



Class 4: The Hague Rules on Business and Human Rights Arbitration

Martin Doe Rodríguez

Deputy Secretary-General, Permanent Court of Arbitration

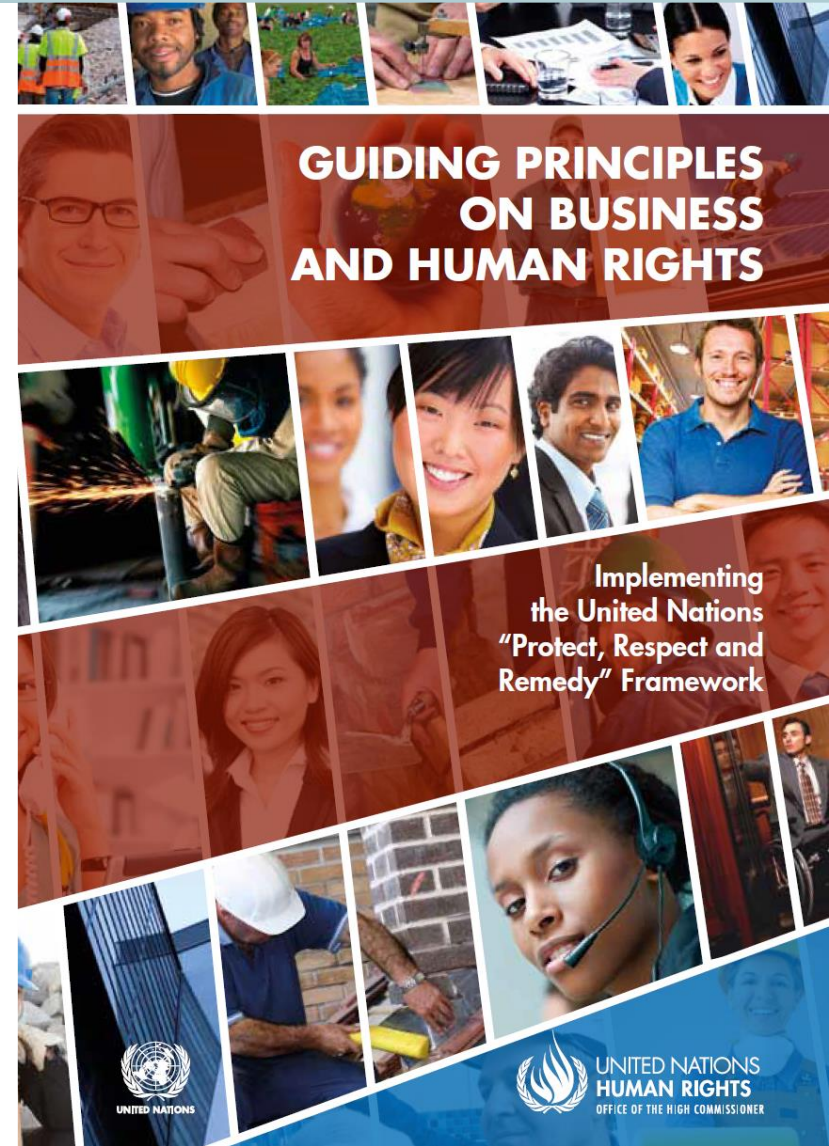
Basel Winter Arbitration School

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Business and Human Rights

“The gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences provide the permissive environment for wrongful acts by companies without adequate sanctioning or reparation. How to narrow and ultimately bridge such governance gaps in relation to human rights is the focus of my work.”

- Testimony at UN General Assembly (2008) by Prof. John Ruggie



Responsibility to Respect Human Rights

13. The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.



**GUIDING PRINCIPLES
ON BUSINESS
AND HUMAN RIGHTS**



Implementing
the United Nations
“Protect, Respect and
Remedy” Framework



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Access to Remedy

Foundational principle

25. 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.



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Access to Remedy

26. State-based judicial mechanisms

27. State-based non-judicial grievance mechanisms

28. Non-State-based grievance mechanisms



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UN Guiding Principle 3 |

- a) **Legitimate**
- b) **Accessible**
- c) **Predictable**
- d) **Equitable**
- e) **Transparent**
- f) **Rights-compatible**
- g) **A source of continuous learning**



**GUIDING PRINCIPLES
ON BUSINESS
AND HUMAN RIGHTS**



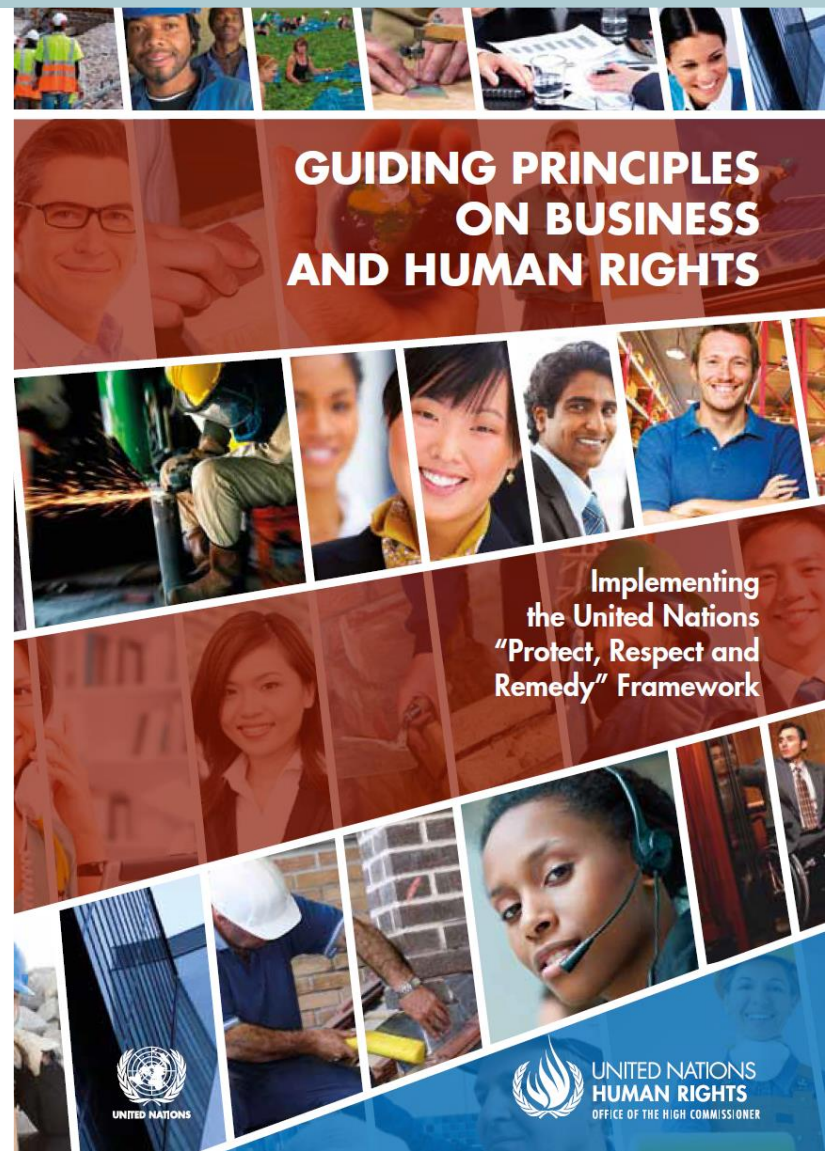
Implementing
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Gap in Access to Remedy

- **Lack of capacity**
- **Corruption**
- **Jurisdiction and standing**
- **Evidentiary issues**
- **Cost**



Advantages of Arbitration



CHARTER
of **THE**
UNITED
NATIONS

AND STATUTE of THE
INTERNATIONAL COURT
OF JUSTICE

- **Neutrality**
- **Expertise**
- **Enforceability**
- **Flexibility**

Proof of concept



ACCORD
on Fire and Building Safety in Bangladesh

5. Dispute resolution. Any dispute . . . shall first be presented to and decided by the [Steering Committee]. Upon request of either party, the decision of the SC may be appealed to . . . a final and binding arbitration process . . . administered by the PCA.”

Bangladesh Accord Arbitrations



“In the Tribunal’s view, this case cannot be characterized either as a ‘public law’ arbitration (involving a State as a party) or as a traditional commercial arbitration (involving private parties and interests), or even as a typical labor dispute.”

– **Procedural Order No. 2, ¶ 93**

Bangladesh Accord Arbitrations



“[There is] a genuine public interest in the Accord, including on the part of other stakeholders who would have a direct interest in its interpretation. [...] On the other hand, the Tribunal must take into account competing factors stemming from the language of the Accord and the practice under it, which point to an obligation to protect certain information about the participating brand companies.”

– **Procedural Order No. 2, ¶ 94**

Bangladesh Accord Arbitrations



“As the Parties have agreed to apply the 2010 UNCITRAL Arbitration Rules to the present proceedings, hearings are to be held in private and any award of the Tribunal can only be made public with the consent of the Parties.”

– **Press Release No. I**

The Hague Rules

“The Hague Rules are based on the Arbitration Rules of the United Nations Commission on International Trade Law (with new article I, paragraph 4, as adopted in 2013) (the “UNCITRAL Rules”), with modifications needed to address certain issues likely to arise in the context of business and human rights disputes.”

– Introductory Note

The Hague Rules On Business and Human Rights Arbitration

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The Hague Rules

*“...changes in order to reflect:
(a) The particular characteristics of disputes related to the human rights impacts of business activities;
(b) The possible need for special measures to address the circumstances of those affected [...];
(c) The potential imbalance of power that may arise in disputes under these Rules; [...]”*

– **Preamble**

The Hague Rules On Business and Human Rights Arbitration



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The Hague Rules

“...changes in order to reflect: [...] (d) The public interest in the resolution of such disputes [...]; (e) The importance of having arbitrators with expertise appropriate for such disputes and bound by high standards of conduct; and (f) [...] special mechanisms for the gathering of evidence and protection of witnesses.”

– **Preamble**

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Arbitration ↔ Human Rights

Neutrality

Expertise

Flexibility

Enforceability

- Legitimate
- Accessible
- Predictable
- Equitable
- Transparent
- Rights-compatible
- A source of continuous learning

Legitimate

Article I: Scope of application

“1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under these Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may expressly agree upon in writing.”

The Hague Rules On Business and Human Rights Arbitration



Accessible and Equitable

Article 5: Representation

“Where a party faces barriers to access to remedy, including a lack of awareness of the mechanism, lack of adequate representation, language, literacy, costs, physical location or fears of reprisal, the arbitral tribunal shall, without compromising its independence and impartiality, ensure that such party is given an effective opportunity to present its case in fair and efficient proceedings.”

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Accessible and Equitable

Article 54: Deposits of costs

“The arbitral tribunal shall ensure that the amount of the deposit does not constitute an undue obstacle to any party’s participation in the proceedings.”

3. The arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only upon approval of the appointing authority.”

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Accessible and Equitable

Article 53: Allocation of costs

“The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case, including the conduct of the parties in the arbitration, the financial burden on each party and the public interest, if any.”

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Accessible and Equitable

Article 18(3): Facilitation by tribunal

Article 26: Objections to claims or defences manifestly without merit

Article 47: Settlement or other grounds for termination

Article 55: Third party funding

Article 56: Mediation and other forms of collaborative settlement

Article 57: Expedited arbitration

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Legitimate and Predictable

Article 11: Arbitrators

“(b) Persons appointed to serve as arbitrators under these Rules shall be persons of high moral character, who [...] shall [observe] the Code of Conduct;

(c) The presiding or sole arbitrator shall have demonstrated expertise in international dispute resolution and in areas relevant to the dispute [...]”

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Legitimate and Predictable

Commentary on Article 6: Appointing Authority

“Article 6 foresees that the PCA, given its intergovernmental nature and experience in business and human rights disputes, will serve as appointing authority [...] Considering that the legitimacy of the arbitral proceedings is closely tied to the selection of suitable arbitrators, parties are encouraged to consider the matter carefully before choosing a different appointing authority.”

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Legitimate and Predictable

Code of Conduct, Article 6: International Best Practices

“A Code of Conduct Committee may be established by the Permanent Court of Arbitration or a body designated by the Permanent Court of Arbitration. The Code of Conduct Committee may revise and update the Code of Conduct. The Code of Conduct Committee may also serve other functions, including in connection with actual or potential violations of this Code.”

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Transparent

What should be the applicable regime for transparency in business and human rights arbitrations?

The Hague Rules
On Business and
Human Rights
Arbitration



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Transparent

Article 41: Public hearings

“[H]earings for the presentation of evidence or for oral argument shall be public [except] where there is a need to protect confidential or restricted information or the integrity of the arbitral process pursuant to Articles 18, 26, 33 and 42.”

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Transparent

Article 43: Repository of published information

“The repository of published information under these Rules shall be the PCA. The repository shall regularly publish general information about arbitration under these Rules as a source of continuous learning, including industry sector, names of arbitrators, outcome of cases and costs.”

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Transparent

Article 26: Objections to claims or defences manifestly without merit

“6. Notwithstanding Articles 39 to 41, until the arbitral tribunal has ruled on an objection made in accordance with paragraph 1, no materials or information regarding the arbitration shall be made public, except with the consent of the party making the objection [...].”

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Transparent

Article 39: Scope of application of transparency provisions

“If all parties are legal persons of a commercial character and the arbitral tribunal determines that there is no public interest involved in the dispute, the arbitral tribunal may, on its own motion or at the request of a party, and after inviting the parties to express their views, decide not to apply Articles 38 to 43.”

+ Model clauses

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Rights-compatible

Article 45: Form and effect of award

“The arbitral tribunal shall state the reasons upon which the award is based and shall satisfy itself that the award is human rights-compatible.”

Commentary: *“[T]his requirement is one of procedure and form, as part of the general requirement of reasons, and not of substance or applicable law.”*

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Rights-compatible

Article 20: Place of arbitration

Commentary: “[A]n award that is not human rights-compatible does not further the objective of access to remedy. [Thus], it is desirable for the arbitral tribunal to select a place of the arbitration in a jurisdiction whose arbitration law allows for the review and set aside of awards on grounds of public policy where such awards violate human rights.”

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Rights-compatible

Article 18: General provisions

“1. [...] The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expenses and to provide a fair, efficient, culturally appropriate and rights-compatible process for resolving the parties’ dispute, including in particular by giving due regard to the urgency of addressing the alleged human rights impacts.”

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Rights-compatible

Article 30: Interim measures

“1. The arbitral tribunal may, at the request of a party, take any interim measures it deems necessary, including any measure to prevent serious harm to the enjoyment of human rights falling within the subject-matter of the dispute.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure [if] the measure should not have been granted.”

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Rights-compatible

Article 31: Emergency arbitrator

“A party that needs urgent interim measures that cannot await the constitution of an arbitral tribunal may submit a request for such measures to the appointing authority.”

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Supply Chains/Lenders

Article 19: Multiparty claims

“The arbitral tribunal may allow one or more third persons to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal instrument that includes the relevant arbitration agreement [...].”

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Sports Governance



The new 'Sport and Human Rights Dispute Resolution Mechanism'

Essentials at a glance

Procedural elements:



1) Mediation and arbitration

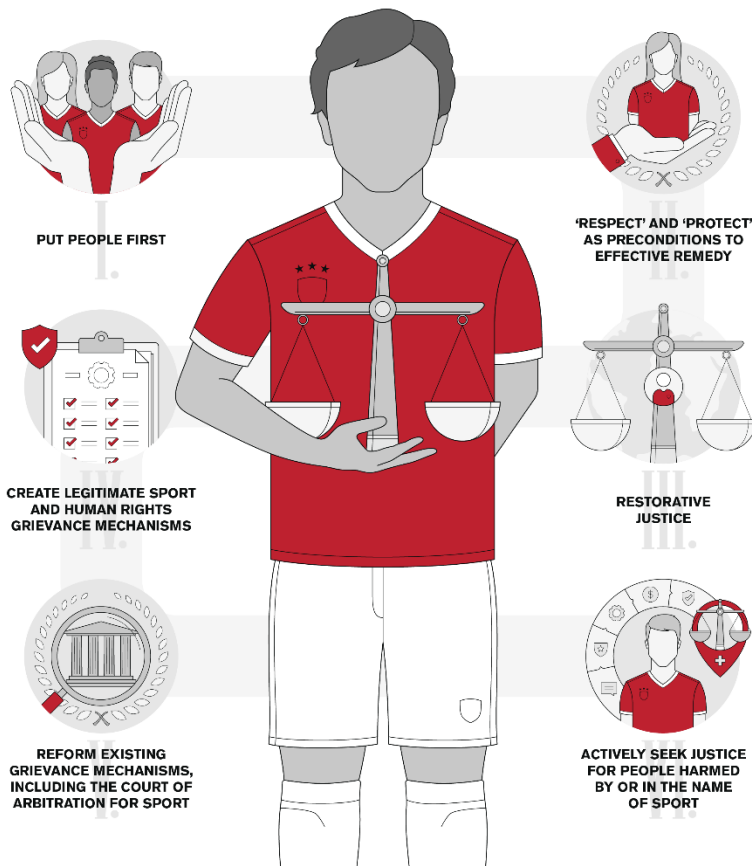
- Time and cost-efficient, including through an expedited procedure
- Human rights compatible, both procedurally and substantively
- Reflecting the public interest in sport and human rights disputes
- Provides for flexibility to tailor the procedure to the rights and needs of, and challenges faced by, affected individuals and groups

2) Advisory opinion

- Provide sports bodies and other business enterprises with expert advice on how to comply with their responsibility to respect human rights, including how to exercise their leverage to prevent harms from realising
- Provides civil society organisations, including player associations, with access to independent expert assessment on adverse impacts and effective responses
- Designed to respond to situations of human rights crisis and to be part of human rights due diligence frameworks
- Outcomes are non-binding



The Player's Six Essential Elements to Effective Remedy



Human Rights at Sea



Human Rights at Sea Arbitration

Arbitration as a Means of Effective Remedy for Human Rights Abuses at Sea

Multi-stakeholder Initiatives

International

ACCORD



for Health and Safety in the Textile and Garment Industry

“The [Steering Committee] may, at any time, agree upon or designate by reference additional rules for arbitrations under this agreement as an alternative or complement to, or substitute for, the UNICTRAL Arbitration Rules in such arbitrations, such as the International Labor Arbitration and Conciliation Rules.”

ILAC Rules

“The International Labour Arbitration and Conciliation Rules 2021 reflect best practices for speedy and efficient resolution of disputes arising under international labour agreements.”

It's time to build a global arbitration system to defend workers' rights



ILAC Rules

“Unless otherwise agreed by the parties, the arbitral tribunal shall render its final award within 180 days from the commencement of the arbitration. The PCA may, upon the request of the arbitral tribunal, extend this time limit.”

It's time to build a global arbitration system to defend workers' rights



ILAC Rules

“As soon as practicable, and in any event within 21 days of commencement of the arbitration, the PCA may hold an administrative conference...”

“The hearing shall in principle take place within 30 days of the case management conference.”

It's time to build a global arbitration system to defend workers' rights



International Accord

International

ACCORD



for Health and Safety in the Textile and Garment Industry

“The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration shall be governed by the International Labor Arbitration and Conciliation Rules. [...] The arbitration shall be seated in The Hague and administered by the Permanent Court of Arbitration.”

Progressive Development

- *Loi sur le devoir de vigilance*
- *Modern Slavery Act*
- *Lieferkettengesetz*
- *EU initiative*
- *Vedanta v. Lungowe*
- *Nevsun v. Araya*
- *Shell Nigeria*
- *Burlington/Perenco v. Ecuador*



Investment Projects

“Recent events demonstrate that an adjudication mechanism capable of producing reliable and enforceable results for all stakeholders, including affected populations, may tilt the balance between having and not having certain large-scale infrastructure and natural resource investments [and] resolving seemingly intractable investment-related social conflicts.”



PAPER NO. 8/2014
JANUARY 2014

From Investors' Arbitration to Investment Arbitration:
A Mechanism for Allowing the Participation of Host
State Populations in the Settlement of Investment
Conflicts

Jose Daniel Amado

Criticisms

Do you think that arbitration of business-related human rights claims is a good idea?

Do you think that businesses and rights-holders will agree to arbitration?



**The Business and Human Rights Arbitration Rule Project:
Falling short of its access to justice objectives**

Lisa Sachs, Lise Johnson, Kaitlin Cordes,
Jesse Coleman, Brooke Guven*

September 2019

CCSI Briefing Note

Criticisms

- ***Human rights not arbitrable***
- ***Not enforceable under NY Convention***
- ***Competition with national or international judicial remedies (and LBI)***
- ***Do not guarantee remedy***
- ***Class actions***
- ***Costs***



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Arbitrability

New York Convention Article II

“1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”

Convention on the Recognition and
Enforcement of Foreign Arbitral Awards
(New York, 1958)



UNITED NATIONS

Enforceability

New York Convention Article I

“3. When signing, ratifying or acceding to this Convention, [...] any State may [...] declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”

Convention on the Recognition and
Enforcement of Foreign Arbitral Awards
(New York, 1958)



Enforceability

Article I: Scope of application

“2. The parties agree that any dispute that is submitted to arbitration under these Rules shall be deemed to have arisen out of a commercial relationship or transaction for the purposes of Article I of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’).”

The Hague Rules On Business and Human Rights Arbitration



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Criticisms

- ***Human rights not arbitrable***
- ***Not enforceable under NY Convention***
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Thank you!



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