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Roll Out the Red Carpet: The Hague Rules on Business and Human Rights Arbitration are Finally Here!

Ylli Dautaj (Durham Law School) · Thursday, December 26th, 2019

Introducing the Rules

Playing its part in the twenty-first century movement to protect human rights, the international legal community has taken a significant step forward by providing for a framework to resolve business and human rights disputes by arbitration. Lead by the former ICJ justice, Judge Bruno Simma, The Hague Rules on Business and Human Rights Arbitration ("the Rules") were launched by "the Drafting Team" on 12 December 2019.

The Rules have been in the making for over five years. The Drafting Team was finally established to prepare the Rules in 2017, which was followed by the "Report on the first Drafting Team meeting", the "Elements Paper on Business and Human rights Arbitration", the "Summary Paper on Sounding Board Consultation Round", and the "Draft version of The Hague Rules on Business Human Rights Arbitration". Following the draft version, a public consultation was open until 4 September 2019.

"Who" … worked on the Rules

These rules where prepared by a team of experts (practicing lawyers and academics) in international investment, arbitration, human rights, and equivalent. The project commenced with a "Working Group" which consisted of six members (Claes Cronstedt; Martijn Scheltema; Jan Eijsbouts; Robert Thompson; Steven Ratner; and Katerina Yiannibas) and was then materialized and finalized by the Drafting Team, consisting of 14 members (Chair, Bruno Simma and Members Anne Van Aaken; Diane Desierto; Marin Doe Rodriguiz; Jan Eijsbouts; Abiola Makinwa; Ursula Kriebaum; Pablo Lumerman; Sergio Puig; Steven Ratner; Katerina Yiannibas; Giorgia Sangiuolo; Martijn Scheltema; and Richard Meeran). The project was funded by the City of The Hague and supported by the Ministry of Foreign Affairs of the Netherlands.

"Why" … working on the Rules

Members of the Working Group opined that, apart from the traditional benefits of arbitration, "international arbitration has the potential to handle human rights abuses in many regions where

courts and other mechanisms have failed". More specifically, the project description states that:

> "International arbitration holds great promise as a method to be used to resolve human rights disputes involving business. These disputes often occur in regions where national courts are dysfunctional, corrupt, politically influenced and/or simply unqualified. Parties to such disputes, generally multinational business enterprises (MNEs) and the victims of human rights abuse linked to MNEs, are in need of a private system that can function in these regions. Arbitration also has certain unique attributes that could serve the parties well even where fair and competent courts are available. In addition, arbitration can serve a useful tool to assist MNEs to prevent abuse from occurring in their supply chains and development projects."

"What" … about the rules

The Rules are based on the UNCITRAL Arbitration Rules. The Rules are also accompanied by elaborate commentary. This further manifests the standing that The Rules may come to have. Corollary, this means that the Rules – in contrast to investment treaty arbitration – are not:

> "[L]imited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the Hague Rules. Parties could thus include business entities, individuals, labor unions and organizations, States, State entities, international organizations and civil society organizations, as well as any other parties of any kind."[1)]

In a post from 2017, members of the Working Group highlighted three "special requirements that the drafting team will need to examine", namely, (a) expertise of the arbitrators; (b) transparency; and (c) witness protection. I consider these requirements to be "threshold issues" and will therefore address each in turn below.

Expertise: The preamble stresses the "importance of having arbitrators with expertise appropriate for such disputes". This objective is detailed in Article 11(c) (on appointment of arbitrators), which emphasizes the requirement of expertise in "business and human rights law and practice" if need be. The commentary to the Article makes it emphatically clear that the Rules have been developed to address the expertise requirement in the selection process. While preserving party autonomy, "the presiding arbitrator is *required* to have demonstrated expertise in international dispute resolution and in areas relevant to the dispute (*e.g.*, business and human rights law and practice […])."

Transparency: In the preamble it is made abundantly clear that the UNCITRAL Arbitration Rules are changed partly to reflect "a high degree of transparency of the proceedings and an opportunity for participation by interested third persons and States." Section IV is attributed to transparency. However, references to transparency are also made throughout the commentary. Section IV covers areas such as its application *per se*, publication of information and documents, and public hearings.

The key take-away is that the articles on transparency mimic those in the UNCITRAL Transparency Rules.

Witness Protection: This part should have benefited from additional discussion. Probably because this is inherently within the sovereign prerogative and any comment would remain tentative and speculative at best. That said, an arbitral tribunal *may*, however, render an interim *order* (?) to enjoin witness intimidation. The debate on arbitral tribunals enjoining/suspending criminal investigations/procedures may shed some light on this debate. Article 30 of the Rules seem to strengthen the role of the arbitrator in this respect. Accordingly, the tribunal may "take any interim measures it deems necessary, including any measure to prevent serious harm to the enjoyment of human rights falling within the subject-matter of the dispute." This could be interpreted broadly and as all-encompassing to include also ancillary issues of protecting a fair hearing and the procedural integrity. Compare this to the language and practice in the ICSID context (*see* here). The commentary also makes it clear that the selection of location for hearings and other meetings should consider safety of witnesses. Finally, and most importantly perhaps, the commentary to Article 33(3) states that the tribunal may adopt specific measures for witness protection, which includes non-disclosure of names, giving testimony in image- or voice altering devises, assignment of pseudonym, closed hearings, complete anonymity, etc. A cautionary note merits some attention: this protection may prove to be a major obstacle to the increased transparency. This type of protection for witnesses will be highly sought-after – it will definitely be used and misused to avoid public scrutiny.[2)]

"Reality" … of the Rules and challenges ahead

Only time will tell how well the Rules will be received by arbitral institutions and by practitioners equally. Will the Rules be an opt-in or an opt-out addition? Either way, the crux of the matter will be to inform the users of its benefits, both in theory and in practice. The Rules are flexible, though, and provide parties with both "discretion to modify or opt-out of certain provisions that do not respond to their needs in the dispute at hand" and sample model clauses, which are annexed to the Rules.[3)]

Additionally, litigation costs remain an outstanding and significant issue. In practice, access to procedural justice may be trite without sufficient resources at the disposal of the aggrieved party. There need to be a sophisticated "legal aid" system planned and carefully executed. Otherwise, the Rules may prove to lack teeth where really needed. Conversely, the author fears that adversaries to arbitration, in general, and to investor state dispute settlement (ISDS), in particular, will selectively fund instances of human rights abuse to level an organized, streamlined, and systematic attack on the procedure. Therefore, it is crucial that there is sufficient expertise, transparency, and witness protection.

On the other hand, an over-emphasis on features traditionally inherent in court litigation – and with the help of strategically skilled and tactically sound litigation lawyers – may slowly turn arbitration into a too judicialized procedure. Some of the hallmarks of arbitration would go lost (*e.g.* flexibility and party autonomy) and therefore naturally lend itself to a re-emerging debate on transforming ISDS into an investment court system (ICS). This time, the proponents of the ICS would cloak the debate in actually demonstrated human rights breaches as opposed to a deficit of

public interest considerations. Therefore, instead of improving international arbitration, it may expose one of its fundamental flaws, but most likely in an exaggerated, unproportioned, and hyperventilated manner. One should be careful in embracing radical change; a good idea can easily trigger the dismantling of a functional one.

"Ethos"… of the Rules

The Rules are guided by a move away from international arbitration being state-centric or investor-oriented and instead towards the reception of a more human-rights oriented approach. There is an emphasis on public interest considerations and access to justice. In a word, the Rules seek to contribute in "filling the judicial remedy gap in the UN Guiding Principles on Business and Human Rights".

Additionally and incidentally, the Rules may help address the "investor obligation deficit" in current international investment agreements (IIAs). And if not used as an addition to ISDS procedures *per se*, the ethos of the Rules may indirectly pave the way towards a "new generation of IIAs" by having elaborated on the standing of human rights considerations in this context, and corollary steered the practice of negotiating IIAs to include such obligations in the future.

Concluding Remark

One should not easily reject viable and feasible solutions to the public interest equation, which is in fact intrinsic for the algorithm of a truly transnational arbitral framework. But one should, on this logic, not too readily embrace a good idea as a substitute for a functional or workable one.

References

?1 The Rules, Introductory Notes, p. 3.

?2 *See e.g. Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania, ICSID Case No. ARB/15/31* (underscoring *inter alia* the hurdles of balancing transparency and maintaining certain information confidential.).

?3 Supra note 1.

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