

Arbitrating Business and Human Rights Disputes: Public Consultation on the Draft Hague Rules on Business and Human Rights Arbitration

Kluwer Arbitration Blog

June 27, 2019

Martin Doe (Permanent Court of Arbitration), Steven Ratner (University of Michigan Law School), and Katerina Yiannibas (Columbia Law School and University of Deusto)

Please refer to this post as: Martin Doe, Steven Ratner, and Katerina Yiannibas, 'Arbitrating Business and Human Rights Disputes: Public Consultation on the Draft Hague Rules on Business and Human Rights Arbitration', Kluwer Arbitration Blog, June 27 2019, <http://arbitrationblog.kluwerarbitration.com/2019/06/27/arbitrating-business-and-human-rights-disputes-public-consultation-on-the-draft-hague-rules-on-business-and-human-rights-arbitration/>

Since 2013, an independent group of international lawyers (the Working Group of the Business and Human Rights Arbitration project) has been considering the possibility of using international arbitration as a method of resolving disputes over obligations and commitments arising out of business-related human rights abuses. The idea underlying the project is that international arbitration could overcome some of the legal and practical barriers faced when bringing human rights claims through the existing mechanisms of redress, particularly national courts. It could provide a meaningful non-judicial remedy for victims of business-related human rights impacts, as called for in Pillar III of the UN Guiding Principles on Business and Human Rights, as well as a strategy for business to manage human rights risks within its supply chain, as called for in Pillar II of the Guiding Principles.

In particular, arbitration in this context would offer: (i) a neutral forum for dispute resolution, independent of both the parties and their home states; (ii) a specialized dispute resolution process in which the parties are able to participate in the selection of competent and expert adjudicators for their dispute; (iii) the possibility to obtain binding awards subjected only to limited judicial review, and enforceable across borders; (iv) means of dispute resolution potentially cheaper and quicker than litigation, which are also able to (v) accord parties broad autonomy to agree upon the substantive laws and procedures applicable to their arbitrations. Arbitrations could involve victim claims against businesses or claims between different businesses within a supply chain, with consent provided ex ante in contracts or other agreements or ex post through a *compromis*.

After extensive consultation with both business and civil society stakeholders, the Working Group formed a Draft Team to elaborate a set of arbitral rules, the Hague Rules on Business and Human Rights Arbitration. The Drafting Team, led by Judge Bruno Simma, consists of 14 experts with diverse professional backgrounds (business, civil society, academic, arbitral institutions, practicing attorneys), and expertise in human rights, arbitration, litigation, operation of supply chains, and other topics relevant to the elaboration of draft rules. The work of the Drafting Team and related activities of the project are funded by the City of The Hague, and endorsed by the Foreign Ministry of the Netherlands.

Transparency and public participation in the drafting of The Hague Rules

The Drafting Team began its work in January 2018, with a meeting at the Center for International Legal Cooperation (CILC) in The Hague. From the outset, the Drafting Team valued the importance of transparency and multi-stakeholder inclusion and discussed how best to involve the various stakeholders so as to promote an informed, inclusive, and balanced process. A Sounding Board was created, consisting of experts to provide input and feedback.

After its second meeting in 2018, the Drafting Team produced an [Elements Paper](#) to educate, inform, and garner input from the potential stakeholders of BHR arbitration. Readers unfamiliar with the project are encouraged to read the Elements Paper. The Elements Paper posed over 70 questions, and over a consultation period running from November 2018 through January 2019, garnered over 120 responses from the members of the Sounding Board as well as additional organizations representing different communities of practice. The summary of those responses is available [here](#). All contributions were reviewed and reflected in preparatory papers by the Drafting Team members for discussion at its third meeting in April 2019 and greatly informed the preparation of the first draft text of The Hague Rules.

Invitation for public consultation on the first draft text of The Hague Rules

The first draft text of The Hague Rules is now available for public consultation between 21 June-25 August 2019. The Rules are based on the 2013 UNCITRAL Arbitration Rules and adapted to the unique features of business human rights disputes. Some key modifications from the UNCITRAL Rules include:

- provisions on facilitating settlement and mediation, and emphasizing the complementarity of arbitration to such procedures as the OECD National Contact Points system (Articles 1(6), 17(3), 42, and 51);
- provisions to address the inequality of arms which may arise in such disputes (*inter alia*, Articles 5(2), 20(4), 24, 27(2), and 27(4));
- the establishment of the PCA as the default appointing authority, given its intergovernmental nature and experience in business and human rights disputes (Article 6);
- procedures for multiparty claims and joinder by third parties (Article 17-*bis*);
- a procedure for the early dismissal of claims manifestly without merit, developed on the basis of similar procedures in the ICSID, SIAC, SCC, and HKIAC Rules (as well as the proposed new ICSID Rules) (Article 23-*bis*);
- provisions making the arbitral tribunal's power over interim measures more robust, and at the same time more flexible (Article 26);
- an emergency arbitrator mechanism elaborated on the basis of the ICC and SCC Rules (Article 26-*bis*);
- specialized evidentiary procedures drawn up on the basis, *inter alia*, of the IBA Rules and Rules of the International Criminal Court, among others (Articles 27, 28, and 30(3));
- measures to protect the identity of parties, counsel, and witnesses where such protections are warranted by the circumstances of the case, while ensuring due process is maintained for all parties (Articles 17(5), 28(3), and 37(5));
- provisions on transparency and third-party participation (Articles 24-*bis* and 33-38);
- tailored provisions on remedies in the business and human rights context (Article 40);
- rules on applicable law that enhance flexibility and party autonomy (Article 41);
- rules to protect the public interest in the case of confidential settlements (Article 42(1));
- nuanced rules in respect of costs and deposits that encourage the tribunal to sensitive to the

- interests of access to justice (Articles 46-49);
- an expedited arbitration procedure for small claims (Article 52); and
- a Code of Conduct that reflects the highest standards for independence and impartiality in international dispute resolution (Annex).

In light of the expertise of the readers of the Kluwer Arbitration blog, the Drafting Team welcomes comments from all readers. In order to guide you through the reasoning underlying the formulation of certain articles of the Hague Rules, draft commentaries are provided for each article to highlight whether the Hague Rules amend the original text of the UNCITRAL Rules and, if so, why and to what extent, including the intent of various clauses. The commentary also formulates certain specific questions on certain points where input is particularly important.

To access the draft Hague Rules on Business and Human Rights and submit comments, click [here](#). Comments should be sent directly to secretariat.simma@cilc.nl by 25 August 2019.