The Hague Rules on Business and Human Rights Arbitration

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The recently released Hague Rules on Business and Human Rights Arbitration may assist and encourage the widening of the ambit of arbitration beyond commercial disputes to those concerning the effect of commercial activities on human rights.

The commercial significance of the relationship between business and human rights continues to increase. Multinationals are increasingly expected by investors, consumers and other stakeholders to report on and demonstrate their compliance with the UN Guiding Principles. This mirrors a recognition by large businesses that preventing their activities having a negative impact on human rights is a sensible risk-management strategy.

At the same time, claims concerning the impact of business activities on human rights are becoming more prevalent. Businesses are at an increased risk of facing a business and human rights-related claim from external stakeholders or participants in their supply chain or related to the activities of a subsidiary. For example, there have been several recent claims in the UK concerning alleged human rights breaches by a foreign subsidiary of a UK-domiciled business.

When a business faces such a claim, the Hague Rules provide a model procedure for the resolution, by arbitration, of disputes arising from the impact of business activities on human rights.

Features of the Hague Rules

The Hague Rules have been developed over five years in a multi-stage process involving a working group and a drafting team, both of which consulted widely, including seeking input from businesses and arbitrators. The drafting team was led by Judge Bruno Simma, a former judge at the International Court of Justice.

The Hague Rules are based on the 2013 UNCITRAL Arbitration Rules, which are already familiar to the international business community. Some amendments have been made to adapt the UNCITRAL Rules to be more suitable for business and human rights disputes, including:

- the presiding arbitrator should have expertise relevant to the dispute
- the tribunal should be diverse
- anticipation of the likelihood of multiparty claims
- provision for the appointment of an emergency arbitrator who is independent and impartial
- provision for submissions to be made by interested third parties (for example, non-governmental organisations or states)
- the award should be compatible with human rights
- compulsory disclosure of funding sources unless otherwise determined by the tribunal

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The Hague Rules encourage the resolution of disputes before or during the arbitration by collaborative means such as negotiation or mediation.

In recognition that there may be a power or resource imbalance between parties to a business and human rights dispute, there is an overarching focus on cultural appropriateness, rights compatibility, fairness and efficiency.

Any award may then be enforced through national laws or international treaties, including in most cases through the New York Convention.

**Why should businesses use the Hague Rules?**

The courts in the jurisdiction where a business and human rights dispute arises may not be the most appropriate forum for the resolution of the dispute from a commercial party’s perspective, for various reasons including:

- The legal process may be lengthy and unfamiliar.
- The independence of the judiciary may not be guaranteed.
- The judiciary may not have expertise in or knowledge of the subject matter.

Although the intention guiding the Hague Rules is not to supplant judicial proceedings, they provide a framework for an alternative means of resolution for business and human rights disputes.

The Hague Rules can be used only by consent by the parties. Consent could be given contractually prior to a dispute arising or by agreement after a dispute arises. The Hague Rules could be included as part of the dispute resolution mechanism in contracts between a business and its supplier, allowing the business to bring a claim for any human rights breaches by the supplier, which may discourage breaches. The Rules state: “These Rules thus intend to provide both a means for access to remedy for rights-holders affected by business activities and a human rights compliance and risk management strategy for businesses themselves.”

Commercial parties may consider consenting to an arbitration brought under the Hague Rules, either at the request of the claimant, or at its own suggestion, to benefit from the advantages of arbitration, which may include:

- more control of and greater flexibility around the procedure (including the ability to agree modifications to the Hague Rules that suit the dispute and the interests of the parties);
- assurance that the arbitrator will be impartial and independent (there is also a requirement that the presiding or sole arbitrator is not a national of states whose nationals are parties or of any State that is a party);
- the ability to agree the language of the proceedings;
- the ability to exercise a degree of choice as to the arbitrators;
- provision for early dismissal of claims or defences that are manifestly without merit; and
- arbitrators being chosen for their relevant expertise and knowledge of the subject matter.

In contrast, some features of the Hague Rules that may make them less attractive to businesses than court proceedings are that any party may be ordered to produce documents at any time during the arbitral proceedings. As such, there is a risk of being required to disclose documents at an earlier stage – and it may be more costly than court proceedings, taking account of the arbitrators’ fees, travel costs and other expenses.

**What next?**

The development of the Hague Rules is aligned with a broader trend of the development of arrangements for the arbitration of disputes concerning climate change, environmental protection and human rights. For example, the ICC Commission has released a report on Resolving Climate Change Related Disputes through Arbitration and ADR.

The focus in the Hague Rules of transparency in proceedings is also aligned with the trend of increasing the transparency of arbitration. For example, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration mandate the accessibility and transparency of treaty-based arbitrations between investors and states.

Though the Hague Rules are – particularly because of the consent requirement – unlikely to be used for all disputes involving the intersection of business and human rights, they provide another tool in the remedy toolbox for business and human rights-related disputes. It will be interesting to see the extent to which they are adopted by businesses and people.
with human-rights grievances.

1Released 12 December 2019.
3Lungowe and others v Vedanta Resources plc and another [2017] EWCA Civ 1528; Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd [2017] EWHC 89 (TCC).

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