



# marc

## insights

ISSUE 1



MCCI ARBITRATION & MEDIATION CENTER



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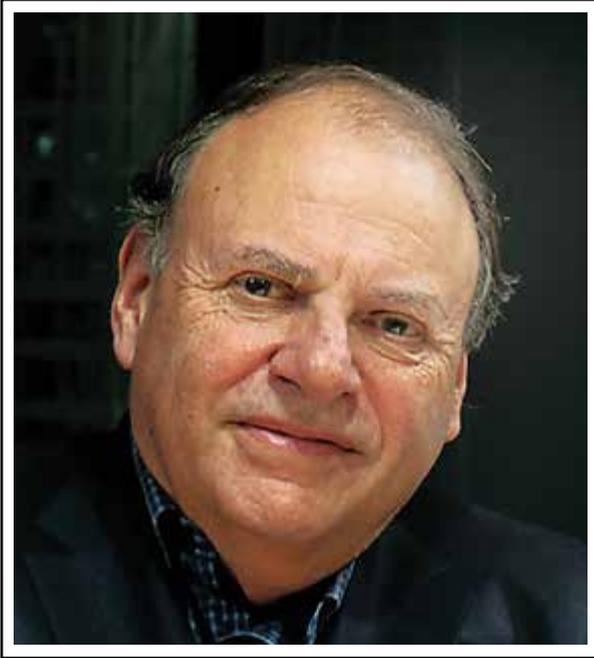
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# Message of the President of the MARC Court

**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.

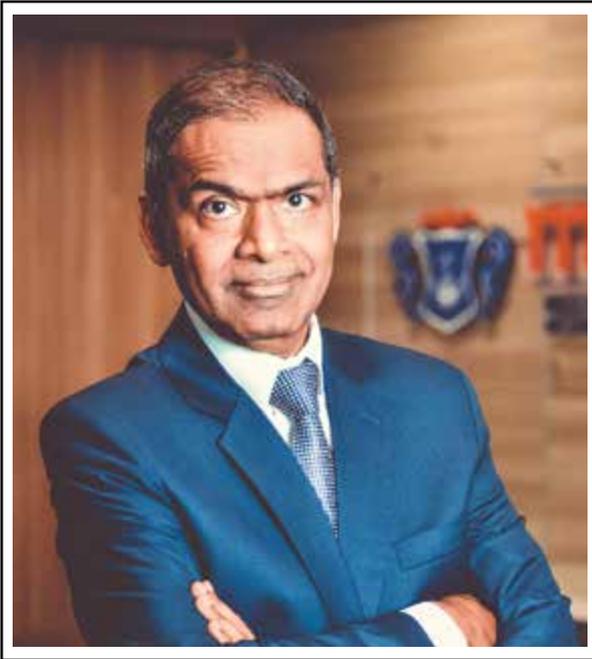
This first issue has received contributions from guest writers who are well-known in the legal field, especially in arbitration and mediation. Members of the MARC Court, MARC Advisory Board and the MARC Secretariat have also touched upon important subjects in this review. We have highlighted the position 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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### Let's talk about it

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# The Arbitration and Conciliation Amendment Act 2019

*A new dawn or sinking into a morass?*



The Indian arbitration landscape is thriving - three years and two rounds of changes, one too many for the practitioners, arbitrators and the domestic/foreign parties to cope with. The Arbitration and Conciliation (Amendment) Act 2015 ("2015 Amendment") came as a sigh of relief, trying to plug most of the loopholes to bring Indian arbitration at par with international standards. However, the same cannot be said about the next round of changes.

The Arbitration & Conciliation (Amendment) Act 2019 ("2019 Amendment") came into force with effect from 9 August 2019. The 2019 Amendment continues to retain most of the provisions of the Arbitration and Conciliation (Amendment) Bill, 2018,

("2018 Bill"), even the regressive ones. Despite the severe criticism and year long wait for the 2018 Bill to translate into amendment, the not so forward-looking provisions seem to see the light of the day, a clear anti-thesis to the very object of arbitration.

## Key Take-Aways

### - Arbitration Council of India

The 2018 Bill proposed the introduction of an Arbitration Council of India ("ACI") to grade arbitral institutions and arbitrators, issue guidelines, accreditation of arbitrators etc. The 2019 Amendment continues to retain them. The Justice B.N. Srikrishna Committee Report recommended the concept of ACI, with the intention to shift from ad-hoc to institutional

arbitration. The erstwhile provisions of the Arbitration and Conciliation Act 1996 ("Act") vested the Supreme Court and High Court with powers to appoint arbitrators under Section 11. This power was broadened in 2015, to include individuals or institutions being designated by the Supreme Court or High Court as the case maybe, for appointment of arbitrators, a move to encourage institutional arbitration. The 2019 Amendment now states that courts may designate institutions for appointment of arbitrators as graded and accredited by the ACI.<sup>1</sup> The ACI has been entrusted with grading of arbitral institutions basis criteria relating to infrastructure, quality and caliber of arbitrators, performance and compliance of time-limits for disposal of domestic or international commercial arbitrations.<sup>2</sup> The members who may be part of the ACI are enlisted in Section 43C of the 2019 Amendment.<sup>3</sup> This is where the root of the problem lies. A closer look at the constitution is a clear signal how the body intends to regulate the arbitration process in India, with greater government control and interference but no clarity on mode of grading, implementation and effectiveness.

### - Qualifications of Arbitrators

Party autonomy is one of the basic tenets of arbitration. Introduction of this provision is another handcuff for parties to select arbitrators. The minimum qualifications, experience and guidelines for accreditation of arbitrators is specified in the Eighth Schedule.<sup>4</sup> The new amendments have faced one of the biggest criticisms, owing, amongst other reasons, to

<sup>1</sup>Section 11 (3A) of the 2019 Amendment

<sup>2</sup>Section 43I of 2019 Amendment

<sup>3</sup>(a) A person, who has been, a Judge of the Supreme Court or, Chief Justice of a High Court or, a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India-Chairperson; (b) An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government-Member; (c) An eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government in consultation with the Chairperson-Member; (d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary-Member, ex officio; (e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary-Member, ex officio; (f) One representative of a recognized body of commerce and industry, chosen on rotational basis by the Central Government-Part-time Member; (g) Chief Executive Officer-Member-Secretary, ex-officio.

foreign legal professionals not being eligible to act as arbitrators. This disincentivizes foreign parties to have their arbitrations seated in India as arbitrators of their choice can no longer be appointed. The international arbitration community would no longer be keen to have arbitrations seated in India.

#### - Timelines

India being infamous for the long delays in litigation and arbitration, the 12-month time-frame (with 6 months extension by consent of parties) came as a breath of fresh air to the arbitration fraternity in India. Just when, all concerned parties were getting used to the strict time-frame and making endeavors to abide by it, the 2019 Amendment has extended it by initiating the 12-month time-frame, to post completing of the pleadings. Completion of pleadings can take long with no definite time-frame and could delay the arbitration indefinitely, rather than aiding the process, it could lead to considerable delays. International commercial arbitration has been excluded from the ambit of time-lines with a proviso to complete it expeditiously and endeavor to finish within 12 months of completion of pleadings. Both these changes have invited harsh criticism. There was no requirement to leave international commercial arbitration out but rather, a simple change, that of leaving out institutional arbitration, i.e. leaving institutions to decide the time-frame, would have possibly been more appropriate.

#### - Confidentiality

It has been considered an innate advantage of arbitrations and one of the reasons for selecting this mode to resolve disputes. But the arbitration community has questioned at times is there even a need for it. Parties

can decide if they wish to keep the proceedings confidential. There was no express provision on confidentiality in the Indian statute earlier. The 2019 Amendment has included a blanket provision on confidentiality encompassing the entire arbitral proceedings except for awards where disclosure is necessary for its enforcement. Certain scenarios where disclosure may be necessary have not been taken into consideration and the exceptions suggested by the Committee have been ignored. An absolute confidentiality provision has been inserted, which will go down as an additional flaw.

#### - Applicability

The applicability of the 2015 amendments gave rise to a series of conflicting decisions across High Courts. The Supreme Court ruling tried to settle the issue in the Kochi decision<sup>5</sup>. The 2018 Bill overturned the Supreme Court ruling. Several changes were proposed and drafts with suggestions sent to the Ministry to address them to prevent the overturn, but all seem to have fallen on deaf ears. The 2019 amendment has deleted Section 26 from the Act, with an intent for the 2015 amendments to be applicable only to arbitral proceedings commenced on or post 23 October 2015 and court proceedings which emanate from such arbitral proceedings. A change yet again on the applicability is moving towards chaos and uncertainty.

The 2019 Amendments have been recently notified except for the provisions related to the constitution of the Arbitration Council of India. Interestingly, the issue on applicability of 2019 Amendments itself will, in all likelihood, be litigated just as the Supreme Court ruling. However, the issue on applicability of 2019 amendments itself will have to be

clarified. There are one too many complexities and faulty drafting that has led to this complicated arbitration regime, one can only hope that good sense will prevail, and the Supreme Court of India will step in to bring some much-needed clarity.



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<sup>5</sup>Eight Schedule: A person shall not be qualified to be an arbitrator unless he: (A) is an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an Advocate; or (B) is a chartered accountant within the meaning of Chartered Accountants Act, 1949 having ten years of practice experience as a chartered accountant; or (C) is a cost accountant within the meaning of the Cost and Works Accountants Act, 1959 having ten years of experience as a cost accountant; or (D) is a company secretary within the meaning of the Companies Secretaries Act, 1980 having ten years of practice experience as a company secretary; or (E) has been an officer of the Indian Legal Service or (F) has been an officer with law degree having ten years of experience in the legal matters in the government, autonomous body, public sector undertaking or at a senior managerial position in private sector; or (G) has been an officer with engineering degree having ten years of experience as an engineer in the government, autonomous body, public sector undertaking or at a senior level managerial position in a private sector or self-employed; or (H) has been an officer having senior level experience of administration in the Central Government or State Government or having experience of senior level management of a Public Sector Undertaking or a Government company or a private company of repute; (I) is a person, in any other case, having educational qualification at degree level with ten years of experience in scientific or technical stream in the fields of telecom, information technology, intellectual property rights or other specialized areas in the Government, Autonomous Body, Public Sector Undertaking, or a senior level managerial position in a private sector as the case may be.

<sup>6</sup>Board of Cricket Control of India v. Kochi Cricket Private Limited Civil Appeal No. 2879-2880 of 2018