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Insights

THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION: A WATERSHED MOMENT?

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On 12 December 2019, the Hague Rules on Business and Human Rights Arbitration were launched at the Peace Palace in the Hague. With human rights billed as the "oxygen of humanity" by the keynote speaker, Dr Bahia Tahzib-Lie (the Netherlands' Human Rights Ambassador), the Rules offer a dispute resolution mechanism which could significantly improve the engagement of businesses with human rights.

The Rules

The Rules are based on the 2013 UNCITRAL Rules (including the Rules Transparency in Treaty-based Investor-State Arbitration), and they incorporate many similar terms to those in the UN Guiding Principles on Business and Human Rights. They are the product of a five-year consultation process aiming to offer a tailored set of arbitration rules which is sufficiently flexible to meet the needs of a diverse range of intended users, but robust enough to protect the interests of victims of human rights abuses. The hope is that stakeholders - businesses of all sizes, labour organisations, international organisations, states and individuals - will all incorporate the Rules into their contracts going forward.

There are a few key differences between the Hague Rules and the UNCITRAL Rules. These differences are intended to manage the specific features of human rights-related arbitration. The most important of these are listed below.

- Provisions such as those in **Article 5(2)** to address inequality of arms between parties, such as to protect witnesses, or manage the potential imbalance of power which might arise in such disputes, whether relating to social or educational barriers faced by potential victims, such as literacy, or costs.
- The Permanent Court of Arbitration will act as the default repository agent under **Article 1(5)** (with which Notices of Arbitration should be filed) and, if requested, will also administer the arbitration.

- Under **Article 7**, the tribunal will by default comprise three members with experience in the field of human rights law, as a way of ensuring that the dispute is handled sensitively.
- The Rules include emergency arbitrator provisions at **Article 31.**
- A waivable section on Transparency at **Articles 38-41**. The default position under this section is that the party names, sector and a description of the document underpinning the dispute will be published, as will key procedural documents such as the Notice of Arbitration and the Response, the Statement of Claim and Statement of Defence,. Hearings will also be held in public with provision for private sessions if necessary.
- An express provision in support of third-party funding under **Article 55**, which requires the disclosure of the names and contact details of the funder, unless the tribunal deems it appropriate not to disclose.
- The addition of a new article enabling proceedings to change from arbitration to mediation, if the parties wish, at any point in the arbitration. **Article 56** also prevents anyone sitting as mediator from later acting as arbitrator.
- The inclusion of a provision for expedited proceedings at **Article 57** in which the award must be rendered within 6 months of service of the Notice.

Challenges facing the Rules

While the Rules are a useful tool in the arsenal against human rights abuses, there remain a number of challenges to overcome if the Rules are to be successful.

The most immediate hurdle for the Rules is ensuring their uptake amongst users. Currently, if business-related human rights abuses are prosecuted at all – and many are not – such prosecution tends to occur in national courts, often in response to large-scale disasters with prominent coverage in the international media. The 2013 collapse of the Rana Plaza garment factory in Dhaka, for example, resulted in the signing of the Accord on Fire and Building Safety in Bangladesh by numerous fashion brands. It incorporated an arbitration provision, which in 2018 led to the settlement of two arbitrations arising out of the collapse administered by the PCA. However, it is difficult to encourage big businesses to sign up to a dispute resolution process which may expose them to more claims than they currently face. Absent the use of a “carrot and stick” approach, they are unlikely to sign up to them of their own volition. However, if the EU legislative trajectory continues to point towards mandatory human rights legislation, then the Rules may be well-placed for widespread uptake.

Certainly, one way of improving uptake would be for governments to legislate to require certain businesses to use the Hague Rules. However, there has been a recent trend amongst businesses towards action on human rights issues, and they face considerable social pressure not to shirk

these obligations (whether moral or legal). If the image problem facing certain types of business in the public sphere encourages them to sign up to the Rules, then a unilateral offer to arbitrate might operate as an open offer to victims of human rights abuses in places where national courts cannot help. There would be difficulties with this scenario as well – not least in ensuring that victims of human rights abuses are aware of the option – but persuading big business to use the Rules would be the first step.

More fundamentally, arbitration itself may not be accepted as an appropriate means for resolving human rights issues in a business setting. Arbitration is usually a private mechanism and allowing businesses to keep human rights abuses confidential will not help to prevent such abuses occurring in the future. The Rules contain new provisions on transparency in an effort to combat this, but the issue remains. Even with the transparency provisions in the Rules, only summaries of the documents underpinning the dispute will be published, along with selected legal pleadings. There is a risk that the public benefit of "naming and shaming" corporate human rights abusers would be lost.

Regardless of whether businesses or other stakeholders engage with the Rules, the individuals and groups of people who unfortunately tend to be the victims of human rights abuses are unlikely to be familiar with the process of arbitration or how to use it to their benefit. They face formidable accessibility barriers, from a lack of awareness that the mechanism exists, to difficulties in finding legal aid or accessing justice under an amicus brief. It will be a challenge for proponents of the Rules to tackle these issues.

Conclusion

Whilst the Rules are unlikely to be transformative in the sphere of human rights abuses, they come at a time of shifting attitudes of business towards accountability for its human rights record. They are a new and well drafted set of arbitration rules which may offer a useful way of regulating businesses' behaviours around human rights. If businesses and governments engage with the Rules and they become a way to hold such entities to account over human rights abuses, then they may even have a preventative effect on big businesses' poor human rights conduct, which, after all, is the main aim in all human rights work.

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