

The Hague Rules On Business and Human Rights Arbitration

Report

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

12 December 2019, Peace Palace, The Hague, The Netherlands

Introduction

on 12 December 2019, in the week of International Human Rights Day, the Hague Rules on Business and Human Rights were launched at a symposium held at the Peace Palace in The Hague. First copies were presented by Judge Bruno Simma, Chairman of the Drafting Team, to the Netherlands Human Rights Ambassador, Dr. Bahia Tahzib-Lie, and the Deputy Mayor of The Hague, Ms. Saskia Bruines.



Picture 1: Launch symposium at the Peace Palace on 12 December 2019

Word of welcome

By Symposium Host Mr. Hugo H. Siblesz, Secretary General
Permanent Court of Arbitration

Host Mr Siblesz welcomed the participants at the launch symposium. Companies have some of the biggest influence in modern society. Their actions and business processes affect people and communities across the globe. For the local community or employees of these enterprises, particularly those in emerging markets, the consequences may sometimes be grave: the violation of their human rights. As PCA Secretary General he emphasized the importance of international arbitration as dispute resolution mechanism in the field of business and human rights. The 2013 Rana Plaza collapse in Bangladesh, which caused the death of over 1,200 people and injured 2,000 more, serves as the prime example of the ultimate consequences of human rights violations. The Bangladesh Accord Arbitrations, which followed, demonstrated the potential of arbitration to address business and human rights cases. The fact that arbitration was available helped those workers achieve a concrete improvement in their working conditions. Of course, rules for arbitration proceedings are not goals themselves. They are tools to obtain results for the parties concerned. It will therefore be up to potential users of the Hague Rules to fulfil their promise.

Symposium opening

By Symposium Chair Prof. Jan Eijsbouts, Member of the Working
Group and Drafting Team

Jan Eijsbouts introduced the Business and Human Rights Arbitration Project. Its background dates from 2013, when the US Supreme Court in the *Kiobel v. Shell* case ruled that the US Alien Tort Statute of 1789 has no extraterritorial effect, thereby denying human rights victims' access to the US courts to obtain damages for alleged violations of human rights. The idea that arbitration could be used as an alternative route, coined by Claes Cronstedt, resulted in the formation of an International Working Group to explore the feasibility and viability of a dedicated arbitration regime as dispute resolution mechanism available to corporations and rights holders to resolve their disputes in the business and human rights field. Jan Eijsbouts then briefly outlined the symposium program.

Presentation of the Hague Rules

By Judge Bruno Simma, Chair of the Drafting Team

As Chair of the Drafting Team, Judge Simma offered the audience a bird's eye view on the drafting process of the Hague Rules on Business and Human Rights. The Drafting Team was composed of experts from various relevant disciplines and regional backgrounds.

Spanning two years of intense and dedicated study and work, involving two broad stakeholder-wide consultations to secure a realistic feedback at each stage, the Drafting Team achieved its mission to complete the Hague Rules. The Center for International Legal Cooperation (CILC) assisted the Drafting Team that was funded by the City of The Hague with the support of the Ministry of Foreign Affairs of The Netherlands.¹

The Drafting Team held sessions at CILC in The Hague, the excellent and very efficient institutional backbone for our project, in January 2018, October 2018, April 2019 and October 2019. It also conducted numerous other meetings via electronic means.

In order to avoid working in splendid isolation and to solicit a wide range of views on its work, the Working Group and the Drafting Team created a Sounding Board of over 220 individuals from different stakeholder groups. These included business, non-governmental organizations, governments, international organizations, human rights lawyers, judiciary, arbitrators, practicing attorneys, academics and others with expertise in human rights, arbitration, operation of supply chains and other topics relevant to the elaboration of the Hague Rules.

These new arbitration rules were written with a focus on the special requirements of human rights disputes and in accordance with the UN Guiding Principles on Business and Human Rights 2011. The Instrument is very different from judicial



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Judge Bruno Simma
12/12/2019

¹ Click [here](#) for CILC project page

proceedings but serves the same goal of contributing to the realization of human rights.

Thanking the City of The Hague and the Ministry of Foreign Affairs for their support in the realisation of the Hague Rules and the Centre of International Legal Cooperation CILC for their excellent cooperation as institutional partner, Judge Simma then proudly presented the first copies of the Hague Rules to Dr Bahia Tahzib-Lie and Mrs Saskia Bruines.

Keynote remarks

By Dr. Bahia Tahzib-Lie, Human Rights Ambassador of the Netherlands

In her keynote address, Dr. Bahia Tahzib-Lie, emphasized the need to solve persisting human rights challenges in the global supply chains of businesses and contribute to sustainable development for all as called for by the UN Sustainable Development Goals. Accordingly, a paradigm shift is required ‘from business and human rights to the business of human rights’ whereby companies acknowledge that respecting human rights is a good thing for business. Corporations must be able to show, that and how they respect human rights, but also be held accountable in case of non-compliance. The Hague Rules provide a new and promising tool to this latter end.

Quoting Foreign Minister Stef Blok from his Human Rights Lecture at Leiden University on 10 December 2019, Dr Tahzib-Lie said: “Human rights are for everyone, whoever you are, whatever you do, wherever you come from.” Human rights are closely linked to sustainable development, economic security and rule of law.

The Netherlands has been quick in its endorsement of the UN Guiding Principles on Business and Human Rights. They are the second country worldwide to adopt a National Action Plan on Business and Human Rights. Furthermore, they took the lead in the establishment of Multi-stakeholder Industry Sector Agreements on International Corporate Social Responsibility. Companies must be able to show how they respect human rights, e.g. engage stakeholders and publish reports.



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*Dr. Bahia Tahzib-Lie,
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12/12/2019*

Pillar III of the UN Guiding Principles, Victims' access to effective remedy, however, has been given less attention so far. Of course, the Dutch support for an effective non-judicial mechanism in the form of an independent National Contact Point of the OECD Guidelines for Multinational Corporations is important, and companies should provide for or cooperate in access to mediation. Judicial remedies have been underdeveloped, however, and the creation of The Hague Rules on Business and Human Rights Arbitration is an important step to encourage companies to “put people over profit” by providing them and those affected by human rights abuses with a new, consensual, flexible and multipurpose remedy mechanism to resolve business and human rights disputes.

Dr Tahzib-Lie concluded by encouraging the drafters to continue with their contribution to the much needed improvement of the remedy system in the field of business and human rights.

Keynote remarks

By Ms. Saskia Bruines, Deputy Mayor of the City of The Hague

Proud of the image of The Hague as the City of Peace and Justice Ms Bruines emphasized that the human based approach of the Rules to justice is important and a cornerstone for such an approach. Having financially contributed to this undertaking, the City is also proud of the launch of The Hague Rules, which, next to the City's other projects in the field of arbitration such as the Hague Hearing Center, are an additional instrument to help people fight for their rights. They are a common set of rules that everyone can subscribe too and which improve institutions and procedures. They allow for transparency and an equal playing field for companies. She complimented all who contributed to Hague Rules and encouraged all who will need access to get justice to make use of the rules.

Scene setter

Taking a closer look at the salient business and human rights issues in The Hague Rules through the lens of the UN Guiding Principles on Business and Human Rights. By Prof. Steven Ratner and Prof. Ursula Kriebaum, Members of the Drafting Team

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.

6.1. Introductory comments

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.

6.1.1. First, BHR arbitration serves the goal of providing a non-state-based non-judicial remedy for victim's 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.

6.1.2. 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.

6.1.3. 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.

6.1.4. Fourth, the HRs 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.

6.1.5. 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.

6.1.6. 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.

6.1.7. 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.

6.2. Inequality of arms

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 on Business and Human Rights Arbitration 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. Steven 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.

6.2.1 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.

6.2.2. Statement of Claims

Article 22 (4) on the statement of claims 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.

6.2.3 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.

6.2.4 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.

6.2.5 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.

6.3. New requirements on arbitrators

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 Hague 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.

6.4. Applicable law – Article 46

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.



Figure 2: Scene setter by Prof. Steven Ratner and Prof. Ursula Kriebaum

6.5. Duty of the tribunal to satisfy itself of the human rights compatibility of an award

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.

6.6. Protection of parties, witnesses etc.

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.

6.7 Transparency

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.

Multi-stakeholder panel discussion

Moderated by Prof. Anne van Aaken, Member of the Drafting Team

After the break a multistakeholder panel, moderated by Prof. Anne van Aaken, Drafting Team member, discussed the salient issues including strengths and weaknesses for the respective stakeholders and addressed possible wider roll-out of the rules.

The panel consisted of:

- ❖ Prof. Massimo Benedettelli, lawyer and arbitrator, ARBLIT, Professor Bari University Aldo Moro,
- ❖ Dr. Mariëtte van Huijstee, Senior Researcher, SOMO,
- ❖ Prof. Catherine Kessedjian, Prof. Em. University Panthéon-Assas Paris II, arbitrator and mediator, Mediation for Better Business,
- ❖ Mr Adam Smith-Anthony, Omnia Strategy LLP, and
- ❖ Mr. Egbert Wesselink, Senior Adviser Pax.

In her introduction, Prof van Aaken emphasized the broad field of possible applications of the rules as demonstrated by the following non-exclusive listing:

- Disputes between (international) companies and affected rights holders directly;
- Disputes between companies and their suppliers on non-compliance with contractually stipulated conditions in the field of business and human rights;
- Disputes in multi-stakeholder arrangements in the field of business and human rights (such as the Dutch Multi-stakeholder Industry Agreements, the Bangladesh Accord or the Voluntary Principles on Security and Human Rights as potential examples);
- Binding BHR dispute resolution as follow on to non-binding mechanisms such as (e.g. OECD NCP) mediation, which did not result in the solution sought;
- BHR dispute resolution in so-called Global Framework Agreements between individual companies and global unions;
- BHR dispute resolution in the field of mega sporting events (e.g. Olympics, FIFA) and individual sporter cases, now resolved by CAS to the sporters' dissatisfaction;
- BHR dispute resolution in international development finance agreements.

She then asked each of the panel members to comment on a specific aspect relevant for their respective fields of expertise.

Mr Adam Smith-Anthony commented on the position of business, which is not monolithic. Businesses are all different (in terms of sectors, of size and of challenges), so there must be mixed positions with respect to each of the possible but quite different applications listed. Strength of the Rules is definitely their range of application, but the level of comfort with the rules by businesses will be different for each of them. Predictability is key for businesses to join. Companies will be looking at aspects like disclosure requirements and investor interests. He was encouraged by the positive uptake of the UNGPs by business as witnessed by the buy-in by 200 companies of the Human Rights Benchmarks. Also the fact, that the risk of non-compliance with international Human Rights norms is growing, pointed in his opinion to the positive incentives for business to adopt the Hague Rules. Of course, as a general rule companies prefer arbitration over litigation.

Representing civil society, Mr. Egbert Wesselink declared he was still open to the viability of the rules, but he had question marks, whether the underlying language of the Rules would be sufficiently understood. He said he had some trouble seeing, whether a company could accept a case being brought against them using the rules. In his view third-party arbitration could possibly be a major game changer in the field. He cautioned on the issues of costs and trust in the system. Can the rules be trusted? They have much about accountability but need more to be decided on consent. In Mr Wesselink's opinion the rules are a well balanced document indeed, but a lot of work is still to be done to make it useful and attentive to rights holders.

Prof. Massimo Benedettelli commented on the criticism against arbitrability of business and human rights disputes on the grounds of their public interest nature and defended the approach by the Hague Rules. Arbitration is the object of a legitimacy crisis, but it is important to realize that it is neutral and can be instrumental to the implementation of human rights. Arbitration has always been evidence that mankind is a single community. When big companies can be faced with litigation in their home jurisdiction, they will see that arbitration is a better tool because it solves their dispute quickly and once and for all. This may also incentivize corporations to include unilateral offers to arbitrate in their codes of conduct. The argument that arbitration is not in the interest of victims is false, because the victims are free to choose. The real question is who will finance the costs of arbitration on the part of the victims.

Prof. Catherine Kessedjian addressed the interaction between mediation and arbitration. She questioned, whether the scope of the rules encompassing V2B and B2B was sufficiently meaningful indeed in particular given the strong public interest at stake in business and human rights issues. In her opinion, V2B and B2B need to be separated. For her, dispute prevention would be paramount, which leads her to conclude, that the provisions on the links between arbitration and mediation should be given more prominence and elaboration. She also cautioned on the idea to try and make the use of the rules mandatory, which would be less effective than the use of “nudging” to persuade parties to voluntarily accept their application.

Also speaking from the point of view of civil society, **Dr. Mariëtte van Huijstee** commented that she had some hesitation on a practical level given the fact that until now the only incentive for business to use arbitration had been in the Bangladesh Accord, but that was based on a high profile incident. She would expect, that the appetite to embrace the mechanism would not be very high at the moment but expected that this could grow as the negotiations progress on a draft UN Treaty on BHR. She added that more can be done to make The Hague Rules appeal to companies. Finally, she questioned, how the victims would get to know the mechanism.



Picture 3 Panel discussion moderated by Prof. Anne van Aaken

Prof. van Aaken then asked the question **“How to bring the gospel to the street?”** Answers included the suggestions from the panel members and the audience.

Concrete suggestions included:

1. the drafting of practical guidance for rights holders **and to adopt the Hague Rules in national procurement procedures** or terms and conditions for multilateral financing as a mandatory judicial remedy mechanism for resolving human rights disputes,
2. the new concept of **“nudging”** – the motivation approach, mentioned by Prof. Kessedjian, of positive reinforcement and rewarding by indirectly suggesting change behavior rather than using legislation or enforcement, – as a tool to encourage companies to apply the new arbitration rules, and
3. the possible use of **imposed settlements as restitution requirements**, currently practiced in the field of corruption and antitrust. In those contexts, private redress is linked, however, to public enforcement by the State, but that is not necessarily applicable in a business and human rights issue, where criminal exposure to and prosecution of corporations is limited.

Closing remarks

By Mr. Claes Cronstedt, Initiator of the Hague Rules project

As initiator of the Hague Rules project, Mr Cronstedt closed the symposium by an appeal on business to act in accordance with the UNGPs corporate responsibility to respect human rights as a global standard of expected conduct and to offer meaningful access to justice, be it in the form of non-judicial remedies as operational grievance mechanisms or mediation or, if those will not achieve a fair and equitable result for the victims, in the form of Business and Human Rights arbitration in accordance with the Hague Rules.

He expressed his great debt of gratitude to all, who had contributed to the successful drafting process of the Rules and their launch and finished by the famous words of Winston Churchill: “Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.” So, a lot will still have to be done in order to give the Hague Rules the broad acceptance they deserve and for that he was counting on the cooperation by many, including business, civil society, the lawyers, the arbitrators, the governments and the academic world.

The launch symposium concluded with a reception, which allowed the participants to further discuss in lively conversations next steps to promote both the spreading and the use of the Hague Rules.

More information

- [Digital version of The Hague Rules](#)
- [CILC project page of The Hague Rules](#)
- [Video and news item of the launch](#)
- Contact: secretariat.simma@cilc.nl