

3RD South Pacific International Arbitration Conference

De-Risking Investment in the South Pacific Through a World Class International Arbitration Disputes Regime

Drafting International Arbitration Agreements

By Jo Delaney, Swee Yen Koh, May Tai, Daniel Kalderimis and Abhinav Bhushan

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Agenda

- Introduction
- Dispute resolution options
- Ad hoc vs institutional arbitration
- Key elements of an arbitration agreement
- Optional elements for an arbitration agreement
- Tips and traps for drafting arbitration agreements

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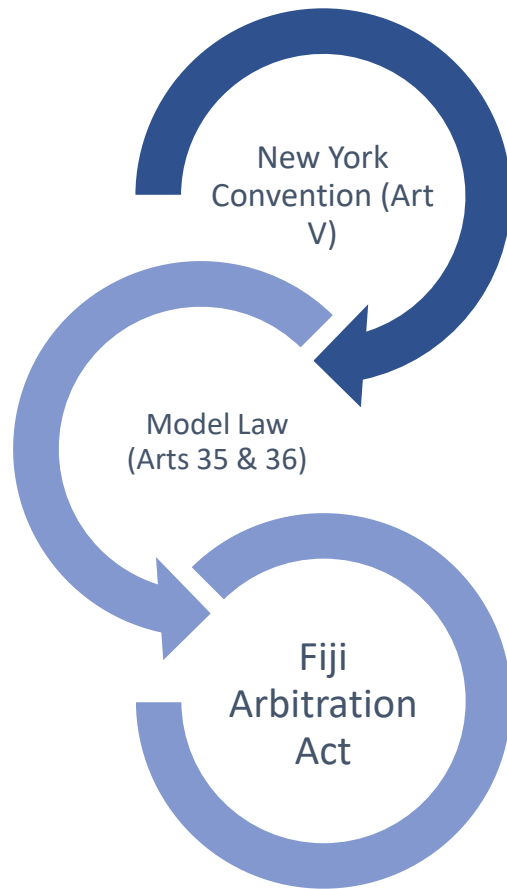
Benefits of arbitration

- 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!**

New York Convention

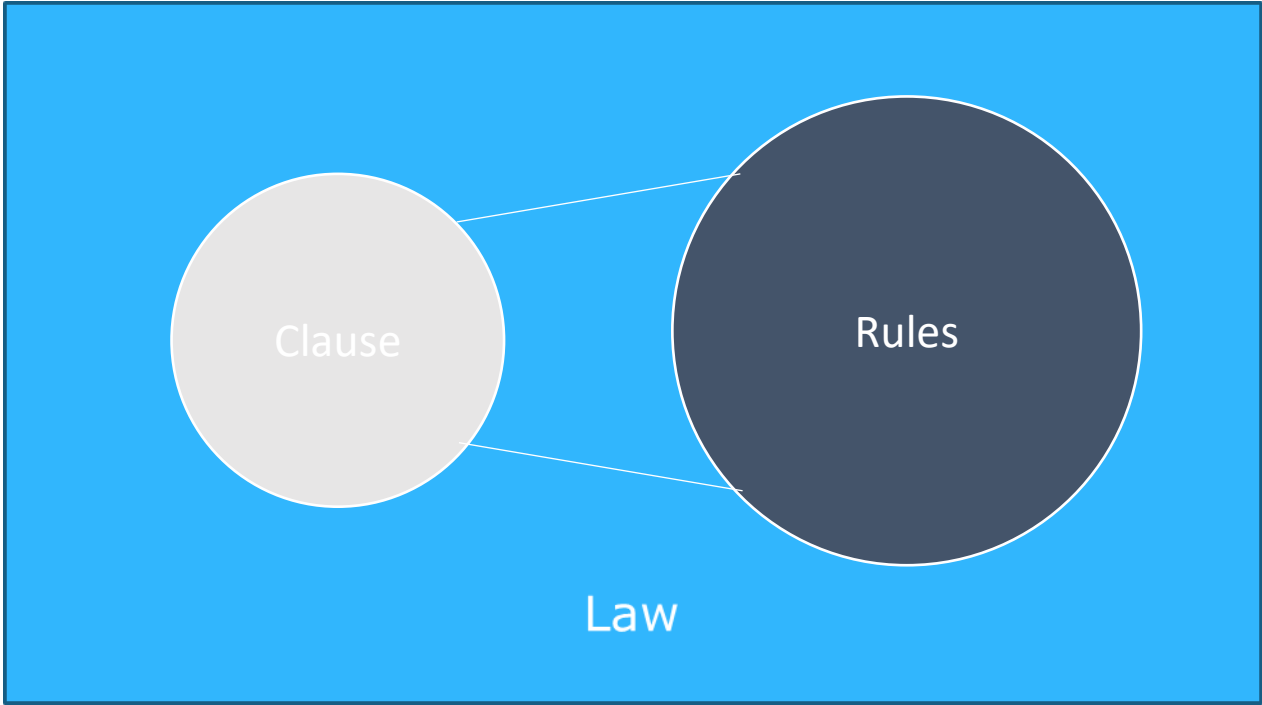


Legal framework

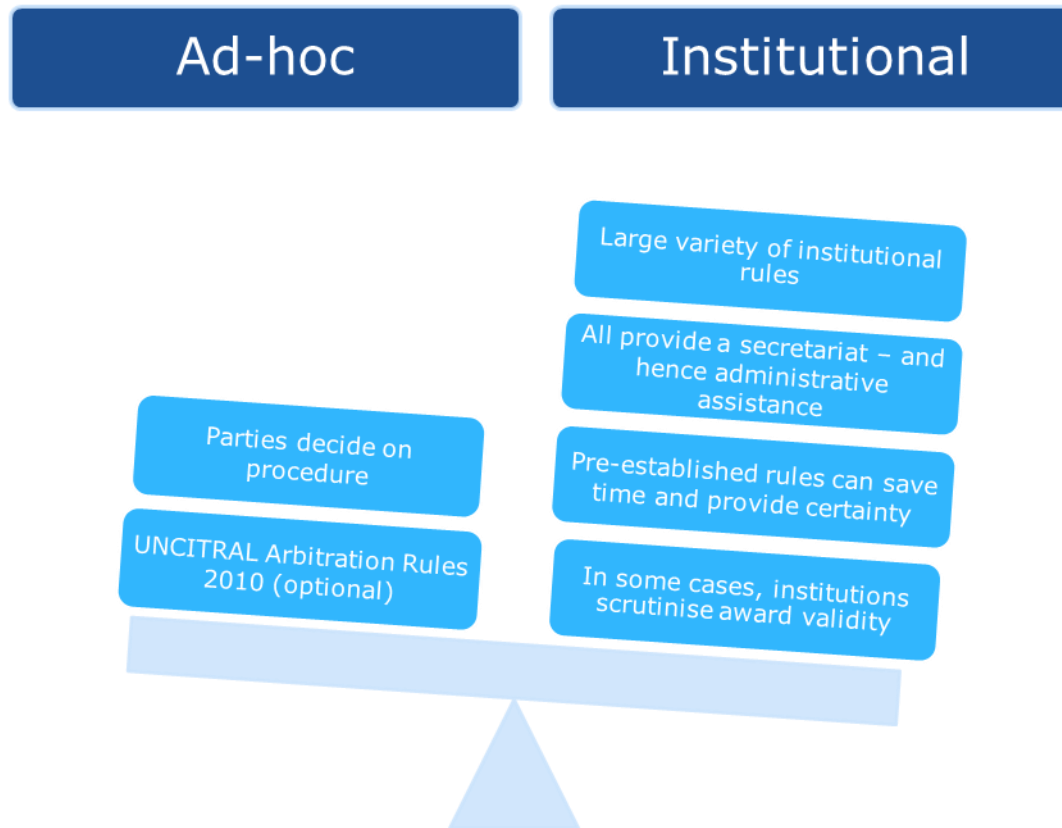


- Article V of the New York Convention provides a simple regime for recognition and enforcement of arbitral awards
- The Model Law operationalises this regime in Articles 35 and 36
- States (e.g. Fiji) domestically implement these provisions to facilitate the global functioning and enforcement of arbitral awards

Arbitration clause vs arbitral rules vs arbitration legislation



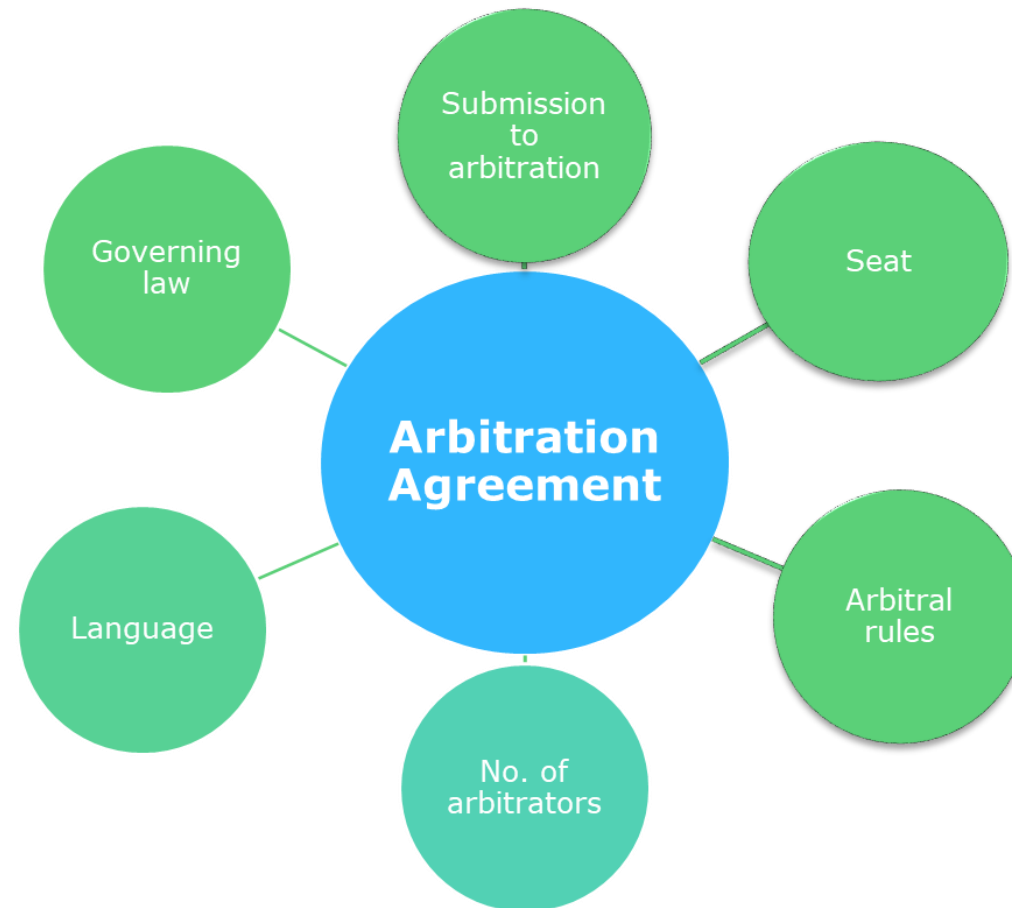
Ad hoc vs institutional arbitration



Key arbitral institutions in APAC



Key elements in an arbitration agreement



ICC Model Clause



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



* **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 _____.

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Optional elements for arbitration agreement

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



Tips and traps

Tip No. 1: Use the model clauses, otherwise beware

Example 1

“In the event of a dispute or difference, arising out of or in connection with this contract, the parties hereby agree that such dispute or difference may, through **election by either party**, be litigated or referred to arbitration in Moscow.”

Example 2

“ 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 **in Singapore, India** administered by the Singapore International Arbitration Centre in accordance with the **Arbitration Rules of the Malaysian Chamber of Arbitration** for the time being in force, which rules are deemed to be incorporated by reference in this clause.”



Tips and traps

Example 3

“In the event of a commercial dispute or difference arising from this contract, the parties hereby agree that such dispute or differences shall be referred to and finally resolved by arbitration.”

Example 4

“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 Chamber of Commerce in Singapore in accordance with its arbitration rules for the time being in force.”



Tips and traps

Example 5

“The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration **as per Singapore Contract Rules.**”

Example 6

“Any and all such disputes shall be finally resolved by **arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce** then in effect and the proceedings shall take place in Singapore and the official language shall be English.”



Tips and traps

Example 7

“This Agreement shall be governed by the laws of the People’s Republic of China.

With respect to any and all disputes arising out of or relating to this Agreement, the Parties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for **arbitration in Shanghai**, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both Parties.

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Tips and traps

Tip 2: Consider the scope of the clause

- All disputes?
- Are steps mandatory or permissible?
- Is a step dependent on a later agreement?



Tips and traps

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?
- How is the division to be determined? Is the distinction clear?

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Tips and traps

Tip 4: Keep the clause simple

- Be aware of possible disadvantages of multitier clauses
- Consider whether the optional clause is necessary
- Are there additional elements that are not required?

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Tips and traps

Tip 5: Check your drafting carefully!

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

Questions

