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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Riccardo Loschi (Riccardo.Loschi@columbia.edu)

The Hague Rules on Business and Human Rights Arbitration*

by
Anne van Aaken and Diane Desierto**

International "soft law," including non-binding standards for businesses, has expanded in recent years, including through the OECD Guidelines for Multinational Enterprises, the Global Compact and the UN Guiding Principles on Business and Human Rights ("Guiding Principles") in 2011. These substantive standards, however, largely omit procedural mechanisms or alternatives to the inadequacy or unavailability of litigation in national courts.

After consultation with numerous stakeholders, the Hague Rules on Business and Human Rights Arbitration (the "Hague Rules") were launched on December 12, 2019. They establish a concrete framework for arbitrating business and human rights disputes, providing claimants with new, consensual, flexible, and multi-purpose remedial mechanisms to resolve those disputes. They are modeled on the 2013 UNCITRAL Arbitration Rules, with modifications to account for the specific context of business and human rights arbitration (based on Pillar III of the Guiding Principles, namely access to remedy for victims of business-related abuses), while also useful for business to fulfill its obligations under Pillar II, the responsibility to respect human rights. As with all arbitrations, consent to arbitrate is crucial to taking part in them. How widely the net is cast vis-à-vis potential victims' ability to bring a claim depends on the scope of consent given by the respective business.

The Hague Rules provide flexibility and breadth to deal with various business and human rights disputes (e.g., business-to-business, victim-to-business, third-party beneficiaries), with *ex ante* or *ex post* consent after the dispute arises. Key differences from commercial disputes concern the public interest in the resolution of business and human rights disputes, which may require higher degrees of transparency (as default rules) and greater participation by third parties (amicus briefs are allowed, including for eligible countries with a sufficient nexus to a dispute); evidence taking and costs allocation mindful of power and resource imbalances among parties; witness protection measures and possibilities for joinder or multi-party claims; and specific expertise and qualifications for arbitrators (as well as a Code of Conduct as default rules). Applicable law, as stipulated by the parties, could range from domestic law (supply chain) contracts, human rights treaties and soft law standards. Tribunals have the additional mandate to ensure that their awards are human rights-compatible. As a shield against costly and meritless suits, the Hague Rules provide for an expedited procedure to dispose of claims manifestly without merit at a preliminary stage.

Because business and human rights arbitration depends on mutual consent of the parties to disputes, they were drafted with the considerations of all stakeholders in mind—those affected by human rights abuses, civil society, business, and countries. The Hague Rules are not meant to displace other procedures, including national courts, but they make it more likely that there would be no gap in access to remedies with respect to the human rights impacts of business operations.

The Hague Rules are a voluntary instrument—but they can be made effective in multiple ways:

- In the FDI context, it is possible to incorporate binding references in investment treaties or state contracts (complementary to required human rights assessments); this would be in countries' interest to fulfil their human rights obligations under Pillar III.

- Development finance institutions and export credit agencies could make the consent to arbitrate under the Hague Rules a requirement for financing, e.g., under the "Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence," adopted by the OECD Council.

- Private banks can incorporate the duty to provide remedy in project-related corporate loans, including through consent to arbitrate under the Hague Rules with a defined group of potential beneficiaries of a project. Such a requirement of consent to arbitrate can also be added to private sector voluntary guidelines and initiatives, such as the Equator Principles.

- New regional arbitral institutions, centers, regional intergovernmental organizations, international and national bar associations, and national courts can offer or refer to the Hague Rules as an optional, alternative or preliminary mechanism for parties seeking to manage or resolve future business and human rights disputes, such as on climate change and labor and environmental issues.

- The Hague Rules can also be used between companies and their suppliers on non-compliance with business and human rights contractual provisions, including third-party beneficiaries (such as Community Development Agreements used in the extractives sector or those in cross-border infrastructure development projects). They are also attractive for multi-stakeholder arrangements (e.g., the Voluntary Principles on Security and Human Rights). Many more applications are possible, such as in national public procurement procedures and in template contracts for sectors and industries.

Most crucially, it is hoped that the business sector has every incentive to consent to arbitrations arising under the Hague Rules as part of the spectrum of available remedies to resolve or finally adjudicate business and human rights disputes in a binding manner, *in parallel* with the possible emergence of new business and human rights national legislation (e.g., in Germany, Switzerland), the European Union plans for a legislative proposal by 2021 on mandatory human rights due diligence for European companies and the UN Business and Human Rights Treaty.

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[**] Anne van Aaken (anne.van.aaken@uni-hamburg.de) is Alexander von Humboldt Professor for Law and Economics, Legal Theory, Public International Law and European Law and Director, Institute of Law and Economics, University of Hamburg, Law School; Diane Desierto (ddesiert@nd.edu) is Professor of Law and Global Affairs, LLM Faculty Director at Notre Dame Law School and Keough School of Global Affairs, University of Notre Dame (USA); Professor of International Law at Philippines Judicial Academy. Both authors were members of the Drafting Team of the Hague Rules. The authors wish to thank Mark Feldman, Eva Hampl and Harm Schepel for their helpful peer reviews.

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