

Kluwer Arbitration Blog

The Hague Rules on Business and Human Rights Arbitration: Noteworthy or Not Worthy for Victims of Human Rights Violations?

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In a [recent post](#), we were told to ‘Roll Out the Red Carpet’ for the Hague Rules on Business and Human Rights Arbitration (the “Rules”). Indeed, the Rules are a new development within the field to assist with disputes relating to human rights and their violations. Following a process of [draft reports](#) and [public consultations](#), the final version of [the Rules](#) was launched in December 2019. The Business and Human Rights Arbitration Working Group (the “Working Group”) that developed the Rules was clear regarding the benefits that arbitration had to offer to cases involving human rights violations, particularly in jurisdictions where corruption is rife, national courts are flawed, and arbitration would help victims of abuse connected to business activities. The Working Group also identified that new rules needed to be formulated given that the current system of international arbitration was not adequate in accommodating human rights issues through aspects such as the lack of transparency and the lack of human rights arbitrator expertise.

The Rules provide a set of procedures for the arbitration of disputes connected to the impact of business on human rights, and are based on the Arbitration Rules of the United Nations Commission on International Trade Law ([the “UNCITRAL Rules”](#)). Like the UNCITRAL Rules, the remit of the Rules can apply to any dispute that parties to an arbitration agreement have agreed to settle by arbitration via the Rules and therefore there is no restriction on the kind of claimant, respondent or subject matter. The Rules, whilst uniform, allow parties to modify or opt out of certain provisions that may not be relevant to the needs of parties in a dispute. The Rules place consent at their foundation and do not address the enforcement of arbitral awards.

The Rules should certainly be commended for their objective of addressing human rights violations. But undoubtedly, there will be experts working in the field inclined to feel a little skeptical about them. At the moment, it is unlikely that the Rules will in fact even begin to deal with primary obstacles to remedies for human rights violations. The undemocratic, underequipped and politically driven legal systems in some contexts that prevent access to remedy, for one, holds an enormous challenge. It is also difficult to see how the Rules will function alongside notions such as *forum non conveniens*, with certain types of business models, and similarly with contractual

principles such as statutes of limitation that often halt remedial processes. Given that the Rules are based on consent, it is equally difficult to answer the question of why companies will agree to arbitrate here and set aside the aforementioned notions, such as *forum non conveniens*. This is in light of the fact that we already see companies continuously arguing against jurisdiction or liability in host states and are not often very amenable to accommodating human rights issues beyond token gestures such as *ex gratia* payments. With a pinch of cynicism, I also foresee watered down arbitration agreements that cancel out possibilities for human rights remedies.

In addition, whilst international arbitration is often quite aptly focused on business to business disputes, in a landscape of human rights infringements, a business to business dispute resolution model becomes somewhat unsuitable and does not pay heed to the truth-seeking and reparative needs of victims. Whilst the Rules try to accommodate both business to business disputes and dispute resolution between companies and specific rights holders, the expectation as to the arena in which the Rules will mainly function seems to be on the former. This undermines the entire purported ethos of the Rules, as well as the fact that the specific rights holder issues do not seem to be clearly thought out. Even if companies consent to arbitrate, there is a presupposition that they will ensure any human rights dispute be adjudicated in their favour. Potential victims that are not working on the same highly resourced and connected playing field may agree to terms and conditions that do not encourage equality. International arbitration can be highly effective for corporate actors on an equal footing trying to resolve commercial disputes, but it is an entirely different situation to transplant this sort of mechanism to human rights dispute resolution without wholeheartedly tackling the big, practical questions.

More importantly, as [Dautaj stated](#), litigation funding will be a significant issue to contend with. The Working Group noted that parties will need to be financially equipped to deal with issues of funding and costs, particularly since arbitration costs would in principle be paid by the losing party, unless otherwise agreed upon or otherwise apportioned by the tribunal, as per Article 53 of the Rules. Article 53 is a prime example of how the Rules completely misunderstand the complex nature of business and human rights disputes and the provisions require significant revisions. Cost barriers will prevent victims from bringing claims and the Rules' approach to fee paying arrangements does not take into account the experience and capacities of human rights claimants. The Rules in fact amplify problems faced by human rights holders. Article 53 could deter genuine claimants, given that often they are unable to afford expensive legal counsel, as multinationals can. There is also no clarity on how Article 53 discretion will be applied by tribunals or any means in which this discretion can be contested by parties if needed.

Furthermore, there are no anti-retaliation protections contained in the Rules. Article 26 of the Rules on preliminary dismissal of claims that do not have legal or factual merit weigh in favour of companies. There is a need to incorporate clearer burdens of proof and delineated standards for the motions outlined in Article 26. Indeed, it is important to ensure that the Rules do not open the floodgates for spurious claims, but as it stands, the complete ambiguity of the Rules on this means that there could be a detrimental impact on genuine claimants as well. A mere acknowledgement that indeed there could be a disadvantaged party and that tribunals can take that into

account during the evidentiary procedure is not sufficient and could potentially confuse the position of the human rights holder. Counterclaims can also be utilised spuriously to threaten human rights holders in bringing a claim, which has largely been unaddressed in the Rules. The lack of a basis in the Rules to prevent retaliation from companies could be detrimental to a human rights claim.

In [their briefing note](#), the Columbia Centre for Sustainable Investment (CCSI) noted that the Rules - in draft form at the time - inadequately considered:

ways in which companies have used legal tools to fight claims and thus impede access to remedy [and] has failed to adequately consider how the Rules might be used to further facilitate companies' efforts to undermine access to justice (...). Arbitration is a system of high-party autonomy and delegated state power which can create risks for weaker parties, such as rights-holder claimants, yet the Rules pay inadequate attention to mechanisms for avoiding or correcting the abuses that can arise when entities are on vastly unequal footing. The limited and general guidance the Rules give tribunals to address inequalities of arms provides little assurance that tribunals will be willing and able to remedy either systemic or case-specific inequalities.

Certainly, there is always the opinion that something is better than nothing. However, I argue that in order to fulfil the objective that the Working Group initially set out to achieve requires much more than what was eventually delivered in the final Rules. The Rules leave gaps and loopholes, which need to be urgently addressed if they are to be taken seriously as a viable option for human rights holders, regardless of the flexibility - like modification or opt out - that they provide to facilitate adoption. The Rules are unfortunately a missed opportunity, despite having a stellar group of individuals forming the composition of the Working Group. Given the short time taken to draft and finalise the Rules, it is questionable how much meaningful engagement with human rights holders and business and human rights experts was actually integrated into the process. In this sense, if we are to answer the question of this post's title of Noteworthy or Not-worthy: as always it depends on the perspective one takes, but as far as human rights victims are concerned, most definitely the latter.

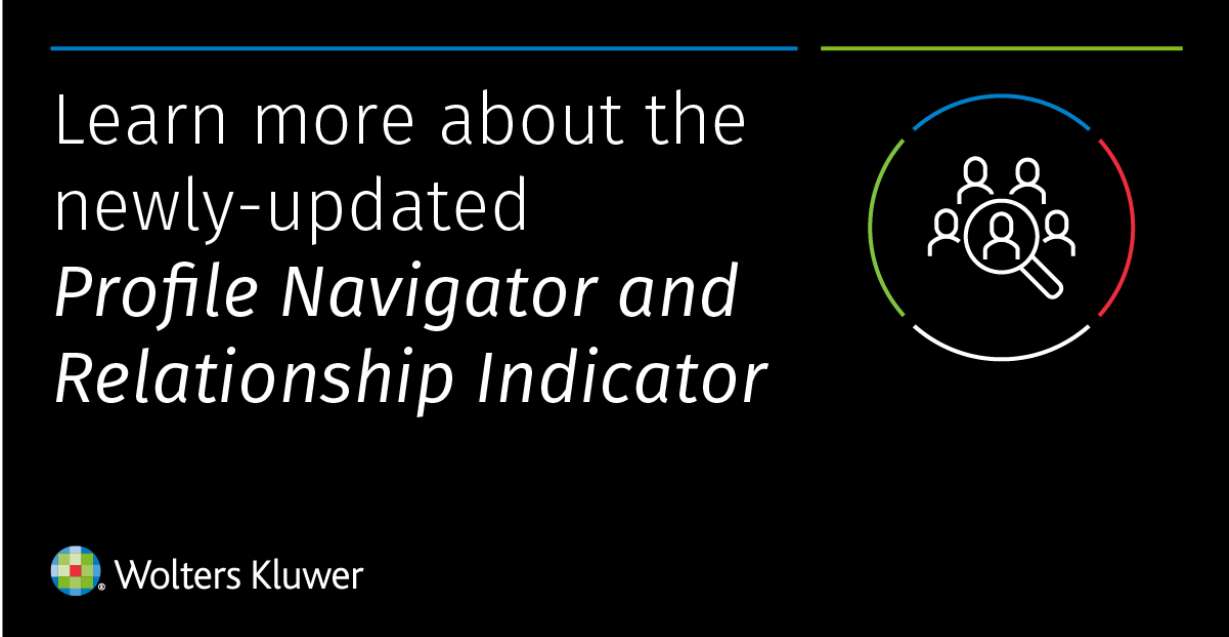
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