



**Chartered Institute of Arbitrators 2020 Roebuck Lecture**

**Getting ahead of the curve: how arbitration can better meet the needs of parties, people and planet**

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Colleagues, friends and fellow members of the arbitration community,

It is a great privilege to have been invited to give today's lecture. It is particularly poignant to give the tenth Roebuck Lecture after Derek sadly passed away in April, and I am grateful to Catherine for her beautiful words in his memory.

When I was asked to pick a title back in February, I could scarcely have anticipated quite how apt my theme would be for today's much-changed world.

Who would have thought that the Roebuck lecture would be live-streamed to an audience of over 1,700 people around the world? Many of you will be listening from the comfort of your homes, hopefully without a tie, jacket or high-heeled shoe in sight, and can ask me questions without having to face international travel or – even more painful – London traffic.

The arbitration community has long reflected on how to adapt to better meet the needs of the parties, and address growing concern about imbalances in the protections given to people and our environment. But we know that lawyers – yes even international arbitration lawyers – are slow to instigate and accept change. That's why COVID-19, for all its appalling devastation, might just spur positive evolution by forcing us to adjust our processes and priorities – necessity being the mother of invention.

Already, we are doing things that before we only spoke about doing. And we are doing them pretty well.

Tonight my message is: we should embrace the opportunity to adapt. We should challenge customary processes and received wisdom, we should re-consecrate our principles and we should put integrity at the heart of our ambitions.

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And after such vaulting rhetoric, where better to begin than the enemy of the air-mile: virtual meetings and hearings.

One of the great advantages of arbitration is the ability to respond to the needs of the parties. In the last few months, we have seen that in action. Today's technology enables us to conference with our clients, attend virtual settlement meetings with counterparties, and conduct entire hearings via the ubiquitous Zoom. To achieve such a dramatic shift would have been unthinkable even three months ago. Of course, we had the technology and we even used it sometimes – but certainly not in such a wholesale manner. Some condemn lawyers as Luddites, but we have been forced to suck it and see, and we have seen that is not too bad.

Showing commendable leadership, CIArb was quick to react and issued its *Guidance Note on Remote Dispute Resolution Proceedings* on 8 April 2020, urging: “business should not be burdened by unresolved disputes due to the inability of parties to meet physically to resolve disputes”. The note offers practical advice on how proceedings can continue remotely, but also how to proactively and positively adapt for the long-term.

Similarly, the ICC issued a *Guidance Note on Possible Measures aimed at Mitigating the Effects of the COVID-19 Pandemic*, and the Stockholm Chamber of Commerce together with Thompson Reuters is offering their online SCC Platform for free to ad hoc arbitrations registered by 31 December.

On 16 April, 13 arbitral institutions issued a joint statement in a show of willingness to work together affirming that:

*“By jointly enabling international arbitration to deliver some degree of certainty in a volatile economic climate, we seek to jointly contribute to a world better prepared to meet the challenges of the post-corona crisis”.*

This international co-operation is admirable.

What can we learn from these developments? That the arbitration community can change and adapt quickly, to help protect and enhance the effectiveness and efficiency of the arbitral process. I hope this spirit of co-operation and willingness to change will endure long after lockdown has ended and penetrate other areas of arbitral practice.

Of course, we still need to have in-person meetings, and certain cross-examinations are more effective face-to-face. But we have learned a few things:

1. *First*, we don’t need to travel quite as much. This will allow us to have more quality time for our clients (and our families). Busy arbitrators will be able to finalise awards more quickly.
2. *Second*, certain parts of the arbitral process can be streamlined and expedited when we put our minds to it. Parties and arbitrators should think more about whether in-person hearings are required. Can it be done via video conferencing? Or can certain parts of the process be done on a document-only basis? Counsel and parties might even be willing to move to a more continental, less adversarial style of advocacy in some cases. Clients might sometimes forego the brilliant QC performance if it helps secure a speedy decision.
3. *Third*, institutions can work together where it makes sense for them to do so. Collaboration rather than competition can benefit arbitration as a whole.
4. *Fourth*, we can save our clients some expense in the process. The rising cost of arbitration is one of the threats to the system. In many cases, it is now the preserve of the elites – unless you have a case that appeals to litigation funders. Commercial and State parties alike are finding the costs prohibitive.

Omnia Strategy recently provided strategic assistance to the Government of the Gambia in an investor-State arbitration using the International Development Law Organization’s Investment Support Programme for Least Developed Countries. Without securing that financial support, one of the poorest countries in Africa would have struggled to fund the expert evidence it needed to defend a claim.

5. *Fifth*, jaw jaw is better than war war, as Churchill once said. In April, BIICL published a concept note discussing the effects of COVID-19 on commercial contracts, suggesting that encouraging parties to negotiate or conciliate rather than focusing on enforcing strict contractual rights could ensure better long term outcomes for the global economy. There is no clear evidence yet that we have seen more settlements of disputes over the last couple of months, but this would be a logical result. Those facing economic hardship are likely to want to find cheaper and faster ways of resolving their disputes. The note also refers to the need to bring “breathing space” to allow for the continuance of a viable contract rather than bringing it to an abrupt end, and suggests the law should be slow to find such conduct amounts to a waiver of rights.

Let’s harness this willingness for change and focus on delivering an efficient process to the users of arbitration, even when the COVID-19 crisis is behind us.

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Having touched on some ways that arbitration can better meet the needs of parties, let’s turn to less well-trodden territory: its impact on people and the planet.

Proper consideration of human rights and sustainability was once an esoteric exercise – essentially the preserve of the odd philosopher or lawyer. Sometimes the very odd ones.

Today, these issues are fast-establishing a *lingua franca* for business, investment, sustainable development and policy-making.

For our clients – governments, corporates, investors and beyond – this means that leadership and management at all levels need to be conversant not just in “ROI”, “P&L” and “KPIs”, but also in “ESG”: environmental, social and governance concerns.

And if our clients are becoming fluent in this new values-based terminology, then any lawyer worth their salt needs to be just as familiar. And yet, lawyers – and indeed the system of arbitration itself – have been slower on the uptake.

This is not just semantics or value-signalling. ESG data and rankings are starting to shape States’ policies and investors’ business decisions.

An upwards trend of shareholder activism, civil society campaigning and public and employee disquiet has reinforced the growing importance of these issues to investors and business leaders.

The international policy and regulatory landscape has also evolved.

The UN-supported *Principles of Responsible Investment* were launched in 2006 and now have almost 2,500 signatories representing some 80 trillion US Dollars under management.

The UN *Sustainable Development Goals* helped to galvanise, broaden and organise the movement. Expect to hear even more about the SDGs as we approach the 2030 target for the goals to be achieved.

But it is the *UN Guiding Principles on Business and Human Rights* that are widely regarded as having established a modern authoritative global standard on human rights and, indirectly, environmental protection.

Endorsed unanimously by the UN Human Rights Council in 2011, the “UNGPs” set out a three-pillar framework:

- the *State duty to protect* human rights,
- the *business responsibility to respect* human rights, and
- importantly, the principle that victims of business-related human rights abuse should have *access to effective remedies*.

More and more we are seeing this non-binding guidance crystallising into “hard law”.

The UK Modern Slavery Act, with its requirement that business executives sign-off statements on steps taken to combat modern slavery, got boardrooms engaged. Last year, the independent review of the Act, recommended that an enforcement body should be empowered to impose sanctions for non-compliance.

The French Duty of Vigilance Law requires companies to map their human rights, health and safety and environmental risks, and to have a plan to address them. The law instantly led to high-profile litigation before the French courts.

Lastly, the EU is proposing by 2021 to require businesses to carry out human rights and environmental due diligence. Justice Commissioner Didier Reynders announced the initiative in April and raised the prospect of sanctions, saying “*a regulation without sanctions is not a regulation*”. Just this week, Commissioner Reynders reaffirmed his strong commitment to this initiative – as did the German Government, which assumes the Presidency of the Council of the EU on the 1<sup>st</sup> July.

COVID-19 has added further impetus to the EU proposal by highlighting concerns about environmental risks, social inequalities and increased legal risks, with States and employers now bracing themselves for a slew of claims.

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There is a clear role for international arbitration in resolving human rights disputes whether arising out of contracts or under treaties. Arbitrators and counsel will, I am sure, rise to the challenge of grappling with these important questions in the context of changing social expectations.

We see this most clearly in ISDS – once an elite backwater and now the centre of significant debate.

The current pandemic has bolstered calls for ISDS to be reformed or even scrapped. Last month, the Columbia Center for Sustainable Investment called for an immediate moratorium on all investment treaty arbitrations and a permanent restriction on all arbitration claims related to measures taken to address the pandemic. Civil society groups are calling on States to terminate investment agreements that provide for ISDS.

Leaving aside practical difficulties around implementation, this reflects a growing trend of questioning whether the unique privileges given to investors are necessary to facilitate international trade.

Bluntly, ISDS has been suffering bad press for some time. You will probably recall the last major flare-up over the Obama TTIP plans.

ISDS ensures foreign investors enjoy protection against arbitrary government measures affecting their investment. There are myriad examples of confiscatory, unreasonable and – frankly – corrupt decisions by States whose own judicial systems are not robust enough to withstand direct or indirect interference from those with power.

Leaving foreign investors unprotected would not only affect narrow corporate interests. It would also have crippling effects on global supply chains, the wider economy, and local communities.

At its best, foreign direct investment facilitates access to international markets, infrastructural development, transfers knowledge and skills and contributes to sustainable development, bringing fundamental necessities such as electricity and water to various countries. At its worst, it can encourage predatory exploitation of a country's precious resources and limit States' ability to undertake legitimate policy initiatives.

The ISDS system was not conceived to be one-sided in favour of investors. However, its evolution has been perceived as doing just that: embracing the narrow interests of claimant investors at the expense of people and planet. There is a danger that this perception could lead to ISDS being swept aside in the stampede to find an elusive better way. We see this most clearly in Europe, in relation to both CETA and intra-EU BITs.

But the perception ignores the reality of further changes already underway, even if more needs to be done.

ISDS already recognises the State's right to regulate in the public interest. The notorious Philip Morris arbitration provoked an outcry not least in the European Parliament a few years ago. Ultimately, of course, those claims did not succeed against Australia or Uruguay.

In the *Uruguay* case, for example, the tribunal dismissed all Philip Morris's claims, finding that a State is owed "*substantial deference*" when addressing major public health problems. Uruguay, it concluded, had acted in a coherent and well-motivated fashion to protect public health.

In the near future, States seeking to justify COVID-19-related measures could also rely on the defences under the law on State responsibility, such as force majeure, state of necessity, and distress. Yes, there are strict requirements for these defences to apply. But the COVID-19 crisis is unprecedented and I expect tribunals will consider such defences seriously as they balance public and investor interests.

We are also seeing more States bringing counterclaims against investors for business activities that have adverse human rights impacts, including environmental harm. In my view, this is entirely appropriate and reflects arbitration's in-built adaptability and its founding principle of reciprocity: finding new ways to establish jurisdiction and balance effectively the objectives and expectations of States and investors.

The ICSID case of *Urbaser v. Argentina* (2016) illustrates the evolution in tribunals' approach to human rights. The claimant was a concession holder that in the early 2000s provided water and sewerage services in Buenos Aires. After Argentina's financial crisis in 2002, the State took emergency measures resulting in the termination of the claimant's concession in 2006. The claimant filed for arbitration with ICSID, alleging that Argentina had violated the BIT due to its obstruction and persistent neglect of the investor's interests.

Argentina raised a counterclaim against the claimant, claiming that the investor's failure to provide the necessary level of investment in the concession led to violations of the human right to water. In its defence, the claimant alleged that, as a non-State actor, it was not bound by human rights obligations. The tribunal rejected that argument and a further argument that the BIT conferred no obligations on the investor.

Instead, the tribunal established that, because corporations are subjects of international law, they can also bear obligations in international law. Further, the tribunal explicitly recognised that: "*international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce*". In other words, the tribunal found that rules of international law, which include human rights, cannot be ignored when adjudicating claims arising from BITs.

While the tribunal ultimately rejected Argentina's counterclaim, this case represents a watershed moment in investor-State arbitration by accepting jurisdiction over a human rights counterclaim.

In recent years, tribunals have also addressed environmental counterclaims. For example, two parallel ICSID cases against Ecuador – *Burlington* and *Perenco* – concerned investments in oil blocks in the Ecuadorian Amazon region. Ecuador's environmental counterclaims were based on domestic environmental and law and contractual obligations. Both tribunals found that the investors were liable for the costs of restoring the environment in the areas where the oil blocks were located. The *Burlington* tribunal awarded Ecuador 41.5 million US dollars, and the *Perenco* tribunal awarded 54.5 million US dollars.

As the world belatedly reacts to the dangers posed by the climate emergency, we can expect new regulations from States taking steps to meet their Paris Agreement commitments. These may clear the path for new claims and counterclaims. At the very least, investors commencing their own investment treaty claims should be advised on the risks of having to defend their human rights and environmental record.

Critics of the ISDS system often point to the large sums awarded by certain tribunals to investors. The 2 billion US dollars awarded to Unión Fenosa Gas, a Spanish company, against Egypt, comes to mind.

Certainly, not all investors prevail and obtain amounts of this magnitude. According to UNCTAD, by the end of 2018, investors prevailed and were awarded damages in 29% of the cases. Nonetheless, tribunals should be cautious when presented with exorbitant claims for compensation.

Dismissing most of the multibillion claims for breaches of the law of the use of force and international humanitarian law during the Eritrean Ethiopian War of 1998 to 2000, the Eritrea-Ethiopia Claims Commission observed that claims of such magnitude raise: "*serious questions*

*involving the intersection of the law of State responsibility with fundamental human rights norms*". As the Commission noted:

*"Huge awards of compensation by their nature would require large diversions of national resources from the paying country—and its citizens needing health care, education and other public services—to the recipient country"*.

Of course, the circumstances of that case were different and may not necessarily translate into investor-State arbitration. But still, tribunals should think carefully about whether large monetary awards are justified or not.

Large awards penalise a State for its behaviour – but ultimately it is the taxpayer and citizens who suffer the consequences. It is important for tribunals to consider the implications of awards and be as smart as possible when determining remedies.

Of course, the global pandemic will create new challenges for tribunals and experts, who will have to consider the effects of COVID-19 when developing the "but-for world" to quantify damages. Quantifying damages was a complex exercise even before COVID-19, when conditions were relatively stable. Post-COVID, one cannot assume that the but-for world will ever return to that scenario of stability.

Tribunals already have at their disposal certain tools to reduce damages in certain circumstances.

Tribunals can take into account an investor's failure to mitigate losses, as we saw in *EDF v. Argentina*.

And an investor's contributory fault can reduce damages. While this may bring to mind extreme circumstances involving illegal activities by the investor, this principle is broader and encompasses imprudent and negligent conduct – see for example the 30% and 50% reductions in *Copper Mesa v. Ecuador* and *MTD v. Chile*, respectively.

Perhaps there could be a role for the bifurcation of quantum – a practice not common in investment arbitration but not foreign to international law. In *DRC v Uganda*, the International Court of Justice's 2005 judgment on the merits held both parties liable to make reparation for their breaches of international law and invited them to engage in settlement discussions on damages. Such an approach by investment tribunals could potentially expedite settlement.

Consistency in decision-making is fundamental to the legitimacy of ISDS. I suggest these are areas where coherent guidelines from tribunals could help the parties and the arbitration system generally.

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Similarly, in commercial arbitration, the pressure for accountability and effective dispute resolution will naturally increase.

One can imagine why businesses may prefer to thrash out sensitive human rights arguments with commercial partners or their own people behind the closed doors of an arbitration rather than in open court.

Increasingly, lead companies' supplier agreements require adherence to a code of conduct or specific human rights norms. These might be supported – for example – by rights to inspect documents, audit premises and even terminate the relationship. Within the company itself, contracts with officers and employees might also demand compliance with policies, including – increasingly – the enterprise's human rights policy. Of course, these might be included principally for optics or as new ethical boilerplate, but that will not stop creative lawyers from using those clauses in a dispute scenario if relevant.

We can also expect tribunals to face more novel arguments and claims. Arbitrators will be asked to interpret contracts and assess conduct in the light of soft law and other human rights and sustainability guidance and best practices. Most obviously, the practical consequences of a company recognising its responsibility to respect human rights – or, more broadly, having obligations under international law – could certainly become a point of contention in an arbitral dispute.

Executives' handling of environmental risks will become not only a matter of contractual performance but also evidence of business judgment. Parties may claim that legal duties have expanded to encompass human rights and sustainability. After all, for how long can directors be said to be acting in the best interests of the company while also ignoring existential climate-related risks or enabling human rights violations?

Indeed, we have started to see such issues considered by apex courts. In February, in the case of *Nevsun Resources v. Araya*, the Canadian Supreme Court ruled that a private, non-State actor may be held liable in Canada for its alleged breaches of international law abroad.

The US seems to be heading the opposite way over the Alien Tort Statute. Invigorated in 1991, when the Second Circuit allowed ATS claims based on modern human rights law in *Filartiga v Pena-Irala*, more recently in *Jesner* in 2018, the Supreme Court ruled – 5 to 4 – that foreign companies cannot be sued under the Act. After a filing by the US Department of Justice a fortnight ago, in *Cargill v Doe*, it seems likely the Supreme Court will soon reconsider whether corporations *generally* are similarly immune from ATS claims. Watch this space.

Closer to home, last year in *Vedanta*, the UK Supreme Court found that the English courts could hear a tort claim against a UK holding company and its Zambian subsidiary for alleged environmental damage in Zambia. Omnia acted for the interveners in that case. Three of the five justices from *Vedanta* will be in action again in a fortnight when the Supreme Court hears the appeal in *Okpabi v Shell*.

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One of the most interesting developments has been led by the Permanent Court of Arbitration in The Hague, on the back of the so-called "Bangladesh Accord arbitrations" in 2016-2017.

In the aftermath of the collapse of the Rana Plaza building in Bangladesh in 2013, faced with public outcry and outrage, over 200 fashion brands and trade unions who operated in the area decided to sign a binding business and human rights agreement.

In October 2016, two labour unions, IndustriALL Global Union and UNI Global Union commenced arbitration proceedings against two unnamed fashions brands. They sought a declaration that the Respondents breached human rights guaranteed by the Accord, as well as a contribution to remediation costs.

We did not benefit from a new line of jurisprudence, as both cases settled. However, this development again showed the fascinating flexibility of the international arbitration system, and a procedural gateway to human rights claims by nationals against investors in different host States.

In 2017, the UN Working Group on Business and Human Rights proposed that arbitration should be used as a binding mechanism to resolve business and human rights disputes. In response, building on the PCA's experience in these cases, a team led by Judge Bruno Simma drafted the Hague Rules on Business and Human Rights Arbitration, which were launched in the Peace Palace on 12 December 2019. I have some familiarity with the process as Omnia provided input as a member of the drafting team's *Sounding Board* and one of our partners spoke at the launch.

The idea is that these specially designed arbitration rules, modelled on UNCITRAL rules, would then be applied by the existing arbitration institutions. The development is particularly impressive because it shows how the main features of international arbitration may be used to embrace new fields of law, not least bringing international enforceability to the sphere of human rights.

As you would expect, it will take time for the new Rules to become an established tool in the international arbitration toolkit. I suspect that B-to-B disputes and public procurement contracts provide the most likely first uses of the Rules, and it will be fascinating to watch and participate in this development.

You will also appreciate that the Rules themselves cannot overcome every hurdle. Indeed, they do not purport to do so – for example, as with other arbitration Rules, they are consent-based but are silent on how that consent should be established.

Also, notwithstanding careful drafting and consultation, inevitably there remain challenges that the parties and arbitrators will need to deal with. For example, around funding and equality of arms, confidentiality versus transparency, and the participation of victims of human rights abuses.

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We have seen that commercial and legal pressures are starting to build pressure on firms to align their business activities with the human rights commitments they now espouse. This applies to the conduct of arbitration, where lawyers handling disputes will need to be versed in these important values and cultural factors as much as the legal contest in question.

This includes the proper and thoughtful use of technology – not just remote proceedings but also – I suspect – newer tools such as data mining, artificial intelligence and blockchain. These will help us achieve greater efficiencies and limit our environmental harms. But we must also be alive to human rights risks – from access to justice and equality of arms to unintended discriminatory effects.

Undoubtedly, we must also be more inclusive. Our arbitration community must better reflect our clients and society if we are to avoid group-think, benefit from a diversity of talents and perspectives, and foster greater trust in the system. I am certainly not the first person to advocate for diversity in arbitration. Dame Elizabeth Gloster stressed the importance of diversity in the 2018 edition of this lecture.

There are important initiatives to promote women within arbitration – and I am delighted that *ArbitralWomen* and *ERA* are among the sponsors of this lecture. Yet we must acknowledge there is still much for us to do on that front. To be genuinely inclusive we must also set our sights on pulling down other barriers – those concerning race, socio-economic background and age, to name just a handful. Building a more just system requires curiosity and honesty about systemic discrimination, and leadership in dismantling it.

I was pleased to see that yesterday ICCA published its first formal policy on diversity and inclusion, together with an implementation plan. ICCA President Lucy Reed said that “*diversity and inclusion are never ‘done’*”, just as CI Arb’s own Catherine Dixon pledged two days ago to continue to promote diversity, equality and inclusion and to review what more can be done to give practical effect to that commitment. These are words that should ring in our ears as each of us reflects on what more we can do.

And let me challenge you still further. In some instances, our clients might be best served if we depart from the standard “win at any costs” mindset, and embrace a more nuanced approach that reflects and advances the role of businesses as corporate citizens. It is not enough only to pay lip service to respecting human rights. Increasingly our clients recognise the imperative to embed that respect not only through their businesses and their supply chains, but also into the way they conduct their disputes. They will need our help in doing so.

What am I asking the arbitral community to take away from all of this? Let’s harness the current energy and use the COVID-19 lockdown experience as a spur for further reform. Let’s continue to work as a community to introduce new ways of working that protect the integrity of the arbitral process and make it relevant to future generations. Perhaps, if we lawyers fully embrace the ESG principles in the same way as we have embraced Zoom, we would all be operating in a better world.

Thank you very much.

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