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PROTECTING HUMAN RIGHTS THROUGH INTERNATIONAL ADJUDICATION

This panel was convened at 3:30 p.m., Thursday, June 25, 2020, by its moderator Diana Tsutieva of Foley Hoag LLP, who introduced the panelists: Ursula Kriebaum of the University of Vienna; Toby Landau of Essex Court; Jennifer Permesly of Skadden Arps Slate Meagher & Flom LLP; Penny Venetis of Rutgers Law School; and Bruno Simma of the University of Michigan Law School.

The Hague Rules on Business and Human Rights Arbitration

*By Ursula Kriebaum**

I. Goals of the Hague Rules on Business and Human Rights Arbitration

Let me start with the goals of the Hague Rules on Business and Human Rights Arbitration. The Business and Human Rights Arbitration Project dates back to 2013. In that year the U.S. Supreme Court ruled in the *Kiobel v. Shell* case that the U.S. Alien Tort Statute of 1789 has no extraterritorial effect. It denied victims of human rights abuses by companies access to U.S. courts to obtain damages for alleged violations. As a consequence, the idea arose that arbitration could be used as an alternative route for dispute resolution available to corporations and rights holders to resolve their disputes in the business and human rights field.

The City of The Hague sponsored the project of developing such rules. That is why they are called "The Hague Rules on Business and Human Rights Arbitration." The drafting team designed them with a focus on the special requirements of human rights disputes. Their aim is to provide a dispute settlement mechanism that is in accordance with the UN Guiding Principles on Business and Human Rights from 2011. Pillar III of the UN Guiding Principles, the victims' access to an effective remedy, has been given less attention so far, that is where the Rules want to close a gap.

The Rules want to provide a non-state-based, non-judicial remedy for victims *ex post* under Pillar III of the UN Guiding Principles. At the same time, they want to offer businesses a possibility to fulfill their obligations under Pillar II to *ex ante* offer a remedy for human rights abuses committed by them or in their supply chain.

II. Key Differences of the Business and Human Rights Arbitration Rules from the UNCITRAL Arbitration Rules

Let me now highlight some of the key differences of the Business and Human Rights Arbitration Rules from the UN Commission on International Trade Law (UNCITRAL) Arbitration Rules.

The process of drafting the Hague Rules required the Drafting Team to navigate between a variety of goals, sometimes in tension with one another. First, the drafting team needed to keep in mind the function of the Rules in both providing reparation for victims and at the same time in assisting businesses in managing risk. Second, it decided to change the UNCITRAL Rules only when needed,

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but also to change them wherever change was needed. Third, the Hague Rules had to provide flexibility and generality to deal with the multiple kinds of proceedings, e.g., business-to-business, victim-to-business, third-party beneficiaries, and *ex ante* versus *ex post* consent. However, they also needed to provide clear guidance for specific situations related to business and human rights arbitration, for example, concerning witness protection. Therefore, the Rules are very flexible but also include new specific provisions. Fourth, the Rules need to respect the autonomy of the parties, an essential characteristic of arbitration, while providing some clear default rules to reflect special aspects of business and human rights arbitration and the requirements of the United Nations Guiding Principles.

As a result, the drafting team sought to balance these two ideas. For that purpose, it drafted new provisions on transparency while providing for Model Clauses that give the parties the option to choose their own procedures. Further changes to the UNCITRAL Rules concern issues like the selection of arbitrators with appropriate expertise for business and human rights disputes as well as a special Code of Conduct for Arbitrators.

Throughout the drafting of the Rules, the Drafting Team paid special attention to the potential imbalance of power of disputing parties in business and human rights disputes. Therefore, various provisions of the Rules deal with issues of inequality of arms between the potential parties of a dispute and reflect this concern. This relates, for example, to representation and assistance, an obligation for the tribunal to manage the proceedings proactively, a possibility to create special mechanisms for the gathering of evidence and protection of witnesses and rules on fees and expenses. The Rules provide in Article 46 for a specifically adapted provision on how to identify the applicable substantive law. The Rules require that the Tribunal satisfy itself that an award is human rights compatible.

III. How Will the Rules Apply – Consent

A business and human rights dispute can only be resolved by arbitration if all the parties involved consent to arbitration. How can consent be established in case of a human rights violation? There are a variety of different possibilities: in some of them, consent will be given before the dispute arose, but it is also possible that the parties enter into an arbitration agreement after a dispute has arisen.

Let us assume that a company and its supplier (e.g., a shoe producer and its suppliers) have a contractual dispute that involves a human rights issue, such as unhealthy working conditions in the premises of the supplier. There will be a supply agreement that will usually include an arbitration agreement. This could provide for arbitration based on the Hague Rules on Business and Human Rights Arbitration. In this way the company would comply with its obligations under Pillar II of the UN Guiding Principles.

An agreement like the Accord on Fire and Building Safety in Bangladesh that had been concluded after the Rana Plaza building collapse in 2013 could provide for arbitration based on the Business and Human Rights Arbitration Rules.

International organizations like the World Bank or the International Monetary Fund could require that companies that receive funding have to agree to submit to arbitration under the Hague Business and Human Rights Arbitration Rules. The same is true for National Development Agencies or Foreign Investment Insurance Companies that could condition funding or insurance on an offer to arbitration by the company vis-à-vis potential victims of future human rights abuses by the company benefitting from the funding or insurance.

Local communities that contract with local or foreign investors, for example in the sector of public services, could require that the local or foreign company or the foreign parent company provides

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for an offer of consent to arbitration should their activities lead to human rights violations. The same is true for example in the mining sector where states could condition licenses to mine upon an offer to arbitrate under the Hague Business and Human Rights Arbitration Rules by the mining company.

These are just some examples. The Annex to the Rules contains a number of examples of Model Consent Clauses for various constellations.

IV. Fields of Specific Importance for Business and Human Rights Arbitration

A. Equality of Arms

Throughout the drafting of the Rules, the Drafting Team paid special attention to the potential imbalance of power of disputing parties in business and human rights disputes. Various provisions of the Rules dealing with issues of inequality of arms between the potential parties of a dispute reflect this concern. Already Article 6(e) of the preamble reflects this when it hints at the importance of having arbitrators with specific expertise. A number of articles of the Rules provide the arbitral tribunal with tools to address inequality of arms issues.

1. Representation

One such example is Article 5(2) dealing with representation and assistance. It deals with inequalities that create barriers to accessing a remedy, such as lack of adequate representation, language, costs, and fear of reprisals. The article instructs the tribunal to make efforts to ensure that an unrepresented party can present its case in a fair and efficient way. This includes more proactive and inquisitorial, as opposed to adversarial, procedures.

2. Statement of Claims

Article 22(4) on the statement of claims offers another example. It provides that the "statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them." The Rules use this expression to allow the arbitral tribunal to take into account the possible imbalance of power in accessing evidence in the arbitration proceedings. This addresses both situations of economic imbalance and situations of power imbalance. An economic imbalance can lead to a situation where the cost of obtaining the documents is prohibitive. A power imbalance can lead to a situation where a party is aware of the existence of certain documents but is unable to obtain them. A reason for this can be that they are in possession of the other party or of third parties. In these instances, the arbitral tribunal may admit a statement of claim and address the issue of evidence subsequently through its power to order the production of evidence or other means of organizing the taking of evidence in the particular proceedings.

3. Further Written Statements

Article 27 is a further example of this approach. It encourages the tribunals to manage the written proceedings proactively to ensure efficiency and equality of arms without compromising due process.

4. Evidence

The same is true for the provisions on the taking of evidence in Article 32. It attempts to strike a balance among a number of factors with respect to the taking of evidence, notably fairness,

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efficiency, cultural appropriateness, and rights-compatibility. Article 32 allows the tribunal to respond to the possible inequality of arms in the context of access to evidence among the parties. This article mentions examples of tools at the disposal of the tribunal to address these issues. Among them are document production procedures, the ability to limit the scope of evidence produced and the power to sanction non-compliance with orders to produce evidence through adverse inferences or a reversal of the burden of proof. It instructs the tribunal to take into account the relevant best practices in the field.

Article 32(4) instructs the tribunal to organize the taking of evidence in accordance with best practices and with the overall considerations of fairness, efficiency, cultural appropriateness, and rights-compatibility. This article recognizes that document production may be required in order to enable a party to have a reasonable opportunity of presenting its case. The tribunal shall take the difficulty into consideration that certain parties may face in collecting evidence (or making precise document requests). Furthermore, it shall consider the potential cost and other burdens that may be caused by document production procedures.

Article 32(6) provides for a discussion between the tribunal and the parties of potential difficulties. This will put the arbitral tribunal in a position to be aware of consequences of potential power imbalances in the taking of evidence. It will enable it to determine what evidence may be relevant, material and necessary to provide each party with a reasonable opportunity to present its case.

5. Costs

The rules on the fees and expenses of arbitrators and allocation of costs also contain provisions that allow tribunals to take into account situations of economic imbalance. The Hague Rules attempt to lower barriers to accessing a remedy. Still, parties will need a minimum of resources to cover the basic costs of the arbitration and their own representation. This can be either through their own resources or through a "legal aid" system, contingency funding or an agreement on the asymmetric distribution of costs and deposits between the parties. Model clauses regarding costs are provided in the Annex to the Rules.

B. Applicable Law – Article 46

Arbitration Rules have to offer legal security and predictability concerning the outcome of arbitration proceedings. Therefore, it is necessary to indicate rules for the arbitral tribunal on how to identify the applicable substantive law. It did not seem advisable to design substantive standards. The substantive standards can stem from a variety of sources, such as domestic law, contracts, human rights treaties and soft law standards. Therefore, the rules need to be flexible enough to cope with this potential patchwork of norms stemming from different legal sources. This flexibility has to be combined with certainty so that it is foreseeable for all parties to a dispute, which norms will be applicable to their dispute. Granting a maximum of autonomy to the parties in choosing rules, should guarantee the necessary flexibility. The default rule in the absence of a choice of law by the parties will ensure certainty.

The Hague Rules follow the four-step approach of the UNCITRAL Rules in determining the applicable law:

(1) paragraph 1 provides for the possibility of an agreed choice of law;
(2) paragraph 2 contains a default rule of applicable law;
(3) paragraph 3 allows for an express agreement of the parties for an *ex aequo et bono* decision by the tribunal;

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(4) paragraph 4 directs the arbitral tribunal's attention to various additional binding rules that it may draw upon to resolve the dispute; and
(5) Option 1, the clause on agreed choice of law in paragraph 1, uses "law, rules of law or standards." The idea is to provide the parties with the broadest possible flexibility in choosing the normative sources from which the applicable law is drawn. This may, for example, include industry or supply chain codes of conduct, statutory commitments or other relevant (business and) human rights norms. Both parties must have agreed to apply these laws, rules of law or standards. It allows applying combinations of rules emanating from different legal systems and from non-national sources.

The same is true for the default rule on applicable law. It refers to "the law or rules of law" the tribunal determines to be appropriate. The change from "law" as mentioned in the UNCITRAL Rules to "law and rules of law" in the Hague Rules allows for the application of rules emanating from different national legal systems or even from non-national sources. Otherwise, a tribunal would frequently be required to apply one legal system in its entirety as national conflict of law rules often provide. The applicable law or rules of law determined by the tribunal under Article 46(2) only contains rules binding upon corporations under national or international law and may include international human rights obligations. Furthermore, when interpreting the applicable law an arbitral tribunal will have to consider the potential direct or indirect relevance of international human rights obligations of any states involved in the dispute in whatever capacity.

Article 46(3) reflects the text of the UNCITRAL Arbitration Rules and allows for *ex aequo et bono* decisions if the parties have expressly agreed on this possibility. Article 46(4) adapts the UNCITRAL Rules to the context of business and human rights and directs the arbitral tribunal's attention to various additional sources of binding rules that it may draw upon to resolve business and human rights disputes. Within industries where all relevant participants have committed to a certain level of human rights protection, a usage of trade may arise and bind the parties. This can be the case even where an instrument containing a choice of law does not expressly incorporate applicable human rights standards.

C. Duty of the Tribunal to Satisfy Itself of the Human Rights Compatibility of an Award

Article 18(1) outlines the general principles underlying business and human right arbitration proceedings. It contains the obligation to conduct the proceedings in a manner that provides for a human rights-compatible process in accordance with Guiding Principle 31(f) of the UN Guiding Principles. In line with this duty, Article 45(4) provides that the tribunal is under an obligation to satisfy itself that its award is human rights-compatible. To fulfill this obligation it will be appropriate to include some discussion on rights-compatibility into the reasoning of the award. This requirement is part of the general requirement to give reasons and is one of form and not of substance or applicable law. It is meant to encourage the arbitral tribunal to consider the rights-compatibility within the ambit of its discretion. However, it does not authorize the arbitral tribunal to disregard or alter the result required by the applicable law as determined in accordance with Article 46.

Furthermore, the obligations to satisfy itself of the human rights compatibility of the award assists the tribunal in fulfilling its duty to render an enforceable award. It demonstrates that the arbitral tribunal has considered potential issues of compliance with public policy which may arise in business and human rights arbitration. This concerns in particular those arising under the law of the legal seat of the arbitration and likely place(s) of enforcement of the award.

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D. New Requirements for Arbitrators[1]

The Hague Rules contain a new Article 11 regarding the selection of arbitrators. Its key innovations include the requirement of demonstrated expertise by the presiding arbitrator or sole arbitrator in international dispute resolution as well as in one or more fields relevant to the arbitration; independence as demonstrated by lack of involvement in the dispute as well as a nationality distinct from that of the parties; and an explicit mention of diversity as a desirable criterion for a tribunal, with an acknowledgment that diversity can come in many forms.

In addition, the Hague Rules contain a special Code of Conduct for Arbitrators. The Code of Conduct is based on best practices, including but exceeding those of the International Bar Association Guidelines. The Code's key innovations include strong duties of disclosure; a ban on double-hatting involving the same issues; certain restrictions on former arbitrators; and the possibility for the Permanent Court of Arbitration to create a Code of Conduct Committee to update the Code as needed as best practices change.

E. Protection of Parties, Witnesses, and Their Representatives

Article 18(5) provides for the protection of parties or their representatives in exceptional cases. It empowers the tribunal to protect the confidentiality of the identity of a party or its representatives vis-à-vis other parties. This may be necessary where the disclosure of such identity is sensitive or may otherwise prejudice that party or its representatives. The tribunal may designate a specific representative of the other party who may be informed of the identity of a party or the representatives of a party who request such designation. All representatives so designated shall observe confidentiality in connection with this identity.

Article 33(3) contains provisions for the protection of witnesses in situations of genuine fear. Specific measures that the tribunal can use may include the non-disclosure to the public or to the other party of the identity or whereabouts of a witness. The commentary provides various examples of such measures. Possible measures include: (1) expunging names and identifying information from the public record; (2) non-disclosure to the public of any records identifying the victim or witness; (3) giving of testimony through image- or voice-altering devices or closed-circuit television; and (4) assignment of a pseudonym. Closed hearings under Article 41 and any appropriate measures to facilitate the testimony of vulnerable witnesses, such as one-way closed-circuit television, are also possible options.

The burden of proof of demonstrating a "genuine fear" rests on the person or party seeking the restriction. This person or party will have to show how the witness would be prejudiced by publicity. This may also depend on what information is already in the public domain. The concept of "genuine fear" should be understood as a subjective fear of harm to the person or their livelihood. A witness may have a "genuine fear" even if similarly placed witnesses have testified without retaliation against them.

In line with this approach, Article 42, dealing with exceptions to transparency, confers the power on the arbitral tribunal to deem information confidential if necessary to protect the safety, physical and psychological well-being and privacy of all those involved directly or indirectly in the proceedings.

[1] This part reflects the presentation by Steven Ratner at the occasion of the Launch of the Business and Human Rights Arbitration Rules on December 12, 2019.

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F. Transparency[2]

The Hague Rules contain a detailed section on transparency. Based on many of the ideas of the UNCITRAL Transparency Rules, they provide a new set of default rules that lean heavily in favor of transparency during the proceedings. At the same time, the Rules recognize that for business-to-business arbitration without a public interest, transparency may be neither required nor desirable, so that the tribunal may decide not to apply it.

The scope of transparency is broad, to cover the publication of key documents, such as the notice of arbitration and reply; the statements of claim and defense; and the decisions and awards of the tribunal. At the same time, the Rules recognize certain information as confidential, notably the identities of persons protected by a confidentiality order for their safety, certain confidential business information, and information confidential under national law. It also provides for public hearings, subject to various exceptions for the protection of witnesses, parties, and counsel. All the public information is to be stored in a repository, which the Rules designate as the Permanent Court of Arbitration.

The Hague Rules have been conceived as a uniform set of rules. However, parties may exercise their discretion to modify or opt out of certain provisions that do not respond to their needs in the dispute at issue. Certain Model Clauses have been developed in this respect. They are annexed to the Hague Rules on Business and Human Rights Arbitration.

V. CONCLUSION

Let me conclude with the famous words of Winston Churchill: "*Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning*." So, a lot will still have to be done in order to give the Hague Rules the broad acceptance they deserve and for that it needs the cooperation by many, including business, civil society, the lawyers, the governments and the academic world and the arbitration community.

[2] This part reflects the presentation by Steven Ratner at the occasion of the Launch of the Business and Human Rights Arbitration Rules on December 12, 2019.

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