



INTERNATIONAL MEDIATION AND  
ARBITRATION CONFERENCE

# 2nd South Pacific International Arbitration Conference

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Stanley Hotel, Port Moresby  
Papua New Guinea



## ARBITRATION IN PAPUA NEW GUINEA DRAFTING ARBITRATION AGREEMENTS

**Daniel Kalderimis, Partner, Chapman Tripp**

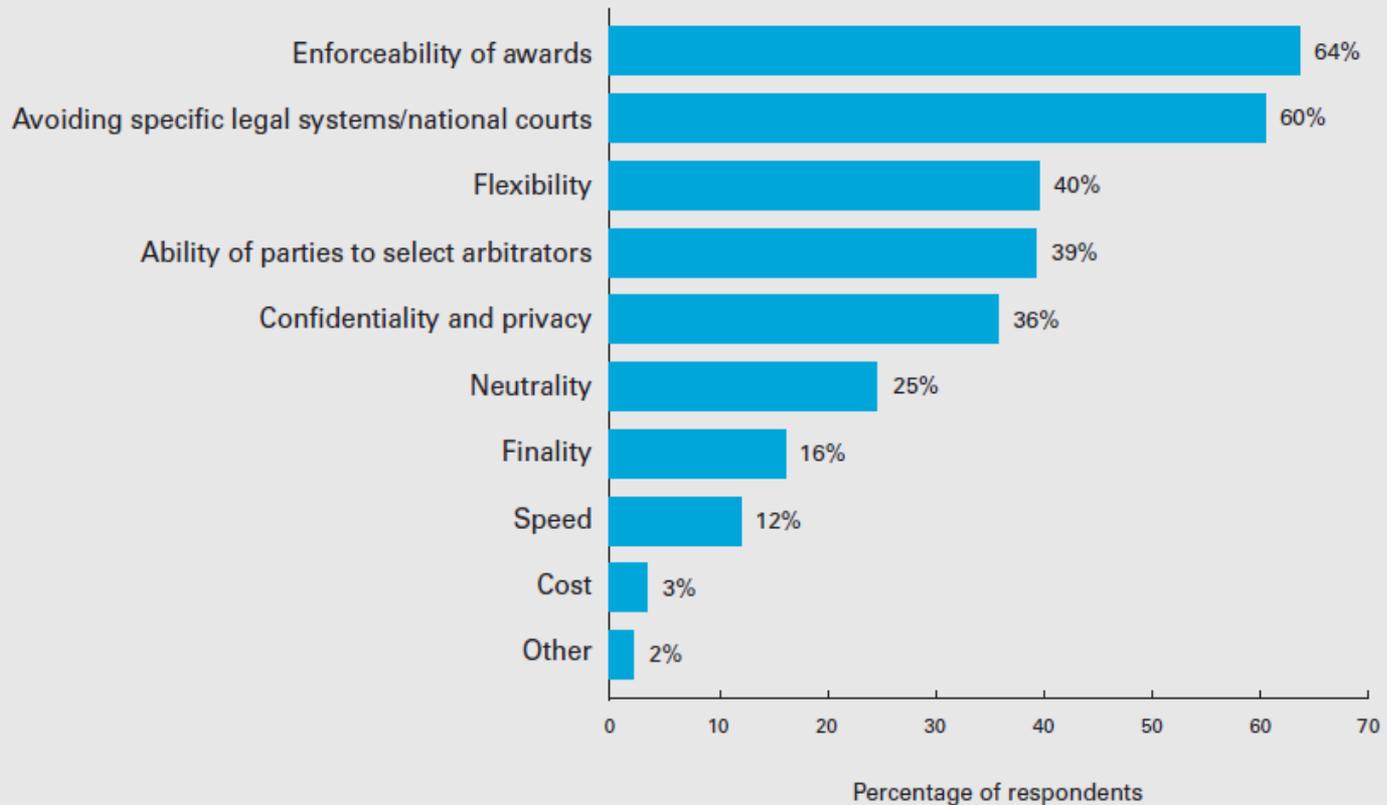
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26 March 2019

# Topics covered

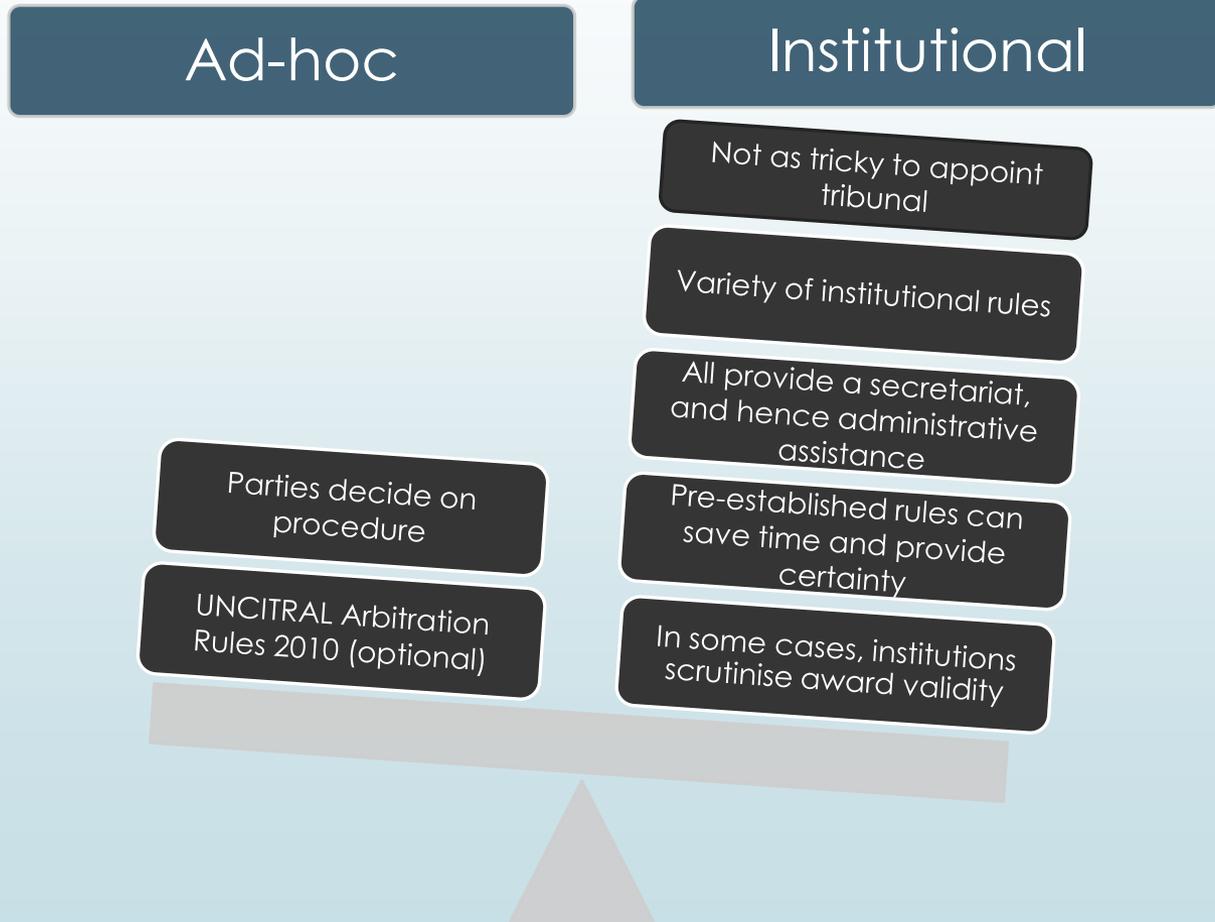
- ▶ Key objectives when drafting an arbitration clause:
  - ▶ promoting *enforceability*
  - ▶ protecting *confidentiality*
  - ▶ preserving *flexibility*
- ▶ Difference between *ad hoc* and institutional arbitration
- ▶ Using model clauses of the main arbitration institutions
- ▶ Knowing where you *don't* need to make adjustments
- ▶ Looking at 2 areas where adjustments may be required:
  - ▶ rules/standards to assist with evidence
  - ▶ joinder of third parties / consolidation of related disputes

**Chart 3: What are the three most valuable characteristics of international arbitration?**



2018 International Arbitration Survey: The Evolution of International Arbitration Queen Mary University of London and White & Case

# Ad-hoc vs institutional arbitration



# Ad-hoc vs institutional arbitration

- ▶ All in all, often wise to incorporate into your arbitration agreement institutional procedural rules
- ▶ In the Asia-Pacific region, consider:

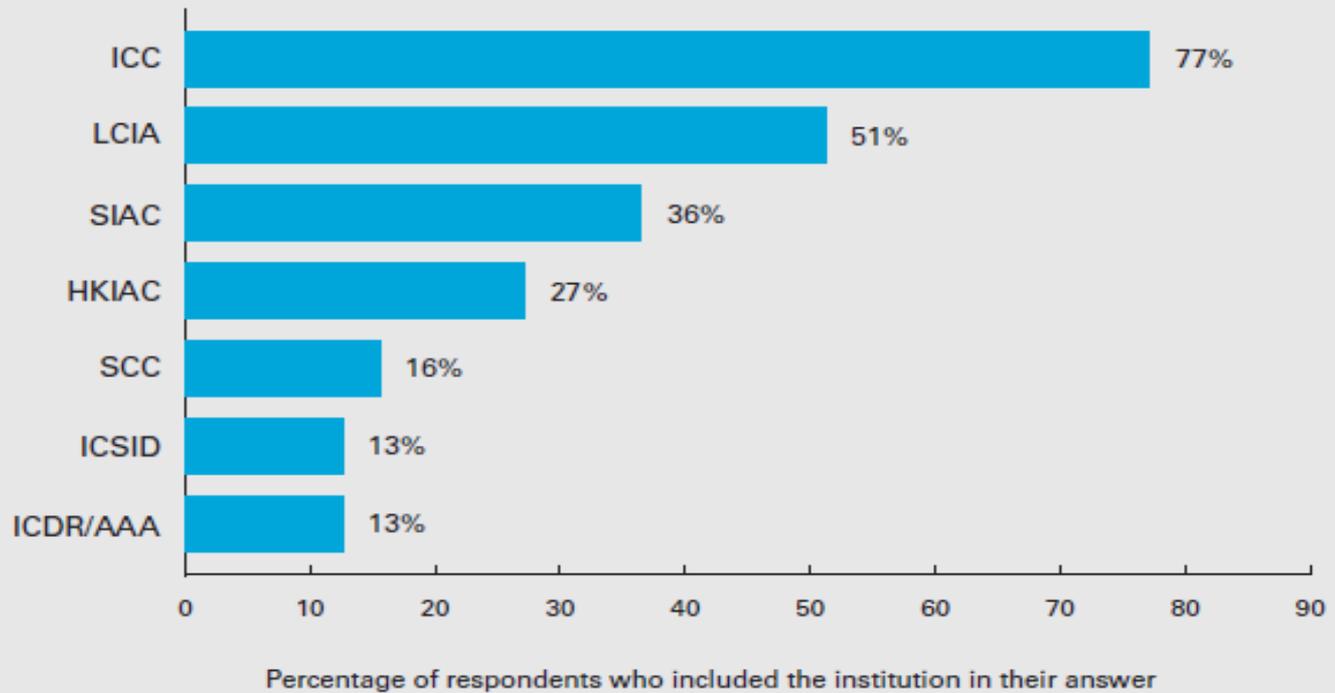


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Te Mana Kaiwhakatau, Takawaenga o Aotearoa

**Chart 12: What are your or your organisation's most preferred institutions?**



**Enforceable**

**Confidential**

**Flexible**





**Consolidation  
and joinder**

**Golden  
Rule: use  
the model  
clause;  
depart only  
advisedly**

**Interim  
measures**

**Confidentiality**

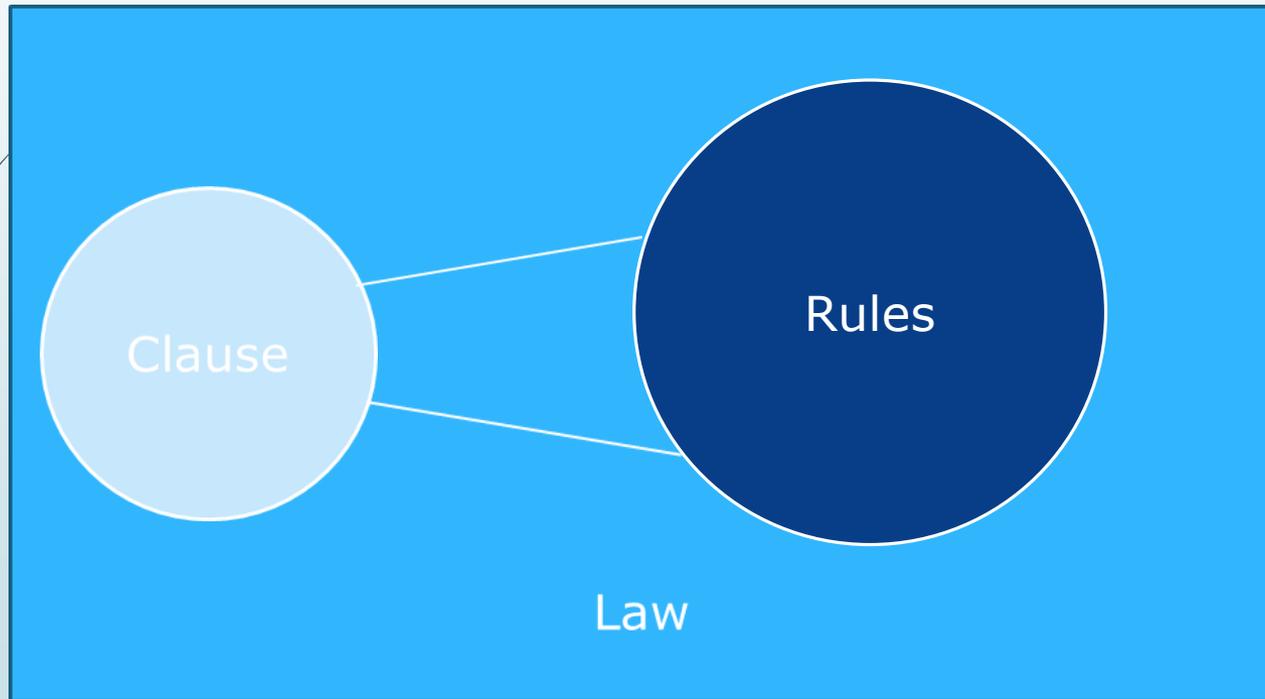
**Gathering  
evidence**

# A cautionary tale about traversing *off piste*



- *Carr v Gallaway Cook Allan* [2014] NZSC 75
- **Golden rule:**
  - use the model clause
  - where deviating, obtain good advice

# Drafting an effective arbitration clause



# Do you need a confidentiality clause?

- ▶ Check, as may be covered by the default settings:
  - ▶ NZ and HK arbitration law
  - ▶ SIAC Rules
  - ▶ Common law principles (English / Singapore common law)

## **14B Arbitration agreements deemed to prohibit disclosure of confidential information**

- (1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.

## **Rule 39: Confidentiality**

- 39.1 Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.

*Ali Shipping v Shipyard Trogir* [1998] 2 All ER 136 (CA) at 146:  
confidentiality is a “term which arises as the nature of the contract itself implicitly requires”

# Do you need an interim measures clause?

- ▶ Addressed in Model Law, art 9 (and hence most national arbitration laws), and most institutional rules
- ▶ Prudent to address this topic only if you seek to clarify circumstances of domestic relief

## *Article 9. Arbitration agreement and interim measures by court*

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

# The procedural preference paradox

- ▶ Easy to agree on procedural preferences in advance, but don't yet know what the dispute will look like or require
- ▶ Hard to agree on procedural preferences once a dispute has arisen, even though much clearer what the dispute will require
- ▶ Institutional rules, while helpful generally, have little to say on evidence rules, standards and procedure





# Selecting additional rules to assist with evidence

- ▶ IBA Rules on the Taking of Evidence in International Arbitration 2010
- ▶ Often wisest to include a “*shall have regard to*” clause
- ▶ Alternative = Prague Rules on the Efficient Conduct of Proceedings in International Arbitration 2018

# Expert drafting: third party joinder

## ➤ **Who**

- Ideally, third party identified in and signs arbitration agreement

## ➤ **How**

- third party must be given copy of notice of arbitration and manifest consent to join

## ➤ **When**

- third party must submit notice to join within X days from receipt of notice of arbitration

## ➤ **Threshold**

- can the third party join any dispute or only some kinds? Is this adequately defined?

## ➤ **Right / discretion**

- does third party *apply* to join or exercise a right to *join*?

## ➤ **Result**

- third party may make claims in and is bound by arbitration

# Expert drafting: consolidating related disputes

## ► **Which agreements**

- eg, A+B agreement *and* B+C agreement

## ► **How**

- each of A, B and C must be given copy of any notice of arbitration submitted under either agreement

## ► **When**

- must submit written consolidation notice, identifying relevant dispute(s), within X days from the receipt of the notice of arbitration

## ► **Threshold**

- usually only available where disputes substantially related and/or raise common questions of law and fact

## ► **Right / discretion**

- does the consolidation notice give rise to a tribunal discretion or compel consolidation?

## ► **Result**

- (usually) only tribunal appointed first in time (if more than one) continues, with jurisdiction over all relevant disputes

# Joinder/consolidation: two final thoughts

- Often wisest:
  - not to draft parallel clauses in related agreements, but to incorporate by reference a single set of master dispute resolution procedures
  - to provide that each member of the arbitral tribunal shall be appointed by an institution, in order to avoid any impression of unfairness (as in *Siemens AG/BKMI Industrienlagen GmbH v Dutco Construction Company* (1993) XVIII YB Comm Arb 140 (Cour de Cassation) at 141)

**Enforceable** ✓

**Confidential** ✓

**Flexible** ✓



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# Questions?

Daniel Kalderimis

Chapman Tripp, Partner

[daniel.kalderimis@chapmantripp.com](mailto:daniel.kalderimis@chapmantripp.com)

+64 27 599 5839