Business and Human Rights Arbitration project
Report | Drafting Team Meeting 25 and 26 January 2018
The Hague, The Netherlands

I. INTRODUCTION

The purpose of the first meeting of the Drafting Team was to identify and to hold initial discussions of some key issues relevant to the preparation of a set of arbitral rules in international disputes concerning business-related human rights abuses. No decisions were taken on the scope or content of the Rules, no drafting was undertaken and it was understood that not all material discussions and issues would be reflected or included in the Rules. The meeting also served to set a timeline and to discuss the organisation of the work, the transparency of the project as well as project deliverables, and the consultative procedure for the inclusion of multiple stakeholder inputs.

The Drafting Team took note of the importance of transparency and multi-stakeholder inclusion from the outset of the meeting. To this end, it was agreed that reports of meetings as well as the draft concept paper and Rules be made publicly available.

The Arbitration Project is conducted by three teams. The **Working Group** consisting of Claes Cronstedt, Jan Eijsbouts, Steven Ratner, Martijn Scheltema, Robert Thompson, and Katerina Yiannibas. The **Drafting Team** consists of Bruno Simma (chair), Anne van Aaken, Diane Desierto, Martin Doe-Rodriguez, Jan Eijsbouts, Cesar Rodriguez-Garavito, Ursula Kribaum, Abiola Makinwa, Richard Meeran, Sergio Puig, Steven Ratner, Martijn Scheltema and Suzanne Spears. The Members of the Drafting Team were selected for diversity of expertise as well regional and gender representation. The **Project Management Team** for operational support consists of Bruno Simma, Jan Eijsbouts, Martijn Scheltema, and Manon Tiessink as project coordinator.

The first meeting of the Drafting Team was attended by Jan Eijsbouts, Steven Ratner, Martijn Scheltema, Katerina Yiannibas, Anne van Aaken, Diane Desierto, Martin Doe-Rodriguez, Cesar Rodriguez-Garavito[1], Ursula Kribaum, Abiola Makinwa, Richard Meeran, Sergio Puig, and Suzanne Spears. Bruno Simma joined via teleconference and additionally, Manon Tiessink attended on the second day of the meeting.

II. BACKGROUND

Subsidy for the project is being provided by the City of The Hague. Project management was initially carried out by The Hague Institute for Global Justice (IGJ). The project, however, is being implemented by the Center for International Legal Cooperation (CILC).

The project has been presented at the last three United Nations Business and Human Rights Forums and a meeting of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The last version of proposal (v6) and Q&A (prepared August 2017) are publicly available.

[1] Mr. Rodriquez-Garavito no longer participates in the Drafting Team and has been replaced by Mr. Pablo Lumerman

III. IDENTIFICATION AND DISCUSSION OF MAIN CONCEPTUAL ASPECTS AND ISSUES

The Drafting Team first discussed certain main conceptual aspects and issues that have emerged by various stakeholders. The members of the Drafting Team offered views and voiced questions about the concept of business and human rights (BHR) arbitration and the obstacles and challenges likely to arise both during the drafting process and beyond. The key general topics that require further study and thought included:

THE RELATIONSHIP OF BHR ARBITRATION TO PILLAR III OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The foundational principle of the United Nations Guiding Principles (UNGPs) on Business and Human Rights is that States must ensure access to effective remedy. The project rests on the Third Pillar of the UNGPs on access to remedy, which mention both judicial and non-judicial remedies. Non-judicial remedies include state-based remedies (*e.g.* OECD National Contact Points) and non-state based remedies (*e.g.* operational-level grievance mechanisms as well as multi-stakeholder initiatives). Non-state based non-judicial remedies should comply with the effectiveness criteria set out in UNGP Principle 31 (legitimate, accessible, predictable, equitable, transparent, rights compatible, source of continuous learning, engagement and dialogue).

Arbitration is not mentioned by name in the UNGPs but as a private adjudicative remedy mechanism it is resonated in the UNGPs Remedy Pillar (e.g. commentary to Principle 28: non-state based non-judicial grievance mechanisms may use adjudicative and rights compatible processes). The Drafting Team took note of the scepticism from some representatives of both business groups and civil society towards a private adjudicative remedy for the resolution of human rights claims and the challenge to arrive at rules that will appeal to multiple stakeholders.

The Drafting Team noted that the UNGP Principle 31 effectiveness criteria must be considered throughout the process of drafting rules, with a particular focus expressed by civil society on legitimacy, transparency and rights-compatibility. The Drafting Team emphasized the importance of developing rules that take into account the particular concerns of victims while also being acceptable to the business community and other stakeholders. It also emphasized that the rules offer a procedural option that should not stand in the way of other remedies currently available to victims or that might become available in the future.

The Drafting Team discussed that more consideration should be given to the role of the state and international organizations in BHR arbitration. These actors (and states in particular) can be involved in the underlying abuses that would be addressed in arbitration, and they might contribute to, or hinder, effective BHR arbitration.

MODALITIES FOR USE OF BHR ARBITRATION: PARTIES AND CONSENT

The Drafting Team considered who would institute proceedings against whom and how parties would establish consent. Two scenarios were discussed: one in which victims/survivors would institute proceedings against a multinational enterprise or supplier, and second, intra-supply chain disputes (business-to-business; B2B). In both scenarios, the rationale and more specifically, the incentive for parties to consent were discussed as a key issue and challenge.

Various modalities for consent were discussed: *ex ante* consent via contract, an open offer to consent instrument, third party beneficiary principles or *ad hoc/ex post* consent to arbitration. In the BHR context,

ad hoc consent may be more efficient, but may not be used in practice. An open offer to consent instrument would involve an instrument that would structure a system where there is a standing option from business to some recipients; recipients who would need to be defined by class, by project or by some relationship to the business. Another option could be a Global Compact model where there is a standing instrument that businesses sign up to. Third party beneficiary principles could establish a space for BHR arbitration where the ultimate beneficiaries are identified in a contract; however, it would be unlikely for a company to offer open consent to an unidentified group of persons, particularly without privity. It was also noted that in many regions, NGOs are bringing such cases forward on behalf of victims. Further consideration should be given to the business incentive for consent beyond reputational concerns (*e.g.* export credit agencies, mandatory for getting a contract, provision in an investment agreement).

As concerning intra-supply chain disputes or other kinds of B2B disputes (between a supplier and a multinational enterprise), because there is an established commercial relationship, there was less of a concern in the discussion for establishing consent to arbitrate in this context. The main concern discussed was that businesses might not consent to arbitrate with transparency, which would otherwise be a salient feature of BHR arbitration. It was also noted that if a supplier in a supply chain violates human rights norms, a company may move to terminate the contract, litigate the dispute before a national court or work with the supplier to improve the behaviour, so there might not be a space for arbitration.

As concerning the issue of consent in a future set of BHR Arbitration Rules, the discussion centred on how to address consent within a set of arbitral rules, model arbitration agreement clauses or in notes/comments. The example of the ICSID Convention was discussed where 'consent' is mentioned rather than for example a particular source (*e.g.* a bilateral investment treaty), therefore relegating the issue of consent to practice. There was general agreement that the Rules should provide flexibility for the growth of BHR arbitration over time.

THE CONNECTION BETWEEN INVESTOR-STATE ARBITRATION AND BHR ARBITRATION

The Drafting team noted the different goals and processes between investor-state and purely commercial arbitration on the one hand and BHR arbitration on the other hand. In the investor-state context, public international law is implicated and there is an issue of public accountability. This is distinctive from a commercial context between two private corporate actors. The Drafting Team noted that care would have to be given in the drafting process to distinguish BHR arbitration from investor-state arbitration and to learn from the on-going challenges to that arbitration.

SUBSTANTIVE LAW APPLICABLE TO BHR ARBITRATION

The Drafting Team noted the centrality of this question for the Rules and the different models followed in other arbitral rules. Key issues would concern respect for party autonomy, default rules, mandatory rules, and the amount of discretion to be afforded to arbitrators. The Drafting Team noted the expressed concern from some civil society representatives that the Rules adopt a mandatory mention of international human rights law. The role of domestic law, including conflicts of law, also requires further consideration.

ARBITRABILITY OF BHR DISPUTES

The Drafting Team noted the importance of the agreement to arbitrate, which sets the scope of the jurisdiction of the arbitral tribunal, but that mandatory law (the domestic law of the seat of arbitration and the law(s) of the state(s) where enforcement is sought) limits the scope of arbitral matters. This varies, sometimes significantly, between jurisdictions.

There was a broad discussion as to whether it is desirable in public policy for individuals to submit human rights claims to arbitration. The particular concern was over the pre-emption of stricter standards by a judicial process. This served to highlight the importance of designing a BHR arbitral mechanism with the inclusion of certain safeguards worthy of preclusive effect. Examples where victims have availed rights under domestic law include the Bangladesh Accord, the Dutch Apparel Accord, and the Austrian Holocaust settlement process. It was further discussed that the particular human right and the manner of giving consent should inform such considerations. It was also discussed that an option to arbitrate evoked unilaterally by the victim against the respondent might better address this concern.

ENFORCEMENT

As concerning the enforcement of BHR arbitral awards, the Drafting Team noted that the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), with 157 Contracting States, generally ensures fewer obstacles for international enforcement than decisions from national courts. It was noted that this added legal security could serve as an incentive for consent.

The Drafting Team also noted that the New York Convention recognizes a public policy exception for the recognition and enforcement of foreign arbitral awards and that this is where issues might arise concerning enforcement where human rights claims are concerned. It was discussed that the public policy exception can vary between national jurisdictions (*e.g.* different concepts of privacy rights). It was noted that there does not seem to be any case law to point to the non-enforcement of an award solely for including human rights.

Further enforcement issues under the New York Convention where discussed inasmuch as the Convention allows parties to make reservations limiting the scope of application to commercial cases. While courts have generally interpreted this broadly, there was discussion as to whether this would amount to some exclusion of BHR cases, particularly considering third party rights. The New York Convention was not contemplated in a tort regime when it was adopted, but has been interpreted to include tort claims where there is a defined legal relationship. Further consideration will have to be given to scenarios where the legal relationship is difficult to define.

It was further discussed that for practical reasons the issue of enforcement merits careful consideration but it cannot be ensured by a set of arbitral rules. Moreover, it was noted that arbitral rules couldn't resolve technical aspects of the New York Convention. There could be cases where awards will not be enforced, as is the case with some foreign judgments or some judgments by human rights tribunals. It was further discussed that due process concerns for enforcement could inform the drafting of BHR Arbitration Rules.

It was noted that mistake of law was not a ground to deny recognition and enforcement under the New York Convention. This would have to be considered carefully vis-à-vis waiver of other forms of recourse.

TRANSPARENCY

The Drafting Team felt that the default rule in BHR arbitration should be that of transparency, with some exceptions that consider confidentiality concerns not only of businesses but also of victims. It was noted that the confidentiality concerns of victims could not be underestimated in light of lethal threats made against both victims and their defenders.

The Drafting Team noted that the transparency provisions could be modelled on the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

The Drafting Team discussed a series of issues related to the matter of transparency that warrant further debate. Questions arose as to whether and under what criteria an arbitral tribunal should be entrusted with the discretionary power to make determinations concerning transparency. Moreover, the Drafting Team discussed how the discretionary power might be defined in a set of rules so that the tribunal take into account both the public interest and the parties' interest in a fair and efficient resolution process. There was also discussion concerning the transparency of settlement decisions. Moreover, it was discussed whether to establish a minimum threshold of transparency, for example, the legal reasoning of the award.

AMICUS CURIAE SUBMISSIONS

The Drafting Team noted the paramount importance of the inclusion of *amicus curiae* submissions considering the difficulty of assembling a complete roster of experts in each type of case. It was noted that this issue is tied closely to the issue of transparency, since *amici* will need to depend on access to pleadings to form their submissions.

Similar to provisions in Article 4 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, it was noted that consideration should be given to determine the interest of the party preparing the submission in the outcome of the dispute and the financing of the submission, among other considerations concerning impartiality and utility.

The Drafting Team also noted that careful consideration should be given on how to define the discretionary power of the arbitral tribunal to accept or deny *amicus curiae* submissions.

SELECTION AND ACCOUNTABILITY OF ARBITRATORS AND EXPERTS

The Drafting Team discussed the challenge of reconciling party autonomy with the importance and difficulty of determining and appointing knowledgeable and impartial arbitrators and, if necessary, experts. The discussion focused on whether or not the creation of lists was manageable and who would be responsible for their design and maintenance, whether some or all arbitral institutions, or other. It was noted that a reliable database that contemplates both geographical diversity and equitable gender representation would be important as the pool of arbitrators in and of itself concerns issues of rights-compatibility. There was concern addressed about preventing the capture of a system by a small pool of arbitrators. The Drafting Team also agreed that further consideration would need to be given to the issue of an appointing authority.

The issue of the dual arbitrator/counsel role was discussed in the context of maintaining the independence and impartiality of arbitrators. There was a discussion as to whether to provide the complete prohibition or the partial prohibition over some prescribed time as any prohibition or otherwise limitation over party choice may be at odds with the ultimate goal of adjudicator selection- choosing someone who is best equipped to handle the dispute.

The Drafting Team also discussed the concern of repeat challenges to the constitution of the arbitral tribunal and whether this could be addressed in the Rules.

APPELLATE REVIEW AND AWARD COMPLIANCE

The Drafting Team acknowledged that appellate review is not a default feature of current arbitral rules. Moreover, it was noted that appellate review is not provided for in the Bangladesh Accord or the Dutch Agreement on Sustainable Garment and Textile.

The Drafting Team noted that silence in arbitral rules on appellate review allows for party agreement on an appeal process but without a direct mechanism in place. Despite the absence of an express mention of an appellate mechanism, it was noted that proceedings to deny recognition and enforcement remain a possibility to challenge an award.

The Drafting Team noted a concern over reconciling the parties' interest on a final, fair and efficient procedure on one hand and concern about developing a body of law where mistaken decisions are adopted. The discussion contemplated whether the main goal of a BHR arbitral system was to provide remedy to victims or to promote a coherent system of law. Although the former has been the primary goal of the initiative and the latter was viewed as a possible ancillary contribution by BHR arbitration, it was noted that for different classes of victims or business enterprises, the concerns are diverse. One class might value efficiency while others value correctness and might prefer litigation.

In addition to appellate review, the Drafting Team considered a system of award compliance or review. It was noted that oversight of an award is not unprecedented but that costs and the expanded jurisdiction (including the long-term existence) of the arbitral tribunal would have to be considered (*e.g.* UNCLOS tribunals). The possibility of provisional measures was briefly discussed as well.

COSTS AND EQUALITY OF ARMS

The Drafting Team discussed ways to make arbitration affordable to victims and their representatives. There was discussion as to the extent to which the issue of costs could be handled within the Rules or through external mechanisms; for instance, a funding mechanism, the feasibility of pro bono arbitrators or counsel, assistance of counsel funded by a State.

The Drafting Team also discussed the discretion of the arbitral tribunal to allocate costs or to adopt a no cure, no pay system.

COLLECTION OF EVIDENCE

As related to the issue of costs and the equality of arms, the Drafting Team discussed the difficulty and the costs associated with the collection of evidence. On this issue, the Drafting Team noted it was important to consider what is particular about adjudicating business-related human rights abuses. The fear of victims was noted and discussions considered witness protection and anonymity. The discussion focused on what could be done to address particular legal and practical challenges concerning the collection of evidence within the Rules; including, electronic filings, reversal of the burden of proof, class action provisions.

INDIGENOUS PEOPLE

The Drafting Team discussed the importance of dedicating more consideration to the issue of representation of indigenous people, with attention also to mass claims procedures. Moreover, the Drafting Team noted the importance to use more inclusive nomenclature: "marginalized and/or vulnerable populations" (this could include women, children, people with disabilities, indigenous peoples, etc.).

COLLECTIVE REDRESS/MASS CLAIM PROCEDURES

The Drafting Team noted that more consideration be given to mass claim procedures and whether and how to develop specialized rules that account for multiple proceedings and witness protection.

REMEDY

The Drafting Team noted that the rubric to remedy under human rights treaties is broad. There was concern voiced not to replicate an investor-state model of damages, when human right claims by their nature have a broad set of remedies.

FRIVOLOUS CLAIMS

The Drafting Team addressed the issue of frivolous claims and how this could be managed in a set of arbitral rules, particularly in relation to the establishment of an arbitral tribunal and the related issue of costs.

MEDIATION AND ARBITRATION

While the Drafting Team recognized that its principal task is the drafting of BHR arbitration rules, it was noted that the UNGPs emphasize that the ideal model to resolve BHR issues to the benefit of both the rights holders and businesses is an amicable solution reached by negotiation or mediation and avoid escalation into legal disputes. The Drafting Team discussed the relationship of arbitration, and arbitration rules, to the possibilities for mediated settlements between the parties. Reference was made to the CEDR Rules for the Facilitation of Settlement in International Arbitration.

The Drafting Team discussed the attractiveness of ADR and particularly mediation from a business perspective against the issue of equality of arms. Members of the Drafting Team related experiences of successful mediations, but often only if the victims had a strong underlying legal case so that they negotiate from a position of strength, which depends on a case-by-case basis.

While no clear consensus was reached on the express inclusion of mediation provisions in the Rules, a number of specific issues emerged and were debated: concerns over confidentiality of a negotiated settlement, scope and suitability of mediation for serious human rights violations.

MODEL FOR THE BHR ARBITRATION RULES: UNCITRAL ARBITRATION RULES

The Drafting Team reached general consensus that the UNCITRAL Rules would be an apt model from which to work, noting that they were designed to be broad and neutral and emanated from a process that

included diverse stakeholders, including members of civil society. Additionally, the UNCITRAL Rules are the most used arbitration rules worldwide and were completely modernised in a three-year revision process in 2010, followed by the subsequent adoption of the UNCITRAL Transparency Rules in 2013. Still, the goal of the drafting process is to develop rules designed specifically for BHR cases.

The Drafting Team agreed that further consideration would need to be given to the issue of an appointing authority.

OTHER ISSUES

The Drafting Team agreed that there remained a number of outstanding issues that for limits on time were not discussed in the first meeting but that may need to be addressed in concept papers, in conjunction with the sounding boards and in future plenary debates: forms of victim participation, risk of parallel proceedings, preliminary measures, injunctive relief, due process concerns, conflicts of law, arbitration agreements and pathological clauses, lack of precedent, interrelation to national courts, special issues for particular industries, special issues concerning state involvement, witness protection, the distinction between small claims and gross human rights violations.

While no rules drafting was undertaken in the first meeting, the Drafting Team did discuss the approach to the drafting process. It was noted that focus would be given to address the main challenges associated with access to a remedy in cases concerning business-related human rights abuses. It was also noted that great consideration would have to be given to balancing specific default rules and clarity with maintaining flexibility. It was noted that rationales for the Rules would be helpful for training purposes or for future interpretation by arbitral tribunals.

IV. ORGANISATION OF THE PROJECT INCLUDING NEXT STEPS

Concerning the process of communication and information sharing during the drafting process, a space will be created on the CILC website to deposit information and documents. Sounding Boards of diverse experts (see below) will be assembled so as to gain actionable input on the outputs at various points during the preparation of the Rules.

Following the first meeting of the Drafting Team, and in preparation for drafting, members of the Drafting Team will prepare briefing papers to address the main issues in more detail and discuss various options for whether and how those issues will be reflected in the Rules. The Drafting Team provisionally agreed that, based on these papers, it would prepare a concept or "elements" paper on the scope of the Rules. The concept paper would be made available online, at which point input will be requested publicly and from members of the Sounding Boards (see below). After the various inputs are considered, the Drafting Team would prepare a first draft of the Rules. At this point, a second consultative process would be held to gain input. The aim of the project is to complete the final version of the Rules in late 2019.

V. SOUNDING BOARD AND OUTREACH

The Drafting Team discussed how to best involve the various stakeholder groups and how Drafting Team members may contribute in this challenge. The Drafting Team seeks the participation of a diverse set of experts to provide input on the entire drafting process, including the concept paper and the first draft of the Rules. It agreed to create a Sounding Board consisting of experts to provide that input and feedback.

After documents are made available on the project website, Sounding Board Members will be contacted via email with particular instructions concerning the consultative procedure.

The Sounding Board will be open to all interested experts. Participation in the Sounding Board would not constitute approval of the project or of the content of the Rules. Members of the Sounding Board could choose to be listed on the project website or could provide input without publicity. Depending on interest expressed in the project, members could include some or all of the following:

Human rights NGOs	Law firms
Multinational business enterprises Business associations	Law professors
Lenders and investors	Human rights victims and victims associations
Labour organizations and trade unions	Bar associations
Corporate counsel	Sports associations
Human rights lawyers and advocates	National governments
International and regional arbitration institutions	International Organizations
International arbitrators	National Contact Points
International mediators	National Human Rights Institutions
Development banks	Export credit agencies
BHR networks	Former international human rights tribunal judges
	Environmental NGOs