

Attorney - General's Office

LOSAF

Law Officers' and State Attorneys' Forum



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Editorial

As this year draws to an end, we are pleased to present to you our 5th issue of the LOSAF.

For many reasons, 2021 has undoubtedly been one of the most eventful years experienced by this Office. For one the Judicial and Legal Service Commission has embarked on an unprecedented shuffling and re-shuffling of law officers both to and from this Office together with several appointments in various capacities and posts within this Office itself. A list of the new appointments is to be found at pages 23 and 24.

After 23 years of service as Solicitor-General, Dheerendra Kumar Dabee GOSK S.C. has retired from service on 26th September last.

LOSAF is thankful to Mr Dabee S.C. for having gracefully accepted our request for an exclusive interview on his last day in office, particularly given the fact that the former Solicitor-General prefers to stay away from the limelight, letting his actions rather do the talking.

Mr Dabee S.C. is succeeded in this highly challenging post by his former second in command, Mr Rajesh Ramlooll SC to whom we wish all the best as he embarks on this new professional venture.

Mr Rajesh Ramlooll S.C., has over and above his new duties found time to share with us some of his expertise in the field of international taxation through an analysis seeking to answer the question of "Whether a Global Minimum Corporate Tax will stop the race at the bottom?"

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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





Editorial (cont'd)

On a more sombre note, as has been the case with so many other institutions up and down the country, the AG's Office has, these past months, not been spared, in mourning the loss of close family members, friends and acquaintances. This Office has suffered the loss of one of its most valuable officers in the person of Nitish Toolsee Bissessur, Legal Research Officer and a close collaborator of LOSAF. We pay him a special tribute in this end of year issue.

Anji Faugoo Boolell, State Counsel explains the basic legal concepts of "Le préjudice écologique". Andy Putchay State Counsel, for his part provides us with an overview of the Gosling Arbitration Case. "Le Statut de l'Animal" is expounded upon by Geetanjali Daby, State Counsel. Our former pupil, Dushinee Maistry introduces Smart Contracts to us in her article entitled "A move towards coding".

A few 2021 case commentaries have also been included in this edition. Under our News & Events, you will also take cognisance of new appointments at the Judiciary as well as within the AG's Office, together with two new memberships on regional and international human rights committees. Following of the retirement of, Mr Mohamad Oozeer PDSM, CSK an overview of his professional journey is issued retires from service and LOSAF. The Bar Association Football Tournament is also reported at page 28.

In spite of the prevailing, but necessary, sanitary protocols, we wish you all a safe and a much happier new year 2022.

We hope you enjoy reading this issue.

Asha Pillay Nababsing



From left to right : Taron Ramtale, Yakshini Peerthum, Asha Pillay Nababsing and Kristyven Andy Putchay

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 Team

Asha Pillay Nababsing
Senior State Counsel

Kristyven Andy Putchay
State Counsel

Yakshini Peerthum
T. State Counsel

Taron Ramtale
T. State Counsel



Mr Rajesh Ramloll S.C. is the new Solicitor-General

Mr Rajesh Ramloll S.C. has succeeded his mentor, Mr Dheerendra Kumar Dabee, G.O.S.K, S.C. as Solicitor-General of the Republic of Mauritius with effect from 27 September 2021. Mr Ramloll started his remarkable journey into the legal world under the guidance of his pupil masters the renowned Mr James Guthrie QC and Mr Philip Baker QC. He states having then caught a “tax virus” against which an effective inoculation has yet to be found.

After he was called to the Utter Bar in 1994, he joined the State Law Office, as it was then called, as Temporary State Counsel thereafter State Counsel and Mr Ramloll S.C. climbed up the ladder at the Attorney General’s Office to become:

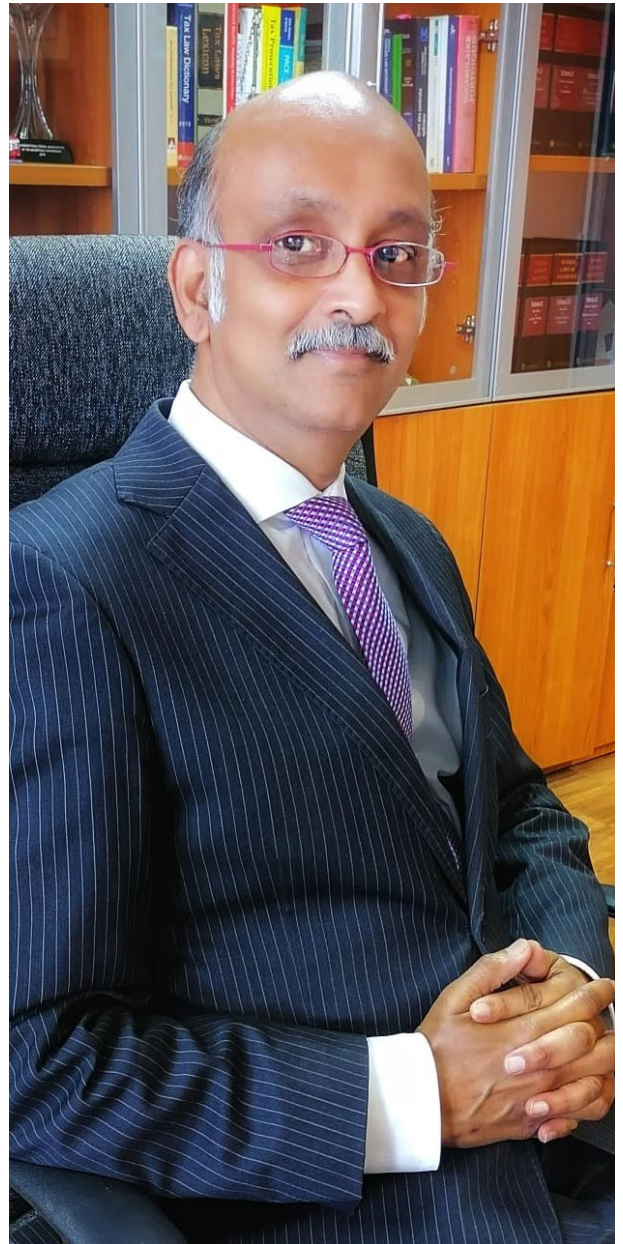
- Senior State Counsel in 1999;
- Principal State Counsel in 2003;
- Assistant Parliamentary Counsel in 2009;
- Assistant Solicitor-General in 2011;
- Deputy Solicitor-General in 2014; and
- Solicitor-General in 2021.

Mr Ramloll S.C. was called to the Inner bar in 2016. In the course of his career, he has appeared and assisted in innumerable cases in Mauritius, at the Judicial Committee of the Privy Council and in investor-state arbitral disputes. Proficient in International Taxation, he finds time, despite his responsibilities as Solicitor-General, to put Mauritius on the tax world map through his appointment as Tax Assessor for the OECD, Global Forum for Tax Transparency, and his position as the President of the International Fiscal Association (Mauritius).

Mr Ramloll S.C. has, to date, published over twenty articles on topical international taxation issues in reputable international tax journals and books such as:

- Cahier de droit International Fiscal;
- Global Taxation; and
- Thomson Reuters (General anti-avoidance rules)

Occupying the hot seat of Solicitor-General may, to many, seem daunting. However, Mr Ramloll S.C. states being up to the challenge with a dedicated and competent team of law officers and state attorneys at the Attorney-General’s Office.



Fireside chat with Mr Dheerendra Kumar Dabee, GOSK, S.C.

(Solicitor-General 1998 - 2021)



Born on the 27th September 1956, Mr Dheerendra Kumar Dabee, former Laureate (Economics Side) joined the Crown Law Office on 7th January 1982 after being called to the UK Bar in 1981 at the Middle Temple, Inn of Court, London.

He has occupied all positions in the Attorney-General's Office including those of Parliamentary Counsel and Acting Director of Public Prosecutions until his appointment in 1998 as Solicitor General, the most senior non-political legal adviser to Government.

He has been elevated to the rank of Senior Counsel in 2003 and was later conferred the G.O.S.K award by the President of the Republic.

Mr Dabee being a very discreet person, LOSAF is thankful to him for having so gracefully accepted our request for this exclusive interview on his very last day in Office as Solicitor General.

L: SG, today (Friday) the 24th September is your last working day in Office as Solicitor General after 39 years in service and 23 years as Solicitor General, what has Dheeren Dabee planned for Monday morning... onwards?

DD: Firstly, I intend to wake up later than usual!. Well usually I wake up around 6-630 am so probably around 730/8 am (laughs) then a private birthday party is being organised at home with a small group and, Covid-19 permitting, a larger group eventually.

L: The young Dheeren Dabee, has been freshly called to the Bar, why the choice of joining the Crown Law Office?

DD: There is a beautiful story behind it!. (smiles). Sometimes, in 1980, after having completed my LLB, I was on holidays in Mauritius and whilst I attended a "Haldi" ceremony at my family home in Mesnil, I was introduced, by my cousin Mr Bhunjun, to a certain Mr K.P.Matadeen (former Chief Justice), then Senior Crown Counsel. The latter told me former laureates are prioritised as regards recruitment at the "CLO". In fact, there was then already a long list of such examples: Mr Gayan, Mr Seetulsingh, Mr Soopramanien, Mr Rajahbalee and he advised me to show my interest in joining the Crown Law Office, and to do so even before me returning to Mauritius, as it was a good place for me to start a barristers' career. It was the very first time that I heard of the Crown Law Office.

In October 1981, upon my return, I did send my application to the Judicial and Legal Service Commission (JLSC) to join this Office. And before formally joining the CLO, I was requested to participate in a law revision exercise, which was being then carried out at the CLO, under the guidance of Mr Angelo, New Zealand Legislative Drafting expert. I was given the opportunity to volunteer and assist in the exercise.

Before my involvement in this exercise, I was a junior in the Chambers of Sir Gaëtan for barely a few weeks! The JLSC offered me the position of temporary Crown Counsel whilst I was a volunteer in the legislative drafting exercise. That is the story behind me joining the Office so early, after my return to Mauritius.

"There has hardly been a day, during those years, when I regretted having joined this Office and spent almost my entire youth, if not life, in it."

L: In hindsight, looking back over the past 23 years, is there anything that you wish you could have done differently?

DD: Probably I would have spared more time to actually attend court which I, somehow was unable to do, because of the big chunk of administrative work I had to do as Solicitor General. Also, had we not lost a number of experienced officers involved in legal, advisory and legislative drafting work, I would have probably been able to free myself to do litigation work more frequently than I did.

L: You have nevertheless appeared in some landmark cases. Can you recall a few of the most memorable ones? *Matadeen v Pointu* for instance!

DD: Yes indeed. It was for the first time that Asian languages counted for ranking at the Certificate of Primary Education (CPE). I appeared, in this case, with senior colleagues, and, eventually when the case went to the Judicial Committee of the Privy Council, I appeared as Junior with Mr Geoffrey Cox QC. This case created a lot of unease at the time in the country.

Also for nearly 6 months, I was very heavily involved, together with my then colleague Mr Caunhye, in the conduct of the controversial Preliminary Enquiry in the case of Sir Gaëtan Duval. I had been Sir Gaëtan's junior or "pupil" after being called to the Bar. I was asked to lead the case that lasted several months before the District Court of Flacq.

I was also the agent for Mauritius in the Chagos Advisory Opinion case, before the International Court of Justice (ICJ) on the issue of whether the Chagos Archipelago was lawfully separated from Mauritius in 1965 and therefore whether Mauritius remains not fully decolonised because the UK still occupies part of our territory in this Archipelago.

I was also the agent of Government in proceedings before the ITLOS Tribunal in the case relating to the legality of the marine protected areas in the Chagos Archipelago that the UK had declared. I am currently serving as agent for Mauritius in the Mauritius-Maldives boundary delimitation case before a Special Chamber of the ITLOS Tribunal.

Fireside chat with Mr Dheerendra Kumar Dabee, GOSK, S.C. (Cont'd)

A couple of years later, I recall I was appearing in a rape case at the Intermediate Court before a bench including Honourable Magistrate Moosun, who was then, I think, the Presiding Magistrate and latter suggested to me, "The court is rising because you need to take instructions from your DPP!". Presumably, I was not getting things right in the way I was conducting my case.

These examples, *avec le recul*, did do me more good than harm. These early lessons, however harsh the Court may seem to be to you, compels you not to be over-confident and forces you to better prepare yourselves. On a fonder note, when we would be appearing before the more distant courts, namely Souillac Court or Flacq Court, we would enjoy the afternoon if the case ended early and we would enjoy the nice landscape in Souillac and sometimes Flacq and also by sometimes cheating by going back home earlier instead of going back to Port Louis. Some of the best moments have been whilst on official mission overseas and meeting people and seeing places you would never have dreamed of.

In those days it was a small crowd in the CLO, and in a way all of us could meet and see each other more often.

L: In relation to the advisory aspects of your work as SG, how do you perceive the relationship that this Office shares with Ministries. Do you feel that there has been over the years a change, an evolution in the manner in which we interact with these various arms of Government?

DD: The huge increase in the activities of Government and in the number of different departments and public bodies over the years of course has been accompanied by the increase in the number of our staff as well. There has been a massive increase in the last 8-10 years in the number of requests for advice and in a way this has made our task more difficult because the impression that you have is that the requests for advice do not contain a proper brief on the facts and do not show sufficient ground work by the public officials seeking the advice. This sometimes causes delay in tendering advice because the initial request tend to be returned back with request for further information, sometimes the precise legal question is not identified. The result may be bad advice, or delay in tendering advice. In the days of the former Solicitor General Mr Venchard, we used to have a template dating back to 1976 and consisting of an update of a 1958 template regarding how requests for advice should be made. I still hope that my successor, with my assistance, will again update that template or the format of any request for legal advice. This may guide the ministries and, in return, result in better quality of legal advice.

L: Any specific piece of advice to TSCs and younger law officers?

DD: Never think that you know too much!. We have the singular advantage in working in an office which today, comprises over 100 counsel and attorneys. This is a vast reservoir of resources, the existence of which any young law officer should be aware of. In case of doubt before giving advice or preparing pleadings, do tap from this vast reservoir of knowledge, which we have.

Avoid being superficial. There have been cases where one felt that advice had been given simply with a view to reducing the number of files, which we all want to, but that should never be at the detriment of the quality of the advice. It is always vital to open the books, to see whether there has been previous advice tendered, whether a case law has given a different interpretation etc.

That will ensure consistency in giving advice. Always remember that you are part of a team, although, with our size, the downside has been that the team spirit has somewhat slightly faded.

L: future projects?

DD: I was reaching a stage, at the beginning of this year, where I was feeling torn between joining one of the 3 law chambers which approached me and retiring and doing nothing. Doing nothing meaning doing everything that doing everything that I have not been able to do before. There are many many things to do, like renovating the house, spending more time winding away, going to the seaside more often and travelling. Ultimately, I was a bit like the prisoner who wants to go back to prison. Side by side with this invitation to join these chambers, also came the request to continue my service within Government. That is what somehow mitigates my retirement. I will continue to serve the office in a consultative capacity. Without, ultimately, excluding the other options and proposals. I do also intend to be more available for my family, and I will also certainly now be able to more often reach home before or well before dinner time!.

L: Any piece of advice to your successor?

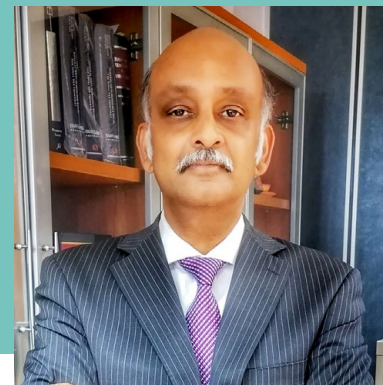
DD: I think my Deputy is very well prepared and beyond doubt able to take over. It is my sincere wish that he steps in my shoes. By nature, he is a very modest, intelligent, honest and good person, and I have no doubt that he will enjoy the same kind of support I have enjoyed from all our colleagues and all staff, from each and every level in this Office. I hope and I do invite them not to show any lesser support to him in performing the duties of Solicitor General, which, at times, can be very exacting.



Part 2 continues on Pg 14

A Global Minimum Corporate Tax: Will it stop the race to the bottom?

by Rajesh Ramloll S.C., Solicitor-General



On Monday 05 April 2021, Janet Yellen, the US Treasury Secretary called for a Global Minimum Corporate (CMT) tax in Chicago. Two days later, Dr. Gita Gopinath, Chief Economist at the IMF made a declaration to the same effect to the BBC.

As the corporate world becomes increasingly digitalized, the challenges of taxing such digitalized taxable profits are multifarious. These challenges have been identified since 2015 by the OECD in its Base Erosion and Profit Shifting (BEPS) report, in particular in Action 1. Multinational Companies in their quest to minimize their tax bills have been criticized for eroding tax bases and shifting profits to low tax jurisdictions.

Let us take a step back. The business model we see today was devised a hundred years ago. However, after the second world war (the war having been fought essentially in Europe and in the Asia Pacific), many companies seizing business opportunities to reconstruct war-struck Europe, through the Marshall Plan, started trans-Atlantic cross-border ventures. This witnessed the inception of a new animal – the Multinational Company (MNC). The legal framework to stimulate such cross-border business included the use of one of the best-known tax treaties in the tax treaty universe – the one between the USA and the UK. The companies were US based MNCs. The country of residence of the MNC was the USA and the country of source (investment) was the United Kingdom. The jurisdiction to tax could be claimed by both countries. However, the double tax treaty between the two countries was there to avoid double taxation of cross border investment. One of the countries (the UK) after a negotiated process gave away the taxing rights (it was the price to pay for reconstruction of war-torn Europe). Negotiating a tax treaty essentially results in the surrender of a taxing right.

The Source/Residence dichotomy in international taxation

The power of having the right to tax in the country of residence is through the inter alia incorporation of the company in that country while the country of source is the host country (of investment). Usually both countries of residence and source have the jurisdiction (nexus) to tax. This is where a double tax treaty negotiated by both countries helps to resolve any issue of double taxation by allocating taxing rights through the negotiated process. One of the two countries, residence or source, agrees to give away its sovereign right to tax certain types of income (dividend, interest or royalties) under certain conditions.

The above solution has been working quite well for the last hundred years or so and the country of source (attracting foreign direct investment (FDI)) was the one to give up its taxing rights.

To the extent that in the source country there is a physical permanent establishment (PE), the solution works perfectly well. What happens when the PE is not a physical PE?

It is estimated that transactions on digital platforms will constitute 40% of global trade by 2025. The 40% is captured by the world's 4 largest big tech mammoths' (GAFA) companies – Alphabet (Google), Amazon, Facebook and Apple .

Apart from being American companies, these big tech giants share something important in common – digital platforms. In 2003, Amazon web services launched its 'cloud' concept and has become in 2020 the largest profitable company on cloud ahead of Microsoft and Alphabet (Google). Alphabet itself is a 2.4 trillion USD Company. Therefore, trade carried out on digital platforms such as the sale for example, of an E-book by Amazon (which developed the first kindle) poses a series of challenges when it comes to where to tax such transactions.

In January 2019, the OECD released a policy paper entitled "Addressing the Tax challenges of Digitalisation of the Economy – Policy Note. This paper had the following to say on the above –

"The tax challenges of the digitalization of the economy were identified as one of the main areas of focus on Base Erosion and Profit Shifting (BEPS) Action Plan." The Action 1 Report found that the whole economy was digitalising and, as a result, it would be difficult, it not impossible to ring-fence the digital economy. The Action 1 report also observed that beyond BEPS, the digitalisation of the economy raised a number of direct tax challenges chiefly relating to the question of how taxing rights (new taxing rights?) on income generated from cross-border activities in the digital age should be allocated among countries".

The vexed question is how to tax transactions, where is no physical anchor?

The OECD proposed a 2-pronged approach called the 2-pillar solution. Under the first Pillar (also called the Unification approach), focus is on the allocation of taxing rights and about introducing new nexus concept. The nexus would allocate more taxing right to "market or user jurisdiction in situations where value is created by a business activity through participation in the user or market jurisdiction." This concept would go beyond the limitations on taxing rights decided by physical presence only. Amendments will consequently have to be brought to the current Article 5 of tax treaties. A Working Party at the OECD is currently working those amendments that need to be brought to the Article and the corresponding commentaries accompanying all the Articles of the OECD and UN Double Taxation Model Treaties. Those commentaries have frequently been widely resorted to by Courts (Australian Courts are an example) as an aid to interpretation of those Articles.

The second Pillar is the one that is currently creating sensation and is at the origin of what is called BEPS 2.0. In July 2021, G-20 Finance Ministries had endorsed the 15 % Global Minimum Tax (GMT).

A Global Minimum Corporate Tax: Will it stop the race to the bottom? (Cont'd)

It will be recalled that at the Inclusive Framework (IF) OECD meeting on 08th October 2021, consensus had been reached to remove the words “at least” before the terms “15 percent Global Minimum Tax”. One of the countries which explicitly expressed reservations to the words “at least” was the Republic of Ireland (where the tax rate on corporations is 12.5 %).

Mauritius forms part of the 140 countries that have joined the IF initiative. Kenya, Nigeria, Pakistan and Sri Lanka have not signed up to the initiative.

On Sunday 31st October last, the “tax deal” was officially endorsed at the G 20 summit. The US- Treasury Secretary, Janet Yellen then wrote on Twitter that US businesses and workers would benefit from the deal even though many US- based big tech/mega companies would have to pay more tax. She also opined to at this will stop the race to the bottom. The implementation of the tax deal will be through two multilateral conventions which should be ready for signature by end 2023. The objectives to be met by the deal are three-fold:

1. a fairer distribution of profits of mega companies
2. a level playing field and
3. tax transparency.

The deal is expected to raise an extra 150 billion USD in revenue annually worldwide. Alphabet (Google) is one of the big tech companies that reacted promptly to the initiative of the G-20. It welcomed the initiative to pay more taxes. Let us wait to see how the rest will react.

It is clear however that the GMT is a new game changer in the universe of international taxation. Mauritius having taken position in favour of the GMT in July 2021, will by 2023 have to look closer at the granular details of the two conventions before incorporating same in domestic law (as it did in February 2020 for the Multilateral Instrument (MLI) which has already changed the international tax landscape).



Préjudice écologique

by Anji Faugoo-Boolell, State Counsel



Avec la loi sur la biodiversité n°2016-1087 du 8 août 2016, le Code Civil Français reconnaît désormais formellement le “préjudice écologique” comme une catégorie de dommages indemnisables. Ce changement symbolique se situe dans le prolongement du domaine de la reconnaissance des dommages en matière de l’environnement. Notamment, il s’inscrit comme une affirmation de la jurisprudence en France. Nous pouvons considérer le jugement de la Cour d’appel de Paris du 30 mars 2010 dans l’affaire du naufrage de l’Erika. En décembre 1999, un pétrolier d’origine Maltaise, Erika, s’est cassé en deux et a coulé dans la baie de Biscaye au large des côtes bretonnes en France. Quelque 400 kilomètres de côtes ont été touchés par le déversement de pétrole, nécessitant des opérations de nettoyage approfondies ayant aussi un impact considérable sur les entreprises de la pêche et les secteurs touristiques.

La reconnaissance juridique du préjudice écologique remonte à l’arrêt historique dit Erika, dans lequel il a été décidé que « les préjudices écologiques résultant de dommages causés à des biens environnementaux non commerciaux sont compensés par un équivalent monétaire ». Elle a également défini le préjudice écologique comme un « préjudice objectif ... [qui] s’applique à tout dommage non négligeable causé à l’environnement naturel, c’est-à-dire à l’air, à l’atmosphère, à l’eau, aux sols, aux terres, aux paysages, aux sites naturels, à la biodiversité et aux interactions entre ces éléments, qui ne peut avoir aucune répercussion sur un intérêt humain spécifique mais qui affecte un intérêt collectif légitime ».



Compte tenu de la reconnaissance courante des droits environnementaux dans le droit Français, l’importance de la reconnaissance législative du préjudice écologique réside dans le choix de politique juridique fait pour organiser et assurer la réparation effective et efficace du préjudice écologique, d’une part, et l’équilibre des intérêts entre la nécessité de protéger l’environnement et les impératifs du développement économique et du progrès social, d’autre part.

En tant que tel :

-L’article 1246 du Code Civil Français affirme le principe de la réparation des préjudices écologiques : « Toute personne responsable d’un préjudice écologique est tenue de le réparer ».

-L’article 1247 affirme que seuls les préjudices écologiques non négligeables sont pertinents. Cela laisse une marge d’interprétation, mais devrait éviter que les tribunaux ne soient inondés de demandes mineures.

L’article 1248 prévoit que, les personnes ayant qualité pour agir en justice pour réparation de dommages écologiques sont : « l’État, l’Agence française pour la biodiversité, les collectivités territoriales et leurs groupements dont le territoire est concerné, ainsi que les établissements publics et les associations agréées ou créées depuis au moins cinq ans à la date d’introduction de l’instance qui ont pour objet la protection de la nature et la défense de l’environnement. »

Établir le préjudice écologique “pur” comme une nouvelle race de causes d’action, le distingue clairement des autres causes d’action plus traditionnelles qui ont été fondées sur le préjudice à l’environnement, mais où l’environnement était le moyen plutôt qu’une « victime » (c’est-à-dire les causes d’action, telles que le préjudice économique et le préjudice moral). L’élargissement du droit de la responsabilité civile en France contribue ainsi à renforcer la protection de l’environnement.

Le régime de la responsabilité civile Mauricien fait face à plusieurs obstacles qui empêchent la légitimation de la notion de dommage écologique pur, notamment qu’un préjudice subit doit être personnel. Le droit commun de la responsabilité civile se repose (dans sa composante extracontractuelle) sur les articles 1382 à 1386 du Code Civil Mauricien. L’article 1382 du Code civil laisse en effet entendre que seul le préjudice causé « à autrui » serait réparable et c’est dans cet optique que la jurisprudence mauricienne a aussi évoluée. Dans les cas de responsabilité civile comme l’orienté l’article 1382 du Code Civil Mauricien, la qualité d’agir est exigée d’une personne qui défend un intérêt personnel. Un dommage environnemental peut entraîner des préjudices corporels, matériels ou moraux déclenchant une mise en œuvre classique de la responsabilité civile. Par contre, en ce qui concerne les atteintes à l’environnement sous le régime de préjudice écologique pur, elles ne qualifient pas comme intérêt personnel.

Préjudice écologique (Cont'd)

L'aggravation de la crise socio-écologique est caractérisée par des hiérarchies imposées par les humains; les humains se considèrent comme la forme de vie dominante et la plus importante ; les vies non humaines ne sont importantes que dans la mesure où elles sont utiles pour maintenir la position des êtres humains au sommet de la hiérarchie sociale. Comme les humains ne ressentent pas les conséquences de nuire à l'environnement, la reconnaissance du principe écologique pur n'est pas une intuition instinctive.

Les signes avant-coureurs se répartissent en deux catégories : ceux qui sont reconnus alors qu'il est encore temps de tenir compte de l'avertissement, et ceux qui sont seulement reconnus, quand il est trop tard pour faire autre chose. La jurisprudence française, soutenue par la doctrine qui a dépassé les frontières du droit de la responsabilité délictuelle « classique » et a élargi la définition de la responsabilité délictuelle pour reconnaître le préjudice écologique pur causé à l'environnement. Il est peut-être temps que le droit mauricien surmonte les obstacles susmentionnés pour s'ajuster aux évolutions mondiales dans le domaine environnemental avant que le monde ne finisse comme Pompéi- une ville anéantie par une éruption volcanique en 79 A.D, même si tous les signes avant-coureurs étaient présents.



Thomas Gosling and others vs Republic of Mauritius

by Kristyven Andy Putchay, State Counsel



In February of 2020, an award was delivered in favour of The Republic of Mauritius in an investor-state arbitration brought by a group of UK investors in relation to the proposed construction of a luxury resort complex at Le Morne - a peninsula of outstanding natural beauty, of cultural and historical significance and a UNESCO World Heritage site since 2008 that commemorates 19th century slaves' fight for freedom.

The international arbitration against Mauritius was submitted to the International Centre for Settlement of Investment Disputes (ICSID) based on the 1986 UK-Mauritius bilateral investment treaty (BIT) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in this case now known as Thomas Gosling and others v Republic of Mauritius (ICSID Case No. ARB/16/32).

The Claimants comprised of Mr Gosling a UK national, Property Partnerships Development Managers (UK) Limited and TG Investments Ltd, Property Partnerships Holdings (Mauritius) Ltd and Property Partnerships Developments (Mauritius) Ltd. They were represented by US law firm Latham & Watkins and their counsels were Ms. Sophie Lamb QC and Mr Samuel Pape.

As Respondent in the claim, Mauritius retained the services of Foley Hoag LLP, a Boston-based law firm that specialises in providing representation to sovereign States in international disputes, having as lead counsels Paul Reichler and Alison Macdonald QC of Essex Court Chambers (London) assisted by Tafadzwa Pasipanodya and Constantinos Salonidis.



Throughout the arbitration proceedings Mauritius' foreign lawyers worked in closed collaboration with their Mauritian counterpart namely The Honourable Attorney-General Mr Maneesh Gobin, The Solicitor-General Mr Dheerendra Kumar Dabee SC, The Deputy Solicitor-General Mr Rajeshsharma Ramloll SC, The then Assistant Solicitor-General Mary Jane Lau Yuk Poon (now Puisne Judge of the Mauritius Supreme Court) and Principal State Attorney Ms. Sureka Angad. Mrs Justice Lau Yuk Poon delivered a talk on this case at the Attorney-General's Office on 29/01/2021 which shed much needed light on the intricacies surrounding investor-state international arbitrations.

The arbitration claim was filed at ICSID on 13th September 2016 and concerned the Claimants' alleged investments in two real estate and tourism developments in Mauritius at Le Morne and Pointe Jérôme respectively whereby the Claimants were challenging Respondent's decision not to grant them the right to build at Le Morne and the cancellation of a lease at Pointe Jérôme, which they argued amounted to an expropriation of their investment, to unfair and inequitable treatment and discrimination under the BIT.

Damages and compensation sought by the Claimants were EUR 18 million for Le Morne and EUR 5.7 million for Pointe Jérôme.

In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed to constitute a Tribunal that consisted of three arbitrators- one to be appointed by each Party and the third presiding arbitrator to be appointed by the co-arbitrators in consultation with the Parties. The Tribunal was thus composed of Dr. Andrés Rigo Sureda, a Spanish national, as President appointed by the co-arbitrators; Prof. Stanimir Alexandrov, a Bulgarian national appointed by the Claimants and Prof. Brigitte Stern, a French national appointed by the Respondent.

On 15th February 2018, the Respondent filed its Notice of Objections to Jurisdiction and Competence as well as its Request for Bifurcation. The Claimants' Observations on the Request for Bifurcation were filed on 8th March 2018. The Tribunal on 9th April 2019, denied the Respondent's Request for Bifurcation and ordered that the proceedings shall continue. Consequently, a hearing on Jurisdiction and the Merits was held in Washington, D.C., USA, from June 17-25, 2019 (June 22-23 excluded).

In a majority decision issued on 18 February 2020, with Prof. Stanimir Alexandrov dissenting, the Tribunal found that the Claimants had never acquired the right to develop the Le Morne site nor had they been given assurances by Mauritius about that right. The Tribunal was of the view that a 2005 letter of intent from then then Mauritian Board of Investment approving of the development before the site was declared a UNESCO World Heritage site, did not qualify as such.

Mrs Justice Lau Yuk Poon, *Puisne Judge of the Mauritius Supreme Court* and Mr Rajesh Ramloll SC, *Solicitor General*

Thomas Gosling and others vs Republic of Mauritius (Cont'd)

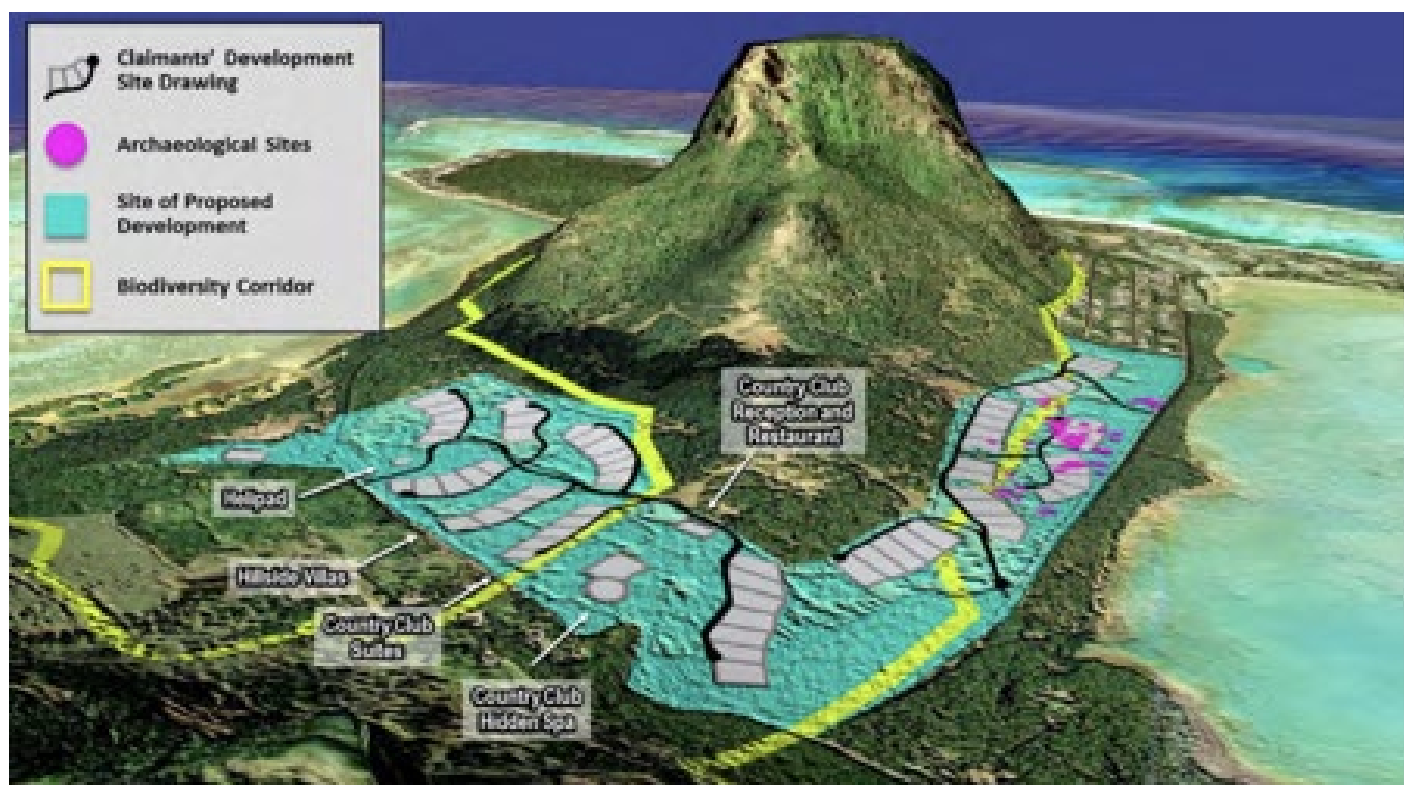
Additionally, the Tribunal also rejected the Claimant's arguments that Mauritius had violated its rights in relation to the cancellation of the lease at Pointe Jérôme. Agreeing with the Respondent's submissions, the Tribunal found that Mauritius was entitled to cancel the Pointe Jérôme lease following contractual breaches by the Claimants.

Commenting on the rationale of the Tribunal, Tafadzwa Pasipanodya said that:

"Mauritius never promised or assured the claimants that their proposed development project was compatible with Mauritius' overriding policy objective of inscribing Le Morne as a UNESCO World Heritage Site. Since the tribunal found no documentary evidence of such alleged promised or assurances, it refused to accept claimants' argument that they had the 'legitimate expectation' that they could proceed with their development project at Le Morne".

With regards to the lease cancellation at Pointe Jérôme, she added that it "was a proper exercise of its right to do so under the term of the lease, not an arbitrary or discriminatory act".

As more and more states pursue the two very distinct policy objectives – that of protecting their national heritage and that of pursuing foreign investment, we are bound to see more 'national heritage' type of investor-state international arbitrations cropping up in the future. Thomas Gosling and others v Republic of Mauritius is a landmark case in that "it provides insight into how states might protect their national heritage without violating an investor's rights under international law".



Le statut de l'animal

by Geetanjali Daby, State Counsel



C'est en tout cas ce que stipule l'article 528 du Code Civil Mauricien, qui est d'ailleurs presque identique à l'ancien article 528 du Code Civil Français, ceci avant l'amendement « Glavany » en France. En effet, jusqu'en février 2015, l'animal était considéré en France, autant qu'il l'est à ce jour à Maurice, comme n'étant rien de plus qu'un meuble capable de se mouvoir par lui-même, en contraste avec, et sous le même article du Code que les meubles inanimés.

Cependant, le statut juridique de l'animal connaît, en 2015 en France, une modification majeure, voire une évolution. Ainsi, suite à un amendement apporté par le moyen de la loi no 2015-177 du 16 février 2015, l'animal ne se retrouve désormais plus affecté par l'article 528 du Code Civil Français. Il n'est donc, en France, plus un meuble. Un nouvel article lui est dédié – l'article 515-14, qui reconnaît désormais que « les animaux sont des êtres vivants doués de sensibilité ».

Cette modification du Code Civil Français a pour effet de moderniser et de restructurer le statut juridique de l'animal. Selon la première Chambre civile de la Cour de Cassation, dans un arrêt du 9 décembre 24 2015, le chien est « un être vivant, unique et irremplaçable, et un animal de compagnie destiné à recevoir l'affection de son maître, sans aucune vocation économique (...) ». L'animal demeure néanmoins, toujours selon l'article 515-14 du Code Civil Français, une chose soumise au régime des biens – il n'a pas de personnalité juridique et ne peut ainsi qu'appartenir à l'homme ou être sauvage. Cette nuance attribuée à la « chose » qu'est l'animal, a pour conséquence de créer une catégorie intermédiaire entre la chose et la personne. En effet, depuis la reconnaissance juridique de sa sensibilité, l'animal n'est plus tout à fait une « chose » dans le sens traditionnel et stricte. L'animal n'a cependant pas non plus le même statut ni les mêmes droits que la personne. Cette nouvelle catégorie intermédiaire a le potentiel d'être développée considérablement, et d'être à la source d'un nouvel ensemble de lois régissant les droits des animaux en tenant compte de leur sensibilité, tout en étant complémentaire aux textes juridiques existants.

Le Code Civil Mauricien est quant à lui, en ce qui concerne l'animal, toujours calqué sur l'ancien modèle du Code Civil Français. Les articles 522 et 524 du Code Civil Mauricien vont même jusqu'à décrire les situations dans lesquelles l'animal est un « immeuble » (à titre d'exemple, les poissons des étangs sont des immeubles).

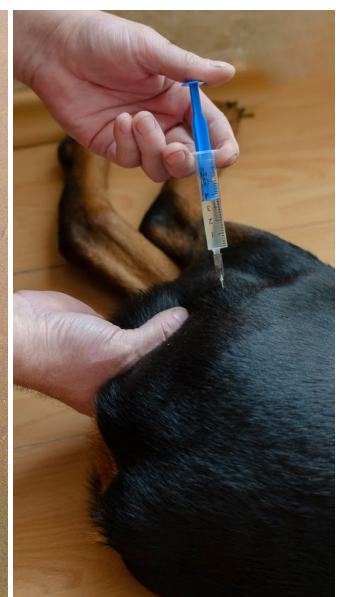
Les répercussions de ces définitions se font ressentir dans l'ensemble des textes juridiques mauriciens relatifs à l'animal.

On retrouve, par exemple, dans l'Animal Welfare Act une section entière dédiée à l'expérimentation animale, notamment la Partie III, qui comprend des provisions telles que la section 8, intitulée « Experiment on Animals ». C'est aussi dans l'Animal Welfare Act que l'on retrouve des provisions pour l'euthanasie des animaux.

Une protection saute cependant à l'œil – la section 44 « Protection from liability », qui assure la protection de ceux qui capturent les chiens et les euthanasient. Ainsi, "Any person who is entitled under this Act to euthanise or seize any animal, does so in a reasonable manner and involuntarily wounds or maims the dog in the course of attempting to do so, shall not incur any civil or criminal liability for the injury done to the dog or its death."

Un autre exemple serait la section 358 du Code Pénal Mauricien, qui crée le délit de « Poisoning animal ». À première vue, le lecteur serait tenté de comprendre qu'empoisonner tout animal constituerait un délit. Cependant, une analyse plus approfondie de cette section révèle une sélection restreinte des animaux concernés. De plus, il semblerait qu'une grande partie des animaux protégés par cette section seraient ceux qui sont utilisés à des fins commerciales, voire les animaux que l'on pourrait qualifier d'animaux de travail et/ou de pacage, protégeant par conséquent les intérêts commerciaux et économiques du propriétaire de l'animal. Ainsi, les animaux plus communément reconnus comme animaux de compagnie, tels que le chat et le chien (à l'exception du chien de garde), ne sont pas concernés par la section 358.

Vu le cadre juridique de Maurice en ce qui concerne l'animal, ce dernier est toujours vulnérable devant nos lois dont l'évolution est devenue nécessaire, peut-être dans le même sens que le modèle français.



¹ Cour de cassation, civile, Chambre civile 1, 9 décembre 2015, 14-25.910, Publié au bulletin

² À noter que cette protection ne s'applique que lorsque l'animal est un chien

"Idem au Royaume Uni, où l'Animal Welfare (Sentience) Bill, introduit en 2021, vise à reconnaître la sensibilité des animaux.

Smart Contracts: A move towards coding

by Ms Dushinee Maistry, Former Pupil (Barrister)



We are all aware of those words ‘Smartphones’, ‘Smart TV’ and ‘Smart watches’ nowadays because technologies play a key part in our daily life. Another word which is becoming popular especially in the legal field is ‘smart contracts’. In this article, I will be providing an insight into this new phenomenon of ‘smart contracts’. What is a smart contract? How is it created/formed? And what legal implications does it entail?

The term ‘smart contract’ was first coined by Mr Nick Szabo who was a computer scientist, law scholar and cryptographer in 1997. You will undoubtedly realise that it was long before Blockchains and bitcoins were even created.

In order for a contract to be valid, there has to be an offer, an acceptance and a consideration (price paid for). Mr Szabo stated that a vending machine is an electronic contract. Vending machines offer to sell drinks or sweets, the customer accepts the offer by putting into the machines coins and the consideration is the payment received and the drink or the sweet. According to him, smart contracts are just like normal contracts that we conclude on a day to day basis, the only exception is that the former are completely digitalised.

Smart contracts (contracts intelligents in French) are now defined as self-executing contracts. The terms and conditions which have been agreed by the parties are written in a code and the contract is executed on a blockchain’s decentralised platform. The biggest blockchain which supports smart contracts is ‘Ethereum’ and the contracts are programmed in a special programming language called ‘solidity’. This language was specifically created for Ethereum and it uses a syntax which is close to JavaScript.

If I want to buy a house from Mr and Mrs. Sun. This deal will be represented online as a block and the transaction will be coded in a certain format using the ‘if, this, then, that’ sematic. The block will then be disseminated to every party on the network and the users who may be anywhere in the world must all give their approval in order to validate the transaction. Afterwards, the block will be added to the chain and the transaction will be executed. The same process will be used if a bank wants to use smart contracts to issue loans for example.



Smart contracts remove the dependency on intermediaries such as escrow agents and they reduce the need to trust the other contracting party. Smart contracts are immutable which means that once they are created they can never be changed. Thus, no one will be able to tamper with the codes of the contract. Since smart contracts run on an already programmed code, it is easier and speedier to execute the contract. A contract can be formed at any time and even on public holidays without any difficulty.

Moreover, by using a blockchain, parties can create and design their own digital token that can be used as a currency. Archiving is also simpler with smart contracts.

Considering the various advantages of smart contracts, one will tend to think whether they are going to replace traditional contracts and whether lawyers would need to learn about coding. I believe that we have not yet reached this point and services of lawyers will always be required. For instance, AXA had withdrawn in 2019 from Ethereum-based flight insurance platform which was launched in 2017 because it has struggled to reach its commercial targets and thus, it has deduced that there is not sufficient demand for a blockchain insurance service yet. Furthermore, Professor Oliver Hart who was the winner of the 2016 Nobel Prize in economics for his work in contract theory stated that smart contracts do not take into consideration unforeseen circumstances or contracts that are written for long lasting business transactions.

To add, how will parties react when things go wrong on a blockchain or in the event of software bugs? To what extent can someone trust the coder or a programming language? In order for a legal contract to be executed and enforceable, a smart contract should be able to state exactly the terms and conditions on which the parties have agreed to enter into a contract. Another hindrance concerning smart contracts are that once they are formed they cannot be modified, this lack of flexibility can raise significant concerns. There will also be legal issues concerning who will be liable, in which country and under what laws will we have to turn to in order to enforce a smart contract given that a blockchain is decentralised.

To conclude, I would say that smart contract is an interesting innovation and that more research should be done on this area to discern whether in the future it will be beneficial for Mauritius to legalise smart contracts as was done in Belarus. I consider that it is also very advantageous for a lawyer to have some knowledge in programming and coding in the present world.



Fireside chat with Mr Dheerendra Kumar Dabee, GOSK, S.C. (Cont'd)

L: Final words? ...

DD: I have served under no less than 8 different Attorneys General. All this with the support and professionalism of colleagues and friends in this Office and thanks to the understanding of these Attorneys General, at least 2 of whom, including the current Attorney General, have been colleagues law officers in the past and, therefore having a privileged knowledge of the role of the Solicitor General and the functioning of the State Law Office.

In some way, my long tenure is testimony to their understanding and recognition that the SG's functions assist in policing boundaries of government power and thereby not only ensuring the integrity of government action but also giving confidence to government to pursue policies that are legally sound and that gives government security if its actions are challenged in the future.

L: You have been also been a member of the Commonwealth Secretariat Arbitral Tribunal, in London?

DD: Yes, I was a member of this institution for some 6 years, and I dealt essentially with employment issues concerning the staff of the Commonwealth Secretariat.

L: SG, you have been at the head of the Solicitor General's Office for many years, what would you consider to be the core values of the AGO which should be enforced and protected?

DD: Being the non-political legal adviser to the Government of the day, inevitably as Solicitor General, myself and our officers, by nature of our duties to get close to politics and to the policies of the Government of the day. It is essential that the right balance be maintained between the duty to provide independent advice to Government and, at the same time, doing nothing to hinder the Government of the day in implementing the policies for which the people have voted the Government in power.

It is a difficult balance to maintain when some very sensitive or politically loaded issues arise. But I think with proper arguments and persuasion, as well as ensuring that throughout you remain professionally honest to yourself, remain committed to maintaining the integrity of the AG's Office, somehow, as we and our colleagues do, we manage to maintain that balance and professional independence, whilst enabling Government to deliver, as far as possible, as promised to the people.

“Dheeren, how long will you carry on as Solicitor General? You may know that one does not last long in that position!!”

Former Chief Justice Lallah

First and foremost is the need to remain professionally independent and at all times ensure you remain honest. Do nothing to prejudice the integrity and quality of legal advice.

L: Many among us consider you as a living encyclopedia! How did you manage to achieve such a depth and width of legal expertise?

DD: (smiles) From my school days, through university and up till I joined the Crown Law Office, I have somewhat lived in great fear! ...at school and at university, fear of failing the exams. Subsequently, when I started appearing in cases as a barrister, fear that I would blunder somehow or that I would miss out on basic legal arguments. This fear has deprived me of sleep sometimes. The result being that I believed I should commit myself 100% to my work so that I do not have to face failure.

Since you start from scratch when you join the State Law Office, being educated in the English legal system, we are not familiar with the bulk of the private law aspects that apply in this country, namely the whole area of code civil, contract, family law, succession etc and that makes you more on your guard as to getting things wrong when tendering advice or appearing in court cases.

My advice, if any, is that nothing is easily achieved. Only by working very hard, and quite often sacrificing family life, which I have done to some extent ... only with hard work do you actually become a little more confident, more confident in tendering legal advice or in preparing a court case. However, “intelligent” one may be, nothing replaces actual hard work. There is no secret, no mystery about it!

‘It is to be noted that, in their recommendations, in the recent “Britam Report”, the Commissioners highlighted the need for the Attorney General's Office to “avoid becoming vulnerable to any extraneous pressure, exercise institutional skepticism on advice emanating from sources other than the established trusted sources, do whatever it takes to watch the interest of the State but without compromising on its image of being apolitical and independent.” I have tried as best as I can to be guided by these principles’

I think learning out the hard way is what I would tell anyone, however much intelligent or qualified you may be, tendering advice or appearing in cases requires a lot a lot of hard work and you will remain basically a student for the whole of your career. You need each time to go back to the texts and the cases and to discuss with your colleagues inevitably.

I believe that is what over time gives you some confidence in providing legal services.

Still, I am far from having become “a living encyclopedia”!

L: Can you share some of your fondest memories and maybe some less fond ones (if any) of the earlier days when you were still a crown law officer?

DD: When joining the CLO in 1982, we were occupying one wing of the old Supreme Court building. CLO comprised a small professional staff, all in all, maybe some 20 or less officers. If I recall correctly at that time there were 9 Judges at the Supreme Court.

Fireside chat with Mr Dheerendra Kumar Dabee (Cont'd)



I think one best recalls the unpleasant incidents! (smiles). In those days we were doing formal matters together with the Principal Crown Attorney Mr Ramdewar. We would be provided with a bulk of files with respect to cases being mentioned before the Supreme Court. Each one in turn had to attend the Supreme Court to appear in "formal matters". On one such occasion, I was appearing before the Chief Justice Cassam Moollan and I remember him telling me "Mr Dabee! This is not the standard we expect from a Crown Law Officer!".

I am indefinitely grateful for the unflinching support, loyalty, honesty and dedication of the law officers, past and present, those who are unfortunately no more or currently serving in the Judiciary or are in private practice or other sectors and of the administrative cadre. It is only with the support of the staff of the AG's Office (including former colleagues), that I have lasted a very long 23-year period.

The saying goes that retirement is not the end of the road, but is just a turn in the road. It so happens in my case, for the reasons I gave you earlier, it will not be a real turn in the road but a slight digression since I will be somehow, for some time during my retirement keep serving the office and attempt to be useful to my colleagues whom I do not want to miss at least for some time.

LOSAF

Conducted by A.Pillay Nababsing

PORTRAIT CHINOIS

Favourite -

Drink?: *Un vin blanc closely rivalled by binding tea. I should specify here that tea is the main drink (laughs) – strong tea, little milk and no sugar!*

Food?: *A good chinese meal! (specially black bean fish or homard au gingembre) closely followed by a beautiful indian meal (chicken tandoori or naan).*

Movie?: *Generally Bollywood clips and parts of films, mais définitivement un accro de l'actualité!*

Actress?: *Priyanka Chopra! (laughs)*

Book?: *The book on Gandhi's life without comparison. So many lessons to learn from. La profondeur de l'âme de cette personne, qui a marqué l'histoire de l'Inde et oui aussi du monde.*

Holiday place?: *There have been many places. But always a close rivalry between London and Udaipur. But London ... always ! Anywhere in London, shopping, walking in Hyde Park, just strolling on the streets in London ! I also really enjoyed Jordan together with the family during one of my most recent overseas trips.*

Travelling plans (post covid)?: *Had it not been for the pandemic, I would have already flown to London (laughs) I do plan to do northern Europe, also Italy, France at some point.*

En mémoire de Toolsee (Nitish) Bissessur

(17 Juillet 1980 – 14 Décembre 2021)

Le bureau de l'Attorney-General perd aujourd'hui un de ses officiers, en la personne de Nitish Bissessur, qui s'est illustré par son dévouement à son travail. Il mettait un point d'honneur à ne livrer une recherche que si elle était minutieuse et pertinente. Subséquemment, il s'assurait (plus d'une fois!) que c'était ce que l'on recherchait en demandant si on avait besoin qu'il fasse des recherches complémentaires ou plus approfondies.... Au point qu'on lui répondait souvent « Nitish ! t'en fais pas !! ...c'est excellent ! ...c'est exactement le point de droit (ou l'arrêt selon le cas) que je recherchais ! ». Ses amis et ses collègues utilisent plusieurs qualificatifs pour décrire Nitish : aimable, souriant, poli, discret, attentionné, cultivé, humble, employé modèle et collègue idéal comme on en trouve rarement. C'est ce qu'incarnait Nitish au quotidien au bureau.



Nitish était un de nos Legal Research Officers, poste qui demandait de lui (notamment) qu'il fasse des recherches, souvent (très) urgentes, sur des points de droit très pointus ou spécifiques mais aussi très variés en rapport à des affaires logées devant les différentes cours et les tribunaux spécialisés, dans lesquelles l'Etat était partie. Il prêtait assistance à la rédaction des lois et des regulations (ayant travaillé étroitement avec la Parliamentary Counsel) et d'avis légaux. Il touchait aux divers aspects du travail (au quotidien) de l'avocat. Il allait rejoindre le noble métier d'avocat dans un très proche futur, ayant presque complété son cours professionnel d'avocat. Nitish était aussi membre de l'équipe de rédaction du Losaf et nous ressentons profondément son absence à la veille de la publication de cette édition.

Nitish Toolsee Bissessur était féru de la langue de Molière. En effet il en avait une parfaite maîtrise et cela se lisait et s'entendait. Nitish a obtenu son DEUG (pour les non-initiés Diplôme d'Etudes Universitaires Générales) en Droit de l'Université de Lille 2. Il poursuit l'année suivant avec un Diplôme Universitaire Certificat d'Etudes Pénales et Criminologiques, puis une Licence SJPE Droit – Diplôme de Licence avant de clore son parcours francophone, toujours à Lille, avec une Maîtrise en Droit Mention Droit Privé et Sciences Criminelles en 2010. Il obtient par la suite, en 2016, son Graduate Diploma in Law du University of Law.

Il rejoint le Bureau du Directeur des Poursuites Publiques en 2013 où il exerce comme Legal Research Officer jusqu'en 2015. Il participait aussi au ODPP Newsletter et était par ailleurs membre du Editorial Sub Committee du Criminal Law Review. Nitish fait partie de l'équipe de l' Institute for Judicial and Legal Studies (IJLS) de juin à décembre 2017 ayant traité de sujets tels que le droit de l'environnement à travers une étude comparative du droit mauricien et du droit international de l'environnement, les directives en matière de détermination de la peine concernant les affaires de drogue, ou encore du divorce dans le droit contemporain. Il rejoint le Bureau de l'Attorney General le 10 Juin 2019.

A toute sa famille et ses proches amis, particulièrement à ses parents, sa sœur et son épouse Preety, tout le personnel du Bureau de l'Attorney-General s'associe à votre peine et présente, en ces moments douloureux, toutes nos condoléances. Nous pensons et penserons à lui, à son sourire, à sa bonne humeur, à son dévouement professionnel, à ses petits gestes d'attention qu'il portait, à ceux qu'il côtoyait et qu'il appréciait, dans les moments difficiles. Il vit dans nos pensées, nos cœurs, nos souvenirs ...

CASE LAW REVIEW

The arbitration pursued by Mr Rawat against the Republic of Mauritius

by Taroan Ramtale, Temporary State Counsel



The French-Speaking Court of First Instance of Brussels was asked by Mr Rawat to annul an arbitral award rendered by a Tribunal comprising three arbitrators, namely Mr Jean-Christophe Honlet, a lawyer at the Paris Bar (appointed on behalf of Mr Rawat), Mr Vaughan Lowe Queen's Counsel, an English barrister (appointed on behalf of the Republic of Mauritius) and Ms. Lucie Reed, a lawyer at the Washington and New York Bars, appointed as President of the Arbitral Tribunal. The Arbitral Tribunal elected Brussels as the seat of the arbitration. The proceedings were administered under the aegis of the Permanent Court of Arbitration in The Hague and conducted under the UNCITRAL Arbitration Rules.

The Arbitral Tribunal delivered its award on 6 April 2018 in an arbitration pursued by Mr Rawat against the Republic of Mauritius for alleged breaches of the Investment Promotion Treaty entered between France and Mauritius (the 'France-Mauritius BIT') in 1973. According to him, the Republic of Mauritius violated the France-Mauritius BIT by freezing and misappropriating his protected investment in the group of companies, British American Investment Co. ('BAI'). He claimed compensation in an amount exceeding USD 1 billion. According to the Republic of Mauritius, the freeze of Mr Rawat's personal and business assets and related actions were part of an ongoing, and legal, investigation of alleged Ponzi-like schemes, involving money laundering and fraud at the level of MUR 1 billion.

The arbitration was brought by Mr Rawat under the 1976 UNCITRAL Arbitration Rules through the Most Favored Nation (MFN) clause in the France-Mauritius BIT and the arbitration clause in the 2007 Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and Protection of Investments (Finland-Mauritius BIT). The Republic of Mauritius successfully argued that the Arbitral Tribunal lacked jurisdiction *ratione personae* to hear the matter. *Ratione Personae* is a Latin and legal term meant to describe the effect of the nature or position of a person. According to the Republic of Mauritius, it never consented to arbitrate investment disputes with Mr Rawat, and in any event, Mr Rawat could not benefit from the France-Mauritius BIT due to his dual nationality.

Indeed, the France-Mauritius BIT does not provide for a direct right of arbitration of a treaty dispute between an investor of one Contracting State and the host Contracting State. Article 9 of the France-Mauritius BIT provides that investment contracts between an investor and the host state must include a dispute resolution clause providing for International Center for Settlement of Investment Disputes (ICSID) arbitration if amicable resolution cannot be reached.

The MFN clause of the France-Mauritius BIT allows "les investissements des ressortissants" to benefit from all provisions more favourable than those in the France-Mauritius BIT, which may result from international obligations entered into by the other State with the first contracting State.

Through this MFN clause, Mr Rawat attempted to benefit from the Finland-Mauritius BIT so as to secure the jurisdiction of the Arbitral Tribunal since the Finland-Mauritius BIT of 2007 expressly includes a right for an investor to pursue arbitration directly against the host state.

The rationale behind the Award

The Arbitral Tribunal had to assess whether Mauritius, as a Contracting State, consented to confer jurisdiction on the Tribunal. Hence, the Arbitral Tribunal had to determine if the 1973 France-Mauritius BIT applied. If the treaty did not apply, consent to jurisdiction was missing, and Mr Rawat was not entitled to the substantive protections provided in the BIT, including access to the MFN clause.

If the BIT did apply, the Arbitral Tribunal would have to determine, in the absence of an express direct investor-state arbitration provision in the BIT, whether the MFN clause in Article 8 operates to demonstrate Mauritius' consent to such direct arbitration through application of the direct investor-state arbitration clause in the 2007 Finland-Mauritius BIT.

It is common ground that Mr Rawat made substantial "investissements" in Mauritius over a long period of time. Article 1(2) of the France-Mauritius BIT does not use the term "investisseur", but only the term "ressortissant". It plainly is a condition of application of the BIT that a natural person claiming protection, such as Mr Rawat, be a "ressortissant" of France or Mauritius.

The Tribunal found that Mr Rawat is a dual national of Mauritius and France and this characteristic was fundamental when determining the applicability of the France-Mauritius BIT. The Arbitral Tribunal ultimately approved the Republic of Mauritius' interpretation that dual nationality does not support jurisdiction *ratione personae*, because the France-Mauritius BIT does not protect dual nationals.

The Arbitral Tribunal rightly supported its finding on how dual nationals are to be treated under the BIT by having resort to Article 31(1) of the Vienna Convention on the Law of Treaties of 1969. Under Article 31(1), terms in the BIT, including the term "ressortissant", should be interpreted according to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

The arbitration pursued by Mr Rawat against the Republic of Mauritius by Taroon Ramtale, Temporary State Counsel (Cont'd)

Article 9 of the France-Mauritius BIT directs all French and Mauritian “ressortissants” who enter into investment contracts with the other state to arbitrate disputes with the host state under the ICSID Convention.

Article 25(2) of the ICSID Convention, to which Article 9 of the BIT necessarily refers also uses and defines the term “ressortissant” as “...toute personne physique qui possède la nationalité d’un Etat contractant autre que l’Etat partie au différend à la date à laquelle les parties ont consenti à soumettre le différend à la conciliation ou à l’arbitrage ainsi qu’à la date à laquelle la requête a été enregistrée ... à l’exclusion de toute personne qui, à l’une ou à l’autre de ces dates, possède également la nationalité de l’Etat contractant partie au différend”.

Article 25(2) expressly excludes dual nationals from the term “ressortissant”. The Tribunal found it decisive that Article 9 of the BIT makes it an obligation, as opposed to an option, for the Contracting States to include an ICSID arbitration clause in investment contracts with protected “ressortissants”. This creates a strict and conventional alignment between the notion of “ressortissant” under the ICSID Convention and under the France-Mauritius BIT according to the Tribunal.

Having found that the term “ressortissant” could not encompass dual nationals when interpreted in the context of the France-Mauritius BIT, the Tribunal therefore upheld Mauritius’ objection to jurisdiction *ratione personae* and accepted that it lacked jurisdiction to hear this arbitration.

Mr Rawat’s unsuccessful attempt to annul the Arbitral Tribunal’s award

Mr Rawat filed an application for annulment of that award on jurisdiction before the French-Speaking Court of First Instance of Brussels.

In its judgment, the French-Speaking Court of First Instance of Brussels reviewed the jurisdiction issue on a *de novo* basis having regard to (a) The ordinary meaning of the term “ressortissant” (b) The purpose or goal of the BIT and (c) The context in which the term “ressortissant” is used. While the outcome was similar, the French-Speaking Court of First Instance of Brussels took a different approach to dismiss Mr Rawat’s claim.

The ordinary meaning of the term “ressortissant”

The Court embraced the Arbitral Tribunal’s finding that “the term ‘ressortissant’ is generally synonymous with national, and in certain circumstances may even have a broader meaning than ‘national’, not narrower.” Because it refers to the link between a person and a State, this term cannot, in itself, cover the hypothesis of a binational.

The principle of effectiveness would be undermined if the inclusion of dual nationals in the general scope of application of the France-Mauritius BIT had the consequence of excluding them from the sole recourse to ICSID arbitration provided for in Article 9 of that treaty.

The Court therefore found that the Arbitral Tribunal rightly declined jurisdiction and the term “ressortissant” excluded in *casu* dual nationals from the protection of the 1973 France-Mauritius BIT.

The purpose or goal of the BIT

The Court found that the objective of the France-Mauritius BIT is to protect foreign investments in the host State, and not to protect French investments in France or Mauritian investments in Mauritius. Yet, it is unclear how the inclusion of investments made by dual nationals in the France-Mauritius BIT would have the particular effect of protecting foreign investments, since an investment made by a dual national will be directly and simply protected under the domestic law of the host State, without having to resort to the protection provided for by the BIT.

Moreover, there was according to the Court no reason to believe that, France or Mauritius intended to grant their dual nationals more rights than they grant to their nationals. In short, Mr Rawat, being a Mauritian National, had to seek the appropriate domestic remedies, rather than through international law.

CASE LAW REVIEW

The Judicial Committee of the Privy Council (“JCPC”) Reinstates the “Betamax Award”

by Nawsheen Maghooa, Temporary State Counsel



Introduction

After several years of relative silence, the Betamax case made the headlines again on 14 June 2021 when the JCPC reinstated the US\$ 115.3 Million award that Betamax had obtained in arbitral proceedings against the State Trading Corporation (‘STC’).

The dispute between Betamax and STC dates as far back as 2015 and the timeline leading up to the dispute can be summarised as follows:

- 2006 to 2008: the Government of Mauritius (the ‘Government’) begins an evaluation exercise as to the best means of providing for the shipping of petroleum to Mauritius;
- 2008 to 2009: negotiation period between the Government and Betamax;
- 27 November 2009: Betamax and STC enter into a Contract (the ‘Contract’) for petroleum shipping services for an uninterrupted period of 15 years;
- 30 January 2015: The then newly-elected Government announces that it would terminate the Contract in light of “the unlawful procedure and processes regarding the allocation of the contract”;
- 4 February 2015: STC gives notice that it was unable to use Betamax’s services under the Contract;
- 7 April 2015: Betamax terminates the Contract.; and
- 15 May 2015: Betamax files Notice of Arbitration with the Singapore International Arbitration Centre, under the arbitration clause in the Contract.

It is also material to note that the dispute hinges on the Public Procurement Act and the Public Procurement Regulations 2008 (the “Regulations”), which came into effect on 17 January 2008 and subsequently amended in 2009.

One of the central issues of the dispute was whether the Public Procurement Act and the Regulations, as they were in force on 27 November 2009, applied to the Contract. It is worth noting that, under the Public Procurement Act, the award of any major contract by a public body requires first and foremost the approval of the Central Procurement Board.

Previous Findings

In the Arbitration, Betamax claimed damages of over US\$150m for breach of Contract. STC advanced a number objections to the arbitration, challenged the jurisdiction of the Arbitrator and filed a number of defences to the claim.

The Arbitral Tribunal, in its award dated 5 June 2017 determined that the Arbitrator had jurisdiction over the dispute and held inter alia that on the proper interpretation of the Public Procurement Act and the Regulations, the Contract was exempted from its provisions and that there was no basis for alleging that it was illegal. The Arbitrator awarded Betamax damages in the sum of US\$115.3m together with interest and costs (the “Award”).

STC applied to the Supreme Court of Mauritius to set aside the Award under Section 39 of Mauritian International Arbitration Act (the ‘IAA’). Section 39(2)(b)(ii) of the IAA provides that one of the grounds for setting aside an arbitral award is if it contravenes the public policy of Mauritius. The Supreme Court was of the view that the statutory provisions of the Public Procurement Act, which dictate the proper and transparent procurement process leading to the award of a contract are “fundamental pillars of good governance in Mauritius” and that any breach thereof would be “injurious to public good.”

The Court held that there had been a breach of the Public Procurement Act during the award of the Contract to Betamax, which made it an illegal contract and that “the enforcement of an illegal contract of such magnitude, in flagrant and concrete breach of public procurement legislation enacted to secure the protection of good governance of public funds, would violate the fundamental legal order of Mauritius”. Accordingly, the Supreme Court set aside the award.

In the realm of international arbitration there exists an automatic right of appeal from the Supreme Court to the JCPC under section 42(2) of the IAA. Nevertheless, the practice is to seek permission to appeal and on 24 June 2019, the Supreme Court granted permission to Betamax to appeal to the JCPC.

The JCPC Findings

The JCPC examined the scope of power of the Supreme Court under the IAA to set aside an award on the ground that it is in conflict with the public policy of Mauritius. It observed that the IAA, based on the UNCITRAL’s Model Law (the “Model Law”) which has strong adherence to the principles of non-interventionism, was intended to make Mauritius attractive to users of international commercial arbitration. In fact, the IAA itself provides for limited court intervention, the exclusion of appeals on questions of law and for the finality of awards.

The Judicial Committee of the Privy Council (“JCPC”) Reinstates the “Betamax Award”(Cont’d)

The JCPC remarked that it is undisputed that it was within the jurisdiction of the Arbitrator to determine whether the Contract between STC and Betamax was illegal or not, based on the provisions of the Public Procurement Act. This was therefore an issue of law apt for determination by the Arbitrator. As the IAA does not permit an appeal on questions of law, the Supreme Court had no power to review that decision unless it could do so under section 39(2)(b)(ii) of the International Arbitration Act.

In the present case the determination of the legality of the Contract turned on detailed questions of interpretation of difficult legislative provisions. It was undisputed that the purpose of the Public Procurement Act was to bring public procurement under clear control and to make certain contracts subject to the approval of the Central Procurement Board, so that procurement was transparent and corruption was deterred. The issue in relation to legality was simply whether the Contract was exempted from the provisions. The JCPC held that this question of interpretation gave rise to no issue of public policy.

The JCPC noted that the Model Law is premised on the principle that where parties have agreed to submit their dispute to arbitration and once the matter has been submitted to an arbitral tribunal, the arbitral tribunal’s decision is final whether the issue is one of law or fact. It is therefore the policy of modern international arbitration law to uphold the finality of the arbitral tribunal’s decision, absent of the specified vitiating factors.

In light of the above, the JCPC clarified that the question for the Supreme Court under section 39(2)(b)(ii) is whether, on the findings of law and fact made in the award, there is any conflict between the award and public policy. The effect of section 39(2)(b)(ii) is simply to reserve to the court this limited supervisory role which requires the court to respect the finality of the award. It cannot, under the guise of public policy, reopen issues relating to the meaning and effect of the contract or whether it complies with a regulatory or legislative scheme.

Based on the above, the JCPC considered that the Supreme Court was in error in reviewing the decision of the Arbitrator that the Contract was exempt from the provisions of the Public Procurement Act and Regulations. That decision of the Arbitrator was final and binding on the parties and therefore no issue arose under section 39(2)(b)(ii) of the IAA as to whether the Award was in conflict with the public policy of Mauritius.

Conclusion

With the cornerstones of arbitration being finality and non-intervention of domestic courts, this decision of the Privy Council reaffirms the deeply rooted policy of modern international arbitration law to uphold the finality of an arbitral tribunal’s award, made within the arbitral tribunal’s jurisdiction.

This aspect of international arbitration was also addressed by the Supreme Court who had carefully worded its judgment so as not to open floodgates for public policy challenges. The JCPC judgment goes a step further and makes it clear the limits on the Supreme Court’s powers in matters of international arbitration and the precise test to be applied, that is whether the award itself conflicts with public policy whereby the court’s intervention would proceed on the court’s application of public policy to the findings (whether of fact or law) made in the award.

CASE LAW REVIEW

Oberoi (Mauritius) Ltd v Assessment Review Committee & Anor (2021 SCJ 396)

by Yakshini Peerthum, Temporary State Counsel



Background Facts

This case involved a company (OML) incorporated in the British Virgin Islands, which is a majority shareholder of Island Resorts Ltd (IRL), a company which is incorporated in Mauritius. OML was specially incorporated for the purpose of investing in IRL and OML borrowed money from its shareholders and advanced it to IRL. This shareholders' loan was to all intents and purposes capital in the hands of OML and formed part of its capital employed in the production of its gross income i.e. for lending purposes to IRL, which in turn produced income, in the form of interest, for OML. The interest received by OML from IRL was subject to income tax in Mauritius as it was income derived from Mauritius. OML in turn sought to deduct from its gross income the interest payable to its shareholders as it considered that it was an interest expense deductible under the general provisions of Section 18 of the Income Tax Act (the ITA). The MRA disallowed the interest expenses pursuant to Section 19(3) of the ITA.

Rationale

The issue before the Court therefore related to the correct interpretation and application of Section 19 of the ITA, that is whether the interest expenditure on the Shareholders' loan from the interest income received by OML from IRL was deductible under Section 18 of the ITA or whether the MRA was right to apply Section 19 instead of Section 18 of the ITA to deny OML the benefit of a deduction on the interest expenditure.

Section 18 of the ITA reads- "Expenditure incurred in the production of income" is a general provision for allowing expenditure or loss from the gross income of a tax payer to the extent that the expenditure or loss was exclusively incurred in the production of gross income and Section 19 of the ITA entitled "Expenditure incurred on interest in the production of income" is a specific interest deductibility provision which allows deduction of interest expenses incurred exclusively in respect of capital employed in the production of gross income. Section 18 covers deductions of expenses in cases other than where Section 19 is applicable.

Once it is determined that the expense sought to be deducted is interest incurred in respect of capital employed for the purpose of producing gross income, Section 19 would as a general rule find its application subject to the discretion of the Director-General under Section 19(3)(a) and to the exception in Section 26(1)(a) of the ITA. For a judicious exercise of the Director-General's discretion under Section 19(3), he must be satisfied of two conditions viz (i) the interest is payable to a non-resident; (ii) who is not chargeable to tax on the amount of the interest.

Held

It was held that since the shareholders' loan was capital employed by OML exclusively in the production of its gross income, the interest payable on the shareholders' loan falls squarely within the expenditure referred to in Section 19(1) of the ITA.

To the extent that the interest payable to OML's shareholders was an expense incurred by OML to produce assessable income, OML should therefore have been entitled to claim a deduction in respect of the interest expense under Section 19 which specifically provides for such deduction, except that the Director-General has rightly exercised his discretion to apply Section 19(3) and disallow the deductibility of an interest expenditure as he was satisfied that the expenditure was incurred in respect of non-residents who are not chargeable to tax on the amount of interest in Mauritius.

It was also held that Section 19(3) of the ITA does not have an extra-territorial effect and the application of Section 19(3) is confined to non-residents not chargeable to tax on the amount of the interest in Mauritius.

CASE LAW REVIEW

SEEGUM v THE STATE OF MAURITIUS (2021 SCJ 162)

by Keshini Mutty, Legal Research Officer



Factual Background:

The appellant was prosecuted before the Intermediate Court for the offence of “using an information and communication service for the purpose of causing annoyance” in breach of sections 46(h) (ii) and 47 of the Information and Communication Technologies Act (“the ICTA”).

The appellant pleaded not guilty to the charges.

The appellant was found guilty at trial and appealed against the judgment of the learned Magistrate.

Legal Analysis:

The appellant’s argument was that section 46(h)(ii) of the ICTA breaches section 10(4) of the Constitution. Hence, the issue to be determined by the court was the constitutionality of section 46(h) (ii) of the ICTA.

Section 10(4) of the Constitution provides that:

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.”

It is important to note that section 10(4) of the Constitution has been interpreted as impliedly providing for the “requirement that in criminal matters any law must be formulated with sufficient precision to enable the citizen to regulate his conduct”. [Vide *Ahnee v Director of Public Prosecutions* [1999] 2 W.L.R. 1305]

At the relevant time, section 46(h)(ii) of the ICTA, which has now been amended, read as follows:

“Any person who – (...) (h) uses an information and communication service, including telecommunication service,

(ii) for the purpose of causing annoyance, inconvenience or needless anxiety to any person; (...) shall commit an offence.”

It was argued by learned senior counsel for the appellant that “causing annoyance” suffers from “hopeless vagueness” inasmuch as it is not defined in the ICTA and as such creates uncertainty. It does not allow the ordinary citizen to determine which conduct may be considered as causing annoyance and whether a particular conduct will fall within the purview of section 46(h)(ii).

In the judgment, Balaghee J noted that the term “causing annoyance” used in section 46(h)(ii) is not defined in the ICTA. The learned judge explained that word “annoyance” is a derivative of the verb “annoy” which is defined in the Concise Oxford English Dictionary, Tenth Edition, as “make a little angry” or “harm or attack repeatedly and that the expression “causing annoyance” may, therefore, be defined as meaning “making a little angry”.

The court stated that section 46(h)(ii) was cast so widely that a wide array of communications, ranging from what are objectively clearly unacceptable communications for example child sexual abuse imagery to evidently innocuous messages from the standpoint of the ordinary man, may arguably fall within its ambit.

Moreover, the court identified the difference between the Mauritian provision and the English and Indian provisions. In the UK, there is the need to establish that an accused party has sent or caused to be sent a message which he knows to be false or alternatively that he has persistently made use of a public electronic communication network to send a message or to cause a message to be sent, while in India the elements of the offence include knowledge of the falsity of the message and at the same time the persistent use of a public electronic communications network to send the message. The court added that, in Mauritius, a single message sent for the purpose of causing annoyance is caught by section 46(h)(ii), even if the content of the message is true.

Furthermore, the court stated that, in Mauritius, there are no guidelines regarding prosecutions under the old section 46(h)(ii) of the ICTA, unlike English and Indian law which provide for at least some clear and objective standards to determine whether an offence has been committed.

Conclusion

To conclude, the court found that section 46(h)(ii), as it then was, has failed to define with sufficient clarity and certainty the conduct which falls within and that which falls outside the ordinary meaning of the expression “causing annoyance” for the purpose of determining whether a particular conduct is criminal. Hence, the court, accordingly, allowed the appeal and quashed the conviction and sentence of the appellant

Appointments

List of Officers who have been promoted during the year 2021 (with effect from – “wef”)		
RAMLOLL Rajeshsharma, S.C	Solicitor General	wef 27.09.21
SEWPAL Pranay	Assistant Solicitor General	wef 10.05.21
NAGHEE REDDY Kritananda	Assistant Parliamentary Counsel	wef 10.05.21
RAMJEEAWON VARMA Priya Veedu	Assistant Parliamentary Counsel	wef 10.05.21
DUNPUTH Purnima	Assistant Parliamentary Counsel	wef 10.05.21
REETOO Dinay	Assistant Parliamentary Counsel	wef 10.05.21
PARSURAMEN Navina	Principal State Counsel	wef 10.05.21
BHOGUN Meenakshi	Principal State Counsel	wef 10.05.21
JEEWA Najiyah Nuha	Principal State Counsel	wef 10.05.21
MOHUNDIN Yogeshwaree	Principal State Counsel	wef 10.05.21
JHEELAN Navish	Principal State Counsel	wef 10.05.21
DANGEOT Daniel Jean Alain	Principal State Counsel	wef 10.05.21
BHOYROO Mohamad Shakheel	Principal State Counsel	wef 10.05.21
SOHAWON-ABDULLATIF Roshanharah Bibi Shameena	Principal State Counsel	wef 10.05.21
BALLUCK Prithiviraj	Senior State Counsel	wef 10.05.21
RAWAT NEEROOA Uroossa	Senior State Counsel	wef 10.05.21
MAHERALLY Bibi Halemoon	Senior State Counsel	wef 10.05.21
PILLAY-NABABSING Asha	Senior State Counsel	wef 10.05.21
DOMAH Kamlesh Kumari	Senior State Counsel	wef 10.05.21
MEETTOOK Nirmal Singh Kamal	Senior State Counsel	wef 10.05.21
ADEEN Hemant Varma	Senior State Counsel	wef 10.05.21
GIGABHOY SAUHOBOA Sulakshna	Senior State Counsel	wef 10.05.21
THOMASOO Noel Antoine	Legal Secretary	wef 10.08.21

Appointments (Cont'd)

List of Officers who have been assigned higher duties		
RAMSOONDAR Niroshini	Ag Deputy Solicitor General	wef 01.10.21
JEAN LOUIS Yvan Caril	Ag Assistant Solicitor General	wef 01.10.21
SEETARAM Mooneeswur Seegobind Maha Rana Pratapsingh	Ag Senior Assistant Parliamentary Counsel	wef 01.10.21
OMBRASINE Annabelle Misha Odile	Ag Assistant Parliamentary Counsel	wef 15.12.21
ESSOP Zaynah Bibi	Senior State Counsel (appointed Ag Magistrate Intermediate Court)	wef 15.12.21
SAWOCK Bhavna	Senior State Counsel (appointed Ag Magistrate Intermediate Court)	wef 15.12.21
ANGO LI YING PIN Marie Désirée Gaëlle	Ag Senior State Counsel	wef 11.05.21

List of Officers who have joined the service during 2021		
PUNCHOO Anekha	Temporary State Counsel	wef 01.06.21
PEERALLY SAYED-HOSSEN Warda Zehra	Temporary State Counsel	wef 01.06.21
COOLEN Gavindren Seeneevassen	Temporary State Counsel	wef 01.06.21
THAKOOR Bhasant Nikheel	Temporary State Counsel	wef 01.06.21
PEERTHUM Yakshini	Temporary State Counsel	wef 01.06.21
RAMTALE Taroon Pooshpketan	Temporary State Counsel	wef 01.06.21
MAGHOOA Nawsheen	Temporary State Counsel	wef 01.06.21
NUNDLOLL Akshay Kumar	Temporary State Counsel	wef 01.06.21
MANNA Gitika Sweta	Temporary State Counsel	wef 01.06.21
GALAMALI Beebee Waseemah	Temporary State Counsel	wef 01.06.21
AUBEELUCK Bibi Adillah Zohrah	Temporary State Counsel	wef 01.06.21
SOBORUN Vishakha Bhumija	Temporary State Counsel	wef 01.06.21

Mrs Mungly-Gulbul becomes the first woman Chief Justice in the history of the Mauritian judiciary.

After more than 170 years of existence, The Supreme Court of Mauritius finally has its first female Chief Justice in the person of Rehana Bibi Mungly-Gulbul. She succeeds Mr Asraf Caunhye to the highest post in the Mauritian judiciary and will be assisted in her new role by the new Senior Puisne Judge, Nirmala Devat.

Sworn in as the 12th Chief Justice of Mauritius since independence at the State House in Réduit on 18 November 2021 by the Ag. President of the Republic Mr Eddy Boissezon, Mrs Mungly-Gulbul was also elevated to the rank of Grand Officer of the Order of the Star and Key of the Indian Ocean as is customary to mark her appointment. The swearing-in ceremony took place in the presence of the Prime Minister, Mr Pravind Kumar Jugnauth as well as other personalities and dignitaries.

In a stellar career at the judiciary spanning over some 38 years, Mrs. Mungly-Gulbul now embarks on a new chapter in administering and delivering justice as the head of the Supreme Court of Mauritius.

Mrs Mungly-Gulbul completed her primary education at the Phoenix Government School and pursued her secondary studies at the Queen Elizabeth College. A national laureate in 1979, she proceeded to England to read law and was called to the Bar in 1983.

On her return to Mauritius, Mrs. Mungly-Gulbul worked as a barrister in private practice and as a Law Officer at the Crown Law Office before joining the magistracy. She was promoted to the Intermediate Court in 1990 and subsequently held the posts of Vice-President of the Intermediate Court and President of the Industrial Court. She was appointed Master and Registrar of the Supreme Court in 2002.

Mrs Mungly-Gulbul was sworn in as Puisne Judge in 2008 by the late Sir Anerood Jugnauth, the then President of the Republic. She rose through the ranks at the Supreme Court to become Senior Puisne Judge in 2020.

All staff at the Attorney-General's Office wish the new Chief Justice much success in her new post.

Justice Aruna D. Narain elected Vice Chairperson and Rapporteur of the CEDAW Committee

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) is a body of independent experts monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (Convention). The Committee is composed of 23 women's rights experts of high moral standing and competence.

Countries which have become party to the treaty (States parties) de facto accept to submit national periodic reports containing detailed information as to how the State party implements the rights enshrined in the Convention. The Republic of Mauritius acceded to the Convention on 9th July 1984 and has since submitted 5 Periodic reports, its next report being due in November 2022. During its sessions the Committee considers State party reports and addresses its concerns and recommendations to the State party in the form of Concluding Observations. The latest Concluding Observations of the CEDAW Committee on Mauritius can be accessed at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MUS/CO/8&Lang=En

The Committee also inter alia gives its views on communications made by individuals alleging violations of the Convention and conducts inquiries into allegations of grave and systematic violations of the Convention. The Committee has been meeting virtually over the past year in view of the COVID-19 pandemic.

Hon. Aruna D. Narain, who has been a member of the CEDAW Committee since 2017 elected Vice-Chairperson and Rapporteur of the CEDAW Committee for a period of two years. She was previously Vice-Chairperson of the Working Group on Communications (2019-21) and of the Working Group on Working Methods (2017-21) of the Committee.

It is worth recalling that Hon. Aruna D. Narain, who was a law officer from 1993 to 2015, was one of the main officers in charge of the human rights desk at the AGO. and appeared, as a member of the Mauritian delegation before various human rights treaty bodies (Human Rights Committee; Committee on Economic, Social and Cultural Rights; African Commission on Human and Peoples' Rights; Committee against Torture; Committee on the Rights of the Child) for the purpose of presenting and defending Government reports during that period. She also took an active part in the first Universal Periodic Review (UPR) of Mauritius before the Human Rights Council in 2008.

It is with great pride that the LOSAF Team extends its warmest congratulations to Her Ladyship Aruna D. Narain as she takes on higher responsibilities on the CEDAW Committee.

Mrs Topsy-Sonoo, Parliamentary Counsel elected as member of the African Commission for Human Rights

During its 39th Ordinary Session, held from 14-15 October 2021, at the African Union Headquarters in Addis Ababa, the Executive Council of the African Union elected 3 (three) new Members and re-elect 1 (one) Member, to serve on the African Commission on Human and Peoples' Rights (ACHPR). Amongst the newly elected members of the ACHPR, is, Mrs Ourveena Geereesha Topsy-Sonoo, who presently occupies the post of Parliamentary Counsel at the Attorney General's Office.

In July 1979, the OAU Assembly of Heads of State and Government decided to place its members under international obligations. Accordingly, a resolution was adopted calling on the OAU Secretary General to form a committee of experts which would draft an African Charter on Human and Peoples' Rights ("African Charter"), providing among other things, for mechanisms to promote and protect the rights embodied in the Charter. A draft Charter was unanimously adopted at a 1981 meeting of the OAU Heads of States and Government in Nairobi Kenya.

The African Charter, which came into force on 21 October 1986, provides inter alia that "an African Commission on Human and Peoples' Rights shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa".

The Commission is composed of eleven members serving in their personal and independent capacity and not as representatives of their countries. Article 31 (1) of Charter provides that the commissioners shall be "chosen from amongst African personalities of the highest reputation, known for their high morality, integrity impartiality and competence in matters of human and peoples' rights (...). They are nominated by State parties to the Charter, which may nominate up to two candidates for election. The members of the Commission serve a six year term and are eligible for re-election indefinitely. At the beginning of their mandates, they solemnly declare to discharge their duties impartially and faithfully.

Human Rights Council "Universal Periodic Reporting"

The 48th regular session of the Human Rights Council was held from 13 September to 11 October this year. During the session, the outcome reports of the Universal Periodic Review Working Group of 14 states were adopted. The Universal Periodic Review (UPR) is a process whereby the human rights records of all UN Member States are reviewed. The UPR is one of the main features of the Human Rights Council and is a State-driven process. It affords each State the opportunity of affirming actions they have taken to improve the human rights situations in their respective countries and to fulfil their human rights obligations, with the ultimate aim of improving the human rights situation in all countries and addressing human rights violations wherever they occur.

A total of 6 panel discussions were held during the 48th session, including a 'High-level panel discussion on the tenth anniversary of the United Nations Declaration on Human Rights Education and Training: good practices, challenges and the way forward'. The High Commissioner expressed the view that 'young people must be the protagonists in developing policies and programmes that affect them'. In the discussion, speakers stressed that human rights education was an effective way to fight against inequalities and exclusion, and calls were made for particular attention to be paid to the opportunities and challenges of online education.

The session was further highlighted by the adoption of a resolution (A/HRC/RES/48/13) on the Human right to a clean, healthy and sustainable environment. The resolution was adopted by a vote of 43 in favour, none against and 4 abstentions (as orally revised). The Council recognised the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights and encouraged States to adopt policies for the enjoyment of the right to a safe, clean, healthy and sustainable environment as appropriate, including with respect to biodiversity and ecosystems, and invited the General Assembly to consider the matter.

Retirement of Mr M. Oozeer PDSM, CSK

Mr Mohamad Oozeer PDSM, CSK is no doubt one of the very few, if not the only person in the history of the Mauritius Civil Service to reckon 66 years of service to the Government and to the State of Mauritius. These 66 years include 25 years as Adviser to the Ministry of Finance and most of our officers would have known him in this capacity. He started his career as Temporary Clerk in the General Clerical Services of the Income Tax Department, appointed by the then Colonial Secretary on 25 September 1954. In recognition of his long and outstanding service, he was awarded PDSM on 12 March 2009 and CSK on 12 March 2017.

Mr Oozeer has had a long career in tax administration acquiring a wide experience in the preparation of tax and other related financial legislation.

He retired from civil service in 1995 as Commissioner for Fiscal Investigation and was appointed as Adviser to the Ministry of Finance where he headed the Legislations and other Legal Issues Unit of the Ministry for the last 25 years.

He assisted namely in the preparation of the yearly Appropriation Bills, Supplementary Appropriation Bills, Finance Bills, Financial Resolutions, Business Facilitation Bill, Companies Bill and various other legislations falling under the purview of the Ministry of Finance. His contract of employment ended on 15th November 2020. He was also a Board member of the Mauritius Revenue Authority from 2015 to 2020.

In the performance of his duties, Mr Oozeer interacted closely with the Attorney General's Office, having worked, up till his retirement, with countless Law Officers and officers of the legislative drafting team of the Attorney General's Office, which team falls under the direct supervision of the Parliamentary Counsel, post presently held by Mrs Geereesha Topsy Sonoo.

The Attorney General's Office wishes to express its appreciation for the professionalism, dedication and commitment which permeated throughout Mr Mohamad Oozeer's interaction with this Office. He has been a constant source of inspiration and we wish him a well-earned, long and enjoyable retirement.

"Mr M. Oozeer PDSM, CSK was in charge of the drafting of all the Regulations and Acts at the Ministry of Finance. He was a very hard working and active person and would always ensure close follow up on all files he was involved with, calling after working hours to inform an officer that he had sent a reply which needed to be attended to. He often would be expecting an immediate reply!.

The drafting of the Finance Bill is always a hectic time for both the Ministry of Finance and for our office. Mr Oozeer would put up the first draft of the relevant bills and expect clearance of same during the course of the day itself. His thought process was always very clear and precise and very methodical in his approach.

2021 will be the first year, since I joined the AGO that the Finance Bill will be prepared without the invaluable help of Mr M. Oozeer, PDSM, CSK.

Warmest wishes from the drafting team to Mr Oozeer for a happy retirement."

G. Topsy Sonoo
Parliamentary Counsel

Mr. Oozeer receiving a souvenir from the Legislative Drafting Team to mark his retirement from service



From left to right: Chandni Boodhram, Dheerendra Kumar Dabee, GOSK, S.C., Geereesha Topsy-Sonoo, Reshma Beekarry-Sunassee, Halemoon Maheraly, Mohamad Oozeer, PDSM, CSK, Dinay Reetoo, Diya Beesoondoyal, Rajesh Ramloll S.C., Mooneeswur Seetaram, Purnima Dunputh, Yvan Jean Louis

MBA's Annual Football Tournament

This year, after many years of non-participation, the Attorney General's Office (AGO) participated in the Annual Football Tournament organised by the Mauritius Bar Association. The tournament took place on 23 October 2021 at Sparc Unicity, Cascavelle.

AGO fielded Gavin Coolen, Rajkumar Baungally, Dinay Reetoo, Nirmal Meettook, Hemant Adeen, Jelend Chowrimootoo, Nikheel Thakoor, Yakshini Peerthum, Taron Ramtale and Adiilah Aubeeluck. Abdool Raheem Tajodeen from the Office of the Director of Public Prosecutions (ODPP) also formed part of the team.

Despite being charismatically led by our team captain Gavin Coolen, the heroics of our goalkeeper Rajkumar Baungally and the "Messi-esque" performance of Jelend Chowrimootoo, the team did not go through to the final stages of the tournament.

It nevertheless turned out to be a great bonding opportunity amongst the seniors and juniors of the office and that of the ODPP. We intend to foster this team spirit and we are looking forward to next year's tournament. Moreover, it was one of the very few teams which fielded two girls.

We thank the Solicitor General for his encouragement in putting together a football team for AGO as well as all members of the office for their support. A special thanks also goes to Dinay Reetoo.



Photo: Yahia Nazroo

Back left to right: Jelend Chowrimootoo, Abdool Raheem Tajodeen, Taron Ramtale, Dinay Reetoo, (supported by) Rajesh Ramlool, Solicitor-General, Adiilah Aubeeluck

Front left to right: Nirmal Meettook, Rajkumar Baungally, Yakshini Peerthum, Hemant Adeen