ALERT MEMORANDUM

The Launch of the Hague Rules on Business and Human Rights Arbitration

January 29, 2020

Businesses are increasingly being evaluated by stakeholders on the basis of their overall impact on the economy, the environment and society, including on human rights. As scrutiny from stakeholders grows, disputes relating to the human rights impacts of business activities are likely to arise.

As we noted in our alert memorandum on "Navigating the ESG Landscape," Selected Issues for Boards of Directors in 2020, a number of jurisdictions have enacted legislation to strengthen transparency on the environmental, social and governance ("**ESG**") implications of business activities. Certain of these regimes provide for private rights of action against companies.[1]

Whilst certain claimants have engaged in innovative litigation strategies to bring human rights claims under existing tort and contract legal regimes,[2] the emerging field of business and human rights arbitration ("**BHR arbitration**") provides a bespoke forum for the settlement of disputes relating to the human rights impacts of business activities.

To this end, the Hague Rules on Business and Human Rights Arbitration (the "**Hague Rules**") were published in December 2019. The Hague Rules were developed by the Business and Human Rights Arbitration Working Group, a private group of international practicing lawyers and academics, assisted by the Center for International Legal Cooperation (the "**CILC**").

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The Hague Rules aim to provide a viable non-State-based mechanism for the resolution of disputes related to the human rights impacts of business activities. Both disputes between affected rights-holders and businesses, and disputes between businesses, may fall within the scope of the Hague Rules, if the parties that consented to arbitration choose to apply them.

The potential of BHR arbitration for the resolution of disputes involving a range of businesses and stakeholders is significant. However, uncertainty persists regarding the appeal of BHR arbitration to potential users and how tribunals may apply the Hague Rules in practice.

This alert memorandum highlights the scope of the Hague Rules and outlines key legal and procedural considerations for users, as well as considering potential future directions for the emerging field of BHR arbitration.

Background to the Hague Rules

The Hague Rules aim to address a perceived "remedy gap" that existed in the UN Guiding Principles on Business and Human Rights (the "**UN Guiding Principles**"), a set of guidelines endorsed by the UN Human Rights Council in 2011, that aim to prevent and address the adverse impacts of business activities on human rights, and provide remedies to victims.[3] The UN Guiding Principles encouraged States to "*consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms*."[4] To this end, the Business and Human Rights Arbitration Working Group and the CILC promoted the development of BHR arbitration to provide a forum for redress, and established a Drafting Committee in 2017 to begin drafting the Hague Rules. Following consultations with interested stakeholders in 2018, draft rules were published in June 2019. The Hague Rules were published on December 12, 2019, following further consultations.

The Hague Rules are based on the Arbitration Rules of the United Nations Commission on International Trade Law (as amended in 2013) (the "**2013 UNCITRAL Arbitration Rules**"), adapted to take into account the specificities of business and human rights disputes.

Scope of the Hague Rules

Consent to arbitrate

Arbitration under the Hague Rules is premised on the consent of the parties to resolve their disputes via arbitration. The Hague Rules shall apply "[w]*here parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under these Rules*."[5] The consent of the parties to submit their disputes to arbitration shall be evidenced in an arbitration agreement.[6] The Hague Rules expressly recognize the competence-competence principle, providing that "[t]*he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*."[7]

Parties may agree to include arbitration agreements within contracts entered into with businesses or stakeholders, particularly in supply-chain contracts, in circumstances where complex supply chains may pose human rights risks. Parties may also enter into separate arbitration agreements to submit certain disputes, such as those with interested stakeholders, to BHR arbitration.

A further possibility is that multiple parties may enter into multilateral agreements that provide for BHR arbitration within a business sector that poses a particular human rights risk. One such multilateral agreement, the Accord on Fire and Building Safety in Bangladesh (the "**Bangladesh Accord**"), was entered into between a number of multinational corporations and trade unions in the wake of the Rana Plaza catastrophe, which involved the collapse of a garment-factory building in Dhaka, Bangladesh in 2013.[8] Two arbitrations arising from the Bangladesh Accord were commenced by trade unions against two fashion brands and were administered by the Permanent Court of Arbitration (the "**PCA**") in The Hague. Both cases were ultimately settled in 2018,[9] but represent a significant example of the use of BHR arbitration for the resolution of human rights disputes.

We note that the Hague Rules provide that "[t]*he characterization of the dispute as relating to business and human rights is not necessary for jurisdiction where all the parties to the arbitration have agreed to settle a dispute under these Rules*,"[10] although it is expected that disputes to be submitted to arbitration under the Hague Rules will typically have a significant human rights component.

Potential users

The Hague Rules apply between parties who have agreed to submit disputes "*in respect of a defined legal relationship, whether contractual or not*," to arbitration.[11] The scope of a defined legal relationship may be interpreted broadly by tribunals, and may include the relationships between businesses and individuals, trade unions and community organizations.

The role of State-based remedies

With their origin in the UN Guiding Principles, the Hague Rules were designed to provide parties with a

non-State-based remedy. However, the Preamble to the Hague Rules emphasizes that "[a]*rbitration under the Rules is not meant as a general substitute for State-based judicial* […] *mechanisms*," which should remain the primary form of remedy for those affected by the human rights impacts of business activities.[12] The interplay between domestic remedies and BHR arbitration in practice remains to be developed.

Commentary provided by the Drafting Committee notes that the Hague Rules may be used to address gaps in domestic remedies available to claimants, such as in circumstances where claimants are unable to pursue claims domestically due to issues of capacity, procedural, jurisdictional or substantive legal restrictions, and issues concerning the length, unpredictability and the cost of pursuing claims in domestic fora. However, the Commentary also notes that BHR arbitration "*may also serve a complementary function in the exercise of the parties' autonomy to submit their disputes to the dispute resolution procedure that best suits their needs, in particular for business and human rights obligations voluntarily undertaken over and above existing legal obligations*."[13] Parties may choose to submit their disputes to BHR arbitration rather than to domestic courts for a number of reasons, such as the ability to select arbitrators with particular experience in human rights issues, or the perceived neutrality of BHR arbitration as a forum.

We note that the Hague Rules do not require claimants to exhaust domestic remedies.

Alternative Dispute Resolution and non-judicial remedies

Parties to arbitrations under the Hague Rules "*shall endeavour to resolve any dispute in good faith through negotiation, conciliation, mediation, facilitation or other collaborative settlement mechanisms*."[14] To support and encourage the use of collaborative settlement mechanisms, the Hague Rules contain provisions on mediation and other forms of collaborative settlement, providing *inter alia* that offers, admissions and statements made in the context of a mediation shall be inadmissible in the arbitral proceedings.[15]

Applicable Law

Arbitral tribunals under the aegis of the Hague Rules shall apply the substantive law designated by the parties, failing which the tribunal shall apply the law or rules of law it determines to be appropriate.[16] In addition, tribunals are required to "*take into account any usage of trade applicable to the transaction, including any business and human rights standards or instruments that may have become usages of trade*."[17] Commentary provided by the Drafting Committee notes that such usage of trade is not intended to vary the applicable law, but that commitments by businesses to human rights standards within a particular industry may be drawn upon.[18] Although it remains to be seen how tribunals operating under the Hague Rules will interpret human rights commitments made by businesses, it bears noting that the UK Supreme Court in the case of *Vedanta Resources Plc and another v Lungowe and others* permitted claims regarding a Zambian mine brought by local residents that drew upon a sustainability report published by Vedanta.[19]

Parties deciding on the applicable law for BHR arbitration are likely to consider the extent to which international human rights law is integrated into the domestic law they choose to apply.

Procedural Matters

The Rules are generally based on the 2013 UNCITRAL Arbitration Rules, with certain noticeable variations to reflect *inter alia* the particular characteristics and requirements of business and human rights disputes.

Appointment of Arbitrators

The Secretary-General of the PCA shall act as appointing authority for arbitrations under the Hague Rules, in the absence of agreement between the parties to the contrary. Unless the parties agree otherwise, or the appointing authority considers that a sole arbitrator is appropriate, the tribunal shall consist of three arbitrators.[20]

Part of the attractiveness of BHR arbitration is that parties may nominate arbitrators who are specialists in business and human rights issues. Indeed, the Hague Rules require that "[t]*he presiding or sole arbitrator shall have demonstrated expertise in*

international dispute resolution and in areas relevant to the dispute, which may include, depending on the circumstances of the case, business and human rights law and practice, relevant national and international law and knowledge of the relevant field or industry."[21]

Although certain arbitral institutions have developed or are developing codes of conduct for arbitrators,[22] the incorporation of a Code of Conduct in the Hague Rules is noticeable. The Code of Conduct sets out *inter alia* certain disclosure requirements and general ethical duties,[23] with which arbitrators must comply.[24]

Multiparty claims and the role of third parties

The Hague Rules provide that, "[i]*n so far as possible, claims with significant common legal and factual issues shall be heard together*,"[25] increasing the likelihood of class arbitrations created by the consolidation of claims brought by multiple parties affected by similar harm.

In addition, a tribunal operating under the Rules "*may allow one or more third parties to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal beneficiary of the underlying legal instrument that includes the relevant arbitration agreement*."[26] No requirement that any party consents to joinder exists, although parties must be given the opportunity to be heard on the joinder request. Seeking joinder may prove attractive to parties as a result, but it is unclear how widely the scope of this provision, and the concept of a third party beneficiary, may be extended.

BHR arbitration is also fertile ground for third party funding or interventions by *amici curiae*. In line with the recent Proposals for Amendment of the ICSID Rules,[27] the Hague Rules require the disclosure of third party funding.[28] The Hague Rules also provide that the tribunal may, following consultation with the parties, invite or allow a third party to file a written submission in the proceedings.[29] A number of interested non-governmental organizations have sought to intervene in recent investment arbitrations,[30] and this trend is likely to continue apace in BHR arbitration.

Balancing the interests of parties

Many disputes submitted to BHR arbitration are likely to involve significant imbalances between the parties. Accordingly, the Hague Rules require, in circumstances "[w]*here a party faces barriers to access to remedy,* […] [that] *the arbitral tribunal shall, without compromising its independence and impartiality, ensure that such party is given an effective opportunity to present its case in fair and efficient proceedings*."[31] It remains to be seen how tribunals will apply this discretion in practice, although it is likely that tribunals may be more proactive and inquisitorial in circumstances where significant imbalances exist.[32]

Urgent or Interim Relief

Prior to the constitution of the tribunal, a party seeking urgent interim measures may request the appointing authority to appoint an emergency arbitrator, provided that the parties have not agreed to another pre-arbitral procedure that provides for the granting of interim or similar measures.[33]

Following the tribunal's constitution, parties may then apply to the tribunal for interim relief, [34] and may also apply to domestic courts for such relief.

Transparency

Articles 38 to 43 of the Hague Rules set out a general transparency regime, which envisages that specified submissions and decisions, oral hearings, and details of the parties and arbitrators, shall be made public.

However, arbitral tribunals under the aegis of the Hague Rules have broad discretion to vary the degree of public transparency of the proceedings, taking into account, *inter alia*, the public interest in transparency, the safety, privacy and confidentiality concerns of those interested in or affected by the proceedings, and the interests of the parties and stakeholders.[35] In the event that "*all parties are legal persons of a commercial character and the arbitral tribunal determines that there is no public interest involved in the dispute*," tribunals are permitted not to apply the transparency regime,[36] in line with the generally confidential character of commercial arbitration.

Efficiency and Costs

The Hague Rules envisage that, in principle, a loser-pays approach to costs is adopted.[37] However, a tribunal may use its discretion to apportion costs between the parties as it considers reasonable, and may consider factors including the financial burden on each party and any public interest.[38] Any third party funding received by a party may also be considered by the tribunal in its determinations on costs.[39]

The Hague Rules contain a variety of mechanisms aimed at limiting the cost and duration of proceedings. For example, where only monetary compensation is sought, and unless the parties have agreed otherwise, the PCA may appoint a sole arbitrator to conduct expedited arbitration proceedings and render an award within six months of the appointment.[40] In addition, the Hague Rules provide, unlike the 2013 UNCITRAL Arbitration Rules, a means for the early dismissal of claims or defenses that are manifestly without merit.[41]

Enforcement

No mechanism for the enforcement of arbitral awards is provided for in the Hague Rules. Instead, the enforcement of awards rendered under the Hague Rules is to be governed by domestic law and international treaties, notably the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). Art. 1(2) of the Hague Rules provides that "[t]*he parties agree that any dispute that is submitted to arbitration under these Rules shall be deemed to have arisen out of a commercial relationship or transaction for the purposes of Article I of the New York Convention*."[42]

Whilst the consent of a State to arbitration under the Hague Rules shall waive sovereign immunity from the jurisdiction of the tribunal, such consent shall not amount to a waiver of the State's immunity from execution.[43]

Future Directions

As businesses become increasingly focused on the human rights impacts of their business activities, and the compliance risks these pose, an awareness of BHR arbitration as a method of dispute resolution is likely to grow.

Those businesses for whom BHR arbitration may prove particularly attractive are likely to be those with extensive, multi-jurisdictional supply chains, where certain stages of the supply chain may expose the business to significant human rights risks.

Businesses concerned about the human rights impacts of their activities may consider internal or external ESG audits of their business activities. In addition to being required under domestic legislation in certain jurisdictions,[44] the preparation of annual statements on the human rights and ESG impacts of business activities may also assist businesses in assessing risk.

Businesses that do identify human rights risks should consider whether to enter into arbitration agreements applying the Hague Rules once a dispute arises, or to include the model clauses appended to the Hague Rules, or variations thereof, in high-risk contracts.

BHR arbitration has significant potential as a means for resolving complex, international disputes involving a variety of parties and stakeholders. However, the system of BHR arbitration under the Hague Rules is premised on the consent of parties to arbitration.

In practice, BHR arbitration under the Hague Rules is likely to be considered alongside a repertoire of other domestic and non-judicial methods available to businesses and rights-holders for the resolution of human rights disputes.

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CLEARY GOTTLIEB

1 The United Kingdom's Modern Slavery Act 2015 and France's *Devoir de Vigilance* Law require companies that exceed certain size or turnover thresholds to publish statements on the impact of their operations and supply chains on issues such as human rights, human trafficking and slavery. *See* Modern Slavery Act 2015, section 54; The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, section 2; Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Art. 1. For further information on the United Kingdom's Modern Slavery Act 2015, *see* our alert memorandum *The Modern Slavery Act 2015: Next Steps for Businesses*.

2 One recent case in the United Kingdom considered the extent to which a United Kingdom-domiciled parent company owes a duty of care to third parties that are affected by the actions of a foreign subsidiary. *See Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20. In its decision on jurisdiction, the Supreme Court stated that there was sufficient material for the claimants to continue with their claim against Vedanta, noting that where a parent company takes steps such as training, supervision and enforcement of policies, the parent may assume an independent duty to third parties.

3 *See* United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. HR/PUB/11/04 (2011).

4 United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. HR/PUB/11/04 (2011), Pillar III, Art. 28.

5 The Hague Rules, Art. 1(1).

6 The Hague Rules, Art. 3(3). *See also* The Hague Rules, Commentary to Art. 3, ¶ 1 ("Given the broad scope of the Rules, the term 'arbitration agreement' referred to under Article 3(3)(c) should be afforded the broadest possible meaning.").

7 The Hague Rules, Art. 25(1).

8 The Accord on Fire and Building Safety in Bangladesh (May 15, 2013).

9 Permanent Court of Arbitration, Press Release: Bangladesh Accord Arbitrations: Arbitrations under the Accord on Fire and Building Safety in Bangladesh between IndustriALL Global Union and UNI Global Union (as Claimants) and Two Global Fashion Brands (as Respondents), "The Tribunal Issues Termination Orders Following Settlement By The Parties" (July 17, 2018).

10 The Hague Rules, Art. 1(1).

11 The Hague Rules, Art. 1(1).

12 The Hague Rules, Preamble (3).

13 The Hague Rules, Commentary to Preamble, ¶ 3.

14 The Hague Rules, Art. 1(6).

15 The Hague Rules, Arts. 47, 56.

16 The Hague Rules, Arts. 46(1)-46(2).

17 The Hague Rules, Art. 46(3).

18 The Hague Rules, Commentary to Art. 46, ¶ 4.

19 *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20, ¶ 58.

20 The Hague Rules, Art. 7(1).

21 The Hague Rules, Art. 11(1)(c).

22 *See, e.g.*, Singapore International Arbitration Centre, Code of Ethics for an Arbitrator; International Centre for the Settlement of Investment Disputes ("ICSID"), Working Paper No. 3: Proposals for Amendment of the ICSID Rules, Vol. 1 (Aug. 2019), p. 294, ¶ 49.

23 The Hague Rules, Code of Conduct.

24 The Hague Rules, Art. 11(2).

25 The Hague Rules, Art. 19(1).

26 The Hague Rules, Art. 19(2).

27 *See* ICSID, Working Paper No. 3: Proposals for Amendment of the ICSID Rules, Vol. 1 (Aug. 2019), p. 37, Rule 14(1) ("A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute ("third-party funding").").

28 The Hague Rules, Art. 55(1).

29 The Hague Rules, Art. 28.

30 *See, e.g., Eco Oro Minerals v. Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 (Feb. 18, 2019); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (Sept. 29, 2003).

31 The Hague Rules, Art. 5(2).

32 *See* The Hague Rules, Commentary to Art. 5, ¶ 1.

33 The Hague Rules, Art. 31.

34 The Hague Rules, Art. 30.

35 The Hague Rules, Art. 38(2).

36 The Hague Rules, Art. 38(5).

37 The Hague Rules, Art. 53(1).

38 The Hague Rules, Art. 53(1).

39 The Hague Rules, Art. 55(3).

40 The Hague Rules, Art. 57(1).

41 The Hague Rules, Art. 26.

42 *See also* The Hague Rules, Commentary to Art. 1, ¶ 2.

43 The Hague Rules, Art. 1(3).

44 *See above*, note 2.