

Attorney - General's Office

LOSAF

Law Officers' and State Attorneys' Forum



## Editorial

### Dear Readers

Welcome to the latest edition of the LOSAF! In this issue, we delve into some of the most pressing and topical legal issues that continue to shape the Mauritian legal landscape. From emerging trends to recent court decisions, we aim to keep you informed and engaged with the ever-evolving world of law.

This issue kicks start with a historical journey into the evolution of the legal age of marriage in Mauritius followed by an article on the relevance of successor Treaties in Extradition matters which highlights the paramount importance of treaties in extradition proceedings.

In the absence of specific ESG legislation, the financial sector has adopted guidelines

on climate and environmental risks.

A rule-based approach, integrating ESG initiatives into existing laws like the Banking Act 2004 is to be called for. The National Code on Corporate Governance addresses stakeholder governance, yet fundamental changes are needed for effective ESG integration. Corporations are urged to collaborate for responsible investments, emphasising the need to balance financial gains with environmental and social concerns. The next upcoming substantial article explores the nuances of this emerging field and advocates for robust legislation, proposing the conversion of Corporate Governance codes into formal parliamentary acts. It also recommends looking to EU regulations for inspiration and adapting them to address local challenges.

## CORE VALUES

- The rule of law and the public interest
- A fair and just legal system
- Integrity and impartiality
- Quality and professionalism
- Independence and competence
- Solidarity, team work and co-operation

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## Editorial (cont'd)

The Office has devised this year its “Last-Friday-Talks Series” training from in-house as well as external experts and trainers with a view to keeping our officers abreast of developments in various legal areas, including novel areas of the law.

These talks covered inter alia matters pertaining to a vibrant and challenging areas of international law: the Maritime Boundary Dispute between Mauritius and Maldives delivered by Mr D. Dabee, S.C., G.O.S.K, Legal Consultant and the former Solicitor-General. This Office is also grateful to Ms Oktavia Weidmann for an excellent exposé on Environmental Social Governance [ESG] and Carbon Credit Mechanisms. Ms Weidmann is a self-employed UK Barrister, is the LLM module leader at the Queen Mary University of London (part-time) in Risk Management and Law and Derivatives in a Legal Context. She is also a regular speaker at IFA and other international conferences in London and Mauritius.

This issue presents an overview of two of the Last-Friday-Talks Series. The progression of international climate change law focusing on key aspects such as flexible targets, mitigation, and adaptation measures outlined in Nationally Determined Contributions, as acknowledged by the Paris Agreement. It also delves into the vulnerability of Small Island Developing States and their imperative to address the

growing complexity of Climate Change Law.

Conducted by Mr. David Luff, a training session was held earlier this year on trade negotiations between ESA countries and the European Union. The lecture provided an overview of the World Trade Organisation (“WTO”) system, emphasising its relevance in the negotiation context.

Although held just over a year ago, we cannot but recognise the tremendous number of hours, working relentlessly, burning the midnight oil for days in a row, that went into the organisation of the Senior Officials of Law Ministries (SOLM) and the Commonwealth Law Ministers Meeting (CLMM) 2022. We therefore seize this opportunity, albeit belated, to extend our gratitude for the commitment of all officers involved, from the support staff, the crucial contribution of Legal Officers, all of whom volunteered to venture into a totally new (non-legal) arena, our liaison officers for their considerable experience and dedication.

In this edition, we also introduce a comprehensive summary of recent case law pertaining to civil litigation issues that promises to be a vital resource for legal practitioners and readers at large. We also include a detailed case analysis of two judgments.

## Mission & Vision

To provide without fear or favour, hatred or ill-will to the government sound and independent legal advice and representation.

To develop into a centre of excellence for legal and legislative drafting services.

To contribute to the development of a fair and just legal system and the promotion of the rule of law in the interest of the state and the people.





## Editorial (cont'd)

Notably in a significant shift, the Supreme Court of the United States, in *Dobbs v Jackson Women's Health Organisation*, ruled that abortion is not constitutionally protected, overturning a right recognized under the Right to Privacy in *Roe v Wade* some 49 years earlier. The dissenting justices expressed sorrow for the loss of a fundamental constitutional protection for millions of American women.

Following the judgment delivered by the Judicial Committee of the Privy Council in the case of *Alphamix v District Council of Rivière du Rempart*, one may wonder whether time limits for arbitral awards can be considered a bane or a blessing.

As the year draws to a close, we extend our heartfelt wishes to each member of our Office family, both legal and support staff, and their respective families. In the spirit of the season, we express our deepest appreciation for the unwavering dedication and resilience exhibited by our team throughout the year. Despite facing many challenges, particularly working under continuous time pressure, and persisting accommodation issues, your commitment has been nothing short of commendable.

A Merry Christmas and a very Happy New Year to all LOSAF readers.

### **Warm regards**

**Asha Pillay Nababsing**

**Ag Legal Secretary**

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## Editorial Team

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# The Evolution of the Legal Age of Marriage in Mauritius – A Historical Journey

by Navina Parsuramen, Ag Assistant Parliamentary Counsel



*"A little girl is still a child. She cannot be a mother or a bride,"* sings the Grammy Award-winner UNICEF goodwill ambassador, Angelique Kidjo

## 1. Introduction

Child marriage is recognized as a grave violation of human rights according to the World Health Organization (WHO), which defines it as any marriage involving at least one person below the age of 18. In 2015, the United Nations Child Rights Committee raised concerns that "child" in Mauritius was defined as any unmarried individual under the age of 18 in the Child Protection Act of 1994. Mauritius, a signatory to numerous international conventions and protocols that strongly condemn child marriages, has pledged to eliminate this practice by the end of 2030 as part of its Sustainable Development Goals.

In Mauritius, child marriages disproportionately affect young girls. Disturbingly, in 2020, 102 girls aged between 16 and 18 were married, while only 9 boys entered such marriages. This imbalance is consistent with previous years, such as in 2011 when 199 girls and 3 boys in the same age range were married. Child marriage is a clear reflection of gender inequality and has detrimental effects on the education, health, and psychological well-being of girls, as well as that of their children. This article traces the historical progression of the legal age of marriage in Mauritius, from 1808 to 2022, shedding light on the legislative changes and the country's persistent efforts to combat child marriages.

## 2. Historical Background

### Code Napoleon 1808

Delving into the historical background, we learn that Mauritius initially adopted the French Code Napoleon in 1808, which while setting the legal age of adulthood at 21, allowed girls to marry as young as 15 and boys at 18. Article 145 of the Code, nonetheless, permitted the authorities to allow marriage at a younger age under exceptional circumstances ("*motifs graves*"). During that era, the French legislator considered puberty to be a crucial factor for marriage, so once a girl reached the age of puberty ("*pubère*"), she was considered eligible for marriage.

### Civil Status Ordinance 1890

In 1890, the Civil Status Ordinance was implemented, leading to the repeal of Articles 144 to 179 of the Code Napoleon. The new Ordinance maintained the legal age of marriage at 18 years for boys and 15 years for girls. However, it introduced the concept of parental consent for the first time. This meant that a boy aged 18 and a girl aged 15 could only enter into marriage with the consent of their parents. If they were below the prescribed age, they could seek approval from the Governor-General based on good and sufficient reasons.

### The Civil Code (Amendment no.2) Act 1975

In 1975, amendments were made to the Civil Code, resulting

in a reduction of the age of majority from 21 to 18 years. These amendments allowed both boys and girls aged 18 years and above to marry without requiring parental consent. Parental consent was still required for girls aged between 15 and 18 years to contract marriage. The law further provided for the Governor-General to grant an age dispensation to contract marriage for minors below the minimum age on good and sufficient reasons shown.

### The Code Napoleon (Amendment No.2) Act 1981

In 1981, as a consequence of complete equality between men and women, a significant change was made to the legal age of marriage for girls, fixing it to 18 years. The provisions of the Civil Status Ordinance relating to marriage were repealed and the legislator reintroduced Articles 144 to 147 in the Code Civil which concerned marriage. Thus, after 1981, marriage was only possible between adults of age. Where one of the parties was below the age of 18, marriage was permissible where the *Ministère Public* considering that it was in the interest of the minor to obtain a dispensation of age applied to the Judge in Chambers. The Judge, then, independently of the parents' wishes, could grant a dispensation of age where he considered such a dispensation "*nécessaire a l'intérêt*" of the minor.

However, the judiciary took a firm stance against child marriages and displayed reluctance in granting age dispensations, even in cases where young girls were pregnant. In a case known as **Ex parte Ministere Public (Unreported) [1982 SCJ 133]**, Glover ASPJ, while refusing to grant an age dispensation for a 14-year-old pregnant girl, stated that '*public funds are being used to enable people to attempt to flout the law.*' Similarly, in the case of **Ministere Pub. Dispensation of age to X to contract marriage to Mr Y [1984 SCJ 39]**, Judge Ahnee, declined the application emphasizing that '*the legislator raised the legal age of marriage to 18 for both men and women for social and economic reasons and to put a stop to the then not uncommon practice of cradle marriages and their but too well-known sad consequences.*'

### Religious Marriage

Prior to 1981, minors belonging to the Hindu and Muslim faiths were able to enter into religious marriages with parental consent, as permitted by the Civil Status (Indian Marriage Ordinances) Amendment 1912. The amendment introduced in 1981, added a new chapter regarding religious marriages to the Civil Code. Interestingly, this amendment did not establish an age limit for such marriages. Specifically, Article 228-2 provided that religious marriages were not subject to regulation by civil law. As a result, it was not illegal for individuals below the age of 18 to enter into religious marriage, as long as the marriage was solemnized and registered in accordance with the provisions of the Civil Status Act.

### The Code Napoleon (Amendment) Act 1984

In 1984, in view of the strict application of article 145 of the Code Napoleon by Judges, further amendments were made to the Code Civil. The result of the amendment was that the eligible



# The Evolution of the Legal Age of Marriage in Mauritius – A Historical Journey (Cont'd)

by Navina Parsuramen, Ag Assistant Parliamentary Counsel

age of marriage was no longer 18, but 16, provided the minors had the consent of their parents or the parent to whom parental authority was entrusted. In cases where the parents were absent, the authority of a Judge was required. Of note, where the parents do not give their consent, the Judge in Chambers cannot substitute himself to the parents and allow a minor aged more than 16 years to contract marriage [Re: **Gowry v Gowry and Ministere Public 1986 MR 44**]. After 1984, minors aged below 16 could still get married under article 145 alinea 3, with the authority of a Judge in Chambers, where the minors and their parents' consent to the marriage.

## Criminal Code (Amendment) Act 1990

In 1990, the Code Civil was amended by section 4 of the Criminal Code (Amendment) Act which deleted the provision allowing minors below the age of 16 to get married. Thus, the legal age to contract marriage was 18, but minors aged 16 years or above could get married with the consent of their parents or the consent of the parent to whom parental authority is devolved, or in their absence, with the authority of a Judge in Chambers. Notably, in an application by the parents of a 14-year-old seeking an age dispensation for marriage, Judge Boolell, ruled in **Ex Parte Vuillemain [1992 MR 93]** that he lacked jurisdiction to grant an age dispensation as the minors were below the age of 16.

## 3. International Obligations

Mauritius' commitment to international obligations is evident through its participation in conventions such as the International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); the African Charter on Human Rights and Welfare of the Child; and the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa ("Maputo Protocol"). The Maputo protocol sets the minimum age of marriage for boys and girls to 18, while the other international conventions/instruments heavily condemn discrimination against children and women, abuse and harmful practices.

## 4. Children's Act 2020

Mauritius took a major stride in its efforts to eradicate child marriages with the implementation of the Children's Act 2020, which came into effect on 24 January 2022. This comprehensive act not only revokes the previous Child Protection Act of 1994 but also aligns Mauritius' legal framework with international standards. The 2020 Act introduces a new definition of a 'child' as 'any person under the age of 18' doing away with the previous definition of 'any unmarried person under the age of 18.'

Since January 24, 2022, both civil and religious marriages involving children, as well as cohabitation with a child, have been strictly prohibited in Mauritius. The amendments made to the Civil Code have repealed all provisions related to child marriages, including the concept of emancipation through marriage. Today, engaging in child marriage or co-habitation with a child is a criminal offence, carrying a maximum penalty of a fine not exceeding one million rupees and imprisonment for a term not exceeding 10 years.

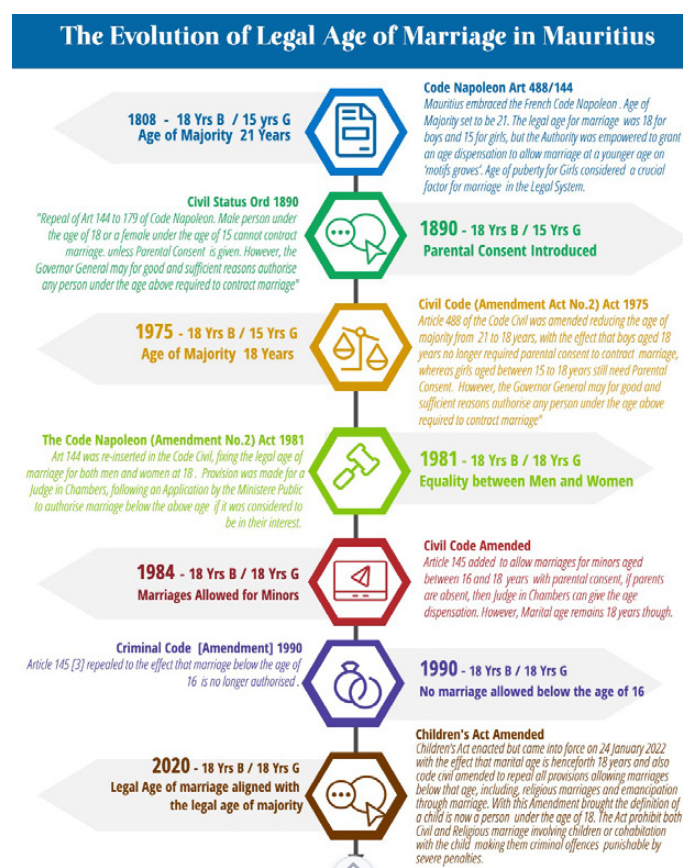
## 5. Conclusion

In conclusion, Mauritius has made significant progress in addressing child marriages and fulfilling its international commitments to

protect the rights of children and women. The historical background demonstrates the gradual increase in the legal age of marriage, reflecting a shift towards recognizing the negative impact of child marriages on individuals' well-being, particularly girls. The article highlights that child marriages are considered a violation of human rights and a manifestation of gender inequality.

Mauritius' participation in international conventions and protocols, such as CEDAW, CRC, the African Charter on Human Rights and Welfare of the Child, and the Maputo Protocol, underscores its dedication to ending child marriages. The recent enactment of the Children's Act 2020 further strengthens Mauritius' legal framework by revoking the previous Child Protection Act of 1994. While the act strictly prohibits child marriages in both civil and religious contexts, with severe penalties for those involved, it also aligns the age at which an individual attain majority with the age at which they can enter into marriage.

While legislative developments are commendable, it remains to be seen how effectively the new law will eradicate child marriages and protect the well-being of children in Mauritius. Continued efforts, including awareness campaigns, education, and support services, will be crucial in ensuring the effective implementation of the Children's Act 2020 and creating a society where child marriages are eliminated entirely, safeguarding the well-being and rights of children.



# Relevance of successor Treaties in Extradition matters

by Kristyven Andy Putchay, State Counsel



Extradition is a form of international cooperation between states. Although relatively seldom, extradition cases are often highly controversial, especially where an extradition concerns a country's own national being extradited to a foreign state.

Mauritius has extradition relations with several countries around the world through an array of bilateral treaties and multilateral conventions. Such relations exist in order for Mauritius to effectively and efficiently administer its criminal justice system and to also prevent its territory from becoming a refuge and safe haven for criminal fugitives – these being imperatives which are in perfect alignment with the Lord Thomas' view that there is:

*"... a constant and weighty public interest in extradition; that those accused of crimes should be brought to trial; that those convicted of crimes should serve their sentences; that the UK should honour its international obligations and the UK should not become a safe haven."*

Extradition cases in Mauritius are governed by the Extradition Act 2017 ("the Act") which implements the international obligations of Mauritius under extradition treaties to extradite persons sought for prosecution or to serve a sentence imposed against them in a foreign state (see s.4(1)).

Essentially therefore, extradition is a matter of international law requiring the cooperation of two or more countries, as well as reliance on international customary and treaty law. In the Act, an 'extradition treaty' –

- (a) means an agreement, an arrangement or a bilateral treaty between Mauritius and a foreign State, or a multilateral treaty to which Mauritius is a party; and
- (b) includes a treaty made before 12 March 1968, which extends to, and is binding on, Mauritius, which contains provisions governing the extradition of persons from Mauritius;"

Although beyond the scope of this article, it must be highlighted that the absence of an extradition treaty is not an absolute bar to extradition. An extradition request may still be entertained by Mauritius on the basis of reciprocity and comity (see s.4(2)).

In Mauritius, extradition is a three-tier process as provided for in the Act. The first stage involves the receipt and consideration of an extradition request via diplomatic channel by the Honourable Attorney-General ("Hon. AG"). If the Hon. AG determines that extradition proceedings ought to be initiated, he proceeds to apply for an order from a Magistrate under s.18 of the Act that the person sought is eligible for extradition.

The resulting extradition hearing before the Magistrate to decide whether the person sought is eligible for extradition is the second stage of the process. Finally, where the Magistrate or the Supreme Court<sup>1</sup> decides that the person sought is eligible for extradition, the

Hon. AG completes the third stage by deciding whether or not to order the extradition of that person to the requesting State.

One of the requirements to be satisfied at an extradition hearing is that **"the requirements of the relevant extradition treaty are met"**<sup>2</sup>. It must be borne in mind that the question of *"whether an international treaty is binding or not is a matter of expert evidence."*<sup>3</sup>

When it comes to the binding character of treaties, while those entered into **on or after 12 March 1968** generally pose no difficulty, treaties that were by contrast entered into **before 12 March 1968** by the UK and other foreign states<sup>4</sup> and succeeded to by Mauritius after its independence from the UK, are at times cause for much controversy and contention, although the latter type of treaties falls within the definition of 'extradition treaty' under the Act. (see above)

The difficulty posed by successor treaties was illustrated in **Heeralall v. Commissioner of Prisons 1992 SCJ 140**. In that case, the Supreme Court took that view that *"since there was no evidence of a binding extradition treaty between Mauritius and France before the lower Court, it had no jurisdiction to make the order committing the applicant to prison pending his eventual surrender to the French authorities."*

However, in **Danche v. The Commissioner of Police & Ors 2002 SCJ 171**, the Supreme Court accepted that there *"was conclusive evidence before the committing Court, which was not the case in Heeralall, that a binding extradition treaty has existed before and since the independence of Mauritius between Mauritius and the U.S.A."* Referring to "Doc. B1" which was produced before the committing court, the Supreme Court said that by:

*"a letter sent on 12 March 1968 by the then Prime Minister and Minister of External Affairs of Mauritius to the Secretary General of the United Nations for circulation among all States Members of the United Nations and the United Nations Specialised Agencies whereby the latter were informed that -*

- (a) *the Government of Mauritius acknowledged that "many treaty rights and obligations of the Government of the United Kingdom in respect of Mauritius were succeeded by Mauritius upon independence by virtue of customary international law";*
- b) *"it is desired that it be presumed that each treaty has been legally succeeded to by Mauritius and that action be based upon this presumption until a decision is reached that it should be regarded as having lapsed. Should the Government of Mauritius be of the opinion that they had legally succeeded to a treaty but subsequently wish to terminate its operation, they will in due course give notice of termination in the terms thereof";*



# Relevance of successor Treaties in Extradition matters (Cont'd)

by Kristyven Andy Putchay, State Counsel

Mauritius had in effect made a “declaration of succession which applies to all treaties, bilateral or multilateral, and is not limited to any period of time [...]”.

Expatriating further on “Doc. B1”, the Supreme Court added that:

*“the reasonable meaning of Doc. B1 is that, so far as concerns all treaties, multilateral or bilateral, “they are to continue in existence and to be considered as binding” on Mauritius “until such time as decisions could be made in regard to them and as to which of them should be terminated and what should be continued”, to borrow the words and reasoning of Lord Morris to suit the Mauritian context – vide J.S.P. Molefi v Principal Legal Adviser and Ors (1970) 3 WLR 338 at page 345.”*

The rationale of the decision in **Danche (supra)** on the principle and application of successor treaties was followed by Magistrates sitting at District Court level in two recent extradition cases to France which have made significant headlines in Mauritius.

Thus in **Attorney-General v. Sicart & Sicart CN:5843/2017**, on the issue of the existence of a binding treaty between Mauritius and France, the Senior Magistrate distinguished **Heeralall (supra)** and applied **Danche (supra)** given that evidence was adduced before the court “to show that both Mauritius and France have accepted there is still a binding Extradition Treaty between the two states [...], no notice of termination was given of the extradition treaty was given by either France or Mauritius [...]”.

Similarly, in **The Honourable Attorney General v Jeremy Decide (also known as Nono) 2023 PL2 92 - CN 1604/23**, the Senior Magistrate again distinguished **Heeralall (supra)** and applied **Danche (supra)** stating that:

*“It is clear that the case of Heeralall (supra) can be distinguished from the present case as Docs A, B and C, which have been produced by Mr Seetohul, show that both Mauritius and France have accepted that there is still a binding Extradition Treaty between the two states.”*

Interestingly, a successor treaty remains in existence and binding as between the successor state<sup>5</sup> and the third state<sup>6</sup> even where the original parties to the treaty (the predecessor state<sup>7</sup> and the third state) have mutually agreed to terminate the treaty in question. Consequently, whilst the 1876 Treaty was terminated both by the United Kingdom and France which are now parties to the European Convention on Extradition, it remains valid and binding as between Mauritius (the successor state) and France (the third state).

In conclusion, it can be said that treaties are indeed of paramount importance in extradition proceedings. In fact, extradition treaties which are binding on Mauritius take precedence over the Act (see ss.3(3) & 4(1)). Treaties also assume that the state parties already have extradition regimes in place. In so far as Mauritius is concerned, past experiences have shown that Mauritius has a well-oiled extradition regime in place that allows compliance with its international obligations under international customary and treaty law while at the same time ensuring that extradition proceedings in Mauritius are conducted in accordance with the rule of law and constitutional principles.



<https://www.komieandassociates.com/criminal-defense/extradition>



<https://montrealcriminallaw.com/en/extradition/>

5 means the State which has replaced another State on the occurrence of a succession of States

6 means any State other than the predecessor State or the successor State

7 means the State which has been replaced by another State on the occurrence of a succession of States

# Environment, Social and Governance (“ESG”): Turning ideals into actions.

by Deorani LUTCHMANEN, Assistant Curator of Vacant Estates



*“It is time to flick the “green switch”. We have a chance to not simply reset the world economy but to transform it.” The UN Secretary General, António Guterres at Columbia University on 02 December 2020.<sup>1</sup>*

Our earth and its people are facing a moment of reality. Our sphere is in a shattered condition due to the endless mugging by humanity upon nature. Now than ever is the time to trip on the road to a safer, sustainable, and reasonable alleyway to transform humankind’s relationship with the environment and with each other. There is a moral imperative to act with urgency and hope. Nowadays, investors are increasingly inspecting beyond merely financial data as there is an economic and financial shift to redraft accounts and endorse behavioural change to report Environment, Social and Governance (“ESG”) issues. Investors want to hear from companies about their success of sustainability.<sup>2</sup> There is an enthralling expectation for a more value focused ESG story but more significantly, for corporates to create a genuine coagulating and meaningful connection with society and environment. Consequently, the latest trends in capital arrangement entail more considerate analysis towards “green financing opportunities”. The inevitable reality is that environmental issues like climate change does not respect borders, Mauritius is no exception. We must transform perceptions that investing in environment and society by adopting good governance is a compromise for economic growth, but the harnessing should come with good intentions than “greenwashing”. The present article evolves around the “E” of this trilogy; the Environment.

## Introduction

The corporate world has entered an all-inclusive strategic agenda with the era of ESG. ESG is the framework which allows companies to identify, assess, and address their activities fairly to their carbon footprint, commitment to sustainability, workplace culture and board structure through gender diversity. This organisational structure became increasingly important to the extent that socially responsible investors want to invest in companies that have high ESG rating and score.<sup>3</sup>

The three main pillars of ESG include (i) Environmental commitment, a driver towards a more sustainable business by reducing businesses’ impact on the environment, including their carbon emissions and footprint, energy usage and waste; (ii) Social commitment, creating diversity at the workplace and caring for the satisfaction and healthiness of those who are employed and the community within which companies operate; and (iii) Corporate governance, urging the companies’ board to demonstrate

transparency and accountability by showing their farthest pledge to equity and equality through an attitude of compliance.

According to recent research by PriceWaterhouseCoopers, it revealed that ESG factors is currently a make-or-break consideration for prominent investors worldwide. ESG emanates as a wake-up call for all companies, large and small, to embrace triple-bottom-line<sup>4</sup> business practices.<sup>5</sup> Correspondingly, corporates are working towards fully integrated ESG reports that incorporates economic, environment, social and governance information in a single document to provide a complete picture of the company’s activities. Companies target to create a sense of ‘social contract’ to enhance their legitimacy to operate in a way that shows respect for society and environment while also boosting financial estimates. Corporates are under the growing pressure to do well by doing good as this will entail ESG scores and ratings. However, this can be viewed with cynicism due to the spectre of ‘greenwashing’ such that companies may improve social performance for purely presentations reasons and not to improve the underlying sustainability goals.

The urgency to transit to a fair, responsible, and sustainable economy undoubtedly stems even more from the energy crisis and the new set emission goals by 2050 by the ‘Climate Change Conference’ (COP 27) 2022. The conference also urged developed country parties to immediately and meaningfully gauge their provision of climate finance, technology transfer and capacity-building by accommodating the needs of developing country parties as part of a global effort.<sup>6</sup>

In that perspective, ESG revolution has fairly instilled the institutional loan funds with the labelled of ‘green finance revolution’. The ESG related financings gradually grasped investors’ consideration. The incorporation of ESG principles in securitised products labelled as the ESG Collateralised Loan Obligations (ESG CLOs) led CLOs Managers in Europe to build ESG ‘negative screening’ measures into their credit rating criteria.<sup>7</sup> On the national level, companies and people in Mauritius are paying close attention to ESG issues. The SEM Sustainability Index (SEMSI) has been launched by the Stock Exchange Mauritius in 2015 with the aim of promoting sustainability, good governance, and transparent business practices. It tracks the price-performance of those companies listed on the Official Market or the Development & Enterprise Market which demonstrate strong sustainability practices and provides a robust measure of listed companies against a set of internationally aligned and locally relevant environmental, social and governance (ESG) criteria. It offers a useful tool for domestic and international investors with an appetite for responsible investment in frontier

<sup>1</sup> Climate Action: It’s time to make peace with nature, UN chief urges | UN News

<sup>2</sup> Gelb, J. et al. (2023) Investors want to hear from companies about the value of sustainability, McKinsey & Company. Available at: <https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/investors-want-to-hear-from-companies-about-the-value-of-sustainability> (Accessed on : 19 September 2023).

<sup>3</sup> What is ESG? environmental, social, and Governance Commitment explained (2022) CIO. Available at: <https://www.cio.com/article/409892/what-is-esg-environmental-social-and-governance-commitment-explained.html> (Accessed: 20 September 2023).

<sup>4</sup> What is triple bottom line approach? the 3PS of corporate impact (2023) ESG. Available at: <https://www.esgthereport.com/what-is-esg/the-g-in-esg/what-are-the-3-components-of-the-triple-bottom-line-approach/> (Accessed: 20 September 2023).

<sup>5</sup> Admin (2023) PWC survey: Prioritize ESG or lose investors - ESG: The report, ESG. Available at: <https://www.esgthereport.com/pwc-survey-prioritize-esg-or-lose-investors/> (Accessed: 20 September 2023).

<sup>6</sup> Decision -/CP27 Sharm el-Sheikh implementation plan - UNFCCC. Available at: [https://unfccc.int/sites/default/files/resource/cop27\\_aup\\_2\\_cover%20decision.pdf](https://unfccc.int/sites/default/files/resource/cop27_aup_2_cover%20decision.pdf) (Accessed: 20 September 2023).



# Environment, Social and Governance ("ESG"): Turning ideals into actions. (Cont'd)

by Deorani LUTCHMANEN, Assistant Curator of Vacant Estates

markets.<sup>8</sup>

However, being surrounded by the ocean, it is high time to raise greater awareness of the ultimate challenge caused by climate change. Mauritius is extremely exposed to disasters and climate risks; it is momentous to move people to take mutual action for the collective good of our globe not just by reporting on the ESG issues but by setting the pace for the islands around to become mindful of the risks. The Bank of Mauritius published a guide in June 2021 for the issue of Sustainable Bonds in Mauritius and in the same vein, the Financial Services Commission issued a set of guidelines to green bonds issuance in 2022.

## The Net Zero Transition

It is no surprise that the Oxford Dictionaries named "Climate emergency" as the 2019 Word of the year.<sup>14</sup> Climate change is not only an ecological issue but a societal issue nowadays. It encapsulates physical risks in the form of extreme natural disasters. It therefore becomes requisite to mitigate the physical climate risks by reducing the addition of greenhouse gases ("GHGs") to the atmosphere to net zero.

Government and business must unify and embrace new planning and investments strategies to incorporate climate consideration into their policies and their managerial structures. However, the social issue crops up as consumers with low-income will bear extra direct capital costs and must spend more in the near term if cost growths are transferred to them. Low-income and fossil fuel-producing countries would face crucial challenges and would need to balance risks and opportunities.<sup>15</sup>

Net-zero emissions can only be attained through joint and collaborative actions. Business sectors with high-emissions products or operations are disproportionately exposed to the net zero transition due to their uppermost extent of exposure of releasing substantial quantities of greenhouse gases (for example, the coal and gas power sector) or sell products that emit greenhouse gases (such as the fossil fuel sector).<sup>16</sup> The universal nature of the transition means everyone will need to play a role to tackle the effects of climate change in a spirit of fairness, thus requiring economies and societies to make noteworthy and meaningful adjustments.

Correspondingly, the carbon market has emerged in response to the net zero target. Carbon credit also known as carbon allowances work like permissions slips for emissions. When a company invest in a carbon emissions project, it then buys a carbon credit usually from the carbon market whereby it gains permission to generate Co2 emissions. Companies who end up with excess credits can sell them to other companies, thus creating an emerging market for carbon credits. Carbon offsets occurs when carbon revenue flow between companies as one company removes a unit of carbon from the atmosphere as part of its normal business activity say by

investing in renewable energy, it can generate an offset and other companies can then purchase that carbon offset to reduce their own carbon footprint. The number of credits issued each year is usually based on emissions targets. Credits are frequently issued under what is known as a "cap and trade" program whereby regulators set a limit on carbon emissions.<sup>17</sup>

It is high time for the regulatory framework to consider combining elements which might classify as an offence to retrofit high-emissions assets to lower their emissions. In the United States, green industrial policies include such laws as the Clean Air Act, Federal Tax credits for renewal energy projects, and state level renewable energy standards.<sup>18</sup> ESG initiatives is no more a top-down approach but as corporates embark on this journey, they must upskill employees to help drive their organizations towards net-zero goals by employing ESG executives to report directly to a ESG Committee which should be a sub-committee of the main Board. Governments and multilateral institutions could use existing and new policy, regulatory, for instance the Corporate Governance Codes and fiscal tools to establish incentives, support vulnerable stakeholders, and foster collective action.

The actions initiated by corporates must depict a relatively rational case for change and show noticeable ownership of the sustainability agenda. There is no greater opportunity for organisations to involve their workforce and include highly skilled women in the development towards net zero. The market of decarbonization and offsetting plans to be highly competitive and volatile, but the question is whether we can place a price on nature as, the real challenge lies in inculcating education within the community who is gradually learning the technical and scientific terms of gas emission.

## 'Green Projects' Financing

The banking industry being the warden of international finance finds itself as a prime protagonist in alleviating the ESG risks through "green funding". Although they embrace a vibrant role as principal facilitators in reorientating financial flows towards sustainable activities, supporting industries and governments in meeting climate risk and their ESG targets, the absolute burden should not be shifted on them as they have their own ESG risk profile.

Within the loan markets, it has become usual practice for banks to fix interest rates on loans linked to ESG performance.<sup>19</sup> Technical reports demonstrate that flows into ESG funds expanded between 2020 and 2021, and the ESG market will grow by 150% by 2025.<sup>20</sup> In Europe, there is a relentless rise of "green funding" and the stimulus for this move is due to the Europe Union's Sustainable Finance Disclosure Regulation ('SFDR').<sup>21</sup> The SFDR is pertinent to CLO Managers as it acknowledges the formation of what are known as Article 8 and Article 9 funds.<sup>22</sup> The SFDR was devised

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# Environment, Social and Governance ("ESG"): Turning ideals into actions. (Cont'd)

by Deorani LUTCHMANEN, Assistant Curator of Vacant Estates

to stimulate capital investment in energy transition and to prevent "greenwashing". For European CLO markets, this incursion of capital into what is ultimately a brand-new ESG asset class.<sup>23</sup>

Customary investment benchmarks are no more convenient to challenge ecology, social, and governance risks due to the consequences of climate change. The derivatives market can play a crucial role in the shift given that it is one of the world's largest markets and a vital component of the international monetary system. CLOs managers in Europe are actively looking to access the vast and rapidly pools of capital earmarked for ESG-linked investments.

Derivatives are primarily hedging instruments used for market speculations and structuring complex financial products. ESG related derivatives include inter alia renewable energy and renewable fuel hedging agreements which help market players manage the risks associated with variability in renewable energy generation. Credit derivatives that are based on ESG factors can attract more funding for green energy initiatives. The derivatives are examples of groundbreaking new products, when purchased by corporations demonstrate a greater dedication to sustainability but also allow investors use their own key performance indicators to choose their own personal sustainability benchmark player.

## The Regulatory Framework

While the ESG space is mostly unregulated, there are nevertheless legal requirements which are being passed in some jurisdictions with the European Union (the "EU") leading in this regard. However for practical reasons, the legal requirements can only be implemented at different pace. The EU has introduced several regulations concerning ESG: the Taxonomy Regulation, the Non-Financial Reporting Directive (NFRD), the Corporate Sustainability Reporting Directive (CSRD), the Sustainable Finance Disclosure Regulation (SFDR) and the Corporate Sustainability Due Diligence Disclosure (CSDDD).<sup>24</sup> The EU has adopted precise and conduct related directives. On the other hand, the United States has seen a fast revolution with an outbreak of new ESG initiatives and suggestions in the US Securities and Exchange Commission. The President Biden issued an executive order requiring the federal government to drive assessment, disclosures and mitigation of climate pollution and climate related risks in every sector.<sup>25</sup>

The EU is the pioneer of the ESG measures. Although there are no

conjoint criterions for setting the ESG measures, it is a progressive sign of proximate achievement in terms of amplified regulatory requirements, risk awareness and transparency to enable the management and disclosure of ESG facts.

However, the five-nation group of emerging economies known as BRICS (Brazil, Russia, India, China and South Africa), has emerged as a greater voice and with a combined perspective for developing countries and is to petition a greater declaration for developing countries in world businesses against a world order and practice of global policies that does not match their necessities and requirements. The group aims at restructuring international governance by mounting dealings in local monies, reorganizing the United Nations and International Monetary Fund to better contain the objectives of developing countries, and allying positions on global issues such as on agriculture, health, and sustainable development. As the group seek to develop independently, alleviating environmental damage of growth has become a major challenge for BRICS where economic progress amidst rising urbanization pollutes the environment, thus rendering ESG aspirations complicated.



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# Environment, Social and Governance ("ESG"): Turning ideals into actions. (Cont'd)

by Deorani LUTCHMANEN, Assistant Curator of Vacant Estates

## Mauritius At The Heart Of Sustainable Development

According to the World Risk Report 2021, the Republic of Mauritius ("Mauritius") was classified as the 51st most exposed country to natural hazard.<sup>27</sup> The development of a 10-year policy for the environment in May 2022 which defines new mindset and approach to business, strategic partnerships and government cooperation is reflective of the efforts made towards ESG initiatives.<sup>28</sup>

Mauritius has furthermore presented its Written Statement in the matter of the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law on in accordance with Orders of the International Tribunal for the Law of the Sea dated 16 December 2022 and 15 February 2023. Mauritius as a small island state is undeniably mindful of the pragmatic risks posed by the effect of Climate Change. The statement submitted in response to this request is a breakthrough for small islands to react to not only marine pollution but to create a forum of awareness for its people.

Mauritius is one of the most competitive and prosperous economy in Africa. It has to sell to the world an "ideal" doorway to channel sustainable investments. Companies in Mauritius should adopt an attitude of commitment to serve humanity and the community, to protect the environment and to create a mindset of participation at all levels in its journey to sustainability. The island being highly exposed to climate change threats, and natural resources depletion is an appeal to companies to make responsible ESG investments. We are no more in an era where companies were on one side and environment and society on the other.

There is no specific ESG legislation in place in Mauritius yet, but there are ESG related frameworks which have been gradually considered by the Bank of Mauritius and the Financial Services Commission in the form of climate-related and environmental financial risk guidelines. It is expedient that a rule-based approach be adopted to create a fertile environment, for instance recognizing that sustainable finance can be a game changer and the ESG initiatives for responsible investments be incorporated into the Banking Act 2004.

The National Code on Corporate Governance highlights stakeholder governance practices in connection with social environment responsibility but the trail to ESG issues undeniably necessitates fundamentals deviations in governance arrangements and business behaviours in Mauritius. Corporates as major actors in the field of ESG must recognize that joined efforts matter.

It is high time to reduce stakeholders' doubts about excessive greed for financial results to the detriment of environment and social welfare. Climate policy should not only be a discussion to raise awareness and to prompt action, but it should now be incorporated as a statute. Stringent laws must emerge and transform the Corporate Governance codes into an Act of Parliament. This law should include inter alia the mandatory aspect for the Board members to consider ESG factors in the investment process and policies of the company. Incorporating ESG factors into the investment process often leads to an increase in corporate engagement with all stakeholders or to more formal actions, such as shareholder resolutions seeking to achieve ESG-related goals. Although ESG

factors will differ for each company and sector wise and cannot be given a standard definition, for a starting point, the regulatory framework can consider the EU regulations to tailor them to the local challenges.

## Conclusion

"We have to choose between a global market driven only by calculations of short-term profit, and one which has a human face." (Kofi Annan, 1999)

While the ESG drive is a commendable step in the right path into giving our planet a human face, ESG is still a fledgling arena with much development ahead of it. For ESG to attain its all-inclusive potential it should be extended to comprise further wide-ranging outlooks and principles about the ethical importance of the planet and differing conceptions of how resources ought to be shared within the education curriculum.

ESG can become a truly worldwide movement and thus do even more for the world's evolution towards a more equitable and sustainable future. As corporate integrates ESG initiatives into its equity story, they should recall that their target investor audience is cultured, long-term oriented, and inexorably focused on sustainable competitive advantage. Mauritius is well-positioned to take headship on ESG issues, but more significantly a regulatory framework must be expediently set up due to the specificity of the island.

ESG issues should not only form part of discussion forums, but there is urgency to create tangible and practical plans that can achieve real results. The fate of humanity, environment and corporate governance can be reshaped as government, financial institutions, and regulators are ready to cooperate given the high concern around global warming. The big question is whether they altogether really walk the "green" talk or they are just making false representations to attract investments.

# Training on the recent legal developments on the national and international space on climate change

by Najiyah N.Dauharry Jeewa, Principal State Counsel



***“Climate change is the greatest threat to our existence in our short history on this planet. Nobody’s going to buy their way out of its effects.” Mark Ruffalo, American Actor.***

On 28 July 2023 at the seat of the Permanent Arbitration Tribunal in Caudan, the Adviser and Manager of the Commonwealth Climate Finance Access Hub, Dr Oldman Oduetse Koboto, favoured us with an interesting and helpful insight on the recent legal developments on the national and international space on climate change.

Dr. Oldman Koboto has an impressive background. He was awarded a doctorate degree in Public International Law, specialising in Climate Change, from the China University of Political Science and Law. He has held several portfolios in the government of Botswana including Prosecuting Counsel, Legal Adviser to the Ministry of Environment, Wildlife and Tourism and Director of the Department of Wildlife and National Parks. He also served as the Environment and Climate Change Specialist at the United Nations Development Programme in Botswana before re-joining the government as the Permanent Secretary for the Ministry of Environment, Natural Resources Conservation and Tourism.

Dr. Oldman guided us through the historical underpinnings of the international legal framework on climate change which originated with the Montreal Protocol on Substances that Deplete the Ozone Layers in September 1987 and culminated in the United Nations Framework Convention on Climate Change (UNFCCC) in 1992. He also compared two main UNFCCC legal instruments, namely the Kyoto Protocol which provided for legally binding emission reduction targets and incentives for compliance and the subsequent Paris Agreement which set a goal to limit global warming to well below 2 degrees Celsius above pre-industrial levels and pursue efforts to limit global warming to 1.5 degrees Celsius. The Paris Agreement importantly recognised the necessity for both mitigation and adaptation measures in achieving this goal and established Nationally Determined Contributions, which are climate action plans developed by each party to the Convention to cut emissions and adapt to climate impacts. He also laid stress on the need for Small Island Developing States, as the most vulnerable countries to the impacts of Climate Change, to develop means and ways to better access climate change funds. He further spent time on emission trading programmes and gave us examples of how they could be implemented by developing countries.

Climate Change Law is becoming increasingly technical and complex. However, it is an area of law from which we can no longer shy away from in the face of the inescapable challenges ahead.



# Commonwealth Law Ministers Meeting 2022

by Yakshini Peerthum, State Counsel  
and Taroon Ramtale, State Counsel



From 22-25 November 2022, Commonwealth Law Ministers, Attorneys General and Senior Officials from 31 member countries met to further a set of proposed actions to be taken at national and Commonwealth level to achieve equal access to justice and justice transformation for all by 2030. This meeting, the Commonwealth Law Ministers Meeting 2022 was hosted by the Attorney-General's Office and was chaired by the Honourable Attorney-General of Mauritius, Mr. Maneesh Gobin.

During the opening ceremony, the Honourable Prime Minister of Mauritius, Mr. Pravind Kumar Jugnauth recognised the importance of having laws and practices in place which reflect compliance with international conventions and norms so that member countries stand united to show their commitment and respect for the protection of human rights.



The Commonwealth Law Ministers Meeting, which is held triennially, is aimed at facilitating information sharing, best practice and collaboration among countries sharing a common legal tradition. The Meeting of 2022 was convened under the theme '*Strengthening international cooperation through the rule of law and the protection of human rights*'. It is acknowledged that international cooperation is essential to advance the rule of law and to protect human rights, especially in an era which is marked by the proliferation of digital assets and the implementation of artificial intelligence. The importance of an ecocentric approach through the co-existence of advancement and the protection of the environment whilst upholding the rule of law was also highlighted in a number of agenda papers which were proposed by Mauritius. Equal and effective access to justice through justice innovation, nevertheless, remained decisive and undoubtedly no stones were left unturned on this subject.

The Meeting of 2022 was also an opportunity for Law Ministers and Attorneys General to further the Plan of Action which was endorsed in Kigali, Rwanda in June 2022 by the Commonwealth Heads of Government. This Plan of Action includes the development of an access to justice toolkit, a legal knowledge exchange portal and model contracts in investment and energy.





# Commonwealth Law Ministers Meeting 2022 (Cont'd)

The Secretary-General of the Commonwealth, the Rt Honourable Patricia Scotland, KC, who graced the Meeting of 2022, reminded member countries that taking advantage of the resources developed by the Commonwealth Secretariat and its partners can only shorten the journey towards the development of solutions for legal problems.

During the deliberations, Law Ministers received and discussed papers on diverse but connected areas of law under the main theme. Effective access to justice, the opportunity of embracing digitalisation and artificial intelligence for court services and the need for simple, user-friendly systems for justice delivery were insightful agenda items. International cooperation among member countries in criminal matters, through Mutual Legal Assistance, was discussed. Success in cross-borders investigations depends to a great extent on well-defined legal mechanisms and procedural frameworks. After having previously endorsed the need to nominate Contact Points and Electronic Evidence Focal Points at the Commonwealth Law Ministers Meeting 2019 held in Colombo, Sri Lanka, Law Ministers now considered the establishment of an Expert Working Group on Commonwealth Schemes for Mutual Legal Assistance.

In order to further best practices among member countries, as it is usually the case at Law Ministers Meetings, the Commonwealth Secretariat extended several toolkits and practice guides on law and climate change, anti-corruption benchmarks, cyber-security for elections and effective methods to negotiate investment contracts by prioritising clauses on environmental, social and economic development in such contracts. Model Provisions on Data Protection devised by an Expert Working Group under the supervision of the Secretariat were tabled at the Meeting. These Model Provisions were adopted by the Law Ministers. The regulation of digital assets was also an important agenda item. It was proposed that a framework model law on digital assets aligned with Commonwealth values be designed for the adoption of digital solutions.

Freedom of expression and the role of the media in good

governance are sacrosanct in upholding good democracy and the protection of human rights. As such, following discussions on this area, Commonwealth Law Ministers unanimously agreed to recommend the '*Commonwealth Principles on Freedom of Expression and the Role of the Media in Good Governance*' to Commonwealth Leaders to consider at the next Commonwealth Heads of Government Meeting.

As far as domestic and international dispute resolution is concerned, it was noted that the use of arbitration had grown in some countries while others only recently began to resort to arbitration. Law Ministers proposed the establishment of an action-oriented Commonwealth Taskforce on Arbitration to promote arbitration throughout Commonwealth and to modernise arbitral law in member countries. Mediation also received interest at the Meeting of 2022. Law Ministers recognised the advantages of acceding to the United Nations Convention on International Settlement Agreements Resulting From Mediation (the 'Singapore Convention').

To close the Meeting of 2022, reports from the Secretariat's partner organisations, namely the Commonwealth Association of Law Reform Agencies, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers Association, the Commonwealth Judicial Education Institute, the Commonwealth Association of Legislative Counsel, the British Red Cross in collaboration with the International Committee of the Red Cross and the Commonwealth Parliamentary Association were received.

Law Ministers and the Commonwealth Secretariat thanked the Mauritian Government and the Attorney-General's Office for having hosted a successful Meeting. Gratitude is expressed to all Legal Officers and Staff of the Attorney-General's Office and all Liaison Officers for their dedication and invaluable support. To the Commissioner of Police and other Departments and Ministries for their unflinching support in namely providing key logistics. To the Prime Minister's Office in providing guidance through-out. The impressive team spirit and work has turned this international event into a true success story!.





# CASE LAW REVIEW

by Meenacshi Devi Ramguttee, Zaheerabee Woozeer, Keshini Devi Mutty,  
Hadiyah Khoyrutty Emambocus | Legal Research Officers/ Senior Legal Research Officers

## **GUERBETTE S D P v DIRECTOR-GENERAL, MAURITIUS REVENUE AUTHORITY 2023 SCJ 146**

### **Factual Background**

This case was an appeal from an ex parte Order by the Judge in Chambers declaring a Compulsory Notice (“contrainte”) executory, demandable and personally owed by the Appellant (then Respondent); and ordering a writ of execution to issue for the seizure and sale in case of non-compliance with the Compulsory Notice.

It appeared that the basis of the Judge’s Order was a proceipe consisting of an application made under Section 21J of the Mauritius Revenue Authority Act (MRA Act) and a document entitled “Compulsory Notice “contrainte” issued, as it appeared, under section 21J of the MRA Act. No affidavit was made part of same.

The Order was being appealed on eleven grounds, mainly challenging the Judge’s Order as being wrong in law and on the facts, misconceived and violative of the Appellant’s constitutional right to a fair trial.

### **Decision**

In this appeal, the pertinent issue was whether the right procedure under Section 21J of the MRA Act had been followed both by the Director-General of the MRA and the learned Judge in Chambers.

After considering the submission of Counsels in the matter, the Court held that the right procedure in this context had not been followed and that the Order of the learned Judge in Chambers is null and void. The Court stated that “both the Director-General of the MRA and the learned Judge in Chambers, while purporting to act under section 21J of the MRA Act, has in fact followed the defunct procedure for “contrainte” obtaining under Article 64 of the *Arrêté du 16 Fimaire An XII du Code Decean No.36 (“Article 64”).*” The Court further stated that although the *Arrêté du Fimaire An XII* was described as “our fundamental law on registration” in the case of *St Aubin S.E. Cy Ltd v Receiver of Registration Dues* [1925 MR 1], it needed to be noted that this was no longer good law after having been restyled as the Registration Duty Act further to the Revision of Laws Act. Section 45 of the Registration Duty Act now provides for the procedure “contrainte” in respect of registration duty which is due, instead of Article 64.

After analysing the above-mentioned Article 64 and the section 21J of the MRA and making reference to the application under section 45 of the Registration Duty Act, the Court found that Section 21J of the MRA Act is somehow cast in almost identical terms as section 45 of the Registration Duty Act, provides for an application to be made to the Judge in Chambers for an Order (“contrainte”), without providing for any Compulsory Notice to be issued by the applicant and endorsed by the Judge in Chambers. The Court also found that the legislator had provided for the Judge’s Order itself to be the “contrainte” instead of the Compulsory

Notice as was the case under Article 64 and under French law. The Court further stated that since “section 21J itself is silent as to the manner in which an application under that section is to be made, every application before a Judge in Chambers is governed by the Supreme Court (Judge in Chambers) Rules 2002, of which Rule 2 provides as follows:

“Unless otherwise provided in any other enactment, every application to a Judge in Chambers shall be made by way of praecipe, supported by affidavit and any relevant documentary evidence.”

The Court highlighted that in that particular case, the Director-General of the MRA had already issued the “contrainte” whilst the legislator had through section 21J transformed the “contrainte” from an administrative warrant under Article 64 to a judicial act in the form of an order of “contrainte”. It was for the learned Judge in Chambers to consider the merits of an application made under Section 21J on the basis of the proceipe and affidavit evidence, before issuing any order of “contrainte”.

The Court allowed the appeal since it found that the procedure adopted by Respondent was fundamentally flawed, that the respondent has no authority to issue a Compulsory Notice purporting to be a “contrainte” and that the Judge’s Order made on the basis of the flawed application was null and void.

## **Cases of Ah Seek A. R. F. V The State Of Mauritius [2023] SCJ 399 and Fokeerbux N. A. & ors v The State of Mauritius [2023] SCJ 400**

In both of these cases, the plaintiffs sought constitutional redress under sections 17 and 83 of the Constitution. They contended that section 250 of the Criminal Code, which provides for the offence of sodomy, is unconstitutional inasmuch as it violates their fundamental rights guaranteed under sections 1, 3, 4, 9, 12 and 16 of the Constitution. They contended that section 250 of the criminal code treated them as criminals and reduced their sexuality as a crime.

The plaintiffs averred that section 250(1) of the criminal code is discriminatory inasmuch as it prevents them, as homosexuals from expressing themselves sexually as it criminalises the act of sodomy. They have explained that, unlike heterosexual persons, they are unable as homosexuals to express themselves in the only way which is natural to them.

They therefore prayed for the following Orders:

- (a) a declaration that sexual orientation forms part of and is implied in the definition of sex as enacted under sections 3, 3(a) and 16 of the Constitution;
- (b) a declaration that section 250 of the Criminal Code is unconstitutional; and

**\* Continues on next page**

# Ah Seek A. R. F. V The State Of Mauritius [2023] (Cont'd)

(c) alternatively, a declaration that section 250 of the Criminal Code does not apply to consensual acts of sodomy “performed by consensual adults”.

## Conclusion

The court held that section 250(1) is discriminatory in its effect against the plaintiffs in breach of section 16 of the Constitution inasmuch as it criminalises the only natural way for the plaintiffs and other homosexual men to have sexual intercourse whereas heterosexual men are permitted the right to have sexual intercourse in a way which is natural to them.

Additionally, the Court reiterates that section 250(1) of the Criminal Code is unconstitutional and violates section 16 of the Constitution inasmuch as it prohibits consensual acts of sodomy between consenting male adults in private and should accordingly be read to exclude such consensual acts from the ambit of section 250(1).

The Court also held that the word “sex” in section 16 of the Constitution should be interpreted as including “sexual orientation”.

## Surendra Dayal (Appellant) v Pravind Kumar Jugnauth and 5 others (Respondents) [2023] UKPC 37

### Factual Background

The appellant was an unsuccessful candidate at the 2019 Mauritius National Assembly Elections. He challenged the validity of the election of his political opponents on grounds of bribery, treating and undue influence for the purposes of sections 64 and 65 of the Representation of the People Act 1958 (“the Act”). The Supreme Court dismissed his petition under section 45 of the Act. He appealed against that dismissal with the leave of the Supreme Court.

He contended that the Supreme Court was wrong to dismiss the following allegations:

*“(i) That promises made by Mr Jugnauth in October 2019 to increase the basic retirement pension (“BRP”), to accelerate forms of public sector pay and terms, and to pay one-off performance bonuses to police officers, firemen and prison officers constituted bribery;*

*(ii) That the provision of free food and drink at an event on 1 October 2019 organised by the Ministry of Social Security (“MSS”) constituted treating.”*

### Privy Council on the proper interpretation of section 64: bribery and treating

The Board pointed out that the purpose of section 64 is to prevent corrupt practices such as vote-buying. It is meant to prevent private inducements to the electorate to vote by reference to arguments other than the public good. When interpreting the words “in order to induce” (an elector to vote (or refrain from voting)), the Board highlighted that there must be some quid pro quo between the conduct of the candidate and the actions of the elector, some bargain between the candidate and the elector such that money is paid (or valuable consideration conferred) to the elector in return for voting in a particular way.

The Board had this to say:

The mere fact that an offer or promise is made to the electorate that represents money or valuable consideration (and is designed to win votes) does not mean that an act of bribery has been committed. Rather, due consideration must be given to surrounding facts and circumstances to determine if there had been illegal vote-buying.

The Board does not accept that the Supreme Court in some way impermissibly elided the position of the individual candidate with that of the political party to which they belonged. Such a distinction is unreal in circumstances where no voter stood to benefit financially from the election of a single individual candidate (as opposed to the election of a particular political party to power). A fair reading of Mr Jugnauth’s speech makes it clear that he was not making a personal commitment to provide the financial benefit in question, but rather a commitment on behalf of his party

According to the Board, the following features support the Supreme Court’s conclusion:

- (i) The proposals were made in open and public, allowing criticism and debate;
- (ii) The proposals had been the subject of prior political debate, and carried transparent underlying reasoning;
- (iii) The BRP and PRB Report proposals related to manifesto pledges;
- (iv) The proposals related to important and sensitive topics of public interest;

\* Continues on next page



# Surendra Dayal (Appellant) v Pravind Kumar Jugnauth and 5 others (Respondents) [2023] UKPC 37 (Cont'd)

(v)The subject-matter of the proposals was also the subject of proposals by other candidates or political parties;  
(vi)The proposals were generic/of nationwide impact, not limited to members of the constituency;  
(vii)There were several weeks between the proposals and polling day, and over a month between the SCIVV event and polling day.  
(viii)The proposed benefit was not contingent on particular individuals voting in a certain way;  
(ix)There was no quid pro quo and/or element of bargaining between candidate and voter;  
(x)There was no question of private funding behind the proposals;  
(xi)Implementation of the proposal was contingent on future (potentially uncertain) political events, including parliamentary vote;  
(xii)There was no finding that the proposals were unreasonable or that they carried any element of deception and/or extreme exaggeration.

## Conclusion

Board dismissed the appeal on all grounds.

## Defence HiTech Security Services Ltd V Mauritius Institute Of Training And Development & Anor 2023 Scj 436

### Factual Background

The case concerned an appeal from a judgment of the Commercial Division of the Supreme Court dismissing the appellant's claim against the respondent for loss of earnings, refund of the performance bonds and damage to reputation which the appellant had allegedly suffered following the termination of its contracts by the respondent.

In a nutshell, following a successful bid, the respondent awarded to the appellant two contracts for the provision of security services in respect of its Head Office and its Training Centres. In the months of June and July 2015, the respondent notified the appellant in writing of several shortcomings and unsatisfactory performances it had noted in the services provided on its (respondent's) sites and requested the appellant to take corrective actions. The appellant was further informed that failure on its part to remedy the breaches might lead to a termination of the contracts. By letter dated 14 September 2015, the respondent informed the appellant that, pursuant to clause 1.7.1 of the contracts, it was terminating the contracts with effect from 15 October 2015 and was forfeiting the performance bonds on account of "a number of unsatisfactory or lack of performances in the services provided on MITD sites" to which the appellant's attention was drawn on numerous occasions but in respect of which the appellant had failed to take corrective action.

The learned Judge found established 3 out of the 6 complaints of shortcomings raised by the respondent against the appellant's performance of the contracts. The learned Judge concluded that the respondent was, on the basis of clause 1.7.1, entitled to terminate the contracts and that the appellant had failed to establish that the contracts had been unlawfully terminated. With regard to the appellant's submissions that the respondent had failed to comply with clause 6.1 of the contracts, headed "Dispute Settlement", the

learned Judge found that "clause 6.1 must be read together with the other terms and conditions embodied in the contract which deal expressly with 'shortcomings' in the plaintiff's performance of its obligations as a service provider".

## Decision

After setting out clauses 1.7.1(a) and 5.2, which made provision for the termination of the contract by the Employer, the Court held that "the Employer may terminate the contract of the Service Provider once it has identified shortcomings in the execution of latter's obligations under the contract and given to it the required time to take corrective measures". The Court then considered clause 6 of the contracts entitled "Settlement of Disputes" and clause 6.1 having the subtitle "Dispute Settlement". It was of the view that the "respondent was fully entitled to invoke clause 1.7.1 to terminate the appellant's contracts". The Court added that clauses 1.7 and 5.2 were stand-alone clauses. It also found that -

"Clause 6 is, ..., not a condition precedent to clauses 1.7 and 5.2, which the respondent ought to have had recourse to prior to terminating the appellant's contracts, as contended by learned Senior Counsel."

The Court was of the view that the "respondent, having complied with the procedural mechanism provided for under clause 1.7.1 prior to terminating the appellant's contracts, was under no obligation to resort to clause 6".

The appeal was dismissed.

# Eco-Sud V The Minister Of Environment, Solid Waste Management And Climate Change 2023 Scj 284

## Factual Background

The case concerned an appeal against a ruling of the Environment and Land Use Appeal Tribunal (hereinafter referred to as “Tribunal”) dated 6th October, 2021 upholding a plea in limine and dismissing the appeal on the ground that the appellant did not have locus standi.

The appeal proceeded on grounds 4.3 to 4.5 only which read -

“4. The Tribunal’s erroneous findings on the Merits:

(.....)

4.3. *The Tribunal erred in finding that ‘nowhere in these pleadings does the Appellant disclose any averment that it is an aggrieved party, nor if or how it has suffered undue prejudice’.*

4.4. *The Tribunal erred in adopting a restrictive interpretation of the locus standi test, as provided for under section 54(2) of the Environmental Protection Act.*

4.5. *The Tribunal erred in failing to adopt a liberal interpretation of the locus standi test, as provided for under section 54(2) of the Environmental Protection Act, which interpretation would have led the Tribunal to find that the Appellant had, even ex facie the pleadings, locus standi. “ (sic)*

## Decision

The Court found that the contention that the appeal before the Tribunal fell within the realm of public interest litigation was incorrect.

The Court was of the view that ground 4.3 was well taken. It construed the term ‘pleadings’ as including the statement of case of an appellant as well as the replies to the statements of defence of the opposing parties. The Court held that it was not incumbent upon the appellant, at the very outset of the appeal itself, to expatiate lengthily on the issue of locus standi, the moreso the statement of case, as per the legal framework in place, should be precise and concise. It further stated that the mere fact that, in the present case, the appellant had expatiated further on its locus standi only in its reply to the respondents’ statements of defence, did not, in any manner whatsoever, cast the appeal before the Tribunal outside the statutory timeframe. The Court found that “the appellant did lengthily aver in its reply to the statements of defence of the respondent and the co-respondents, how it was aggrieved by the decision of the respondent and how it is likely to incur undue prejudice”.

Grounds 4.4 and 4.5 were dealt with together. The Court was of the view that the prerequisites for ‘standing’ under Section 54(2) of the Environment Protection Act (hereinafter referred to as “EPA”) should not be given a narrow interpretation that would render it ineffective. It held that -

“‘Standing’ to bring an appeal under Section 54(2) of the EPA will exist where an appellant can show that he/it has a sufficient interest in the act or decision that he/it wishes to challenge or where he/

it can establish that he/it is personally affected or substantially and unduly prejudiced in his/its right or interest, in addition to Section 54(2)(c) of the EPA. This implies that an appellant organisation, in seeking to establish that it is an aggrieved party to whom undue prejudice is likely to be caused, will have to show genuine concern and interest in the environmental aspects that it seeks to protect and sufficient knowledge of the subject matter at hand so as to qualify it as genuinely acting in the general interest albeit no individual property right or interest has been affected. Other factors will then be relevant and considered in the light of the factual context of the application. Indeed, in such matters, the appellant’s expertise and knowledge of the subject matter, its track record of engagement on the subject matter, any previous involvement in the matter at hand, the merits of the claim and the importance of the issue raised and its consequences may be considered. It must be, however, understood that each case will depend on its own facts.”

The Court added that it “is up to the Tribunal ... to objectively, in appropriate cases, find the fundamental balance between those parties with a legitimate interest and those who simply have too much time on their hands, rather than dismissing appeals outright on the basis of locus standi”. The Court was of the view that in interpreting the prerequisites of ‘standing’ under Section 54(2) of the EPA, it ought to adopt the same reasoning of the court in *Walton v The Scottish Ministers* [2012] UKSC 44.

The Court quashed the ruling of the Tribunal and remitted the matter back. It ordered the Tribunal to hear full arguments on the issue of ‘standing’ in the light of the analysis made.



# Okiyo Maritime Corp. V The State Of Mauritius 2023 Scj 486

The case of Okiyo Maritime Corp. v The State of Mauritius concerns the establishment of a limitation fund for the MV Wakashio, a vessel involved in a maritime incident. The applicant, who was the registered owner of a Panamanian-flagged bulk carrier, MV Wakashio seeks permission to create a bank guarantee for the fund, to be jointly managed

The oil spill has been described as one of the worst ecological disasters ever to hit the western Indian Ocean causing serious oil pollution damage to the seawater, beaches and coasts, coral reefs, mangroves and other wildlife. Since the Vessel's gross tonnage is 101,932 and the incident does not involve any loss of life or personal injury so the applicant claims that it is entitled to limit its liability to special drawing rights, pursuant to Section 197(b)(ii) of the Merchant Shipping Act.

However, the respondent claims that under Section 195(d) of the Merchant Shipping Act, there can be no limitation of the applicant's liability for claims of oil pollution damage. The process of assessment and quantification of damages resulting from the incident and the ensuing oil spill is still ongoing. Damages mentioned above constitute exclusively oil pollution damage within the meaning of Section 195(d) of the Act. Besides, Section 32 of the Environment Protection Act provides that any person affected in any way by a spill, shall have a right to damages from the owner of the pollutant. It is also averred as a fact that the Code Civil Mauricien does not set any limit on the liability of a tortfeasor.

## Legal Points:

1. Expert Opinion: The applicant sought to file an affidavit containing the opinion of Sir Nigel Teare, citing the relevance of his expertise in matters similar to local law. However, the court expressed reservations about the relevance of such an affidavit and the timing of its submission.
2. Late Submission: The applicant's proposal to present Sir Nigel Teare's opinion in the form of an affidavit was met with objection due to its late submission, as the matter had already been fixed for hearing on the merits.
3. Interpretation of Law: The court emphasized its ability to interpret the statute without the need for a foreign expert, as the matter primarily pertains to the interpretation of a statute.
4. Relevance of Expert Opinion: Concerns were raised regarding the relevance of Sir Nigel Teare's opinion to the prayers of the applicant, with assertions that the matters for which his opinion was sought were not essential for the present application.
5. Late Stage Submission: The late stage at which the motion for an additional affidavit was made was highlighted, with emphasis on the court's discretion to allow such evidence if essential for reaching a sound decision.

For the above reasons, it is clear that when it comes to the interpretation and application of Mauritian laws, there is no necessity for the opinion of a foreign Judge, therefore the Court ruled that it does not need the assistance of Sir Nigel Teare to interpret the Merchant Shipping Act and to come to a decision.

## Christopher Peter Van Zyl & Ors V The Registrar Of Companies 2023 Scj 473

### Factual Background

The applicants, acting as joint liquidators of HGG Financial Group Inc. (in liquidation), sought to revive the company and have it reinstated on the register. The respondent, the Registrar of Companies, resisted the application, contending that the relevant provisions of the Companies Act and the Insolvency Act did not allow for the restoration of a company that had been voluntarily wound up and dissolved.

### Legal points

#### 1. Interpretation of Statutory Provisions:

The crux of the dispute revolved around the interpretation of section 320(1) of the Companies Act, which provides for the restoration of a company removed from the register, and its compatibility with section 309 of the Companies Act and section 137 of the Insolvency Act. The applicants argued that section 320(1) should be read in conjunction with section 309, which deals with grounds for removal from the register, including removal subsequent to a company's liquidation. Conversely, the respondent contended that the absence of explicit provisions for the restoration of voluntarily wound up and dissolved companies indicated legislative intent to preclude such restoration.

\* Continues on next page

# Christopher Peter Van Zyl & Ors V The Registrar Of Companies 2023 Scj 473 (Cont'd)

## 2. Case Law and Discretion:

Both parties relied on case law, including the New Zealand case of *100 Investments Ltd & Ors v Registrar of Companies* [2020] NZHC 880, to support their respective contentions. The applicants invoked the principle that the courts do not generally require a high standard of proof for restoration, while the respondent emphasized the absence of specific provisions for restoration in the relevant legislation. Additionally, the court considered the case of *Wenzhou Hongliang Trading Co Ltd v The Registrar of Companies* [2023] NZHC 621, which highlighted the court's residual discretion in ordering restoration.

## 3. Judicial Discretion and Just and Equitable Grounds:

The court deliberated on the exercise of judicial discretion in ordering restoration, emphasizing the need for a case-by-case assessment of the facts and merits. It acknowledged the absence of local case law on the matter and opted to be guided by New Zealand case law due to the similarities between the Companies Acts of both jurisdictions. Ultimately, the court found that the applicants had provided a sufficient basis for the exercise of its discretion, deeming it just and equitable to order the revival of the company.

### Implications

The judgment underscores the significance of judicial discretion in restoration applications, particularly in the absence of explicit legislative provisions. It also highlights the potential need for legislative review, as suggested by the court, to address the requirements for pursuing the revival of voluntarily wound up and dissolved companies.

This case serves as a pertinent illustration of the interplay between statutory interpretation, case law, and judicial discretion in the context of company restoration applications, offering valuable insights for legal practitioners and stakeholders in corporate law and insolvency matters.

## **Hurnam D. -Ipo The Honourable Attorney General & Anor 2023 SCJ 430**

### Factual Background

An ex parte application was made to the Supreme Court whereby the applicant moved for an order pursuant to section 10(3) of the Law Practitioners Act 1984 (LPA) as amended and/or section 18 of the Courts Act directing that "his name be restored to the Roll of Law Practitioners (Barristers) forthwith"

Following disciplinary proceedings against the applicant, his name was erased from the Roll of Barristers and also following disciplinary proceedings by the Bar Standards Board in UK, he was disciplined and expelled from his Inn, the Honourable Society of Lincoln's Inn.

Therefore, pursuant to section 36 of the Courts Act, the applicant made a request to the Chief Justice for the matter to be heard by

3 Judges whereby the Chief Justice did not agree to the request and set the matter to be heard by the present Bench consisting of 2 Judges.

The applicant objected to the matter being heard by 2 Judges on the ground that the Court has no jurisdiction to hear and determine this application pursuant to section 10(3) of the LPA and/or under section 18 of the Courts Act to have the name of the applicant restored on the Roll of Law Practitioners and that this application must mandatorily be heard by a bench of at least 3 Judges.

### Legal Analysis

It is submitted on behalf of the learned Counsel for the Honourable Attorney General that sections 35 and 36 of the Courts Act state how the power of the Supreme Court should be exercised. He submitted that section 14(1) of the LPA refers to section 13 of the LPA which in fact relates to disciplinary proceedings. Since the present proceedings are not disciplinary proceedings those provisions are not applicable to the present matter.

Learned Senior Counsel for the Mauritius Bar Association made clear that sections 35,36,37,38 and 39 of the Courts Act must be read together and that the Chief Justice has acted within her jurisdiction under section 36 to set the matter before the Court. It is for the person arguing that it is the full Court consisting of 3 or 5 Judges that must hear a case to give his reasons. In the matter at hand since the application is made under section 10(3) of the LPA, there is no requirement that the full Bench of the Supreme Court should hear the application.

It is worth emphasizing here that under section 36 of the Courts Act, the Honourable Chief Justice has a discretion to direct that any case shall be heard by 2 or more judges. However, section 39 provides that if the law requires any case pending before the Supreme Court to be taken before the full Court, 3 or 5 Judges shall hear the case.

It is noteworthy that section 10 of the LPA does not require a full Court to hear an application for the restoration of the name of a person on the Roll of law practitioners. It is true that section 18(4) of the Courts Act stipulates that a hearing under this section shall be governed by section 14 of the LPA. It must be noted that section 18 of the Courts Act relates to disciplinary powers of the Supreme Court to hear and determine any complaint of a disciplinary nature in respect of the professional conduct of a law practitioner. It cannot be disputed that the present proceedings are not disciplinary proceedings and this is conceded by the applicant

Moreover, the Senior Counsel of the third parties submitted that it is a fallacious argument to try and link section 10 of the LPA with disciplinary proceedings since sections 13 and 14 of the LPA have already been applied *vide* **Devendranath Hurnam, a barrister-at-law [2008 SCJ 17]** and the disciplinary process has ended. Indeed, the disciplinary Court is functus officio and this Court is not sitting to take disciplinary action against the applicant.

**\* Continues on next page**



# Hurnam D. –Ipo The Honourable Attorney General & Anor 2023 SCJ 430 (Cont'd)

Learned Counsel for the Honourable Attorney General stated that the present application should be purely and simply set aside since section 10(3)(b) of the LPA is not intended to empower the Supreme Court to confer upon a person who is not a law practitioner the status of a law practitioner. It is thus not open to the applicant, a non-law practitioner, to apply to the Supreme Court under section 10(3) of the LPA to change his status to that of a law practitioner. Learned Senior Counsel for the Mauritius Bar Association agreed with the stand of the Honourable Attorney General and submitted that the present application, which is made under section 10(3) of the LPA is wrong and misconceived.

In the light of the above, the application, was deemed misconceived and was set aside with costs.

## Central Electricity Board V Norbert Desiré Louis Carbonel Coquet [2023 SCJ 318]

by Shilpa Ganoo Ramful, Pupil

### Factual Background

The plaintiff is the supplier of electricity around the island and is entitled to collect from its customers. It is praying for a judgment ordering the defendant to pay to it the sum of Rs 736,367.00 representing the “loss of revenue” suffered by it due to four electricity meters at the defendant’s premises having been tampered with.

The Defendant averred in a plea in limine litis that –

- (a) the plaintiff does not disclose a cause of action against him; and
- (b) the plaintiff’s claim is “anyway” time-barred.

### Legal Analysis

The learned Judge stated that only the first limb of the plea in limine will be addressed. It is the contention of learned Counsel for the defendant under this limb of the plea in limine that there is no averment of fact in the second amended plaintiff with summons which would allow this Court to find that there is a contractual relationship between the parties in relation to the meters allegedly tampered with or on the basis of consumption by the defendant of electricity supplied by the plaintiff.

The Court referred to **Rule 3(1)(b) of the Supreme Court Rules 2000** (“SCR”) which provides that a plaintiff has to state the substance of the cause of action. In **Lutchman & Others v Beau Plan Milling Company Ltd & Others** [2016 SCJ 170], the Court explained **rule 3(1)(b) of the SCR** in the following terms –

*“A plaintiff with summons must state the substance of the cause of action. In other words, a plaintiff must ex facie disclose a cause of action with precision and clarity so that a defendant knows what case he has to meet.”*

Matters of fact necessary to sustain the plaintiff must also be stated clearly and distinctly pursuant to **rule 13(1) of the SCR**. Further, where a pleading discloses no reasonable cause of action, the

Court may order that it be struck out after hearing any interested party (**see rule 15(2) of the SCR**). The Court was of view that it cannot be said that it has been precisely and clearly averred in the plaintiff that there is a contract between the parties and that the defendant is bound to pay to the plaintiff the sum claimed as “loss of revenue suffered by the plaintiff due to tampering” under that contract.

Furthermore, although it is clear from the preceding averments in the plaintiff that the plaintiff must have been referring to the amount due as charges for the actual consumption of electricity by the defendant, liability *ex facie* the plaintiff is averred to arise from custody of the meters supplying electricity to the premises, not from actual consumption of the electricity by the defendant or supply of electricity to him.

It has not been averred in the present case by the plaintiff that tampering with the impugned meters constitutes a breach of contract so that the alleged loss of revenue results from an “*inexécution contractuelle*” on the part of the defendant. The only link between the four impugned meters and the defendant is that they were supplying electricity to the defendant’s premises and were under his custody. There is no averment that the meter used by the defendant was itself tampered with or that it is in any way connected to the four impugned meters.

### Conclusion

The Court held that the facts, as averred in the plaintiff, do not disclose a cause of action in contract under **rule 3(1) of the Supreme Court Rules 2000**. The first limb of the plea in limine was therefore upheld and the plaintiff was set aside, with costs.

# A Step Backward: Dobbs v Jackson Women's Health Organisation No. 19-1392, 597 U.S (2022)

by Sweta Manna, State Counsel

*"With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent"*

The closing words of Justices Breyer, Kagan, and Sotomayor, in their joint dissent, shall echo in annals of history. With a stroke of a pen, the Supreme Court of the United States in **Dobbs v Jackson Women's Health Organisation No. 19-1392, 597 U.S (2022)**, by a majority of 6-3, held that abortion is not a protected right under the Constitution of the United States and reversed a right that was implicitly recognised under the umbrella of the Right to Privacy by a majority of 7-2 in **Roe v Wade 410 U.S. 113 (1973)** 49 years ago.

The case of *Roe* (supra) created the "trimester" system which allowed:

- an absolute right to an abortion in the first three months (trimester) of pregnancy;
- some government regulation in the second trimester; and
- States to restrict or ban abortions in the last trimester as the foetus nears the point where it could live outside the womb except where such abortion was necessary to preserve the health and life of the pregnant woman.

**Roe** (supra) had recognised a constitutional right to obtain an abortion, without undue interference from the State, before approximately the end of the second trimester of pregnancy which the Court understood as the usual point of fetal viability.

In 1992, the Supreme Court of the United States in the case of **Planned Parenthood of Southeastern Pennsylvania v. Casey 505 US 833 (1992)**, by a majority of 5-4, again reaffirmed **Roe** (supra) and recognised the right of the woman to choose to have an abortion before foetal viability and obtain it without undue interference from the State. The Court held that the source of the privacy right that undergirds women's right to choose abortion, prior to the foetus attaining viability, derives from the due process clause of the Fourteenth Amendment to the U.S. Constitution, placing individual decisions about abortion, family planning, marriage, and education within a realm of personal liberty which the government may not enter.

The distinguishing feature of **Casey** (supra) is that for the first time, the Justices revised the test that Courts use to scrutinize laws relating to abortion, moving to an "undue burden" standard: a law is invalid and a State unduly interferes in the right to pre-viability abortion if its restrictions "impose...an undue burden on a woman's ability to make this decision" or present "a substantial obstacle to the woman's effective right to elect the procedure."

In **Casey** (supra), the new abortion statutes required that, amongst others, a married woman seeking an abortion must sign a statement indicating that she has notified her husband. Applying the 'undue burden' standard, the Court held that the provision relating to husband notification was invalid inasmuch as such requirement did constitute an undue burden, because husbands could potentially resort to abuse and obstruction upon learning of their spouses' abortion plans. The majority held that "the woman's right to terminate her pregnancy **before viability** is the most central principle of *Roe v Wade* [...] it is a rule of law and a component of liberty we cannot renounce."

Coming back to **Dobbs** in 2022 - It overturned both **Roe** and **Casey** and held that there is no constitutional right to abortion (including pre-viability abortion). The implications thereof are substantial.

## Potential Implications of Criminalising Abortion

Criminalising abortion may amount to a violation of the right to health under Article 25 of the Universal Declaration of Human Rights. Criminalising abortion does not stop abortions, it just makes abortion less safe. It is estimated by Amnesty International that 25 million unsafe abortions take place annually and as a consequence, more than 22,000 women die each year. Unsafe abortion remains one of the leading causes of maternity mortality. Having regulatory measures and an appropriate framework which caters for abortion entails safe access to health care and minimal maternity mortality.

Criminalising abortion may also amount to a violation of the right to privacy. A privacy-based defence of pre-viability abortion seems to depend on the premise that the woman's choice affects only herself - in other words, that the foetus is not a person and that the State's unwarranted interference with her choice is an infringement of her right to privacy. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion.

Criminalising abortion may classify as a form of discrimination. Denying access to health services that **only women require**, including abortion, is linked to discrimination and may constitute gender-based violence, torture and/or cruel, inhuman and degrading treatment.

The Committee on the Elimination of Discrimination against Women, established under the Convention on the Elimination of All Forms of Discrimination Against Women adopted by the United Nations General Assembly on 18 December 1979, has explained that "Violations of women's sexual and reproductive health and rights, such as criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, and forced continuation of pregnancy, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."<sup>1</sup> The Committee has specified that "it is discriminatory for a State Party [to the Convention] to refuse to legally provide for the performance of certain reproductive health services for women."<sup>2</sup>

The Working Group on discrimination against women has emphasized that the "right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, involving intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights."<sup>3</sup>

Similarly, the Special Rapporteur on the right to health has stated that laws criminalizing abortion "infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health."<sup>4</sup>

It is, in fact, in this spirit, that over the last 25 years, more than 50 countries have changed their laws to allow for greater access to

1 Committee on the Elimination of Discrimination against Women, General Recommendation 35 (2017) on gender-based violence against women, updating general recommendation 19, CEDAW/C/GC/35, para. 18.

2 Committee on the Elimination of Discrimination against Women, General Recommendation 24 (1999) on women and health, para. 11.

3 Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46 (2018), para. 35.

4 UN's Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254 (2011), paras. 21, 65.



# A Step Backward: Dobbs v Jackson Women's Health Organisation No. 19-1392, 597 U.S (2022) (Cont'd)

abortion, at times recognizing the vital role that access to safe abortion plays in protecting women's lives and health. Ireland joined that list on 25 May 2018 when, in a long-awaited referendum, its people voted overwhelmingly to repeal the near-total constitutional ban on abortion.

## Abortion in Mauritius

Section 235 of the Criminal Code provides, as a general rule, that "... any person who, by any food, drink, medicine, or by violence, or by any other means, procures the miscarriage of any pregnant woman, or supplies the means of procuring such miscarriage, whether the woman consents or not, shall be punished by penal servitude for a term not exceeding 10 years."

The Criminal Code was amended in 2012 to cater for instances of authorised termination of pregnancy. Section 235 A of the Criminal Code provides for certain specific instances where termination of pregnancy is authorised.

A specialist in obstetrics and gynaecology, who is registered as such under the Medical Council Act and provides treatment in a prescribed institution as defined in section 38A of the Medical Council Act, may only provide treatment to terminate a pregnancy where another specialist in obstetrics and gynaecology and another specialist in the relevant field share his opinion, formed in good faith, that —

- (a) the continued pregnancy will endanger the pregnant person's life;
- (b) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant person;
- (c) there is a substantial risk that the continued pregnancy will result in a severe malformation, or severe physical or mental abnormality, of the foetus which will affect its viability and compatibility with life; or
- (d) the pregnancy has not exceeded its fourteenth week and results from a case of rape, sexual intercourse with a female under the age of 16 or sexual intercourse with a specified person which has been reported to the police.

The situation in Mauritius is a far cry from **Roe and Casey** where the right to pre-viability abortion was implicitly recognised in the right to privacy. The question which begs to be answered is - will Mauritius ever reach the times of **Roe and Casey**? Can a right to pre-viability abortion be implied in any of the Chapter II rights under our Constitution? I shall conclude with the words of Late Justice R B Ginsburg - "*it is essential to a woman's equality with man that she be the decision maker, that her choice be controlling.*"

Sweta Manna, State Counsel

Written on 8 August 2022



# Are Time Limits For Arbitral Awards A Bane Or Blessing: The Case Of Alphamix V District Council Of Riviere Du Rempart [2023 Prv 20]

by Anji Faugoo Boolell, State Counsel



In May 2009, disputes arose between the applicant and the respondent over a contract for the construction of the Rivière du Rempart market. The parties agreed to submit these disputes to arbitration based on a clause in the contract. An arbitrator was initially appointed but later resigned after issuing three interim awards. In April 2015, a new arbitrator, Mr. Justice Benjamin Marie Joseph, was appointed to decide the remaining issues.

The arbitrator's original mandate was for six months but was extended multiple times. Eventually, with the agreement of both parties, the mandate was extended until December 31, 2018. On the last day of the mandate, the parties were informed by the arbitrator's chambers that the award would be ready by noon. During a meeting held at 13:10, the arbitrator informed the parties that they would receive an unedited version of the award, as it had not yet been formatted, with an edited version to follow later. Around 13:56, the arbitrator sent an unedited and unsigned draft award dated December 31, 2018, to the legal advisors of the parties.

On January 3, 2019, at 13:28, the arbitrator's secretary informed the legal advisors that the formatted, edited, and signed version of the award, delivered on December 31, 2018, was ready. In 2022, the respondent applied to the Supreme Court of Mauritius to have the arbitrator's award declared null and void, citing non-compliance with the requirement of Article 1026-4 of the Code de Procédure Civile. The Supreme Court ruled that since the award was delivered after the expiration of the arbitrator's mandate, it could not be upheld and should be annulled. The appellant then appealed this decision to the Privy Council.

The Privy Council considered the alternative argument of "tacit prorogation" of the Appellant who argued that regardless of the date of signature, the Supreme Court should have concluded that the parties agreed to extend the arbitrator's mandate beyond 31 December 2018. This would have meant that the award delivered on 3 January 2019 fell within the scope of the extended mandate, even if it was not signed until that day. It was also claimed that the District Council waived its right to argue otherwise.

The court reached the conclusion that the actions and communications of the parties clearly indicated a mutual intention formed and expressed on 31 December 2018. This intention was that a delay in providing the final, signed version of the award until 3 January 2019 would not render the award invalid. This constituted an implicit agreement to extend the deadline for delivering the award until 3 January 2019 at the earliest. Therefore, the award presented on that day, which favoured the contractor, fell within the authority of the arbitrator, making it valid and enforceable.

Although there was some ambiguity regarding the arbitrator's statement of "later on," the court determined that everyone present at the hearing on 31 December 2018 must have understood that the final version of the award would not be provided on the same

day. Considering that the following two days were public holidays, as mentioned earlier, the earliest possible date for providing the award would have been 3 January 2019.

Considerable attention has been given to implementing strategies that manage the time and expenses associated with arbitration proceedings in order to minimize their duration. Nonetheless, the significant delay in issuing awards remains a source of frustration for parties and their advisors. Consequently, there is an increasing debate surrounding the inclusion of specific time constraints in arbitration agreements, dictating the period within which the tribunal must render its award. The objective of imposing such time limits is to guarantee a speedy and efficient resolution to the arbitration process, culminating in a prompt issuance of the award.

According to Article 1027-3 Mauritian Civil Procedure Code, which regulates domestic arbitrations in Mauritius, in the absence of a specified time limit in the arbitration agreement, the mandate of an arbitrator lasts for six months from the date of appointment. However, this duration can be extended if the parties reach an agreement to do so. Imposing a time limit in arbitration can be beneficial in expediting the process, but it can also lead to complications, especially when there is no provision for extending the time limit. While the award in this specific case was ultimately deemed valid, it serves as a reminder to arbitrators and parties that there can be significant consequences to delayed issuance of an award. In this case, it clearly provided an opportunity to the Respondents to obstruct the arbitral process and this resulted in the arbitral award being annulled before the Supreme Court in Mauritius. Another crucial takeaway is that, irrespective of formal requirements, the court will consider the parties' conduct and statements, even in the absence of a written agreement.

Alphamix [2023] serves as a stark reminder that when drafting arbitration clauses, whether explicitly including a deadline for delivering an award or implying one based on the chosen seat, it is advisable to address the consequences of an award being issued beyond the specified timeframe.



# Dispute Avoidance And Dispute Settlement Training For The Governments Of Eastern And Southern Africa Countries

From 11<sup>th</sup> to 13<sup>th</sup> January 2023, this Office had the privilege of benefiting from a training on 'Dispute Avoidance and Dispute Settlement for the Governments of Eastern and Southern Africa Countries ("**ESA countries**")', led by Mr. David Luff<sup>1</sup>, in the context of the trade negotiations between the ESA countries and the European Union.

The lecture provided an overview of the World Trade Organisation ("**WTO**") system and its relevant significance in the context of the negotiation. The WTO system is premised on two main fundamentals, namely the most-favoured nation principle and the national treatment principle. These two fundamentals are enumerated in three main WTO agreements on trade, namely the General Agreement on Trade in Services, General Agreement on Tariffs and Trade and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

## *(1) Most-favoured nation principle ("**MFN principle**")*

The MFN principle requires that favourable treatment granted to one country be immediately and unconditionally extended to all other countries. The WTO agreements do not allow countries to discriminate between trading partners.

For instance at Article II of the General Agreement on Trade in Services, it is provided that each member of the WTO shall 'accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country'.

## *(2) National Treatment Principle*

On the other hand the National Treatment Principle, in the context of trade in services, requires an 'importing country to treat foreign services and service suppliers of any other Member no less favourable than its own 'like' services and service suppliers'<sup>2</sup>.

At Article XVII of the General Agreement on Trade in Services, it is provided that 'each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers'.

But outside these principles, in the context of trade in goods, at Article XXIV(4) of the General Agreement on Tariffs and Trade, it is provided that:

"The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."

As of 1<sup>st</sup> December 2022, 355 regional trade agreements were in force, which make them now the norm, rather than the exception. These agreements are becoming increasingly complex, covering several areas of the traditional trade in goods and services, and now branching into investment. These agreements even have their own dispute settlement mechanism.

This training was a useful overview of the WTO system as a whole but also provided us with an insight into the more complex structure of permitted trade agreements outside the WTO region, with a particular focus on the ESA countries – EU negotiations.

**Mr. Y. Jean-Louis, Assistant Solicitor-General**



**Mrs. G. Angoh Li Ying Pin, Ag Senior State Counsel**



# Compte rendu du lancement des Actes de Colloque sur le droit pénal mauricien

La *Law Reform Commission* (LRC) a procédé, le mercredi 3 mai 2023, au lancement des « *Actes de colloque sur le droit pénal mauricien : entre défis et enjeux* », un recueil complet et détaillé de conférences, d'ateliers et de tables rondes qui se sont tenus lors du Colloque sur le droit pénal organisé par la LRC en décembre 2021. Cette publication rassemble les connaissances et les réflexions des experts en droit pénal du pays, offrant ainsi un outil précieux pour les praticiens, les chercheurs et les décideurs politiques.

Le lancement de ces Actes de colloque a eu lieu en présence de différentes personnalités du monde judiciaire, dont le Solicitor-General, Monsieur Rajesh Ramlooll, SC, du Chairperson de la LRC, Monsieur Gunness Ramdewar, SA, OSK, GOSK, de la représentante de l'UNODC, Mademoiselle Pooja Bissoonauthsing, du Directeur des Poursuites Publiques, Monsieur Rashid Ahmine, de Monsieur Gérard Angoh, GOSK, Chairperson de l'IJLS, ou encore du président du CVLE, le juge Nicholas F. Oh San-Bellepeau.

Le CEO de la *Law Reform Commission*, Monsieur Sabir Kadel, a souligné, lors de ce lancement, l'importance de ce genre de colloque, réunissant les experts en droit pénal, pour la bonne santé de notre État de droit, et combien salulaire est la publication d'écrits juridiques qui permet la diffusion du droit à un large public. Il a également insisté sur le fait que les innovations technologiques, les nouvelles formes de criminalité et les défis sociétaux exigent une révision constante de nos lois pénales pour garantir leur pertinence et leur efficacité. Il a enfin fait ressortir que le droit pénal est le reflet de notre conception de la justice, et qu'il doit constamment évoluer pour refléter les valeurs qui constituent les fondements de notre société.

Lors de son allocution, le Solicitor-General, Monsieur Ramlooll, SC, a relevé que les « Actes de colloque sur le droit pénal mauricien » abordent un large éventail de sujets, y compris les réformes législatives récentes, les questions émergentes en matière de cybercriminalité, les problèmes liés à la justice pénale pour les groupes vulnérables et les défis posés par les nouvelles technologies et la criminalité transfrontalière. Qui plus est, a-t-il poursuivi, la réforme du droit pénal est une démarche cruciale et ambitieuse, car elle reflète notre volonté de repenser les fondements mêmes de notre système judiciaire. Il est de notre devoir, selon lui, en tant que juristes et citoyens d'œuvrer à une justice plus éclairée, pour que les fautes soient sanctionnées à la mesure de leur gravité, et pour que les droits fondamentaux de chaque individu soient préservés. Il a également salué l'œuvre de la LRC, qui joue un rôle prépondérant dans la réforme du droit pénal et qui, grâce à son travail acharné, sa rigueur et son engagement indéfectible envers les principes de justice et d'équité, s'est érigée en modèle pour d'autres pays en quête de réformes législatives, comme les Seychelles tout récemment qui ont institué une Law Commission et qui ont consulté leurs comparses mauriciens en la matière.

Enfin, Mademoiselle Bissoonauthsing, qui chapeaute le programme des crimes maritimes à l'UNODC, a mis en avant le fait que cette publication témoigne d'un investissement intellectuel considérable et d'une volonté constante de la part de la LRC d'éclairer les complexités du droit pénal à travers un prisme pratique et innovant. En outre, cette initiative met en valeur le sérieux, la rigueur et la compétence de la Commission en matière de réforme juridique. Le fait d'avoir rendu ces travaux publics témoigne, selon elle, de leur engagement envers la transparence et le partage du savoir, ce qui est sans aucun doute un gage de qualité, et ces Actes constituent

ainsi une ressource incontournable pour les professionnels du droit. Elle a également tenu à souligner la précieuse collaboration entre l'UNODC (Office des Nations Unies contre la drogue et le crime) et la Law Reform Commission, qui illustre la coopération internationale cruciale dans le domaine du droit pénal.

La LRC a pris soin de sélectionner les meilleures contributions pour créer une ressource fiable et pertinente pour les professionnels du droit et les chercheurs. Les « Actes de colloque sur le droit pénal mauricien » constituent une plateforme unique pour les échanges d'idées, les discussions sur les meilleures pratiques et les réflexions sur l'avenir du droit pénal à l'échelle tant nationale que régionale.

Il a été rappelé que la *Law Reform Commission* s'engage à promouvoir la recherche et la réflexion sur le droit pénal, et espère que cette publication contribuera à un dialogue constructif et à une collaboration accrue entre les différentes parties prenantes du droit pénal dans le pays.

Les « Actes de colloque sur le droit pénal mauricien » sont disponibles en version papier au prix de Rs. 500.00. Pour obtenir de plus amples informations sur la publication, consulter le site web de la LRC ou rédiger une demande à l'adresse électronique suivante : [lrc@govmu.org](mailto:lrc@govmu.org).





# Photo Chronicles of “Last-Friday-Talks” Series

The “Last-Friday-Talks” represents a recurring series of discussions orchestrated by the Attorney-General’s Office. These talks are designed for Legal Officers, aiming to enhance their self-professional development and meet the ongoing statutory requirements. The sessions take place on the last Friday of every month or so.



1. Training by Mr David Luff on “Dispute Avoidance and Dispute Settlement for the Governments of Eastern and Southern Africa Countries” (January 2023)



2. “Investment Arbitration - Quo Vadis?” by the Solicitor General, Rajesh Ramlohl SC (May 2023)

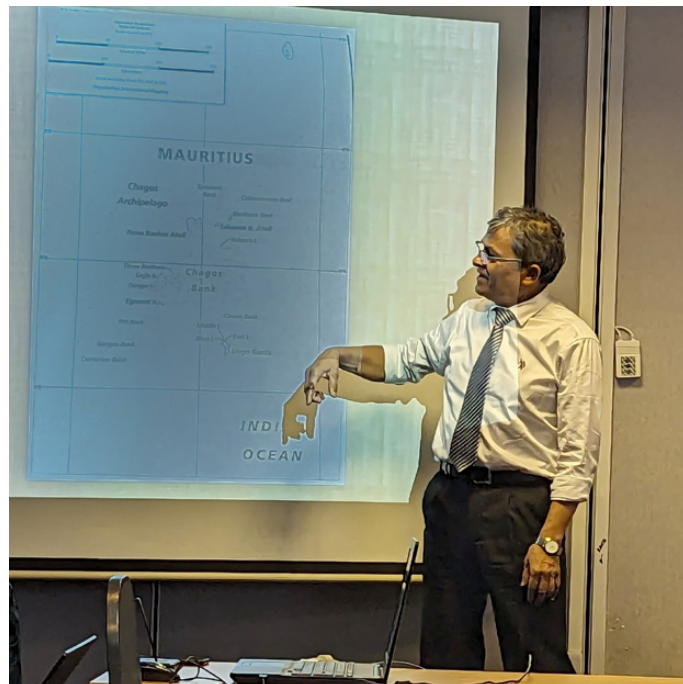
## Photo Chronicles of “Last-Friday-Talks” Series (Cont’d)



3. " International Commercial Arbitration [ (i) Procedure and Strategies, (ii) Evidence Gathering, Witness Preparation and (iii) Document Production ]" by FOLEY HOAG LLP (May 2023)



## Photo Chronicles of “Last-Friday-Talks” Series (Cont’d)



4. “The Maritime Boundary Dispute between Mauritius and Maldives” by Mr D. Dabee, S.C., G.O.S.K, Legal Consultant (June 2023)



## Photo Chronicles of “Last-Friday-Talks” Series (Cont’d)



5. “The Recent Legal Developments on the International and National Scene in the Field of Climate Change” by Dr Oldman KOBOTO, Manager of the Commonwealth Climate Finance Access Hub (CCFAH) (July 2023)



6. “ESGs (Environmental Social Governance) and Carbon Credit Mechanisms” by Oktavia WEIDMANN, Barrister at Law (August 2023)
7. “Cryptoassets -A New Frontier” by Oktavia WEIDMANN, Barrister at Law (November 2023)