**A: The arbitration agreement and questions of jurisdiction**

1. Escalation clauses: Have you had any good experiences where such clauses facilitated a settlement in a way that would not have been likely with a standard arbitration clause? Or does it just increase the risk for delay or jurisdictional issues?

2. In *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd*, the English Commercial Court found that a dispute resolution clause requiring the parties to hold 'friendly discussions' for a continuous period of four weeks was a jurisdictional (instead of a procedural) pre-condition to arbitration, so that a tribunal appointed in circumstances where that obligation was breached would not have jurisdiction. This decision could have unintended consequences, including giving award debtors a potential new ground for challenging an award under section 67 of the Arbitration Act 1996. What do delegates think of this decision?

3. Given recent case law on problems arising from unclear/badly drafted Arbitration Agreements, to what extent should the industry actively encourage the adoption of model Arbitration Agreements?

4. LCIA experience with non-signed arbitral clauses. Is there a "*prima facie*" analysis of parties' comportments towards arbitral jurisdiction?

5. Are States' varying approaches to *Kompetenz-Kompetenz* diminishing the efficiency and effectiveness of international arbitration?

6. In practice, arbitrators tend to decide they have jurisdiction under the competence-competence principle, is this process flawed due to the inevitable self-interest of the arbitrators? If so, should any changes be made or safeguards put in place, and is it a concern in practice?

7. An eminent practitioner has published a Model Bilateral Arbitration Treaty, which provides a default arbitration mechanism for the resolution of defined international commercial disputes. Is this the way forward for international commercial arbitration?

8. Is Gary Born/WilmerHale's Model Bilateral Arbitration Treaty an interesting discussion piece or the future of international dispute resolution?

9. Gary Born's draft model bilateral arbitration treaty – what are the group's views on whether this (if adopted by states) would be a good development? And are states likely to adopt it?

**B: Arbitration, the EU and investment law**

10. What is the impact of Russia/Ukraine sanctions on international arbitration in London?

11. What is the impact of sanctions on commercial arbitration in Europe?

12. Anecdotal evidence suggests that Russian parties are looking to seats outside the European Union such as Hong Kong and Singapore for future arbitrations in the light of EU sanctions. Do participants have experience of this, and do they believe that EU sanctions are an existential threat to Russia-related arbitration in London, Stockholm, Paris etc.?

13. Do any delegates have experience of how arbitral tribunals are dealing with contractual obligations impacted by the EU sanctions regime in respect of Russia, particularly in circumstances where by virtue of the seat, or the arbitrators' nationality, the tribunal is subject to that regime itself?

14. Where the issue as to whether international sanctions should be taken into account and applied by an arbitral tribunal, from the institutions' perspective and in particular, from the LCIA's perspective, should the arbitral tribunal be primarily concerned with the enforceability of its award? In other words, does an arbitral tribunal have an overriding duty, according to institutional rules, to apply international sanctions if it fears that its award may not be enforceable for public policy reasons in the country in which enforcement is likely to be sought and do institutions have a say and a role to play in this respect, and to what extent?

15. Does the Recast Brussels Regulation go far enough in expanding/clarifying the arbitration exception?

16. Has the recast Brussels Regulation resolved the problems with the interface between arbitration and the old Brussels Regulation?

17. In light of the increasing involvement of the European Commission in ISDS proceedings, both as amicus and in seeking to prevent enforcement of the *Micula* award, what steps might a European claimant take to Luxembourg-proof a claim against a Member State?

18. The future of investor-state dispute settlement is uncertain, with many issues being debated in relation to, for example, TTIP. One idea which has been around for a number of years is that of a world investment court, and it was discussed recently, for example, in the UNCTAD expert meeting on the transformation of the international investment agreement regime in Geneva in February 2015. What are the group's thoughts on the idea of a world investment court?

19. Opponents of the investor-state dispute settlement provisions in TTIP have described international arbitration tribunals as "rigged pseudo-courts". Is there a danger that such discourse will damage the reputation of arbitration more widely among the general public?

20. What is the future of ECT claims?

**C: The parties and the arbitral tribunal**

21. What disclosure or notification requirements should apply to the parties in relation to the use of third party funding in arbitration?

22. Is third party funding in arbitration a good thing?

23. How important is party-nomination of arbitrators in international arbitration? Would it be preferable (quicker, less biased etc.) for the arbitral institution to select and appoint every Tribunal /Sole arbitrator without exception?

24. What can and should be done about the over-booked arbitrator? How much control do parties lose over the arbitration process due to this problem?

25. Is enough really being done to expand the pool of potential arbitrators? What can be done when people always want to appoint similar arbitrators? Does the "arbitration community" really want things to change?

26. Should arbitrators' remuneration be structured to provide a financial incentive to produce an award quickly after the close of proceedings?

27. In light of the recent successful section 68 challenge in *Home Secretary v Raytheon Systems [2015] EWHC 311 (TCC)*, is there an argument for a legislative reform allowing arbitrators to be held liable for (limited aspects of) their negligence in respect of their drafting of awards? Would potential liability encourage water-tight awards, or would it merely lead to delays in awards being rendered, a dearth of willing arbitrators and/or a burgeoning market in "arbitrator insurance"?

28. If an arbitrator is asked to recuse himself or herself and refuses, and is subsequently successfully challenged by a party, should the arbitrator be entitled to receive fees for the period between the refusal to resign and the determination of the challenge?

29. "How I got my first appointment as an [arbitrator/Tribunal secretary] - without being appointed by a partner in my firm." Discuss.

30. What is "enmity" as a ground of IBA conflict: any interesting experiences?

31. In light of recent case law, how relevant is the conduct of the arbitrator during the hearing for bringing a challenge against him/her?

32. Should the LCIA issue more detailed guidance on the use of arbitral secretaries?

**D: Evidence**

33. The inadmissibility of evidence of precontractual negotiations in contractual interpretation under English law: are tribunals determining disputes under English substantive law obliged to apply this rule? Do they in practice?

34. How and when should questions of privilege be addressed when counsel have to comply with a different set of ethical rules? How do tribunals address the imbalance that can arise (between different bar rules and/or counsel that are not a member of the bar)?

35. Are there rules of privilege which arbitrators are bound to apply in a London-seated arbitration?

    Most discussion on privilege in arbitration proceeds from the premise that the arbitrators have a relatively untrammelled discretion to apply whatever privilege rules they think are appropriate. But how does that fit with the English court's approach that privilege is not merely a matter of procedure, but a "fundamental

human right" – (see Lord Hoffmann in *R(Morgan Grenfell) v Special Commissioner of Income Tax [2003] 1 AC 573* at para 7)?

36. Should the IBA Rules of Evidence be amended to include a right of reply for the party requesting production of documents?

37. Should merits hearings in arbitration be longer? The fact that arbitration hearings are commonly shorter than court trials may be arbitration's only costs-saving compared to litigation, but do shorter hearings lead to inadequate opportunities to cross-examine witnesses and/or increased use of costly post-hearing briefs?

38. How do you deal with the situation where a party has failed to call a key witness of fact, and even to submit a written statement from that witness? As opposing counsel, would you feel entitled to request that the arbitral tribunal draw adverse inferences in such a situation if you yourself have made no effort to call the witness in question? If so, what rules would you rely on to justify your request?

39. Should fact witnesses always be sequestered?

40. Expert direct evidence

    Do delegates consider direct expert evidence assists tribunals in their decision process (for example, expert presentations)? On the one hand, direct evidence allows the experts to provide a summary of their evidence of their detailed reports "in their own words". However, the experts can also bring new "evidence" which can be hard to fully explore in cross examination, given the tight time scales and the preparation (of both Counsel and opposing expert) that has already been considered.

41. Expert direct evidence and expert independence

    Do delegates consider that direct evidence can lead to experts appearing less independent than when they are just cross examined? Direct expert evidence can lead the expert to make broad impactful statements in their presentation which, due to time constraints, are unable to be fully clarified (discussing the specific assumptions/caveats that are required to be considered around this subject) which can lead to the audience feeling that the expert is not being fully independent.

42. What do delegates think of "hot tubbing" of experts? Is this something that they would consider likely to improve the usefulness of expert evidence to Tribunals, or is it only something that should be used when considering specific points, as required? Following on from this, what makes a good "hot tubbing" scenario, and what makes a bad one?

43. Application of conflict of interests rules to legal experts?

44. Under what circumstances if any are tribunal appointed experts preferable to party-appointed experts?

**E: Practice and procedure**

**(i) Time and costs**

45. As costs continue to increase and proceedings seem to get more and more complex, is arbitration losing its advantage over litigation (at least in comparison to English litigation)?

46. Should Article 15 of the LCIA Rules contain maximum page limits on Statements of Case (say 100 pages), which would apply unless the Tribunal orders otherwise?

47. International arbitration today appears to be burdened by an excessive approach to written submissions. As one of the potential mechanisms to address delay and costs, should arbitral tribunals routinely impose page limits (identifying font size, line spacing and margin size) on all written submissions in an arbitration? Such limits are now usually imposed on post-hearing briefs - is there any reason in principle why the same technique cannot be used in relation to written submissions before a hearing?

48. In light of Article 15.10 of the new Rules, are delegates experiencing greater willingness from tribunals to set a firm timetable at the start of an arbitration for provision of its eventual award (whether the arbitration is being conducted under the new Rules or the old ones)?

49. Is there anything that can be done to stop stalling tactics by a party to an arbitration?

    In particular, is it possible to avoid circumstances where a party selects an arbitrator as part of a 3 man panel, in the knowledge that he or she won't have availability to take part in the arbitration for the next year, or even longer?

    Once the panel is in place the focus would be on them to impose a strict timetable but prior to their appointment, is it simply a case of needing to ensure that the arbitration clause is robustly drafted to avoid unnecessary delays?

50. Another issue that seems to arise is the non-payment of fees as a means of disrupting proceedings. We have had instances where one party has covered all of the arbitral fees to ensure that the proceedings go ahead but in circumstances where that party is unable or unwilling to cover 100% of the fees, what can be done?

51. Arbitrators are increasingly pandering to requests for extensions of time and additional rounds of pleadings, often without questioning the merits or necessity of such requests. The main justification seems to be to ensure that their awards are not challenged on grounds of due process. Is it time for an "overriding objective" to be incorporated into the Rules, balancing the need to deal with cases justly and at a proportionate cost?

52. What are the pros and cons of a bifurcated proceeding in which liability is decided first and quantum after?

53. Article 14.1 of the LCIA Rules 2014 is one new rule aimed at reducing delay in arbitral proceedings. In practice, has this helped drive a more efficient process, or does it confirm Zachary Douglas' comment last year that it is for counsel and arbitrators to change their expectations of each other rather than relying on institutional rules to resolve these problems (Keynote Speech, Dutch Arbitration Day 2014)?

54. Will one of the more notable developments in international arbitration over the next few decades be a greater acceptance of the summary determination of disputes (see, for instance, *Travis Coal v Essar Global Fund Limited*)?

**(ii) Soft law guidelines**

55. The LCIA Guidelines on party legal representation, The IBA Guidelines on Conflicts of Interest in International Arbitration, The IBA Guidelines on Party Representation in International Arbitration: does the recent spate of new (or revised) "soft law" indicate the growing inflexibility of international arbitration, or a welcome codification of norms which will enhance the accessibility of arbitration?

56. The so-called Kaplan opening: a hearing after the first round of written submissions and witness statements but prior to the evidentiary hearing. Can participants see this working?

57. Under the current “default” setting, arbitral tribunals establish the entire procedure of the arbitration from the very beginning without being endowed with sufficient knowledge of the dispute. As an alternative to this, two commentators – Constantine Partasides QC and Scott Vesel – have recently advocated the introduction of a “case review conference” or “CRC” immediately following the first exchange of submissions on merits, at which the tribunal can address further procedural matters such as document production, further written submissions etc., focused by a tribunal-led discussion on the issues and evidence necessary to determine the parties’ requests for relief.

    What are delegates’ views on this proposal and in particular on whether it would add to the overall efficiency of the arbitral process?

**(iii) Ethics**

58. What impact, if any, are the new Articles 18.5 & 18.6, and the General Guidelines (Annexed to the 2014 LCIA Rules), having on the way in which legal representatives approach and manage LCIA arbitrations conducted under the 2014 Rules?

59. Seven months on from the introduction of the *General Guidelines for the Parties' Legal Representatives*, have the Guidelines succeeded in keeping us all on the straight and narrow?

60. Have the *General Guidelines for the Parties' Legal Representatives* made any real difference for the end users of international arbitration, namely the clients?

61. Application of the Annex Guidelines as an effective remedy for counsels' conducts during the procedure?

62. How to conciliate the Annex Guidelines with local bar rules or other guidelines?

63. Can a UK expert (for example a member of the ICAEW) be coached/prepped, prior to providing oral evidence, by a non-English qualified solicitor even if the expert has been engaged/appointed by an English firm?

64. The power given to LCIA tribunals under the 2014 Rules to police counsel conduct (Art. 18.6) is a unique provision in the context of institutional rules. I suspect a great many people are wondering what might come of this power, and how/when it might be used by Tribunals. Is there a case for the publication (in due course) of summaries of decisions made by tribunals under Article 18.6 and the sanctions imposed (if any), in a similar manner to the LCIA's publication of challenge decisions?

**(iv) Emergency arbitration**

65. The Emergency Arbitrator ("EA") procedure – how effective is it perceived to be as a means of interim relief? Does perception differ from reality? To what extent are enforceability (and other) concerns with the EA procedure dissuading parties from seeking relief from an EA?

66. The HKIAC Rules (Schedule 4, Article 21), the ICDR Rules (Article 37(6)), the SCC Rules (Schedule II, Article 4(4)), the SIAC Rules (Schedule 1 Article 4) and the Swiss Rules (Article 43 (11)) provide that the emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise. The ICC Rules (Schedule V, Article 2(6)) state that "*an emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application*". The LCIA Rules are silent about this.

    Can a party nominate an emergency arbitrator to act as a member of a three member Tribunal if the other side objects to such nomination? Will the LCIA Court appoint the emergency arbitrator in the absence of the

parties' agreement? If not, what would be the authority / reasons for not nominating / appointing the emergency arbitrator?

67. Is it time to develop a practice of publishing Model Procedural Orders? Many arbitrators have precedents which they circulate to the parties for comment, and many lawyers will also have their own precedents that they prefer to work from. To mitigate against the risk that this would codify certain procedural practices, the model procedural order could provide for various options, as well as setting out possible bells & whistles, along with a commentary on the advantages and disadvantages of various options. If this is a good idea, would it be better for the exercise to be spearheaded by institutions or practitioners?

68. With a duration of two weeks or more, is the emergency arbitrator procedure ever going to be quick enough for "emergency" circumstances? Is it an expensive distraction from an application to court for interim or conservatory measures?

69. Article 29 of the ICC Rules provide that an Emergency Arbitrator's decision must take the form of an order, whereas other institutions (LCIA, SIAC, SCC, SCIA, HKIAC) state that a decision by an Emergency Arbitrator may take the form of an order or an award. What is the consequence of this, if any? Should orders and/or awards by Emergency Arbitrators be enforceable under the New York Convention? If so, does this pose a problem for the ICC Emergency Arbitrator, who is empowered to make no more than an order?

**(v) Costs**

70. In *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd and another [2015] NIQB 23*, the Northern Ireland High Court removed a stay of court proceedings in favour of arbitration because the parties had failed to pay the ICC's advance on costs. In *BDMS Ltd v Rafael Advanced Defence Systems [2014] EWHC 451*, the English High Court granted a stay of proceedings on the ground that the defendant's failure to pay its share of the advance on costs did not amount to a repudiatory breach of the arbitration agreement. Which court was right and what bearing should payment of the advance on costs have on the court's power to stay proceedings in favour of arbitration?

71. Should a Respondent's refusal to pay its share of the deposit in arbitration have more significant repercussions for the parties? A discussion of *BDMS Ltd v Rafael Advanced Defence Systems [2014] EWHC 451 (Comm)* and practical considerations.

**(vi) Interim relief**

72. Where court proceedings have been commenced in breach of the arbitration agreement, should arbitral tribunals order anti-suit relief on an interim basis and what benefits, if any, might parties derive from such relief?

73. Does the requirement in Article 25.3 of the LCIA Rules that any application for interim measures to a state court before the formation of the Tribunal be promptly communicated in writing to the LCIA Registrar and other parties prevent a party from proceeding to obtain interim relief from a state court on an ex parte basis?

74. Interim measures can be an effective tool in international arbitration but enforcement can be a problem in many jurisdictions. Is it time for a New York Convention equivalent for interim orders of an international arbitral tribunal and/or emergency arbitrator?

75. Section 41(6) of the Arbitration Act 1996 specifies that *"[i]f a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim."* In your experience, have you come across tribunals that refused or were reluctant to exercise this power? If so, what were the reasons proffered?

    In your non-London seated arbitrations where you acted for the respondent, have you ever experienced difficulties with discontinuing a claim where the claimant has failed to provide security for costs?

**(vii) General**

76. Anecdotal evidence suggests that disputes referred to arbitration settle less often than those referred to the courts. This may, in part, be due to the courts' (at least the English courts') expectation that the parties will attempt to settle a dispute using ADR. Should the arbitral institutions be taking a more active role in promoting early settlement of disputes referred to arbitration?

77. Limits of the freedom of arbitrators to decide on a transnational scenario of new principles and norms and the need to hear the parties on any matter used in that decision and not previously argued by the parties? Has the "non-surprise" principle become still more important in this non-regulated world?

78. *Amicus curiae*: can a tribunal change its decision based in an *amicus curiae* new information without the obligation of hearing the parties?

**F: Orders, awards and enforcement**

79. What is the effect of an Order for Discontinuance of the arbitration made by the Tribunal under Article 22.1 (xi) where both parties have abandoned the arbitration? Is it possible for the arbitration to be subsequently revived and can either party revive it?

80. Has anyone in the room successfully argued for an interim award ordering an interim payment of damages, where the amount paid may be subject to an adjustment or cross-claim in the final award?

81. Was the decision of Mr Justice Akenhead in *Home Office v Raytheon* correct and what impact might it have on arbitration in England?

82. Should governments be able to use confidential arbitration/international arbitration to resolve their commercial disputes?

83. Enforcement of foreign arbitral awards: did the English Court adopt the correct approach in *Malicorp Ltd v Government of the Arab Republic of Egypt and others [2015] EWHC 361 (Comm)*?

84. Article V 1(e) of the New York Convention grants local courts a discretion to refuse recognition and enforcement of an award if that award has been set aside in the seat of arbitration. Should such power really be regarded as discretionary? If parties to an arbitration have chosen the seat of the arbitration and the award is then set aside in that seat, why should they not be bound by that choice? Should local courts therefore employ this power, *without* discretion, when faced with petitions to recognise/enforce awards that have been set aside at the seat?

85. At the Queen Mary's 30 year conference, Gerry Lagerberg's presentation (which he was unfortunately unable to give, due to illness) set out some statistics demonstrating that the monetary value of an award was not necessarily the same as the face value of the award. Given that these statistics appear to show that only 30% of awards are paid in full, do delegates consider that claimants should somehow be compensated in circumstances where enforceability is more complex / difficult? And if so, how would this work in practice?

86. In February, the DIFC Courts enacted a practice direction which provides that a DIFC Court monetary judgment may be converted into an arbitral award by submitting the dispute to be resolved by the arbitration rules of the DIFC-LCIA Arbitration Centre. Do participants consider that this novel development will influence other jurisdictions?

87. In practice are there likely to be time/costs savings in having a trial of preliminary issues when challenging an arbitral award? (see *X v Y and another [2015] EWHC 395 (Comm)*).

88. *Diag Human SE v Czech Republic [2014] EWHC 1639 (Comm)* – is the English Court's judgment that issue estoppel can apply to the enforcement of awards under the New York Convention where the same issue has already been determined in enforcement proceedings in another jurisdiction a big issue or of no issue?

**And finally…**

89. Stealing, shamelessly, from the School of International Arbitration/White & Case 2015 survey: if you could have any improvement made to international arbitration what would it be?