Kluwer Arbitration Blog

Energy Disputes in a Disruptive World – A Take on Business and Human Rights Arbitration

Julianne Hughes-Jennett (Hogan Lovells) · Sunday, July 14th, 2019

During the London International Dispute Week in May this year (which was covered at the Kluwer Arbitration Blog in depth, see here), a panel on "energy disputes in a disruptive world" focused on the increasing prevalence of claims against energy companies in relation to climate change or for involvement in human rights impacts. I had an opportunity to speak, in particular, on a new initiative to use arbitration to resolve business and human rights disputes: the Elements Paper on the "Hague Rules on Business and Human Rights (**BHR)** Arbitration" (**Rules**) (for additional information on the Rules see also here, in a separate post published recently at the Kluwer Arbitration Blog).

The Rules were initiated by the Business and Human Rights Arbitration Working Group, a private group of international practicing lawyers and academics. They aim to create an international private judicial dispute resolution avenue available to parties involved in business and human rights issues as claimants and defendants, thereby contributing to filling the judicial remedy gap in the UN Guiding Principles on Business and Human Rights.

"Human rights disputes" in this context means:

1. The Victim-Business scenario – the typical scenario in which "victims" bring claims against a company alleging that their human rights have been impacted by the activities of that company. For example, the recent litigation against Vedanta Resource Plc in the United Kingdom (*see* our blog post here); and
2. The Business-Business scenario – with the growth of obligations to monitor and conduct due diligence down a business' supply chain, we can expect to see a rise in disputes between businesses – *e.g.*, where a manufacturer imposes obligations on a contractor or supplier to comply with certain human rights standards in the performance of its obligations and that contractor or supplier breaches those obligations.

Currently, these disputes are resolved by various legal/judicial and non-legal/judicial mechanisms. These can include, in extreme cases where a criminal offence has been committed (*e.g.*, someone has been killed on the instructions or with the knowledge of a company's executives), criminal proceedings before national courts. However, most commonly, we see claims against companies framed by reference to tort law, as in the recent case before the UK Supreme Court *Vedanta PLC and Anor* v *Lungowe and Ors. v* [2019] UKSC 20, in which over 1,800 members of communities affected by pollution from mining operations in Zambia are seeking damages from a UK registered

parent company, Vedanta Plc and its Zambian subsidiary on the basis that the UK Plc owes a duty of care in tort to the claimants because of the extent of its intervention in the management of the Zambian subsidiary. The UK Supreme Court decision is a jurisdictional decision providing that the courts of England and Wales have jurisdiction over both the UK company and its Zambian subsidiary, but provides interesting insights into the circumstances in which a duty of care could be said to be owed by a parent company in relation to the activities of its subsidiary.

There also exist a range of non-judicial avenues for resolving BHR disputes, for example, the OECD National Contact Point system provides a forum for complaints by victims and their representatives and seeks to facilitate the consensual resolution of adverse impacts, including through mediation and settlement. The Elements Paper proposes the drafting of arbitration rules that could be used in the context of BHR disputes. The proposal does not call for the establishment of a new arbitration institution or a standing BHR arbitration panel/tribunal.

During my presentation, I flagged some of the potential challenges with respect to the Rules, but also the potential advantages. Inevitably, the issue of consent to arbitration will be challenging for disputes not arising out of an existing contract containing an agreement to arbitrate. In such a scenario, there would need to be a voluntary submission to the arbitral process after the harm or event in question has occurred, which may in practice be difficult to achieve. While the Elements Paper suggests that commercial contracts could specifically identify classes of victims that could initiate or participate in future arbitrations as "*third-party beneficiaries*", it is, however, likely to be challenging in practice to provide for such beneficiaries in commercial contracts. There is also the question of what norms or laws would be applied by the arbitral tribunal? Should they include "soft law" such as the United Nations Guiding Principles on Business and Human Rights (**UNGPs**)? What should happen in the event of a conflict between the applicable law and international human rights law?

The issue of transparency is also of major importance in BHR arbitration. Traditionally, arbitration proceedings are confidential. Still, should transparency be a guiding principle and a default rule of BHR arbitration proceedings, or should it be left to party autonomy (as it is the case in the ICSID Rules)? More fundamentally, is a private forum like arbitration appropriate for resolving human rights disputes?

The supporters of the proposal point to the greater neutrality and impartiality offered by arbitration, which may be welcomed in politically or emotionally charged disputes, and to the possibility of modifying the process to make it more transparent and public.

Conversely, the Rules could be a means to improve access to remedy for victims of human rights under Pillar 3 of the UNGPs, which provides that

> "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy".

Businesses may also be more willing to engage with a dispute resolution process they are familiar with and may feel like they have more control over. Further, the flipside of the challenge of identifying what law/rights and obligations would apply is that this may force the clarification and

development of enforceable BHR norms against which business conduct can be measured with a greater degree of certainty.

In conclusion, while we are a long way off from establishing specific arbitration rules for BHR disputes, there was already precedent for the use of arbitration to resolve human rights disputes. The Accord on Fire and Building Safety in Bangladesh ("**Accord**") was a legally binding agreement signed in 2013 between global brands and retailers and trade unions in the aftermath of the Rana Plaza building collapse that led to many deaths and injuries. The Accord committed the signatory companies to ensuring a safe working environment in the Bangladeshi textile industry, including independent inspection programs, health & safety committees, and training. The dispute resolution clause in the Accord provided for arbitration. The first two cases under the Bangladesh Accord were filed in July and October 2016 by two Swiss-based non-governmental labour groups against two global brands (also signatories). The labour groups argued, *inter alia*, that the brands did not require its factories to remedy hazards in a timely manner—leaving thousands of workers in dangerous conditions. The labour group also charged that the brands did not ensure that it was financially feasible for its factories to fix ongoing safety issues, as required by the Accord. The cases settled but offer an interesting case study for how business and human rights arbitrations may work in practice.

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