Resolving Business and Human Rights Disputes – Is Arbitration the Way to Go?

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Table of Contents

Abstract

The insufficient level of protection afforded to human rights violations caused by business-related activities of multinational enterprises has recently begun to garner increased attention. On an intergovernmental level, the elaboration of an internationally binding treaty regulating the activities of transnational corporations is underway. States have also taken initiatives on a national level to reflect their commitment in

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implementing the UN Guiding Principles on Business and Human Rights. In both respects, much work remains ahead. Against this background, a group of prominent lawyers have suggested the use of arbitration as an alternative venue for resolving business and human rights disputes. After a span over five years of concept elaboration, public consultation and drafting, the idea has materialised in the creation of the Hague Rules on Business and Human Rights Arbitration (the Hague Rules or Rules), which were officially launched on 12 December 2019. This paper aims to take stock of the proposed Rules and the context of their appearance and examine if arbitration is a suitable medium for resolving business-related human rights infringements. In doing so, it discusses the legal framework governing the confluence of business and human rights as well as the features which speak both in favor and against arbitration as a means of settling business-related human rights disputes. The provisions of the Hague Rules are addressed in detail, particularly where default rules where tailored to better respond to the needs of human rights disputes. The paper concludes with an assessment of arbitration's potential to ensure protection and enforcement of human rights in international business and reflects whether the Rules are robust enough to empower victims in this endeavor.

Keywords: business, human rights, arbitration, the Hague Rules, victims, corporate accountability, human rights due diligence, compliance

Multinational enterprises operating at regional (MNEs) or global (GNEs) scales are no rare occurrence in today's globalised marketplace. The ever increasing cross-border trade and flow of capital poses however serious challenges to states' regulatory capacity (or at least, the efficiency thereof), leading to what some authors have dubbed as a "governance gap".[1] This gap allegedly allows, on the one hand, businesses to carry on without being held accountable for their human rights violations and on the other hand, to deny victims of such violations their right to an effective remedy due to oftentimes slow, corrupt and inefficient judiciaries. Ideally, said gap should be addressed "through improvements in the functioning of national courts and further development of private international law rules applicable to cross-border disputes involving multinational enterprises",[2] however such solutions are not readily available.

Starting from this premise, a group of prominent lawyers have proposed the use of arbitration[3] as a complementary, non-binding, gap-filling resolution mechanism for

1 *Cronstedt/Thompson,* Harv. Int. Law J. 2016/57, p. 66, ft. 2 referring to Ruggie.

2 *The Drafting Team of the Hague Rules on Business and Human Rights Arbitration*, Paper on Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process (Elements Paper), November 2018, available online: https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE.font12.pdf (08/03/2020).

3 The idea, coined by Claes Cronstedt, originated in 2013 in the aftermath of the *Kiobel v. Shell* case when the US Supreme Court ruled on the non-extraterritoriality of the US Alien Tort Statute effectively denying victims to apply to US courts for damages resulted from alleged human rights violations.

human rights disputes arising in an international business context (BHR Arbitration). After a span of over five years of concept elaboration, public consultation and drafting, this idea has materialised in the creation of the Hague Rules on Business and Human Rights Arbitration (the Hague Rules or Rules).

Consequently, this paper aims to take stock of the proposed Rules and the context of their appearance and examine if arbitration is a suitable medium for resolving business-related human rights infringements.

A. Emerging norms

The legal framework governing the confluence of business and human rights is merely emerging. The leading soft-law instrument on state and corporate accountability for human rights is the UN Guiding Principles on Business and Human Rights (Guiding Principles), which was endorsed[4] by the UN Human Rights Council in 2011. The Guiding Principles were developed by the then-UN Secretary-General's Special Representative for Business and Human Rights, Professor John Ruggie, and rest on three fundamental pillars: (i) the state's obligation to *protect* human rights; (ii) the corporate responsibility of business enterprises to *respect* human rights; and (iii) the access to appropriate and effective *remedy* for those whose rights were breached.[5]

By the same UN Resolution, a Forum on Business and Human Rights was established to "discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights".[6] The Forum is the world's largest annual gathering of its kind with more than 2000 participants across various sectors (government, business, academia, human rights institutions, investor and trade organizations, civil society, etc.) coming together in Geneva for a three-day discussion on the "Ruggie framework".[7]

Since 2011, there have been a number of developments to address and enhance the standards and practices with regard to business and human rights. Amongst the most notable ones is the UN Human Rights Resolution 26/9, adopted in July 2014, whereby it was decided to "establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" with the mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business entities".[8] In July 2018, the working group has produced a so-called

4 *HRC*, Resolution, Human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/RES/17/4, 6 July 2011, recitals para. 1.

5 *United Nations,* Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework, 2011, General Principles.

6 *HRC*, Resolution, Human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/RES/17/4, 6 July 2011, para. 12.

7 https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2018ForumBHR.aspx (08/03/2020).

8 *HRC*, Resolution, Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/RES/26/9, 14 July 2014 (passed narrowly), para. 1.

Zero Draft[9] of this binding treaty, which was followed a year later by a Revised Draft.[10] The latter, *inter alia*, provides:

(i) States' duty to prevent human rights violations by requiring all persons conducting business activities (including transnational enterprises) to undertake human rights due diligence and include this obligation in contractual relationships of transnational character; conduct environmental and human rights impact assessments; carry out meaningful consultations with potentially affected groups; report publicly and periodically on environmental, labour and human rights matters.[11]
(ii) States' duty to guarantee access to justice and remedies to victims, including to be protected "from any unlawful interference against their privacy and from intimidation and retaliation",[12] ensure "appropriate access to information",[13] "investigate all human rights violations and abuses effectively, promptly, thoroughly and impartially",[14] allow victims to "submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties"[15] and assist them in overcoming administrative barriers "including through waiving costs where needed".[16]

The fate of the draft treaty remains however uncertain as a number of states have shown reticence[17] or outright opposition[18] to it.

The Guiding Principles have found reflection in the OECD's 2011 revision of its Guidelines for Multinational Enterprises[19] and the European Commission's 2011

9 *OHCHR*, Zero Draft on Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 16/07/2018, available online: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf (08/03/2020).
10 *OHCHR*, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 16/07/2019, available online: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (08/03/2020).
11 Ibid., Art. 5.
12 Ibid., Art. 4(3).
13 Ibid., Art. 4(6).
14 Ibid., Art. 4(10).
15 Ibid., Art. 4(8).
16 Ibid., Art. 4(13).
17 The European Union was reluctant to join the negotiations from the outset and has recently stated that it will not participate in the negotiations in the absence of a mandate from Member States. Several Member States (Spain, France and Belgium) are intervening individually. For more, please read: https://www.business-humanrights.org/en/are-the-eu-going-to-miss-the-boat-on-the-un-binding-treaty/ (08/03/2020), and https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS_BRI(2018)630266_EN.pdf (08/03/2020).
18 The United States of America is not participating at the sessions of the intergovernmental working group and opposes the treaty process as it "runs counter to the consensus of the international community". For more, please read: https://geneva.usmission.gov/2019/10/16/the-united-states-governments-continued-opposition-to-the-business-human-rights-treaty-process/ (08/03/2020).
19 *OECD*, Guidelines for Multinational Enterprises, available online: http://www.oecd.org/daf/inv/mne/48004323.pdf (08/03/2020).

Communication on a renewed EU strategy for Corporate Social Responsibility,[20] to name a few. They have also prompted governmental action in the United Kingdom[21] and the Netherlands,[22] which have adopted national plans on business and human rights.

In recent years, there have been a number of initiatives to translate the Guiding Principles standards into enforceable legal obligations with the French Duty of Vigilance Law of 2017 being one of the most compelling examples therefor.[23] The law mandates the largest companies established in France to conduct human rights due diligence by obliging them to identify and prevent "severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage and health risks"[24] throughout their supply chains (addressing, thus, the activities of the parent companies themselves, the companies under their direct or indirect control, as well as their suppliers and subcontractors).

B. The proposal

In this context, on 13 February 2017, the Working Group on International Arbitration of Business and Human Rights (Working Group) published a Proposal[25] for new arbitration rules. According to its authors, "international arbitration holds great promise as a method to be used to resolve human rights disputes involving business".[26] Already back in 2014, the same authors called for the creation of an international arbitration tribunal[27] on business and human rights in matters of corporate

20 *European Commission*, COM(2011) 68, A renewed EU strategy 2011-14 for Corporate Social Responsibility, 25/10/2011, available online: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf (08/03/2019).

21 *The United Kingdom Government*, Good Business – Implementing the UN Guiding Principles on Business and Human Rights, available online: https://www.business-humanrights.org/sites/default/files/media/documents/uk-national-action-plan-sep-2013.pdf (08/03/2020).

22 *The Netherlands Ministry of Foreign Affairs*, National Action Plan on Business and Human Rights, available online: https://www.business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf (08/03/2020).

23 https://www.lawgazette.co.uk/legal-updates/the-hague-rules-on-business-and-human-rights-arbitration/5102761.article (08/03/2020).

24 *National Assembly (France),* Law No. 2017-399, Relating to the Duty of Vigilance of the Parent Companies and the Companies Giving Orders, 27/03/2017, Article 1, unofficial English translation, available online: http://www.respect.international/french-corporate-duty-of-vigilance-law-english-translation/ (08/03/2020).

25 *Cronstedt/Eijsbouts/Thompson*, Working Paper on International Business and Human Rights Arbitration (Proposal for BHR Arbitration Rules), 13/07/2017, p. 2, available online: https://www.cilc.nl/cms/wp-content/uploads/2018/03/INTERNATIONAL-ARBITRATION-TO-RESOLVE-HUMAN-RIGHTS-DISPUTES-INVOLVING-BUSINESS-PROPOSAL-MAY-2017.pdf (08/03/2020).

26 Ibid.

27 *Cronstedt/Thompson et. al*, Working Paper on An International Arbitration Tribunal on Business and Human Rights, 25/02/2014, available online: http://www.l4bb.org/news/IntlArbTribunal25Feb2014.pdf (08/03/2020).

liability for human rights violations. It seems however that the idea of establishing such a tribunal by the institution thought most suitable – the Permanent Court of Arbitration (PCA) – did not catch wind and thus, new arbitration rules were suggested instead. Some of the most salient features of the Proposal for BHR Arbitration provided that:

(i) The Rules would be a revision of international arbitration rules currently in use, particularly the UNCITRAL Arbitration Rules (UNCITRAL Rules).
(ii) BHR Arbitration would allow both victim-to-business and business-to-business arbitration.
(iii) Arbitrators in BHR Arbitration would be experts in both business and human rights.
(iv) Arbitration could occur anywhere in the world, either in person or by Internet, in both ad-hoc and institutional settings.
(v) Arbitral awards could be enforced in all 159 States parties to the New York Convention.[28]
(vi) To ensure equality of arms, the Rules would reduce barriers for victims in accessing justice.
(vii) The Rules would provide businesses with tools to ensure compliance with human rights standards throughout the supply-chain.

A drafting team chaired by former ICJ judge Bruno Simma (Drafting Team) was assembled to draft the Rules. The Drafting Team worked in consultation with a Sounding Board of more than "220 individuals from different stakeholder groups, including business, non-governmental organisations, governments, international organisations, 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".[29]

In October 2018, the Drafting Team released a Paper on Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process[30] (Elements Paper) of the future Rules, which were now formally entitled "The Hague Rules on Business and Human Rights Arbitration". After a round of consultation with the general public and the Sounding Board, on June 2019, the Drafting Team released a consolidated draft of the Rules.[31] Drawing upon the feedback to the consolidated

28 *United Nations,* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10/06/1958.
29 *The Hague/CILC,* The Hague Rules on Business and Human Rights, December 2019, Foreword, p. 1.
30 Elements Paper, (fn. 2).
31 *Drafting Team,* Draft Arbitration Rules on Business and Human Rights, available online: https://www.cilc.nl/cms/wp-content/uploads/2019/06/Draft-BHR-Rules-Final-version-for-Public-consultation.pdf (08/03/2020).

text, the Drafting Team finalized the Hague Rules and Commentary,[32] which were officially launched on 12 December 2019.

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C. Opting for arbitration

Before delving into the concrete provisions of the Hague Rules, let us examine the arguments substantiating the Proposal for using arbitration as a means of settling business-related human rights disputes. The Drafting Team noted that initial consultations on BHR Arbitration revealed that "states, the business community, civil society organisations, and local communities dealing with human rights violations on the part of businesses would welcome the proposal to use international arbitration to help fill the gaps in the current system of protection of rights".[33] Indeed, at a first glance, international arbitration has many features which make it an appealing forum:

I. Independence from the court system

One of the most ardent critiques brought to the current system of dealing with human rights violations is the inefficiency of the judiciary. Thus, the underlying idea of the Proposal is that "international arbitration could overcome some of the legal and practical barriers faced by individuals when bringing human rights claims through the existing mechanisms of redress, particularly national courts".[34] According to the Working Group, victims "have little access to justice" as "courts have largely failed to provide for their needs" and "cases drag on for years and often end inconclusively".[35] From that perspective, arbitration would be better placed in resolving business-related human rights disputes as it is relatively independent from state courts and as such, it would cater services to disputants "who would otherwise either engage in protracted court litigation or, where no court is available, resort to bitterly fought media battles".[36] In addition, courts might have a certain bias towards corporations operating in their jurisdictions and may be prone to corruption. This would be less problematic when the dispute is administered via arbitration as "the parties may choose both a neutral place for the resolution of their dispute and a neutral tribunal".[37] Even in fair, impartial and competent courts, parties have to face serious

32 *The Hague/CILC*, The Hague Rules on Business and Human Rights (the Hague Rules), available online: https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (08/03/2020).
33 Elements Paper, (fn. 2), p. 1.
34 Ibid.
35 Proposal for BHR Arbitration Rules, (fn. 25), pp. 1-2.
36 Ibid., p. 2.
37 Ibid., p. 5.

obstacles such as high entrance fees, language issues, delays and lengthy proceedings or difficulties in enforcing orders.[38]

II. Choosing arbitrators

Another perk of using arbitration versus court litigation is the possibility for parties to choose their arbitrators. Human rights violations arising out of the activity of transnational corporations are often time complex issues which require specialist knowledge of international human rights and business law. Regular judges, "chosen by the luck of the draw",[39] are insufficiently versed in dealing with such entangled matters and thus, by selecting arbitration, parties would benefit from expert arbitrators adjudicating their claims.

III. Procedural flexibility

Opting for arbitration would also mean that parties can design procedural rules tailored to the particularities of their dispute. Use of custom rules usually results in increased efficiency and decreased costs of the proceedings. In particular, by selecting the substantive and procedural law to govern their dispute, the parties would be able, for instance, to "craft individual discovery plans; motion practice would be simplified; and annulment proceedings would be considerably limited in scope".[40] Also, the proceedings could take place in any preferred jurisdiction or more conveniently, via Internet.

IV. Enforceability of awards

Awards granted in arbitration proceedings would potentially be enforceable around the world, including under the New York Convention currently numbering 159 signatories. This is subject to several exceptions that might apply in individual cases, such as public policy concerns.

V. Ensuring compliance

Good corporate governance and corporate social responsibility are concepts which have received much lip service in the past couple of years. Realising the reputational risk and the legal liability that may be associated with human rights violations, many MNEs and GNEs have prioritized adopting human rights policies.[41] According to the

38 https://publications.elsafrance.org/2018/02/18/is-bhr-arbitration-the-new-black-a-proposal-for-international-arbitration-on-business-and-human-rights/ (08/03/2020).
39 Proposal for BHR Arbitration Rules, (fn. 25), p. 5.
40 Ibid., p. 6.
41 https://www.legalbusiness.co.uk/blogs/the-new-risk-front-for-gcs-nearly-half-of-contracts-have-human-rights-clauses-lb-research-finds/ (08/03/2020).

Working Group, this is insufficient, as there is a need for such enterprises to "conduct human rights due diligence throughout their supply chain".[42] And here too, international arbitration could be one of the tools that a transnational corporation could use to "prevent, mitigate and remediate abuse that it causes, that it contributes to or that it is directly linked to"[43] and keep its supply chain in compliance.[44] One of the examples to achieve such compliance, suggested in the Proposal, is to include so-called "perpetual clauses" in contracts with first tier suppliers that "require them to insert similar provisions in contracts with their own suppliers, and so on through the supply chain"[45] deferring to arbitration any breaches that occur. In this manner, any defaulting party could be subject to a binding business and human rights arbitration process brought by any party empowered under the contract to invoke proceedings.[46]

These initial considerations have been duly reflected in the Hague Rules – albeit to varying extents – as discussed in the following.

D. The Hague Rules

Since the Hague Rules are devised on the blueprint of the UNCITRAL Rules, this paper will primarily focus on the adjustments made to the source-rules as required by the nature of BHR Arbitration. It is noteworthy that the Hague Rules, similarly to the UNCITRAL Rules, provide no limitations on the type of parties or the subject matter of the dispute, applying to "any dispute that the parties to an arbitration agreement have agreed to resolve by arbitration".[47] They also do not address the content and modalities of consenting to arbitration, as well as the enforcement of arbitral awards or other modalities of ensuing compliance with awards.[48]

The preamble to the Rules lists the six key features particular to business and human rights arbitration, which made deviations from UNCITRAL Rules necessary:

(i) The specific character of human rights disputes arising in a business context;
(ii) The need for special measures to address the circumstances of victims of human rights abuses resulting from business activities;
(iii) The potential imbalance of powers between parties;
(iv) The public interest in the transparent resolution of such disputes and participation by third parties and States;
(v) The importance of expert arbitrators bound by a code of conduct;
(vi) The potential need to develop special mechanisms for witness protection and evidence-gathering.

42 Proposal for BHR Arbitration Rules, (fn. 25), p. 1.
43 Ibid., p. 14.
44 Ibid., p. 17.
45 Proposal for BHR Arbitration Rules, (fn. 25), p. 19.
46 *The Working Group on International Arbitration of Business and Human Rights,* Questions and Answers on International Arbitration of Business and Human Rights, 17/08/2017, available online: http://www.l4bb.org/news/Q&A.pdf (08/03/2019).
47 The Hague Rules, (fn. 32), Introductory Note, p. 3.
48 Ibid.

Addressing these in turn, the Hague Rules recognise, for instance, that "the issue of proper and informed consent may be particularly sensitive in the business and human rights context" and thus, a tribunal operating under the Rules has "a special duty to verify" that natural persons have given their consent to arbitration (particularly in non-contractual claims) and not simply presume knowledge or consent.[49] The need to protect the confidentiality of a party's identity or representative when warranted by the circumstances of the case is also considered, with the arbitral tribunal being empowered under Art. 18(2) of Rules to "designate specific representatives of other parties who may be informed of [such] identity" and who are bound by a duty of confidentiality.[50] Similarly, acknowledging the high likelihood of multiparty claims in the context of business and human rights disputes, the Hague Rules provide for a separate article dedicated to such claims – under Art. 19(1) of the Rules, the tribunal is empowered to adopt special procedures in order to handle large numbers of parties and claims.

Second, the provisions on interim measures purport to give the arbitral tribunal "maximum flexibility" and "the widest possible discretion" in handling relief requests from alleged victims of human rights abuses.[51] Under Art. 30(2) of the Hague Rules, arbitral tribunals are empowered to render interim measures in the form of arbitral awards in an attempt to mitigate enforceability issues (without necessarily guaranteeing that national courts will treat them as such). Paragraph 3 of the same article vests the arbitral tribunal with the power to order monetary penalties for non-compliance with its interim measures (which may or may not be lawful under mandatory applicable law). Moreover, Art. 31 of the Hague Rules allows for the appointment of an 'emergency arbitrator' if relief measures are urgently needed and the arbitral tribunal has not yet been constituted.

Third, in dealing with potential inequality of arms between parties, Art. 5 of the Hague Rules mandates the arbitral tribunal to ensure that parties facing barriers[52] to access to remedy are given effective opportunity to present their case, "including by adopting more proactive and inquisitorial, as opposed to adversarial procedures".[53] Guided by the necessity to protect claimants from being intimidated or discouraged to pursue their claims though unfounded defences (and to avoid reputational risks being caused to respondents by unfounded claims), Art. 26 of the Hague Rules provides for an expedited procedure to dispose of claims and defences manifestly without merit.[54] An attempt to lower barriers to remedy also refers to costs. In this regard, the Hague Rules provide that "the fees and expenses of the arbitrators shall be reasonable in amount, taking into account […] the cost burden on each party",[55] allowing a re-

49 The Hague Rules, (fn. 32), Commentary to Art. 1, para. 4.
50 Ibid., Art. 18 and Commentary.
51 Ibid., Commentary to Art. 30, paras 1-4.
52 Art. 5(2) provides an open list of potential barriers such as "lack of awareness of the mechanisms, lack of adequate representation, language, literacy, costs, physical location or fears or reprisal".
53 The Hague Rules, (fn. 32), Commentary to Art. 5.
54 Ibid., Commentary to Art. 26, para. 2.
55 Ibid., Art. 52(1).

vision of the default "loser pays" rule of cost allocation by the arbitral tribunal if it "determines that apportionment [between parties] is reasonable"[56] under the circumstances of the case. Under Art. 54 of the Rules, the tribunal is also bound to ensure that "the amount of the deposit [of costs] does not constitute an undue obstacle to any party's participation in the proceedings".[57]

Forth, the Rules source their transparency provisions from the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration while granting "wider flexibility"[58] to the arbitral tribunal in organising disclosure and public access to the proceedings. Hence, under Art. 38 of the Rules and consistent with the transparency objective, the arbitral tribunal may adapt the Rules to the particularities of the dispute. The Rules stipulate for the disclosure of key documents such as statements of claim and defence, arbitral tribunal orders, decisions and awards (Art. 40), as well as public hearings for the presentation of evidence and oral arguments (Art. 41). In the same vein, Art. 28 of the Rules allows interested states (of the parties' nationality, on whose territory the conduct which gave rise to the dispute occurred or which are parties to any treaties applicable to the arbitration) to make written submissions. The latter is an addition to the UNCITRAL Rules on third party submissions acknowledging the public dimension of business and human rights arbitration disputes.

Fifth, the Hague Rules place a special emphasis on the importance of arbitrator independence, impartiality and expertise to the legitimacy of business and human rights arbitration proceedings.[59] Going beyond the corresponding UNCITRAL Rules provisions, Article 11 of the Hague Rules requires arbitrators to have a high moral character and imposes specific competency requirements to presiding or sole arbitrators (experience in international dispute resolution *and* the areas relevant to the case, whether human rights law and practice or a relevant field or industry), who in addition shall be of another nationality than the parties involved. Arbitrators are obliged to comply with the Code of Conduct, which is an integral part of the Hague Rules and has been drafted on the basis of international best practices and ethical standards (such as the IBA Guidelines on Conflicts of Interest in International Arbitration), adopting "stricter requirements" where the nature of business and human rights disputes so demands.[60]

Lastly, the Hague Rules foresee a broader and more general power of the tribunal to organise the taking of evidence in the manner it sees fit, taking into consideration not only fairness and efficiency, but also cultural appropriateness and rights-compatibility (borrowed from the language of the Guiding Principles commentary).[61] By the same rationale, Art. 32 of the Rules provides that the arbitral tribunal may "limit the scope of the evidence that may be produced by the parties" and "order the production of documents to the extent necessary to enable each party to have a reasonable op-

56 Ibid., Art. 53(1).
57 Ibid., Art. 54(2) and Commentary, para. 1.
58 Ibid., Commentary to Art. 38, para. 1.
59 The Hague Rules, (fn. 32), Commentary to Art. 11.
60 Ibid., Code of Conduct, Preamble.
61 Ibid., Commentary to Art. 32, paras 1-3.

portunity of presenting their case".[62] The commentary thereto clarifies that the tribunal can "encourage the use of electronic means of communication for the taking of witness evidence, including live testimony by means of audio or video-link technology or prior recorded testimony" and at its discretion "direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, set limits to written and oral statements", being "cognizant of both the difficulty that certain parties may face in collecting evidence (or making precise documents requests) and the potential cost and other burdens that may be entailed by document production procedures".[63] The Rules also contain provisions for the protection of witnesses in situations of genuine fear,[64] allowing the tribunal to adopt specific measures for non-disclosure of witness identity or whereabouts such as "(a) expunging names and identifying information from the public record; (b) non-disclosure to the public of any records identifying the victims or witness; (c) giving testimony through image- or voice- altering devices or closed circuit television; and (d) assignment of a pseudonym".[65]

The Hague Rules have been devised as a uniform set of rules, but parties may exercise their discretion in modifying or opting out of provisions depending on the dispute at hand.[66]

In the words of their authors, the Rules are intended to provide "a means for access to remedy for right-holders affected by business activities [particularly where more traditional remedies are either unavailable or ineffective] and a human rights compliance and risk management strategy for business themselves".[67] The concern of making arbitration under the Rules fair and accessible for victims of business activities (but also sufficiently attractive for businesses) is clearly discernible in the text. However, the reader is inevitably confronted with the question whether arbitration is, at its core, suited to settle disputes concerning human rights violations.

E. Is arbitration a suitable forum?

The same characteristics which make arbitration so tempting to commercial parties might play against the victims of human rights abuses. As some authors[68] point out, companies are "repeat users" of arbitration and as such, are more familiar with its procedures and have more resources available to dedicate to the process. There is a wide range of concerns, for businesses and victims, in particular, that would caution against resorting to arbitration in business-related human rights disputes, as follows:

62 Ibid., Art. 32(1) and (3).
63 Ibid., Commentary to Art. 32, para. 4.
64 Ibid., Art. 33(3).
65 Ibid., Commentary to Art. 33, para. 3.
66 Ibid., Introductory Note.
67 Ibid., Commentary to the Preamble.
68 *Crockett/de Sousa,* Asian Dis. Rev. 2018/20, p. 105.

I. Consent to arbitrate

Consent is widely viewed as the cornerstone of arbitration, although its nature is also evolving.[69] The Proposal for BHR Arbitration advanced the idea of "victim empowerment" by allowing potential victims to join in as parties to arbitral proceedings or act on their own behalf without being signatory parties to arbitration agreement.[70] Furthermore, the working documents on the Hague Rules suggested that clauses could be drawn up in such a way that "labour unions, human rights NGOs, human rights advocates and others"[71] could also act on the victims' behalf. According to the Report[72] of the Drafting Team, two of the most discussed modalities to secure consent are "open offer to consent" instruments and "*ex post* consent to arbitration". From the perspective of businesses, it is difficult to see why they would conclude a submission agreement[73] after the dispute has arisen and in the preparation phase, the Drafting Team had accepted that "further consideration should be given to the business incentive for consent beyond reputational concerns",[74] as well as why "a company would offer open consent to arbitrate to an undefined group of persons".[75] From the perspective of victims, the challenge appears twofold: first, how could victims which are not parties to the arbitration agreement access the proceedings and second, even if they are signatories, how to ensure that the victim's consent to arbitrate is genuine.

Unfortunately, these initial concerns are not dispelled by the Hague Rules as the matter of consent is not particularly dealt with in neither text nor commentary. Art. 1(1) sets out, for instance, that "the 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". The commentary thereto merely notes that the issue of consent of natural persons to arbitrate (especially) non-contractual matters "may be particularly sensitive" and that the Rules do not impose express additional requirements "for obtaining or proving such consent".[76] Art. 3(3)

69 For a discussion on the diminishing role of consent please see *Moses*, Challenges for the Future: the Diminishing Role of Consent in Arbitration, Transnational Dispute Management 2014/4, available online: https://www.transnational-dispute-management.com/article.asp?key=2135 (08/03/2019). One of the examples quoted is for instance the US court system where arbitration is mandatorily imposed for consumer and employee claims as contrasted with European system whereby arbitration remains largely consensual.

70 According to the Working Group, this so-called "arbitration without privity" is an accepted feature of international arbitration. However, in practice this idea is far from having gained traction and in its Report of January 2018, the Drafting Team recognized that the issue of consent, the rationale and more specifically, the incentive for parties to consent, are key challenges. For further details, see the Report on the Drafting Team Meeting of 25 and 26 January 2018 (Report on BHR Arbitration), available online: https://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf (08/03/2020).

71 Proposal for BHR Arbitration Rules, (fn. 25), p. 21.

72 Report on BHR Arbitration Project, (fn. 70).

73 A submission agreement is an agreement to arbitrate concluded after the dispute has arisen.

74 Report on BHR Arbitration Project, (fn. 70), p. 3.

75 Ibid., p. 3.

76 The Hague Rules, (fn. 32), Commentary to Art. 1, para. 4.

d) of the Rules provide that a notice of arbitration shall include "identification of any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organisation or agency or relationship out of, or in relation to which, the dispute arises" with the commentary adding that the means for proving consent to arbitration "should be […] broadly construed, subject only to any mandatory applicable rules regarding the form of an arbitration agreement". In keeping up with the original intentions, the Rules provide a model clause granting defined classes of third party beneficiaries the right to submit to arbitration disputes arising under the instrument in question (contract, treaty, relationship or rule, etc.), however the clause does little to alleviate doubts previously raised with respect to both practicability and enforceability under mandatory provisions of relevant domestic laws and the New York Convention. During the multi-stakeholder panel discussion held at the launch of the Hague Rules the issue of trust in the system has been highlighted by civil society representatives as the Rules "have much about accountability but need more to be decided on consent", prompting the question "can be Rules be trusted?".[77]

II. Governing law

There is a vast number of sources of law from which standards and rules for human rights and obligations can be derived from. This includes both hard law (domestic human rights legislation, contractual human rights obligations and treaties on human rights concluded between states) and soft law sources (the Guiding Principles, the OECD Guidelines).[78] One of the arguments for BHR Arbitration, according the Working Group, was that by resorting to arbitration, parties will be able to avoid complex cross-border issues and conflicts of law, which usually arise in state court litigation.

Whether the Rules bring an improvement on this account is however debatable. In particular, the Hague Rules provide that "the arbitral tribunal shall apply the law, rules of law or standards designated by the parties" and in the absence of such designation, "the law and rules of law which [the tribunal] determines to be appropriate", in all cases taking 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" and which may bind the parties "even where the contract does not expressly incorporate applicable human rights standards".[79] By purposefully using the terms 'rules of law' and 'standards', the authors refer to the possibility "for parties to designate, and for the tribunal to apply, rules emanating from different legal systems or

77 *Report on the Launch Symposium of the Hague Rules on Business and Human Rights Arbitration* (Launch Report), 12/12/2019, available online: https://www.cilc.nl/cms/wp-content/uploads/2020/02/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_Launch-Report-pdf (08/03/2020).

78 https://www.kwm.com/en/au/knowledge/insights/international-arbitration-of-business-related-human-rights-disputes-20181221 (08/03/2019).

79 The Hague Rules, (fn. 32), Art. 46(1), (2) and (4) and Commentary.

even from non-national sources",[80] including, for example, "industry or supply chain codes of conduct, statutory commitments or regulations from sports-governing bodies or any other relevant (business and) human rights norms".[81] In the desire "to provide the parties with the broadest possible flexibility in choosing the normative sources from which the applicable law is drawn", the Rules broaden the potentially applicable instruments and laws. Undoubtedly beneficial in some respects, this also adds a considerable layer of uncertainty to the proceedings.

III. Inequality of arms

Perhaps the key concern with using arbitration to resolve business-related human rights disputes is the substantial risk of an inequality of arms between the victims of human rights infringements (which would typically produce themselves as claimants) and the businesses themselves (usually respondents). Commercial arbitration is so successful because it caters to parties operating more or less on a level playing field (in terms of legal know-how, resources) united by similar interests (expediency, confidentiality). What works so well for commercial parties is precisely what can significantly prejudice victims of human rights abuses, which are oftentimes impoverished and face difficulties in obtaining adequate legal advice. The benefit of parties to an arbitration to select arbitrators or craft tailor-made procedures, for instance, clearly favors commercial entities; victims of human rights abuses are unlikely to be able to meaningfully engage in such processes.[82] Arbitration is also becoming increasingly expensive with a myriad of costs requiring up-front payment (e.g. administrative, tribunal and legal fees) which is prone to deter victims from seeking redress.

In its proposal for BHR Arbitration, the Working Group recognized that these are valid considerations and had initially proposed a number of measures ranging from the establishment of an aid mechanism (similar to the financial Assistance Fund maintained by the PCA, which provides support to less wealthy states) to the use of *pro bono* arrangements (via private lawyers, NGOs, unions, etc.).[83] The Hague Rules build on this idea but specify in the introductory note that arbitration under the Rules "is meant to be employed where it is reasonable to presume that all parties have a minimum of resources at their disposal to cover the basic costs of the arbitration and their own representation, either by themselves or through a 'legal aid' system, contingency funding or an agreement on the asymmetric distribution of costs and deposits between parties".[84]

While the attempt to lower barriers for victims is commendable, one cannot help but ask oneself how exactly is this 'legal aid' system going to look like and what real opportunities will it present for victims seeking to hold a well-heeled MNE or a GNE accountable for human right violations. Some authors have also raised the legitimate

80 Ibid., Commentary to Art. 46, para. 1.
81 Ibid., Commentary to Art. 46, para. 2.
82 *Crockett/de Sousa,* (fn. 68), p. 108.
83 Proposal for BHR Arbitration Rules, (fn. 25), pp. 25-26.
84 The Hague Rules, (fn. 32), Introductory Note.

question whether funds "could be put to better use in building the capacity of State courts or […] establishing more accessible non-adversarial dispute resolution mechanisms".[85]

IV. Confidentiality versus transparency

Disputes involving human rights breaches are matters of public interest which demand transparency. Commercial arbitration, on the other hand, is usually confidential. This raises serious doubts whether arbitration is compatible with human rights issues. Furthermore, there are voices that argue that "human rights should remain the prerogative of national courts as a matter of public policy".[86]

Throughout the drafting process of the Hague Rules, the issue of transparency has been at the core of debates. While it was clear from the very beginning that BHR Arbitration rules would be closely modelled on the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, the Drafting Team had to ponder "as to whether and under what criteria an arbitral tribunal should be entrusted with the discretionary power to make determinations concerning transparency" and farther, concerning the transparency of settlement decision "whether to establish a minimum threshold of transparency, for example, the legal reasoning of the award".[87] The working documents on BHR Arbitration suggested that the way forward on the issue was for the new Rules to "establish a mandatory minimum degree of transparency or leave that decision to the parties", reserving exceptions also "entirely at the discretion of the parties or confined to business and state secrets, and victims / lawyers / witnesses' protection".[88]

This line of thinking has ultimately guided the text of the Hague Rules, which provide for wide discretionary powers of the tribunal to adapt the transparency regime to the case at hand, including by opting out entirely from applying transparency provisions where "all parties are legal persons of a commercial character and […] there is no public interest involved in the dispute".[89] Otherwise, the tribunal may decide as "necessary or appropriate to the circumstances of the case", provided that hearings for the presentation of evidence and oral arguments are public[90] and key documents, including the award, are published.[91] Apart from where by virtue of parties' autonomy the Rules are derogated from, Art. 42 of the Hague Rules lays out a series of exceptions to transparency with regard to confidential or protected information. Such information consists of confidential business information and "any other information deemed confidential under any other grounds of confidentiality that the arbitral tribunal de-

85 *Crockett/de Sousa,* (fn. 68), p. 108.
86 https://publications.elsafrance.org/2018/02/18/is-bhr-arbitration-the-new-black-a-proposal-for-international-arbitration-on-business-and-human-rights/ (08/03/2020).
87 Report on BHR Arbitration Project, (fn. 70), p. 5.
88 Elements Paper, (fn. 2), p. 10.
89 The Hague Rules, (fn. 32), Art. 38(5).
90 Ibid., Art. 41.
91 Ibid., Art. 40.

termines to be compelling", information necessary to protect the parties and others involved in the proceedings or whose disclosure would impede law enforcement, as well as "information that is protected against being made available to the public under the arbitration agreement".[92] Although adjustments are necessary, particularly where "the safety, physical and psychological well-being and privacy of all those involved directly and indirectly in the proceedings" is at stake, the Rules do hint towards far-reaching exceptions from transparency standards. What would prevent, for instance, a GNE or MNE to list certain information as "confidential" in an arbitration agreement and in the eventuality of a dispute, have it exempted from disclosure "as agreed by the parties"? Balancing the competing interests of businesses and victims of human rights abuses is most certainly not an easy task. It remains to be seen in practice if the Hague Rules are robust enough to ensure that the public interest of having open proceedings is not stifled and that victims are able to benefit from one of their key leverages – publicity.

V. Enforcement of awards

Enforceability of awards under the New York Convention, which is one of the key strengths of commercial arbitration, might not be such a clear-cut case in human rights disputes. In the proposal for BHR Arbitration, the Working Group noted that there are several exceptions to enforcement of arbitration awards that usually apply: (i) the award must be based on a "commercial" contract; (ii) the award must not be a "domestic" award; (iii) enforcement of the award must not run contrary to "public policy".[93] These exceptions are, however, far from being inconsequential as they leave a considerable margin of discretion for state courts to refuse enforcement on grounds that, for instance: (i) human rights are non-arbitrable; (ii) relationships arising out of human rights violations by an enterprise are not "commercial"; or that (iii) such awards cannot be enforced due to public policy concerns, which places resolution of human rights disputes in the exclusive jurisdiction of states. In addition, enforcement of an award may be refused by a court under Article V of the New York Convention where proceedings are brought by victims, which are not *per se* signatories to the arbitration agreement.

The Hague Rules do not address the issue of enforcement of awards directly. Art. 1 of the Rules provides that "any dispute submitted to arbitration under these Rules shall be considered to have arisen out of a commercial relationship or transaction" in an attempt to preclude objections to enforcement due to the lacking "commercial" nature of the dispute and whose efficiency remains to be tested. Further, the Rules place upon the tribunal the duty to "satisfy itself that the award is human rights-compatible",[94] with the commentary thereto explaining that the requirement serves to "encourage the arbitral tribunal to consider this issue within the ambit of its dis-

92 Ibid., Art. 42(2) (b) and (c).
93 Proposal for BHR Arbitration Rules, (fn. 25), fn. 13.
94 The Hague Rules, (fn. 32), Art. 45(4).

cretion in crafting remedies under its award" (without being authorised to alter the result obtained under the applicable law) and to "assist in fulfilling's the arbitral tribunal's duty to render an enforceable award by […] having considered potential issues of public policy which may arise" under the *lex arbitri* and the laws of potential places of enforcement.[95] This might aid courts presented with the award in finding arguments pro enforcement, but it would most likely be ineffective in jurisdictions where public policy is rather clear on the matter.

E. Existing models

Having weighted on the pros and cons of BHR Arbitration with the latter seeming perhaps particularly damning, one might jump to the conclusion that arbitration is not suited after all for resolving human rights disputes. However, models where arbitration has been put to good use for addressing human rights violations perpetrated by corporations are not exactly a novelty. And even though such instruments are not open to allow victim-to-business arbitration scenarios as envisaged under the Hague Rules, an examination thereof might be useful nonetheless as one of the intended purposes of the BHR Arbitration is to ensure compliance with human rights obligations throughout the supply chain. In the following we will examine two such instances:

I. The Accord on Fire and Building Safety in Bangladesh

On 24 April 2013, after a series of previous fatal factory fires, the Rana Plaza garment factory collapsed in Bangladesh killing 1133 people and critically injuring thousands more.[96] This promoted the negotiation of the above Bangladesh Accord, which was signed in May 2013 by two global trade unions, eight local trade organizations encompassing more than two million workers and over 150 factories and almost 200 apparel brands, importers and retailers from Europe, North America, Asia and Australia.[97] Article 5 of the Accord contains provisions on a complaints mechanism and refers to arbitration as a means for final resolution of disputes.[98] As announced

95 Ibid., Commentary to Art. 45, para. 3.
96 About the Bangladesh Accord, available at: https://bangladeshaccord.org (08/03/2019).
97 https://www.transnational-dispute-management.com/article.asp?key=2529 (08/03/2020).
98 The exact provision of Art. 5 of the Accord reads as follows:
Dispute resolution. Any dispute between the parties to, and arising under, the terms of this Agreement shall first be presented to and decided by the SC [Steering Committee] […]. Upon request of either party, the decision of the SC may be appealed to a final and binding arbitration process. Any arbitration award shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought and shall be subject to The Convention on Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), where applicable. The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection for the Arbitrator, shall be governed by the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).

by the PCA, the institution has administered two arbitrations[99] arising under the Accord, commenced by two non-governmental labor union federations based in Switzerland against two global fashion brands. On 17 July 2018, the Tribunal constituted in the two arbitrations proceedings issued termination orders following the settlement by the Parties of the claims brought forward.[100]

The Accord, which some have called "a breakthrough"[101] and "a game changer",[102] was designed to remediate Bangladesh's apparel factories for an initial term of five years, ending on 30 November 2018. Wanting to maintain and expand on the progress achieved, over 190 brands and retailers have signed an extension of the Accord with global unions in the form of a "Transition Accord", which entered into force on 1 June 2018.[103] The dispute resolution provision of the Transition Accord incorporates the most recent revision of the UNCITRAL Arbitration Rules continuing to provide for The Hague as the seat of arbitration, the PCA as the administering institution and the law of Netherlands as governing.

It has not been all smooth sailing for the Accord, which ceased operating on 30 November 2018 after domestic resistance from government and employers' organisations prevented its extension.[104] Following prolonged negotiations, on 19 May 2019, an agreement was reached in the form of a Memorandum of Understanding between the Accord Steering Committee and the Bangladesh Garment Manufacturers and Exporters Association (and endorsed by the government) allowing for operations under the Accord to be taken over by a new national Ready-Made Garment Sustainability-Council.[105] The development has been faced with criticism[106] and concern[107] and it remains to be seen whether the new structure will continue to act independently in guaranteeing worker safety.

99 PCA, Case No. 2016-36, *Industriall Global Union and Uni Global Union v. X*, and PCA, Case No. 2016-37, *Industriall Global Union and Uni Global Union v. Y.*

100 PCA, Bangladesh Accord Arbitrations, https://pca-cpa.org/en/cases/152/ (08/03/2020).

101 https://cleanclothes.org/resources/recommended-reading/making-global-corporations2019-labor-rights-commitments-legally-enforceable-the-bangladesh-breakthrough/view/ (08/03/2020).

102 *Rahman,* Nord. J. Work. Life Stud. 2014/4.

103 https://bangladeshaccord.org/about/ (08/03/2020).

104 *BDApparelNews Desk*, Accord hearing deferred till April to allow 'negotiation talks, available online: https://www.bdapparelnews.com/Accord-hearing-deferred-till-April-to-allow-negotiation-talks/293 (08/03/2020).

105 *Accord on Fire and Building Safety in Bangladesh*, Accord reaches Resolution on Continuation of its Work in Bangladesh, available online: https://bangladeshaccord.org/updates/2019/05/19/accord-reaches-resolution-on-continuation-of-its-work-in-bangladesh (08/03/2020).

106 *Clean Clothes Campaign, International Labor Rights Forum et al.*, The Bangladesh Accord continues to operate but its independence may be at risk, available online: https://laborrights.org/releases/bangladesh-accord-continues-operate-its-independence-may-be-risk#_ftn1 (08/03/2020).

107 *Clean Clothes Campaign,* Protect progress – the Bangladesh Accord, available online: https://cleanclothes.org/campaigns/protect-progress (08/03/2020).

As originally intended, the Bangladesh Accord is an excellent example of how transnational enterprises may be held accountable for human rights violations via arbitration. Sadly, it is now unclear whether this progress can be safeguarded.

II. The International Olympic Committee "Host City" Contract

Bids such as Qatar's to host the 2022 FIFA World Cup with spending for infrastructure estimated to USD 100 billion have brought back into the public eye the issue of human rights abuses (of migrant workers, in particular).[108] This has led several international sport organizations (FIFA, the International Olympic Committee) to adopt international human rights standards such as the UN Guiding Principles.

More notably, the International Olympic Committee has incorporated in its "Host City" Contract for the 2024 Olympic Games a provision which obliges the Host City, the Host National Olympic Committee and the Organising Committee of the Olympic Games to "protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements […] and with all internationally-recognised standards and principles, including the United Nations Guiding Principles on Business and Human Rights"[109] in all their activities. This obligation and the overall performance of the "Host City" Contract is subject to arbitration in the Court of Arbitration for Sport in Lausanne.[110]

While this provision is yet to be tested in practice it certainly represents a step in the right direction: towards a broader recognition by public and private entities of their human rights obligations and the commitment to uphold and enforce them in case of disputes (via arbitration).

F. Conclusion

The transnational activity of corporations and the recent developments in raising corporate governance and corporate social responsibility standards make it clear that human right obligations are bound to appear with an increased frequency in business-related disputes. In the Mergers & Acquisitions context, for instance, "some companies are heat-mapping high-risk locations, sectors and supply chains risks when evaluating target companies and their subsidiaries in addition to the due diligence they already perform […] looking not just at the environmental effects of the target company but also what downstream effects they may have on affected communities' rights".[111]

108 https://www.transnational-dispute-management.com/article.asp?key=2529 (08/03/2020).
109 *International Olympic Committee,* Host City Contract Principles, Art. 13.2 b, available online: https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf (08/03/2020).
110 Ibid., Art. 51.2.
111 https://www.lexology.com/library/detail.aspx?g=5f4fbded-6f3a-458b-80dd-b88620b6d7a0 (08/03/2020).

Since MNEs and GNEs mainly resort to arbitration for solving business-related disputes, it is inevitable that human rights issues associated with them are going to end up before arbitral tribunals. Here, the Working Group notes that "the rules in use today for international arbitration were written without a focus on the special requirements of human rights disputes" and that there is a need for "arbitrators who have expertise in business and human rights".[112]

Arbitration can bring significant contribution to ensuring protection and enforcement of human rights in business-to-business relations, as well as empowering victims and its potential should be further explored. The key challenge with devising appropriate mechanisms in this regard is the delicate balancing on the one hand, of incentives for businesses to use the process and on the other, of ways to ensure victims are afforded sufficient protection when seeking relief. The Drafting Team has faced this struggle as well and it remains to be seen in practice whether the Hague Rules have succeeded in striking the right balance between these competing interests.

The Hague Rules are by no means intended to replace State-based judicial mechanisms, but come into play "where alternative avenues are not available or adequate".[113] Similarly, the Rules do not purport to replace non-judicial means of dispute settlement (such as mediation or other collaborative forms) suggesting that in such cases BHR Arbitration could serve as "an escalation mechanism and a backstop" enhancing the former's effectiveness.[114] From a practical perspective, these intentions could be perhaps better spelt out in the text of the Rules, clarifying, for example, the interaction between arbitration and mediation.

Built on the mould of the UNCITRAL Arbitration and Transparency Rules, the Hague Rules deviate where identified that business and human rights disputes require a different, often more flexible, approach. This flexibility may well turn out to be the Rules' key strength and weakness. The multi-stakeholder panel discussion held at the launch of the Rules revealed concerns of the Rules' appeal to companies[115] but also how useful they are to rightsholders,[116] with some cautioning against the coexistence of business to business and victims to business arbitration under the same umbrella.[117]

Despite the open questions, the Hague Rules serve as an important stepping stone in mapping out alternative mechanisms for solving business-related human rights violations. The Rules should also be credited for "encouraging dialogue between stakeholders and creating awareness on human rights violations perpetuated by businesses",[118] which is paramount. We cannot but agree with the Secretary General of the

112 Proposal for BHR Arbitration Rules, (fn. 25), pp. 2-3.
113 The Hague Rules, (fn. 32), Preamble and Commentary.
114 Ibid.
115 Launch Report, (fn. 77), p. 15.
116 Ibid.
117 Ibid., p. 16.
118 http://arbitrationblog.kluwerarbitration.com/2019/09/13/a-further-step-towards-business-and-human-rights-arbitration-the-hague-rules/ (08/03/2020).

PCA that the Rules are not goals in themselves, but tools in the hands of the parties and it will be up "to potential users of the Hague Rules to fulfil their promise".[119]

A momentum has certainly been created for effectively addressing business-related human rights violations, be it through the adoption of a binding treaty,[120] through incorporation by business enterprises of human rights provisions in their contracts or the adoption of human rights policies. Naturally, some of these mechanisms will prove themselves to be more efficient than others. Time will tell whether there is a real need and use for the Hague Rules as opposed to, for example, modernisation of current rules by arbitral institutions and a more comprehensive training of lawyers and arbitrators in international human rights law to better tackle the challenges posed by disputes involving human rights issues.

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119 Launch Report, (fn. 77), p. 3.
120 See discussion in s. A.

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