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# THE DISPUTE RESOLUTION REVIEW

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THIRD EDITION

EDITOR  
RICHARD CLARK

LAW BUSINESS RESEARCH

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Third Edition

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RICHARD CLARK

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# MAURITIUS

*Gilbert Noel\**

### I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Disputes in Mauritius may be litigated before the courts, mediated or arbitrated. The legal and logistical framework for international arbitration is still at an early stage. Recently, the Supreme Court has adopted Mediation Rules, effective January 2011. Two Judges of the Supreme Court have been appointed at the level of the newly created Mediation Division to facilitate disposal of civil and commercial cases.

In line with the ongoing reforms, the Supreme Court of Mauritius has created a Commercial Division which has been hearing commercial cases for the past two years. There are other divisions of the Supreme Court with the aim and purpose of creating areas of specialisation within the Supreme Court.

Mauritius is positioning itself as a jurisdiction for International Arbitration. The International Arbitration Act 2008 ('the Act') is based on the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the UNCITRAL in 2006. The Act adds another layer to the legal framework since Mauritius is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Law offers certain features, solutions and structures to global businesses that are novel and unique in the African region.

The two main features of interest are that (1) an appeal shall lie as of right to the Judicial Committee of the Privy Council in England against any final decision of the Supreme Court under the Act; and (2) substantial appointing functions and administrative responsibilities are given to the Permanent Court of Arbitration having its seat at the Hague. These features will provide international users with the reassurance that the arbitration regime itself is effective and that if there are any court applications relating to arbitrations, they will be heard and disposed of appropriately.

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\* Gilbert Noel is a partner at Appleby.

## II THE YEAR IN REVIEW

### i *Bank of Scotland PLC v. Barclays Bank PLC & DOS Investments Ltd*

The Bank of Scotland applied to the Commercial Division of the Supreme Court of Mauritius under the Banking Act 2004 of Mauritius to obtain copies of bank statements in relation to banking transactions that had taken place in accounts held at Barclays Bank. Under the Act, such an application for disclosure may be made on application of a party to 'legal proceedings', but the Act does not specify whether the said legal proceedings have to be in Mauritius. In this case, a fraud was committed in England and the funds were transferred to an account at Barclays Bank Mauritius in the name of Arrowise Investments Ltd, subsequently known as DOS Investments Ltd. It was this entity that had the account on which the relevant transactions occurred. There were ongoing legal proceedings in the High Court of England. A freezing order was obtained in the High Court of England prohibiting the relevant individuals from removing assets outside England for a value of up to £6 million. The Court held that the Act extended only to proceedings in Mauritius and not overseas. The Judge stated that in the absence of substantial legal proceedings in Mauritius, the applicant was going on a fishing expedition. The Judge therefore did not recognise the legal proceedings in England.

### ii *DMH Corporate v. Decocity Ltd*

There was a preliminary objection to a winding up petition on the grounds that the statutory demand was defective. The Insolvency Act provides for a one month delay on serving the statutory demand prior to filing the winding up petition, whereas the notice only allowed three weeks. The Commercial Division of the Supreme Court held that it will not set aside the statutory demand 'by reason of a defect or irregularity' unless the Court considers that substantial injustice would be caused. The Court further stated that following the delay of one month under the statutory demand, the lawyers should apply to Court for leave prior to filing the winding up petition.

### iii *Volcano Agrosience (Pty) Ltd v. Roger Fayd'herbe & Ors*

This case refers to an application by a foreign minority shareholder holding 25 per cent of the shares in a Mauritian company. The majority shareholders holding 75 per cent of the shares passed a special resolution by way of written resolution and without notice to the minority shareholder. The resolution, among other decisions, removed the minority director, adopted a new constitution and varied the terms of issue of shares held by the minority holder. The Commercial Division of the Supreme Court held that the resolution was null and void as it was not compliant with the relevant provisions of the Act. The question of the jurisdiction of the Judge was also addressed. Under section 169 of the Companies Act 2001, 'An order may not be made under this section in relation to a course of conduct that has been completed'. The Judge considered that in the exercise of its equitable jurisdiction, a judge should be able to intervene to prohibit and restrain the execution of acts done or conduct of the company or its directors, when those acts or that conduct are unlawful and contravene the company's constitution or the Act.

iv *Maurilait Production Ltée v. Innodis Ltd*

The decision relates to a trade name and trademark dispute. Although the applicant was using a name that may be considered common, the Court considered that it had used the same name in relation to products of the company for the past three decades. The Judge was therefore satisfied that the applicant had shown that it has a serious, arguable case whereby it may have a real and substantial right in a name which may very well have become a trademark or mark in relation to which it is entitled to be protected against any invasion by a competitor who has just started to use the same words while the applicant has been doing same for the past 30 years.

### III COURT PROCEDURE

#### i Proceedings and time frames

##### *Proceedings before the Supreme Court of Mauritius*

The procedure before the Supreme Court is governed by the Supreme Court Rules 2000. If the Supreme Court Rules are silent on a procedure, the French-based Code de Procedure Civile would apply.

Generally, civil proceedings before the Supreme Court of Mauritius sitting in its original jurisdiction are initiated by way of plaint with summons. The plaint with summons is lodged in the Registry of the Supreme Court and served on the defendant to the case not later than 14 days prior to the returnable date. Service on the defendant may be effected either by registered post with a request for advice of delivery or by an usher. The plaint with summons is returnable before the Master and Registrar, who has jurisdiction to deal with all formal matters prior to the hearing of the case.

The pleadings that are exchanged before the Master and Registrar are the demand of particulars, answer to particulars, plea and the reply. Once all the above-named pleadings have been exchanged between the parties, the Master and Registrar fixes the case for hearing.

Prior to the hearing of the case, the plaintiff's attorney applies to the Registry of the Supreme Court for a certified copy of all the pleadings exchanged between the parties as well as all entries on the record as regards the case. He also prepares a brief and files same with the Registry within 14 days from the date of hearing and communicates a copy of the brief to the defendant's attorney.

For the purposes of giving evidence during the hearing of the case, any party who wishes to summon a witness to give oral evidence may apply to the Master and Registrar for the issue of summons to witness. In respect of documentary evidence, the party may serve a notice on the other party's attorney describing the documents he intends to adduce as documentary evidence and the place where such documents may be examined.

##### *Court of Civil Appeal*

After the hearing of the case, if any party is aggrieved by the judgment of the Supreme Court, he may appeal to the Court of Civil Appeal. The appellant thereupon serves a notice of appeal on the respondent to the case and lodges his appeal in the Registry of Supreme Court within 21 days from the date of judgment. If the respondent wishes to resist the appeal, he may serve on the appellant and file in the Registry a notice to resist

appeal. The appeal is decided by the unanimous opinion of the judges where the Court of Civil Appeal is composed of two judges and in accordance with the opinion of the majority of the judges where it is composed of three judges.

### *Judicial Committee of the Privy Council*

If any party is dissatisfied with the judgment of the Court of Civil Appeal, he may appeal to the Judicial Committee of the Privy Council in England. The appeal must be made within 21 days from the day of judgment. The application is made by way of motion supported by way of affidavit before the Supreme Court.

### *Commercial Court*

Any dispute of a commercial nature may be lodged before the Commercial Division of the Supreme Court either by way of plaint with summons or by way of motion and affidavit in matters of urgency. The hearing of the case is heard before a judge of the Supreme Court.

### *Applications before the Judge in Chambers*

Injunctive relief and urgent applications before the Judge in Chambers shall be made by way of an application referred to as *praecipe* supported by an affidavit. The applicant shall disclose all relevant facts in his initial affidavit evidence. The respondent may, in reply of the applicant's first affidavit, file a counter-affidavit. The applicant may reply to the counter-affidavit by filing a second affidavit and the respondent shall have a final right of reply to the second affidavit of the applicant. It is to be noted that no further affidavit may be filed by either the applicant or respondent except with leave of the Judge in Chambers.

### *District court, intermediate court and industrial court*

Actions before the above named lower courts are made by way of *praecipe* and is heard by a Magistrate. Any party aggrieved by the judgment of the lower courts may appeal to the Supreme Court within 21 days following the day of judgment; the day of judgment is excluded for the purposes of computing the above delay of 21 days as compared to the Supreme Court whereby the day of the Judgement is included for the purposes of the delay to file an appeal.

## **ii Class actions**

Class actions are not specifically provided for in the laws of Mauritius and so far there has been no known class action before the Supreme Court of Mauritius.

## **iii Representations in legal proceedings**

Litigants, when defending a case, are allowed to represent themselves in legal proceedings and this applies to both corporate entities and natural persons. A legal entity should delegate a natural person to attend court. However, in most cases, the parties to litigation have recourse to an attorney to represent and defend themselves in legal proceedings. In order to file a plaint before the Supreme Court, the plaintiffs are required to retain services of attorneys and counsel.

**iv Service to be effected abroad**

Unfortunately, Mauritius is not a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The service of legal documents abroad is therefore governed by the Courts (Civil Procedure) Act 1856 whereby leave of the Judge in Chambers must be obtained prior to effecting service outside jurisdiction. The application is made by way of an application (*praecipe*) supported by affidavit.

**vi Enforcement of foreign judgments**

A final and conclusive judgment of a foreign court may, under the present case law in Mauritius through the *exequatur* proceedings, be enforced by the courts in Mauritius, without re-examination of the merits of the case provided that:

- a* the foreign judgment is still valid, final and capable of execution in the country in which it was delivered, notwithstanding that an appeal may be pending against it or it may still be subject to an appeal in such country;
- b* the foreign judgment is not contrary to any principle affecting public policy in Mauritius;
- c* the foreign court that delivered the said judgment had jurisdiction to hear the case;
- d* the Mauritian conflict of laws rules were respected;
- e* there has not been any *fraude à la loi*, i.e. any malice, bad faith and fraud on and in the choice of law and jurisdiction clauses;
- f* the party had been regularly summoned to attend the proceedings before the foreign court; and
- g* the foreign judgment is duly registered with the relevant authority in Mauritius, in circumstances in which its registration is not liable, thereafter, to be set aside.

Furthermore, a final and conclusive judgment of a court of England and Wales would be recognised and enforced by the Supreme Court in Mauritius. A final and conclusive judgment of a foreign court may be enforceable in Mauritius if the foreign court is situated in a country to which the Reciprocal Enforcement of Judgments Act 1923 ('the 1923 Act') applies. The procedure provided for in the 1923 Act must be followed if the 1923 Act applies. The 1923 Act applies to the United Kingdom.

Under the 1923 Act, a judgment obtained in the superior courts of a territory to which it applies will be enforced by the Supreme Court of Mauritius without re-examination of the merits of the case provided that:

- a* the judgment was obtained in a superior court in the United Kingdom;
- b* the superior court in the United Kingdom had the requisite jurisdiction;
- c* the judgment was not obtained by fraud;
- d* the defendant in the proceedings was duly served with the process of the original court and either voluntarily appeared or submitted to or agreed to submit to the jurisdiction of that court;
- e* the defendant who was either carrying on business or ordinarily resident within the jurisdiction of the original court either voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of the court;

- f* the application for enforcement is made to the Supreme Court of Mauritius within 12 months after the date of the judgment unless a longer period is granted by the Supreme Court;
- g* the judgment is final and conclusive, notwithstanding that an appeal may be pending against it or it may still be subject to an appeal in such country;
- h* the judgment has not been given on appeal from a court that is not a superior court; and
- i* the judgment is duly registered in the Supreme Court of Mauritius in circumstances in which its registration is not liable thereafter to be set aside.

**vi Access to court files**

An action entered before the court and entered in the cause list would become a matter of public record. There is, however, limited access to court files and papers. The relevant pleadings are not publicly available although an interested party may officially write to the Master and Registrar to request for copies of the specific documents in the court files. Judgments are publicly available as the cause lists and judgments are posted on the website of the Supreme Court of Mauritius.

## **IV LEGAL PRACTICE**

The legal profession in Mauritius is traditionally made up of three branches; attorneys, barristers and notaries public. The attorneys are the first point of contact for clients and act mainly as instructing lawyers, similar to solicitors in England. The barristers are instructed by the attorneys and act as advocates. The notaries public are mainly responsible for conveyancing, authenticity and succession. Notaries may also administer oaths for purposes of affidavits. In view of recent amendments in the Law Practitioners Act, international law firms may also be registered in Mauritius as well as registered foreign lawyers. This is consistent with the policy to promote Mauritius as a regional and international financial centre.

**i Conflicts of interest and Chinese walls**

The legal profession is regulated by the Law Society, the Bar Council and the Chamber of Notaries. Conflict of Interest is not allowed under the respective Codes of Ethics of the three branches of the profession. There are no specific provisions as regards Chinese walls within the same firm. Therefore, Chinese walls should be permissible provided that the parties to the relevant transactions expressly and in writing allow lawyers within the same firm to represent them.

**ii Money laundering, proceeds of crime and funds related to terrorism**

Lawyers fall under the definition of ‘member of the relevant profession or occupation’ pursuant to the Financial Intelligence and Anti-Money Laundering Act 2002 (‘FIAMLA’). It follows that lawyers are under an obligation to make a report to the Financial Intelligence Unit when they have reason to believe that there may be a suspicious transaction in breach of the provisions relating to anti-money launder and financing of terrorism.

However, the FIAMLA further states that nothing in the Act shall be construed as requiring a law practitioner to report any transaction of which the lawyer has acquired knowledge in privileged circumstances unless it has been communicated with a view to further a criminal or fraudulent purpose.

**iii Legal privilege**

Mauritius would follow the same principles of legal privilege as under the English common law. Communications between a lawyer and client are privileged and there are only a few exceptions to such a privilege. The privilege would not apply in the case of furtherance of a crime. It is also established that the privilege is that of the client and may therefore be waived by the client.

**V ALTERNATIVES TO LITIGATION**

**i Mediation**

The Supreme Court of Mauritius has recently adopted the Supreme Court (Mediation) Rules 2010. These rules are being made effective at the beginning of 2011 with the appointment of two Judges of Supreme Court as mediation judges. The rules apply to civil suits and actions pending before the Supreme Court or as the Chief Justice may deem appropriate to refer to mediation. Furthermore, any party to a civil action may apply to the Chief Justice for the matter to be referred to mediation.

The primary purpose of mediation under the rules is to encourage a common agreement or narrow down the issues in dispute.

Where the parties have reached a formal agreement, the mediation Judge shall record the settlement agreement in the form of a memorandum setting out the terms of the agreement.

**ii Arbitration**

*The Permanent Court of Arbitration ('the PCA')*

The PCA is seen as a neutral international organisation and considered well placed to fulfil appointing and administrative functions under the International Arbitration Act. The government of Mauritius has negotiated a host country agreement with the PCA pursuant to which the PCA will appoint a permanent representative in Mauritius and funded by the Mauritanian government. The tasks of the permanent representative will be to assist the Secretary General of PCA and to promote Mauritius as a centre for international arbitration.

In the case of failure under the Act to appoint an arbitral tribunal, any party may request the PCA to take the necessary measures and to give directions as to the making of the necessary appointments. The PCA may also revoke appointments or designate any arbitrator as the presiding arbitrator. The PCA may also decide on matters such as challenge of arbitrator and extension of time limits.

*Distinction between international arbitration and domestic arbitration*

The new legislation distinguishes between international arbitration and domestic arbitration. A new regime for international arbitration has been created and it is wholly separate from that applicable to domestic arbitration. The Act focuses mainly on international commercial matters while domestic arbitration will continue under the aegis of the long standing and French-originated Code de Procédure Civile. The Act reckons the specificity of international arbitration in that global players prefer non-intervention of the courts, and will choose Mauritius as an arbitration centre if they can be guaranteed that their contractual terms to arbitrate their disputes will not attract the intervention of the courts in the process except in very limited circumstances.

*Arbitration agreements*

The Act specifically provides that it shall apply only to arbitrations started on or after the commencement of the Act and not before. For an arbitration agreement to be valid, it must be in writing. It can be either in the form of an arbitration clause in a contract or other legal instrument or in the form of a separate agreement.

Parties to the arbitration are free to choose the seat of the arbitration. For the purposes of the Act, arbitration shall be considered an international arbitration where the juridical seat is in Mauritius and the parties to the arbitration agreement have their place of business in different states. The juridical seat may also be determined by agreement, and the shareholders in a global business company may resolve that any dispute concerning the company may be referred to arbitration under the Act. The shareholders of a global business company may furthermore incorporate the provisions of an arbitration agreement in the company's constitution.

Any contention as to whether an arbitration is an international arbitration or the First Schedule (optional supplementary provisions, determination of preliminary point of law of Mauritius by court, appeals on questions of Mauritanian law) of the Act applies to the arbitration, shall be determined by the arbitral tribunal.

Where an action is brought before any court and a party contends that the action is the subject of an arbitration agreement, that court shall automatically transfer the action to the Supreme Court provided that the request is not later than when submitting the first statement on the substance of the dispute. The Supreme Court shall on such a transfer refer the parties to arbitration unless a party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case the Supreme Court shall itself proceed to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed. Where the Supreme Court finds in favour of the latter, it shall transfer the matter back to the court that made the transfer.

The agreement may determine the number of arbitrators. If the agreement is silent on the matter, the number of arbitrators shall be three. Furthermore, an agreement that indicates an even number of arbitrators shall be understood as requiring the appointment of an additional arbitrator as presiding arbitrator.

No person shall be precluded by reason of his nationality from acting as an arbitrator. As regards procedure, the parties are free to agree on a procedure for appointing the arbitral tribunal and may therefore set out the contractual terms to that effect. It follows that the tribunal owes several duties such as to act fairly and impartially between

all parties and to allow each party a reasonable opportunity to prepare and put their case, and to adopt suitable procedures so as to provide a fair means for the resolution of the dispute. Justifiable doubts as to the independence and impartiality of an arbitrator or lack of qualifications as per the agreement are sufficient grounds to challenge an appointment.

The arbitrator enjoys immunity for anything done or omitted while acting as arbitrator unless the act or omission is shown to have been in bad faith.

An interim measure may be granted by the arbitral tribunal at the request of a party and at any time before making the final award. The interim measures may refer to the *status quo* pending determination of the dispute, action that would prevent any current or imminent harm or prejudice to the arbitral process, preservation of assets and evidence, and provision of security for costs. An interim measure granted by the arbitral tribunal may be enforced on application to the Supreme Court irrespective of the country in which it was issued.

A party to an arbitration agreement may also request, before or during arbitral proceedings, the Supreme Court or a court in a foreign state to issue an interim measure of protection in support of arbitration. For the court to grant such a measure is according to the Act not incompatible with the arbitration agreement.

An arbitral award may be set aside by the Supreme Court only where there is proof that (1) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or under Mauritius law; (2) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings; (3) the award deals with a dispute not contemplated by the scope of the arbitration; or (4) the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties. The award may also be generally challenged before the court on the basis that the subject matter of the dispute is not capable of settlement by arbitration under Mauritius law, the award conflicts with public policy, the making of the award was induced or affected by fraud or corruption or there is a breach of the rules of natural justice. An application for setting aside may not be made after three months have elapsed from the date on which the party making the application has received the award.

An arbitral tribunal may rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement. An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision of the arbitral tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause.

The arbitral tribunal may, subject to the agreement of the parties, order the payment of a sum of money, and will have the same powers as a Court in Mauritius to order a party to do or refrain from doing anything, order specific performance of a contract, and to order rectification setting aside or cancellation of a deed or other document.

The successful party should recover a reasonable amount reflecting the actual costs of the arbitration and not only the nominal amount. However, in the absence of an award fixing and allocating the costs of the arbitration, each party shall be responsible for its own costs, and shall bear in equal share the costs of the PCA, the fees and expenses of the arbitration tribunal, and any other expenses related to the arbitration.

## **VI OUTLOOK AND CONCLUSION**

Mauritius is new to the concept of formal mediation and international arbitration. Furthermore, the Commercial Division of the Supreme Court is still during its first years. Therefore, although the framework is now in place for efficient, cost-effective, and competent resolution of civil and commercial disputes, the jurisdiction will now begin to explore and exercise within this more sophisticated framework.

## Appendix 1

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### ABOUT THE AUTHORS

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