Viewing our World through a Different Lens: Environmental and Social Considerations in International Arbitration

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Abstract:
Climate change is the greatest challenge humanity will face this century, yet the international arbitration community has been slow to recognize its significance and to react to its effects. The international arbitration community was similarly slow to address the under-representation of women in arbitration, with measurable change in this area only being seen in the last five years. We have yet to realize any significant improvement achieving a more diverse community more generally, beyond the narrow issue of the under-representation of women.

This article addresses the behavioural changes which have been achieved in these areas and considers those that remain to be implemented to embed environmental and social considerations into the culture of international arbitration. It argues that every dispute should be viewed through a diversity and an environmental lens and identifies the changes that are needed now. We must secure change to ensure that arbitration meets the needs of its users, as we look to a future which looks very different to even the recent past.

Keywords: climate change; arbitration; diversity; sustainability.

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1. ACHIEVING BEHAVIOURAL CHANGE

In the words of John F Kennedy '[c]*hange is the law of life and those who look only to the past or the present are certain to miss the future.*' It is now that international arbitration needs, more than ever, to turn its eyes to the future. Yet change will not be easy. Those involved in the conduct of international arbitration tend to be a fairly conservative group, to whom change does not come naturally. Achieving widespread behavioural change in any situation is challenging. International arbitration has evolved in a somewhat passive way, with arbitrators tending to focus on the truism that the foundation of arbitration is party consent and therefore they should not be seen to overly control proceedings. This passivity means that international arbitration is an unlikely candidate for radical change.

The theory of 'reasoned action' posits that behaviours occur because of intention, and intention is influenced by personal attitude and perceived social norms.[1] Essentially, the more positive a person's attitude toward changing their behaviour and the more others demonstrate the desired behaviour or support the behavioural change, the stronger the person's intention to change their behaviour will be and the more likely they are to successfully change it. It is here that leadership in the international arbitration community will play a key role. Amplifying the voices that are already challenging the *status quo* will be vital in helping us achieve lasting change. Empowering arbitrators in particular to take greater ownership of the disputes before them is a real opportunity to shape the future of international arbitration. And this will only be achieved by bold leadership exhibited by those who are already at the top of the profession.

The other way in which we can drive change is to 'nudge' the arbitration community generally towards a more modern approach to their practices. Behavioural economists Richard H. Thaler and Cass R. Sunstein introduced the concept of 'nudging' to the wider public in a 2008 book titled 'Nudge', with a revised edition released in 2021.[2] They explained how economists have historically assessed human behaviour from the prism of *homo economicus*, rather than *homo sapiens*. Behavioural economics has traditionally assumed humans are rational actors who assess objectively, choose optimally, and make unbiased forecasts and decisions. An important shift in perspective has been to accept that humans, unlike Thaler and Sunstein's *homo economicus*, are not rational 'textbook' actors; they do not always make predictions or decisions based on an unbiased objective analysis, carefully weighing the costs and

1. 'What Is Behavior Change in Psychology? 5 Models and Theories', Madden, Ellen, & Ajzen, 1992.
2. 'Nudge, The Final Edition,' Allen Lane (2021). See also 'Nudging towards a Greener Future in Arbitration', by Lucy Greenwood and Leonor Cordova, https://www.ciarb.org/resources/features/nudging-towards-a-greener-future-in-arbitration, from which some of the material in this paper is taken.

benefits of alternative scenarios. This means not only that humans are (of course) fallible, but also that they are easily influenced by what Thaler and Sunstein term 'choice architecture', by which they mean the practice of influencing choice by adjusting the context in which people make decisions. Essentially, where choice architecture is manipulated, the individual retains the sense of having a free choice but the way in which the options are presented nudges the individual towards a particular approach.

Before addressing the twin approaches of leading and nudging to promote change in approaches to social and environmental issues in international arbitration, I briefly describe the present position with regard to the impact of climate change in international arbitration and the importance of diversity in international arbitration. I then examine the initiatives that are seeking to deliver change in these areas.

2. INTERNATIONAL ARBITRATION AND THE ENVIRONMENT

It is now almost universally accepted that human activity causes climate change and behavioural changes are an essential mitigation measure.[3] The United Nations Climate Change Conference (COP26), which took place from 31 October to 13 November 2021, produced the 'Glasgow Climate Pact', which has been somewhat depressingly described as 'neither a triumph nor a train wreck.'[4] On the one hand there were certain breakthroughs, such as the explicit acknowledgment that coal and fossil fuels are the main drivers of climate change. On the other hand, many developed and developing countries regretted the concessions that they were forced to make to reach an agreed text. It is far from clear that the actions that will come from the Glasgow Climate Pact will be sufficient to allow the goals of the Paris Agreement to be reached; namely, to keep the global temperature rise to below 2°C and limit it to 1.5°C by the end of the century. What is clear is that climate change will pervade every aspect of our practices by the end of the next decade and international arbitration practitioners must act now to properly equip themselves to address the issue.

Recalling the words of David Rivkin introducing the IBA Practical Guide for Business Lawyers on Human Rights: '[t]he overarching message for lawyers as business advisors is straightforward and powerful. We cannot now – if we ever could – conceive of our role exclusively as technical

3. The Intergovernmental Panel on Climate Change (IPCC) issued a report in 2013 which categorically stated that climate change is real and human activity is the main culprit. The IPCC report issued in 2022 determined that behavioural change played a crucial role in the fight against climate change, in tandem with technology. https://think.ing.com/articles/ipcc-report-calls-for-urgent-behavioural-change-and-carbon-removal-technologies#a4.
4. https://www.economist.com/international/2021/11/13/cop26-ends-with-a-pact-that-is-neither-a-triumph-nor-a-trainwreck.

specialists in black-letter law. Rather, our clients need us to be wise counselors, who integrate legal, ethical and business concerns in all our advice.'[5] We need to be pragmatic in our approach to our clients and aware of the impact of climate change on their businesses. In a speech given in October 2019, Mark Carney, Governor of the Bank of England, stated '[c]hanges in climate policies, technologies and physical risks in the transition to a net zero world will prompt reassessments of the value of virtually every asset'.[6]

International arbitration practitioners have already begun to see significant changes in the type of disputes they are facing, with a far greater proportion of energy-related disputes now being linked to power generation from renewable sources and renewable technologies more broadly. There have also been significant changes in the approaches companies are taking to the climate crisis and the way in which company performance is measured. Known as 'ESG' principles, environmental, social and corporate governance are now the three central factors used to measure the sustainability and societal impact of a company or investment. Companies report annually on their 'non-financial' performance[7] and ESG factors are now highly influential in terms of a company's agenda and strategy. A UN-Accenture report 'The CEO Study – A Call to Climate Action' was based on hundreds of one-to-one interviews with CEOs from the world's largest companies.[8] According to the report a staggering 91% of global CEOs view climate change as an urgent priority for business and over half of the participants believed that climate change would create opportunities for growth and innovation for their company. Just as in recent years we have seen clients expecting law firms to field diverse teams on their matters, we are also likely to see clients requiring that law firms demonstrate commitment to environmental principles as well.

There are two sides to the coin of climate change in relation to dispute resolution practitioners. On one side, there is the impact of climate change on an arbitration practice. On the other, there is the impact of an arbitration practice on climate change.

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5. 'Introducing the IBA Practical Guide for Business Lawyers on Human Rights': https://shiftproject.org/forging-the-path-as-wise-counselors/.
6. '*Strengthening the foundations of sustainable finance':* https://www.bankofengland.co.uk/-/media/boe/files/speech/2019/tcfd-strengthening-the-foundations-of-sustainable-finance-speech-by-mark-carney.pdf?la=en&hash=D28F6D67BC4B97DDCCDE91AF8111283A39950563 See also the comments by pensions minister Guy Opperman, stating that climate changes poses a financial risk that is *'too important to ignore'.*
7. See, for example, BP's ESG datasheet or Exxon's sustainability report: https://www.bp.com/en/global/corporate/sustainability.html, https://corporate.exxonmobil.com/Community-engagement/Sustainability-Report.
8. The UN Global Compact-Accenture CEO Study Special Edition: A Call to Climate Action: www.unglobalcompact.org/library/3551.

2.1 Climate Change's Impact on Arbitration

Addressing the first side of the coin, we are already seeing an increase in disputes relating to climate change, both in relation to cases brought to right wrongs caused by climate change, matters relating to climate-change-driven technology, such as renewables, and cases brought to challenge or influence environmental policy or behaviour. In 2014 Christina Figueres, Executive Secretary of UNFCCC, said that 'climate change increasingly poses one of the biggest threats to investments'.[9] While Ms Figueres was emphasizing the need for institutional investors to move away from fossil-fuel-based investments, this statement is also applicable to investor-state arbitration. The *Burlington* and *Perenco* cases brought against Ecuador both resulted in successful environmental counter-claims, with Ecuador being awarded US$41.5 million and US$54.5 million respectively to remediate the Ecuadorian Amazon region.[10] As states amend their regulatory regimes to meet their Paris Agreement obligations, we are likely to see an increase in environmentally-based counterclaims.

In terms of the impact of regulatory change, in recent years a number of states have been held liable to investors under bilateral and multilateral investment treaties for the impact of changes to their renewable energy incentive schemes on foreign investors in the renewables sector. Over €800 million has been award against Spain alone, following a series of measures taken by Spain between 2010 and 2014 to eliminate or reduce solar energy subsidies which were found to have breached the country's obligations under the Energy Charter Treaty.[11] These cases have turned into something of a 'saga',[12] with 28 arbitral awards (so far) being issued in arbitrations against Spain, Italy and the Czech Republic brought on the basis of changes to renewable energy regulations in those countries. A detailed discussion of these cases is beyond the scope of this article, but it is notable that there has been

9. https://uk.reuters.com/article/us-un-climate-change/un-climate-chief-urges-investors-to-bolster-global-warming-fight-idUSBREA0E1KM20140115.
10. See *Perenco Ecuador Limited v the Republic of Ecuador*, ICSID Case No. ARB/08/6 https://www.italaw.com/sites/default/files/case-documents/italaw10837.pdf and *Burlington Resources Inc v the Republic of Ecuador* ICSID Case No. ARB/08/5 https://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf.
11. See, *OperaFund Eco-Invest SICAV plc and Schwab Holding AG v. Kingdom of Spain, Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain, NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v. Kingdom of Spain, 9REN Holding S. à r.l. v. Kingdom of Spain, SolEs Badajoz GmbH v. Kingdom of Spain, InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*.
12. For an interesting discussion on the relevant cases, see '*The Renewable Energy Saga from Charanne v Spain to the PV Investors v Spain: Trying to see the wood for the trees*' http://arbitrationblog.kluwerarbitration.com/2021/02/01/the-renewable-energy-saga-from-charanne-v-spain-to-the-pv-investors-v-spain-trying-to-see-the-wood-for-the-trees/.

considerable divergence in the way that the various arbitration tribunals approached the question at the heart of the disputes, namely the legitimate expectations general legislation can give rise to and the impact of changes to those regulations on the expectations of foreign investors. I would simply observe that regulatory changes spawned by the Paris Agreement are likely to be considered 'reasonably foreseeable'[13] and therefore ought to fall within the legitimate expectations of investors.

Climate-related issues are not limited to investor-state arbitration. Industry sectors such as the energy and construction sectors are likely to see the most climate change related disputes and increased regulatory issues. These sectors already have a strong preference for commercial arbitration. The energy sector in particular is already seeing increased numbers of disputes relating to renewable technologies, including solar and wind, and issues arising out of carbon capture and electricity storage technologies. The ICC Commission Report 'Resolving Climate Change Related Disputes through Arbitration and ADR'[14] highlighted that disputes arising out of sectors expected to be impacted by climate-change-driven transitions accounted for around 70% of all new ICC arbitration cases in 2018, with the construction, engineering and energy sectors alone accounting for over 40%. Its conclusion was that '*climate change related disputes will increase exponentially*' going forward.

The ICC Task Force on Climate Change[15] identified three potential categories of commercial arbitration disputes. First, the task force concluded that climate change related commercial arbitration could arise in relation to contracts concerning the reduction of greenhouse gas emissions and the energy transition, and envisaged disputes over renewable energy facilities, the decommissioning of power plants and the adaptation of infrastructure. Second, the task force identified that contracts without specific climate-related objectives could also generate disputes involving climate or environmental issues by being impacted by changes in national laws, regulation or policy and responses to associated climate change action in national courts. Third, the task force envisaged the possibility of 'submission agreements' to arbitrate climate-related issues where no agreement to arbitrate existed and also suggested that unilateral offers to arbitrate by corporations to resolve climate change or environmental disputes may increase in prevalence. Approaching climate change in such a compartmentalized way may risk siloing climate change issues in an unhelpful manner. A better approach may well be to view

13. As per the decision in *Charanne BV v the Kingdom of Spain*, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf.
14. https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf.
15. https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/.

everything through an environmental impact lens. Climate change should be considered in relation to both the policy and also the practice in international arbitration. We all must acknowledge that climate change is likely to feature in some way in almost every type of dispute in the next ten years and beyond.

2.2 Arbitration's Impact on Climate Change

Although it is unarguable that arbitration practitioners will have a significant role to play in the determination of climate change disputes, of equally pressing concern is the need to act to minimize our practice's impact on the environment. This is the second side of the coin: the impact of our practices on climate change.

An environmental assessment is the assessment of the environmental consequences of a plan, policy, program, or project prior to the decision to move forward with the proposed action. The purpose of the assessment is to ensure that decision makers consider the environmental impact when deciding whether to proceed with a project. The International Association for Impact Assessment defines an environmental impact assessment as 'the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made'.[16] In 2019, members of the Campaign for Greener Arbitrations, supported by Dechert LLP, conducted a case study of a major international arbitration to determine its impact in terms of carbon footprint. The team based the case study on a US$ 30–50 million international arbitration they had been involved in. The total carbon impact in kgCo2e[17] of the arbitration used as the case study was 418,531.02. This would require planting over 20,000 trees to offset the emissions. Over 93% of the identified emissions related to travel, in particular air travel (business class[18]). In 2020 Herbert Smith Freehills LLP conducted research into the carbon footprint of a law firm's participation in an international arbitration and broke down the total carbon emissions into 57% energy use (within the firm), 41% travel and 2% materials. Of the travel-related emissions, unsurprisingly, 98% were attributable to air travel.

As a community, we have been woefully out of touch in relation to the contribution our practices are making to the increase in carbon in the atmosphere. In 1958, the year of the New York Convention, the concentration of carbon dioxide in our atmosphere was 316 parts per million. As of June 2022, it was 420 parts per million. By the time you read this article,

16. https://www.iaia.org/.
17. Carbon dioxide equivalent.
18. Depending on the size of the area for each seat, business class is usually between two or three times as energy intensive as economy class.

it will be higher.[19] Even if not every international arbitration has the carbon footprint of the Campaign's case study, it is unarguable that the practice of international arbitration comes with a heavy carbon price tag, and it is unacceptable that this price tag was largely ignored by international arbitration practitioners for so long.

As a community, for many years we were similarly out of touch in relation to diversity and, in particular, to the under-representation of women on international arbitration tribunals. Progress has been made in recent years, although much still remains to be done in relation to the under-representation of other groups and to address intersectionality and this article will now consider the present position in relation to diversity in international arbitration. Before we briefly leave the climate crisis, it is worth noting that climate change disproportionately affects women. Seventy per cent of the 1.3 billion people living in poverty are women. In urban areas, 40 per cent of the poorest households are headed by women. Women predominate in the world's food production (50–80 per cent), but they own less than 10 per cent of the land.[20] The synergies between initiatives to address inequality and climate changes are considerable and it is to this issue that I now turn.

3. INTERNATIONAL ARBITRATION AND DIVERSITY

Only ten years ago I wrote '[t]he lack of gender diversity in international arbitration tribunals is seen as an 'ongoing issue … rearing its head now and again …'. I noted that 'there are occasional blog postings about gender diversity, intermittent flurries of discussion in internet forums, and, much less frequently, the occasional publication of hard statistics about the composition of international arbitration tribunals. There has been relatively little comment on the reasons underpinning the lack of gender diversity in international arbitration tribunals; in contrast, there appears to be general acceptance that this is the status quo. International arbitration practitioners have become comfortable with the notion that women are a significant minority, if not a "tiny fraction" of the international arbitrator population.'[21] In 2010 Michael McIlwrath and John Savage asked '[i]n a discipline that prides itself on being transnational and designed for the resolution of cross-cultural disputes around the globe, is it acceptable that the vast majority of prominent international arbitrators are white, male lawyers or law professors over the age

19. Check for yourself at https://www.co2.earth/daily-co2.
20. https://www.un.org/en/chronicle/article/womenin-shadow-climate-change#:~:text=Women%20are%20increasingly%20being%20seen,dependent%20on%20threatened%20natural%20resources.
21. 'Getting A Better Balance on International Arbitration Tribunals' Greenwood and Baker, *Arbitration International*, Volume 28, Issue 4, 1 December 2012, Pages 653–668.

of 50?'[22] Finally, from being a topic that was rarely discussed, diversity, or more accurately the lack of diversity, began to be discussed at length at conferences across the globe.[23] The 2017 Berwin Leighton Paisner survey on diversity in arbitration confirmed that practitioners and users of international arbitration were concerned about the lack of diversity. 80% of respondents thought that tribunals contained too many white arbitrators, 84% thought that there were too many men and 64% felt that there were too many arbitrators from Western Europe or North America.[24]

However, we must be alert to whether diversity fatigue is now creeping in, ten years after detailed analysis of the under-representation of women in international arbitration began to be published and discussed. There is a risk that we are becoming weary of the efforts to address diversity in our profession. We must not be. Research shows that diversity leads to better decision-making. Being exposed to others who are socially different (outside our affinity groups) causes us, as individuals, to work harder cognitively, thereby making better, more accurate decisions. There have been multiple studies documenting this effect. For example, one study looked at the value of cognitive diversity in solving problems. Teams were given the task of solving a murder mystery. They were given plenty of complex material to assimilate, including alibis, witness statements, a list of suspects, forensics and so on. In half the cases the groups were composed of four friends, the other half were composed of three friends and a stranger. The teams with an outsider performed far better than the other teams. They got the right answer 75% of the time compared with 54% from those in the other group and 44% for individuals working alone. But note one thing – the participants in the two groups had very different experiences completing the task. Those in diverse teams found the discussion cognitively demanding. There was plenty of debate and disagreement because different perspectives were aired; they got to the right decisions, but they were not wholly certain about the decision they reached. The homogeneous teams' experiences were very different. They found the session more agreeable because they spent most of the time agreeing with each other. They mirrored each other's perspectives and although they were more likely to be wrong, they were far more confident about being right. They were not challenged on their blind spots and so missed the opportunity to identify them. They were not exposed to other perspectives so became more certain of their own. This is the

22. Michael McIlwrath and John Savage International Arbitration and Mediation: A Practical Guide (Kluwer Law International 2010) 5–079. See, for a different point of view, Jan Paulsson's article *Ethics, Elitism, Eligibility* Journal of International Arbitration, (Kluwer Law International 1997 Volume 14 Issue 4) pp. 13–22.
23. It is now rare to find a conference that does not have a panel on diversity.
24. BLP 2017 survey *Diversity in Arbitration: Are we getting there?* http://www.blplaw.com/expert-legal-insights/articles/diversity-on-arbitral-tribunals-are-we-getting-there.

danger with homogenous groups: they are more likely to form judgments that, in the words of the study 'combine excessive confidence with grave error.'[25] A real understanding of the benefits of true cognitive diversity on decision making will be critical in ensuring that the continuing efforts to broaden the field of international arbitration practitioners are successful.

Before looking at the initiatives and the progress made in this area, I want to pause to consider briefly the barriers to appointing diverse candidates as international arbitrators. In relation to the appointment of women, the answer is far from straightforward. Factors impacting women include the effect of pipeline leak, implicit bias and lack of visibility. Efforts are being made to address all three factors but with varying degrees of success. However, to the list I also add as an impediment to women being appointed as arbitrators the way that society sees men (and, arguably, white men) as the human default. This is pervasive across society as a whole, but I would argue that the assumption that an arbitrator *is* 'male-unless-otherwise-indicated' is one that seems endemic; and it is an assumption that is made by both men and women arbitration practitioners. In conversations or presentations, we refer to an arbitrator as 'he' or the chair as the 'chairman'. On numerous occasions speakers at conferences, both on the podium and from the floor, unconsciously use 'he' when referring to an arbitrator. That observation applies to men and women equally. The Arbitration Act 1996 uses 'he' exclusively to refer to arbitrators and 'judge-arbitrators', only containing references to 'her' when followed by 'Majesty' (referring to the Royal Assent for the bill). In writing, using 'he' as the generic masculine will not be read that way, it is read overwhelmingly as male. According to Caroline Criado Perez, author of 'Invisible Women':

> when the generic masculine is used people are more likely to recall famous men than famous women; to estimate a profession as male-dominated, to suggest male candidates for jobs and political appointments. Women are also less likely to apply, and less likely to perform well in interviews, for jobs that are advertised using the generic masculine. In fact, the generic masculine is read so overwhelmingly as male that it even overrides otherwise powerful stereotypes, so that professions such as 'beautician', which are usually stereotyped female, are suddenly seen as male.

As we have a deeply male-dominated culture (and particularly in such a male-dominated profession as the law), the male experience is seen as universal and the female experience is seen as niche. Rather like we have the English football team and the English women's football team; we are risking creating arbitrators and female arbitrators. Although the engaged discussion

25. See Matthew Syed, 'Rebel Ideas: The Power of Diverse Thinking'.

that has taken place in the last decade on the lack of women in our field is to be welcomed, we must avoid underscoring the notion that a female arbitrator is somehow a different creature from the (default) male arbitrator. As we continue to demand equality in this field, we must be careful in how we position female arbitrators to avoid this pitfall.

Turning now to the significant progress that has been made in this area, the most well-known of the initiatives to increase the number of women appointed as arbitrators is the Equal Representation in Arbitration Pledge.[26] Signatories to the Pledge commit to increase, on an equal opportunity basis, the number of women appointed as arbitrators, with a view towards reaching the goal of full parity. In particular, signatories promise to take steps to ensure that, whenever possible, committees, governing bodies and conference panels in the field of arbitration include a fair representation of women; that lists of potential arbitrators or tribunal chairs include a fair representation of female candidates; and that entities in charge of arbitral institutions include a fair representation of female candidates on rosters and lists of potential arbitrator appointees and appoint a fair representation of women to tribunals. The Pledge was met with an enthusiastic response from the community and has over 5000 signatories to date.[27]

Largely due to the Pledge and other initiatives, such as the organization ArbitralWomen,[28] there has been progress in relation to the under-representation of women in the field. Although there has been slower progress in relation to arbitrators who possess more than one diverse attribute, progress has been made in relation to the proportion of women appointed to arbitrator tribunals as a whole. The 'Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings'[29] was released in 2020. This summarized the progress that had been made as follows: 'A study by Professor Susan D. Franck of investment treaty awards rendered before 2007 found that "[w]omen were a tiny fraction of arbitrators",' identifying 'five women (3.5%) in the population of 145 investment treaty arbitrators' and noting further that 'there were no tribunals with two or more women. Professor Franck's subsequent research of 252 awards dated to January 2012 found that only 3.6% of the 247 individual arbitrators were women, and that 81.7% of tribunals were all-male panels … more recent statistics suggest improvement, with women comprising 21.3% of the population of arbitrators appointed in 2019. The improvement in the statistics may evidence the positive impact of increased

26. www.arbitrationpledge.com. The author is a member of the Global Steering Committee of the Pledge.
27. www.arbitrationpledge.com.
28. www.arbitralwomen.org. The author was a director of ArbitralWomen from 2014–2018.
29. https://www.arbitration-icca.org/report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and-proceedings.

awareness about gender diversity in international arbitration, thanks in part to initiatives like the ERA Pledge and ArbitralWomen, as well as the efforts of arbitral institutions, advocates and parties to promote the fair representation of women as arbitrators.' More recent statistics show that around 28% of arbitrators appointed by institutions are female,[30] although only a relatively small proportion of arbitral appointments are made directly by the institution. For example, the report on ICC appointments in 2020 notes '[i]n principle, arbitrators acting in ICC cases are either (i) confirmed by the ICC Court Secretary General or by the ICC Court upon party nomination agreed by the parties, or (ii) appointed by the ICC Court in the absence of nomination. In the vast majority of cases during 2020, arbitrators were nominated by the parties or the co-arbitrators (75%)'.[31] Although this figure will change for different institutions, across the board the majority of appointments are made by parties or co-arbitrators. I should stress that there does appear to be continuing progress in this area. As noted, the Cross Institutional Task Force on Diversity established a 2019 figure of 21.3% representing the appointment of female arbitrators across the board. The ICC statistics for 2020 report 23.4% female arbitrators appointed in ICC cases[32] and the LCIA statistics for 2021 report 32% female arbitrators appointed in LCIA cases.[33]

There are, therefore, grounds for some optimism in relation to female arbitral appointments, yet it remains to be seen how we translate this success to a wider concept of diversity. For example, more recently, and somewhat belatedly, we are finally addressing the notion of 'intersectionality'. This refers to the overlapping effect of different aspects of diversity in a single individual.[34] Professors Joshua Karton and Ksenia Polonskaya[35] carried out some interesting research on this issue into the composition of ICSID arbitrator appointments between 2012 and 2017. From a total of 951 appointments made, Karton and Polonskaya noted, as have others previously, that the majority of all appointments of women to ICSID panels were of two women, Brigitte Stern or Gabrielle Kaufman-Kohler. Out of 951 appointments reviewed by Karton and

30. https://www.herbertsmithfreehills.com/insight/inside-arbitration-diversity-what-has-been-done-so-far-and-can-the-arbitration-community-do.
31. https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/.
32. https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/.
33. https://www.lcia.org/lcia/reports.aspx.
34. The term was apparently coined by Kimberlé Crenshaw, an American law professor, in a 1989 paper, see *True Diversity is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity* Joshua Karton, Ksenia Polonskaya http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/.
35. Joshua Karton, associate professor at the Queen's University Faculty of Law, Canada. Ksenia Polonskaya, postdoctoral fellow at the Centre for International Governance Innovation, Canada.

Polonskaya only 106 (11%) were of female arbitrators, and of those Stern obtained 53 appointments and Kaufman-Kohler 15. Only 38 appointments (4% of the total) went to other female arbitrators. In relation to intersectionality, out of the 951 appointments Karton and Polonskaya determined that only three appointed arbitrators were female, non-white, and from a developing state: Bertha Cooper-Rousseau (Bahamian), Tinuade Oyekunle (Nigerian), and Dorothy Udeme Ufot (Nigerian). All three were members of annulment committees and all three were appointed by ICSID. Karton and Polonskaya found no arbitrators appointed to ICSID panels, and no arbitrators appointed by parties or by other arbitrators who had these characteristics.[36]

We have also, finally, started to look beyond the under-representation of women and address other aspects of diversity. Established by a group of global lawyers practicing in international arbitration, the REAL organization – Racial Equality for Arbitration Lawyers – addresses the lack of racial parity in arbitral appointments. It also seeks to challenge the socioeconomic limitations faced by young and mid-level practitioners entering the field. REAL also cites as one of its strategic goals its intention to 'consider the special problem posed by intersectionality when it comes to diversity and inclusion'.[37] It is to be hoped that initiatives such as REAL will be able to build on the momentum achieved by the Pledge and drive real change in the international arbitration community in relation to diversity that goes beyond the 'mere' under-representation of women.

4. RISING TO THE CHALLENGE

As discussed, the arbitration community has been out of touch with climate change and its present and future impact on our practices and, more importantly, our role in contributing to it. While the arbitration community has fared better in relation to diversity, there is still much more we can do.

A greater appreciation of the scale of the climate change emergency has led to a welcome focus on accelerating action to combat it. The question for us all is how we achieve the collective behavioural change that is urgently required, and it is here that principles of behavioural economics may be applied to facilitate that change. Speaking at COP26, the UK's chief scientific adviser Sir Patrick Vallance said '[b]ehaviour change is part of this [i.e., the fight against climate change], and some of that is down to what we do as individuals and some of it is what needs to make things easier for us. We can't assume it's

36. *True Diversity is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity* Joshua Karton, Ksenia Polonskaya http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/.

37. https://letsgetrealarbitration.org/strategic-goals/.

going to be dramatic personal behaviour change that's going to be the solution to this unless we have some way of making that easier, so the green choice is actually the easy choice.'

Quite simply, we cannot advise clients appropriately and develop expertise in climate change related disputes until we have audited our own practices to reduce our carbon footprint and developed a nuanced understanding of the changes that are required.

The community has already been '*nudged*' in relation to diversity. Indeed, the success of the ERA Pledge was the inspiration for the Green Pledge, which I launched in 2019. The Green Pledge sets out the guiding principles of the Campaign for Greener Arbitration:[38]

> As an arbitration practitioner committed to ensuring that I minimise the environmental impact of my practice, I commit to:
>
> Creating a work space with a reduced environmental footprint by looking for opportunities to reduce energy consumption and waste;
>
> Corresponding electronically, unless hard copy correspondence is expressly needed in the circumstances, while also being mindful that email has a carbon footprint;
>
> Encouraging the use of videoconferencing facilities as an alternative to travel (including for the purposes of conducting fact finding or interviews with witnesses);
>
> Avoiding printing, requesting the use of electronic rather than hard copies of documents and promoting the use of electronic bundles at hearings;
>
> Using, where possible, suppliers and service providers who are committed to reducing their environmental footprint (including for the purposes of arranging an arbitration hearing);
>
> Considering and/or suggesting, where appropriate, that witnesses or experts give evidence through videoconferencing facilities, rather than attend hearings in person;
>
> Avoiding unnecessary travel and using videoconferencing facilities as an alternative;
>
> Considering and questioning the need to fly at all times and offsetting carbon emissions for any arbitration-related travel.

Reducing the carbon footprint of an arbitration will, of course, depend on numerous factors, cited by members of the Greener Arbitrations Steering Committee as:

> including the applicable law governing the proceedings; the size of the arbitration (including the number of parties; the location of the parties and the

38. www.greenerarbitrations.com. The author launched the Green Pledge and founded the Campaign for Greener Arbitrations in 2019.

> arbitrators; the anticipated volume of witness and expert evidence; the range of issues in dispute; and the complexity of the issues); the arbitrators' and parties' ability to communicate and prepare documents electronically (including the availability and reliability of such electronic resources); the burden and costs of implementing sustainable behaviours measures incurred by the parties, arbitrators and/or the administering institutions; the impact of any such measures on the efficiency of the arbitral process; the availability of cybersecurity measures to protect the integrity of arbitral proceedings; as well as many other important considerations such as the equality of arms of the parties, access to justice, and the impact of these measures on diversity.[39]

In a year in which the world has faced record temperatures and regions have been ravaged by wildfires and extreme weather events, it is surely unarguable that we need urgent and coordinated action by everyone involved in international arbitration. While there are obstacles to significant collective action to combat climate change, there are also ways to overcome these obstacles, and it is critical that the arbitration community works together towards a shared goal of minimizing our impact on the environment.

One such obstacle is the so-called 'present bias', namely that 'people are more concerned with now as opposed to later.'[40] For example, climate change is seen as a less pressing issue than the COVID-19 pandemic. Somewhat surprisingly for an industry which is not noted for its ability to make drastic changes, international arbitration adapted quickly and flexibly to the pandemic with hearings moving, fairly seamlessly, to a remote basis shortly after the first lockdowns were announced. Across the globe, the reduction in international and domestic travel, amongst other impacts of the pandemic, meant that in 2020 the Earth 'overshoot' day, which marks the date each year that the consumption of resources globally surpasses the amount of resources the Earth can produce annually took place a month later than in 2019.[41] An unintended 'benefit' of the pandemic may well be that it has forced the international arbitration community to change in a way that would have taken years otherwise and that the 'present bias' has, in fact, resulted in unanticipated change. The challenge we now face is to see whether we revert to fully in-person hearings or whether remote hearings are here to stay.

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39. Maguelonne de Brugiere and Cherine Foty (members of the Greener Arbitrations Steering Committee), *'Sustainability and Diversity in the Newly Virtual World of International Arbitration'*, published by www.arbitralwomen.org.
40. 'Nudge, The Final Edition,' page 282.
41. Overshoot Day occurred on 29 July 2019 and on 22 August 2020. In 2022 it occurred on 28 July. overshootday.org.

A further potential obstacle is 'salience', essentially the notion that if an individual does not personally witness the impacts of climate change, she is unlikely to be concerned by them. I would counter here that in the international arbitration community we are accustomed to interacting with individuals all over the world who are seeing the impacts of climate change in their daily lives. However, the issue of salience is, sadly, diminishing as we are all increasingly seeing the impacts of climate change. The recent heatwave in the UK is a striking example of climate change impacting those who may never have believed they might be affected by it. Houses in Essex were destroyed by wildfires and the UK experienced record high temperatures of over 40 degrees Celsius in July 2022.[42]

The final obstacle is that people do not receive positive feedback on the environmental consequences of their actions. To counter this, the community must applaud action in this area and celebrate achievements. Here we have begun to recognize efforts, with the Campaign for Greener Arbitrations winning the Global Arbitration Review Award for Best Development in 2020. The keynote at the 2022 London International Disputes Week focused on sustainability and other conferences have also spotlighted climate change. Increased environmental awareness generally is starting to be recognized and celebrated. In 2020 Global Arbitration Review began including a question on law firms' sustainability policies in their annual survey to determine the top 100 arbitration law firms. Law firms are beginning to identify sustainability champions and to publish sustainability targets.

All that said, we still need a significant nudge to achieve sustainable change. The first rule of a successful 'nudge' is, in line with Sir Patrick Vallance's view, to make it easy. According to the authors of Nudge: '[a]rchitectural solutions, making things easy or automatic, can have a much bigger impact than asking people to do the right thing.'[43]

4.1 First Nudge: Make it Easy

The Campaign for Greener Arbitrations has paved the way to make it easy to go green. The Green Protocols are a set of directives intended to guide the effort to reduce the environmental impact of international arbitrations. Such Protocols primarily focus on three critical areas in which changes in the behavioural practices of arbitration practitioners could have the largest impact in substantially reducing carbon emissions. Specifically, the community is encouraged to: (i) adopt clean forms of energy, (ii) reduce or eliminate long–haul travel and (iii) minimize waste, for example by eliminating

42. https://www.telegraph.co.uk/news/2022/07/19/london-fire-wennington-dartford-upminster-green-uk-heatwave-summer/.
43. 'Nudge, The Final Edition,' 305.

hard copy filings altogether. There is a detailed framework document which provides a roadmap to help navigate through the Protocols and outlines the sustainable measures that permeate throughout each Protocol. The Protocols focus on how practitioners can implement the key messages of the Campaign, in particular by considering energy providers, eliminating single use plastic, considering digital alternatives and drastically reducing travel.

There are six Green Protocols to choose from:

The Green Protocol for Arbitral Proceedings and the Model Green Procedural Order

The Arbitral Proceedings Green Protocol (and accompanying Model Procedural Order) offers guidance from inception through completion of an arbitration matter. It outlines a series of measures suggested to conduct proceedings in a more environmentally sensitive manner. As with all Protocols, the suggested measures are intended to be adopted individually or in their entirety, as appropriate. To the extent possible, stakeholders are encouraged to subscribe to as many of the measures as practical. Examples of measures contained in the Arbitral Proceedings Protocol include conducting remote proceedings, refraining from printing materials and avoiding unnecessary travel.

The Green Protocol for Law Firms, Chambers and Legal Service Providers Working in Arbitration

This Protocol shifts focus to the day-to-day operations of organisations. To encourage compliance amongst colleagues, firms are urged to appoint 'Green Ambassadors', to develop policies and best practices within their organisations to subscribe to more environmentally friendly procedures.

The Green Protocol for Arbitrators

This Protocol is a guide for Arbitrators; the key components of energy, travel and waste considerations are noted as they pertain to the working environment and practices of arbitrators. Arbitrators may also consider the Model Green Procedural Order mentioned above which provides draft language which can be easily adopted by Tribunals to implement sustainability measures in the conduct of an arbitration.

The Green Protocol for Arbitral Institutions

With direct input from institutional representatives, this Protocol was developed to provide guidance for both the internal operations of institutions

and in their management of arbitrations, in particular in terms of minimizing printing, promoting efficiency and reducing waste.

The Green Protocol for Arbitration Conferences

Stakeholders who plan and host arbitration events should consult the Arbitration Conferences Protocol which addresses event planning and venue selection. Organisers are encouraged to partner with 'green' organisations, those that practice sustainable behaviours in their operations and offerings. The Protocol encourages stakeholders to give consideration to hosting virtual events rather than in-person events, particularly for those who plan multiple conferences annually.

The Green Protocol for Arbitration Hearing Venues

Facilitators of hearing venue spaces are referred to the measures included in this Protocol. Among the actions suggested here, facilitators are encouraged to employ technology platforms to promote digital presentations and file sharing as a way to reduce reliance on paper during proceedings. Particular consideration should be given to powering venues through the use of cleaner forms of energy, wherever practical.

As mentioned, the Protocols encourage limiting the use of single use plastic. On this point, as part of the initial research into the environmental impact of an arbitration, the Campaign for Greener Arbitrations looked at the use of disposable coffee cups in one major arbitration. It found that around 3,000 cups were used, which equates to almost a ton of carbon equivalent emissions. Although it is a small thing, eliminating the use of disposable cups in arbitrations would have a significant impact (and would also signal strongly to the wider community that arbitration practitioners are taking steps to address the climate emergency).

4.2 Second Nudge: Make it the Default

The second rule of a successful 'nudge' is to make it the default position. For this I would urge that every part of an international arbitration practice must be viewed through an environmental lens. One of the main action points relates to travel. As a community, we love to travel. Prior to the pandemic we would travel for initial kick-off meetings, to finalise submissions, to meet and interview witnesses or experts, for procedural conferences, for hearings, for networking, for conferences, etc. Underlying much of this is the belief that in person meetings are superior to virtual meetings. This belief is something which we need to examine carefully and question.

Useful data is starting to emerge on this issue. In 2022 Herbert Smith Freehills LLP conducted a detailed research study into the carbon footprint of in-person hearings and virtual hearings.[44] The study found that an in-person hearing gave rise to 111 tonnes of carbon dioxide equivalent, which was 19 times that of the carbon footprint of an identical hearing taking place virtually (which was estimated to generate around 6 tonnes of carbon dioxide equivalent emissions). The study's authors concluded 'this Co2e difference is the equivalent of the average amount of Co2 generated by 15 people in the EU during an entire year'.[45]

The greatest green challenge that arbitration practitioners face as we emerge from the pandemic will be making travel the exception, rather than the norm, and persuading practitioners to continue to attend hearings remotely where possible. The reality is that it will never be possible to eliminate travel entirely, but there is certainly scope for all of us to reduce the amount of travel we undertake on our cases. Where travel is considered necessary, there are steps that can be taken to ensure that it is done in a more environmentally friendly way. For example, is a flight necessary, or can the trip reasonably be done by train? A train journey from London to Paris emits 90% less greenhouse gases than the equivalent short haul flight and produces less carbon per passenger than a single car journey from central London to Heathrow Airport.[46] Often we are not making those simple calculations and we should be. Making it a default position that we will not travel will mean that when we do travel, we do so on an informed basis.

5. MAKING IT LAST

The enduring question for behavioural change is always whether it will last. Nudges are all very well, but it is leadership that will drive sustainable change. As the saying goes, '[a] leader is one who knows the way, goes the way and shows the way.' International arbitration has been dominated for 30 years by a relatively small group of practitioners. This is changing as the industry expands and evolves, but there is still a critical role that established practitioners can play in modelling the behavioural changes that are needed.

Women have led the various initiatives that have set the tone for international arbitration over the past five years. They took the fact that women were a 'tiny fraction' of international arbitrators and made it uncomfortable for people to maintain the *status quo*. They moved the needle from around 6% to around

44. https://www.herbertsmithfreehills.com/insight/inside-arbitration-whether-virtual-or-physical-we-can-do-more-to-make-arbitration-hearings.
45. https://www.herbertsmithfreehills.com/insight/inside-arbitration-whether-virtual-or-physical-we-can-do-more-to-make-arbitration-hearings.
46. 'Faster than flying: the high-speed rail routes taking on the air' https://www.railway-technology.com/analysis/faster-flying-high-speed-rail-routes-taking-air-industry/.

28% of arbitral appointments going to women, and they achieved this in a relatively short space of time. We can take inspiration from the changes that we have achieved in relation to the under-representation of women, certainly in relation to white women, but now is the time to continue to push for more diversity, greater intersectionality and to encourage a more sophisticated approach to other issues, such as socio-economic diversity.

It is vital that we continue to promote and celebrate the changes in behaviour that have moved the needle so significantly in relation to the under-representation of women and to take what we have learned from the activism in that area and apply it to other diversity initiatives.

In relation to climate change, practitioners are finally beginning to understand the way they must go. Now they need to step up and be seen to take the first steps on the journey. Doing nothing is not an option. Changing how we view our practices and actively choosing to view every action we take through an environmental lens will not only fundamentally alter the way we run our practices, but it will signal to others that we are working to secure the future of international arbitration as we move into the post-pandemic world.

Your short guide to the EUP Journals Blog http://euppublishingblog.com/

A forum for discussions relating to Edinburgh University Press Journals

1. The primary goal of the EUP Journals Blog

To aid discovery of authors, articles, research, multimedia and reviews published in Journals, and as a consequence contribute to increasing traffic, usage and citations of journal content.

2. Audience

Blog posts are written for an educated, popular and academic audience within EUP Journals' publishing fields.

3. Content criteria - your ideas for posts

We prioritize posts that will feature highly in search rankings, that are shareable and that will drive readers to your article on the EUP site.

4. Word count, style, and formatting

- Flexible length, however typical posts range 70-600 words.
- Related images and media files are encouraged.
- No heavy restrictions to the style or format of the post, but it should best reflect the content and topic discussed.

5. Linking policy

- Links to external blogs and websites that are related to the author, subject matter and to EUP publishing fields are encouraged, e.g.to related blog posts

6. Submit your post

Submit to ruth.allison@eup.ed.ac.uk

If you'd like to be a regular contributor, then we can set you up as an author so you can create, edit, publish, and delete your *own* posts, as well as upload files and images.

7. Republishing/repurposing

Posts may be re-used and re-purposed on other websites and blogs, but a minimum 2 week waiting period is suggested, and an acknowledgement and link to the original post on the EUP blog is requested.

8. Items to accompany post

- A short biography (ideally 25 words or less, but up to 40 words)
- A photo/headshot image of the author(s) if possible.
- Any relevant, thematic images or accompanying media (podcasts, video, graphics and photographs), provided copyright and permission to republish has been obtained.
- Files should be high resolution and a maximum of 1GB
- Permitted file types: *jpg, jpeg, png, gif, pdf, doc, ppt, odt, pptx, docx, pps, ppsx, xls, xlsx, key, mp3, m4a, wav, ogg, zip, ogv, mp4, m4v, mov, wmv, avi, mpg, 3gp, 3g2*.