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A Further Step Towards Business and Human Rights Arbitration – The Hague Rules

Maria Laura Izzo (Pinsent Masons) · Friday, September 13th, 2019 · Young ICCA

Recently, focus has been brought upon the use of international arbitration to solve human rights abuses caused by businesses ("**BHR Arbitration**"). Disputes involving human rights violations often occur between parties of unequal financial means and commercial sophistication, and in countries which cannot offer an efficient and free from corruption judicial system. Arbitration has the potential to represent a valid remedy when judicial proceedings are not available or efficient, offering a neutral forum free from political pressures, impartial judges with expertise in human rights selected by the parties, procedural flexibility, greater efficiency and near-universal recognition as a result of the New York Convention.

A couple of years ago, a group of international practitioners (the **"Working Group**"), started to explore the possibility to use international arbitration in human rights-related disputes through the creation of a new set of Arbitration Rules (the "**Hague Rules**"), adaptable to the peculiarities of disputes concerning human rights violation perpetuated by businesses.

The proposal for the "International Arbitration of Business and Human Rights Disputes" was published on 13 February 2017 and formally presented on 23 March 2017 at an event hosted by the Arbitration Institute of the Stockholm Chamber of Commerce.

The project, sponsored by the City of the Hague and managed by CILC – Centre for International Legal Cooperation, saw the participation of international lawyers and professors as members of the Working Group and the Drafting Team and of stakeholders such as NGOs, businesses, law firms and civil societies organisations dealing with human rights violations, as members of the Sounding Board; the latter with the aim to give a practical input to draft the Rules.

In June 2019, the Working Group published the first draft of the Hague Rules, available for public consultation until 4 September 2019. The final version of the Rules is scheduled to be launched in The Hague in December 2019.

The Rules

The Hague Rules on Business and Human Rights Arbitration are based on the UNCITRAL Rules from 2013.

The UNCITRAL Rules have been modified when necessary in order to reflect (i) the particular characteristics of disputes related to human rights impacts of business activities; (ii) the need for special measures to address the circumstances of those affected by human rights' violations (iii); the potential imbalance of power that may arise; (iv) the public interest in the resolution of such disputes, which requires among other things a high degree of transparency of the proceedings and an opportunity for participation by interested third persons and states; (v) the importance of having arbitrators with appropriate expertise; (vi) the possible need for special mechanisms for gathering evidence and protection of witnesses.

The rules were open for a public consultation until September 4th to give to the interested stakeholders the possibility to submit further comments on the draft before the publication of the final version. For this purpose, each article of the Rules has a commentary highlighting whether the Rules amend the original text of the UNCITRAL Rules and, if so, to what extent. Furthermore, the commentary formulates specific questions for the readers invited to take the commentary into account when providing comments.

The Rules also include a Code of Conduct, which is still at an early drafting stage.

Why Arbitration?

When bringing a human rights claim through the existing mechanisms of redress, individuals face legal and practical barriers. Often public courts are not able to address those issues efficiently due to reasons that include capacity in the national courts of the state where the underlying conduct took place, jurisdictional or substantive law restrictions in the courts a parent company's national state, costs of litigation, corruption and lack of impartiality.

Arbitration can represent an efficient mechanism to tackle human rights violations, not just for directly affected individuals but also for corporations and states.

As for corporations, the introduction of a reliable and independent mechanism would benefit them in meeting their responsibilities under the Guiding Principles on Business and Human Rights ("**UNGPs**") to (i) respect human rights (Pillar II), which requires them to conduct due diligence on their potential human rights impact and to prevent, mitigate and remediate any impacts that are identified, whether as a result of their own activities or those of their business partners, to provide a remedy to victims (Pillar III), and provide expert mediation/conciliation and arbitration. BHR Arbitration has the potential to facilitate responsible conflict management by corporations and to assist them in managing their supply chain by avoiding human rights abuses.

As for the states, the encouragement, facilitation and prescription to use arbitration

would constitute a tool to fulfil their responsibilities under UNGPs Pillars One and Three.

The Preamble of the Hague Rules itself defines the following as the key purposes of BHR Arbitration:

- Providing a remedy for those affected by the human rights impacts of business activities in situation where traditional remedies do not work properly.
- Assisting businesses in meeting their responsibilities under the UN Arbitration.

Challenges

The use of arbitration in business and human rights disputes is not free from challenges. Two of the main issues are (i) the risk of non-enforceability of a BHR Arbitration award and (ii) the clash between the need for transparency, essential in disputes involving human rights' violations, and confidentiality, one of the main features of arbitration. The Rules, however offer a solution for these and other relevant issues (*e.g.*, evidence gathering, protection of witnesses, agreement to arbitrate, and choice of law).

The enforceability issue arises from the perception of human rights' violation in the society. Adjudicating the breach of an individual's human rights has traditionally been perceived as a matter for a state's national court as it has no commercial nature. Therefore, there is the risk that enforcement may be challenged on the grounds that the adjudication of human rights issues by a private tribunal is either not capable of being settled by arbitration under national law because not commercial or is contrary to the public policy of that State (Art. 5(2) of the New York Convention).

To overcome this risk, the draft of the Rules state at Article 1 that:

"*The parties agree that any dispute that is submitted to arbitration under these Rules shall be considered to have arisen out of a commercial relationship or transaction for the purposes of Article I of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter called the "New York Convention*")".

This provision, establishing a connection between human rights' abuses and the commercial relationships or transactions behind them, efficiently precludes a party from making an objection to the enforcement of an award rendered under these Rules on the basis of a "commercial" reservation made by the relevant State to the New York Convention.

Regarding transparency, many argue that the public interest in the resolution of human rights disputes requires a high degree of transparency which cannot be guaranteed by arbitration, traditionally characterized by confidentiality. Other argue that transparency can be better guaranteed in arbitration than in public courts because it guarantees greater neutrality and impartiality in politically and emotionally charged disputes.

Article 33 of the Rules efficiently responds to the need to promote transparency in the conduct of the proceedings, taking into account the public interest in the matters, parties' interest in a fair and efficient resolution of their disputes and security, privacy and confidentiality concerns of the parties, and all the other involved.

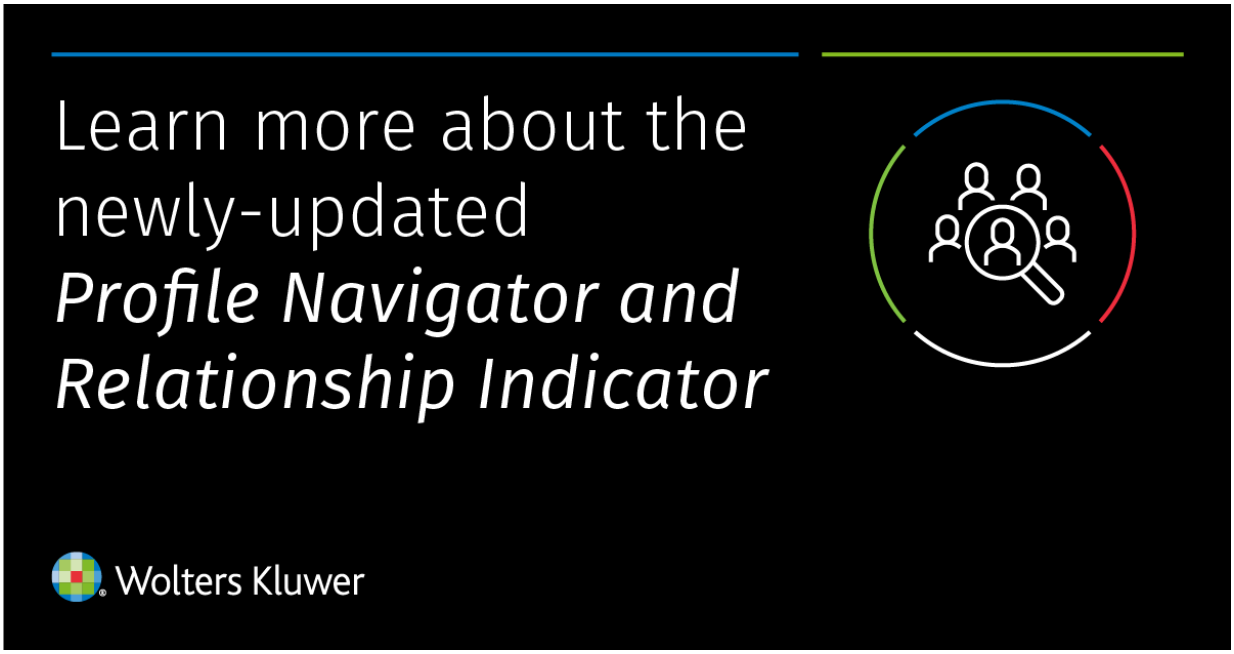
To guarantee a high degree of transparency and to promote awareness and legal certainty, Article 35 establishes that the main documents of the arbitration proceeding, such as the notice of arbitration, response, statement of claim and of defence, lists of the exhibits, witnesses and any other document provided or issued by the arbitral tribunal need to be made public.

Furthermore, Article 36 states that the hearings for the presentation of evidence and for oral arguments are public with a duty for the arbitral tribunal to make the appropriate arrangements to hold in private parts of the hearing which require protection of confidential and restricted information or the integrity of the arbitral process. Other exceptions to transparency are formulated in Article 37, which establishes cases where confidential or protected information cannot be made available to the public.

Conclusions

The Hague Rules represent a first important step towards BHR Arbitration and the project has the merit to have encouraged a dialogue between stakeholders and create awareness on human rights' violations perpetuated by businesses and in identifying alternative venues to solve these disputes.

However, the Rules can only address procedural matters and leave out important issues of substance related to BHR arbitration which will be tackled outside of the Rules, (*e.g.* through the drafting of model arbitration clauses, model substantive clauses for contracts).



This entry was posted on Friday, September 13th, 2019 at 10:00 am and is filed under Arbitration, Enforceability, Human Rights, International arbitration, The Hague Rules, Transparency
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