

THE INTERNATIONAL ARBITRATION (MISCELLANEOUS PROVISIONS) BILL
(No. VI of 2013)

Explanatory Memorandum

The objects of this Bill are –

- (a) to amend the International Arbitration Act in order to facilitate its objective of creating the most favourable environment for international arbitration to thrive in Mauritius; and
- (b) to resolve an ambiguity in the regime applicable to the recognition and enforcement of foreign arbitral awards in Mauritius and to facilitate the operation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in Mauritius.

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ARRANGEMENT OF CLAUSES

Clause

1. Short title
2. Code de Procédure Civile amended
3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act amended
4. International Arbitration Act amended
5. Transitional provision
6. Commencement

A BILL

To amend various enactments relating to international arbitration

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the International Arbitration (Miscellaneous Provisions) Act 2013.

2. Code de Procédure Civile amended

The Code de Procédure Civile is amended, in the “Deuxième Partie”, “Livre Troisième”, “Chapitre Cinquième” -

- (a) by repealing article 1028 and replacing it by the following article –

1028. Les sentences arbitrales rendues à l'étranger sont régies par -

1^o le *Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act*; et

2^o le *International Arbitration Act*.
- (b) by repealing articles 1028-1 to 1028-11.

3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act amended

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act is amended –

- (a) by inserting, after section 3, the following new section –

3A. Convention to apply to all foreign awards irrespective of reciprocity

The Convention shall apply to the recognition and enforcement of all arbitral awards made in the territory of a State other than Mauritius, irrespective of whether or not there is reciprocity on the part of that State.

- (b) by inserting, after section 4, the following new sections –

4A. English and French official languages for the purpose of the Convention

For the purposes of Article IV of the Convention, any arbitral award made in the English or French language shall be deemed to have been made in an official language of Mauritius.

4B. Limitation and prescription period not to apply

Notwithstanding any other enactment, no limitation or prescription period provided for in the laws of Mauritius shall apply to the recognition and enforcement of an arbitral award under the Convention.

4. International Arbitration Act amended

The International Arbitration Act is amended –

(a) in section 2 –

(i) by repealing subsection (1) and replacing it by the following subsection–

(1) In this Act –

“Amended Model Law” means the Model Law on International Commercial Arbitration adopted by UNCITRAL on 21 June 1985, as amended on 7 July 2006;

“arbitration” means any arbitration, whether or not administered by a permanent arbitral institution;

“arbitration agreement” means an agreement by parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not;

“arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

“CLOUT database” means the database of case law on UNCITRAL texts (CLOUT), maintained by UNCITRAL and accessible *inter alia* on the website of UNCITRAL;

“costs of the arbitration” means the costs of the PCA in discharging its functions under this Act, the fees and expenses of the arbitral tribunal, the legal and other expenses of parties, and any other expenses related to the arbitration;

“Court” –

(a) means a Court in Mauritius; and

(b) includes, where appropriate, a body or organ of the judicial system of a foreign State; but

(c) does not include the PCA;

“data message” –

- (a) means information generated, sent, received or stored by electronic, magnetic, optical or similar means; and
- (b) includes electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

“Designated Judge” means a Judge nominated by the Chief Justice under section 43;

“domestic arbitration” means any arbitration with its juridical seat in Mauritius, other than an international arbitration;

“electronic communication” means any communication between parties by means of a data message;

“GBL Company” means a company holding a Global Business Licence under the Financial Services Act;

“international arbitration” means any arbitration where –

- (a) the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business in different States;
- (b) one of the following places is situated outside the State in which the parties have their place of business –
 - (i) the juridical seat of the arbitration, if determined in, or pursuant to, the arbitration agreement; or
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected;

- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State or that this Act is to apply to their arbitration; or
- (d) the arbitration arises under an arbitration clause included in the constitution of a GBL company pursuant to section 3D;

“International Arbitration Rules” means Rules made under section 198 of the Courts Act for the purposes of this Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act;

“juridical seat” means the juridical seat of an arbitration referred to in section 10;

“Model Law jurisdictions” means jurisdictions which have, or have substantially, adopted the Model Law;

“New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed at New York on 10 June 1958;

“PCA” means the Permanent Court of Arbitration, having its seat at The Hague, acting through its Secretary-General;

“UNCITRAL” means the United Nations Commission on International Trade Law.

- (ii) by inserting, after subsection (1), the following new subsection –

(1A) For the purposes of determining whether an arbitration is an international arbitration –

- (a) where a party has more than one place of business, its place of business shall be that which has the closest relationship with the arbitration agreement;
- (b) where a party does not have a place of business, reference shall be made to its habitual residence.

(b) by inserting, after section 2, the following new sections –

2A. Extent of Court intervention

In matters governed by this Act, no Court shall intervene except where so provided in this Act.

2B. International origin and general principles

In applying and interpreting this Act and in developing the law applicable to international arbitration in Mauritius –

- (a) regard shall be had to the origin of the Amended Model Law, the corresponding provisions of which are set out in the Third Schedule, and to the need to promote uniformity in the application of the Model Law and the observance of good faith;
- (b) any question concerning matters governed by the Amended Model Law which is not expressly settled in that Law shall be settled in conformity with the general principles on which that Law is based; and
- (c) recourse may be had to international materials relating to the Amended Model Law and to its interpretation, including –
 - (i) relevant reports of UNCITRAL;
 - (ii) relevant reports and analytical commentaries of the UNCITRAL Secretariat;
 - (iii) relevant case law from other Model Law jurisdictions, including the case law reported by UNCITRAL in its CLOUT database; and
 - (iv) textbooks, articles and doctrinal commentaries on the Amended Model Law.

2C. Disconnection of international arbitration from domestic arbitration and regime

(1) In applying and interpreting this Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act, and in developing the law applicable to international arbitration in Mauritius, no recourse shall be had to, and no account shall be taken of, the law or procedure relating to domestic arbitration.

- (2) In particular, and for the avoidance of doubt –
- (a) any existing rules concerning the reliance on evidence, the service of proceedings out of the jurisdiction of Mauritius, or any other matter shall not apply to applications made to a Court, or matters arising, under this Act or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act;
 - (b) specific rules of Court may be made pursuant to section 198 of the Courts Act, setting out a comprehensive and stand-alone procedural code for the applications and matters referred to in paragraph (a); and
 - (c) rules made pursuant to paragraph (b) may make provision for *inter alia* –
 - (i) the hearing of the applications and matters by Designated Judges so that all applications and matters are heard and determined by Judges with specialist knowledge in the field of international arbitration;
 - (ii) the service of proceedings out of the jurisdiction by electronic means or courier;
 - (iii) the payment of security for costs; and
 - (iv) the assessment and payment of costs by the parties and their legal representatives, arising out of the applications and matters.

2D. Waiver of right to object

A party which knows, or could with reasonable diligence have known, that any provision of this Act from which the parties may agree to derogate or any requirement under the arbitration agreement has not been complied with, but proceeds with the arbitration proceedings without stating an objection to the non-compliance within a reasonable time or such time as may have been agreed upon by the parties shall be deemed to have waived its right to object.

- (c) by inserting, after section 2D, the following new heading –

PART IA – SCOPE OF APPLICATION

- (d) by repealing section 3 and replacing it by the following section –

3. Temporal application

(1) This Act shall not apply to arbitration proceedings initiated before its commencement.

(2) This Act shall apply to arbitration proceedings initiated on or after its commencement under an arbitration agreement, irrespective of the date on which the arbitration agreement was entered into.

- (e) by inserting, after section 3, the following new sections –

3A. Material application

(1) Subject to subsection (2) and section 3B, this Act shall apply to an international arbitration only where its juridical seat is in Mauritius.

(2) Sections 5, 6, 22 and 23 shall apply to every international arbitration, whether or not its juridical seat is in Mauritius.

3B. Application of First Schedule

Subject to section 3D, the First Schedule or any of its provisions shall apply to an international arbitration only where the parties so agree by making express reference to that Schedule or to that specific provision.

3C. Determination of threshold issues

(1) Subject to section 10(1), any issue as to –

- (a) whether an arbitration is an international arbitration;
- (b) whether the juridical seat of an international arbitration is in Mauritius; or
- (c) whether the First Schedule or any of its provisions applies to an international arbitration,

shall be determined by the arbitral tribunal.

(2) Where an issue referred to in subsection (1) arises before a Court or the PCA –

- (a) where the arbitral tribunal has been constituted, that Court or the PCA shall decline to decide that issue and refer it for determination by the arbitral tribunal;
- (b) where the arbitral tribunal has not yet been constituted, the Court or the PCA may make a provisional determination on the issue pending the determination by the arbitral tribunal.

3D. Arbitration clause in constitution of GBL company

(1) The shareholders of a GBL company may include an arbitration clause in the constitution of the company, which provides that any dispute arising out of the constitution of the company shall be referred to arbitration under this Act.

(2) Notwithstanding any agreement to the contrary, the juridical seat of any arbitration under this section shall be Mauritius and the First Schedule shall apply to that arbitration.

(3) The shareholders of a GBL company may incorporate an arbitration agreement in the constitution of the company, whether by reference to the model arbitration clause contained in the Second Schedule or otherwise –

- (a) at the time of the incorporation of the company; or
- (b) at any time after the incorporation of the company, by a unanimous resolution of all the current shareholders.

(4) Nothing in this section shall limit –

- (a) the right of the shareholders of a GBL company to agree to the arbitration of a dispute concerning or arising out of an agreement other than the constitution of the company, such as a shareholders' agreement; or
- (b) the right of a GBL company to agree to the arbitration of a dispute between itself and a third party,

and subsection (2) shall not apply to any such arbitration.

3E. Miscellaneous provisions on scope of application

(1) This Act shall bind the State.

(2) The fact that an enactment confers jurisdiction on a Court but does not provide for the determination of the matter by arbitration shall not per se mean that a dispute about the matter is not capable of determination by arbitration.

(3) Where any other enactment provides for the arbitration of a dispute, this Act shall not apply to an arbitration arising under that other enactment.

(f) in section 10(1), by deleting the words "Subject to section 3(5)(b)(ii)" and replacing them by the words "Subject to section 3C(2)(b)";

(g) in section 23 –

(i) by repealing subsections (1) and (2) and replacing them by the following subsections –

(1) (a) The Supreme Court shall have the same power to issue an interim measure in relation to arbitration proceedings as it has in relation to proceedings in Court, whether the juridical seat of the arbitration is in Mauritius or not, and whether that power is usually exercised by a Judge in Chambers or otherwise.

(b) In exercising a power referred to in paragraph (a), the Court shall have regard to the specific features of international arbitration.

(2) Unless the parties otherwise agree, the power referred to in subsection (1)(a) shall be exercised in accordance with subsections (2A) to (6).

(ii) by inserting, after subsection (2), the following new subsection –

(2A) The Court shall exercise the power referred to in subsection (1)(a) in such a manner as to support, and not to disrupt, the existing or contemplated arbitration proceedings.

- (h) by inserting, after section 39, the following new section –

39A. Order setting aside arbitral award

The Supreme Court may, where it makes an order setting aside an arbitral award or any part thereof under section 39, and taking into account the grounds on which the award or the relevant part thereof has been set aside, give such other directives as it considers appropriate, including directives relating to –

- (a) the remittance of the matter to the arbitral tribunal;
 - (b) the commencement of a new arbitration, including the time within which such arbitration shall be commenced;
 - (c) the future conduct of any proceedings the parties to which were referred to arbitration under section 5(2); or
 - (d) the bringing of any action, including the time within which such action shall be brought, by any party to the arbitral award concerning any matter which was the subject of the arbitral award which was set aside by the Supreme Court.
- (i) in section 42 –
- (i) in subsection (1) –
 - (A) by deleting the word “For” and replacing it by the words “Subject to subsection (1)(A), for”;
 - (B) by deleting the word “Judges” and replacing it by the words “Designated Judges, composed of such Designated Judges as the Chief Justice may determine”;
 - (ii) by inserting, after subsection (1), the following new subsections –
 - (1A) Applications to the Supreme Court for interim measures under sections 6(2) and 23 shall in the first instance be made to, heard by and determined by a Judge in Chambers who shall be a Designated Judge, but shall be returnable before a panel of 3 Designated Judges, composed of the Designated Judge who initially heard the matter and of such 2 other Designated Judges as the Chief Justice may determine.

(1B) (a) Any hearing before the Supreme Court under this Act or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act shall be held in public, save that the Court may, upon the application of a party, exclude from the proceedings persons other than the parties and their legal representatives where –

- (i) all the parties so agree; or
- (ii) the Court considers it to be necessary or expedient in circumstances where publicity would prejudice the interests of justice, taking into account the specific features of international arbitration, including any expectation of confidentiality which the parties may have had when concluding their arbitration agreement or any need to protect confidential information.

(b) Notwithstanding paragraph (a), the announcement of the decision of the Court shall be in public.

(1C) The Court may, on the application of one or all of the parties and where the interests of justice so require, prohibit the publication of all information relating to Court proceedings under this Act.

- (j) by adding the following new sections –

43. Designated Judge

(1) The Chief Justice shall nominate 6 Judges to serve as Designated Judges under this Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act.

(2) A Judge nominated by the Chief Justice under subsection (1) shall remain a Designated Judge for a period of 5 years or until the end of his service as a Judge, whichever occurs earlier, and may be eligible for re-nomination as Designated Judge for further periods of 5 years.

(3) A Judge's nomination as Designated Judge shall not affect his ability to carry out other business in the Supreme Court.

44. Appeal to Judicial Committee

Any appeal to the Judicial Committee under section 42(2) against a final decision of the Supreme Court under this Act or under section 4(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act shall be made in accordance with the procedure applicable to appeals as of right under the Mauritius (Appeals to Privy Council) Order 1968.

45. Witness statements

(1) Notwithstanding any other enactment, a witness statement which complies with the International Arbitration Rules shall be admissible in evidence in proceedings in Court under this Act or under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act.

(2) Any person who, for the purposes of this Act or the International Arbitration Rules, knowingly makes a witness statement which is false in any material respect shall commit an offence and shall, on conviction, be liable to a fine not exceeding 10, 000 rupees and to penal servitude for a term not exceeding 3 years.

(k) in the First Schedule –

- (i) by deleting the words “[Section 3]” and replacing them by the words “[Section 3B]”;
- (ii) in paragraphs 1(1) and 2(1), by deleting the words “section 3(8)” and replacing them by the words “section 2A”;

(l) in the Second Schedule –

- (i) by deleting the words “[Section 3]” and replacing them by the words “[Section 3D]”;
- (ii) in paragraph 1, by deleting the words “section 3(6)” and replacing them by the words “section 3D”;
- (iii) in paragraph 2 –
 - (A) in subparagraph (1), by deleting the words “or relating to” and “, or relating to the company,”;

(B) by adding the following new subparagraph –

(7) Any dispute, controversy or claim shall be kept confidential and any proceedings before the Supreme Court in relation thereto shall, with the agreement of all parties, be heard in private.

(m) by repealing the Third Schedule and replacing it by the Third Schedule set out in the Schedule to this Act.

5. Transitional provision

This Act shall apply to all proceedings in Court under the International Arbitration Act or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act which are pending on the commencement of this Act.

6. Commencement

This Act shall come into operation on 1 June 2013.

SCHEDULE
[Section 4(m)]
THIRD SCHEDULE
[Section 2B]

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