Seminar March 23, 2017, on Business and Human Rights
The Swedish Branch of the International Law Association, Arbitration Institute of the Stockholm Chamber of Commerce and International Chamber of Commerce (ICC) Swedish National Committee

Presentation by Claes Cronstedt

In April 2013, the Supreme Court of the United Stares dismissed the tort case of *Kiobel v. Shell*. The case was about the liability of a multinational corporation for aiding and abetting crimes against the Ogoni community in the Niger Delta. As the Ogoni people could not expect a fair and open court trial in Nigeria they sought justice in the US courts under the Alien Tort Statute.

Alien Tort Statute is unique. It was enacted 1789 and has one paragraph only. This jurisdictional law permitted aliens to sue in the US courts for torts committed in violation of international law, even if the parties basically had no links with the US - and where the alleged abuses were committed outside the US. It was considered to be the resort for serious human rights disputes where national courts were corrupt, politically influenced or simply unqualified. By the dismissal of this case, the Supreme Court told the world that the US was fed up to be offering extraterritorial jurisdiction to aliens.

The defeat of the Alien Tort Statute triggered the start of our project. Society wants a system of legal governance with global reach for business and human rights disputes.

I took a page out of the book of late medieval history, when the merchants created a private system of delivering justice among themselves - speedily and at low cost. It was referred to as *Lex Mercatoria.* It filled the gap in justice due to the shortcomings of city state courts in their time.

Society now needs a *New Lex Mercatoria* to fill the gap in justice on business and human rights disputes. It should respond to the weakening role of the nation states following globalization. As International Law Professor Anne Marie Slaughter puts it: "*The compression of distances and the dissolution of borders that drive globalization, has proved far more efficient at producing global markets than global justice".* Prof Gunther Teubner, a famous legal thinker, known for his works within the field of Social Theory of Law is perhaps a step further: "*The difference between a highly globalized economy and weakly globalized politics, presses for the emergence of a global law that*

has no legislation, no political constitution, no politically ordered hierarchy …".

I contacted a small group of international lawyers to discuss how to apply international human rights law in civil disputes and if society could accept arbitration as an answer to the problem. Bob Thompson, New York, Jan Eijsbouts, The Hague, and myself became the core and executive members of the Working Group on the project named *International Business and Human Rights Arbitration.*

We applauded John Ruggie with his UN Guiding Principles on Business and Human Rights. But these are still non-binding on corporations and we concluded that waiting for the UN and/or nation states to solve the problem would take to long a time that society can't afford to lose. Further, the rule of national law is suffering in many countries. India for example has a backlog of more than 33 million cases.

All in all, by thinking outside the box we believed that arbitration combined with mediation could be a new global avenue for swift access to justice in business and human rights disputes. Providing tailor-made arbitration rules and expert arbitrators and mediators could potentially have a significant impact in ensuring the right to remedy. It could also promote the implementation of all three pillars of the UN Guiding Principles and enhance the OECD National Contact Point system. Jan Eijsbouts will tell you more.

Arbitration requires the consent of the parties. Both victims and corporations have an incentive to agree to submit human rights disputes to international arbitration. The victims would have an effective forum in which to seek justice. The corporations would have a way to prevent and resolve disputes that, if allowed to fester, could have dire consequences for their risk profiles, reputations and social license.

We are focusing on three areas. The first two relate to global supply chains and development projects. Their consent to arbitrate would come in the form of contractual provisions aimed at complying with human rights norms, and with a final clause that requires the parties to resolve any disputes through arbitration.

The third area we are focusing on consists of disputes that arise without a pre-existing arbitration agreement. In these situations it will be up to the parties to decide whether to mediate and arbitrate and get a swift

resolution, or to fight out the dispute in an often unpredictable foreign court and also risk a fierce media and Internet campaign.

Many of the worst cases of human rights violation began as minor complaints that were ignored by the corporations. They then grew to major confrontations, which escalated to serious human rights violations - big fires starting from small fires.

That's why mediation plays a vital role in our project. Before resorting to arbitration, the disputing parties would do well to consider the use of mediation. This could allow them to maintain control of their dispute and its resolution, and thus potentially arrive at a settlement, quickly and at a low cost. Mediation also offers advantages when the disputing parties wish to preserve a valuable relationship. Our project will provide a roster of expert mediators from different cultures. Jan Eijsbouts will tell you more.

Mediation and arbitration proceedings could take place virtually anywhere in the world. And an arbitration award may be enforced in any of the 156 states that are parties to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. A national court judgment, on the other hand, can with some exceptions only be enforced in the state of that court.

What happens next with our project? The next step is to prepare special arbitration rules, based on the UNCITRAL but adjusted to fit the needs of human rights disputes. To be clear, our project should not be equated with other forms of arbitration, such as the criticised investor-state arbitration – hence, totally different stories. Jan Eijsbouts will tell you why.

There are three aspects to consider. The first is to line up a sponsor for the project. The second is to identify the issues that should be taken into account when developing the new arbitration rules. And the third is to assemble a drafting team, and a set of advisors to that team that represent all concerned stakeholders. This draft list of issues, based on our discussions with various stakeholder groups to date, appears on Appendix C in our discussion paper. The final list should become a starting point for the actual drafting process.

Since our project began 2013, we have invited comments from the business community, the international human rights community, the academics and governments. Nearly all of the responses have been positive. We have posted six discussion papers; you have received the last version.

So there you are. We believe in this project. An old saying: *Justice, once there is a procedure for its delivery, is prone to have its own momentum.*