The Hague Rules on Business and Human Rights Arbitration: What the Drafters Got Right And Wrong

Kelsey Berndt
THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION: WHAT THE DRAFTERS GOT RIGHT AND WRONG

BY
Kelsey Berndt*

I. INTRODUCTION

Arbitration has become an increasingly popular substitute for the traditional judicial system due to its efficient and private nature. Human rights has more recently joined the mix of arbitrable subjects. As the international community is becoming increasingly aware of the “relationship between business and human rights,” the international community has also become increasingly anxious for business and human rights arbitration as well as rules to dictate the arbitration. Arbitration may be appealing to victims of human rights violations for a variety of reasons.

First, arbitration is more efficient and less expensive than traditional litigation, as well as confidential. Aside from these traditional commercial reasons for arbitration, for victims of human rights violations in jurisdictions with corrupt national courts, pursuing arbitration may be a better option than filing suit in court, because arbitration would provide a more fair trial than the court system. Arbitration can offer these individuals “(i) a neutral forum; (ii) a specialized dispute resolution process . . . [and] . . . (iii) . . . binding awards subjected only to limited judicial review.”

* This author is an Associate Editor of the Arbitration Law Review and a 2021 Juris Doctor Candidate at Penn State Law.


5 Id.

6 Id.
The arbitration community first used the United Nations Guiding Principles on Business and Human Rights (UNGPs) to inform decisions in human rights arbitrations. The UNGP consists of a three-pillar framework. The first pillar is that states have existing legal obligations to respect, protect, and fulfill human rights. The second pillar is that business enterprises are required to comply with applicable laws and respect human rights. The third pillar is that effective remedies need to be available when rights and obligations in respect of human rights are infringed. Efforts to draft the Hague Rules on Business and Human Rights Arbitration, based on the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency—which are rules governing investor-state arbitration—began in 2018. The working group—the group in charge of designing, monitoring, and effectuating the creation of the Hague Rules—received comments both before creating the first draft and after publishing the first draft. Based on these comments, the working group finalized the Hague Rules and published them in December of 2019. The Hague Rules provide insight to arbitral tribunals, as well as parties, regarding the composition of the arbitral tribunal, arbitral proceedings, transparency, and the eventual award. Although the drafters of the Hague Rules made several additions to adapt the UNCITRAL Rules to both the business and human rights arbitration context, the Hague Rules arguably fall short in several areas. Largely, the Hague Rules’ deficiencies could be fixed through further clarification and increased guidance for the arbitrators and arbitral tribunals that will conduct business and human rights arbitration. Overall, it will be difficult to tell whether the Hague Rules effectively accomplish their purpose—providing fair arbitration to those whose human rights have allegedly been infringed through dealings with businesses—until parties have the opportunity to arbitrate under them.

---


8 Id.

9 Id.

10 Id.

11 Id.


13 Id.

14 Id.

15 Simma et al., *infra* note 47.
II. THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS

The Hague Rules on Business and Human Rights Arbitration were first considered for human rights violations arising out of business and other contracts in 2013.\(^\text{16}\) However, a working group to create the Hague Rules was not assembled until the beginning of 2018.\(^\text{17}\) The drafters based the Hague Rules on the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.\(^\text{18}\) The UNCITRAL Rules, adopted in 2014 by several countries and individual treaties, outlines which parts of arbitration should be made available to the public.\(^\text{19}\) Signatories to the UNCITRAL Rules agree to make available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any disputing party, a list of all exhibits of documents, expert reports and witness statements, any written submissions by the non-disputing party to the treaty and by third persons, transcripts of hearings and orders, decisions, and awards of the arbitral tribunal.\(^\text{20}\)

A. The Elements Paper

The working group first produced an Elements Paper to educate, inform, and garner input from the potential stakeholders of business human rights arbitration.\(^\text{21}\) The paper included over seventy questions regarding election criteria and process of nomination and appointment of arbitrators; transparency; participation of non-disputing parties; evidence; protection of witnesses, human rights defenders, and counsel; time-sensitive situations; types of relief; recognition and enforcement; claims manifestly without merit; costs and financing; and settlement by mediation.\(^\text{22}\)

The Elements Paper’s consultation period ran from November 2018 until January 2019, at which point the comments were summarized and published.\(^\text{23}\) The responses came from individuals as well as in the form of “collective contributions by companies and business organisations, NGOs, civil society organisations, law firms, academic institutions,

---

16 Simma et al., supra note 12.

17 Id.

18 Id.


20 Id.

21 Simma et al., supra note 12.

22 Id.

national governments, and IGOs.” The general comments the working group received were largely out of concern for the corporate parties. Some commenters questioned whether there was even a need for business human rights arbitration. NGOs submitted comments with concern for claimants. Comments from NGOs ranged from pushing the working group to “propose the creation of an independent institution to administer the [Hague] Rules and arbitration” to imploring the working group to ensure that the Hague Rules would not “reverse the burden of proof from the claimant to the respondent.”


The Columbia Center on Sustainable Investment—a “university-based applied research center . . . dedicated to the study practice and discussion of sustainable international investment”—points out that companies do not want to be sued. To avoid legal action, corporations have fought for a variety of limitations including “doctrines of forum non conveniens, legal rules restricting which entities in the corporate group can be sued for what and where, norms shielding parent companies from liability for conduct of their subsidiaries, and legal tools companies can use to move assets across borders and

24 Center for International Legal Cooperation, supra note 24.

25 Id. Commenters believed language in the Elements Paper was prejudicial to business groups, e.g. “‘victims’ (rather than ‘alleged victims’) ‘violations,’ and ‘barriers’ resulting from the corporate form;” that “the [Hague] Rules should not imply that corporations themselves can violate human rights . . .;” whether “consent can be meaningfully obtained from individuals or communities;” from business groups to ensure that individuals would not be able to pursue claims in arbitration as well as in court and from NGOs to ensure that individuals continue to have the right to pursue claims in court rather than arbitration; whether the Hague Rules would create a loophole of sorts in which corporations would be able to “avoid accountability . . . by passing liability onto their subsidiaries and suppliers in a business-to-business (B2B) arbitration . . .;” that the implementation of business human rights arbitration should not detract from “efforts to reform domestic courts;” that “various concerns in the investor-state context are not replicated in [business human rights] arbitration.”

26 Id. Some commentators had the opinion that “additional corporate liability . . . is not necessary or appropriate.”

27 Id.

28 Id.

29 Columbia Center on Sustainable Investment, About Us, COLUMBIA CENTER OF SUSTAINABLE INVESTMENT, HTTP://CCSI.COLUMBIA.EDU/ABOUT-US/.

across legal entities to shield them from execution.” The authors—members of the Columbia Center on Sustainable Investment—acknowledge that the Hague Rules may help alleged victims avoid some of these limitations “but only if and to the extent that companies agree to having claims brought against them in arbitration.” Meaning, for the Hague Rules to be effective, corporations must consent to these claims being brought in arbitration, even though corporations have fought for limitations on these claims in other contexts. Thus, the authors believe arbitration will only be agreed to when it is advantageous for corporations.

The authors note that some concerns exist regarding arbitration in general. They include that “arbitration undermines substantive rights, and creates relatively unchecked potential for abuse, and that the risks of harm fall disproportionately on the weaker party.” In response to these concerns, the authors argue that the drafters of the Hague Rules should do a variety of things. First, the drafters should develop annotated texts of options to aid in the pursuit of access to justice. This annotated guide would explain the various issues the parties need to agree on, the available options, and “the implication of those options.” Second, the authors call for the drafters of the Hague Rules to develop the rules “with claimants in mind.” The authors suggest that the drafters should include rules that combat the struggles that affect claimants in any legal situation: the legal costs, the necessary expertise, difficult substantive and procedural rules, lack of access to “information necessary to prevail,” and the financial and legal risks associated with bringing a claim. The authors criticized the draft of the Hague Rules for not being written in such a claimant-

---

31 Columbia Center on Sustainable Investment, Business and Human Rights Arbitration, COLUMBIA CENTER OF SUSTAINABLE INVESTMENT.

32 Id.

33 Id.

34 Id. This gives the impression that corporations are “overcoming their resistance to suit, and the ‘BHR’ label may encourage potential claimants to agree to them, BHR arbitration does not necessarily ameliorate access to justice problems and may in fact, exacerbate them individually or systematically.”

35 Id.

36 Id.

37 Id.

38 Id.

39 Id.

40 Id.

41 Id.
minded way. For example, unsuccessful claimants must bear the burden of both their own costs and the opposing party’s costs. Furthermore, the authors argue that the provisions are vague and make it difficult for a claimant to know whether they have a valid claim that will survive arbitration.

C. The Final Hague Rules on Business and Human Rights Arbitration

The Hague Rules are broken into six sections: introductory rules, composition of the arbitral tribunal, arbitral proceedings, transparency, the award, and miscellaneous provisions.

1. Introductory rules

The introductory rules encompass the scope of application, the notice and calculation of periods of time, the notice of arbitration, the representation and assistance, and the appointing authority. One important variation from the UNCITRAL Rules on Transparency—from which the Hague Rules are adopted—is the imposition of the requirement of written explanation for deviations from the Hague Rules. The commentary included in the Rules provides the explanation for this imposition; the purpose of the written explanation is to inhibit the amount of deviations from the Hague Rules. Presumably, if a party can find a valid reason for deviating from the Hague Rules, there is no council, body, etc. that is going to prohibit the party from deviating, because one of the most attractive aspects of arbitration is the great autonomy that parties have in choosing the rules that dictate how the arbitration will be conducted.

42 Id.

43 Columbia Center on Sustainable Investment, supra note 31.

44 Id.

45 Simma et al., The Hague Rules on Business and Human Rights Arbitration, Center for International Legal Cooperation 19 (Dec. 2019). None of the articles in the sixth section, Miscellaneous provisions, are particularly noteworthy. Thus, a section on the sixth section has been foregone.

46 Id. at 4.

47 Id.

48 Id.

One of the concerns that the working group received on the Elements Paper is how arbitral tribunals and arbitrators will ensure meaningful consent to arbitration.\textsuperscript{50} The drafters acknowledge this concern in the commentary.\textsuperscript{51} However, the drafters failed to implement any requirements for ensuring parties obtain this meaningful consent.\textsuperscript{52} The drafters hold the tribunal responsible for verifying the consent of natural persons engaged in business and human rights arbitration, yet give no instruction on how the arbitral tribunal should verify consent.\textsuperscript{53}

Another addition to the Hague Rules, unique from the UNCITRAL Rules on Transparency, is the call for tribunals to act in a more “proactive and inquisitorial” manner, rather than adversarial when one of the parties is unrepresented.\textsuperscript{54} The rationale for this addition is derived from the UNGP.\textsuperscript{55} The addition is a response to the fact that there is “a negative impact on the overall fairness” of the arbitration in arbitration between an unrepresented party and a represented party.\textsuperscript{56}

Article 6 of the Hague Rules delegates the Permanent Court of Arbitration as the default appointing authority.\textsuperscript{57} The reason for this is that the Permanent Court of Arbitration has experience in business and human rights arbitration.\textsuperscript{58} Parties, of course, are allowed to choose another appointing authority if they wish.\textsuperscript{59}

\textbf{2. Composition of the arbitral tribunal}

The second section is comprised of articles regarding the number of arbitrators, appointment of arbitrators, disclosures by and challenge of arbitrators, replacement of an

\begin{itemize}
\item \textsuperscript{50}Center for International Legal Cooperation, \textit{Summary of Sounding Board Consultation Round 1 – Results Elements Paper on the Hague Rules on Business and Human Rights Arbitration}, CENTER FOR INTERNATIONAL LEGAL COOPERATION (Jun. 2019).
\item \textsuperscript{51}Simma et al., supra note 47; “[i]ssues of proper and informed consent may be particularly sensitive in the business and human rights context, especially with respect to the agreement by natural persons to the arbitration of non-contractual matters.”
\item \textsuperscript{52}\textit{Id.}
\item \textsuperscript{53}\textit{Id.}
\item \textsuperscript{54}\textit{Id.} at 24.
\item \textsuperscript{55}\textit{Id.}
\item \textsuperscript{56}\textit{Id.}
\item \textsuperscript{57}\textit{Id.} at 25.
\item \textsuperscript{58}\textit{Id.}
\item \textsuperscript{59}See \textit{id.} at 3. Parties may deviate from the Hague Rules.
\end{itemize}
arbitrator, repetition of hearings in the event of the replacement of an arbitrator, and exclusion of liability.\textsuperscript{60}

Article 11 is another article that was created for the Hague Rules.\textsuperscript{61} This article is important because it prohibits parties from appointing arbitrators who have been involved in some manner in the situation that led to the arbitration.\textsuperscript{62} A provision like this is essential to keeping arbitration fair, because it ensures that the arbitrator will not be unduly biased.

Article 14 also creates a new protection not included in the UNCITRAL Rules.\textsuperscript{63} This article doubles the amount of time given to the parties to bring a challenge against an arbitrator.\textsuperscript{64} As has been stated, in arbitration involving human rights, there is a strong possibility of less sophisticated parties who may not be able to retain representation. By increasing the amount of time a party has to challenge an arbitrator, parties who may not be able to retain representation have a better chance of realizing they have the right to challenge an arbitrator they feel is inappropriate, and thus, have a better chance at ensuring a fair arbitration for themselves.

3. Arbitral proceedings

The third section encompasses articles that relate to the actual arbitral proceeding.\textsuperscript{65} The articles include general provisions, multiparty claims, place of arbitration, language, statement of claim, statement of defence, amendments to the claim or defence, objections to the jurisdiction of the arbitral tribunal, objections to claims or defences manifestly without merit, further written statements, submission by a third person, periods of time, interim measures, emergency arbitrator, evidence, hearings, experts appointed by the arbitral tribunal, default, closure of hearings, and waiver of right to object.\textsuperscript{66}

Perhaps the most significant article of this section is Article 19, which creates the possibility of claimants bringing class action arbitration.\textsuperscript{67} Granting parties the right to bring a class action in arbitration is incredibly important, because class actions are essential in ensuring justice is brought in situations where the costs of arbitration outweigh the potential compensation. In situations where parties may not have the ability to pay for the

\textsuperscript{60} Simma et al., supra note 47.

\textsuperscript{61} Id. at 30-32.

\textsuperscript{62} Id.

\textsuperscript{63} Id. at 33-34.

\textsuperscript{64} Id.

\textsuperscript{65} Id. at 6-7

\textsuperscript{66} Id. at 39-40.

\textsuperscript{67} Id.
arbitration on their own, the parties can still ensure that businesses that are violating human rights do not get away with their conduct by utilizing class action arbitration.

Article 26 is a potentially problematic article as it creates an “expedited procedure” to drop claims that appear to be frivolous, unfounded, etc. at an early stage of the arbitration.68 Seemingly, this means that arbitral tribunals can throw out claims of alleged human rights violations without looking further into them. Given that business and human rights arbitration is certainly going to lead to some arbitration between unsophisticated parties and highly sophisticated parties, creating an expedited process for disposing of claims seems dangerous. For example, a factory worker brings a claim against his employer, alleging that the company violated his human rights. The factory worker already agreed to arbitrate all issues arising from human rights violations in his employment contract. The company had greater bargaining power in negotiating the employment contract and, as a result, was able to choose the arbitrator or arbitral tribunal. The company could easily have chosen an arbitrator or arbitral tribunal who has agreed to toss out any claim against the company. Admittedly, this could have been a scenario prior to the Hague Rules. Now, however, the drafters have given arbitral tribunals the go ahead to dispose of claims at an early stage of the arbitration.69 This may result in claims that should have been heard never being fully arbitrated. The commentary mentions that this article was created with the concern that parties may bring unfounded claims that result in high costs and “reputational consequences” for the respondents.70 Although the drafters also noted that the article can protect claimants from unfounded defenses with true purposes of intimidation.71

4. Transparency

The fourth section regards the transparency expected out of the arbitral proceeding.72 The articles include the scope of application of transparency provisions, publication of information at the commencement of arbitral proceedings, publication of documents, public hearings, exceptions to transparency, and repository of published information.73

Article 40 covers which documents from the arbitral proceeding should be made public.74 The documents the drafters believe should be made public include “the notice of

68 Simma et al., supra note 47, at 47-48.

69 Id.

70 Id.

71 Id.

72 Id. at 7.

73 Id.

74 Id. at 71-72.
arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence, . . . the orders, decisions and awards of the arbitral tribunal.” Additionally, if applicable, the drafters believe a table of exhibits, expert reports, and witness statements should be made public, as well. In the commentary, the drafters note that arbitral tribunals are welcome to make additional documents public as well. Specifically, the drafters note that the arbitral tribunal should consider “the objectives of business and human rights proceedings” when deciding whether additional documents should be made public. Giving the arbitral tribunal power to publish documents related to the arbitral proceedings is important to furthering human rights, because it can bring greater attention to the issues in question. In turn, human rights organizations may be able to educate themselves and advocate for others in efforts to prevent similar situations that could potentially result in human rights abuses. Rather than including this power of discretion regarding publication of documents in the commentary, the drafters should have included this as a provision of the actual article. The power should have been included in the article itself, because, presumably, parties are not adopting the commentary but the articles and provisions themselves.

5. The award

The fifth section contains the articles that pertain to the award of the arbitration. The articles include the decisions, the form and effect of the award, the applicable law, settlement or other grounds for termination, the interpretation of the award, correction of the award, additional award, definition of costs, the fees and expenses of arbitrators, the allocation of costs, and the deposit of costs.

Article 45 governs the form and effect of the award. Specifically, provision four mandates that the arbitral tribunal should give reasons for how the award is human rights compatible. Requiring the arbitral tribunal to state specifically how the award is human rights compatible is a good step in the direction of ensuring parties are receiving fair arbitration because it requires the arbitral tribunal to remain conscious of the human rights impact. However, the drafters fail to provide any information on what “human rights

75 Simma et al., supra note 47.
76 Id.
77 Id.
78 Id.
79 Id. at 7-8.
80 Id.
81 Id. at 77-78.
82 Id.
`compatible” means. 83 Although the drafters designate the Permanent Court of Arbitration as the default arbitrator appointing authority due to its experience and expertise in business and human rights arbitration, parties are not required to adhere to this designation. 84 So, while the Permanent Court of Arbitration may be trusted to appoint arbitrators who are experienced in the relevant area and have the capability to interpret “human rights compatible,” other institutions may not be deserving of the same trust. In order to ensure appropriate awards whether the Permanent Court of Arbitration is used or not, the drafters should have included extra guidance on what “human rights compatible” means.

Article 53 governs the allocation of costs. 85 The Hague Rules adopt the traditional rule that the unsuccessful party bears the costs of the arbitration. 86 The reasoning for this rule is two-fold. First, it prevents parties from bringing unfounded claims. 87 Second, it makes it more feasible for indigent parties to seek arbitration. 88 The drafters, however, recognized that this rule may actually serve as a deterrent of arbitration in the business and human rights arbitration context. So, the drafters gave the power to the arbitral tribunal to split costs as the tribunal deems “reasonable” after taking into account the “conduct of the parties in the arbitration, the financial burden on each party and the public interest . . .” 89 By giving the arbitral tribunal the power to split costs as it sees fit, the drafters protected economically weaker parties’ opportunity to arbitrate by providing assurance that even if the arbitrator(s) do not decide in their favor, they are not necessarily saddled with the costs of arbitration.

III. WHERE THE FINAL HAGUE RULES COULD BE IMPROVED UPON

A. Picking and Choosing Provisions

Arbitration is meant to be independent and allow for greater autonomy of the arbitrating parties. 90 This independence and autonomy is reflected by the fact that parties

83 See Simma et al., supra note 47. In the commentary on Article 45, the drafters note that “[t]he arbitral tribunal has discretion to interpret [human rights compatibility] and what is required in order for its award to be rights-compatible.”

84 Id.

85 Id. at 87.

86 Id.

87 Id.

88 Id.

89 Id.

who agree to use the Hague Rules on Business and Human Rights Arbitration in their arbitration may pick and choose which provisions they wish to implement.\(^9\) In situations where one arbitrating party has greater power than the other party the more powerful party could choose to disregard the provisions that are intended to provide protections against abuse of power.\(^9\) Unfortunately, several articles in the Hague Rules are essential for ensuring that parties receive fair arbitration, and there is no protection from one party derogating from those articles. For example, Article 5 ensures that in situations where one party is unrepresented the tribunal may adopt a more “proactive and inquisitorial” process rather than adversarial.\(^9\) If parties are allowed to disregard this provision when they agree to arbitrate under the Hague Rules, then parties who are already at a disadvantage can become even more disadvantaged. So, the less sophisticated party would be thrown into an adversarial situation without representation when the tribunal could actually be acting in a more helpful manner if the rules were strictly implemented.\(^9\)

Similarly, Article 11 prohibits people previously involved in the dispute from being appointed as an arbitrator.\(^9\) Article 11 additionally prohibits arbitrators of the same nationality as one of the parties from being appointed.\(^9\) Both parts of this provision are intended to ensure impartiality.\(^9\) But if a party can disregard this Article, then the party chips away at the rationale for arbitrating human rights issues. The rationale being that some court systems cannot ensure a fair trial.\(^9\) By giving parties the opportunity to appoint arbitrators who have been involved in some manner or who share the same nationality with a party invites the possibility of bias back into the arbitration process.

Article 19 allows class actions.\(^9\) Class actions are important because they allow for the litigation of claims that generally do not have a large payout. If an individual believes they have a claim, but the cost of litigation—or even arbitration—would outweigh any award the individual may win, the individual is unlikely to pursue the claim alone. And then the would-be respondent—assuming the respondent is acting illegally—would continue to get away with whatever illegal activity it engages in, evading justice. In a class action, the harmed individuals can band together with other harmed individuals, mitigating the costs of litigation to each one until the potential award outweighs the cost of litigation

---

91 Simma et al., *supra* note 47.

92 See *id.* at 3.

93 *Id.* at 24.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 39-40.
or arbitration. However, a corporate party may enter into an arbitration agreement with its employees which derogates Article 19, which likely greatly decreases the possibility of the employees bringing action against the corporate party for human rights violations.

To prevent the issues discussed above, rather than the provision allowing for the parties to choose whichever articles they want to abide by, the provision could apply only to certain articles. The drafters should have decided which articles are imperative to ensuring a fair arbitration process and prohibited parties from derogating from those specific articles. Of course, this is difficult given that arbitration is meant to allow for great autonomy, and the inclusion of a provision prohibiting parties to derogate from certain articles may potentially make the Hague Rules less appealing to parties who are used to the autonomy afforded by arbitration. One implication to a provision that limits party autonomy is that fewer parties may agree to use the Hague Rules. This in turn would result in individuals being forced to arbitrate under rules that are not specifically catered to business and human rights arbitration.

**B. Arbitration as a Replacement for the Judicial System**

In the preamble to the Hague Rules, it is written that arbitration is not a complete replacement of the judicial system. However it is unclear in which situations the drafters of the Hague Rules believe arbitration should be used rather than the judicial system and vice versa. Because it is unclear when parties should use arbitration and when they should pursue their claim in the court system, it could lead to issues regarding arbitrability—the question of whether the claim can be arbitrated. Arbitration is meant to be efficient and an argument of whether or not a claim can be arbitrated will add time and costs to the arbitration process. By failing to clarify when arbitration should be used rather than the judicial system, the drafters are taking away from one of the benefits of arbitration. Although full clarification of when to use arbitration rather than the judicial system may not have been possible without parties first putting the Hague Rules to use, the drafters likely could have avoided the deficiency to some degree. The drafters could have imagined some possible situations where arbitration would be better equipped to handle the issue than the judicial system and vice versa. If the drafters included at least some examples of these situations, they could have cut down on the possibility of arbitrability issues and ensured parties enjoy the benefit of efficiency that is meant to come with arbitration.

**C. Class Actions in Arbitration**

As discussed above, class actions can be incredibly helpful in ensuring that individuals receive damages when their rights have been violated and when the payout would be too small to make the costs of litigation or arbitration worth it. Article 19 provides for the possibility of class actions, but gives no instruction on how an arbitrator, the

---

100 Simma et al., *supra* note 47, at 13.

tribunal, or parties should go about dealing with a class action. As mentioned, the Hague Rules provide guidance for business and human rights arbitration between two or more businesses as well as between businesses and individuals. It is easy to foresee situations where a business violates multiple individuals’ human rights through the same action. As mentioned previously, the Hague Rules are adopted from the UNCITRAL Rules on Transparency. The UNCITRAL Rules do not have a section on class arbitration. In fact, there is a lack of guidance on class arbitration in the arbitration community as a whole. Because arbitrators and arbitral tribunals may not have vast experience with class action arbitration, the drafters should have provided greater guidance on how class action arbitration should proceed.

D. Appointing Authority for Appointing Arbitrators

Article 6 of the Hague Rules designates the Permanent Court of Arbitration as the default appointing authority for appointing arbitrators for business human rights arbitration. The drafters chose the Permanent Court of Arbitration due to its experience and expertise in the area of business and human rights arbitration. Of course, parties that agree to use the Hague Rules have the authority to choose whether or not to use the Permanent Court of Arbitration as the appointing authority for their arbitrators. As discussed above, parties are inclined to use arbitration because parties are allowed greater autonomy than they receive from the court system. However, with a matter as serious as human rights, perhaps the parties’ autonomy should be a bit limited. If the drafters did not

---

102 Simma et al., supra note 47. (“Claims with significant common legal and factual issues shall be heard together. The tribunal may adopt special procedures appropriate to the number, character, amount and subject matter of the particular claims under consideration . . . the arbitral tribunal may allow one or more third persons to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal instrument that includes the relevant arbitration agreement, unless, after giving all parties and the person or persons to be joined the opportunity to be heard, the arbitral tribunal finds that joinder should not be permitted. Third persons so joined shall become parties to the arbitration agreement for the purposes of the arbitration. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration . . . where a third person is a party to or a relevant third party beneficiary of the arbitration agreement, the arbitral tribunal shall not deny the joinder solely on the basis that such joinder might prejudice other parties”).

103 Id.


106 Simma et al., supra note 47.

107 Id.

108 See Simma et al., supra note 47. Parties are not required to follow all of the provisions and articles the drafters have set out in the Hague Rules; parties may choose to derogate from any provisions they wish to.
want to limit the autonomy of parties to the degree of only allowing the Permanent Court of Arbitration as the appointing authority, they should have at least included a list of appointing authorities that have similar experience as the Permanent Court of Arbitration has with human rights and business arbitration. The purpose of the Hague Rules is to ensure the parties receive a fair hearing. One way to do this is to make sure that those overseeing the hearing are well acquainted with human rights. By including a list, the drafters would still be affording the parties some amount of autonomy as well.

IV. CONCLUSION

The Hague Rules on Business and Human Rights Arbitration developed out of the need to efficiently and fairly hear claims of human rights violations arising out of business and contracts. Specifically, the Hague Rules are meant to provide an alternative to the judicial system when individuals cannot be assured that the judicial system will provide a fair and neutral trial and subsequent award. The drafters of the Hague Rules recognized the need to balance parties’ want for autonomy in arbitration with ensuring protection for those whose human rights have been violated. Overall, the drafters produced a set of rules that are in need of greater development and clarification. Business and human rights issues are new to arbitration, and the drafters rely too heavily on arbitrators and arbitral tribunals to interpret the Hague Rules. In a developing field with presumably a small group of experts, the drafters should not have left so much up to the arbitrators and arbitral tribunals. Several of the articles are essential to ensuring parties have fair arbitration proceedings. Unfortunately, many of them are open to interpretation by arbitrators and arbitral tribunals who may not have experience in human rights. Furthermore, all of the articles are susceptible to being completely powerless if parties choose to not adopt them. The drafters should have provided further instruction and explanation in some areas. Additionally, the drafters should have included a provision in the preamble identifying which provisions are most important to ensuring fair arbitration and therefore not allowed to be passed over—even though this would deplete some of the autonomy that typically comes with arbitration.


110 Id.

111 Simma et al., supra note 47,

112 Id.

113 Stanaro, supra, note 2.