

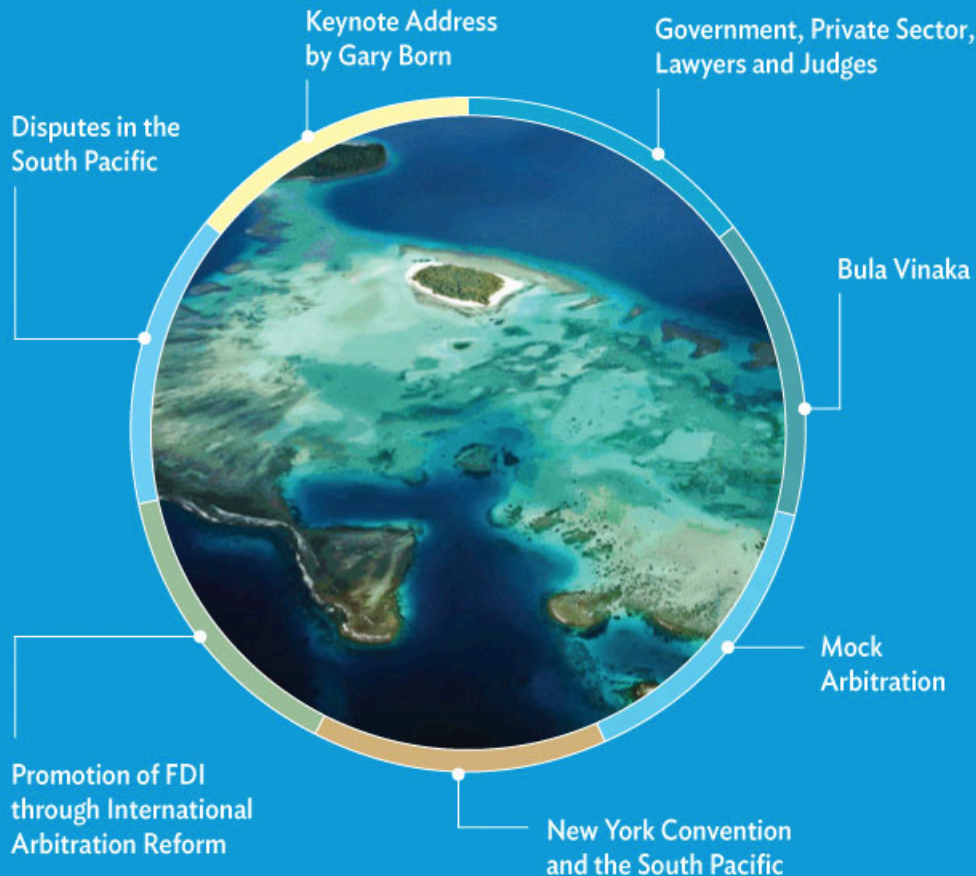
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REGIONAL INTERNATIONAL ARBITRATION CONFERENCE

DAWN OF INTERNATIONAL ARBITRATION IN THE SOUTH PACIFIC

12 & 13 February 2018

Westin Denarau Island, Nadi, Fiji



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DRAFTING ARBITRATION AGREEMENTS

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Horrigan and Tim Lindsay**

13 February 2018



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Agenda



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- Dispute resolution options
- Model clauses
- Key elements of an arbitration clause
- Optional clauses to consider
- Tips and traps



Dispute resolution options



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- What are the potential risks?
- How will disputes be resolved?
 - where?
 - by whom?
 - which legal rules?
- What does the dispute resolution clause say?
- Is it enforceable?
- What are your options?



Dispute resolution options



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- Negotiations
- Mediation
- Expert determination
- Arbitration
- Litigation



Benefits of arbitration



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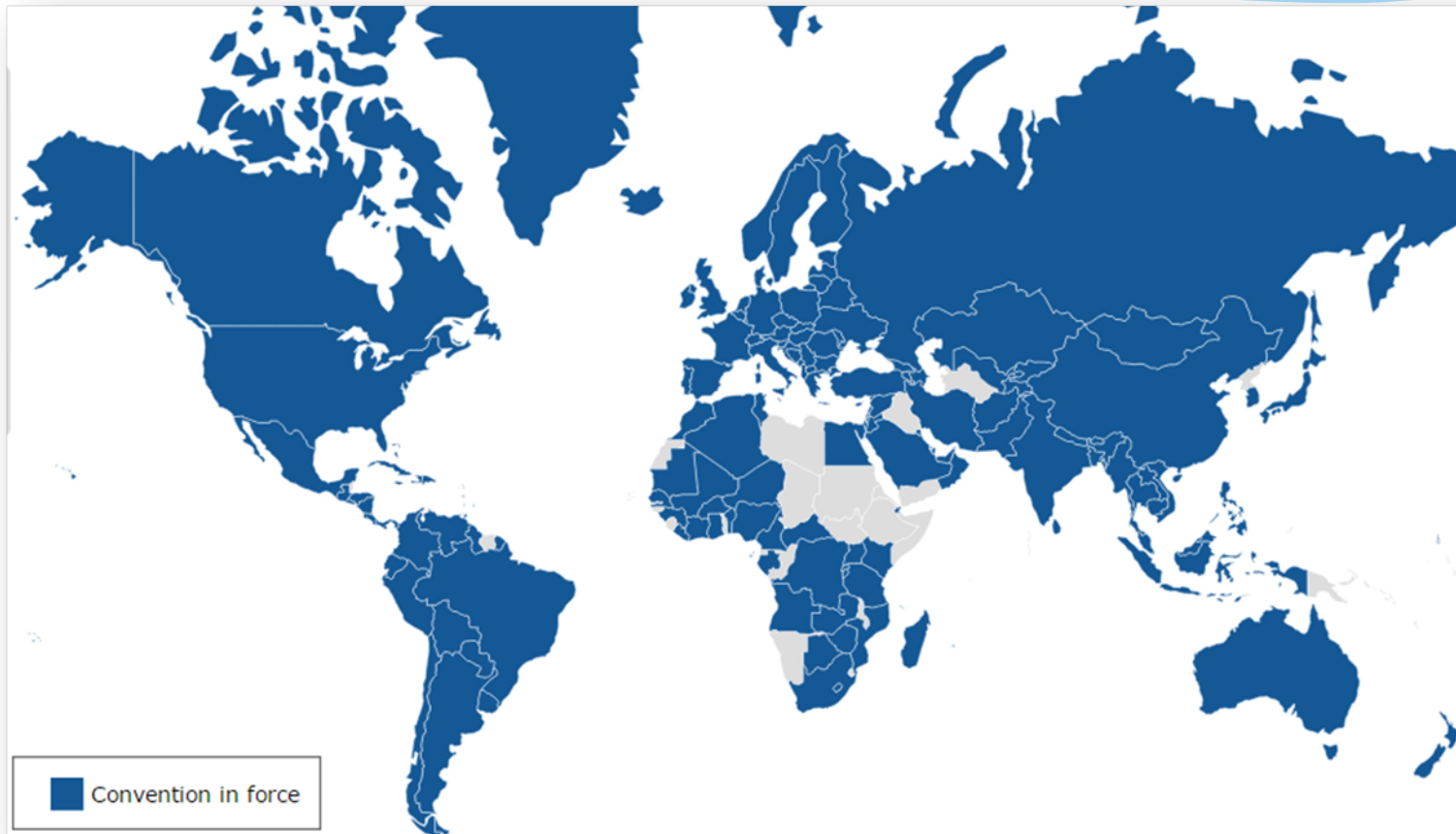
- Choice of independent tribunal
- Neutral forum with flexible procedures
- Binding outcome with limited right of challenge (no appeal)
- Confidentiality and privacy
- Key advantage of arbitration: **ENFORCEMENT!**

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New York Convention



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Model Clause



- Model clauses of arbitral institutions



香港國際仲裁中心
Hong Kong International
Arbitration Centre



ACICA
Australian Centre for
International Commercial Arbitration



ARBITRATORS' AND MEDIATORS'
INSTITUTE OF NEW ZEALAND INC
Te Mana Kaiwhakataua, Takawaenga o Aotearoa



ICC Model Clause



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All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.



SIAC Model Clause



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* SIAC MODEL CLAUSE

In drawing up international contracts, we recommend that parties include the following arbitration clause:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].*

The Tribunal shall consist of _____** arbitrator(s).

The language of the arbitration shall be _____.

Key elements





Submission to arbitration



- Broad definition of “dispute”
- “Relating to”, “arising out of”, “in connection with”
- Cover all disputes - contract, tort, statute
- Different approaches to interpretation



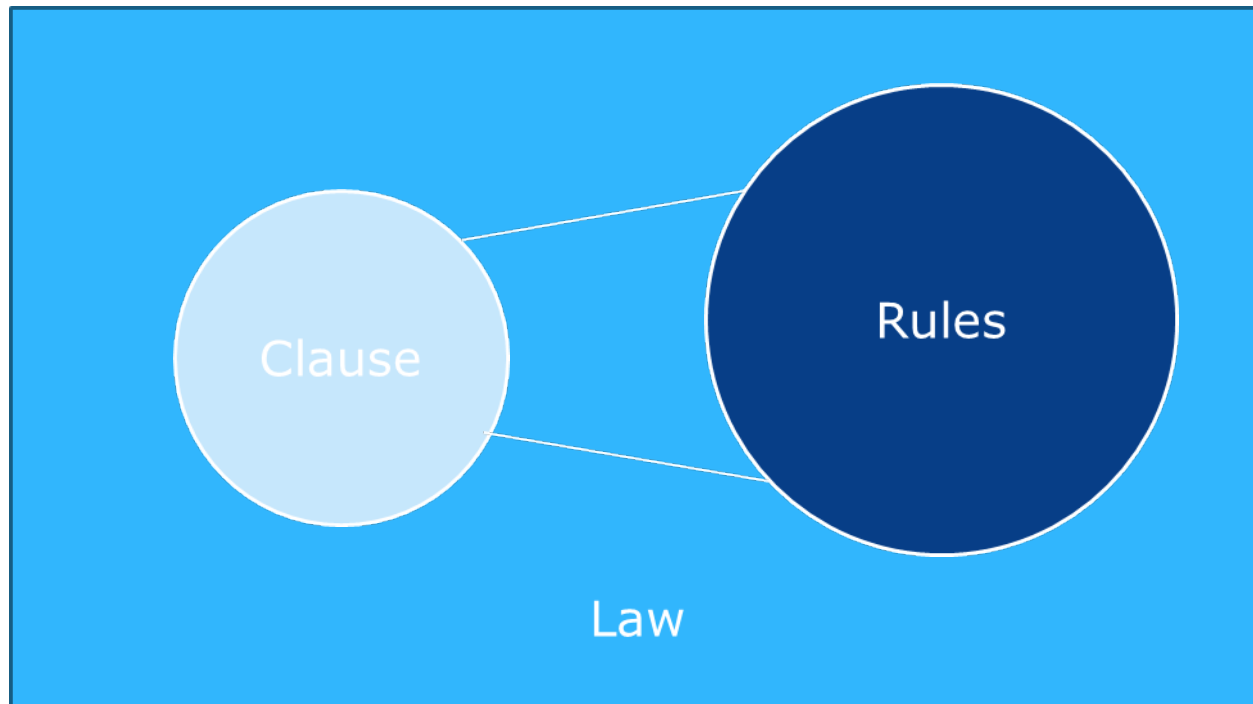
Arbitral Rules



- Arbitral Rules play significant role
- Interaction between clause, rules and law of seat (procedural law)
- Ad-hoc vs institutional arbitration



Arbitral Rules



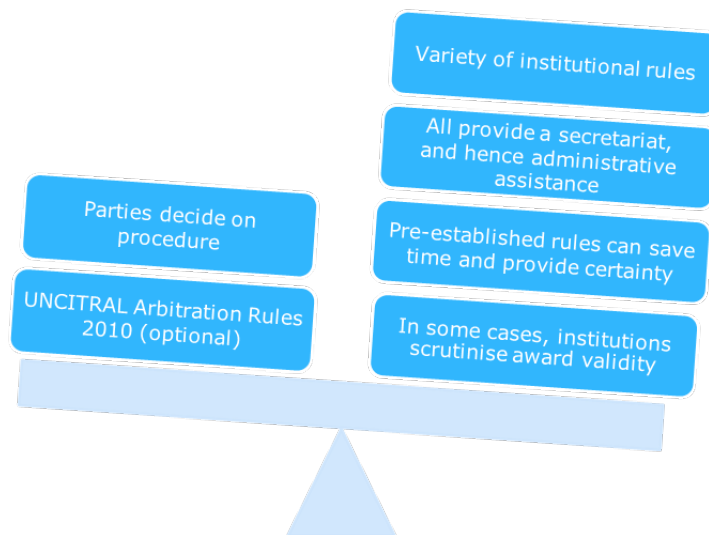


Institutional vs ad hoc arbitration



Ad-hoc

Institutional





Seat of arbitration



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- Procedural law – procedural issues:
 - Local arbitration legislation/procedure
- Court support and supervises the arbitral proceeding
 - Issue interim remedies
 - May assist with taking of evidence
 - Consider any challenge to set aside the award
- Enforcement of an award – based on the seat of the arbitration
 - An award made in a State that is party to the New York Convention is enforceable in any other party State
- Seat / legal place may not be physical place of proceedings
 - Hearings may be held where convenient



UNCITRAL Model Law



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- United Nations Commission on International Trade Law:
Model Law on International Commercial Arbitration 1985
(amended 2006)
- An instrument to promote harmonisation:

...a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.

— Resolution adopted by the General Assembly
(11 December 1985)



Arbitral tribunal



- Specify number of arbitrators
- Amount in dispute
- Complexity of dispute / issues involved
- Consider appointment process – may be specified in arbitral rules or in arbitration clause
- Default process for appointment



Language of arbitration



- Specify the language of arbitration
- Language of pleadings and hearings
- Witness statements, expert reports
- Translation issues



Governing law



- Law of contract – substantive law / merits
- Law of arbitration agreement
- Law of procedure of arbitration



Optional clauses



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- Confidentiality
- Interim measures
- Award is final and binding
- Waiver of appeal on point of law
- Joinder and consolidation
- Guidance on how to conduct the arbitration



Tips and traps



Tip 1: Clauses are not boilerplate

[intentionally defective clause removed from distribution version]



Tips and traps



[intentionally defective clause removed from
distribution version]



Tips and traps



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Tip 2: Consider the scope of the clause

- All disputes, including “existence, validity or termination” of the contract?
- Are steps mandatory or permissible?
- Is a step dependent on a later agreement?
(eg parties will agree on how to resolve dispute)



Tips and traps



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Tip 3: consider any carve outs from the clause

- Have disputes been carved out for expert determination?
- Have disputes been split between arbitration and litigation?



Tips and traps



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Tip 4: Keep the clause simple

- Be aware of possible disadvantages of multi-tier clauses
- Consider whether optional clauses are necessary



Tips and traps



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Tip 5: Check your drafting carefully!

- Check cross-referencing
- Check time frames between different mechanisms
- Is clause certain and enforceable?



Questions



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