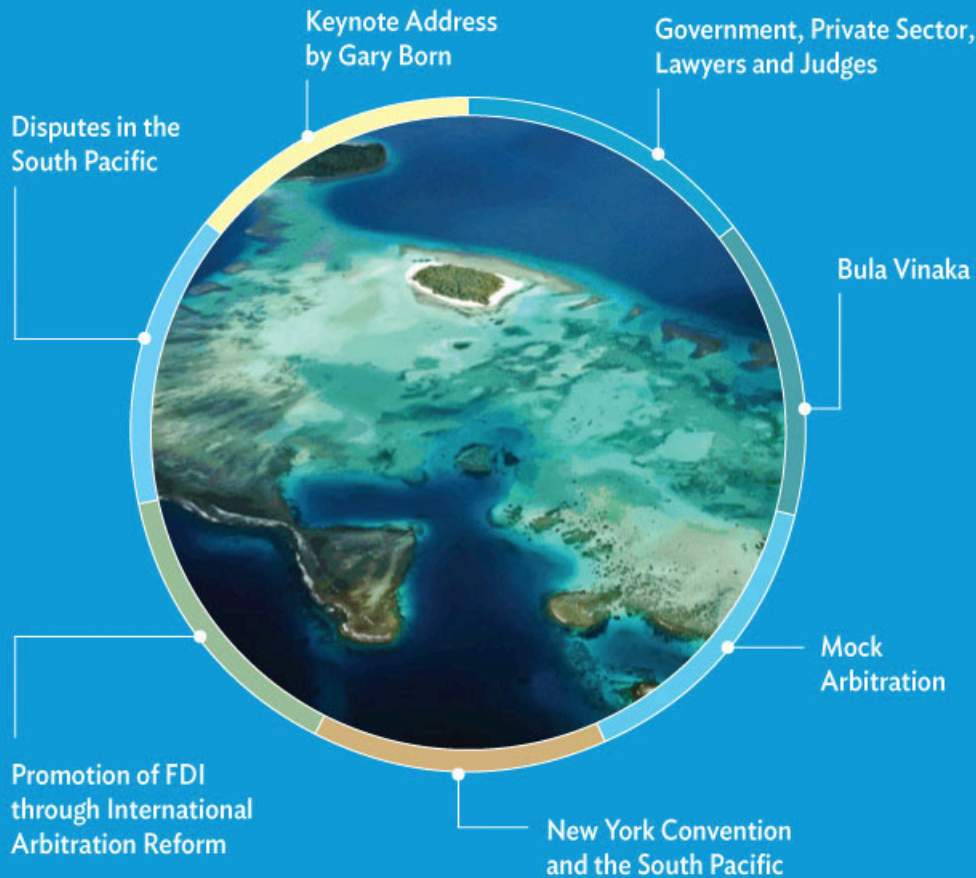


REGIONAL INTERNATIONAL ARBITRATION CONFERENCE

DAWN OF INTERNATIONAL ARBITRATION IN THE SOUTH PACIFIC

12 & 13 February 2018

Westin Denarau Island, Nadi, Fiji



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CONSTRUCTION DISPUTES



United Nations
UNCITRAL



Construction Disputes

- Construction developments in South Pacific
- Features of construction dispute resolution
- Types of construction disputes

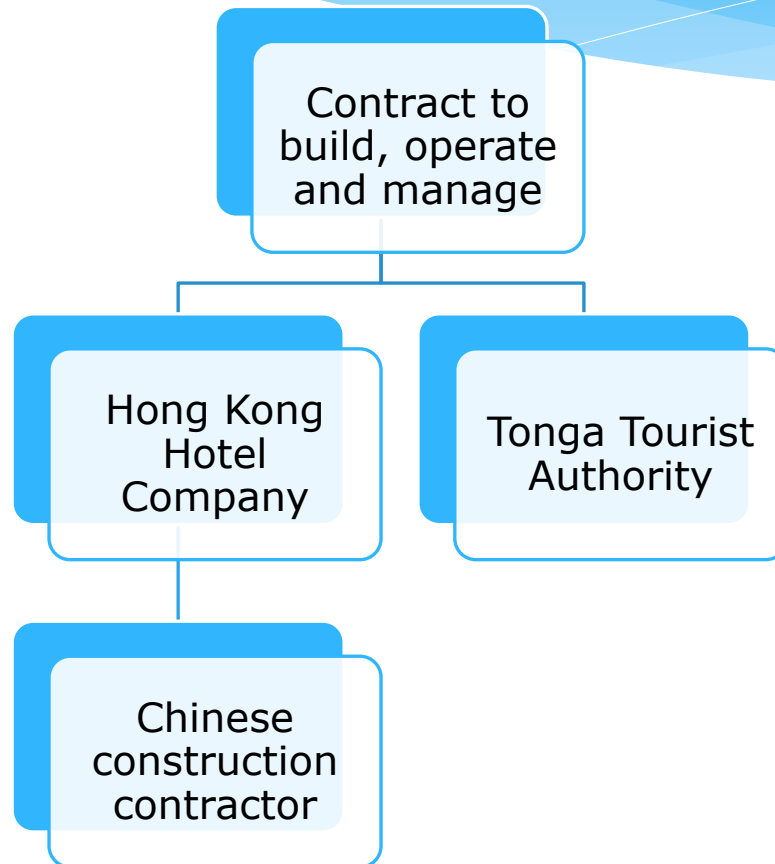


Construction developments

- Energy projects – hydroelectric power, renewable energy, electricity storage and distribution – PNG, Solomon Islands, Marshall Islands, Cook Islands, Vanuatu
- Road and transport projects – Timor-Leste
- Port projects – Nauru
- Water supply and sanitation – Solomon Islands
- Submarine cable – internet connection - Micronesia

Case study

Construction of luxury resort project in Tonga





Case study

- Contract to build, operate and manage – Tonga Tourist Authority and Hong Kong Hotel Company
- EPC Contract – Hong Kong Hotel Company and Chinese construction company
- 24 months for construction
- Delays in government approvals and then delays in supply of materials – estimated to be 6 months late
- Chinese construction company claims EOT
- Also claims additional payment for variations



Features of construction dispute resolution

- * Negotiations
- * Mediation
- * Expert determination
- * Dispute avoidance boards / dispute resolution boards
- * Arbitration
- * Litigation

Mediation

- * Neutral mediator who facilitates settlement
- * No binding decision from mediator
- * One of the first steps before adjudication begins
- * Flexible procedure
- * Creative outcome possible



Expert determination

- * Informal form of adjudication by neutral expert
- * Resolves narrow, factual, technical issues
- * Experts rely more on their own expertise and investigation
- * Final and contractually binding decision



Dispute avoidance boards

- * Included in FIDIC Forms for disputes arising during project execution
- * A standing or ad hoc board of neutrals who provide recommendations or contractually binding decisions, which may be binding and may become final
- * Dispute adjudication board
 - Dispute avoidance board

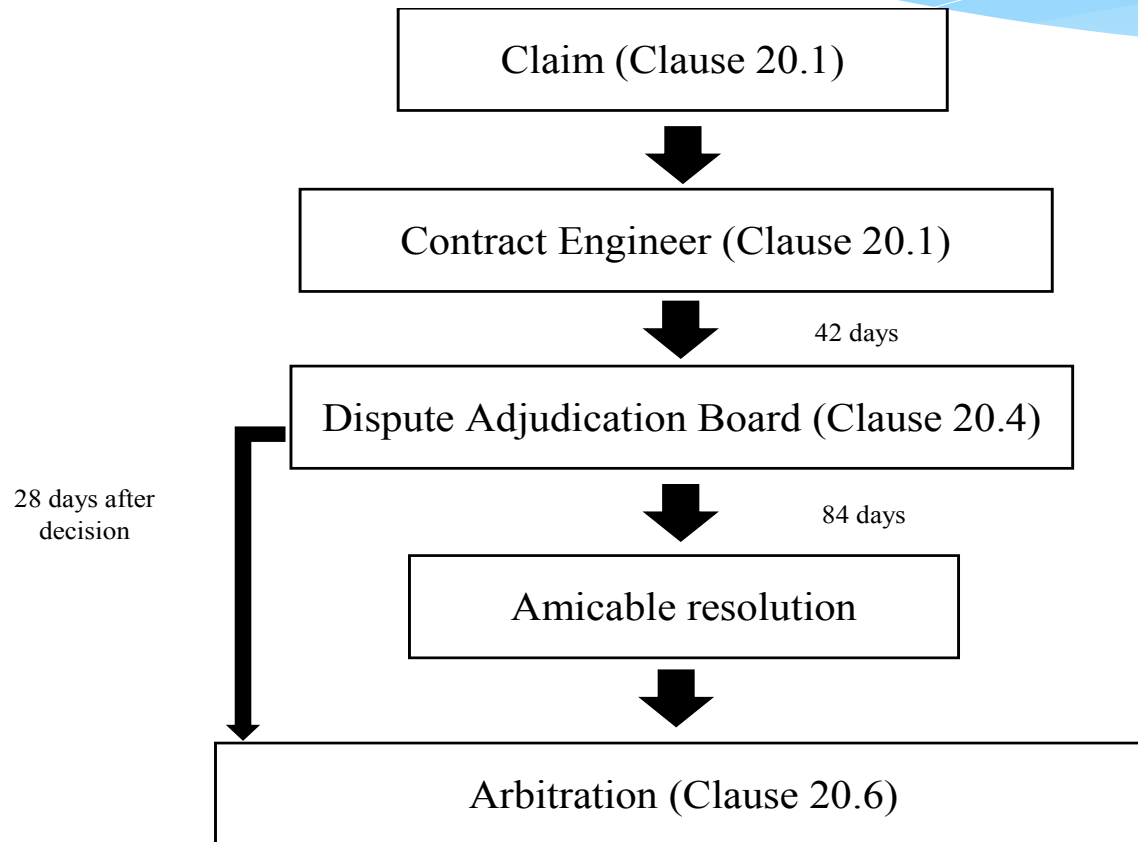
Arbitration

- * Speed
- * Cost
- * Choice of arbitrator
- * Flexibility of procedure
- * Award executed as a decree
- * Limited grounds for challenge to an award
- * Privacy and confidentiality
- * Newer forms of dispute resolution – hybrid mechanisms/multi tier mechanisms
- * Arb-Med-Arb

- * Nature, volume and complexity of construction contracts.
- * Multifaceted fact situations involving multiple agreements, multiple parties and complicated timelines.
- * Construction law is a “separate breed of animal” – high level of specificity; technical terminology and milestones.
- * Need for specialization/expertise.

Dispute Resolution under FIDIC

- All FIDIC contracts contain a common dispute resolution clause.
- * Clause 20 prescribes a multi-tier dispute resolution mechanism:



Multi-party Arbitration

- * Construction contracts typically involve multiple contracts and multiple parties; sub-contracts and sub-contractors.
- * Main contract and the subcontracts are separate and distinct agreements.
- * No direct relationship between the employer/developer and the subcontractor - possibility of initiation of parallel arbitration proceedings.
- * Parties may expressly provide for multi-party arbitrations in their contracts or incorporate identical arbitration clauses in the main contract and all subcontracts.



Best Practices in Construction Arbitration

- * Drafting a clear, unequivocal and unambiguous arbitration agreement.
- * Fixing reasonable procedural timetable to sufficiently analyse and present the complex facts involved.
- * Maintaining proper documentation; loss of key witnesses presents obstacles in formulating, quantifying and proving claims.
- * Adding specificity while incorporating standard form construction contract terms.
- * Ensuring continuous hearings - practical considerations of delay and disruption are instrumental in determining liability.



Types of construction disputes

- * Delays and extension of time
- * Variations
- * Quality of performance
- * Defects
- * Failure to comply with specifications



Common issues in construction disputes

- Variation claims
- Extension of time (EOT) claims
- Security

Variation claims

What constitutes variation:

- * A Variation is an alteration to the scope of works of the Contractor by the Employer in the form of an **addition**, **substitution** or **omission** from the original scope of works.

Variations under FIDIC Silver Book (Clause 13):

- * Employer may instruct the variation without prior agreement as to feasibility or price;
- * Employer may request a proposal, seeking prior agreement so as to minimise the dispute; or
- * Contractor may initiate their own proposal.

Procedure: Article 13.3 of Silver Book

Valuation of Variations:

- * Schedule of Rates and Prices in the Contract;
- * Rates or prices for similar work, if appropriate; or
- * Cost Plus Profit of executing works.

Role of Technical Experts:

- * whether the work constitutes a variation;
- * if so, what is the price adjustment to the Contract Price; and
- * how this will impact the Contractor's Time for Completion (EOT Claims).



Extension of Time (EOT) claims

EOTs under FIDIC Silver Book (Clause 8.5)

- * A Contractor is entitled to an EOT if and to the extent that Time for Completion is or will be delayed by:
 - * a Variation;
 - * a cause of delay giving an entitlement to EOT under the Contract (e.g., delays caused by authorities (Clause 8.6)); or
 - * any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site (or any Unforeseeable shortages in the availability of Employer-Supplied Materials).

Delay damages (Clause 8.8)

- * Damages for failure to complete works within Time for Completion
- * Sole remedy for delay

Role of Technical Experts

Performance security under FIDIC Silver Book (Clause 4.2)

- * The Contract should specify the amount and currencies of any performance security given by the Contractor.
- * The specific form of performance security should be included in the tender documents annexed to the conditions of the Contract.

When is recourse to security available?

- * Clause 4.2.2 FIDIC Silver Book

Common Issues

- * Conditional vs unconditional; on demand vs notice provisions; relevant jurisdiction; governing law

Case Study

Questions ?