marc insights

ISSUE 1

MCCI ARBITRATION & MEDIATION CENTER

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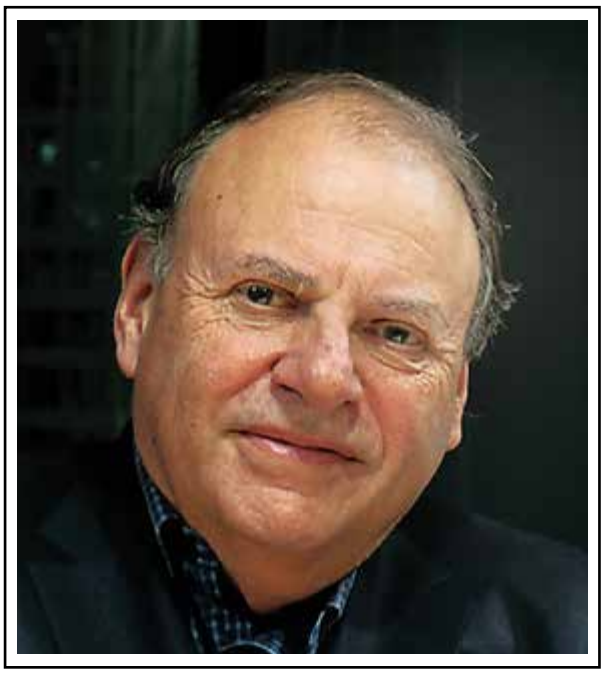


Message of the President of the MARC Court

Neil KAPLAN CBE QC SBS

President of the MARC Court;
International Arbitrator

Arbitration Chambers, Hong Kong

Dear Readers,

I am very pleased to write the opening message for this first edition of MARC Insights, MARC's first Dispute Resolution review, dedicated to informing and debating on topics and issues related to Alternative Dispute Resolution.

As President of the MARC Court since 2017, I have been following with interest the evolution of the Centre, and I am proud of the achievements realised by the MARC Team in such a short period of time.

In a little less than four years, MARC has set up a world-class MARC Court and MARC Advisory Board. It also introduced the cutting-edge 2018 MARC Arbitration Rules and organised a very successful first edition of the Mauritius Arbitration Week, which I had the pleasure to launch in May 2018. This is on top of setting up MARC45 – the group for young arbitration practitioners – roadshows and participation in international arbitration events in London, Paris, Kenya, Durban, Madagascar, Reunion Island, Hong Kong, Beijing, Singapore and Seoul. The series of impressive events organised also included the second edition of the Mauritius Arbitration Week in 2019, local events to sensitise the Mauritian legal and business community, as well as training sessions organised on award-writing, tribunal secretary duties, case management and international arbitration practice.

The caseload increase is developing at a promising rate, and I have good reasons to believe that the Centre will be a flourishing one in the coming years.

The launching of MARC Insights comes at a propitious moment of the year; it is time to reflect on past achievements, on the work at hand and on the future.

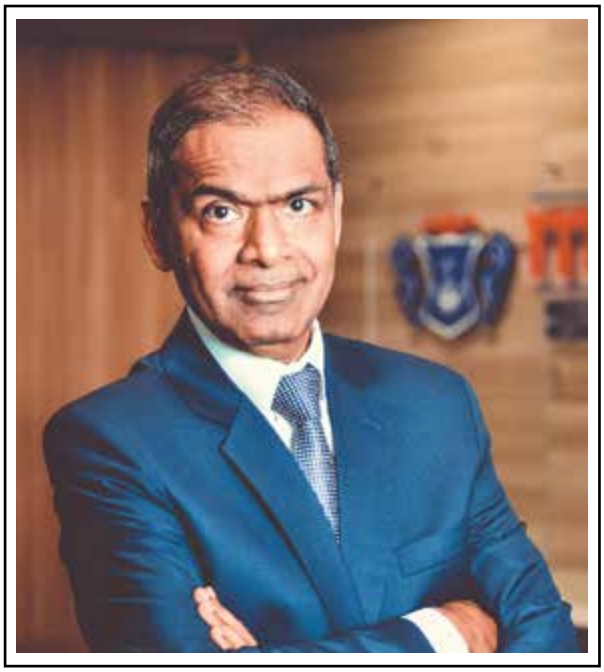
This first issue has received contributions from guest writers who are well-known in the legal field, especially in arbitration and mediation. Members of the MARC Court, MARC Advisory Board and the MARC Secretariat have also touched upon important subjects in this review. We have highlighted the position of Mauritius as a bridge between Asia and Africa and also included hot topics related to alternative dispute resolution methods. In addition, we have included a spotlight on investment arbitration as well.

It also features an interview with the Honourable Yves Fortier, the latest addition to the MARC Court. Yves is an esteemed and respected arbitrator and colleague with whom I have had the opportunity to work not only as Board members of ICCA but as arbitrators. Yves also served as Canada's representative at the United Nations and thus brings to the Court great experience of international affairs. The Court is truly international and the combined experience of its members will assist MARC in developing best practices and excellence in arbitration.

This first edition of MARC Insights also features a Q&A with some members of the MARC Court and the MARC Advisory Board, keen to share their experience and insights.

I hope that you will enjoy this first MARC Insights.

Congratulations to the MARC Team on its achievements, and I reiterate my continued support towards the progress of MARC into a world-class arbitration centre.



Editorial

Barlen PILLAY
Secretary General
The Mauritius Chamber of Commerce and Industry

Dear Readers,

I am honored to write the editorial of this first edition of MARC Insights and I seize this opportunity to congratulate all the authors who have contributed to it, as well as the MARC team for their efficiency and team work in its achievement. I wish to thank in particular, the President of the MARC Court, Mr Neil Kaplan QC, all the members of the MARC Court and the MARC Advisory Board for their relentless support towards the development of MARC since 2017.

It is also a wonderful opportunity for me to reflect on the achievements of MARC since its inception.

The MCCI as a forward-looking private sector institution conscious of the specific and complex nature of commercial disputes, the more so in international transactions, decided in 1996 to set up a Permanent Court of Arbitration, operating under its aegis. The Arbitration Court was introduced as a service to economic agents to provide them the means to better manage costs and time of dispute resolution through arbitral proceedings while satisfying the needs of promptness, efficiency and confidentiality as well as being in compliance with international standards and best practice.

At that time, Mauritius did not exist on the map of international arbitration. Domestic commercial arbitration had certainly always existed - at least dating from the 1808 Napoleonic Code - and the Mauritius Chamber of Commerce and Industry has itself conducted arbitrations dating as far back as 1855 under its auspices. But, the Region was little known in international arbitration.

For a retrospective of the main milestones:

• In 1996, the Mauritius Chamber of Commerce and Industry became the pioneer of institutional arbitration in Mauritius and the Indian Ocean Region by creating a Permanent Court of Arbitration, modeled on the ICC International Court of Arbitration.

• In 2004, the Convention of New York on the Recognition and Enforcement of Foreign Arbitral Awards Act 2004 was promulgated, allowing foreign arbitral awards to be recognized and enforced in Mauritius. The MCCI was instrumental in bringing this positive change to the international legislative profile of Mauritius as it had made numerous representations to Government to further the development of international commercial arbitration in Mauritius, focusing its efforts in two specific directions: firstly, to convince the Government to ratify the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, and secondly, to adopt in addition to the domestic law, legal provisions for an International Arbitration Act inspired from international standards. These representations are evidenced in the 1998 Report of the Presidential Commission on Judicial Reform, chaired by Lord Mackay.

• In 2009 was proclaimed the International Arbitration Act (IAA), which came to fill the gaps of our legislative apparatus for international arbitration. Based largely on the UNCITRAL Model Law on International Arbitration, the IAA was the second pillar of the building with the ratification of the New York Convention.

• The Law Practitioners Act was also amended to allow qualified and experienced foreign lawyers in international law and arbitration to work in Mauritius.

• Moreover, since its introduction, our International Arbitration Act has not remained static but has been particularly sensitive to developments in law and practice. When it was introduced in Parliament, mention was made that the IAA would be monitored

over the years, with a view to identifying any problems with its content or possibilities for improvement.

• It is in this spirit that the law was amended in 2013. The amendments made it possible, inter alia, to introduce more clarity in the legislative provisions on the recognition and enforcement of foreign arbitral awards. They also allowed the appointment by the Chief Justice, and for a period of 5 years - of 6 Judges specialized in arbitration - the designated judges - and having the responsibility to deal with cases arising from the IAA and the 2004 Act on the New York Convention, the objective being to allow these judges to acquire expertise in the field of international arbitration.

• In addition to Government initiatives, the Judiciary in Mauritius has been particularly supportive of the development of arbitration, for instance as exemplified by judgements such as **MALL OF MONT CHOISY LIMITED v PICK 'N PAY RETAILERS (PROPRIETARY) LIMITED & ORS and that of CRUZ CITY 1 MAURITIUS HOLDINGS v UNITECH LIMITED & ANOR.**

Arbitration finds its legitimacy in its conformity with international standards of fair trial and the rule of law. Although it is a system in its own right, arbitration has the support and supervision of the state judiciary and does not operate in a legal vacuum. With a reactive legislative apparatus, a judiciary favorable to the development of arbitration, and a reliable arbitration center such as MARC, which has stood the test of time, we have all the assets for arbitration to flourish in Mauritius.

However, there is still a long way to go and we must not rest on our laurels. Important tasks include making economic operators more aware of the benefits of using arbitration, consistently providing training in arbitration practice and developing best practices, and ensuring that MARC benefits from visibility and recognition on the international arbitration scene.

On this note, I would like to take this opportunity to congratulate once again the MARC team for the work achieved in 2019, and reiterate the complete support of the MCCI towards the development of MARC.

"The Mauritius Chamber of Commerce and Industry has itself conducted arbitrations dating as far back as 1855 under its auspices."

• Through its years of existence, MARC has administered a significant number of both international and domestic cases, ranging from less than 1 million MUR to 650,000 million MUR. MARC has also conducted several training programmes in arbitration and mediation, enabling both local and foreign practitioners to develop their skills in the field and consolidate their practice. MARC has also organised numerous workshops and conferences, including two editions of the Mauritius Arbitration Week in 2018 and 2019. It has also revamped its hearings facilities, and can now offer state-of-the-art arbitration and mediation facilities at its premises in Port Louis. The Center has also provided job opportunities for seasoned as well as younger law practitioners, whether working as counsel to parties in arbitration cases or as tribunal secretaries. Arbitral tribunals have been composed of both local and foreign arbitrators. And since 2017, thanks to a robust team headed by Mr Neil Kaplan QC, the Center has expanded its international outreach and has set up a new governance structure composed of the world's finest arbitration experts, such as Funke Adekoya SAN, Hon. Yves Fortier, Sarah Grimmer, Sophie Henry, Lord Neuberger, Prof. Marike Paulsson, David Rivkin, Prof. Klaus Sachs, Harish Salve SA, Roger Wakefield, to name a few.

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Changing Landscape of Confidentiality in International Arbitration

Confidentiality of arbitral proceedings is often attributed as the driving force behind the growth of international arbitration in the last sixty years. But, as Redfern and Hunter mentions, though confidentiality still remains a key attraction of arbitration "*... the once-general confidentiality of arbitral proceedings has been eroded in recent years ...*"[1]. Recently, in the 2018 International Arbitration Survey: The Evolution of International Arbitration, conducted by White & Case and Queen Mary University of London, 87% of respondents believed that confidentiality in international commercial arbitration is of importance. However, confidentiality is not of itself the single biggest driver behind the choice of arbitration.[2]

Professor Gary Born suggests that due to an absence of international norms prescribing a duty of confidentiality, the national legal systems have taken widely differing approaches on whether international arbitration proceedings are confidential, and the scope of any implied confidentiality obligations[3].

The UNCITRAL Model Law is silent on confidentiality in international arbitration, and therefore many jurisdictions, such as the United Kingdom, Korea, Japan, the Federal Arbitration Act in the United States, the Swiss law do not stipulate any express obligations. However, some arbitral institutions, such as London Court of International Arbitration (LCIA)[4] and Singapore International Arbitration Centre (SIAC)[5] prescribe that arbitral proceedings shall remain confidential. The International Chamber of Commerce (ICC) rules prescribes that upon the request of a party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.[6]

One important distinction which should be kept in mind, is between 'privacy' and 'confidentiality' of the arbitration proceedings. Privacy of international arbitration proceedings would mean that third parties, or parties not connected to the arbitration proceedings except the counsel, the expert witnesses or the transcribers would not be allowed to sit in the arbitration proceedings. This is almost always applied and must be distinguished from the duty of confidentiality, which means that disclosures about the arbitration proceedings cannot be made to any third party, without prior consent.

Position in India

The Indian Arbitration and Conciliation Act, 1996 (Act) has gone through a sea change in the recent past. In the 2019 amendments, an express duty of confidentiality has been incorporated in the Act. In terms of the newly inserted Section 42A of the Act the parties, the arbitrators and the arbitral institution are duty

[1]Chapter 1. An Overview of International Arbitration', in Blackaby Nigel, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Sixth Edition), 6th edition (Oxford University Press 2015) pp. 30.
[2]Available on https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf (accessed on 28 November 2019).
[3]Gary B. Born, *International Commercial Arbitration* (Second Edition), 2nd edition, Chapter 20: Confidentiality in International Arbitration', Kluwer Law International 2014, pp.. 2784 and 2785.
[4]See Article 30 of the LCIA Rules, 2014.
[5]See Rule 39 of the SIAC Rules, 2016.
[6]See Article 22 (3) of the ICC Rules, 2017.

bound to maintain confidentiality of all arbitral proceedings, except when the disclosure of an arbitral award is necessary for the purposes of implementation and enforcement of an award. The origin of the newly inserted provision can be traced back to the high-level committee chaired by Justice B N Srikrishna (Retired Judge, Supreme Court of India), which had suggested reforms for improving institutional arbitration in India. The report suggested insertion of the confidentiality provisions along with certain exceptions, such as: disclosure required by legal duty, to protect or enforce a legal right, enforcement or challenge to an arbitral award before a court or judicial authority[7].

> "...confidentiality is not of itself the single biggest driver behind the choice of arbitration"

The limited exception to the confidentiality obligation, i.e., for implementation and enforcement of an award, poses serious challenges to the process of arbitration. In turn it also makes the confidentiality obligation under law more susceptible to violations. For example, the provision does not take into consideration that disclosure of the arbitral proceedings may be required in case of seeking interim protections or several other court proceedings in relation to the conduct of the arbitration. Disclosure may also be required in cases where experts are engaged to work on a dispute, third party funding is required or disclosures relating to an arbitration are necessitated under applicable laws. While the newly inserted provision obligates arbitrators, parties and arbitral institutions to maintain confidentiality, it is silent on the obligations of counsel, witnesses, transcribers, tribunal secretary etc. in this regard. Further, there is no penalty prescribed for a breach of the obligation and it is also not clear as to which forum will adjudicate a breach of such an obligation.

Position outside India

In the United Kingdom, there are no express obligations on confidentiality of arbitral proceedings, and confidentiality is presumed unless the arbitration agreement states otherwise. The exceptions have been set out in the decision of *Ali Shipping Corporation*[8] and include: (a) disclosures made with express or implied consent of the party who produced the material; (b) by order or permission of the court; (c) when reasonably necessary for the protection of the legitimate interests of an arbitrating party; (d) when disclosure is necessary in public interest.[9] In ***Glidepath BV v Thompson***[10], the Court observed that a stranger to the arbitration should not in general be given access to the documents, unless an exception as aforementioned is attracted.

In Singapore, the (Singapore) Arbitration Act and the (Singapore) International Arbitration Act do not explicitly impose a duty of confidentiality, and there is always an implied duty subject to the limitations. The position is similar to the UK, and the High Court of Singapore in ***Myanma Yaung Chi Oo Co Ltd v Win Win Nu***[11], after relying on the decision of the English Court in Ali Shipping Corp, has held that the leave of the court is not required in circumstances where disclosure of information is reasonably necessary for the protection of a party's legitimate interest.

Transparency v. Confidentiality

As the world moves towards transparency, do we need confidentiality as an express statutory obligation, or are we better off if the arbitral awards are published thereby lending more transparency to the process? The UNCITRAL Rules on Transparency in Treaty–based Investor-State Arbitration (2014)[12] provides an answer to this conundrum, by applying the test of "what to disclose" instead of "when or to whom to disclose". The Rules advocate greater transparency in investment arbitration to further public interest and provide for public access to 'key documents' prepared during the course of arbitral proceedings. At the same time, confidential or protected information has been adequately safeguarded under the exception to the rules.

A similar threshold could also be contemplated for international commercial arbitrations. Arbitral awards could be published after redacting any information which is commercially sensitive or which may disclose or jeopardise the business interest. Parties may not disclose sensitive redacted information except under exceptional circumstances such as during challenge or enforcement proceedings or for interim reliefs. Greater transparency in this manner would benefit international arbitration by bringing in more accountability for the arbitrators and helping in development of a jurisprudence on certain points of law. Although unlike national courts, the decision of the arbitral tribunal is not binding, guidance can certainly be taken from

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[7]Page 72, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, available at http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (accessed on 28 November 2019).
[8]**Glidepath BV v Thompson [2005] EWHC 818** *(Comm).*
[9]**Ali Shipping Corp v. Shipyard Trogir, [1998] 2 All ER 136.**
[10]**[2005] EWHC 818 (Comm).**
[11]**[2003] SGHC 124.**
[12]For a detailed analysis, please see 'UNCITRAL brings in new transparency rules with effect April 1, 2014 in treaty based investor state arbitration', available on http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/uncitral-brings-in-new-transparency-rules-with-effect-april-1-2014-in-treaty-based-investor-state-a.html?no_cache=1&cHash=d1a716f314a5dc88c269b0a5f6eba054.

the rulings of the prior tribunals on the same issue. Parties may be able to avoid investment of substantial time and money if arbitral awards written by leading practitioners are available to the public.

However, while promoting transparency, the importance of confidentiality must not be lost or undermined and a balanced approach is essential. It must be recognized that parties to an international commercial arbitration go to great lengths to protect their business interests. In fact, many a time they choose arbitration to ensure that adverse awards do not become public. Alongside, arbitrating parties also must acknowledge that in the age of social media and legal publishers such as Global Arbitration Review or Investment Arbitration Reporter, which frequently reports about the nature, stage, the parties involved, the sum involved in the arbitral proceedings, there is very little to hide about the existence of the arbitration proceedings or even its outcome. Therefore, instead of projecting confidentiality and transparency as arch nemeses, the legislators, arbitrators and parties must align the two principals to further the development of international arbitration.

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