

**The Hague Rules
On Business and
Human Rights
Arbitration**

**QUESTIONS
&
ANSWERS**

1. What is the purpose of business and human rights (BHR) arbitration and the Hague Rules?

Arbitration of business and human rights disputes offers a reliable mechanism allowing businesses and those affected by the human rights impacts of business activities to resolve their disputes in situations where more traditional remedies, such as judicial proceedings, are not available or effective. In arbitration, the parties to a business relationship that could affect, or has affected, the enjoyment of human rights agree to address violations or potential violations through a legal process outside of courts, where they select the arbitrators and the final decision is binding on the parties. It offers a way for those affected by a business's operations – workers, communities, and other businesses within a supply chain – to hold it accountable for any human rights violations. Arbitration also represents a way for businesses to further compliance with their corporate responsibility to respect human rights and manage risks associated with their operations, or of those with whom they have business relations.

The Hague Rules offer a comprehensive set of procedural rules for the conduct of arbitration involving BHR disputes. Because the issues and parties involved in business and human rights disputes are different from those in typical commercial disputes, investor-state disputes, or state-to-state disputes, existing arbitration rules do not provide an adequate procedural framework. The Hague Rules address these differences through, for instance, rules on transparency; protection of claimants, witnesses, and counsel; and human rights compatibility of awards. At the same time, the Rules are general enough that they can be deployed by parties in a range of business sectors, from the extractive industries to apparel manufacturing to professional sports.

2. How does arbitration under the Hague Rules relate to the UN Guiding Principles on Business and Human Rights?

The UN Guiding Principles on Business and Human Rights set standards for business regarding respect for human rights (Pillar II) and recognize the imperative of a remedy for those affected by business-related human rights abuses (Pillar III). Beyond state-based judicial remedies, Pillar III specifically contemplates other remedies, and arbitration is one such mechanism (along with others such as the OECD National Contact Points). Pillar III also sets forth criteria for fair and effective remedial mechanisms, which the Hague Rules were specifically designed

to meet. These include legitimacy, accessibility, predictability, transparency, and rights-compatibility.

Arbitration under the Hague Rules can also assist businesses to meet their responsibilities under Pillar II. Through contractual commitments to observe human rights and a willingness to submit to arbitration to address allegations of human rights violations, businesses are incentivized to meet their human rights responsibilities under Pillar II. And an award by an arbitral tribunal against a business can promote the remediation that a business is required to undertake when it causes or contributes to human rights violations. Furthermore, by obtaining similar commitments from business partners or entities in their supply chain, businesses can also help meet their duty to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services.

Lastly, arbitration helps a state fulfill its duty to protect individuals against human rights violations under Pillar I. States can encourage or require domestic businesses, state-owned or state-controlled businesses, or businesses receiving state support – such as export financing or foreign investment insurance – to accept arbitration of business-related human rights issues. International organizations like World Bank’s MIGA can make similar requirements of the businesses that they support. Such action can ensure that a remedy is available in case of an adverse human rights impact by those businesses.

3. Why would businesses and those affected by their operations agree to use arbitration under the Hague Rules?

The various stakeholders involved in the intersection of business and human rights can all have an interest in agreeing to arbitration under the Hague Rules. For businesses, a binding agreement between a business and stakeholders affected by its operations (e.g., workers, communities, and entities within its supply chain) to arbitrate under the Hague Rules – and thus to respect the outcome and pay any damages awarded – sends a strong signal of their commitment to respect human rights and provide a remedy for violations as required by the UN Guiding Principles on Business and Human Rights. This commitment, whether made up front in a contract or made after a dispute arises in an agreement to submit it to arbitration, can help foster a corporate culture of respect for human rights and have positive reputational ramifications for business. Equally, in keeping with the UN

Guiding Principles, businesses might demand that their own suppliers and business partners accept arbitration in order to mitigate and address human rights risks throughout their operations.

In addition, the procedures of the Hague Rules, with their flexibility for parties and finality of an award, can allow for a more rapid and effective resolution of the dispute than domestic courts. Finally, businesses might also agree to arbitration under the Hague Rules where states and financial institutions make such acceptance a condition for providing loans, insurance, and other financial aid—or take acceptance of arbitration into account in a business’s ESG (environmental, social and governance) rankings.

For workers, communities, and others who might be adversely harmed by a business’s operations, recourse to arbitration under the Hague Rules will be appealing if there is a serious risk that for any reason domestic courts or other national institutions cannot provide a timely and meaningful remedy for violations. Moreover, given that the Rules were specifically drafted to take account of special concerns surrounding human rights-related claims, those bringing claims can have confidence that the procedures will be legitimate, fair, and effective.

4. Is arbitration under the Hague Rules a substitute for national courts and international human rights courts?

No. Arbitration is a consensual process. Unless the parties have each freely consented to arbitration under the Hague Rules for the resolution of their disputes on the basis that it is in their best interests to do so, any interested party may seek recourse before competent national or international courts. In fact, when the courts are functioning effectively and can provide a genuine remedy for those affected by business-related human rights violations, the rights holders and others would typically have recourse to them. For example, individuals could sue business entities for violations of international human rights law or domestic law, or one business in a supply chain could sue another for violation of human rights commitments set out in contracts. In the case of multinational businesses, such proceedings could be brought in the state where the relevant conduct occurred or the state where the multinational is headquartered.

In many situations, however, courts cannot be counted on to provide such relief due to inaccessibility, lack of independence, corruption, lack of capacity,

underdeveloped legal frameworks, and other factors. In addition, for claims against multinational businesses, courts in a business's home state may refuse to accept such cases based on jurisdictional, corporate-law, and other legal doctrines. Enforcement of a foreign judgment may also face various barriers, even when issued by a reputable court according to international standards. Finally, domestic litigation might entail significant costs or delay for the parties. In these situations and others, parties may determine that it is in their best interest to proceed to arbitration under the Hague Rules. In this sense, the Hague Rules form part of an ecosystem of remedies contemplated by Pillar III of the UN Guiding Principles on Business and Human Rights.

As for international human rights courts, those affected by business-related human rights abuses may have recourse to them to adjudicate the duties of states, including duties to regulate the conduct of business, when domestic remedies have been exhausted. Arbitration under the Hague Rules is not a substitute for such proceedings. However, it might complement them by providing for the possibility of recourse directly against businesses, who cannot be sued in such courts.

5. Will BHR arbitration divert the focus from improving national institutions?

No. The UN Guiding Principles on Business and Human Rights make clear that those affected by business-related violations should have multiple avenues for pursuing a remedy against businesses, including both state-based institutions and business-initiated grievance mechanisms. BHR arbitration will not compete with national institutions for multilateral and bilateral assistance to states in improving national institutions, nor will it reduce the interest of states and international organizations in these efforts. BHR arbitration works from the same assumption as the UN Guiding Principles that effective judicial processes and other national processes are critical to access to a remedy.

6. How is BHR arbitration under the Hague Rules different from investor-state arbitration?

BHR arbitration under the Hague Rules is fundamentally different from investor-state arbitration, which has faced significant criticism in recent years for both its procedures and the outcomes of arbitral proceedings. First and foremost, arbitration under the Hague Rules is about the corporate responsibility to respect

human rights, not protection of the interests of foreign investors vis-a-vis the state. Second, and relatedly, arbitration under the Hague Rules will not limit the regulatory role of the state in protecting the human rights of its people, but instead add another layer of protection for them. Third, arbitration under the Hague Rules provides a forum for those harmed by business activities and other stakeholders who have historically been excluded from investor-state arbitration, with possibilities for participation and special protections for them. Fourth, arbitration under the Hague Rules would, unless and to the extent the parties decide otherwise, be a transparent process. Lastly, the Hague Rules specifically identify familiarity with human rights norms as a relevant criterion for the selection of arbitrators.

7. How do the Hague Rules address mediation?

In keeping with the UN Guiding Principles on Business and Human Rights, the Hague Rules encourage the use of mediation and other non-judicial collaborative mechanisms among the parties to a business and human rights dispute. Parties to a dispute may choose mediation as a prerequisite to arbitration or they can agree to halt an arbitration to attempt collaborative settlement. The Hague Rules ensure that any admissions, offers, or statements of the parties made during mediation will not be admitted in the arbitration proceedings, thus encouraging the parties to explore numerous possibilities for settling their dispute. Moreover, mediators cannot participate in any capacity in an arbitration, again ensuring that the mediation process can proceed free of concerns as to how it might affect, or be affected by, an arbitration.

8. In what kinds of situations can arbitration under the Hague Rules be used?

Arbitration under the Hague Rules can be used in a variety of situations. It can be used as a backstop to enhance the effectiveness of mediation, facilitation, or operational-level grievance mechanisms. It can also be used to give binding legal force to voluntary commitments by businesses, especially where such commitments exceed existing human rights standards. The Hague Rules were designed to be flexible and can be easily tailored for a variety of contexts or to render them even more suitable to the circumstances of a given dispute.

More particularly, arbitration can serve as a direct means by which businesses offer redress for adverse human rights impacts that may arise from their

operations. In the business-to-business setting, arbitration can also serve as a mechanism for businesses to ensure compliance by their business partners with their human rights commitments. A business might, for example, require that its suppliers or other business partners adhere to a code of conduct and submit to arbitration by experts who can assess compliance and determine any appropriate action. Similarly, businesses might require their business partners to make an open offer to submit human rights disputes between them and affected individuals or communities to arbitration under the Hague Rules. Multi-stakeholder industry arrangements and global framework agreements between individual businesses and global unions may also employ arbitration to ensure their coherent application when disputes arise.

Model clauses are included in an annex to facilitate utilization of the Hague Rules in a variety of scenarios.

9. Who can take advantage of arbitration under the Hague Rules?

In general, any stakeholder can submit a dispute to arbitration if they are a party to an agreement or other instrument that refers to the Hague Rules. These can include all kinds of instruments such as contracts, agreements, rules, decisions, resolutions, treaties, and even constituent instruments of organizations. Many such instruments will identify further stakeholders that can submit claims, even if they are not parties. In addition, the Hague Rules provide for any interested third person to participate and make submissions to the arbitral tribunal.

The Hague Rules do not limit the stakeholders that can bring a case to arbitration or the kinds of disputes they can submit, as long as the instrument invoked covers the particular parties and disputes involved. Parties could thus include business entities, individuals, labor unions and organizations, states, state entities, international organizations, and civil society organizations. Likewise, disputes could relate to national human rights laws, international human rights standards, industry or supply chain codes of conduct, statutory commitments or regulations from sports-governing bodies, or any other relevant human rights norms that the parties have agreed to apply.

10. How does one bring a case under the Hague Rules?

An arbitration under the Hague Rules is commenced by a “Notice of Arbitration” setting out the instrument invoked, the basic details of the claim, and the remedy sought. A party can also apply to join an arbitration that is already under way if it is named in the instrument referring disputes to arbitration under the Hague Rules. The Permanent Court of Arbitration (PCA), located in The Hague, which serves as the secretariat for proceedings under the Hague Rules, will promptly publish basic information and documents regarding any new case on its website (www.pca-cpa.org), so that stakeholders can be apprised of them and decide whether they wish to apply to join the proceedings or make submissions.

11. Who serve as arbitrators in cases under the Hague Rules? How are they chosen?

By default, a tribunal consisting of three arbitrators will be appointed to hear the dispute. One arbitrator will be selected by the claimant party or parties and another by the party or parties being claimed against. A third arbitrator, who acts as the president of the tribunal, is then chosen by the first two arbitrators. If necessary, the Permanent Court of Arbitration (PCA), an intergovernmental organization with expertise in the resolution of business and human rights disputes and other matters of public interest, will step in to appoint any missing arbitrators.

The PCA is also charged with ensuring that arbitrators have the requisite independence, impartiality, and qualifications to serve as arbitrators. The Hague Rules include a code of conduct that arbitrators must follow, embodying the highest international ethical standards to protect the legitimacy and integrity of the proceedings. The president of the tribunal must have expertise in international dispute resolution, business and human rights law and practice, national and international laws, or a particular field or industry, as necessary depending on the circumstances of the case. The Hague Rules also require those involved in the appointment process to take into account the advantages of a diverse tribunal.

12. Can the Hague Rules respond to situations of imminent risk of harm to human rights or destruction of evidence?

Yes. The Hague Rules provide multiple mechanisms to address urgent situations that arise before a final decision can be rendered, or even on an

emergency basis before an arbitration commences. Furthermore, the Hague Rules allow national courts to intervene and complement any orders made by an arbitral tribunal in this regard.

13. Will the arbitration proceedings be transparent?

By default, the Hague Rules provide for broad transparency and the publication of all key documents and information regarding the proceedings. At the same time, the rules recognize that, in business-to-business arbitrations without a public interest, there may be cases where transparency is neither required nor desirable and allow an exception in such situations. In addition, the parties to any arbitration may decide that proceedings remain confidential. Even in cases between businesses and rightsholders, there are many situations in which confidentiality may be legitimately required or agreed. Exceptions to transparency are also provided under the rules for several situations. Model clauses are included in an annex to facilitate tailoring the level of transparency to the circumstances of the parties and disputes in question.

14. What if claimants, witnesses, or counsel need protection against threats from respondents or third parties?

Under the Hague Rules, the arbitral tribunal has the power to allow parties, counsel, and witnesses to participate anonymously if necessary to protect the safety, physical and psychological well-being, or privacy of those involved directly or indirectly in the proceedings. The arbitral tribunal also has broad powers to order other appropriate measures to counter any risk of intimidation or retaliation.

15. Should businesses be concerned that this process opens the floodgates to frivolous claims?

No. The Hague Rules provide for an expedited procedure to dispose of claims and defenses manifestly without merit at a preliminary stage of an arbitration. They do so precisely in order to deal with the possibility of unfounded claims that might entail costly litigation and reputational consequences for respondents, as well as unfounded defenses that might be used to discourage a claim or even intimidate claimants.

16. How is the imbalance of power between individual rights-holders and businesses addressed in the Hague Rules?

Various provisions of the Hague Rules seek to respond to potential imbalances of power. For example, the tribunal must take into account economic and other power imbalances that may undermine the effective representation of the parties or taking of evidence. The arbitral tribunal has a variety of tools to address issues of inequality of arms, often by encouraging a more proactive role by the tribunal.

17. How do the Hague Rules address the problem of lawyers' fees and other costs that parties might be unable to afford?

The Hague Rules attempt to lower barriers to access to remedy as much as possible. Still, parties will need a minimum of resources to cover the basic costs of the arbitration and their own representation. This can be achieved using their own resources, a “legal aid” system, contingency funding, or an agreement on the asymmetric distribution of costs and deposits between the parties. In the case of an unrepresented party, the tribunal is under a duty to ensure that such party can present its case in a fair and efficient way, despite financial barriers. The tribunal could then adopt more proactive and inquisitorial, as opposed to adversarial, procedures.

Proceedings may also take place anywhere across the world, with a view to reducing costs and enhancing accessibility for all participants. The Permanent Court of Arbitration (PCA), who administers the proceedings under the Hague Rules, has access to a worldwide network of hearing facilities and experience with hearings by videoconference and other means that do not require a physical presence.

Furthermore, the rules on the fees and expenses of arbitrators and allocation of costs, including lawyers' fees, allow tribunals to take into account situations of economic imbalance. Model clauses regarding costs in the Annex to the Hague Rules offer various options to address these issues upfront.

18. Is there a mechanism in the Hague Rules that ensures that awards are compatible with human rights?

Yes. The tribunal is under an obligation to conduct the proceedings in a manner that provides for a human rights-compatible process in accordance with Principle 31(f) of the UN Guiding Principles on Business and Human Rights. In addition, it must satisfy itself that its award is human rights-compatible. Thus, it will be appropriate to include a discussion of rights-compatibility in the reasoning of its award.

19. How do the Hague Rules ensure compliance with BHR arbitration decisions?

Awards rendered by arbitral tribunals under the Hague Rules can be enforced in national courts across the world in accordance with the 1958 *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. This mechanism offers a significant advantage of arbitration over alternative forms of recourse, in particular where enforcement takes place in a jurisdiction far from the location where the human rights harm occurred.

Arbitral tribunals under the Hague Rules are also empowered to impose penalties for non-compliance with any provisional orders it makes. Furthermore, all orders, decisions, and awards of the arbitral tribunal are published by the Permanent Court of Arbitration on its website (www.pca-cpa.org). Therefore, businesses that agree to submit disputes to arbitration but then refuse to abide by the outcomes can therefore expect to suffer reputational consequences.

20. How will arbitration decisions actually contribute to the progressive development and enjoyment of human rights?

As an initial matter, arbitral tribunals under the Hague Rules—which will include experts in the subject matter of the dispute—must satisfy themselves that their decisions are rights-compatible and in accordance with the applicable law. Even where a confidential settlement of a dispute is reached, the arbitral tribunal must be unanimously satisfied that the settlement is human rights-compatible before it grants its imprimatur and renders it into an enforceable award. Where an arbitral tribunal fails in this duty, or any party seeks to abuse arbitration for an

improper outcome that violates fundamental human rights, the national courts of the named legal seat of the arbitration can intervene on public policy grounds.

Moreover, arbitrations under the Hague Rules are transparent by default, with all orders, decisions, and awards published by the Permanent Court of Arbitration (PCA) on its website (www.pca-cpa.org). The only exception in this regard is where the arbitration is undertaken business-to-business and engages no systemic public interest. The PCA will also publish general information about arbitration under the Hague Rules, including industry sector, names of arbitrators, outcome of cases and costs, in order to serve as a source of continuous learning in keeping with the UN Guiding Principles on Business and Human Rights. Over time, the publication of awards addressing how specific business practices and relationships can give rise to rights violations will make businesses aware of their responsibilities to protect human rights, and rights-holders aware of their rights.

This document answers key questions associated with the Rules. For further elaboration of the [Rules](#), please refer to the Commentary contained in the Rules.

Information about the launch of the Hague Rules at the Peace Palace in The Hague on 12 December 2019, including a short video presentation, may be found [here](#).