



Ciarb Roebuck Lecture 2025

'Damages and Remedies: Responsibilities and Reputation'

Delivered by Sir Robin Knowles CBE

18 June 2025

INTRODUCTION

Don MacIntyre: Thank you. It's the most control I've ever had by just standing up and being silent at a podium. Thank you very much. welcome, everyone, to this year's Roebuck lecture, which is 'Damages and Remedies: Responsibilities and Reputation' delivered by Sir Robin Knowles CBE. My name, in case none of you know me, is Don MacIntyre, and I am the new CEO of Ciarb. First and foremost, thank you for joining us here today at 12 Bloomsbury Square and of course, virtually all around the world. It's very much appreciated. Before we start, just a few housekeeping notes, for in-person guests in case of a fire alarm, please follow the staff instructions and evacuate the building. I'm pretty sure you won't stay and hang around, but just in case. Please do exit the building. For our virtual guests, you can explore the virtual platform and at the top navigation bar during the sessions, please use the chat function on the right-hand side of your screen to interact with your fellow participants and let us know where in the world you are joining us from; go ahead and try using the chat now if you'd like. If you need assistance with anything, please use the help widget which is located at the bottom of your screen. The lecture is being recorded and will be available on our virtual platform immediately after the lecture, and also on our YouTube channel.

Don MacIntyre: If you ask if you ask a question in person, please note that you will be recorded. So hopefully it's a good question. If you would prefer not to be recorded, please do let us know before you ask the question. I'll hold you to that as well. Of course we will take questions at the end of the lecture, both in the room and virtually. Lucy Greenwood, one of our trustees, will be leading the discussion for the virtual guests. Please do use the Q&A function on your screen to ask your questions. Obviously not for you guys, for everybody else. I would now like to welcome our speaker, Sir Robin Knowles. Just in case

you don't know him, and I've learned this, Sir Robin is a judge in the High Court in England and Wales. He sits principally in the Commercial Court and there he recently decided P & ID versus Nigeria. Quite impressive. Accountable to an international steering group, Sir Robin is the judge with the day-to-day responsibility for the Standing International Forum of Commercial Courts. He's a member of the Financial Markets Law Committee and its governing board. Sir Robin has a career long involvement in encouragement and coordination for legal pro bono, nationally and internationally, and chairs the board of the National Pro Bono Centre. Please everybody. Thank you, Sir Robin.

Sir Robin Knowles: Thank you very much. You're very kind.

Sir Robin Knowles: Thanks very much indeed, Don. Thanks also for leaving me with my copy of the speech.

LECTURE

Sir Robin Knowles: I pay tribute to the late Professor Derek Roebuck. I am honoured to give this 15th lecture in his name, and at the invitation of the Chartered Institute of Arbitrators.

Some money awards in arbitration are now vast. There is no other word for it. Are they correct? I am not sure that we are clear about what is correct. I am also not sure that we have developed what is needed to reduce the risk of error, where awards can be this vast. I do not think we are ready, but I do believe that we could be.

Correctness of result. In arbitration we do not always spell out the importance of correctness of result. When we do, it is also very easy to find ourselves focused on liability and not so much on damages.

Reflect for a moment on how the Supreme Court described arbitration in its decision in Fiona Trust. That the parties wanted their disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration, and what Lord Hoffmann called *"the unobtrusive efficiency of the supervisory law"*.

Of international contracts in particular. Lord Hoffmann said: *"They want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction"*.

What is of note is that there is no reference to the importance of correctness of result. Of course, there are reasons for that. And in one sense it was taken as given.

There is also, of course, the point that the importance of correctness is relative to the dispute. In modest cases there is room for some tolerance in the practical interests of cost, efficiency and time. As long as the result is fair.

But when it comes to vast awards, let's be very clear and express: the correctness of the result is really important. The consequence of error when it comes to calculation of loss can be vast.

We know that another thing that is really important in the context of dispute resolution and the rule of law, is certainty with predictability. The presence of vast awards on the landscape is not currently sustaining certainty and predictability, at least while we are unclear about what is correct. And at least until we have developed what is needed to reduce the risk of error.

Vast awards that we have seen have brought with them a range of consequences. They have opened new scales of disputes about enforcement. They have encouraged more claims seeking vast awards. They have not helped the healthy development of commercial arbitration funding.

Some disputes have become harder to settle however strong the merits of the claim. This is because expectations are set high by other vast awards and there is uncertainty.

In other disputes the threat of the scale of award has forced settlement, however weak the merits of the claim. The respondent cannot take the risk of a vast award, and there is uncertainty.

There's an overall impact here on confidence and on reputation. And it's not confined to one area of arbitration. Indeed, it is not confined to arbitration alone amongst dispute resolution methods. The impact of vast awards and uncertainty is relevant to every area of dispute resolution and at every level.

Some of the vast awards, and vast claims, have been against states. But just as for a state and its entire economy, so too the consequences of a vast claim or award can be enormous for a business and for all those who invest in or work for it.

But I would add a word about states in particular. States are users of the process of dispute resolution that is arbitration. In courts, arbitration and mediation, users and

potential users' matter. Where we encourage states to use arbitration, we should make it our business to know – to really know – about states as users.

A state is a user that is not just the government of the day but a community of people, young and old, poor and better off, well and unwell. It is an entire economy.

As for the government of the day, sometimes that government will not, for whatever reason, engage with a dispute in the way we count upon for a dispute resolution process to work well.

I said earlier that vast awards and vast claims have made some disputes incapable of settlement, and that the threat of their scale has forced settlement in other disputes. Let me try to show that in action in the context of the state as a user.

A state contracted to allow long term mining by particular methods. In time, the harmful consequences of those methods become better understood. The state introduces modern regulation. A claim is made against the state for preventing the old methods.

The claim might produce a vast award. A vast award would be impossible for the state to meet. The state undoes the regulation as a result. Extend that example by imagining that the regulation was an essential contribution towards global efforts on pollution or environment, or modern slavery, or climate change.

Let me turn to P&ID against Nigeria. Not to the fraud and corruption in the case, but to how damages were dealt with. The dispute does, I believe, allow us the opportunity to ask questions and test our answers.

On damages, the tribunal got to a figure of US\$ 6.6 billion, and interest was to add more billions of dollars. The figure was a multiple of the size of the health and education budgets of Nigeria. In 2017, the year of the award, that sum was one quarter of the entire budget for the entire nation.

P&ID and Nigeria had, on the face of it, contracted. P&ID agreed to build gas processing facilities; Nigeria would supply wet gas by pipeline for processing. P&ID would earn from the sale of the byproduct from processing.

But P&ID did not build, and Nigeria did not supply. The contract was terminated by reason of Nigeria's non-performance. P&ID was held to be entitled to damages.

When it reached damages, the tribunal majority described *"the calculation"* in these terms:

"If the contract had been performed, P&ID would have received for 20 years an income from the sale of natural gas liquids extracted from the wet gas supplied by the Government. As against that income, it would have had to finance the necessary capital expenditure to acquire the site and construct the gas processing facilities ("CapEx") and incur revenue expenditure in operating the plant ("OpEx")."

"The loss is therefore [continued the tribunal] the value of the stream of net profit which P&ID would have made if the Government had performed the contract according to its terms. As the damages have to be assessed once and for all, it is necessary to estimate the value of that stream of profit at the time of the breach, making an appropriate discount for the fact that P&ID will be awarded immediate payment in place of sums which would actually have been received over a 20-year period."

On the expert evidence (about which more later) that gets you to US\$6.6 billion. That figure eclipsing, as I've said, the size of the health or education budgets, and for a number of years, of a country of 200 million people.

When it began the arbitration, P&ID's own, open, on the record, estimate of its loss was US\$1.992 billion. The figure was three times higher by the time of the Award. Of course, these uplifts can happen, and of course the case is decided on the evidence. But.

I heard extensive evidence and argument before deciding that challenge to the Award. This allowed me to look in detail at what had and what had not happened. There is much on fraud and corruption, but for present purposes I leave that aside and focus simply on how damages were dealt with before the tribunal.

I said that there did not seem to have been argument, and consideration of argument, whether (over 20 years) profitability might deteriorate for reasons not connected with Nigeria's compliance with its obligations. For example, a hardening adverse position for gas in the context of a developing global response to climate change.

Nor was there full argument of the possibility that P&ID might, at least in time, have devoted profitably elsewhere the time and energies it would otherwise have had to devote here on this project. (There was something on mitigation, but that may not be free from challenge.)

And where, in a case like P&ID v Nigeria, if not in that case itself, neither party has performed, are damages to be calculated in the same way if liability seems to turn on who called breach first?

Any challenge to the tribunal's formulation of *"the calculation"* might test conventional legal opinion, and might be unsuccessful, but it was not attempted. And this where so much turned on it for both parties. It used to be the case that small cases often discovered or developed the law, the common law, or showed up gaps. Now it is more likely that the larger ones do. They attract the investment of the legal resource that is capable of helping us develop the law.

We shouldn't be surprised at the idea that the common law in relation to prospective loss after repudiation continues to be found or developed. Just as in an appropriate case we can do better than discounted cash flow as a methodology – and we know it.

Let me take another example from *P&ID v Nigeria*. It concerns interest. In its own right interest can be a point of very real importance. A vast award would become vaster. In 'billion-dollar award world' hundreds of millions turn on this; billions even, as in *P&ID v Nigeria*.

Nigeria found its own (unsuccessful) argument about discount rate rebounding on it when it came to interest, but no closer analysis was pressed for by Nigeria. The argument on interest, such as it was, was all over in a short period of time. Billions of dollars would turn on this.

The conventional idea of interest, based on *"what P&ID would have had to pay to borrow the money or could have earned by investment in Nigeria"* was not challenged. There was no attempt to test that when dealing with sums so vast that in no real circumstance would P&ID be borrowing those sums or have invested those sums in Nigeria.

Let's take things a little bit further, in the case of a state. Where do we consider the consequences of a calculation that results in an immediate award for sums that would and could never have been received immediately? Discounting for accelerated receipt is not a full answer. And we add interest for each delay in payment of that lump sum when it would and could never have been paid up in a lump sum in the world of the contract. Again, it is the vast award that tests what we are doing and where we may need to look again. In several respects, much of this is open to the challenge that it is simply not commercial to approach matters in this way, at this level. Among the results is aggressive enforcement, or attempts at enforcement, before or after the possible start of transactions in the claim, or in the award, or in the claimant.

These are just examples. But let me challenge you a little further with another example that I was pleased to identify, in reading more widely in the investment treaty/ public international law context. Professor Paparinskis asks whether the size of award today reopens the question whether the capacity of the State to satisfy an obligation to pay full

compensation should be a legally relevant consideration for determination of the content of responsibility. He discusses the idea of an exception to the principle of full reparation in international law of State responsibility for cases where full compensation is crippling for the responsible State or its peoples. The Professor may be right; he may be wrong. But the point deserves to be discussed. Alongside others I have mentioned and others that will be in your minds.

What happens in arbitration where there may be more to be understood about the law than we have to date realized? It is a feature of arbitration that sometimes it is not easy for arbitration to deal with the question whether there is more to the law in an area, or whether the law should be developed. In arbitration, in one sense, the apex tribunal is the tribunal.

I suggest that it is here that we need an effort across the system of dispute resolution. I will be suggesting other respects in which an effort across the whole system is needed. But here, where points are decided in arbitration – some of the world's greatest and most expert and experienced lawyers are arbitrators – we should strive for transparency of those awards, and perhaps greater visibility of the process, and the welcome academic analysis, research and criticism to follow.

Or we might look for the opportunity, in another appropriate case, to put points for decision to our courts, by ad hoc agreement, if need be. Would you consider proposing that a point in court is referred to arbitration, or that a point in arbitration is referred to court?

There's this point too. Working with experts who are not lawyers we might examine whether we can develop, carefully, quantum models, not as a piece of expert evidence (to which I will turn), but as a form of expression of a more sophisticated law of quantum. Those models could be with us from the start of the dispute resolution process.

Would you raise the suggestion that there is more room for remedies other than money awards decided after the event? Should we be considering more room for using declarations ahead of conduct that might or might not breach or terminate contracts? Should we be prepared to assess quantum ahead of contract termination, or at least ahead of a finding of liability?

Our readiness to examine these things is in the true interests of those who choose arbitration. And in the interests of working towards certainty.

Let me move from substantive law to evidence and specifically to expert evidence.

What is the work that the expert is doing? That is a basic question, but in practice the answer is complex. By this I mean no criticism.

In litigation it has taken many years for single jurisdictions to settle the principles of what is expected from an expert, and from the lawyers instructing an expert, and from the court when dealing with expert evidence. One jurisdiction will differ from another, but at least the dispute will be resolved within the corners of a single legal tradition. In most jurisdictions – perhaps all – this is still a work in progress, with the uncertainty that attends.

But in arbitration, the answer to the question – what is the work the expert is doing – may be far more complex. The lawyers instructing the experts may be from different legal traditions. The experts may be from different countries or jurisdictions or parts of the world, with different training.

I have been struck in discussion with experts internationally by the different ways in which they see their task, or at least the uncertainty over this. Should they focus on putting forward the analysis that provides the best result for the party that has sought their evidence? Some will say this is acceptable if – if – the expert called by the other party is doing the same. Another expert will see their task as presenting the available range of analyses, good or bad for the party that has sought their evidence. One expert will expect to cooperate; another less so. One expert will consider revisions from a client; another will not.

I am talking only of reputable experts. The expert who is the hired gun is a problem under any system. But the question that reputable experts raise is what is expected of them in arbitration. And what they can expect of other experts in the dispute.

Best practice statements and protocols have been contributed by leading arbitral institutions, to their credit. These are helpful, but they are general and perhaps necessarily general. There remain many different approaches to standards.

The difficulties here are compounded where the opportunity for the expert teams to do their work may be very different. And when it comes to the responsibility of in-house counsel, legal representatives, arbitration funders and others in relation to the work of experts is it clear what is required? What we ask of all of them and of the tribunal, is all linked with the result that uncertainty can compound.

The tribunal receiving the expert reports has the work product. But what does the tribunal know of what has led to that work product. Across the run of disputes, we cannot be clear. How tribunal members engage on this, when they may also be from different traditions may also affect the result.

So, may I take the opportunity to go to P&ID again, and the opportunity that it gives us to look at this aspect?

I will have to summarise, but there were these features of the expert evidence.

First, the expert called by Nigeria had, as the tribunal knew, had very little time to prepare written reports. This was the fault of Nigeria, but it was also the fact.

Second, the expert called by Nigeria by its Government, in the simple words of the tribunal majority, “[*did*] not appear to have been shown Mr. Quinn’s evidence”. Documents apart. Mr. Quinn’s evidence was the factual evidence in the case and an expert had not been shown it. And the tribunal realised that and made that observation. There was, the tribunal majority found, misapprehension by the expert called by Nigeria about what P&ID had done and what material the other expert had.

Third, the tribunal recorded that points raised by Nigeria had not featured in the report of the expert called by Nigeria, or been put to the expert called by P&ID in the course of cross-examination, and that other points had not been challenged by Nigeria. These included on matters such as cost of security, performance of employees, yield, sales, and future income. On the topic of policies that could affect pricing in the future, the tribunal said this:

“However, when [the expert called by Nigeria] gave oral evidence, he said that there were several forecasts available on websites which were different from; a policy scenario that had been adduced by the expert called by P&ID].”

The tribunal continued:

“He did not, however, identify these [forecasts or websites] or produce them to the Tribunal. The Tribunal did not have the benefit of ... comments [from the expert called by P&ID], because none of this material (if such it was) had been put to him in cross-examination.”

Fourth, it was, respectfully, clear – and that includes clear to the tribunal – that Nigeria’s leading counsel for the quantum hearing did not understand what the tribunal was putting to him in argument. This was not through any lack of clarity on the part of the tribunal, but it was the fact.

The four features are about competence, not fraud or corruption. Part of the function of experts as independent experts was to assist the tribunal. And the plain fact is that the tribunal did not have that assistance from experts called by Nigeria. Have I made it clear that there was US\$6.6 billion in issue?

In this situation, the tribunal majority relied on the expert called by P&ID. The majority said that it was satisfied that the expert called by Nigeria carefully examined all the available materials and exercised his own judgment. There were no grounds, said the tribunal, upon which to reject his estimate of CapEx of US\$579,990,000. Turning to OpEx the majority of the tribunal said that P&ID had made its own calculations of OpEx for the project under six heads and had arrived at a figure of US\$59,881,600. The expert called by P&ID said, noted the majority of the tribunal, that he had reviewed these costs and considered they were reasonably accurate.

You know that, respectfully, I did not consider that the tribunal did all that it could to find out more, here and elsewhere. When I looked at what was argued and what was not argued, I struggled to accept what happened in a dispute of this importance and magnitude.

I was sure the tribunal was troubled, and I said so. I appreciate that views on what a tribunal should do in this situation will differ. I understand the points that can be made. The tribunal was entitled to rely on the parties' professional legal representatives to take the points that their clients wished to take. The conduct and effort of Nigeria's government, administration and lawyers at the quantum stage of the arbitration was deserving of severe criticism. It was very clear that the tribunal (and P&ID) had met with many, and many inexcusable, delays from Nigeria, and it was understandable that the tribunal should manage the arbitration firmly in response.

In the debate in Parliament in the House of Lords over the new Arbitration Bill (now Act) in this jurisdiction, in the course of a brief summary of the P&ID arbitration, Lord Hoffmann said this:

"Eventually, at another hearing, we went into the question of what damages had to be paid. Arguments were again brought, with expert witnesses on both sides, and we came to the conclusion that it was a large figure, because the gas was due to have been supplied over a period of 25 years and it all added up."

You will anticipate the point that I'm going to make. The difficulty I have is that although there were expert witnesses on both sides, the tribunal did not have the assistance of competent expert evidence on both sides. In choosing arbitration, did the parties contemplate that a decision would be made in circumstances where the tribunal did not have assistance from both sides? Did the parties contemplate when they chose arbitration, that the tribunal would be unable to try to bring about the assistance that was missing?

So, what could have been done differently? Please do not be concerned that in asking this question, we ignore the difficult job that the tribunal faced in P&ID v Nigeria. The spirit of the exercise we are discussing is about taking the opportunity to improve.

In the debate in the House of Lords, Lord Hoffmann himself said this of the bribery and corruption aspects of the case, but it is material here as well:

“The question your lordships have to think about is [he said] ‘what does that mean we arbitrators are supposed to do in practice?’”

There are two ways to look at this. One is to ask, what would we actually have been prepared to do differently? Because it is not easy. What would you actually do if you were the tribunal?

The second way of looking at this could inform the first. It is to ask what the user would expect, at the point when the arbitration agreement was made. In choosing arbitration, I suggest the parties seek a fair decision and a decision that is correct. Especially in major disputes. We emphasize the other features of arbitration, but these are the ones at the heart of it for present purposes. However you phrase things.

We may need users themselves to help us with the answer to this, rather than rely on our own expectation of what their position would be. Users have often helped us with the answer in other areas, as courts around the world have found,

Would you have required the expert called by Nigeria to go back and read the evidence of Mr. Quinn and write a further report? Why not? Would you have invited Nigeria – late, yes – to put the points it had not put even by calling the experts back?

Would you have taken the initiative as the tribunal to bring in another expert? Of course, there are arguments for and against party-appointed or tribunal-appointed experts, but decisions have to be made, especially where things are not working and that fact might compromise the ability to decide fairly and correctly.

With the benefit of knowing what can happen, as in P&ID, would you, in the future, in fact spend time with the experts before any reports are written? To ask what they proposed to do; to make clear what would help the tribunal; to discuss how the experts proposed to exchange and test views; to ascertain what the experts needed to do a good job. To establish proposed assumptions. Professor Doug Jones has spoken recently on the importance of identification of assumptions and, respectfully, he is right to do so.

I add here that many experts to whom I have spoken over the years say they would welcome the opportunity for earlier involvement, in one form or another, whether or not directly with the tribunal. And they say the same for litigation in the courts.

And once it was clear that Nigeria's advocate did not understand the points that the tribunal was putting on quantum, would you have done what was needed to ensure that arguments were raised and explored by other means, perhaps by appointing counsel to the tribunal – an independent advocate to assist the tribunal.

There is the related question, of course, whether if parties do not raise a point, the tribunal should nonetheless propose submissions on whether there is more to the law or to its development? You will know that it is my argument that this is within, rather than outside, the process that the parties have chosen when they chose arbitration.

I know that if arbitration is adversarial, there is sometimes a fear about the tribunal risking the appearance of partiality by what is termed “*entering the arena*”. But we can do better than allow vast awards to turn on whether a point is put or not, or whether questions from the tribunal are understood or not.

What we are looking for, and we should be proud of, is a tribunal that is striving to equip itself with the assistance needed to produce an impartial result. Seen in that light, a hands-on rather than an over-detached tribunal should be uncontroversial. We have things to learn from our civil law colleagues who understand that investigation is not partiality.

Overall, this is an area for the tribunal to have confidence in itself. That includes the courage to examine relatively radical ideas that might challenge our traditional assumptions. Though much of what I have suggested I don't think is really radical.

So much discussion that we have had about courts and arbitration has been about enforcement. The New York Convention is important and a true achievement, but it is not an entirely great friend when it over dominates the discussion between courts and arbitration in the areas that I have sought to cover. Courts and arbitration need to take time together on other things so that they are surer of each other. If arbitrators strove to ensure that they had the expert or legal assistance that they needed, or themselves raised legal issues at the cutting edge, do we really fear that the courts, the supervisory courts, would arrest their support for arbitration?

More generally and across dispute resolution. It is time to move on from marketing and competition between dispute resolution methods and between jurisdictions. These are instead times for shared best practice, for collaboration and for integration. We need

more principles – of law or practice – to be understood and developed. For this we need all hands. Let's aspire to see the whole relationship between litigation, arbitration and mediation as an integrated one, including complementary paths in the pursuit of justice. The issues of culture, standards, external expertise, and understanding and development of the law are universally relevant.

It is together that courts and arbitration and mediation form a system. And, today, this system is international and needs to be forward looking. It is vital to stability and to economies through the rule of law. We will need that system all the more as law helps us in a world of ever-increasing complexity, of AI, of poverty and inequality, of further definition of corporate responsibility and of climate change.

Each of these challenges and others will require us to look further at the law and as we do we will find more from it.

The different perspectives that courts and arbitration and mediation can bring to rights and to interests may unlock some of the problems that come with vast awards; awards that one party will struggle to enforce and the other party may struggle to survive. We are brought more in reach of what the Hon. James Allsop, former Chief Justice of Australia's Federal Court, has called *"a culture of problem solving"* that goes beyond black letter law and discrete processes, and instead focuses on the sensible and effective resolution of disputes as part of a system. I can hear the users supporting.

We now have the institutions that can help with the collaborative dialogue across countries. In one of those coincidences, when the award in P&ID was made, in 2017, something else started and that was something close to my heart called SIFoCC, the Standing International Forum of Commercial Courts, the largest gathering of commercial courts and judges from around the world. But what is notable for present purposes is that SIFoCC was joined by ICCA in Doha last year for a global meeting of judicial delegations from across the world. And only last month this institute, the Chartered Institute for Arbitrators, joined SIFoCC in Africa for a meeting of judiciaries focused on effective dispute resolution for that continent.

At SIFoCC's Fourth Full Meeting in Sydney, the Chief Justice of Singapore, Sundaresh Menon, gave the Keynote Address to judicial delegations attending from every part of the world and every legal tradition. In international commercial dispute resolution, he imagined a regular dialogue among judges, arbitrators and mediators to raise awareness and understanding on all sides, with a view to working towards a set of shared perspectives on key issues. He took – and this is notable too – the opportunity to record that this was precisely what Judge Dominique Hascher, representing ICCA, the International Council for Commercial Arbitration, had suggested at the same Full Meeting.

Thank you for your kind interest in this. Will you please bring your ideas into the work that institutions and others can do to bring about change across the system? Whatever our individual role, every one of us has responsibilities here to the rule of law and the public interest.

This is urgent because vast awards that we cannot be sure about are here, with all their consequences. But it's also a lifetime's work for each of us. It's about culture, approach and commitment.

But at heart, the answer to the question "can we do better?" is a firm "yes". The great thing is, we know we can. Uncertainty today over vast awards is capable of opening up improvements in dispute resolution and greater understanding of the law, if we take the opportunity to work out the solutions together and find out more together.

We all have a part to play in this. Thank you very much. Thanks.

COMMENTS, QUESTIONS, ANSWERS

Sir Robin Knowles: Thank you very much.

Lucy Greenwood: Wonderful. Well, thank you, Sir Robin. I mean, absolutely fascinating and thought provoking lecture and on such an important and I would say far too under considered subject. So a real challenge to us all there. And I think particularly Sir Robin's focus on the user perspective, the user's voice is far too often not heard enough in this process. So, thank you again, Sir Robin, for that lecture. We have the opportunity to hear from you all here in the room. And we also have the very engaged online audience. So please don't be shy. We have the opportunity to keep Sir Robin here for another 25 minutes or so. So, let's do that I'm going to start with one of the questions that we had online. And then I see we've already got some questions here in the room. So, thank you for that. The question online and I'm just going to read it out very kindly for us, but it largely goes to one of the points you touched on, which is that elusive standard of reasonable certainty; proving damages with reasonable certainty. Sir Robin, so if I could ask Cristen to read out the question, please. Thank you.

Cristen Bauer: Can everyone hear me? Okay. It's coming through. Yes. This is from, a damages and valuation expert from Singapore. And he says, what are your views as to the expectations of certainty when there is inherent uncertainty in the damages assessment process?

Sir Robin Knowles: Yes. Thanks for the question. I think that what we've got to be careful about is expecting too much from a term, whether it's "reasonable certainty" or "certainty" or anything else. We are in an area here where there is no substitute for more detailed discussion of individual situations and sets of circumstances. I mentioned in the speech, designed to provoke thought, that one thing we could try and work out with the assistance of experts is whether there are models that would articulate what it is we are trying to do, and make a make a contribution in that way. That is an example of a form of expression that sometimes may be more useful, I think. I know this has been done, but it could be a very, very rich occasion if one assembled a lot of thoughtful people and said to them, now let's discuss "reasonable certainty". We would learn what a range of answers that gives. From there, we would start to work out whether there's a better way of expressing things. but more often I think we would come away perhaps with some scenarios and situations, which we could use to give a better result.

Lucy Greenwood: And I think if I can jump in on that, you know, I think in this process there's an awful lot of focus, as Sir Robin said, on liability, on establishing whether or not there was a wrong and I would say, taking again from your excellent words, Sir Robin, that's not enough. Focus on how you right that wrong if the wrong has been established. And just to that point, we're all very intimately familiar with what a "balance of probability" standard is, but we don't do the same kind of, I would say, forensic analysis of, of this sort of mythical standard of, of "reasonable certainty" for damages. And it rather goes to your point about how we can test the experts more. And so, I'd be interested if you wanted to sort of elaborate on that, Sir Robin, because, again, often this is simply the usual way of cross-examination. We sit as arbitrators, we hear the cross and we make value judgments based on that. But help us a little more on your general thoughts on that.

Sir Robin Knowles: Well, I mentioned two things again to provoke discussion that really, we could start bringing about right now, because they can be brought about on an arbitration by arbitration basis. And we not only help the dispute, but I think we learn a lot more generally. And the first is time with the experts right at the beginning. Yes, it may be that one's got to push a bit to get that to happen. but part of what I'm suggesting is now's the time to push. The second, and it's a related thing, is that the experts are, in a polite and reserved way saying, "hear us". And so, the more often we can be sitting down with them, even in an arbitration or, frankly, in a court hearing, and for the sort of discussion that I mentioned about their work and about how they can make the best contribution, whether that's at the beginning of the case or further on. It seems to me the least suitable situation, as a general approach, is that we come across the expert for the first time when we are reading reports, however we might have been trying to frame the issues, And we hear them for the first time when they're being cross-examined.

Lucy Greenwood: Absolutely. And I mean, arbitration is such a frontloaded process in many ways. It may well be that we haven't sufficiently focused on front loading the quantum rather than always front loading the liability. I know we have lots of questions in the room, so thank you, there was one right at the back. I can just see the blue sleeve. Yes. Do go ahead. With the blue sleeve. Do introduce yourself?

Audience member 1: Audley Sheppard KC, 20 Essex, Vice President of ICCA. Thank you, Sir Robin, for your very insightful comments. You identify, if I may respectfully say rightly, on the difficulties that flow from full reparation, a doctrine that is very well entrenched in English law, for breaches of contract. I also expect Nigerian law. Also, international law. And I think it is the size of damages against states which has turned states against ISDS and investment protection generally, not necessarily holdings of liability, because many, many states have administrative law and judicial review, that can hold states to account. But it's the size of damages, which is an affront to the state. You asked for suggestions. One suggestion I have and have put out there at other times, is to consider loss of a chance as an approach to damages. I say this because I had a case some years ago against Nigeria. There were some parallels in that a power purchase agreement was signed and terminated after eight days. A claim was brought for many hundreds of millions. The tribunal found on liability against Lagos State and against the government. Because of the guarantee, there was no question of fraud or corruption. It was very ably defended by an SA and one of Nigeria's leading advocates, very, very well known, very able. And when it came to damages, of course, the client was pressing for many hundreds of millions of dollars. But the tribunal looked at that and the fact was no site had been chosen. No feedstock agreement had been entered into. Amongst other considerations they thought that it was reasonable to assume that construction could be delayed and probably over budget, and that would affect the whole financing of the project as a result. They said there were too many uncertainties. They would approach it on the basis of loss of a chance. They made considerable discounts to the total top level claim and they eventually awarded \$11 million. Proportionate. Was a client unhappy? Of course. The claimant was very unhappy. Proportionate because there was liability. There was wrongful termination of the PPA. But whatever profits might have been made was too uncertain. So, I thought it was proportionate. I thought it was reasonable. It recognized wrongdoing by the other contractual counterparty but it wasn't a huge, it wasn't a massive amount of damages. And I wonder whether if we looked more seriously and it may need some variation on orthodox theory about loss of a chance doctrine. But I think if we approach some of these claims when projects were at very early stages, on that basis, I think we would come to a more reasonable and perhaps acceptable result for states as a result.

Lucy Greenwood: Thank you. Audley and an excellent point. And also, it goes to one of the points that Sir Robin made; a fairly radical suggestion in his lecture about the possibility

of looking at damages even before liability, because if that had happened in the example you gave, then everyone would have been far clearer as to what they would actually be going to recover. But Sir Robin, do you want to comment on the point that was made?

Sir Robin Knowles: I would; I'd love to. Actually, the first thing to say, though, is that that last idea of dealing with damages before liability, it very much came into my mind as a result of conversation with Lucy. It just shows. And the first point I'd make in response to Audley is thank you, because what he has said is in the spirit of trying to bring forward ideas in relation to the particular area where they are needed. I think the idea has a contribution to make. And I just emphasize these things. First of all, if we head that way, we need to resolve the uncertainty about which cases are in the loss of chance bracket and which cases are not. I think that's uncertain in the courts, and it's uncertain in arbitration, but at least we know what we're trying to aim at there. Secondly, though Audley has emphasized states, and I know I did to a degree, this is an issue that goes beyond states. It is really important in a world that is full of corporations and business. They're all looking for this to be, approached sensibly. Audley sets a great example to get us under way.

Lucy Greenwood: Yes, thank you very much. We have more enthusiastic questions in the room. Thank you. And I'll be coming to online as well. The question just here. Sorry. Yeah, I'm not worried. Yes, yes that's right. Oh well we'll go to the one in front of you next. But you go ahead. Yes, please. Sorry. It's difficult to see you at the back there.

Audience member 2: Yes. Thank you so much.

Lucy Greenwood: Do introduce yourself?

Audience member 2: Oh, my name is M. Thabo Chakaka Nyirenda. I'm the Attorney general of the Republic of Malawi. Coming to the awards, huge awards that, sort of and as alluded to is particular to the P&ID case. Wouldn't one of the suggestions be, as I think a number of English court cases have decided, where you have exaggerated the claim then the findings that that claim is founded on fraud and deception, even though they can hold some nominal or maybe say, for example, the actual award. The actual damage could have been \$100 million or \$10 million, but you have put forward a claim for compensation of \$10 billion, and then you should lose or lose some amount, on account of you exaggerating the claim and on the basis of fraud and deception. I think the number of English court cases at that point.

Lucy Greenwood: Thank you very much for the question. Did you want to comment on it, Sir Robin?

Sir Robin Knowles: Again, I think we should welcome all ideas. I am cautious about the idea that comes in with a solution that I would be, what I would say is, late in the process of dispute resolution. And I am cautious about an idea that, I can see, is going to be approached in practice in quite a reserved way by courts and tribunals. But thank you for the idea.

Lucy Greenwood: Thank you. We'll take one, one question online and then we'll come to the gentleman in the blue suit. I know he's been waiting, so apologies. I don't know your name, but Cristen, I think you had a question about the finality of arbitration awards and court intervention.

Cristen Bauer: That's right. This is a question here from the chat that says, do you see a future where courts intervene more actively in reviewing arbitral awards for public interest or proportionality, even at the risk of undermining finality, especially in cases involving state entities?

Sir Robin Knowles: It is a really important question. I do not see the quantity of court intervention increasing. But I think on the few occasions when it happens that should be viewed positively as the system working. But I touched in the lecture of the idea of actually thinking about bringing some points of law through to the courts. The parties have got their arbitration agreement, but it doesn't stop a sensible conversation that says, actually this point, before anyone starts deciding it, is one, that one might put before a court. It's a point of wider interest. I think the problem at the moment, which is not doing anyone any good is, is that a great deal of time is necessarily being consumed in the space of enforcement battles. Over very large awards. That is not the most, productive way of the relationship working. It's necessary at the moment but, I hope we can move on from that.

Lucy Greenwood: Thank you very much, Sir. Robin. We'll come to the gentleman in the blue suit. I've been waiting patiently. Do. Go ahead.

Audience member 3: Nasser Khan, a reputable quantum expert.

Lucy Greenwood: Thank you, Mr. Khan.

Audience member 3: So, Sir Robin, my question is. It's a very similar case, P&ID and when we look at the record, the big case, Pakistan, one was set aside by the UK courts while the other wasn't. Was it because one was commercial arbitration, or one was investor state? How do you see the difference of loss of chance and termination, fraud investigations and all of that between the two cases. How? Because to me they are very similar in nature in that. But one was set aside and one wasn't. How do you see that?

Sir Robin Knowles: I wouldn't achieve very much if I sought to reconcile the two, specific cases, but we should expect differences. I think that, between cases, whether they involve states or companies, it is, in fact, different outcomes that can help us in the end, develop our understanding of the law. An area of difference between a state and a corporation that I would keep in mind, was the one that I tried to mention in the talk. We have to recognize that a state will, from time to time be in a situation where it is actually difficult for it to engage with a dispute in the way that we, as involved in the dispute resolution sector, would like. And I think we've got to be smart as to how we work through that. In P&ID, the tribunal gave more time and more time still. And in the end said, well, you've had your time and we're going to now deal with it. It's in that context, I think that perhaps, a tribunal would see whether there's something going on there that is causing this, foolish, approach by the state. And it's an approach that damages the whole population. And it might be an approach that's a result of some terrible bureaucracy. The tribunal will think, how can I cut through this? And one of the ways of cutting through might be to say, right, we're going to bring another expert in or we're going to bring another, independent, counsel in to assist us. But what we not going to do is just say, well, you've had your chance, we will proceed without the benefit of the evidence or argument we would expect. We need to give a fair result. We must have the argument we need to get the law right in a respect that may be very, very tricky because the awards in this area are very large.

Lucy Greenwood: Absolutely. Absolutely. Thank you. More questions in the room yes, gentlemen, just in front of Kikoano. Yes. So not only the one gentleman in front of you. Sorry.

Audience member 4: Thank you. Yes. Good afternoon. Thank you for that wonderful lecture, my name is Amir Singh. I'm here from next door, New Delhi. I just dropped in. I'm also treasurer of the IBA. My question was very simple. You mentioned in the course of your comments that, arbitration, mediation and litigation should come together as dispute resolution mechanisms that work and perhaps tie up have better, you know, stitching put them all together. And I was wondering why arbitrators are not permitted to be amiable compositors. As much as they should be. And the same happens even with courts. Sometimes they don't see the opportunity to understand a dispute and force the parties into a mediated position where they know what's going on. And it's better to do that with agreement rather than a judgment. Thank you.

Lucy Greenwood: Thank you very much for the question. And what immediately occurs to me is how you feed that into improving predictability in arbitration awards, if you bring in that greater ability to act as an amiable compositor. But what a wonderful question. Thank you. Sir. Robin, what are your thoughts?

Sir Robin Knowles: Above all, it's the broad conviction that the more time we spend together, as litigators, arbitrators and mediators, or those involved in any of those processes, the more we will identify solutions that are workable, and when we're going to use them. And it's that that will help certainty. Yes, it will also help certainty in the sense that we, arrive at an improved fashion in which one form of dispute resolution could operate. But in the process, everybody else in that conversation understands why, and what is sought to be achieved. So, there is not only a more developed process, but there's a general understanding of why that's a good move.

Lucy Greenwood: Thank you very much. Cristen, anything online or I'm very happy to take more questions from the room.

Cristen Bauer: Yes, maybe we have a few questions, some of which you've already kind of touched on. So maybe we'll yield the floor.

Lucy Greenwood: Sure, absolutely. Who's desperate to be heard in the room? Go ahead. Go ahead. You're the first I saw. Yes. Go ahead. Sir.

Audience member 5: Hello, Sir. Robin. My name is Saad Hegazy. I'm one of the Ciarb trustees and also, reputable experts as well. So, thank you so much for the for the wonderful lecture. It's actually touched every one of the experts and also arbitrators. One of the things you mentioned was about the existing practices. And you said the guidelines governing expert involvement in arbitration are often sometimes too general. Yes. Okay. So in the light of that, do you believe the arbitral institutions, for example, should move towards like some kind of requiring more rigorous, specific methodologies from the experts, specifically in cases like the one we were talking about Nigeria v P&ID, which have like a public interest or state entities, how can we fix this? Because, you know, experts go to arbitrations, and everyone is selecting different methodologies. And even with these, what we call so-called general methodologies or general guidelines, it's very hard to agree on specific issues.

Sir Robin Knowles: But like all aspects of this, it is not easy. I do think the institutions, encouraged by us all, can work towards greater specificity in some of the guidelines and protocols. I do not believe that that will resolve this, as opposed to make a contribution to it. I think the real contribution will come from the way in which the arbitration community as a whole, engages with the providers of expert evidence, to live a better process in the course of each dispute. At least in some disputes I think we will find there are gains if we were to bring early engagement between tribunal and experts. And we might find that in the early days we were. building a structure, case by case, but it would soon surface more of a template for another case or series of cases. I can say on the court side, on the litigation side, we have found it helpful to have more detail in protocols

and statements and the like but that's more easily achieved, as I said in the lecture, if one is just dealing with one jurisdiction, and one can say, well, that's the position in litigation in this jurisdiction, please comply with it. I'm not sure we'll get there if we rely on that approach to resolve the position in arbitration so the institutions can continue to make their invaluable contribution. But a lot of this is about each one of us deciding to approach this together. Day in and day out.

Lucy Greenwood: Absolutely. Thank you very much. Now, I know you have been very, very patient back there. So do put your question.

Audience member 5: Thank you very much, Robin. And thank you very much, Lucy, for this opportunity. Now, please, you allow me to make [] short comments and then ask a question. Number one is my name is Mary. I'm a Nigerian. [] I congratulate you for the initiative of this collaboration because I raised a question at a webinar, you know, in Nigeria, and I asked the question, I said, as much as we are happy with the decision that you give, and let's reflect and ask ourselves a deeper question, if that appeal or if that challenge was before a court in my country, could the outcome have been the same? That is a question we need to, you know, ask ourselves. And that is why the collaboration comes in. We need a lot of support, you know, from your initiative. And I'm sure a lot of our jurisdictions will be very happy to collaborate. Now to my question. I want you to clarify for me, you know, the suggestion that you made with regards to, you know, how a tribunal could, on his own, appoint an expert. I ask this question because I, I keep in mind that under several procedural rules, the burden of proof lies on each party, either the claimant or the respondent for the defence. I mean, how could the tribunal navigate, you know, those nuances when a party is unwilling to, you know, to bring an expert? How could I- how could the tribunal, how far could the tribunal go in supporting a party in proving his case, considering the fact that if a tribunal goes ahead to appoint an expert, it has an implication of cost. So, where I would not say enough is enough.

Sir Robin Knowles: Thanks. Thanks very, very much. It deserves a fuller answer. But let's put at the forefront of our mind the fact that the expert contribution is there because it's an independent contribution. Whoever has hired the expert, it is for the purpose of producing independent, expert evidence to the tribunal and if the tribunal finds itself in a place where it has given permission in the process for there to be independent, expert evidence but one of the expert teams is simply not making its contribution then it seems to me a small step to bring in another expert. That is not favouring either side at all, because the way it is being brought in is as independent expert evidence. I am absolutely aware of how, difficult that might be in an individual case, including in relation to costs, but it's one of those things, isn't it, where it's either that or you get the sort of thing that has surfaced in the P&ID v Nigeria case. And put that way, there's only one way.

Lucy Greenwood: Absolutely. I'm going to take one last question. a very short one, if we can make it that. I think you had your hand up before in the green tie, didn't you? Do go ahead and please introduce yourself. And a short one. It's going to be our last question, so no pressure.

Audience member 6: Freddie Simpson, I'm a barrister here in London. You spoke about the correctness of awards. I was wondering if you just flesh out what you have in mind when you're talking about correctness.

Lucy Greenwood: Just an easy one to finish on.

Sir Robin Knowles: I think I also may have said That I am not even sure we know what correct is, but it's the accuracy of the result. and that means, sometimes, working through to a next level in the law that applies or working past some of the too obvious contributions of fact or expert evidence when one knows there's, there's more, that needs really to be found. To get to the right answer. Maybe the right answer is the way a user would put it. Maybe, with real gratitude for your question, what do we mean by correctness that we should put to the users?

Lucy Greenwood: Thank you very much indeed. And thank you to everyone online as well for their really great engagement throughout this fascinating lecture. Thank you to everyone in the room. Early on in Sir Robin's wonderful remarks, he did say, and I quote, we can do better than discounted cash flow and we know it. Well, Sir Robin, we do, and we will. So, thank you very much indeed.

Lucy Greenwood: Thank you.