

## The Hague Rules on Business and Human Rights Arbitration

**A closer look at the salient Business and Human Rights Issues through the lens of the UN Guiding Principles on Business and Human Rights, presented by Prof. Steven Ratner and Prof. Ursula Kriebaum, Drafting Team members, at the Launch Symposium of the Rules at the Peace Palace on 12 December 2019**

At the Launch Symposium of the Hague Rules on Business and Human Rights Professor Steven Ratner and Professor Ursula Kriebaum shared the various issues the Drafting Team had to navigate in order to develop a set of rules that can be used in a broad range of situations and that are flexible enough to cope with a patchwork of norms. The following is a summary of their remarks.

### **1. INTRODUCTORY COMMENTS (Prof. Ratner)**

The process of drafting the Hague Rules required the Drafting Team (DT) to navigate between a variety of goals, sometimes in tension with one another. Prof. Ratner addressed some of those goals and how the DT tried to take account of them.

**1.1.** First, BHR arbitration serves the goal of providing a non-State-based non-judicial remedy for victims *ex post* under Pillar III, while also serving as a strategy for business to fulfill its obligations under Pillar II *ex ante*. As a result, the DT needed to keep in mind the function of the Rules in both providing reparation and in assisting business in managing risk.

**1.2.** Second, because BHR arbitration can only succeed if key constituencies accept and use the Hague Rules, they need to appeal to business stakeholders as well as civil society and States. As a result, the DT decided to change the UNCITRAL Rules (familiar to business) only when needed, but also to change them wherever change was needed. As each change was considered, the DT considered the possible reactions of different stakeholder groups and sought to balance their concerns.

**1.3.** Third, the Hague Rules needed to provide flexibility and generality to deal with the multiple kinds of proceedings, e.g., business-to-business (B2B), victim-to-business (V2B), third-party beneficiaries, *ex ante* vs. *ex post* consent. But they also needed to provide clear guidance for specific situations related to BHR arbitration, e.g., concerning witness protection. As a result, the DT made sure that the Rules would be very flexible but also included new specific provisions.

**1.4.** Fourth, the Hague Rules need to respect the autonomy of the parties, an essential trait of arbitration, while providing some clear default rules to reflect special aspects of BHR arbitration and the requirements of UNGP Principle 31. As a result, the DT

sought to balance these two ideas, e.g., with important new provisions on transparency, while providing for Model Clauses to give the parties the option to choose their own procedures.

**1.5.** Fifth, the Hague Rules needed to provide a new mechanism for addressing BHR disputes while not undermining other effective mechanisms. Thus, the DT made sure to underline the continued primacy of judicial mechanisms for victims as well as the desirability of other non-judicial processes like mediation.

**1.6.** Sixth, the Hague Rules needed to reflect some of the insights gained in recent years during debates over the future of investor-state arbitration, while making clear that BHR arbitration serves a fundamentally different goal of vindicating human rights and not investor rights. As a result, the DT made significant improvements to the UNCITRAL Rules on issues like transparency and arbitrator selection.

**1.7** Finally, a word about process: In accordance with UNGP 31, the DT went out of its way to elicit as much input as possible from relevant stakeholders. This desire for inclusivity manifested itself in (a) the composition of the DT in terms of the diversity of expertise, regional perspectives, and gender; (b) the publication of progress reports, the Elements Paper, and the first draft; (c) the creation of the Sounding Board, composed of 220 individuals; (d) outreach during the drafting process via publications, speeches, blogposts, and other efforts by individual members of the DT; and (e) active consideration of all comments received from members of the Sounding Board and others responding to our published materials.

## **2. INEQUALITY OF ARMS (PROF. KRIEBAUM)**

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.

Article 6 (c) of the preamble points out that the Hague Rules contain changes compared to the UNCITRAL Rules in order to address the “potential imbalance of power that may arise in disputes under these Rules”. Already Article 6(d) of the preamble reflects this when it hints at the importance of having arbitrators with specific expertise, a point Prof. Ratner also addressed in more detail.

A number of Articles of the Rules provide the arbitral tribunal with tools to address inequality of arms issues.

## 2.1 Representation

One such example is Article 5(2) dealing with **representation and assistance**. It responds to the potential inequality of arms among the disputing parties that may have a negative impact on the overall fairness of the arbitration proceedings, including in terms of legal representation. It deals with inequalities that create barriers to access to a remedy such as lack of adequate representation, language, costs, and fears of reprisal. 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.

## 2.2. Statement of Claim

Article 22 (4) on the **statement of claim** 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.

## 2.3 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.

## 2.4 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, 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. The Article mentions examples of tools at the disposal of the tribunal to address such 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 organise the taking of evidence in accordance with best practices and with the overall considerations of fairness, efficiency, cultural appropriateness and rights-compatibility. The 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.

The Article provides for a discussion of potential difficulties the parties may have. 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 of presenting its case.

## **2.5 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 access to remedy. Still, parties will need a minimum of resources at their disposal to cover the basic costs of the arbitration and their own representation. This can be either by 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.

## **3. NEW REQUIREMENTS ON ARBITRATORS (PROF. RATNER)**

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 one or more field 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 explicit mention of diversity as a desirable criterion for a tribunal, with an acknowledgment that diversity can come in many forms.

In addition, the Rules contain a special Code of Conduct for Arbitrators. The Code is based on best practices, including but exceeding those of the IBA 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 PCA to create a Code of Conduct Committee to update the Code as needed as best practices change.

#### 4. APPLICABLE LAW – Article 46 (PROF. KRIEBAUM)

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 legal instruments 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. Flexibility is also necessary since consent to the Rules can be established in various ways. 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. By granting a maximum of autonomy to the parties in choosing rules, the necessary flexibility should be guaranteed. 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:

Para 1 provides for the possibility of an agreed choice of law. Para 2 contains a default rule of applicable law. Para 3 allows for an express agreement of the parties for an *ex aequo et bono* decision by the tribunal. Para 4 draws the arbitral tribunal's attention to various additional binding rules that it may draw upon to resolve the dispute.

Option 1, the clause on **agreed choice of law** in **Para 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 for.

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 draws 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.

## **5. DUTY OF THE TRIBUNAL TO SATISFY ITSELF OF THE HUMAN RIGHTS COMPATIBILITY OF AN AWARD (PROF. KRIEBAUM)**

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 fulfil 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 serves 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, it 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.

## 6. PROTECTION OF PARTIES, WITNESSES ETC. (PROF. KRIEBAUM)

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 (a) expunging names and identifying information from the public record; (b) non-disclosure to the public of any records identifying the victim or witness; (c) giving of testimony through image- or voice-altering devices or closed circuit television; and (d) 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.

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.

## **7. TRANSPARENCY (PROF. RATNER)**

The Hague Rules represent a significant advance insofar as they contain a new and detailed section on transparency. Based on many of the ideas of the UNCITRAL Transparency Rules, the Hague Rules 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 B2B 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 defence; 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 PCA.