

21 Mauritius

An established gateway for the structuring of investments into India, Mauritius is now widely recognised as the entry point for investors into Africa and for private wealth management services. Mauritius has recently taken steps to review and revamp its ADR regimes of law, especially in the field of arbitration and mediation.

Once a French colony and then a British one, Mauritius obtained its independence from Great Britain in 1968. In 1992, Mauritius became a Republic but retained its membership of the Commonwealth. Mauritius is a hybrid jurisdiction borrowing legal concepts and traditions from both common and civil law. Its legal system is accordingly governed by principles derived both from the French Code Napoleon and the English common law. However, in the past two decades, a raft of legislation has been passed to bring significant changes to the legal framework governing commercial and financial services.

The single-structured judicial system consists of two parts: the Supreme Court and the subordinate courts. The Supreme Court is a superior court of record and has unlimited jurisdiction to hear and determine any civil and criminal proceedings, and has the same original jurisdiction as the High Court in England. It is vested with all the necessary powers and authority to exercise its equitable jurisdiction as a court of equity, and also exercises supervisory jurisdiction over the subordinate courts in order to ensure that justice is duly administered. The Supreme Court has original jurisdiction to determine whether any provision of the Constitution has been contravened, including the power to determine whether any law made by parliament is void on the grounds that it contravenes any of the provisions of the Constitution. It is also empowered to secure the enforcement of the protective provisions entrenched in the Constitution.

The Judicial Committee of the Privy Council is the highest court of appeal for Mauritius. Appeals to the Judicial Committee from decisions of the Court of Appeal, or the Supreme Court may be as of right, or with the leave of the Court, as set out in *section 81* of the Constitution and *Courts Act, section 70A*. The Judicial Committee may also grant special leave to appeal from the decision of any court in any civil or criminal matter (*section 81(5)* of the Constitution) The procedure for appeal to the Judicial Committee is provided by the *Mauritius (Appeals to Privy Council) Order 1968*.

21.1 Arbitration Law and Practice

The *Mauritian International Arbitration Act* ('IAA 2008') was adopted in 2008. Based on the *UNCITRAL Model Law*, the IAA sets out the rules applicable to international arbitration in Mauritius and also established the Mauritius International Arbitration Centre (MIAC). The legislation has adopted best-practice modifications and improvements drawn from the English *Arbitration Act*, UNCITRAL's work on the Arbitration Rules, and from the experiences of other Model Law jurisdictions. In 2013, the *International Arbitration (Miscellaneous Provisions) Act* ('IAA Amending Act') was enacted together with the *Supreme Court (International Arbitration Claims) Rules 2013* ('IAA Rules').

21.1.1 International Arbitration Act 2008 (IAA 2008)

Under the *IAA 2008*, 'international arbitration' is defined as any arbitration where:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their place of business in different states;
- (b) one of the following places is situated outside the state in which the parties have their place of business:
 - (i) the juridical seat of the arbitration, if determined in, or pursuant to, the arbitration agreement; or
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected;
- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state, or that the *IAA 2008* applies to their arbitration; or
- (d) the arbitration arises under an arbitration clause included in the constitution of a global business (offshore) company.

The *IAA 2008* applies to international arbitrations which have Mauritius as their juridical seat, save for a few provisions which apply whether the juridical seat is in Mauritius or not. These relate to:

- referrals to the Supreme Court of Mauritius from other courts to determine whether the parties ought to be referred to arbitration instead;
- applications to the Supreme Court to obtain interim measures in connection with international arbitration proceedings; and
- recognition in Mauritius of interim measures granted by an arbitral tribunal.

The general purport of the *IAA 2008* is to encourage parties to resort to international arbitration, and to limit the intervention by the Mauritian

courts. Appeals against decisions made by the Supreme Court under the *IAA 2008* are made directly to the Privy Council.

21.1.2 IAA Amending Act

The *IAA Amending Act* introduces several key changes which include:

- (a) Clarity in recognition and enforcement of foreign arbitral awards, repealing provisions on the recognition and enforcement of foreign arbitral awards contained in the *Code of Civil Procedure* (which contained a requirement of mutuality); and
- (b) ‘Designated Judges’, being six judges designated for a period of five years by the Chief Justice as being the only judges who shall hear applications under the *IAA 2008* and *Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001* (‘*CREFAA 2001*’).

This should, in the long term, enable those judges to acquire an expertise in the field of international arbitration. Designated judges can exclude persons other than the parties and their legal representatives from attending the court proceedings and restrict the publication of information relating to the court proceedings in order to preserve confidentiality.

The *IAA Amending Act* introduces witness statements as a method of adducing evidence in proceedings before the Supreme Court under the *IAA 2008* and *CREFAA 2001* (which enacts the *New York Convention* into Mauritian law). A witness statement only needs to be verified by a statement of truth by the witness. This seems to indicate that witness statements (which, unlike affidavits, are not public documents) sworn abroad would not need to be subject to the cumbersome process of apostille before being admissible as evidence before the Supreme Court.

Last, but not least, the *IAA Amending Act* has clarified that the *IAA 2008* is to provide that only disputes arising out of the constitution of a global business company (‘GBC’) are to be subject to arbitration under *IAA 2008* and not disputes ‘relating to the company’ as was previously provided in the *IAA 2008*. The effect of this is that there is no conflict where the constitution of a GBC 1 or a GBC 2 company provides for arbitration under the *IAA 2008*, and other investor documents, such as shareholders’ agreements provide for other modes or forums of dispute resolution. Investors do not have to be subject of Mauritius arbitration if they do not so wish since the mandatory requirements only relate to disputes arising out of the company’s constitution.

21.2 IAA Rules

The *IAA Rules*, which are intended to be a comprehensive and stand-alone procedural code for matters arising under the *IAA 2008* or *CREFAAA 2001*, also impose rigorous case management timelines in order to expedite the proceedings. Timelines relate notably to the filing and serving of written evidence, the agreement between the parties of an estimated length of hearing of an application, the filing of a court bundle, or brief of evidence and documents to be used at the hearing, and the filing and serving of skeleton arguments and bundles of authorities by the parties.

21.2.1 LCIA-MIAC Arbitration Centre

In July 2011, the Government of the Republic of Mauritius, the London Court for International Arbitration (LCIA) and the Mauritius International Arbitration Centre Limited (MIAC) entered into an agreement for the establishment and operation of a new arbitration centre in Mauritius, to be known as the LCIA-MIAC Arbitration Centre. Drawing upon the experience and expertise of the LCIA, one of the longest-established arbitral institutions in the world, it offers all the services offered by the LCIA in the UK.

21.3 Trust and Foundation Law

21.3.1 Trusts

The Mauritius Trust has all the attributes for use in wealth preservation and management, and has been the cornerstone of its private wealth management since 1989 – when the first *Trusts Act* (which was an updated version of the English *Trustee Act 1925*) was enacted. In 1992, the *Offshore Trusts Act* was enacted and in 2001, a new *Trusts Act* was introduced. The *2001 Act* reflected legislation in other offshore jurisdictions but also brought about a number of innovative features to help position Mauritius as an important jurisdiction for estate planning. Mauritius law allows for the setting-up of various types of trusts, including fixed, discretionary, protective, purpose, spendthrift, sharia compliant and charitable. The salient features of a Mauritius trust are:

- no registration or filing requirements;
- anti-avoidance provisions in relation to forced heirship;
- trustee must be regulated by the Financial Services Commission;
- extensive powers may be given to the protector;
- possibility to split trusteeship into a custodian and a managing trustee;
- maximum duration of 99 years;
- non-resident trusts are tax-exempt;
- trusts may apply for a Global Business Category 1 licence; and
- confidentiality is enshrined in the law.

21.3.2 Foundations

On 5 June 2012, the Mauritius Parliament passed the *Foundations Act* aimed at allowing for the establishment of private foundations in Mauritius, in order to further promote Mauritius as a platform for wealth management services, succession and estate planning. The legislation allows for foundations to be established to benefit persons, or a class of persons, or to carry out a purpose which may be charitable, non-charitable or both. The salient features of a Mauritius foundation are as follows:

- has a separate legal personality;
- foundation needs to be registered;
- charter does not have to be registered;
- requirement to have a council which may not be in Mauritius;
- requirement to have a company secretary licensed by the Financial Services Commission (FSC);
- registered office to be in Mauritius;
- extensive powers may be given to the protector;
- non-resident foundations are tax-exempt;
- foundations may apply for a GBC I licence;
- information filed in respect of offshore foundations not available for public inspection; and
- confidentiality enshrined in the law.

21.4 Mediation Law and Practice

Prior to 2010, mediation of disputes (other than employment related disputes) – when it occurred – took place outside the traditional court system. That was to change with the publication by the *Supreme Court of Mediation Rules* in September 2010 (the '*Mediation Rules*') and the opening of a dedicated Mediation Centre, which is a division of the Supreme Court Division, to facilitate the disposal of civil and commercial cases.

Under the *Mediation Rules*, any party to a civil suit, action, cause or matter which has been brought and is pending before the Supreme Court may apply to the Chief Justice for it to be referred for mediation. The *Mediation Rules* apply to such civil suit, action, cause or matter which has been brought and is pending before the Supreme Court as the Chief Justice may deem appropriate to refer for mediation before a Judge of the Supreme Court. The primary purpose of mediation is stated to be for the parties, in all good faith, to dispose of the civil suit, action, cause or matter by a common agreement, or to narrow down the issues in dispute. Mediation aims to reduce the costs involved in the case, reduce any undue delays in litigation and facilitate a fair and just resolution of the dispute. It is to be proceeded and concluded within

the time allocated by the mediation judge, who is provided with all necessary powers to facilitate mediation between and among the parties to the dispute, in order to enable them to reach an agreement and so dispose of the civil suit, action, cause or matter pending between the parties. Since its inception in 2011, hundreds of cases have been heard by the Mediation Division.

21.5 Ratification of the New York Convention

Mauritius adopted the *New York Convention* in 2001 through the enactment of *CREFAA 2001*. Prior to this, *articles 1028 and 1028-1 to 1028-11* of the *Code de Procédure Civile ('CPC')* set out the regime and procedure for the enforcement in Mauritius of arbitral awards made outside Mauritius ('foreign awards'). There was at one stage some confusion as to whether *CREFAA* had implicitly repealed *articles 1028 and 1028-1 to 1028-11* of the *CPC*. As stated above, the *IAA Amending Act* has settled this issue by expressly repealing *articles 1028 & 1028-1 to 1028-11* and replacing it with a new *article 1028*, which provides that arbitral awards made in foreign countries are governed by *CREFAA 2001* and *IAA 2008*.

21.6 Attitude of Local Courts and Authorities to ADR

ADR has now been integrated into the judicial system, albeit in respect of any civil suit, action, cause or matter which has been brought and is pending before the Supreme Court. Either a party to such suit, action, causes or matter may apply to the Chief Justice for it to be referred for mediation, or the Chief Justice may refer for mediation any such suit, action, cause or matter that he deems appropriate.

21.7 Use of ADR Clauses and Provisions in Trust and Foundation Instruments

Neither the *Trusts Act* nor the *Foundations Act* contains any express provision with regard to ADR. However, under both the *Trusts Act* and the *Foundations Act*, the court which has jurisdiction to hear matters in respect of trusts/foundations is the Supreme Court. Therefore, such matters may always be referred to mediation on the basis of the *Supreme Court (Mediation) Mediation Rules 2010*, even in the absence of ADR clauses and provisions in trusts and foundations instruments.

21.8 Mandatory Requirements for Mediation

Mediation may be mandatory where parties to a contract have decided to incorporate into the contract dispute resolution clauses, requiring mediation to be attempted as the first avenue of dispute resolution, ahead of others like arbitration or court litigation. This may arise both in local contracts and in

agreements for cross-border transactions. Otherwise, as previously stated, in respect of any suit, action, cause or matter which has been brought and is pending before the Supreme Court, any party may resort to mediation and also the Chief Justice may refer the same for mediation.

21.9 Enforcement of ADR Awards

Under the *Mediation Rules*, 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. Once the memorandum has been signed by the mediation judge and by the parties to the agreement, it will have the same force as if it were a judgment of the court by consent of and between the parties who have signed it, and it may thus be enforced accordingly. In addition, the *Mediation Rules* provide that the mediation judge may make such orders as he considers necessary or expedient, relating to matters consequential to the agreement, including the stay, discontinuance or withdrawal of proceedings, as may be appropriate in respect of the main case pending before the Supreme Court, in order to give effect to the settlement agreement.

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