INTERNATIONAL ARBITRATION (MISCELLANEOUS PROVISIONS) ACT 2013

Explanatory Notes

The present Explanatory Notes, which were presented to the National Assembly upon the second reading of the International Arbitration (Miscellaneous Provisions) Bill, explain the rationale behind the Bill and are intended to assist with the interpretation and application of the same.

1. Clause 2 of the Bill: Repeal of article 1028 *et seq.* of the Code de Procedure Civile

1.1. Articles 1028 and 1028-1 to 1028-11 of the Code de Procédure Civile ("CPC") set out the regime and procedure for the enforcement in Mauritius of arbitral awards made outside Mauritius ("foreign awards") prior to incorporation into our law of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 ("the Foreign Arbitral Awards Act"). In particular, Articles 1028 and ff. set out the procedure for the enforcement of a foreign award by way of an application to the Supreme Court for *exequatur*.

1.2. Since 2001, Article 1028 and ff of the CPC have co-existed with the Foreign Arbitral Awards Act. The Foreign Arbitral Awards Act was enacted upon the ratification by the Republic of Mauritius of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). The Foreign Arbitral Awards Act gives force of law in Mauritius to the New York Convention 1958, the main international convention governing the recognition and enforcement of foreign arbitral awards.

1.3. Following the enactment of the International Arbitration Act ("the IAA"), there has been some debate as to whether Articles 1028 and 1028-1 to 1028-11 of the CPC have been implicitly repealed with the coming into operation of the Foreign Arbitral Awards Act in 2004[1].

1.4. Clause 2 of the Bill resolves that ambiguity by expressly repealing –

[1] See Salim A. H. Moollan, *Une brève introduction à la nouvelle loi mauricienne sur l'arbitrage internationale*, Revue de l'arbitrage Vol. 2009 (2009), Issue No. 4, pp. 933-941(expressing the view that Articles 1028 and ff. could be held to have been implicitly repealed upon the passing of the New York Convention Act); Anwar A. H. Moollan, *Rethinking the Recognition and Enforcement of Arbitral Awards: A Mauritian Perspective* (December 2010) in Permanent Court of Arbitration (Ed.), *MIAC 2010: Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat*, (Government of Mauritius, 2012), p. 265 at pp. 267-268; Jamsheed Peeroo and Antoine Guilmain, *'Pour une Réforme du Droit Mauricien de l'Arbitrage International en Matière de Reconnaissance et d'Exécution des Sentences' The New Bar Chronicle*, No. 3, Nov. 2011, pp. 9-14

1.4.1. article 1028 and replacing it by another article 1028 which provides that arbitral awards made in foreign countries are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act and the International Arbitration Act; and

1.4.2. articles 1028-1 to 1028-11.

2. Subsection 3(a) of the Bill: New York Convention to apply to all foreign awards irrespective of reciprocity

2.1. When the New York Convention was ratified by the Republic of Mauritius, the Republic of Mauritius agreed to enforce foreign arbitral awards in accordance with the Convention, but excluded from that agreement (as it was entitled to do pursuant to Article I(3) of the New York Convention) awards rendered in countries which had not themselves ratified the New York Convention.

2.2. This exception (called the reservation of reciprocity) is applied by some but not all of the 148 New York Convention Contracting States. 70 States have not made any reciprocity reservation. Of the States which have exercised their right to make the reservation of reciprocity, several nevertheless apply the New York Convention to foreign awards rendered in non-Contracting States or apply the same recognition and enforcement regime regardless of where the foreign award was rendered (this includes the following countries: Algeria, Denmark, France, Japan, Kuwait, New Zealand, Poland and Serbia).[2]

2.3. In order to ensure that the repeal of Articles 1028 et *seq.* of the CPC leaves no gap in the laws of Mauritius, Mauritius is withdrawing the reciprocity reservation which it made when acceding to the New York Convention. Clause 3(a) of the Bill ensures, for the avoidance of any possible doubt, that the New York Convention is to govern the recognition and enforcement of all foreign awards in Mauritius. This will ensure that all foreign awards are governed by a single recognition and enforcement regime in Mauritius (that of the New York Convention). The wording of Clause 3(a) (which provides that "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") should not be understood as preventing *a contrario* the application of the Convention to awards made in Mauritius, as section 40 of the IAA provides separately that the Convention also applies to the recognition and enforcement of awards rendered under the IAA.

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[2] Source: ICC International Court of Arbitration Commission Report, *Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards* (ICC Dispute Resolution Library, 2008), available at: http://www.iccdrl.com/CODE/LevelThree.asp?tocxml=ltoc_CommReportsAll.xml&page=Commission%20Reports&L1=Commission%20Reports&L2=&tocxsl=DoubleToc.xsl&contentxsl=arbSingle.xsl&Locator=9&contentxml=CR_ALL_0037.xml&AUTH=&nb=0#TOC_BKL1_2

3. Clause 3(b) of the Bill: New sections of the Foreign Arbitral Awards Act

3.1. Clause 3(b) of the Bill introduces the following additional sections in the Foreign Arbitral Awards Act:

3.2. **Section 4A: English and French official languages for the purpose of the Convention**

3.2.1. Article IV of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards refers to the official language of the State in which the award is sought to be enforced.

3.2.2. While English is the official language of the National Assembly in Mauritius, and while both English and French are widely spoken in Mauritius, there may be scope for argument as to whether either language is 'an official language' of Mauritius for the purposes of Article IV of the New York Convention. The insertion of section 4A will resolve any ambiguity in that respect, and ensure that full use is made of the comparative advantages of Mauritius, such as the multilingualism of its citizens, by providing that all awards rendered in English or French shall be deemed to have been made in an official language of Mauritius for the purpose of the New York Convention. This will avoid unnecessary translation and ensure that awards rendered in both anglophone and francophone arbitrations are enforceable without unnecessary expense and delay.

3.3. **Section 4B: Limitation and prescription period not to apply**

3.3.1. An arbitral award is the final decision on a particular dispute, and its enforcement is not subject to any limitation periods. Section 4B accordingly clarifies, for the avoidance of doubt, that actions for recognition and enforcement of foreign awards in Mauritius are not subject to any domestic period of limitation or prescription.

4. Clause 4: Amendments to the International Arbitration Act

4.1. Clause 4 introduces a number of amendments to the IAA.

4.2. **Clause 4(a) to 4(e): structural changes to section 3 of the IAA**

4.2.1. The structure of section 3 of the IAA (which is entitled "Application of Act", but which in fact covers matters beyond the application of the Act, such as the extent of Court intervention [see Article 5 of the UNCITRAL Model Law; hereinafter "the Model Law"], the waiver of a right to object [see Article 4 of the Model Law] or the interpretation of the Act [see Article 2A of the Model Law]) departs significantly from that of the Model Law, and has not proven straightforward to apply. A decision has accordingly been taken to restructure the opening part of the IAA with (a) the numerous subsections of section 3 of the IAA being turned into sections of the legislation in a manner more in line with the Model Law and (b) these sections being reorganised, with a distinction being drawn between preliminary provisions properly speaking (which remain in Part I), and the provisions which define the scope of application of the Act (which have been placed in a new Part IA).

4.2.2. These changes are purely structural and do not affect the meaning or effect of the relevant provisions, save for the two substantive changes explained in paragraphs 4.3 and 4.4 below.

4.3. **Clause 4(b) of the Bill: New section 2C of the IAA (former section 3(10)**

4.3.1. Section 2C of the amended draft deals with the important disconnection which the IAA has operated between international arbitration and domestic arbitration and regime. Section 2C(1) effectively reproduces the contents of section 3(10) of the IAA[3], but a new subsection (2) has been added in order to clarify, for the avoidance of doubt, that the procedure to be applied in applications under the IAA and the Foreign Arbitral Awards Act is separate from that applied in other civil matters, that 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 such applications, and that these rules may provide for the hearing of these matters by Designated Judges. This subsection will in particular provide an express statutory underpinning for the rules of Court on international arbitration which are intended to come into effect in parallel with the amended IAA.

4.4. **Clause 4(e) of the Bill: New section 3D of the IAA (former section 3(6))**

4.4.1. The other substantive change effected in the restructured sections relates to the incorporation of arbitration agreements in the constitution of GBL

[3] While the drafting of section 2C(1) has been streamlined compared to that of section 3(10) of the original IAA, no change of substance whatsoever is intended by that change of form and the legislative intent remains the same as that noted in paragraph 36 of the *travaux préparatoires* of the IAA, i.e. to disconnect the law of international arbitration in Mauritius (which is to be developed by reference to international standards) from domestic Mauritius law (and in particular from domestic Mauritius arbitration law).

companies, a matter originally dealt with in section 3(6) of the IAA and now dealt with in section 3D.

4.4.2. Section 3(6) is meant to provide an option to the shareholders of GBL companies to arbitrate their disputes under the constitution of the company in circumstances where the only forum for the resolution of such disputes had thenceforth been the Mauritian Courts (see paragraph 31(a) of the Travaux Préparatoires of the IAA[4]). The wording of the subsection however appears to have created some confusion as to the exact scope of that provision, with an *obiter dictum* in one decision of the Supreme Court to the effect that section 3(6) (and therefore the mandatory provisions of section 3(6)(b) providing that the seat of any arbitration under section 3(6) must be in Mauritius and that Schedule 1 of the IAA must apply to that arbitration) may catch arbitration clauses set out outside the constitution of the company (in that case, in a shareholders' agreement).

4.4.3. Given the potentially drastic effects of the said mandatory provisions, it was thought preferable to amend the wording of the new section 3D to make it absolutely clear that section 3D is dealing solely with arbitration clauses incorporated in the constitution of the GBL company, and does not affect the right of the shareholders of the company to agree to the arbitration of disputes concerning or arising out of agreements other than the constitution of the company (such as a shareholders' agreement).

4.4.4. This change will ensure that the purpose of the provision (to introduce an option to arbitrate where none existed before) is clearly put into effect, without any risk of harming pre-existing arrangements or of limiting the parties' choice of arbitral seat for agreements other than the corporate document (the constitution).

4.4.5. To reiterate, prior to the enactment of section 3(6), the only forum for the resolution of disputes arising under the corporate documents of a GBL company (its constitution, what would formerly have been referred to as the Memorandum and Articles or 'Mem & Arts' of the company) was the Mauritian Courts. The Act gives GBL companies the option to arbitrate these disputes rather than go to the Mauritian Courts, while making sure that the Courts of Mauritius retain a limited supervisory jurisdiction over the arbitral proceedings by (i) mandatorily fixing the juridical seat of the arbitration in Mauritius and (ii) making the provisions of the First Schedule to the Act (including the right to appeal on a point of Mauritius law) applicable to the arbitration. Section 3(6) (now section 3D) is not however meant to apply to agreements to arbitrate which are to be found outside of the constitution, such as, for instance, a shareholders' agreement. Many shareholders in GBL companies have shareholder agreements between them providing for international arbitration outside Mauritius (e.g. in Singapore), and it is not the aim of the IAA to force them to arbitrate in Mauritius rather than in their jurisdiction of choice: rather, it

[4] And see further paragraph 17(c) and 31-32 of the Travaux Préparatoires.

gives these shareholders the option to have an arbitration clause in their constitution in addition to that in their shareholders' agreement. Ideally, shareholders will want to make sure that they have the same (or compatible) arbitration clauses in both documents (which would in particular mean choosing Mauritius as a seat in both clauses); but, even if that is not the case, opting for arbitration in the constitution of the company will ensure that the parties have parallel arbitral proceedings in Singapore and Mauritius rather than Court proceedings in Mauritius and a competing arbitration in Singapore, thereby giving them more flexibility in the conduct of the proceedings. For instance, in parallel arbitral proceedings, the parties can cooperate to have the same arbitral tribunal hear both disputes. Even without that cooperation, parties and arbitral institutions may be able to get substantially the same tribunal to hear the two disputes.

4.5. **Sections 4(f), 4(k) to 4(m) of the Bill: incidental amendments arising from the restructuring of section 3**

4.5.1. These changes arise directly from the restructuring of section 3 and are purely mechanical.

4.6. **Section 4(g) and 4(i) of the Bill: interim measures application in international arbitration matters to be heard before the Judge in Chambers and to be returnable before 3 Judges and further changes to interim measures regime**

4.6.1. Sections 6(2), 23 and 42 of the IAA provide that interim measures application in international arbitration matters must be heard before a panel of 3 judges, in the same way as all other international arbitration matters. This has proved cumbersome in practice, in particular for urgent applications.

4.6.2. The Bill addresses this problem by providing that these applications will henceforth be heard and determined by a Judge in Chambers in the first instance, but will be returnable before a panel of 3 Judges. This strikes a balance between the need for expediency, and the assurance that international arbitration matters ultimately remain the subject of a collegiate decision.

4.6.3. The amendments also introduce two further features:

(a) Section 23(1) of the IAA is being amended to make it clear that 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 that power is usually exercised by a Judge in Chambers or otherwise. This will prevent argument as to the extent of the jurisdiction available to the Judge in Chambers in applications under section 23: the Judge in Chambers has full and

complete jurisdiction, granted by section 23 itself, subject only to such limits as are set out in section 23;

(b) A new subsection (2A) is being introduced in section 23 to provide that (subject to any contrary agreement of the parties) the Court shall exercise its power to issue interim measures in order to support, and not to disrupt, existing or contemplated arbitration proceedings. This is in line with the IAA's object to create the most favourable environment for international arbitration to thrive in Mauritius, and will ensure that the easier access which parties are given to the Court to apply for interim measures (by giving them access to the Judge in Chambers for that purpose) is not abused by parties in order to disrupt arbitral proceedings in Mauritius or abroad.

Comment [S1]: That is the effect of section 23(2), and it is important to make it clear that we are not infringing party autonomy. If parties want to agree (in their arbitration agreement for instance) that the Court will have wider powers, they may do so.

4.7. **Section 4(h): consequential matters upon setting aside of an award**

4.7.1. In line with the Model Law, the IAA did not provide for what is to happen to a matter if an arbitral award is set aside by the Supreme Court partly or in whole. A new section 39A now makes specific provision for this, and will ensure that the Court may, if appropriate, make consequential orders following the setting aside of an award or of any part thereof, including directives relating to (i) the remittance of the matter to the arbitral tribunal; (ii) the commencement of a new arbitration, including the time within which such arbitration shall be commenced; (iii) the future conduct of any proceedings the parties to which were referred to arbitration under section 5(2) of the IAA (stay of Court proceedings in favour of arbitration); or (iv) the bringing of any action 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.

4.8. **Section 4(i) of the Bill: ability of the Court to hold hearings in private**

4.8.1. Sections 10(9) and 10(10) of the Constitution provide that hearings before Courts in Mauritius must be held in public save *inter alia* where (i) the parties otherwise agree (see the opening words of section 10(9)) or where (ii) the Court is empowered by law so to do and may consider this necessary or expedient in circumstances where publicity would prejudice the interests of justice. The new section 42(1B) of the IAA provides the necessary legal basis for the Courts to be able to hold proceedings in private for applications under the IAA and under the Foreign Arbitral Awards Act where appropriate, 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. The new section 42(1C) makes consequential provisions with respect to the publication of information.

4.9. **Section 4(j) of the Bill: Designated Judges and procedure for appeals to the Judicial Committee**

4.9.1. The new section 43 of the IAA[5] will put in place a system of 6 Designated Judges to hear all international arbitration matters in Mauritius, thus ensuring that all applications under the IAA or the Foreign Arbitral Awards Act are heard by specialist Judges. In addition to the specialist knowledge which the Designated Judges will accumulate from hearing all international arbitration matters, it is intended that they will receive specialist training both in Mauritius and abroad.

4.9.2. The new section 44 of the IAA specifies the procedure for appeals to the Judicial Committee under section 42(2) of the IAA and under section 4(3) of the Foreign Arbitral Awards Act.

4.9.3. The new section 45 of the IAA makes provision for the use of witness statements in Court proceedings under the IAA and under the Foreign Arbitral Awards Act, and for the applicable sanctions where a person knowingly makes a false statement.

4.10. **Section 4(k) to 4(m) of the Bill: incidental amendments**

4.10.1. These are consequential amendments to the Schedule to the IAA.

5. Clause 5 : Transitional provision

5.1 This Clause of the Bill specifically provides that the International Arbitration (Miscellaneous Provisions) Act (once passed by the National Assembly) shall apply to all proceedings in Court under the IAA or the Foreign Arbitral Awards Act which are pending on the commencement of the Act. This will ensure that the new regime put in place by the Bill and by the rules of court for international arbitration which are intended to take effect at the same time as the legislative changes will apply to all Court proceedings under the IAA or the Foreign Arbitral Awards Act which will take place as from the date of commencement of the Act, i.e 1 June 2013.

[5] Sections 43 and 44 of the IAA as enacted in 2008 are now spent, and are being replaced by these new sections.