

Comparing the Hague Rules on Business & Human Rights Arbitration with Other Remedies for Human Rights Victims at Sea

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Which remedy for human rights at sea claimants?

FACTORS TO CONSIDER IN EVALUATING REDRESS OPTIONS



Factors to Consider in Evaluating Redress Options

1. State and non-State actors in human rights abuses at sea

- a) human trafficking, treatment of refugees and migrants
- b) labor violations on ships and vessels (e.g. seafood slavery, employment conditions in cruise lines, etc.)
- c) search and rescue of fishermen and mariners in distress
- d) marine environmental violations (e.g. illegal wildlife trade, destruction of coral reefs and natural habitats, artisanal or traditional cultural fishing rights and sustainability practices)
- e) human rights violations from States' maritime law enforcement activities

Factors to Consider in Evaluating Redress Options

2. Intersecting legal regimes

2.1. **On subject-matter:** international human rights law, UNCLOS, IMO conventions (including the Maritime Labour Convention) international environmental law, international maritime law, applicable regional or national law

2.2. **Different assertions of sovereignty and regulatory authority in maritime zones:** high seas (and global commons such as the Area), exclusive economic zones, contiguous zones, territorial seas, internal waters

2.3. **Delineations between exclusive flag State jurisdiction, coastal State jurisdiction, port State jurisdiction, and concurrent jurisdictions**

Factors to Consider in Evaluating Redress Options

3. Accessibility of procedures to human rights victims

3.1. Direct submission of individual claim

3.2. State sponsorship of claim to State or non-State actor

3.3. International organization/civil society submission of claim on behalf of a group, class, or mass claimants

Factors to Consider in Evaluating Redress Options

4. Evidentiary burdens on human rights victims

4.1. Tribunal's fact-finding capabilities

4.2. Evidentiary presumptions, especially on evidence in the control of alleged human rights violator

4.3. Possibility for discovery procedures

4.4. Role of expert reports by UN and other organizations

Factors to Consider in Evaluating Redress Options

5. Reparative measures available to human rights victims

5.1. Treaty-based

5.2. Contract-determined

5.3. In the absence of stipulation, reliance on any **default reparative rules** in the controlling jurisdiction (e.g. Part II of Articles of State Responsibility; coastal State's law determining relief for tort, contract, or criminal violations; flag State rules)

Features to consider

THE HAGUE RULES ON BUSINESS & HUMAN RIGHTS ARBITRATION



Consent to Arbitrate

- May exist well in advance of any disputes to ensure stability between contracting parties (e.g. labor unions and private sector firms).

See Annex to the Hague Rules, providing model clauses **pre-dispute submission to arbitration for contracts** as well as other agreements or instruments

Consent to Arbitrate

- Could be negotiated to resolve existing disputes

See Annex to Hague Rules:

Model submission agreement for existing disputes

Model clauses to incorporate the Rules into existing arbitration agreements

Arbitral Procedure and Expedited Arbitration

- Hague Rules, Section III (Arbitral Proceedings)

Article 18(1): “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expenses and to provide **a fair, efficient, culturally appropriate and rights-compatible process** for resolving the parties’ dispute, including in particular by giving **due regard to the urgency of addressing the alleged human rights impacts.**”

Arbitral Procedure and Expedited Arbitration

- Hague Rules, Article 57:
 1. Unless the parties have agreed otherwise, **where only monetary compensation is sought and the appointing authority determines that, in view of the circumstances of the case, it is appropriate to appoint a sole arbitrator** pursuant to Article 7, para. 2, the following expedited procedures shall apply:
 - (a) All time limits under the Rules shall in principle be halved;
 - (b) The proceeding shall be decided on the basis of written statements and documents without an oral hearing; and
 - (c) The final award shall be made within six months from the date of the appointment of the sole arbitrator.
 2. Once appointed, the sole arbitrator may determine that the expedited procedures shall not apply.

Third Person Submissions

- Hague Rules, Art. 28(3):

In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

- (a) Whether the third person has a **significant interest in the proceedings**
- (b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing **a perspective, particular knowledge, or insight that is different from that of the parties.**

Tribunal-Appointed Experts

- Hague Rules, Art. 34(1):

After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal....

[Identical to 2013 UNCITRAL Rules, Art. 29]

Transparency

- Hague Rules, Arts. 38-43 (Section IV)
 - similarities to UNCITRAL Transparency Rules
 - flexibility on the part of the arbitral tribunal to adapt to the needs of the parties to a BHR dispute
 - adaptations to BHR disputes (e.g. business or contractual confidentiality provisions among compelling grounds for non-disclosure)

Reparative Scope

- Hague Rules, Art. 45(2):

“An award may order **monetary compensation and non-monetary relief, including restitution, rehabilitation, satisfaction, specific performance and the provision of guarantees of non-repetition.** An award may also contain **recommendations for other measures that may assist in resolving the underlying dispute and preventing future disputes or the repetition of harm,** which shall be binding only if agreed by the parties.”

Domestic or transnational litigation, UN human rights treaty body procedures

SOME POINTS OF COMPARISON



Points of Comparison

1. Applicable Law

- Hague Rules Art. 46 (1) and (2): parties stipulate, but if they do not, then the arbitral tribunal applies the law or rules of law “which it determines to be appropriate”. This will accommodate the entirety of International Human Rights Law, Environmental Law, applicable business and human rights standards, as well as any “instruments that have become usages of trade”
- In contrast: narrower scope of applicable law in domestic or transnational litigation, or in individual UN human rights treaty bodies

Key Differences

2. Flexibility, adaptability and responsiveness of proceedings and available reparative measures

- Limitations within domestic laws, jurisdictional competences of international courts, as well as limited mandates under UN treaty body procedures
- Involvement of third persons and experts widens the possible resources for fact-finding available to Hague Rules BHR arbitral tribunals

Key Differences

3. Binding legal effect and enforceability in different jurisdictions

- Enforceability under 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards
- No statute of limitations on enforcement, generally, but consider the rules of the forum for enforcement
- Final and unappealable arbitral awards, unless the award is vacated according to the 1958 New York Convention
- No 'home court' advantage for any one party
- Can enable the resumption of relationships between disputing parties (cf. garments sector and labor unions after Bangladesh Accords)
- Domestic or transnational litigation is jurisdictionally-specific, and enforcement depends on the strength and resources of the prevailing party in the State concerned. UN treaty bodies' recommendations are addressed to revising State measures pursuant to the reportorial and communications procedures – not tailored to individual claimants' reparative redress in all circumstances.

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9 July 2020

Webinar: Humanity at Sea and Shearman & Sterling
Arbitration as a Means of Effective Remedy for Human Rights
Abuses at Sea

