Kluwer Arbitration Blog

Aligning Human Rights in Business with International Commercial Arbitral Rules

June Yeum (Pillsbury Winthrop LLP) · Saturday, October 9th, 2021

This year marks the 10th anniversary of the UN Guiding Principles on Business and Human Rights ("UNGPs"), which set out the duties of States and responsibilities of companies to embed human rights considerations in business activities. Of the three Pillars in the UNGPs, Pillar II (principles 11-24) specifically sets out human rights principles by which businesses should abide, including responsibilities to:

- Avoid infringing on the human rights of others and address adverse human rights impacts (Principle 11);
- Seek to prevent or mitigate adverse human rights impacts even if they have not contributed to those impacts (Principle 13);
- Have a human rights due diligence process in place, including the remediation of adverse human rights impacts (Principles 15 and 22); and
- Seek ways to honor internationally recognized human rights when faced with conflicting requirements (Principle 23).

Despite the enactment of these principles, the scorecard for the first decade has been rather disappointing. According to the UN Working Group on Business and Human Rights, business-related abuses are still a major concern and a source of deep frustration. Child labor implicates 160 million children worldwide. Other abuses range from one-bathroom-break rules to slavery to torture.

As was recognized at UNGPs' inception, "*there is no single silver bullet solution to the institutional misalignments in the business and human rights domain*" and all social actors "*must learn to do many things differently*." For these reasons, UNGPs have been adopted by standard-setting bodies in the corporate, investment and accounting communities. In this same line, bar and trade groups are mapping out implementation strategies of UNGPs.

The commercial arbitration community, however, has been largely non-committal. As a recent report on UNGPs notes, commercial arbitration is seen as a "problematic forum" for resolving human rights-related disputes. According to the report, this is due to various features of commercial arbitration, including its "confidentiality, lack of transparency and participation by affected stakeholders, and the lack of human rights expertise of commercial arbitrators."

While the new Hague Rules on International Arbitration of Business and Human Rights Disputes

have been justifiably hailed as a milestone in providing a new forum for human rights matters, as with any arbitral rules, the Hague Rules kick in *only if* the underlying contract so provides or the parties so agree post-dispute.

Against this backdrop, this post examines the possibility of aligning UNGPs with pre-existing international commercial arbitral rules such as those promulgated by the ICC, ICDR, SIAC, LCIA, UNCITRAL, and HKIAC, with a view to assisting businesses in enhancing their human rights practices.

This post will shed a light on questions such as: (a) should an arbitral tribunal be empowered to consider evidence of human rights violations without fear of breaching its duty to render an enforceable award? and, (b) what if arbitral rules were amended to specifically include language authorizing tribunals to factor in human rights considerations as akin to trade usages?

Such a reference will enable global corporations to assign increased risk factors to human rights abuses (especially when transacting in countries where such abuses are more prevalent). Business decision-makers will thus be able to financially justify reducing human rights abuses.

There are numerous concerns raised by the application of human rights principles to commercial arbitrations; however, such legitimate fears should not be insurmountable, provided that participants are willing to endeavor, with an open mind, to "*do many things differently*".

Below are some likely objections and answers to the integration of human rights in international commercial arbitration:

Objection 1: ***Arbitral rules are no place for substantive, non-contractual rights.***

Many of the widely-used arbitral rules such as Article 21 of the ICC Rules, SIAC Rule 39 and Article 34 of the ICDR Rules require tribunals to consider trade usages in their determination of liability. According to some practitioners, these types of provisions "*underscore arbitration's historic roots in, and objective of, providing resolutions of disputes in a manner that accords with commercial expectations and practices.*" In turn, globally recognized standards are routinely proffered as evidence of trade usages. Given the universally accepted nature of fundamental human rights, UNGPs could be considered analogous to trade usages if deemed applicable to the contract. Accused parties would be hard pressed to argue it is not industry practice to respect human rights in conduct relating to the contract at issue.

The international arbitration community should not disregard the power of institutions to impact business human rights practices. Arbitral rules typically provide that the current version govern even where the operative contract predates rules amendments. Tribunals and national courts have held that a reference to an institution or its rules means the rules themselves form part of the parties' agreement by incorporation. And, while tribunals' rulings are sometimes vacated as contrary to national law or public policy, arbitral rules themselves are rarely questioned under party autonomy principles.

One might argue that institutions lack a mandate to meddle in human rights issues. However, institutions are becoming increasingly proactive in shaping arbitration's operative framework. NIMBY phenomena could be avoided if leading institutions joined forces, as many did last year in

issuing their "Arbitration and COVID-19" joint statement.

Objection 2: ***Victims won't benefit. What's the point?***

One could argue that because arbitration is *inter-partes*, the application of UNGPs may not benefit non-party victims. However, a reference to human rights considerations should still have an indirect, deterrent effect. Further, a tribunal's finding that a company violated UNGPs could have a binding, collateral estoppel effect in subsequent or parallel proceedings involving the victims themselves, especially in arbitration-friendly jurisdictions where corporations are often headquartered.

Given tribunals' broad power to fashion remedies, evidence of UNGP violations could even in some cases lead to an order directing the breaching party to correct its wrong and/or compensate victims. Tribunals might even provide an avenue for victims to join in as third-party beneficiaries or necessary parties, enabling them to obtain relief in the arbitral proceeding itself.

Objection 3: ***Since commercial arbitration is private, will victims even know?***

Due to arbitration's confidential and private nature, victims may never even learn of a finding implicating them. Certain arbitral rules such as SIAC Rule 39 have robust built-in confidentiality protections. That said, in practice, the confidentiality of arbitral proceedings is increasingly called into question, as parties sometimes compromise the confidentiality of proceedings or the award. Taking a page from the Hague Rules mentioned above, arbitral rules could include a carveout allowing evidence of human rights violations a higher degree of transparency in the proceedings.

Objection 4: ***Is this an improper importation of equitable principles?***

One could argue that such provisions grant tribunals equitable powers whereas many arbitral rules prohibit tribunals from deciding as *amiable compositeur* absent consent. However, such a scenario is unlikely where the reference to human rights or UNGPs is expressly made in the rules, which are considered part of parties' agreement by incorporation. Parties will remain free to modify or opt out as prescribed in other parts of the various arbitral rules. A tribunal should thus have comfort that it is not acting beyond its mandate from the parties.

Objection 5: ***Delay, costs, and existential threats: will there be user support for this proposal?***

Injecting human rights concepts into arbitral rules could reduce the predictability of the outcomes, delay proceedings and increase costs, at a time when the arbitration community is striving to do the opposite. Amidst a renewed debate on international commercial courts and the Hague Choice of Court Agreements Convention, such references could discourage arbitration. However, if fairness, security, or conflicts of interest are worthy of consideration in arbitral proceedings, human rights deserves its own seat at the table. Moreover, the risk of counsel or parties abusing human rights

issues is mitigated by already-existing rules empowering tribunals to determine relevance, weight, admissibility, and materiality of evidence.

Objection 6: *Will it be a toothless addition?*

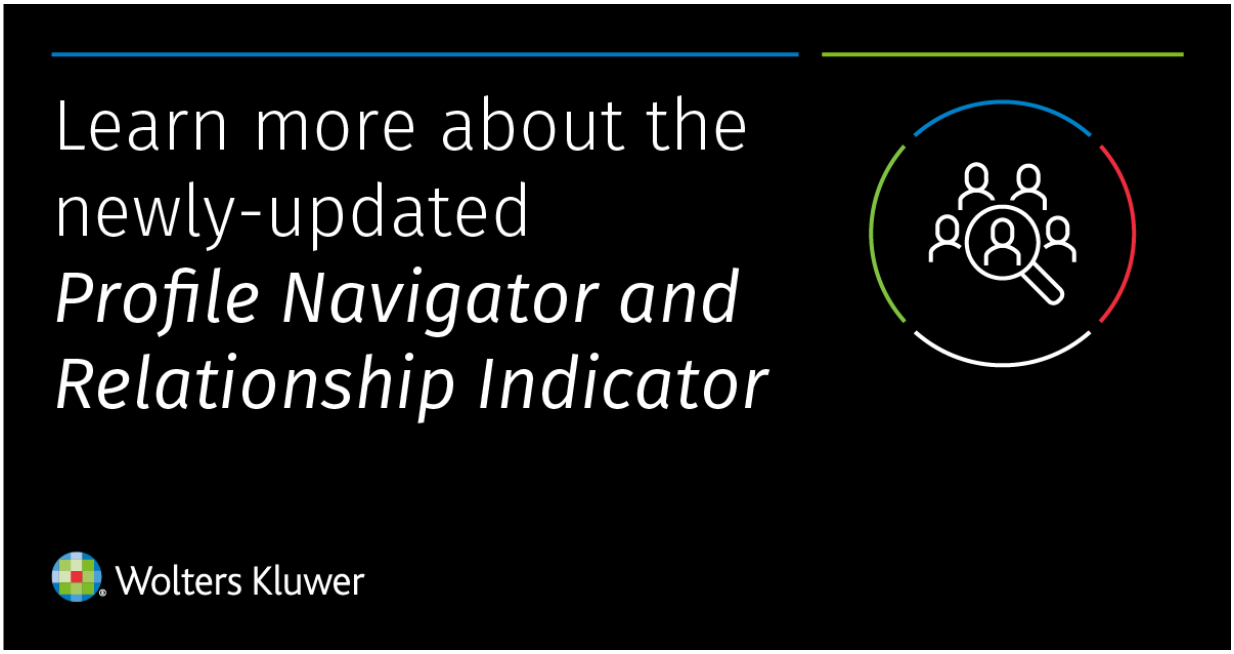
UNGPs use predominantly permissive language (*e.g.*, "should" and "responsibility" instead of "shall" or "duty"). While human rights will not likely confer a separate cause of action for breach of UNGPs until codified in national laws, the commercial arbitral community should begin somewhere. Empowering counsel and parties to proffer, and tribunals to consider, evidence of UNGPs or human rights considerations would be a good starting point.

Notably, Commentary to UNGP 11 notes: "*The responsibility to respect human rights…exists over and above compliance with national laws and regulations protecting human rights.*"

Conclusion:

The most frequent opposition might be "it's just not done." As others have noted, we must "*learn to do many things differently*." Commercial arbitration should not be considered a problematic forum in businesses' efforts to promote human rights.

Throughout history, arbitration has flourished in societies that prioritized human rights, and floundered in those that did not. The arbitration community owes its existence to a humane society. Even if the most we achieve is giving *rhetorical* power to business' human rights decisions, that would be a start. Ultimately, we need to find ways to do our share.



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