

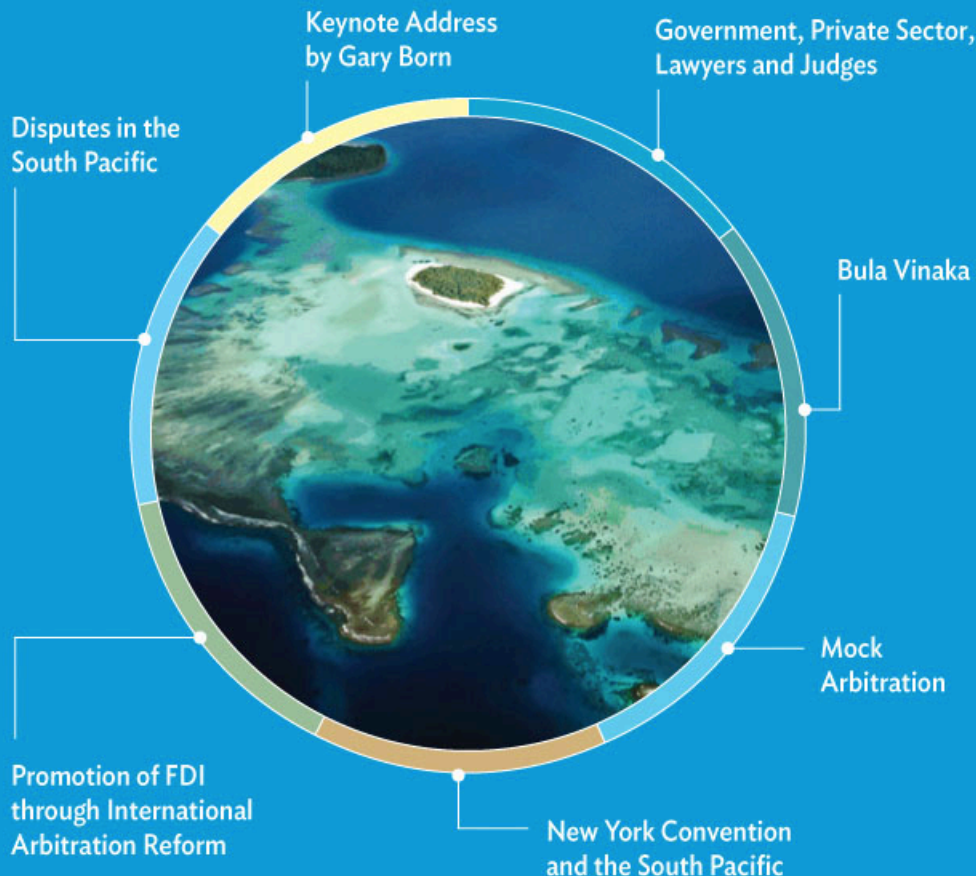
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REGIONAL INTERNATIONAL ARBITRATION CONFERENCE

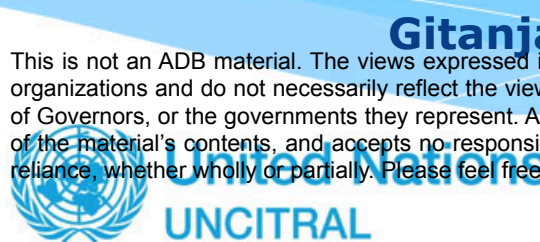
DAWN OF INTERNATIONAL ARBITRATION IN THE SOUTH PACIFIC

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KUSTOM – A PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION



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Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**)



United Nations
UNCITRAL

- * A convention for the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.
- * 157 signatories
- * Very limited exceptions for enforcement are set out in Article V.



Grounds for refusal of enforcement – Art V



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1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.



The Public Policy Exception – V(2)(b)



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Article V(2)(b) of the New York Convention:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: [...]

(b) The recognition or enforcement of the award would be **contrary to the public policy of that country.**"



Common Ground in Regard to the Public Policy Exception



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- Spirit and purpose: protect the fundamental, mandatory policies of the Contracting States' national legal regimes
- Public policy exception can be invoked ex officio by the relevant national courts
- Exception to the general “pro-enforcement” approach of the New York Convention
- Public policy has to be interpreted restrictively



The Fiji International Arbitration Act 2017



- Article 54(1)(b)(ii) implements Article V(2)(b) of the New York Convention
- Article 55 clarifies in which cases public policy is expressly violated:

Without limiting the generality of sections 32(1)(b)(ii), 52(2)(b)(ii) and 54(1)(b)(ii) of this Act, it is declared, **for the avoidance of any doubt**, that, for the purposes of those sections, **an interim measure or award is in conflict with**, or is contrary to, **the public policy of Fiji if—**

- (a) the making of the interim measure or award was induced or affected by **fraud or corruption**; or
- (b) a **breach of the rules of natural justice** occurred in connection with the making of the interim measure or award.



Aspects of Public Policy (International Law Association)



“The international public policy of any State includes: (i) **fundamental principles, pertaining to justice or morality**, that the State wishes to protect even when it is not directly concerned; (ii) **rules designed to serve the essential political, social or economic interests of the State**, these being known as 'lois de police' or 'public policy rules'; and (iii) the **duty of the State to respect its obligations** towards other States or international organisations.”

Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 19 Arb. Int'l 249, at 255 Recommendation 1(d) (2003)



Kastom as Public Policy – “Fundamentality” Criterion



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- Public policy exception can only be applied “on the basis of articulated, **fundamental** policies that are **reflected in constitutional, legislative, or judicial authority**” (Gary Born, International Commercial Arbitration, 2nd ed., § 26.05[C], at 3665)
- Recognition of kastom in many **constitutions of the Pacific Islands**: Fiji, Cook Islands, Federated States of Micronesia, Papua New Guinea, Samoa, Solomon Islands, Tuvalu
- Recognition of kastom also by **statutory law**: Laws of Kiribati Act 1989, sections 4(2)(b) and 5(1)



Kastom and International Arbitration – the Example of Micronesia



- Constitution of the Federated States of Micronesia (FSM), Article XI Section 11:

“Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia.”



Kustom and International Arbitration – the Example of Micronesia (2)



- FSM Supreme Court in *E.M. Chen & Associates v Pohnpei Port Authority*:

“The Court finds that **non-judicial settlement of disputes is entirely consistent with Micronesian customs and traditions**, whether it be by arbitration or some other form of alternative dispute resolution. The time and expense of judicial proceedings can make them prohibitive for some people. **The less confrontational atmosphere of non-judicial proceedings may be attractive to parties** for many reasons.”

FSM Supreme Court, Trial Division (28 September 2001), 10 FSM Intrm. 400, at 408 et seq.