Kluwer Arbitration Blog

International Arbitration of Business and Human Rights: A Step Forward

Claes Cronstedt, Jan Eijsbouts, Adrienne Margolis, Martijn Scheltema, Robert C. Thompson (Working Group on International Arbitration of Business and Human Rights) and Steven Ratner (University of Michigan Law School) · Thursday, November 16th, 2017

International arbitration is taking a giant step forward as part of the global movement to protect human rights. A drafting team, with expertise in international investment, arbitration, human rights, supply chains and other issues, is being assembled to prepare a set of rules. The project is the culmination of several years of work exploring the use of arbitration to resolve business and human rights disputes. It is being funded by the City of The Hague and supported by the Netherlands Foreign Ministry. Bruno Simma, former judge of the International Court of Justice and a respected international arbitrator, will chair the drafting team. A wide range of stakeholders will provide input through a network of "sounding boards". Once drafted, the rules will be offered to the Permanent Court of Arbitration and other international arbitration institutions. The new rules could also be used in arbitration proceedings that the parties manage themselves on an ad hoc basis.

Arbitration – Filling a Gap in Victim Protection

Current remedies for business-related human rights abuses such as trafficking in persons, child labor, violence against labor protestors, unsafe and unhealthy working conditions, land seizures, and multiple others are patchy, unpredictable, often ineffective and fragile. This fails both victims, who have little access to justice, and businesses, which often operate in environments of legal uncertainty and where participants are not competing on a level playing field.

The Working Group on International Arbitration of Business and Human Rights has undertaken more than three years of consultations with stakeholders. It has concluded that international arbitration has the potential to handle human rights abuses in many regions where courts and other mechanisms have failed. Arbitration may also be an attractive alternative to court litigation even where competent courts are available, offering speedier procedure and awards that are potentially enforceable throughout the world under the New York Convention.

Multinational businesses face growing pressure to ensure that they and their business partners are not involved in human rights abuse. A number of highly publicized cases have fueled public indignation, prompting concern among businesses that being tainted with human rights abuse can harm their reputation and weaken their social license to operate. International initiatives such as the United Nations Guiding Principles on Business and Human Rights are influencing business policy.

The Guiding Principles' third pillar stresses the necessity of a remedy for victims of corporate human rights abuses, and human rights arbitration represents one form of remedy. In addition, the World Bank's Performance Standards and the Equator Principles are providing human rights guidelines for lenders and investors. National legislation is contributing, for example the recent UK Modern Slavery Act and the new French due diligence law.

Advantages of Human Rights Arbitration for Business and Victims

The Working Group has frequently been asked why businesses would agree to arbitrate human rights disputes. There are many reasons. Arbitration provides a forum in which businesses and those who accuse them of human rights abuses can impartially resolve their disputes no matter where the abuses might occur. When a corporation's reputation is questioned by NGO campaigns, management might prefer speedy resolution of a dispute, rather than lengthy litigation in court. Instead of submitting cases to judges chosen by "the luck of the draw," parties would choose neutral arbitrators who have business and human rights expertise. An expeditious and fair hearing would limit reputational damage. Proceedings can be less adversarial than in court litigation, preserving working relationships.

A business could also choose arbitration to prevent future human rights abuse in its supply chains by inserting human rights commitments and arbitration clauses into its contracts. These contracts could contain perpetual clauses that require each member of a supply chain, in turn, to insert such clauses in contracts with its own suppliers. An entire supply chain could be covered by an arbitration arrangement that allows the originating business to instigate arbitration against any supplier in the chain that breaches the commitment to observe human rights. This would not be expanding its own liability, only exposing any breaching supplier to relatively prompt enforcement.

Businesses that develop projects such as airports, highways, plantations, and mines could place arbitration clauses, human rights commitment clauses and perpetual clauses in their development contracts. This would commit those working on the project to avoid human rights abuses and would be directly enforceable by the multinational, since the actors violating human rights would be subject to arbitration.

Multinationals could increase the deterrent effects of their supply chain and development contracts by enabling victims of abuse to invoke the arbitration clauses, thus becoming third party beneficiaries. Giving rights to victims can be a highly effective compliance tool, as shown in environmental programs where statutes provide for so-called "citizen suits." Victims have historically shown great interest in vindicating their own rights, as numerous cases brought under domestic tort law in various jurisdictions indicate. A supplier or subcontractor is likely to think twice before committing human rights abuse when it faces binding arbitration instigated by the multinational company, the victims, or both.

The victims' side has much to gain by choosing to arbitrate. The lack of available courts in many regions of the world and jurisdictional bars in multinationals' home states mean that arbitration could be the sole source of justice for most victims. Hence, any development that offers arbitration, such as business contracts containing third party rights, would be welcomed.

The Need for New Arbitration Rules and Model Arbitration Clauses

If international arbitration would be acceptable to both the business side and the victims' side, why

are revised arbitration rules needed? The UNCITRAL and other commercial arbitration rules are not flexible enough to accommodate human rights disputes. Human rights arbitration is fundamentally different from, for example, investor-state arbitration and has special requirements that the drafting team will need to examine.

The *first* requirement is that the arbitrators who handle human rights disputes will need to have expertise that is currently lacking. Human rights NGOs have made clear to the Working Group that, in their view, commercial arbitrators have neither the expertise nor the sensitivity to human rights matters to enable victims to feel comfortable coming before an arbitral tribunal. Hence, the Working Group is recommending that arbitration institutions adopting the new rules should create special rosters of human rights arbitrators, as the Permanent Court of Arbitration has established a special roster of arbitrators for environmental matters. The new rules should also allow the parties, especially the victims' side, to appoint qualified arbitrators who are not on the official rosters.

The *second* requirement is that the arbitration proceedings are transparent. Hearings should not be held in secret, and awards should not be unpublicised. Human rights NGOs and many others believe that human rights issues are of public concern. Transparency will also allow the public to hold arbitrators accountable for making fair and impartial rulings.

The *third* requirement relates to the participation of victims and their representatives in human rights proceedings. In many cases of abuse, multiple victims will be presented. Special provisions are needed to qualify such victims as legitimate claimants and allow for joinder of their claims. Additionally, particularly in countries with repressive governments, witness protection arrangements will be required. The arbitrators may need special powers to allocate costs and legal fees to winning victims, in order to overcome the "inequality of arms" that victims face when litigating with well-funded businesses. Finally, human rights awards may require long term monitoring and supervision, along the lines of the environmental rules adopted by the Permanent Court of Arbitration.

In addition to new rules, standardized or model contract language is needed so that businesses can implement the program with suppliers and subcontractors. The Working Group is inviting national and international bar associations to collaborate to draft human rights commitment clauses, escalation clauses and perpetual clauses.

Next steps

This arbitration proposal is in the early stages of development. The Working Group envisions that once the new rules are in place, business leaders will begin to support them. Others will follow. Lenders, investors, and government agencies could also play a role in encouraging the use of international arbitration to resolve business and human rights disputes.

For additional information, including the composition and background of the Working Group, see here.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Thursday, November 16th, 2017 at 10:25 am and is filed under Arbitration, Arbitration Proceedings, Enforcement, Human Rights, International arbitration, International Courts
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.