



GLOBALISING YOUR PRACTICE - OPPORTUNITIES AND CHALLENGES

Alternative Dispute Resolution Through International Arbitration and Mediation

NGOGA GAKUBA Thierry(Rwanda)

FIJI LAW SOCIETY/INTERNATIONAL BAR ASSOCIATION CONVENTION 2019

Nadi, 6 & 7 September 2019



Introduction

Foreign investors prefer to invest in countries that maintain efficient and modern laws.

For example, jurisdictions that regularly reform their laws on international arbitration, such as Hong Kong and Singapore, are among the top recipients of foreign investment globally. Even if they invest elsewhere, they are comfortable to take disputes to that particular jurisdiction.

Currently the Arbitration have become an industry silently contributing to the Economic growth in some jurisdictions with clear understanding of the role of policy makers in the process.

A great work have been done in FIJI toward Mediation; Keeping the momentum is important(Building the culture of Mediation) ; the role of judges, Lawyers, etc...(case of Lagos Multi door Court in Nigeria, Switzerland, Rwanda)



**GLOBALISING YOUR PRACTICE -
OPPORTUNITIES AND CHALLENGES**

Introduction (Content)

(1) International Arbitration and legal Representation

(2) Using statistical data to Map the Pacific region in International arbitration and discussing what lawyers and policy makers in the region should explore to appear on the map of international arbitration for **the “CAKE TO BE SHARED PROPERLY” as a way to face Globalization.**

(3) A highlight on Mediation.



International Arbitration & Legal Representation

- Limitations on the parties' choice of legal representatives would contradict the basic concept of arbitration as a flexible and self-tailored dispute resolution system.
- freedom of legal representation is recognized in most national arbitration laws, and by most institutional arbitration rules . Especially in South-Eastern Asia and Pacific; the arbitration rules of many centers and Arbitration Act provide for such a freedom:

Art. 35 of FIJI INTERNATIONAL ARBITRATION ACT 2017:” *Unless otherwise agreed by the parties, a party may appear in person before an arbitral tribunal and may be represented— (a) by himself or herself; or (b) by any other person of that party’s choice*

International Arbitration & Legal Representation(Cont...)

- Article 5 of the Chinese European Arbitration Centre (CEAC) arbitration rules 2012: *“Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation **or assistance(...)**”.*
- South Korea: Article 7 of Korean Commercial Arbitration Board rules 2016: *“ A party may be represented by any person of its choice in proceedings under the Rules, subject to such proof of authority as the Arbitral Tribunal may require”*
- **Singapore:** Art. 23 of SIAC rules 2016
- **Australia:** article 8 of ACICA arbitration Rules 2016
- **Thailand:** article 53 of the Thailand arbitration center rules 2015
- **China:** Article 22 of China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules 2014



International Arbitration & Legal Representation(Cont...)

- ❑ Despite what have been said: laws in a few jurisdictions require that counsel in locally-seated to be locally-qualified to represent in arbitration
- ✓ That is true in Turkey, **Thailand** and was formerly true in Japan and a few other jurisdictions(Gary Born , 2014).
- ✓ **difficulties also in India.** There, the law appears to allow foreign lawyers to appear in arbitration but this is have been challenged to the Supreme Court in Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position of the SC of March 18, 2018 appear to be that foreign lawyers not allowed to appear in arbitration. (<http://www.advocatekhoj.com/library/judgments/announcement.php?WID=9848>)
- ✓ **In Nigeria:** Nigeria Legal Practitioners Act define a legal Practitioner as only lawyer registered to practice law in Nigeria(**Is that a good way to share the CAKE?**)



International Arbitration & Legal Representation(Precision)

- **Philippine:** Article 13 of the Philippine Dispute Resolution Center *rules of 2015* : “*the parties may be represented by persons of their choice, irrespective of, in particular, **nationality or professional qualification**” .*
- **Mauritius:** In the Mauritius Arbitration Act (section 31) " Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, **who need not to be qualified to practice law in Mauritius or in any other jurisdiction.**“
- **Tested Best Practice without Precision:** case of Rwanda with 25 KIAC International arbitration case out 97 total cases(Parties have been represented by foreign counsels but preferred to work with local counsels since the Seat of arbitration and applicable law to the contract were mainly Rwanda in the 97 cases: Rwandan Law)
 - ✓ **Allowing anybody is important for defining a “safe arbitration seat”**
 - ✓ **Focus much on your Seat in contract (Applicable law) for ended share the “CAKE”**
 - ✓ **Example of two Asian parties applying law of one of the country of North America or European**



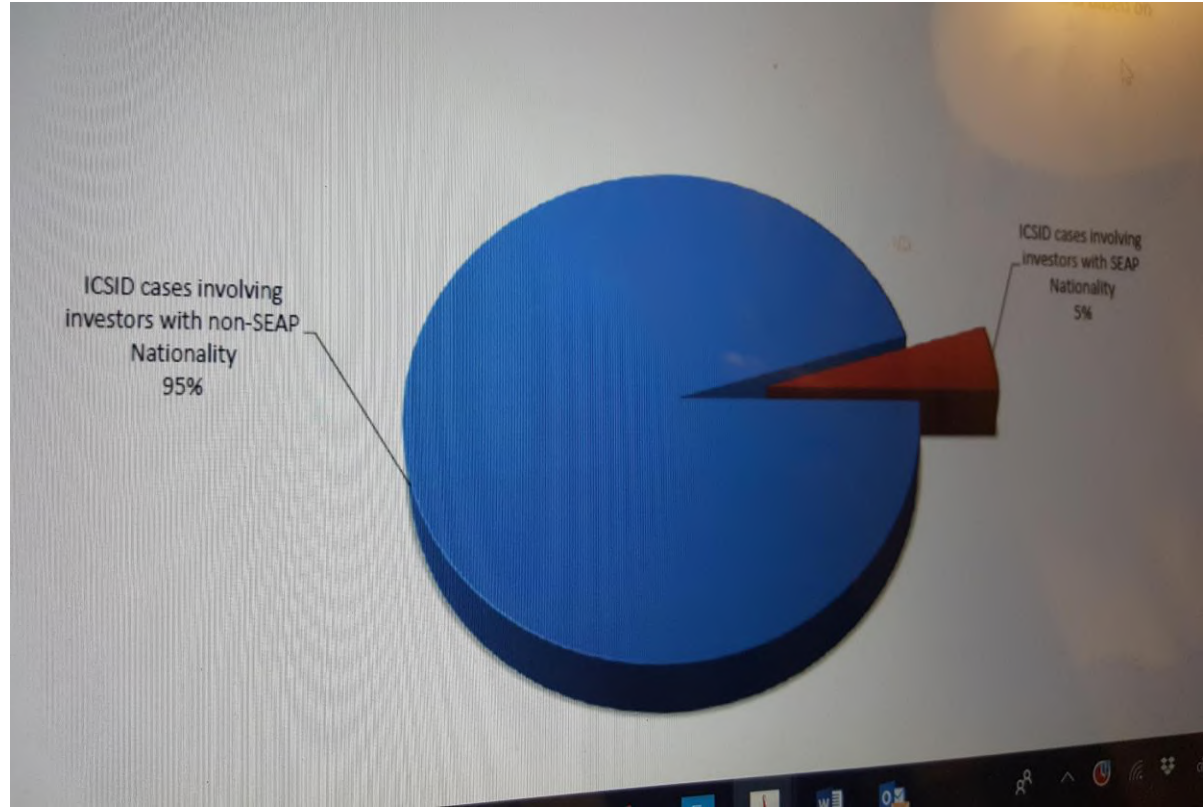
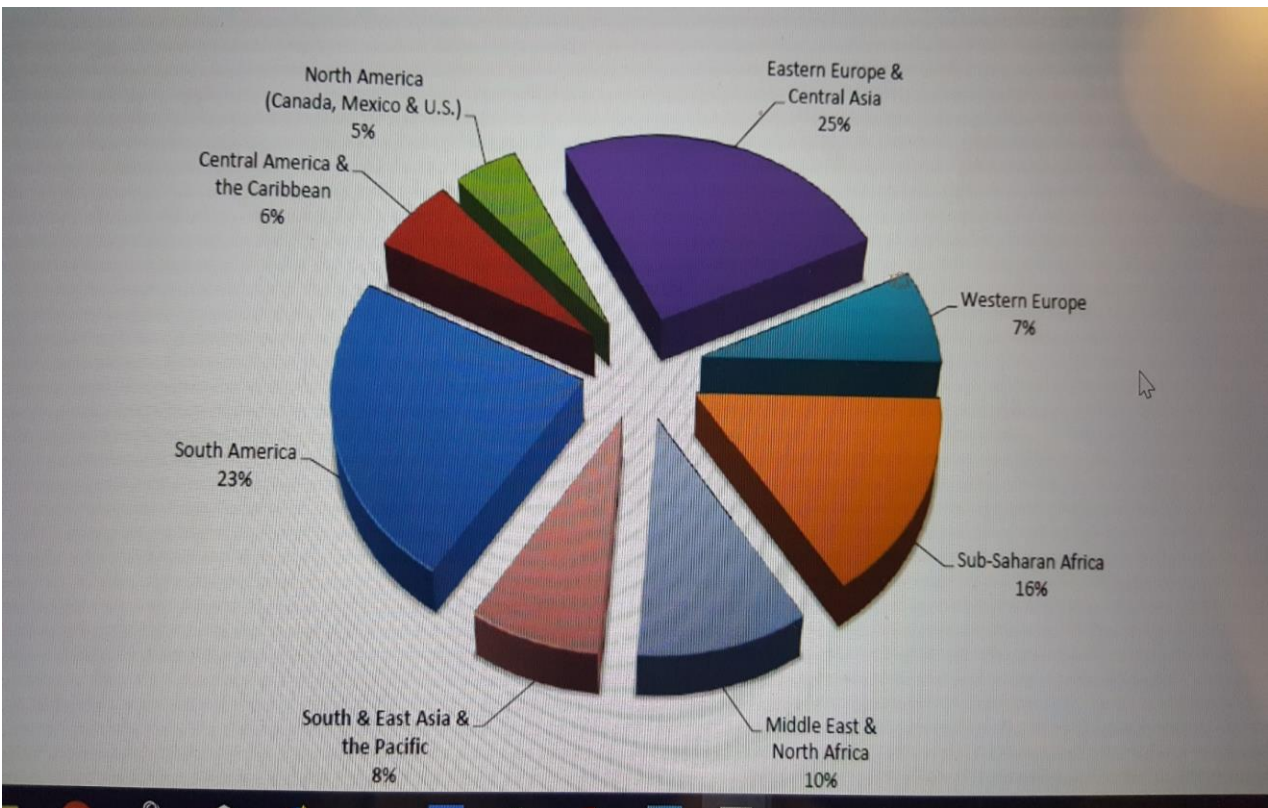
Second Objective of the Presentation

(2) Using available statistical data in SE Asia and Pacific and beyond regarding international arbitration to discuss what Lawyers and policy makers have done or should be doing to get the **“CAKE SHARED PROPERLY”** as a way to face Globalization.



GLOBALISING YOUR PRACTICE - OPPORTUNITIES AND CHALLENGES

ICSID Statistics 2010-2018 revealed that SE Asian and Pacific registered (8% of the total cases , Western Europe (7%) and North America(5%)



Arbitrators and Conciliators appointed: SE Asian and Pacific (179) , Western Europ(850) and North America(393) . Same cases but Appointments are four times more.

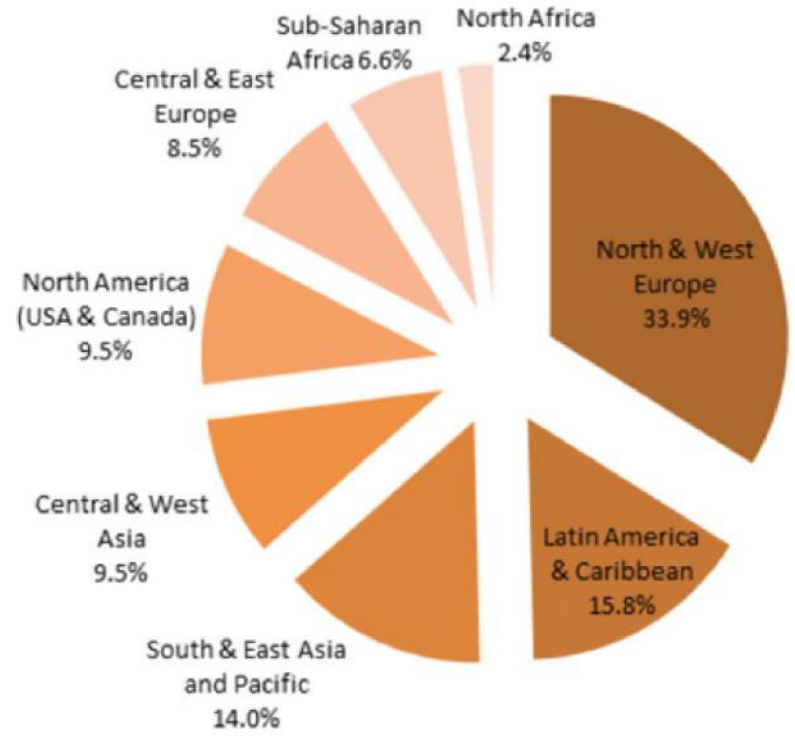


GLOBALISING YOUR PRACTICE - OPPORTUNITIES AND CHALLENGES

In 2017, on the 810 registered cases by the ICC, **14,0%** involved SE Asia and Pacific while North & West Europe (**33.9%**).

The Nationality of arbitrators appointed from SE Asia and Pacific (**123**) while North & West Europe (**679**)

Origin of arbitrators appointed in ICC case 2017



Region	Year	Men	Men %	Women	Women %
North America	2016	193	86%	32	14%
	2017	114	82%	25	18%
Latin America & Caribbean	2016	145	88%	19	12%
	2017	165	82%	36	18%
Central & West Asia	2016	46	84%	9	16%
	2017	43	68%	20	32%
South & East Asia and Pacific	2016	109	89%	14	11%
	2017	123	87%	18	13%
North & West Europe	2016	617	86%	103	14%
	2017	679	85%	119	15%
Central & East Europe	2016	64	70%	27	30%
	2017	61	69%	27	31%



Choice of Law in ICC arbitration 2017

In 87% of the disputes referred to ICC Arbitration in 2017, parties included a choice-of-law clause in their contracts. The laws of **England** and **USA** States remained the most frequent choices, followed by **French and Swiss law**.

Consideration: The choice of law (Lex Arbitri) determine the appointment and the counsel to involve(Dispute resolution clause)



MEETING THE CHALLENGES

Some barriers to Participation in Arbitration/to Arbitrate in developing countries cited in literature (Pacific Islands included)

- ❑ Interference of Courts
- ❑ Corruption
- Limited trained professionals(issue of capacity building).

For example As of December 2016, the most widespread university in Oceania only teaches “Foreign Trade and Investment(Faculty of Arts, Law & Education – School of Law.” The University of South Pacific)

- Poor legal/regulatory frameworks(New York Convention- Arbitration Act based on Model Law, Reforming the arbitration practice)
- Lack of data on Enforcement in many developing countries, Pacific Island included?
- What else? Political instability, **visa issue**? Airline?

The Pacific Islands need to work on the above to position themselves as Pro-Arbitration

An effort to improve will accelerate the participation of players from the Pacific to appear on the Map of International Arbitration.



**GLOBALISING YOUR PRACTICE -
OPPORTUNITIES AND CHALLENGES**

CHANGES HAPPENED

Herbert Smith Freehills conducted a survey on the enforcement of arbitration awards in the ASEAN region(2018)

- **Singapore (Enforce in 6 months, Herbert Smith Freehills 2018),**
- among the ASEAN countries, 91.02% of the participants consider **the Singapore** courts to be highly or very effective in enforcing international arbitral awards, This is followed by **Malaysia** where close to 69% of the participants consider the courts to be effective generally in enforcing international arbitral awards.
- The courts' approach to enforcement of arbitral awards in the other South East Asian countries is still not as developed as in Singapore, but they have steadily improved over the years, especially in **Thailand**, and **Philippines** where courts have been increasingly effective in recognising arbitral award
- **Rwanda in Central Africa (6 months, users perception survey 2015)**



Recent Experience: Reform in Rwanda for new Safe arbitral seat

- Kigali International Arbitration Centre(KIAC) registered 120 cases in 6 years(30% being Int'l cases)
- 3-6 months (enforcement of award vary between 3 to 6 months)
- None of the 70 KIAC awards is yet be set aside by the Rwandan court
- No visa required to come in Rwanda since 2017 to all citizenship of the world
- Chief Justice rules of 2012 giving priority of arbitration case over other matter. It doesn't follow the normal role/Registry
- The New civil code procedure of April 2018 limiting court intervention in Arbitration
- **Art: 21: Grounds for refusal of registration of a claim by the court Registrar**
- Files a claim without demonstrating that he/she has used amicable settlement or arbitration specified in the contract;



Dealing with the influence of negative perception

- WB Doing Business report which ranked 186 economies of the world
- Global Competitive Index,
- Global States of Mind Surveys
- Business baseline profitability index

Some of the developing countries are getting better ranking than established Arbitration Seat in the above index & Survey(The Pacific Islands should be part of this survey)



What lawyers and Policy Makers can do to appear on the map of Int'l arbitration(share the cake).

- ❑ Driving/Positioning your respective countries as an Arbitration safe Seat(**legal representation, 1958 New York Convention, Model law, Supportive Courts, Clear Enforcement Regime, visa policy, safety etc..**).
- ❑ Testing the use of Arbitration in Pacific Islands: **Start with Contract Negotiation & drafting (Seat-Applicable Law, Avoid Pathological Clauses)**. For purpose of sharing the cake when Dispute arises.
- ❑ Learn more than one International languages (for young people-Lawyers)

Ended: Be aware that: Arbitration is not only a legal concept or a form of justice but an industry which includes many attractive factors such as **tourism, Hotels facilities, zero tolerance to corruption, Entry facilities(visa), safety, internet facility, transport etc....**

Example: PRADA Report in France (2011).

Case of Egypt

Eg2: 2012 Ministerial Instruction on Contract drafting , negotiation of Dispute resolution clause(Rwanda) with model arbitration clause compulsory to Government contract.



What lawyers and Policy Makers can do to appear on the map of Int'l arbitration(Cont...)

- ❑ Establishment of arbitral institution in the Region or a Pro-Active Government of one of the Island to support nearby institutions such as ACICA(Australia) or AMINZ(New Zealand) in establishing Branch across the region. This could **involve tax incentives or subsidised premises by Government.**
- ❑ On Going Professional training in Arbitration and Mediation(SAA, Ciarb, CEDR, SMC) and review of University Curriculum to include Arbitration Module(change to start at Law School)
- ❑ Push for the Seat and Applicable law to be one of the attractive law in the Islands
- ❑ Sharing the cake in the future may require making your seat "Safe"(particularly a clear enforcement regime)



Few Consideration on Mediation

Current Current Legal Framework on Mediation in Fiji seem to be favourable to Mediation

The High Court Rules(Art.59.2) and Magistrates Court Act 1944 (Art 28, 29,30) among others require Magistrates and Judges to promote mediation in Fiji

- Mediation need to fit Wider strategic context(to resolve backlog for example, Citizen participation in Justice process such as Mediation Committee Act in Rwanda).
- UK Government: The Dispute Resolution Commitment(DRC)**
- Lagos Multi Door Court House in Nigeria**
- SWITZERLAND(Med-Arbitration Practice), currently China as well.**
- Monitoring closely the UN Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation")**



**GLOBALISING YOUR PRACTICE -
OPPORTUNITIES AND CHALLENGES**

Conclusion

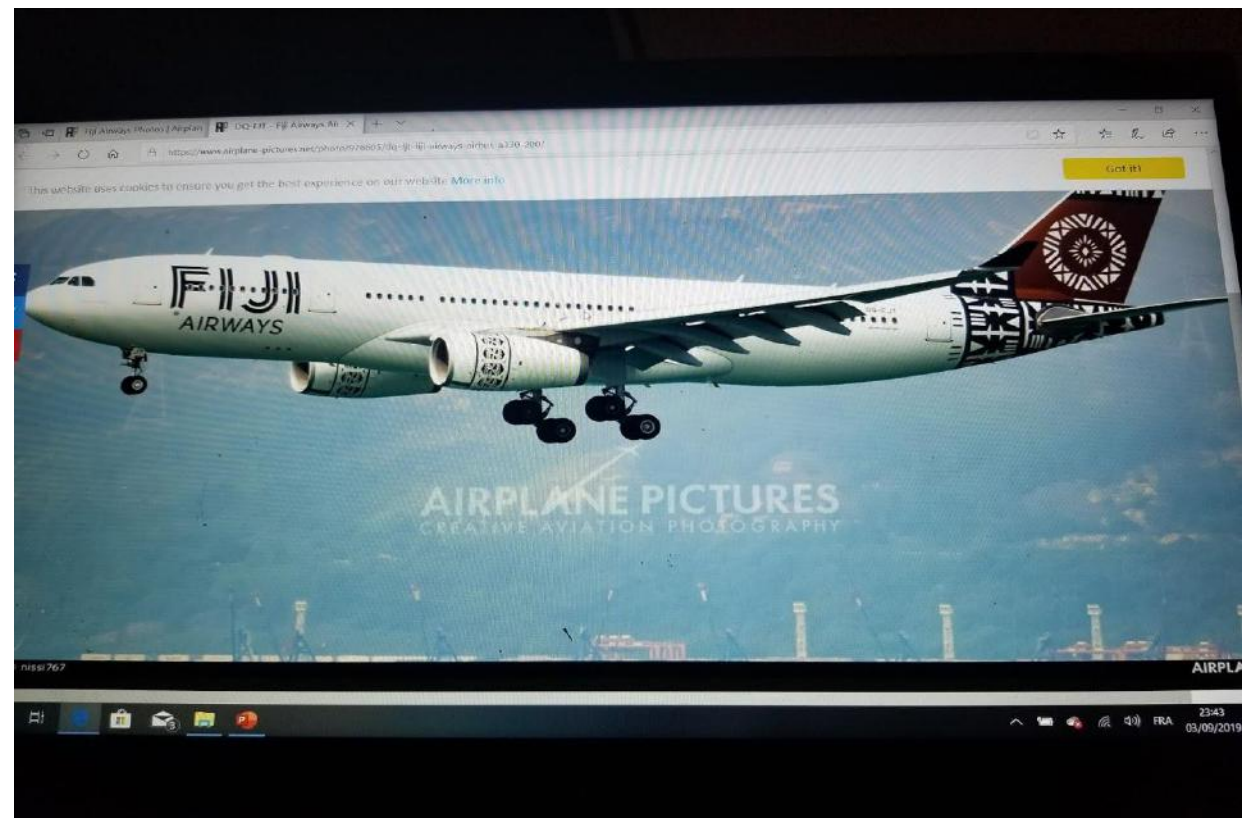
Finally, the lesson from what is happening in the Pacific islands is not different from other developing countries including SE Asia and Africa which have made useful progress arbitration and Mediation in positioning as new ADR seat.

Ended, change is possible, it is happening, and the mission of the legal practitioners gathered here is **to contribute to make it happen more quickly than in the past. FOR THE CAKE TO BE SHARED PROPERLY**



Conclusion (Cont...)

The Analogy of captains of the Pacific Islands during turbulences



- Turbulences are directing to land out of Pacific Region such as Paris, London or Zurich etc.. since during turbulence it is allowed to land any where (you pay the landing cost).
- Despite the Turbulences, without fear the captain and his Assistant pushed and landed safely in Fiji , Papua New Guinea or Vanuatu

Those captains who can make it are:

Lawyers in the Pacific Island and their policy makers (Attorney General/Ministry of Justice) right from the beginning of the Contract negotiation and drafting to make sure that when dispute arises the **CAKE WILL BE SHARED EQUALLY.**



***GLOBALISING YOUR PRACTICE -
OPPORTUNITIES AND CHALLENGES***

THANK YOU