MARC NEWSLETTER

February 2015

Editor's Note

Dear All,

This is the very first issue of MARC's Newsletter which we are launching as a platform to inform, to host and initiate discussions and exchanges on issues pertaining to the development of Alternative Dispute Resolution methods in Mauritius.

It will need your full support and contribution to stay alive and fulfill therefore its objective.

State justice, not just in Mauritius, is often burdened and it takes time for a dispute to be heard and judged. Resolution of disputes may take months and very often years and its adversarial nature may make it more difficult for parties to pursue business relationships.ADR is a solution.

Furthermore, in a context of increasing competition in trade and industry the MCCI strongly believes that it is crucial for lawyers and operators as well to become familiar with ADR.

The MCCI is a member of the International Chamber of Commerce (ICC) and has entered into a strategic partnership with the Paris Chamber of Commerce (CCIP) and their Mediation and Arbitration arm 'Le Centre de Médiation et d'Arbitrage de Paris' (CMAP).

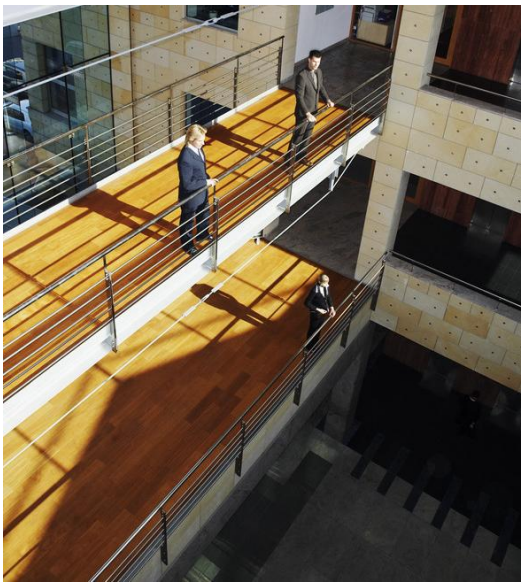
Relying on the experience, knowhow and network of CMAP, the MCCI has succeeded in building capacity for its ADR activities set up in 1996 and which has been rebranded MCCI Arbitration and Mediation Center (MARC).

2014 was a very successful year for MARC in terms of number of cases and also in terms of visibility and new activities such as training. We wish through the regular issue of this Newsletter to inform both the legal and business communities on our various activities and also contribute to the promotion and development of ADR recourse in Mauritius and the Region.

We also invite you to send us your comments or article to be published in the MARC Newsletter.

Barlen Pillay, MARC Permanent Secretariat

New eligibility criteria for MARC Panel of Arbitrators



"One of the new commercial criteria for substance is that the constitution of the company should contain an integrated arbitration clause providing for arbitration in Mauritius"

Financial Services Sector:

New Rules on substance applicable since 1 January 2015 with a requirement for offshore companies to include an arbitration clause in their constitution

The Financial Services Commission has since 1 January 2015 implemented new commercial substance requirements for Global Business Companies Category 1 (GBCs1), to ensure that they are clearly controlled and managed from Mauritius. GBC1s need a tax resident certificate – the TRC – to prove that they are tax residents of Mauritius and hence entitled to the related benefits under the Mauritian offshore sector regime.

This certificate is delivered yearly by the Mauritius Revenue Authority after confirmation and recommendation from the FSC. Prior to 1 January 2015, the substance requirements to qualify for tax residency for GBC1s have been as follows for a number of years:

- The need for two resident directors
- Board meetings to be held and chaired in Mauritius
- Accounting records to be maintained at the registered office in Mauritius
- Principal bank account to be held in Mauritius
- Accounts to be audited in Mauritius
- Accounts audit to be based on IFRS and approved GAAPs

In addition, GBC1s must now meet with at least one of the following criteria to obtain the TRC:

- Having office premises in Mauritius
- Employing at least one Mauritian at administrative or technical level
- **Including an arbitration clause in the constitution of the company providing for arbitration in Mauritius**
- Listing on the Stock Exchange of Mauritius
- Holding or expecting to hold assets in Mauritius worth at least 100,000 USD for the next 12 months
- Having a reasonable yearly expenditure in relation to its type of activities in Mauritius

MARC Arbitration Clause:

MARC, which has been providing an institutional framework for arbitration of commercial disputes since 1996 as an arm of the Mauritius Chamber of Commerce and Industry, proposes a model arbitration clause, which GBC1s may consider for adoption in their constitution in order to meet the new substance requirements.

The model "Arbitration Only" clause is as follows:

"Any dispute arising in connection with the present contract shall be finally settled under the Arbitration Rules of the Arbitration and Mediation Center of the Mauritius Chamber of Commerce and Industry (MARC) by… (one or three) arbitrator(s) appointed in accordance with the said rules."

If the contract is of an international nature, the parties should particularly foresee the applicable law, the venue and the language of arbitration.

Arbitration of disputes in the Financial Services Sector

Mediation: The new dispute resolution tool for SMEs

Cost-effective, rapid and confidential, mediation is set to become a favored tool for resolving commercial disputes between SMEs

MARC's Mediation framework can provide structured support at low cost to SMEs for the resolution of business disputes through mediation.

Mediation is an amicable dispute resolution process in which an independent, impartial third party trained in mediation helps the parties to reach a negotiated outcome to their dispute by adopting a consensual solution satisfactory to each of them.

The aim of mediation is to promote reconciliation, settlement or compromise. In this sense, it is a perfect business management tool for resolving conflicts smoothly. The fundamental difference between mediation and arbitration is that the purpose of mediation is to bring about reconciliation between parties through the intervention of a third party, and not to settle the dispute by imposing a binding decision. Mediation also differs from expertise in that the expert gives a technical or financial advice, while the mediator essentially works on the needs and expectations of the parties, and does not in principle give any advice on the merits of the case.

Companies operate now in a changed corporate world, one in which managing relationships in business circles, building and maintaining relationships are extremely important. The most successful companies make of networking, building business trust and smoothing out conflicts efficiently, a true art. A dispute degenerating into a court case can damage commercial relationships and reputation, and all companies have a duty to, as far as possible, attempt to preserve relationships, resolve conflicts as soon as possible before they worsen.

Various types of disputes may affect a company. It may have a dispute with another company, with its own officers, with investors, with suppliers or customers, with regulators, with the community at large. While not all disputes may be resolved through mediation, a vast majority can. Mediation as an ADR mechanism if optimized can be a useful business management tool and a value addition to the whole process of building and maintaining business relationships.

Mediation is based on the principle of a contractual agreement. It is based upon mutuality, trust, collaborative problem solving in order to achieve a common goal. Contractual mediation, where parties have provided either before or upon occurrence of a dispute, in the form of a contract, that the dispute will be solved by mediation, has the advantage of a mutual agreement between the parties at the very onset. The ADR framework is in place at the beginning, parties own the whole process, and all the elements are in place to assist them in communicating and trying to find a creative solution to their issue.

The MARC has set up such a contractual mediation process since February 2014. **For more information, contact the MARC Permanent Secretariat (Barlen Pillay or Anjana Chikhuri) on 208 33 01 or at akhemraz@mcci.org/bpillay@mcci.org**

"The training was superb. It was an even balance between theory and practical. I thought I understood the subject but it was only through doing the exercises that I really began to understand the benefits of Mediation. Certainly it's not only for lawyers but would benefit business men, executives and leaders.
Full credit to an excellent presentation team and well thought out course."

Mitchell Barrett,
Lawyer

I guess that many of us did not know what to expect at the start of the training session. We ended up learning the basics of mediation by Saturday. But most of all, we lived "*une belle aventure humaine*" for one week.

Jean-Didier Sauzier,
Chartered Secretary

TRAINING IN MEDIATION WITH THE *CENTRE DE MEDIATION ET D'ARBITRAGE DE PARIS (CMAP)*

The CMAP held an intensive training course in mediation in December 2014. MARC organized the training in the context of the partnership agreement between MCCI and CMAP, established in 2012. It also collaborated with the Mauritius Bar Association to set up the course. Participants came from various fields namely law practice, judiciary, finance, engineering, human resource management and executive management.

The week of 1 to 6 December 2014 was indeed an intensive one for the 28 professionals who participated in the training. It was packed full of role plays which put to test their theoretical knowledge about the stages and techniques of mediation. The course also covered specific issues such as confidentiality, the role of lawyers, ethics and freedom from bias. Overall participants were very satisfied with the quality and standard of the training content as well as that of the two French experts who delivered the course: Melanie Germain, lawyer in charge of international activities at the CMAP and Patrick Van Leynseele, Bar-at-law in Bruxelles and New York, and experienced mediator. The training concluded with an assessment of one hour, involving a role play in which each participant was required to play the role of a mediator. The pass rate following this assessment was 74%.

The batch of 17 participants who passed is thus the first to acquire the qualification of "Médiateur certifié par l'agrément CMAP-MARC". MARC intends to renew this training program on a regular basis.

Some pictures of the training:

Challenge of the jurisdiction of the arbitral tribunal: The Supreme Court adopts a non-interventionist approach and upholds the principle of competence-competence in a recent case, an excellent signal for the development of international arbitration in Mauritius:

Arbitration proceedings sometimes trigger a host of parallel court proceedings initiated by parties who wish to challenge the jurisdiction of an arbitral tribunal. In a recent decision by the Supreme Court of Mauritius (Mall of Mont Choisy Ltd v Pick 'N Pay Retailers (Proprietary) Limited 2015 SCJ 10, the Court took a firm stand by opting for a non-interventionist approach, in support of the principle of competence-competence, considered as one of the pillars of arbitration. The judgment refers to a case decided by the Supreme Court of Canada (Dell Computer Corporation v Union des Consommateurs and Olivier Dumoulin (2007) 2 SCR 801, which sets out and analyses two opposing schools of thought as regards how the Court should approach the question of validity and applicability of the arbitration agreement and the degree of scrutiny it should exercise. The first school, it is said, "favours an interventionist judicial approach to questions relating to the jurisdiction of arbitrators." Since the Court has the power to review the arbitrator's decision regarding his or her jurisdiction, then it is argued to avoid duplication of proceedings, the question of validity or applicability of the arbitration agreement should be within the jurisdiction of the court to decide once and for all. On the other hand "the other school of thought gives precedence to the arbitration process. It is concerned with preventing delaying tactics and is associated with the principle commonly known as the 'competence-competence' principle. According to it, arbitrators should be allowed to exercise their power to rule first on their own jurisdiction." The Supreme Court of Canada favoured the noninterventionist judicial approach in the Dell case, and the Supreme Court of Mauritius followed the example. Referring to the International Arbitration Act 2009, the judgment indicates that: "Section 5(2) states equivocally that the Court should examine the arbitration agreement on a prima facie basis. It is therefore clear that the legislation has opted for a non interventionist judicial approach."The judgment also further states that *"in deciding whether to refer a case to arbitration, the Court should be satisfied that 'there is a very strong probability that the arbitration agreement may be null, void, inoperative or incapable of being performed." The "very strong probability" test is in our views a very high one. The judgment of the Supreme Court of Canada in the case of Dell Computers indicates that his test may be satisfied when 'the challenge to the arbitrator's jurisdiction is based solely on a question of law.' We further read from the headnote to the case the following: 'If the challenge required the production and review of factual evidence, the Court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. (...) Before departing from the general rule of referral, the Court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding." We respectfully take the same view."* This judgment goes a long way in support of the arbitral process in Mauritius.

To learn more on the question of challenge of the jurisdiction of the arbitral tribunal, read the article by Mathias Scherer, "Damages as a sanction for commencing court proceedings in breach of an arbitration agreement" at http://kluwerarbitrationblog.com

Setting up and first meeting of the Commission in March 2014

To join the MARC Commission for Strategy and Development, contact the MARC Permanent Secretariat on akhemraz@mcci.org or bpillay@mcci.org

MARC Commission for Strategy and Development

The Commission for Strategy and Development of the MCCI Arbitration and Mediation Center (MARC) held its first meeting of this year 2015 on Monday 2 February. Main discussions were on the necessity for harmonised contract drafting practices regarding dispute resolution, especially in construction contracts where the Government and a private sector operator are involved. Members also discussed about the need for a legislative framework for mediation in Mauritius, in order to enable the business community to optimise benefits from this out-of-court conflict-solving technique which is gaining increasing popularity in developed countries. The Singapore model was considered as a good example. Singapore, which has recently launched its Singapore International Mediation Center, is hailed as a leader in the field of international ADR and has over the years refined its arbitration and mediation institutional framework with various legal tools.

Another topic of discussion was the need for structured training and sensitisation programmes targeting both the business and legal communities, as well as the need for continuous professional development courses for arbitrators. The MARC Permanent Secretariat announced its forthcoming training programmes in mediation and arbitration for the year, as well as new eligibility criteria for admission on the MARC Panel of Arbitrators, which will be implemented as from March 2015.

MCCI Arbitration and Mediation Center

Mauritius Chamber of Commerce and Industry
3, Royal Street, Port Louis, Mauritius
Tel. +230 208 3301
Fax. +230 208 0076
www.mcci.org

Editorial Team: Mrs. Anjana Khemraz-Chikhuri &
Mr. Barlen Pillay, from the MARC Permanent Secretariat

Should you wish to contribute articles to the MARC Newsletter, please contact us at akhemraz@mcci.org or bpillay@mcci.org