

REGIONAL INTERNATIONAL ARBITRATION CONFERENCE

DAWN OF INTERNATIONAL ARBITRATION IN THE SOUTH PACIFIC

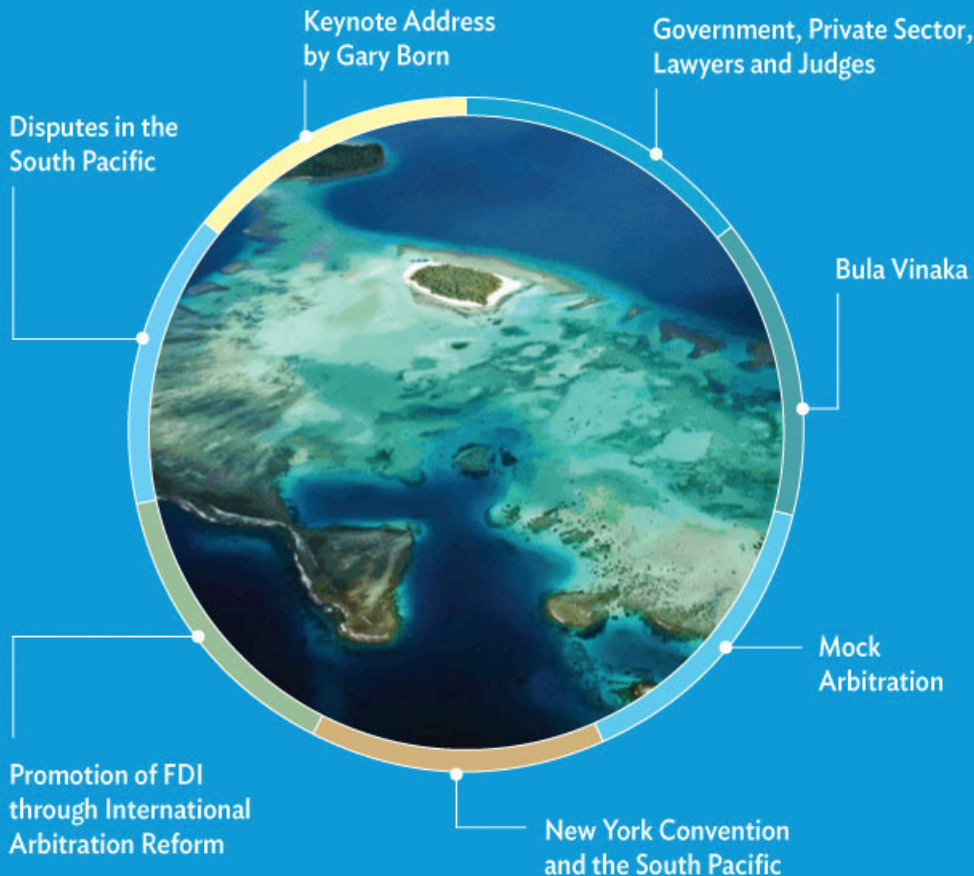
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Westin Denarau Island, Nadi, Fiji

CONTRACTING WITH FOREIGN PARTIES & CROSS-BORDER DISPUTE RESOLUTION

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United Nations
UNCITRAL

What is Arbitration?

A procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute.

In choosing arbitration, the parties opt for a **private** dispute resolution procedure instead of going to court

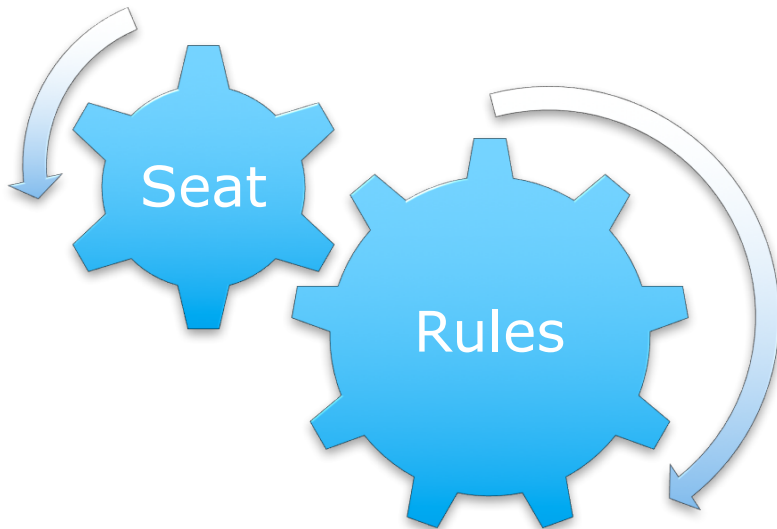
Arbitration versus Litigation

- * Neutrality of forum
- * Confidentiality
- * Flexibility of procedure
- * Choice of arbitrators
- * Expertise
- * Costs
- * Enforceability
- * Finality

What is an Arbitration Agreement?

- * A clause in a contract, by which the parties to a contract agree to submit to arbitration the disputes that may arise in relation to that contract
- * An agreement by which the parties to a dispute that has already arisen agree to submit the dispute to arbitration

Key Moving Parts



Nature, complexity and value of potential claims

Speed at which decision is required

Multi-party disputes

Location of the relevant parties

Law of the Seat

Which Arbitration Rules should I choose?



Choosing the Right Arbitration Rules

- * Who are the parties involved?
- * Do the rules cater for the specific needs of the parties?
- * What is the reputation and experience of the institution?
- * How much institutional involvement will there be?
- * How many arbitrators should there be in default of agreement?
- * What will the fees and costs be and how are they calculated?

Institutional or Ad-hoc?

- * UNCITRAL Arbitration Rules
- * International Chamber of Commerce (ICC)
- * Singapore International Arbitration Centre (SIAC)
- * Hong Kong International Arbitration Centre (HKIAC)
- * London Court of International Arbitration (LCIA)
- * Australia Centre for International Commercial Arbitration (ACICA)

How to choose your Arbitrator



How to choose the Right Arbitrator

- * Nationality and language
- * Professional qualifications and expertise
- * Temperament and disposition
- * Independence and impartiality
- * Availability
- * Relationship with other arbitrators

Where should your
Arbitration be seated?

Choosing the Right Seat

- * Will the courts of the seat intervene in the arbitration?
- * Does the legislation of the seat impose additional rules?
- * Is the subject matter of the dispute arbitrable?
- * To what extent can the arbitral award be challenged/appealed?
- * How enforceable is the arbitral award?



What Makes a Good Seat: The London Principles

- * An arbitration law providing a good framework for the process, limiting court intervention and striking the right balance between confidentiality and transparency
- * An independent, competent and efficient judiciary
- * An independent, competent legal profession with expertise in international arbitration



The London Principles

- * The right to choose one's legal representative, local or foreign
- * Ready access to the country for witnesses and counsel and a safe environment for participants and their documents
- * Professional norms embracing diversity of legal and cultural traditions, and ethical principles governing arbitrators and counsel



The London Principles

- * Well-functioning venues for hearings and meetings
- * Adherence to treaties for the recognition and enforcement of foreign awards and arbitration agreements

Cost Benefit Analysis



The diagram features two large, overlapping arrows on a blue background. The left arrow points left and is labeled 'Damages'. The right arrow points right and is labeled 'Costs'. Both arrows have a gradient from light blue to yellow. The arrows overlap in the center, with the 'Costs' arrow positioned slightly behind the 'Damages' arrow.

Damages

Costs

Quantifying Damages

PWC International Arbitration Damages Research 2015

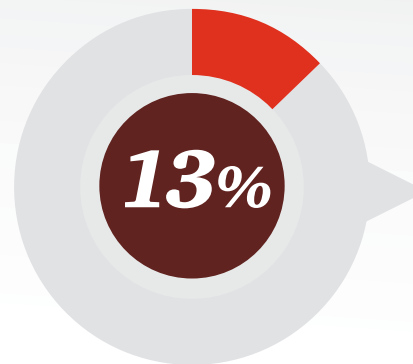
Mind the Gap

Given the huge disparity in the parties' relative positions, tribunals have a difficult job to determine an appropriate amount of damages to award. We found that there were few cases where the tribunal awarded zero damages or the full amount claimed. In the majority of cases tribunals award less than half of the amount claimed.

Tribunal awarded claims



Tribunals
award on
average only
37% of the
amount
claimed



**Respondent
expert vs.
claimant**
Respondent amount
as a % of amount
claimed (**13%**)



Quantifying Damages

- * Fair market value
 - * Where a party has been deprived of an asset
 - * When an asset has been harmed
 - * When a party has been misled
- * Valuation date
 - * Date when cause of action occurred
 - * Date when damage occurred
 - * Date when claim is made



Quantifying Damages

- * Methods of valuation
 - * Income approach – discounted cash flow
 - * Market approach – trading and transaction comparables
 - * Cost approach – replacement cost

Categories of Costs

- * Cost Calculators
 - * Arbitrator fees
 - * Administrative fees
- * External counsel's fees
- * Fees for expert witnesses
- * Support services costs
- * Enforcement fees
- * Management, employees, in-house counsel's costs

Comparison of costs

Global Arbitration Review, Arbitration Costs Compared, 2018

	100,000 – 500,000		1,000,000 – 5,000,000		10,000,000 – 50,000,000	
	1 arbitrator	3 arbitrators	1 arbitrator	3 arbitrators	1 arbitrator	3 arbitrators
SIAC	11,320 – 32,438	28,194 – 84,777	49,125 – 93,696	128,139 – 244,611	115,982 – 213,589	302,304 – 549,911
ICC	15,825 – 42,159	35,945 – 96,007	62,714 – 132,349	141,472 – 307,107	170,799 – 267,988	397,367 – 612,966

Third-Party Funding

- * Financing of a claim by a party unconnected to the dispute in return for financial gain – typically a share of the damages if the claims succeed
- * Financing or risk management tool – preserve cash flow for core businesses while shifting the risks and cost of their claims to the funder.
- * Explicitly allowed in certain jurisdictions

Thank you



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