

PAPER 1

DISPUTE RESOLUTION TECHNIQUES: MEDIATION, ARBITRATION OF ENVIRONMENT DISPUTES IN MAURITIUS

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1. Mauritius is a densely populated island with a current population of just over 1.3 million. It inherited a singular dual legal system after it was first colonized by the French and subsequently by the British, before it became independent in 1968. The French substantive law has largely subsisted but the Court structure and procedural rules are predominantly inspired by the common law system.
2. Today, this unique legal system is made up of about 800 law practitioners in private practice (barristers, attorneys and notaries). In addition, about 100 legal officers (barristers and attorneys) are posted at the Attorney-General's Office and the DPP's Office, and 71 Judicial Officers make up the core of the Judiciary (20 Supreme Court Judges, 1 Master & Registrar, 1 Deputy Master & Registrar and 49 Magistrates).
3. Mauritian legal professionals read law in Mauritius, England and Wales, France, Australia, New Zealand and Canada among other jurisdictions, Magistrates appointed at District and intermediate Courts were, until very recently, only required to have practiced as barristers for at least two years to be eligible for appointment on the Bench. Supreme Court Judges were qualified for appointment provided they reckoned a minimum of five years' practice at the Bar. The Institute of Judicial and Legal Studies caters for professional legal training for all law practitioners and the Judiciary.
1. The Environment in Mauritius is protected under several legislations, primary and secondary, which are too numerous to enumerate here. Suffice to say that the main statutes and the subsidiary legislations cover all aspects of environmental protection, to list a few: air and water pollution, coastal and marine protection, flora and fauna protection, hazardous substances/chemicals degrading the environment, noise control, heritage sites, etc.
2. The main legislation is the Environmental Protection Act 2002 (as amended-2008) which provides inter alia for:
3. The protection and management of environmental assets
4. Environmental protection and sustainable development for present and future generations

5. Environmental management
6. Coordination of inter-relations of environmental issues;
7. The proper implementation of governmental policies and enforcement provisions
8. The protection of human health and quality of life
9. The foundation of the legislation seems to be “Polluter Pay principle” with the creation in 2008 of fixed penalty notices to allow the polluter to pay promptly for the environmental degradation. The enforcement and prohibition of environmental degradation are also strongly seen in the legislation. However, the enforcement of the legislation is in practice done in a diplomatic and “soft” approach as the balance of the conflicting interests of economic growth and environmental degradation is often carried out by environmental enforcement officers.
10. Mediation is part of Mauritian law at the apex with the creation of the Mediation Judge under the Supreme Court(Mediation) Rules 2010. The rules governing mediation have been made under ss. 17A and 198 of the Courts Act of Mauritius. The rules apply to civil suits pending before the Supreme Court [s. 2(1)] and the purpose of the mediation is “in all good faith, to dispose of the civil suit, action, cause or matter by a common agreement, or to narrow down the issues in dispute.” (c.f. s.3) s.3 further states that the purpose of mediation should strive to reduce costs and delays in litigation and facilitate a fair and just resolution of the matter by the mediation judge within the allocated time.
11. The mediation judge is a Judge of the Supreme Court thus designated by the Chief Justice [s. 4(4)]. The procedure is informal and flexible and the mediation judge plays an active and leading role even in the procedure[s.4(3)] The mediation process is confidential and in private as well as documents and evidence tendered.[s.9] and the time limit for mediation must not exceed 30 days from the first session of mediation[s. 15]. In case of failure of mediation, the mediation judge can refer the matter to the Master and Registrar to fix for trial [s. 14(1)] . If a settlement agreement has been reached by the parties, with or without the help of the mediation judge [s.13], the mediation judge will draft the settled agreement in the form of a memorandum setting out the terms of the agreement. The validity of the settlement agreement shall be same as a judgment of the Supreme Court. [s. 13(2)]. A mediation process ends either on agreement signed by the parties or upon an order of the mediation judge who has the power to cancel the mediation session on non-compliance by the parties [s. 16]

12. This is the formal regulated form of mediation and as per my research undertaken, up to now there have been no environmental disputes which have gone for mediation since the creation of the legislation.
13. Given the confidentiality of matters pending for mediation and arbitration, gathering information regarding environmental disputes was not easy. Direct interviews with relevant people in these domains were carried out. It was also confirmed by the MIAC (Mauritius International Arbitration Council) that there have not been any environmental disputes cases for arbitration either.
14. Mediation in environmental disputes can be seen to be carried out at 3 levels:
15. The Supreme Court level with the mediation judge (already discussed in points no. 4-5 above)
16. Mediation by the Environmental and Land Use Appeal Tribunal created under the Environmental and Land Use Appeal Tribunal Act 2012 (ELUAT 2012)
17. The Department of Environmental Protection of the Ministry of Environmental, Sustainable Development and Disaster and Beach Management.
18. Mediation at the Environmental Tribunal [ET] is governed by the ELUAT 2012. The Tribunal in its s.5 (3) (a-c) is supposed to hear appeals under certain specific legislations and sections of various legislations like Environment Protection Act 2002, Local Government Act 2011, Morcellement Act, Town and Country Planning Act. The ET is an autonomous body falling under the Prime Minister's Office who hears appeals against decisions taken by the Minister of Environment or the Director of Ministry of Environment [the Technical Head] under specific sections (s. 54(1)) as defined by the ELUAT. Most of the appeals lodged before the ET concern the permits denied or granted by the relevant authorities. The procedure before the ET is purely mediation process as per s. 5(3):
 - a. "Any proceedings of the Tribunal shall-
 19. Be held in public;
 20. Be conducted with as little formality and technicality as possible; and
 21. Not preclude an endeavor by the Tribunal to effect an amicable settlement between the parties."
22. Ever since its creation, the ET has heard cases in a conciliatory, non adversarial fashion, with the chairperson of the ET sitting at the same level as the parties.

Often the complainant is unrepresented and is guided actively by the chairperson and the deputy chairperson to lodge her appeal, etc. So far 1341 cases have been lodged, and 892 have been disposed of through this process. There are 449 ongoing cases before the ET.

23. However, in December 2016, an amendment has been brought in s. 5 (aa) to (ae) which lays down strict process of appeal where in actual practice from January 2017 onwards, compulsory legal representation in all appeal cases:

a. (aa) every notice of appeal referred to in paragraph (a) shall be accompanied by-

24. A statement of case; and

25. Where necessary, any witness statement, with copy to all relevant parties.

i. (ab) A statement of case shall contain precisely and concisely-

26. The facts of the case;

27. The grounds of appeal and the arguments relating thereto;

28. Submissions on any point of law; and

29. Any other submissions relevant to the appeal.”

1. And so forth. It in effect contradicts s. 5(3) above by making legal presentation mandatory, and goes against the spirit of the ELUAT which was to make environmental disputes inexpensive and user friendly, especially when the complainant is perceived to be a David pitted against a Goliath size corporate. Recent cases seen like *Georges Chen Fee Ah Yan & Bruno Savrimootoo v. The District Council of Grand Port in presence of Le Chaland Hotel Limited (CN ELAT 995/15)* [ruling given in Dec 2016] were perceived to be such types of cases where again the balancing exercise of conflicting interests of economic development v. social justice has been carried out, but to the detriment of the economically weaker parties with the 2016 amendments brought in. Only the future will tell whether the mediation process established so far at the ET will subsist or will be chipped in by the adversarial process as embedded the moment when legal representation and process formalization are made mandatory.

30. The balancing exercise between economic growth on one hand and environmental concern is an exercise which is also carried out at a 3rd level by the Officers of the Department of Environmental Law and Prosecution Unit of the Ministry of Environment in Mauritius. Under the Environment Protection Act 2002 (as amended 2008), s. 70 to s. 75.
31. Under s. 70 (2)(a), the environment officers carry out an informal mediation by going on the site and carrying out investigations into the complaint made. They hear both parties informally and try to reach an agreement. Failure of correcting environmental degradation results into an enforcement notice (s. 71) which is still conducted in a conciliatory manner through mediation. This “soft approach” of balancing the interests, talking to both parties, trying to reach a consensus continues through the prohibition notice per s. 72 is issued where time given to correct environmental concern can be extended. Informal mediation process continues until s. 75 EPA.
32. Finally, it must be noted that Mauritius is a party to around 36 environment-related conventions, protocols and other binding and non-binding instruments. The will to protect the environment has to not only be on paper in the legislation but also visible in the minds of every person in Mauritius and the world.