



INTERNATIONAL ARBITRATION AND ADR – THE IMPACT ON THE RULE OF LAW

Mauritius Conference Report

The World Jurist Association's Conference on *International Arbitration and ADR – the Impact on the Rule of Law* was held April 5 – 7, 2011 in Grand Baie, Mauritius. This Conference brought together 150 distinguished delegates and speakers from 20 countries, representing every region of the world. Our Host Committee was chaired by Honorable YKJ Yeung Sik Yuen, GOSK, Chief Justice of the Supreme Court of Mauritius.

Prior to the Opening Ceremony, the foreign delegates were given a unique opportunity to visit the Pamplémousses Botanical Garden in Mauritius. The WJA was also honored by a special audience with the President of Mauritius, His Excellency, The Right Honorable Sir Anerood Jugnauth, GCSK., KCMG., QC.

Opening Ceremony

Valeriy Yevdokymov, President of the World Jurist Association and Chairman of the Union of Lawyers of Ukraine, welcomed all the distinguished guests, and introduced the idea behind the Conference, as well as the topics to be discussed in upcoming panels. He also asked for a moment of silence to remember Margaret Henneberry, our immediate past Executive Vice President, who passed away last year.



The Hon. Y. K. J. Yeung Sik Yuen, GOSK, Chief Justice of Supreme Court of Mauritius, described his first associations with the WJA, including the Beijing Conference in 1990, and the Kyiv Congress in 2009, where he was first approached to host a conference in Mauritius. He then talked about the theme of the conference as being part of the government's effort to promote Mauritius as a center of international arbitration and introduce mediation into the court system, and about how Mauritius makes an appropriate venue, since its recent changes to its legal system that make it more conducive for dispute resolution.

The Hon. Yatindra Nath Verma, Attorney General of Mauritius, told the audience about Mauritius's rich English and French legal traditions, vibrant economy, political stability, and long commitment to rule of law. He noted that there is a dire need for the present international arbitral set-up to recognize different legal cultures and make the laws more user-friendly.

PANEL SESSION I - INTERNATIONAL ARBITRATION WITHIN A HYBRID CONTINENTAL AND COMMON LAW LEGAL SYSTEM: NEW OPPORTUNITIES IN MAURITIUS

The first panel, *International Arbitration within a Hybrid Continental and Common Law Legal System: New Opportunities in Mauritius*, was chaired by **Mr. K P Matadeen**, a Senior Puisne Judge from Mauritius.

Mr Marc Hein (Mauritius), Barrister, spoke about using Mauritius as a jurisdiction of choice for the arbitration of cross border disputes. He mentioned that apart from being a beautiful attractive location, Mauritius is a full member of the UN and the African Union, COMESA, SADC, ICJ, International Centre for Settlement of Investment Disputes (ICSID), MIGA, and a cooperative jurisdiction with OECD, IMF, and the World Bank. He said that Mauritius is very business-friendly, and that they have developed a skilled work force to offer professional and reliable services that are transparent. Other attractive factors include the country's favorable time zone, low tax jurisdiction, new laws offering international investors the proper legal framework to set up their investment platform and operations from here, including a network of 36 Double Taxation Treaties. Hein also mentioned that Mauritius had recently adopted the International Arbitration Act (IAA 2008), a modern piece of legislation based on the UNCITRAL model law that provides for a specific regime in relation to international arbitration, adopting the solution of the Permanent Court of Arbitration (PCA). The Act also provides a direct access to a panel of three judges of the Supreme Court of Mauritius in case their intervention is needed. Finally, he emphasized the necessity of other industries and sectors like financial services, trade & commerce, business, and the judiciary generally collaborating with existing arbitration organizations.

Mr Justice Satyabhooshun Gupt Domah (Mauritius) spoke about international arbitration within the hybrid legal system of Mauritius. He said that in Mauritius, a consensus-building multiethnic nation colonized by the French and then given to the British, an act of capitulation made public law to be common law and private law to be civil law. He also stated that arbitration in the global world is both public and private because of competing interests in various aspects of the international system. He also mentioned that in English law, the arbitrator's jurisdiction must be reviewed by the courts if an action is brought to set aside or enforce. In contrast, the French system makes no arbitration a legal order above the national legal order.

Mr Matthias Kuscher (Mauritius), legal counsel and head of the Office of the Permanent Court of Arbitration (PCA) in Mauritius spoke about the role of the PCA in ensuring efficiency, transparency and neutrality. Kuscher first described the general role of the PCA in the international dispute resolution arena as the oldest intergovernmental organization dedicated to the resolution of international disputes. He mentioned that The PCA has witnessed a substantial growth of its membership base in recent decades, and as of this year, 111 states have acceded to its founding conventions. He described role and powers of the Secretary-General of the PCA under the Mauritius International Arbitration Act (2008) as pertaining to the composition of the Arbitral Tribunal, the scrutiny of the fees and expenses charged by the Arbitral Tribunal, and the extension of time limits.

The Secretary-General is statutorily barred from having recourse to or taking into account existing Mauritian statutes, precedents, practices, principles or rules of law or procedure relating to domestic arbitration. The Act also puts gives the Secretary-General a wide-range arsenal of remedial measures, allowing him to take any necessary measures to remedy a failure in the appointment process. In carrying out his/her role, the Secretary-General will be able to draw upon the extensive experience he has accumulated in more than 400 cases over the past thirty-five years as designating and appointing authority under the UNCITRAL Rules, other international instruments and *ad hoc* agreements. In terms of challenges faced, the Arbitral Tribunal will be the statutory default authority charged with deciding challenges in the absence of an agreement of the parties in this regard. Kuscher then goes on to say that the mandate of an arbitrator terminates following his or her withdrawal, resignation, removal following a successful challenge or removal by agreement of the parties, and the Secretary General's role in termination is to be the statutory default authority for deciding any controversy that may remain as a result. When replacing arbitrators, the tribunal are to follow the same procedure that originally led to that arbitrator's

appointment. The degree of the involvement of the Secretary-General in that replacement process will thus depend on the particulars of the original procedure.

In regards to fees and expenses charged by the Arbitral Tribunal, Kuschner mentioned that the Secretary-General enjoys discretion not only with respect to the methods of scrutiny that he chooses to employ, but also with respect to the manner and terms of any adjustment that he might decide to order, and except where the arbitration is conducted *ad hoc* or without scrutiny, there is generally no recourse for the parties.

Kuschner also said, the Secretary-General is the general statutory default authority empowered to extend, upon an application by a party or the Arbitral Tribunal and agreement by the parties, any time limit applicable in a given set of arbitration proceedings falling under the Act.

He touched upon the finality and non-reviewability of the exercise of the Secretary-General's powers, intended by the drafters to avoid unnecessary delays in arbitration proceedings and combat the use of dilatory tactics by recalcitrant parties, while ensuring that multi-level supervision of the fundamental elements of the arbitral process can be exercised efficiently.

Logistically speaking then, Kuschner said that the principal responsibilities of the PCA Representative and Legal Officer in Mauritius, who operates under the direct control and authority of the Secretary-General therefore, are assist with the discharge of the Secretary-General's functions under the Mauritius International Arbitration Act and with the promotion of Mauritius as a venue for the resolution of dispute resolution.

Finally, Kuschner made the point in his conclusion that despite its novelty and innovativeness, the new statutory regime is highly sophisticated, finely balanced and perfectly attuned to the needs of international arbitration users, based on the aforementioned discussion.

PANEL SESSION II –THE IMPORTANCE OF INTERNATIONAL ARBITRATION AND ADR TO DEVELOPING COUNTRIES

The second panel, *The Importance of International Arbitration and ADR to Developing Countries*, was chaired by **Prof Ved Nanda**, Director of International Legal Studies Program at the University of Denver (USA). He set the theme of ensuring fairness in international arbitration in developing countries.

Mr. Franklin Hoet-Linares (Venezuela), attorney and WJA President for the Americas, spoke about the importance of international arbitration and ADR to developing countries, with an emphasis on Latin America. Although the status of ADR of Intellectual Property Rights (IPR) in Latin America has not changed substantially during the last years, he concluded that ADR in Latin America is growing and is necessary. For example, the confrontation between the two main blocks, ALCA (AFTA) (American Free Trade Agreement) and ALBA (Bolivarian Alternative to the Americas), has resulted in a new situation in Brazil, which now has its own strategy investment, natural and human resources, technological



development, and stable independent leadership in its internal and external policies. He mentioned that there was an expected result of an eventual incorporation of Venezuela in *Mercosur* and the

growing of Brazil as indisputable leader in Latin America. In further explaining the necessity of ADR in Latin America, Hoet-Linares stated that ADR generates an indirect benefit to the already overburdened Latin American judicial systems, to ease their workload, and to promote their own arrangements for alternative ways of solving the cases filed in their own courts such as conciliation and mediation. He pointed out certain examples of the evolution of ADR law in Latin American countries, including Venezuela and Ecuador, and concluded by saying that in the last decade, the rules with regard to arbitration have been subject to substantial changes within the Latin American context. During this period, the majority of the regulations have been changed and therefore, very few systems are left without adapting its rules to the modern principles that guides them.

Mr Justice Deon Van Zyl (South Africa), judge and WJA President for Africa spoke about mediation as a form of alternative dispute resolution in South Africa, with particular reference to the mediation of disputes in correctional centers. He mentioned that in South Africa mediation has been practiced informally over a long period of time without a mediation training requirement, adherence to a code of conduct or the need to acquire some or other alternative dispute resolution accreditation. In the community sector it has been used to address complaints among neighbors before such complaints burgeon into conflicts and full-scale disputes which may give rise to litigation, and in the educational sphere mediation is used on a daily basis to resolve complaints arising from conflicts among students or between students and teaching or administrative staff. Van Zyl then said to a large extent, the South African dispute resolution system relates to resolving disputes in the workplace. In the labour context the process of negotiation generally commences with demands and counter-demands after which it moves to reciprocal concessions and an eventual compromise or settlement. The most significant move in the direction of establishing mediation in its correctional context was the creation of the Judicial Inspectorate for Correctional Services, an independent monitoring and oversight body, to ensure that inmates are detained under humane conditions, treated with human dignity and prepared for a dignified reintegration into the community. Van Zyl said that we see informal mediation in the correction centers, as the Judicial Inspectorate is required to appoint an independent visitor for each correctional centre to deal with complaints of inmates by regular visits, interviewing inmates in private, recording complaints in an official diary and monitoring the manner in which they have been dealt with. On the rare occasions when a complaint cannot be resolved by the intervention and facilitation of the visitor, the unresolved dispute must be referred to a visitor's committee. Van Zyl concluded by saying that although independent visitors and visitors' committees are not specifically trained in mediation techniques, they are subjected to intensive training that include a number of mediation techniques.

Mr Patrice Doger de Spéville (Mauritius), senior counsel, spoke about the need for strong international Arbitration and ADR regional centers in the developing world and the aspiration of Mauritius in that context. He discussed the increasing popularity of ADR in developing countries, and how it is an inevitable tool in the growth of a global economy. Competing economies require that we have stable reliable, relatively inexpensive mechanisms to resolve disputes. He then mentioned that in order to protect the foreign investors in developing countries, there needs to be a strong push for ADR, for which he suggested Mauritius as a contender, because of their unique location in the market, and the rising economic growth rate in Africa.

Mr Barlen Pillay (Mauritius), manager of the Legal and Business Facilitation Division at The Mauritius Chamber of Commerce and Industry, spoke about international arbitration and economic development

Pillay began by mentioning that even in the private sector, trade and business norms are now being recognized as legal systems, and that these norms and rules were even becoming harmonized. These norms, or *lex mercatoria*, were based on principles such as flexibility,

trust, confidentiality and party's autonomy. International arbitration, Pillay explained, was thus natural outgrowth of the process of economic liberalization. Arbitration is a voluntary process with a certain dosage of flexibility; parties mutually consent to the process and in normal circumstances, cooperate fully in view of a prompt resolution of the dispute. The confidential aspect of the proceedings is also to their advantage, as is the possibility to decide upon the procedure, place, date, governing law and language of the proceedings. In the world of increasing competition in trade and industry development, economic leaders must master arbitration as a management tool in order to grow business. He then mentioned certain factors that made Mauritius an attractive venue for international arbitration, including: its political stability and long tradition of democratic principles and good governance; its geographical advantage at the crossroads of Africa, Europe and Asia; its hybrid legal system of English-inspired common law and French-inspired civil law, its pool of skilled legal counsels, accountants and experts in international trade and finance, and its advanced bilingualism.

Pillay concluded by saying that the legal and economic development of alternative dispute resolution was a norm in modern and competitive economies, and that arbitration has huge potential in overcoming difficulties associated with the process of creating a sound business environment necessary for stable economic development.

PANEL SESSION III – THE ROLE OF THE JUDICIARY – PERSPECTIVES FROM THE COURTS

The third panel session, *The Role of the Judiciary – Perspectives from the Courts*, was chaired by **Justice Y K J Yeung Sik Yuen**, Chairman of the Host Committee and Chief Justice of the Supreme Court of Mauritius.

Mrs Béatrice Brenneur, mediator to the Council of Europe, former President of Appeal Court, founder and vice-President of GEMME (European Association for Judges), and President of the International Conference of Judicial Mediation (CIMJ), spoke about mediation in individual employment conflicts brought before the Court of Appeal in Grenoble. She mentioned that few cases of mediation have been instigated by judges in industrial tribunal cases, but that Grenoble's social chamber ordered more than 1000 mediations with a resolution rate of more than 75%. She then said that mediations are carried out under a judge's supervision: he selects the cases appropriate for mediation, provides information about mediation to the parties, proposes mediation to the parties through a special mediation proposition hearing, and approves the agreement or makes a judgment at the end of the mediation.



Mr Justice Shaheed Bhaukaurally (Mauritius) spoke about competence in arbitration. He mentioned that the less autonomy afforded, the more than a party will frustrate the arbitral agreement. In deciding who decides on the validity of the arbitral clause to begin with, he states that there is policy consideration and case law for preferring that the arbitral court should start the question, as courts would create delay and costs. On a positive note, parties will let the arbitrator decide the jurisdiction.

Mr Anwar Moollan, (Mauritius), barrister, also spoke about competence in arbitration. He mentioned that courts should defer to an arbitral tribunal, and then afterwards the courts could review an award. He also noted that from case law, national courts should only do prima facie examinations.

Mr Justice Jianli Song, (China), Supreme Court judge, spoke about judicial mediation in China. She said that the Chinese mediation model reflects fusion between traditional Chinese values, articulated in Confucianism (Daoism), a standard that socially mandated people to act in conformity and harmony socially. The Civil Procedural Law of 1982 further affirmed these principles. Song further explained the characteristics of Chinese judicial mediation, which included: lawfulness, mediation on principles of free will, and a combination of mediation and adjudication. She concluded by saying that China's deep-rooted traditions promote resolving dispute by friendly mediation, which differ from the West's adversarial tradition of litigation and arbitration.

Mr Mohammed Amir-Ul Islam (Bangladesh), Barrister-at-Law, Amir & Amir Law Associates, spoke about whether courts intervention in international arbitration could be considered a help or a hindrance. He mentioned that although in most jurisdictions, the trend has been towards minimal supervisory role of the courts, the key point has always been how to safeguard both party autonomy and the quality of justice. Acting in aid of arbitration has been the major role of the court. There have been many instances when courts have been found to interfere unduly in the arbitral process, as a device for delaying and further defeating the main rationale behind adaptation of the arbitration clause. As a way forward, he concluded by saying that in order to reduce Court's intervention, there may be recommendation for higher standard of strong prima facie case to be established before entertaining a petition challenging the award of a tribunal before the court.

Meeting of the WJA Board of Governors at GBICC

PANEL SESSION IV – THE ROLE OF THE STATE – NATIONAL SECURITY CLAIMS TO RESTRICT ARBITRATION

The fourth panel, *The Role of the State – National Security Claims to Restrict Arbitration* was chaired by **Sir Hamid Moollan, Q C** (Mauritius).

Prof. Karel Klima (Czech Republic), WJA National President and Professor of law at the University of West Bohemia, spoke about constitutional law, *ordre public* and arbitration. She mentioned that the idea of international arbitration tribunals that use several instruments of international law institutes a “non-governmental” approach to settling private-law disputes. She noted that from the constitutional viewpoint, such an approach relinquishes, to some extent, the right to resort to general courts of law, the principle of fair trial and, to some extent, the principle of appeal. All these factors correspond, more or less, to the organizational and procedural aspects of constitutional law. From the viewpoint of constitutional law, it is difficult to perceive the effects of this agreement as “a derogation of the jurisdiction of the Constitutional Court”. More precisely, the issue concerns the lawful use of the arbitration authority of public power with regard to a subject of private law with the possibility (albeit limited) to have the matter “returned” for review by a general court of law.

Mr B. Madhub (Mauritius), Deputy Solicitor-General, spoke about state entities and arbitration, in terms of immunity. He mentioned that the capacity of state to enter into an arbitration agreement will depend upon its constitution and its internal legislation. It is important to consider to what extent the State can claim “sovereign immunity”. The types of immunity which

are most likely to be of relevance are those relating to jurisdiction, enforcement and prejudgment proceedings. State practice suggests that whether a State is seeking immunity from jurisdiction or from execution against State-owned property, the State and its wholly owned or controlled entity/enterprises consider themselves to be functionally the same, so that the activities of State entity/enterprises are considered to be carried out by the State in its exercise of sovereign authority. Thus, Madhub suggests that a State or a State entity/enterprise can claim sovereign immunity only for *acta jure imperil* (government or sovereign acts) but not for *acta jure gestionis* (acts of a private or commercial character). The distinction between *actus jure imperil* and *actus jure gestionis* is seen to revolve around the "nature" and "purpose or motive" of the act concerned. Another distinction is the question of "whether the act could be also performed by private persons."

Mr Iqbal Rajahbalee (Mauritius), Senior Counsel, spoke about national security claims under bilateral investment agreements.

PANEL SESSION V – TRANSPARENCY AND CONFIDENTIALITY – UNDERSTANDING THE CONCERNS

The fifth session, *Transparency and Confidentiality – Understanding the Concerns*, was chaired by **Mr Justice A. Caunhye** (Mauritius).

Ms. Enrica Maria Ghia (Italy), WJA President for Europe and attorney, Studio Legale Ghia, spoke about mediation in Italy, in terms of it being a fresh start to save the Italian judicial system. Ms. Ghia began by pointing out Italy's low ranking on efficiency of judicial systems for civil and commercial matters, due to very long duration of their judicial proceedings and operational obstacles of judicial offices (5.6 million civil proceedings are actually pending before Italian courts, each with an average duration of 1.210 days). Some parties used the length of the proceeding as a strategy to obtain a 'natural' delay of their payment obligations. Recently, in an effort to reduce the amount of pending civil proceedings, the Italian legislature recently introduced Legislative Act n.28/2010 for mandatory mediation of certain matters, like property rights, inheritance, leases, medical liabilities, and damages caused by vehicles or craft circulation. She then mentioned that while voluntary alternative dispute resolution existed prior to the new Act, it was considered expensive and not widespread. The new Act's mediated cases are to have a maximum duration of four months, and represent 65% of cases. The Act also highlights the important requirements a mediator must fulfill, such as: impartiality, independence, confidentiality. The educational requirements of the Act allow non-legal professionals to practice as mediators, an approach that has been criticized by jurists. Ghia then described the procedural steps in mediation in Italy, including: a preliminary preparation phase, an initial common meeting, a private sessions, and a final common meeting. She pointed out that the parties are always free to jointly ask the mediator to propose a settlement, and the mediator will have to explain to the parties that a proposal that is not accepted by one among them, will expose this latter to further and eventual liability. Subsequent to a mediation proceeding, the judge will condemn the party who did not accept the proposal to refund the mediation and the judicial fees to the counterpart and to pay an administrative sanction equal to the same amount of judicial costs already paid to start the judicial proceeding.

Ghia concluded by saying that the introduction of mediation in Italy should decrease the average duration of the judicial proceeding from 57% up to 71% (or roughly from 547 to 202 days) according to an ADR Center study. While some professionals criticize mediation considering it the 'privatization of the judicial system' and inadequate to properly protect and support individuals' rights, others are convinced of its importance in provoking drastic decreases in time duration and numbers of litigation proceedings pending; but also in the mental approach to litigation at individual level.

Ms Justice Yue Yang (China), Senior Judge of PRC and Vice Chief Judge, Shengyang Intermediate People's Court, Liaoning Province, spoke about research on ADR regarding the connection of litigation and ADR systems in China from the perspective of courts.

She mentioned that as a consequence of the development of Chinese economy and society, courts have deferred to dispute resolution to help solve numerous systematic issues. This conceptual change has led to some new trends in the Chinese dispute resolution system, namely more attention to mediation and reconciliation procedures and increasing connection with non-governmental ADR procedures in addition to traditional court sessions followed by judicial judgments. There are three different types of ADR in China, namely non-governmental ADR, administrative ADR, and industrial ADR. There are also three types of judicial ADR: assistance mediation system, commission mediation system and coordinated reconciliation system. She then mentioned that there are several aspects of problems in the connection of litigation and ADR, including : the unsatisfactory effect of the application of non-judicial ADR, the lack of valid connection system between litigation and ADR, the absence of communication and feedback systems, and insufficient attention to duration of ADR.

In describing the history of ADR in China, Ms. Yang explained that The ADR system has been confirmed by the legislators of the two Civil Procedure Codes since the country's establishment, and since then, the Supreme Court has introduced proposals on how to improve mediation and stressed the importance of interaction of litigation and ADR. The "connection of litigation and ADR" covers the whole process of dispute settlement in and out of court. Currently, the "convenience network" has been established with the people's tribunals as the core, the judicial offices and the people's mediation committees as the basis, and the majority of rural population as the service objects. The courts also establish a series of measures including "convenience window", "green channel" and "special commission" during the litigation process. Ms. Yang then concluded by saying that to lighten the pressure on courts from a lack of trial staff and the increase of cases, China should look for more ADR social support and introduce appropriate multi dispute resolution entities to enhance the transparency of litigation and broad public involvement.

Ms Lucie Barron (USA), President, ADR Services Inc., spoke about establishing confidence in the ADR and mediation system, and about the growth of mediation and private ADR companies. She mentioned that people have confidence in mediation and private arbitration because of transparency and confidentiality. Its growth has also been due to state intervention and the need for organized private companies to assist with the administrative operations with scheduled mediations. She pointed out that private ADR companies succeeded because they assist litigants in resolving lawsuits quickly, efficiently and at a much lower cost than ongoing litigation. She also highlighted certain factors necessary for viability of private ADR companies internationally, including: legislative framework, increased demand from business interests, and education of the legal community. Barron concluded by saying that the successful development of the private mediation industry in California, with its emphasis on both the transparency of the process and confidentiality of what is disclosed during mediation, may serve as a framework for the development of private mediation around the world.

Mr. Ravind Chetty (Mauritius), Senior Counsel, spoke of transparency in arbitration proceedings. He mentioned that transparency in arbitration must have a purpose; otherwise it will have no public benefit. To that extent that arbitral proceedings deal with subject matter outside the private domain, they will require compliance with transparency. Chetty pointed out that transparency in arbitration has not been of paramount concern, but that now there is a trend towards more transparency. For example, recent revisions were made to UNCITRAL that allow

optional clauses to the parties to decide whether to make the proceedings transparent. Also, the Secretary General to UN mentioned that adequate transparency where human rights and state obligations are the subject is key. When we examine case law, Chetty said that we would also see the same trend. In *Metanix Corporation v. USA* and *Canfor v. USA* for example, the hearings were made public. In reaching their decision in *UPS v. Canada* and *Arguas Argentinas*, where non-parties were allowed to make reports so that their point of view could be taken into account, the Tribunal underlined the emphasis placed on the value of greater transparency for proceedings such as these. The justification was that public acceptance of the legitimacy of international arbitration is strengthened by increased openness of the arbitral process. Chetty concluded by saying that transparency at times can be achieved by meeting both the test of openness and the test of accountability.

Mr Kailash Dabeesingh, Chartered Arbitrator (Mauritius) – spoke about whether confidentiality in arbitration was fact or fiction. Dabeesingh began by saying that arbitral proceedings are generally considered private and confidential. He then distinguished between privacy and confidentiality – privacy is referred to the fact that only the primary parties to a dispute may attend hearings and participate in hearings, and confidentiality is referred to the party's' obligation to not share or discuss the proceedings and materials. English courts provide an implied duty of confidentiality in arbitral proceedings, with exceptions when: consent to disclosure is granted by the party who originally produced the material; the court has ordered the disclosure; the disclosure is reasonably necessary for the protection of the legitimate interest of an arbitrating party; and where public interest requires disclosure.

Recent developments in the law have disarmed the understanding that confidentiality is a fundamental principle of international commercial arbitration and one of the main advantages of arbitration as opposed to litigation. In a later case, the scope of the obligation of confidentiality in arbitration was further delineated, where the notion of a blanket duty of confidentiality was discarded, and instead a balancing exercise was suggested between public interest in the administration of justice and protection of genuinely confidential and sensitive information. Australian and Swedish courts also decided that confidentiality is not an essential attribute of private arbitration such as to impose an implied obligation on each party not to disclose the proceedings or documents. In Singapore, the original English position has been preferred over the Australian position in respect of arbitration, keeping with the parties' expectations to take the position that the proceedings are confidential and that disclosures can be made in the accepted circumstances. French courts in the meantime, provide an even more stringent protection for the confidentiality of arbitral proceedings and awards than the English courts. Australian courts agreed that the English approach to leave the courts to work exceptions on a case to case basis offers a better response. The United States of America is another major trading nation which does not uphold implied confidentiality in arbitrations.

In examining institutional rules, Dabeesingh found that they commonly provide that arbitrators maintain confidentiality of proceedings but few prohibit disclosure by the parties or by witnesses. National legislations like the ICSID (International Centre for Settlement of Investment Dispute) and the UNCITRAL Model Law are silent on confidentiality. The ICC (International Chamber of Commerce) Rules of Arbitration, while silent on the confidentiality of awards and materials produced and information disclosed in the proceedings, respects the confidential character of the arbitration proceedings and awards in relation to an ICC arbitration. LCIA (London Court of International Arbitration) Arbitration Rules are consistent with the English law on confidentiality. The AAA (American Arbitration Association) Arbitration Rules binds the arbitrator and the administrator to a duty of confidentiality.

He concludes by saying that until the international community develop and promote a unified standard set of confidentiality rules, the phenomena that we associate with privacy and confidentiality is destined to remain vague.

PANEL SESSION VI –BALANCING THE INTERESTS OF INVESTORS AND HOST STATES – HUMAN RIGHTS AND ENVIRONMENTAL POLICIES

The sixth panel, *Balancing the Interests of Investors and Host States – Human Rights and Environmental Policies*, was chaired by **Mrs Justice Rita Teelock** (Mauritius).

Prof. Dr. Alexander Bělohávek (Czech Republic), WJA First Vice President, Host of the 24th Biennial Congress on the Law of the World, and lawyer at the Law Offices of Bělohávek, spoke about the publicity and non-publicity in international investment arbitration.

Mr Satyajit Boolell, SC (Mauritius), Director of Public Prosecutions, spoke about the rule of law as a key guarantee for investors. He began by saying that the economic development of Mauritius exemplifies that, where economic opportunities and political stability exist, a legal system that has a high respect for the rule of law draws foreign investment and international business. He then explained that the rule of law rests on two fundamental pillars: submission to all of the law, and the separation of powers. More recently also, the rule of law was defined as More recently, in their official Declaration, G8 Foreign Ministers, stated that the rule of law was characterized by the principles of supremacy of the law, equality before the law, accountability to the law, legal certainty, procedural and legal transparency, equal and open access to justice for all, irrespective of gender, race, religion, age, class, creed or other status, avoidance of arbitrary application of the law and eradication of corruption. Mauritius' International Arbitration Act was drafted having these considerations in mind.

Bilateral investment treaties, popular in Mauritius, were designed by western capital-exporting governments to protect investors when they make investments abroad, typically in developing countries, and they give assurance to the investors that their foreign investments will be guaranteed fair and equitable treatment, full and constant legal security and dispute resolution through international mechanism. However, Boolell mentioned that concerns are emerging that these treaties provide foreign investors with broad and ambiguous rights, which may be asserted before international arbitration tribunals, whose operations are shrouded in confidentiality. Several governments have acknowledged public concerns by moving to revise their investment treaties, so as to provide greater certainty that those treaties will not impinge upon the domestic policy space of government officials and elected politicians.

Boolell concluded by saying that all stakeholders in the investor-State process have an interest in greater transparency, as investor-State arbitrations involve the public interest in ways that commercial arbitrations do not. Because: each case involves an allegation that the State acted wrongfully; the disputes often arise in relation to critical national economic sectors and social services, such as water, electricity, oil and gas, mining, waste disposal, transport and telecommunications; they could involve challenges to regulatory measures to protect public welfare; the disputes have implications for the public purse, irrespective of the sector or regulatory measure involved and international investment law is now an important part of the international law on globalization, and tribunals interpreting the provisions of investment treaties have a pivotal role in how the law is developed.

Mr Robin Sivakumaren Mardemootoo (Mauritius), Attorney-at-law, spoke about-defying traditional limits of ADR in cross-border investments, citing the examples of “rent-a-judge” and “pay-as-you-go” courts. He mentioned that bilateral investment treaties always contain a dispute resolution clause, most times referring the matter to arbitration or conciliation before a forum such as the International Center for the Settlement of Investment Disputes. He then mentioned that the issues arising before investment arbitration tribunals were traditionally of a commercial nature related to alleged discrimination or other alleged violations of the treaty obligations but lately, more complex ones like human rights issues and environmental issues. For example, foreign investors may ask for environmental regulations to be relaxed in order to execute an agreement. Also, Mardemootoo pointed out that it is very rare for bilateral or multilateral investment treaties to provide for human rights, perhaps because of jurisdictional challenges, but cited some case examples where States have raised at part of their defence, arguments based on human rights.

PANEL SESSION VII – ISSUES TO CONSIDER IN DRAFTING AN INTERNATIONAL ARBITRAL / ADR AGREEMENT

The seventh panel, *Issues to Consider in Drafting an International Arbitral / ADR Agreement*, was chaired by **Mr Justice David Chan Kan Cheong** (Mauritius).

Mr. Ronald M. Greenberg (USA), WJA Immediate Past President and counsel at Dykema spoke about certain considerations in preparing international arbitration agreements. Greenberg pointed out minimum topics that parties should consider, including: the scope of arbitration, governing procedure, location, selection of arbitrators, discovery, governing law, prehearing remedies, sovereign immunity, pre and post-judgment interest, costs and attorney’s fees, currency, and enforcement of the award. He also mentioned that the less you leave to an arbitrator or a court regarding procedures, the more money saved.

Mr Désiré Basset (Mauritius), Senior Counsel, and **Mr Antoine Domingue** (Mauritius), Senior Counsel, spoke of certain issues to consider in drafting an international arbitration/ ADR agreement.

First, they described three objectives of an agreement: to produce binding consequences on the parties who have agreed that the state Court process is not their preferred option to resolve their disputes, to adopt a venue where the procedural aspects of the arbitration can be secured through a process that enable proceedings to flow as smoothly as possible, to exclude the state Court’s intervention in the disputes resolution, and to empower the chosen arbitrators to adjudicate the disputes in an efficient and effective way.

They then mentioned that in considering the objectives, one issue is the importance of deciding whether one will proceed with institutional arbitration or ad hoc arbitration, and then the location of the juridical seat of the arbitration. On an ad-hoc basis, Mauritius is conferred to the Permanent Court of Arbitration (PCA). The Mauritian International Arbitration Act also makes Mauritius a very friendly venue in which Courts are quite supportive of international arbitration. The Courts are not intervene except to beef up the arbitral process; if a party contends that a dispute is to be resolved by arbitration, the matter will be sent to the Supreme Court, which judges on a prima facie basis in favor of arbitration in case of any doubt. Another issue to consider is that interim measures available in Mauritius under Section 23 of the Act are supportive of arbitration. A third issue, in considering the juridical seat of arbitration is that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has the force of law in Mauritius,

and it also applies to Awards under the Act as regards to enforceability, to ensure compliance with the Rule of Law in terms of capacity to arbitrate, due process requirements, rules of natural justice, and the upholding of the public policy of Mauritius.

Ms Narghis Bundhun (Mauritius), asked the question of whether the choice of the seat of arbitration would be the single most important clause to an arbitration agreement. She said that Parties to an international commercial contract are usually domiciled in different jurisdictions and come from different cultures and legal backgrounds, so they resort to arbitration because they prefer to choose the law that will govern the substance of the contract. Jurisdiction is also important because parties will not be able to enforce the award if the arbitral tribunal has not complied with the law of the country where the arbitration took place, or the “seat”. The Mauritius International Arbitration Award of 2008 also reflected this sentiment. Bundhun also explained that the choice of the seat of the arbitration is generally left to the parties, except in the event that the parties have omitted to indicate the seat in the arbitration agreement. Mauritius Law, modeled after the Model Law provides that in non –institutional arbitration, it is for the arbitral tribunal to determine the seat of the arbitration. Bundhun then mentioned that seat determination could be important in the event that the proceedings run through rough waters and the assistance of the court becomes necessary. Also, she says that the jurisdiction generally needs to be seen to be neutral, independent of the parties and to present the basic safeguards such as the equality of treatment between the parties.

Dinner – Hosted by **Mr Y.K.J. Yeung Sik Yuen, G O S K**, at **Domaine Anna, Flic en Flac**

Day Two of the Conference ended with a wonderful dinner hosted by the Chief Justice of Supreme Court of Mauritius. Delegates from abroad and distinguished local judges, magistrates, and members of the legal profession were treated to a wonderful evening of friendship and welcome.

PANEL SESSION VIII – ENFORCING AN INTERNATIONAL ARBITRATION AWARD

The eighth panel, *Enforcing an International Arbitration Award*, chaired by **Mr. Justice A. R. Hajee Abdoula** (Mauritius).

Prof. Dr. Alexander Bělohávek (Czech Republic), spoke about *ordre public* and the enforcement of an international arbitration award.

Mr. Justice Wan E'xiang (China), Justice and Vice President of the Supreme Court spoke about judicial review over international arbitral awards in Chinese courts. He mentioned that institutional arbitration is legislatively required in China, but that ad hoc arbitral awards could be allowed. Other characteristics of arbitration in China, include centralized jurisdiction on judicial review cases with foreign elements, and pre-reporting (automatic appeal) system in negative-ruling cases. The pre-reporting system and centralized jurisdiction can ensure the judicial integrity and quality of judgments in judicial review cases for international arbitration.

He also discussed debated issues in judicial review cases, including: extending the arbitral agreements to non-signatory parties, the nationality of arbitral award under the New York Convention, a truncated tribunal, and public policy. He concluded by making note that the New York Convention is directly and favorably applied in China with procedural safeguard in the judiciary, and that the extension of an arbitration clause cannot cover all the disputes with non-signatory third parties. He also mentioned that public policy as a ground to deny the effect of

arbitral awards is extremely restricted in China, except when it relates to judicial sovereignty and finality of the country.

Mr Rishi Pursem Senior Counsel (Mauritius), spoke about enforcing an annulled international arbitral award. The Mauritius International Arbitration Act the Act is intended to ensure that Mauritius can benefit from an innovative and progressive international arbitration law, focused on the autonomy of the parties, the flexibility and celerity of the procedure, the certainty and security of the solutions and, most importantly the efficiency of the awards. Pursem mentioned that it is generally accepted that awards annulled in one country cannot be enforced in other countries, except for a few jurisdictions. France however, enforced in annulled award in 1984, rationalizing that an arbitral award is an autonomous international decision. There were also a few US decisions that also took that approach. Pursem also mentioned that it would be up the Supreme Court's discretion to grant or refuse enforcement. Also, he stated that the fate of an international arbitration award could conclusively be determined by the courts of the state where the seat of the arbitration is, or, in the case of a losing party pursuing its adversary with enforcement actions in the one country after another until a court is found to grant the enforcement of an award annulled by the courts of the state where the seat of the arbitration is.

PANEL SESSION IX – UNDERSTANDING THE UNCITRAL RULES ON ARBITRATION – AMENDMENT 2010

The ninth panel, *Understanding the UNCITRAL Rules on Arbitration – Amendment 2010*, was chaired by **Mr Justice Eddy Balancy** (Mauritius).

Mrs. Dra. Monica Grill (Argentina), WJA National President for Argentina and Professor of Private International Law at Buenos Aires University, spoke about the UNCITRAL Rules on Arbitration – Amendment 2010. She noted that the text of the new UNCITRAL Rules reflects a range of recent developments in the law and practice of international arbitration. The revisions were in the areas of notices, multiple parties and joinders, interim measures, exclusion of liability, appointment of the arbitral tribunal and the appointing authority, experts appointed by the tribunal, awards and costs. The modern prevalence of arbitration as a method of resolving international disputes, both in contractual and non-contractual settings, has generated a number of rules and customs that were either absent or in their early stages of development when the 1976 UNCITRAL Rules were drafted. She stated that the revisions to the UNCITRAL Rules are welcomed, as arbitration is of ever increasing importance as a means of resolving international disputes fairly, and the revisions will assist in maintaining UNCITRAL arbitration as a useful, efficient, and effective procedure for dispute resolution.

Mr. Rashad Daureeawo (Mauritius), Senior Counsel, spoke about understanding the UNCITRAL Rules on Arbitration. Mr. Daureeawo mentioned that UNCITRAL arbitration was adopted by the United Nation Commission for International Trade Law (UNCITRAL) and United Nation General Assembly in 1976, as a framework for ad hoc arbitration. Then, in 1985, UNCITRAL produced a “Model Law on International Commercial Arbitration, and on 2006, they modernized the rule to promote efficiency in arbitral proceedings. Before the revised rules, the 1976 rules were silent on a number of points, thus encouraging negotiation as well as tactical delays. The revisions update rules are in line with the realities of the modern methods of arbitration and this can be seen in the recognition and regulation of joinder and multi-party disputes, “futureproofing” of provisions related to service and communication as well as the many procedural amendments to

enhance arbitral efficiency. Daureeawo concluded that, at first glance, the changes made to the revised Rules are constructive, shrewd and seem in line with UNCITRAL's stated purpose of resolving practical issues to enhance the operational efficiency of the rules, and make changes only where deemed necessary to update the rules. Thus, ad hoc arbitration now faces increased regulation, greater efficiency and modernity that the procedural amendments accord. The revised Rules' incremental nature of the change minimizes any ambiguity in interpretation.

PANEL SESSION X – CROSS-CULTURAL MEDIATION – EXAMPLES FROM THE FIELD

The tenth panel, *Cross-Cultural Mediation – Examples from the Field*, was chaired by **Mrs Justice A. F. Chui Yew Cheong** (Mauritius).

Dr. Ann Brady (United Kingdom), WJA National President; Barrister, mediator in Rougemont Chambers UK, and a member of the Civil Mediation Council spoke about mediation developments within the European Union (EU) and in England and Wales. She mentioned that in the EU, the development of ADR is a declared political priority of EU institutions whose task it is to promote these types of alternative techniques, and to ensure an environment propitious to their development and to guarantee quality. Their mediation development operates behind the legal framework of: access to justice for all, Article 6 of the ECHR, Article 47 of the Charter of Fundamental Rights of the EU, the European Code of Conduct for Mediators and the 2008 Directive on certain aspects of mediation in civil and commercial matters. She also discussed the ongoing debate in England and Wales about who should be court mediators, and she suggested that that to be cost effective, court mediators should be able to read a court file quickly, understand its contents and work within a limited time frame.

Mr. Edward Sullivan (USA), Partner at Garvey Schubert Barer, and **Ms. Alexia Solomou** (The Netherlands), Attorney, International Court of Justice, spoke about ADR in land use disputes. They mentioned that ADR was gaining popularity as a beneficial alternative to litigation across multiple legal systems, as judicial dockets are becoming more crowded and the cost of litigation is increasing. They then mentioned the many benefits of ADR in land use cases, as with wide-area planning where there are numerous parties may benefit from an impartial mediator or arbitrator who can negotiate for the majority.

They then went on to compare the ADR system used in the State of Oregon in the United States of America with the ADR regime in England. Oregon has a mandatory statewide land use planning system that encourages citizens' participation; thus individuals and other stakeholders may repeatedly challenge local government decisions, and litigation may stretch out for years. Oregon state guidelines are designed to encourage the use of ADR, which provides an opportunity for parties to negotiate mutually agreeable solutions and avoid the expenses of protracted litigation. Oregon law provides for a structured mediation process at each step of a land use appeal.

Ms. Solomou then provided an illustration of the importance of building trust between community members and elected representatives in land use planning with the *Bull Mountain v. City of Tigard* case study. The City of Tigard planned to integrate the rural Bull Mountain neighborhood into its boundaries, but the Bull Mountain community was overwhelmingly unreceptive to Tigard's annexation plan, considering it a "hostile takeover." Due to the lack of trust and communication between the parties in this process, today Bull Mountain property owners must still individually apply for plot annexation in order to be incorporated into Tigard. With ADR procedures in place, the shared interests between Bull Mountain residents and city government may have led to a more satisfactory resolution and long term planning solution.

They then mentioned that ADR has also been integrated into water management in Oregon, at the individual water right application level and at the state administrative agency level. When neighbors and other stakeholders challenge the water use permit application during this process, Oregon's ADR processes are indispensable. If ADR is unsuccessful, then one may resort to administrative litigation through contested case procedures. They also mentioned the use of negotiation in facility siting in the *Mount Hood* case, where a stalemate arose between two parties regarding possible encroachment by the operator of a ski resort upon the National Forest near the Portland Metropolitan area.

In contrast, they said, the use of ADR has been relatively slow in England, due to: lack of public awareness, lack of experience in this field by lawyers, fear of showing weakness by accepting ADR, and resistance to the idea of compromise. Beginning as early as 1996, mediation has been used as a form of ADR within the planning system in England, particularly in relation to appeals. Certain Planning Acts emphasize effective pre-application processes as the key to achieving the efficient examination of major schemes, but formal dispute resolution technique mediation is not yet embedded in the English planning system. A Mediation in Planning Report, commissioned in 2010, recommended that mediation be strongly encouraged by Government by providing a policy framework, creating capacity to allow its benefits to be realized, and establishing an appropriate regime of incentives and penalties to support the delivery of this new approach to planning.

In comparing ADR in Oregon to that of England, they said that ADR in Oregon benefits from several distinct advantages over the system in England such as supportive legislation, a reputation for success, and skilled, readily available facilitators; however, their ADR processes are under-supported and underleveraged. In contrast, they said, ADR in England is valued more for its greater emphasis on confidentiality and is more cost-effective.

They concluded by saying that the development and efficiency of ADR still remains too dependent upon the local political and legal cultures (i.e. private parties and government authorities). For the use of ADR in Oregon to expand, its funding mechanisms must improve, alternatives to the "attorney's fees rule" should be explored, and the value of the ADR profession's services should be more widely recognized and respected. For the use of ADR in England to expand, mediation should be developed as a crucial part of participatory planning, and the recommendations contained in the Mediation in Planning Report should be implemented to the maximum extent possible.

Mr. Eric Ribot (Mauritius), Senior Counsel, entitled his discussion "*Si fueris Roma, Si fueris alibi*", a play on words of the common phrase, « When in Rome... ». He explained that the culture of the persons before you are critical in mediating a solution. For example, he mentioned that in Japan "Face" is very important; you must always help somebody to gain "Face", and you must never allow the other party to lose "Face" publicly. The mediator must put themselves into the parties' shoes, and must be able to set aside parties' views. He mentioned that different cultures' means of communication can be categorized into "High Content" or "Low Context" communication. "Low context" emphasizes linear logic and individualism, while high context emphasizes spiral logic and collectivism. He also mentioned that in a low power distance culture, where superiors and subordinates are equal, the mediator should call the parties by their first name, but in a high power distance culture, where the relationship between superiors and subordinates is rarely close/personal, the mediator needs to use a different approach.

Closing Remarks

Mr Y K J Yeung Sik Yuen, G O S K, Chief Justice of Mauritius, thanked all participants for attending. He paid tribute to Margaret Henneberry, and thanked the WJA Office headquarters team for their

help. He also thanked all the volunteers, all judges as moderators, emcees, law officers, bar associations, and panelists for their research and hard work. He appreciated the commission of police, who ensured the transportation. He reminded the audience of the WJA motto - world peace through law, and of the need to savor the strength of the legal fraternity world wide.

Prof. Dr. Alexander Bělohávek, WJA First Vice President & Host of the 24th Biennial Congress on the Law of the World, thanked the President, Prime Minister, Supreme Court, Chief Justice, Attorney General, Bar Association, hosts, various courts, sponsors etc. He also paid tribute to Margaret Henneberry, and then invited attendees to the 24th Biennial Congress of WJA, in Prague.

The State House Ballroom Reception – was hosted by **His Excellency, The Right Honorable Sir Anerood Jugnauth, G C S K., K C M G., Q C**, President of the Republic of Mauritius

