UNIT 14: LEGAL ASPECTS OF ENTREPRENEURSHIP

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14.0 OVERVIEW

It is not always an easy task to do business in Mauritius. Entrepreneurs, for example, need money and funds in order to raise capital to do business. Though they have support from the Small Enterprises & Handicraft Development Authority (SEHDA) they have to take loans and sometimes they may not be able to refund back the money. In some circumstances, they have to employ/dismiss workers when they face financial constraints. They have to deal with contracts to buy machines on lease or on hire purchase. The same question to these issues arises very often:
where is the law? So what do you need to know when you wish to be an entrepreneur, a director of a company or a trader in Mauritius?

In a nutshell, there are pieces of legislations, which an entrepreneur needs to know. This is the purpose of this unit. In this unit, the student must be aware of the following pieces of legislations: The Hire Purchase and Credit Sale Act, the Consumer Protection Act, The Companies Act, The Securities Act, The Employment Rights Act, the Employment Relations Act, The Insolvency Act, The Trade mark Act, The Copyright Act just to name a few.

Because of time constraints, it is not always easy to deal with all of them. In this unit, students will be able to understand important aspects of the Mauritian Law such as Labour Law, Law of Contracts; the law of negotiable instruments (such as bills of exchange, promissory notes and cheques just to name a few).

In addition, there are various codes where the student must be conversant with: The Civil Code, The Code de Commerce and the Penal Code. The three of them have been borrowed from French Law and it is also an heritage left by the French (1715-1810) but as from 1810-1968, the British ruled the country and imposed English law such as judicial review (a public law remedy) and injunctions (perpetual injunction, interim injunction, prohibitory injunction for example). Since then, we have inherited both English and French Law and they can be found in our statutory books.

14.1 LEARNING OBJECTIVES

By the end of this Unit, you should be able to do the following:

1. Discuss some of the rights and duties of an entrepreneur in his business and the different ways he and his employees are protected (labour law, unfair trade, discrimination just to name a few) with respect to the laws, which are applicable in Mauritius.

2. Analyse where the law is and how it is applicable in Mauritius, which has inherited both English and French law.
3. Be Conversant with the various pieces of legislations, which deal with legal aspects of entrepreneurship. You must read various statutes and Acts of Parliament in order to understand this unit. These statutes are cited in this Unit.

4. Be acquainted with judicial precedents. They are a source of law in Mauritius and you must read cases, cited in this Unit 14, in order to know how the Supreme Court came to a decision.

14.2 LEGAL ASPECTS OF BUSINESS

In a new world of technology, businesses are achieved in various different ways such as by using the Internet (e-business, e-commerce contracts) and digital banking.

Legal forms of business are becoming more and more technical: leasing, hire purchase and factoring are some examples and just to name a few.


First, what is law and why is it important for entrepreneurs? The law consists of rules and regulations that shape the conduct of individuals and organisations within society. In order for business to bloom there are various pieces of legislations, which aim to protect an institution (a company) and/or the individuals (Consumer Protection Act, Hire Purchase and Credit Sale Act).
Second, there are various categories of legal forms of business in Mauritius because we have a hybrid or mixed legal system (English and French). We have adopted English common law, French civil and commercial law and we have ratified various conventions (The Occupational, Safety and Health Convention 1981 which applies to all workers in the branches of economic activity covered).

We have also retained some Codes, which have been borrowed from the French law (Code de Commerce, Code Pénal and Code civil) and we have written laws (in the form of statutes or Acts of Parliament). One of the most important pieces of legislation in Mauritius is the Constitution. It is the supreme law of the land such that any other law, which is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

Third, there are Courts, which hear cases linked with business law and the law of contract. These Courts are the District Court, the Intermediate Court, the Bankruptcy Court and the Supreme Court just to name a few. The Supreme Court is the highest court in this country.

14.3 COMPANY LAW AND DROIT DES SOCIETES

14.3.1 Introduction

A company has a legal personality (Salomon v. Salomon & Co. Ltd 1897). In Mauritius, we have both companies (the Companies Act 1984 and the Companies Act 2001) and sociétés (Loi française du 24 juillet 1966, no 66-537). The Companies Act 1984 was borrowed from the Companies Act 1985 which prevails in England but the Mauritian Legislature has implemented the new Companies Act 2001 which is borrowed, this time, from the New Zealand Act.

In Mauritius, whenever there is a French Law and an English Law, the English Law shall prevail but whenever in an enactment a French term or expression is used, or an English term or expression is explained by reference to a French term or expression, the interpretation of the enactment shall be in accordance with that of the French term or expression (Section 10 of the Interpretation and General Clauses Act 1974) - Dayam v. Dayam. On page 24 of the Code de
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Commerce: “En cas de contradiction entre le Code de commerce et la Merchant Shipping Act, c’est le dernier texte qui doit juridiquement prévaloir”.

The Code de Commerce includes international conventions such as The Bruxelles Conventions (Transport maritime), The Varsovie Convention 1929 (12 Oct.1929) and The Hayes Protocol 28 Sept. 1955 (Transport aérien). There are also The Co-operatives Act 2005 and The Co-operative Societies Act.

14.3.2 Droit des Sociétés - Loi Française du 24 Juillet 1966

The Code de Commerce was first promulgated on the island of Isle de France in 1807, just after the Code Napoléon de 1804. Sociétés based on the French model have a legal personality (art. 21 of the Code de commerce) that is they have a name and a nationality (or personne morale- art. 21 Code de commerce) with a life period of 99 years (art. 19 Code de commerce). It contains the following with regard to:

14.3.2.1 Les Commerçants (Traders)

Traders are those, according to article 3 of the Code de commerce, who “exerçent des actes de commerce”. And the law considers as actes de commerce:

“Tout achat de biens meubles pour les revendre, soit en nature, soit après les avoir travaillés et mis en oeuvre; Tout achat de biens immeubles aux fins de les revendre, à moins que l’acquéreur n’ait agi en vue d’édifier un ou plusieurs bâtiments et de les vendre en bloc ou par locaux; Toutes opérations d’intermédiaire pour l’achat, la souscription ou la vente d’immeubles, de fonds de commerce, d’actions ou parts de sociétés immobilières; Toute entreprise de location de meubles; Toute entreprise de manufactures, de commission ou de transport; Toute entreprise de fournitures, d’agence, bureaux d’affaires, établissement de ventes à l’encan, de spectacles publics; Toute opération de change, banque et courtage; Toutes les opérations de banques publiques; Toutes obligations entre négociants, marchands et banquiers; Entre toutes personnes, les lettres de change.”
According to article 7-1 of the Code de commerce:

“Sont commerçants et tenus des obligations de la profession, même si leur activité ne comporte que des opérations de nature civile, les agents d’affaires, les agents commerciaux, les courtiers et les commissaires. Toutefois, ne sont pas commerçants ceux qui pratiquent des opérations d’intermédiaire prévues par la présente section, lorsque ces opérations sont nécessaires ou accessoires à l’exercice d’une profession libérale traditionnellement civile.”

However, any person (personne frappée de déchéance) who has been convicted for a minimum of three years of penal servitude for, inter alia, larceny (vol- article 301 Penal Code), embezzlement (abus de confiance- article 333 Penal Code), swindling (escroquerie- article 330 Penal Code), forgery (faux en écriture) is not allowed to be a trader unless a Judge in Chambers and the Ministère Public allow such person to be a trader (la loi française du 30 août 1947).

### 14.3.2.2 Les Incapables

Minors are not traders. According to section 4 of the Code de commerce: “Le mineur, même émancipé par le mariage, ne peut être commerçant.”

In France, married women were traders provided their husbands have authorised them to do so (loi française du 18 février 1938 and loi française du 22 septembre 1942). In Ireland Fraser & Co. Ltd v. Vial 1934 MR 43, the Supreme Court held that: “A married woman trading without the authorisation of her husband was not a trader as defined in the enactment replaced by the Bankruptcy Act, and therefore not amenable to the bankruptcy law.”
Today, they are fully independent after loi française du 13 juillet 1965 has been promulgated in France and we still follow the reforms, which occurred in France. According to article 5 of the Code de Commerce:

“La femme mariée peut librement exercer un commerce. Elle n’est pas réputée commerçante si elle ne fait que détailler les marchandises du commerce de son mari; elle n’est réputée telle que lorsqu’elle fait un commerce séparé.”

And it is important to know that: “Sous tous les régimes matrimoniaux, la femme commerçante peut, pour les besoins de son commerce, aliéner et obliger tous ses biens personnels en pleine propriété. Sous le régime de communauté, elle ne peut ainsi aliéner et obliger ses biens réserves; et elle oblige tous ses biens personnels en pleine propriété. Sous le régime de communauté, elle ne peut ainsi aliéner et obliger ses biens réserves; et elle oblige même l’ensemble des biens communs et les propres du mari dans les cas prévus à l’article 1420 du Code civil.”

14.3.2.3 Société en Nom Collectif (SNC) and Société en Commandite Simple (SCS)

These are mainly the two main types of sociétés. They have a legal personality (Société en Participation does not have ‘la personnalité morale’ or legal personality) but the main distinction between the two is that in a SNC they are all traders whereas in a SCS minors are not traders but instead they enjoy the quality of an ‘associé’.

14.3.2.4 Dissolution et Liquidation

After registration (Registrar of Companies), a société based on the French model may go on liquidation after dissolution (at this stage the société has still a legal personality). A société may be dissolved either voluntarily, by a decision of the court (dissolution judiciaire), strong disagreement between associé such that there is a ‘mésentente entre associé paralysant le fonctionnement de la société’”) or the life span of the société has
exceeded the 99 years (article 1844-7 Code de commerce and Ng Cheon Ton v. Ng Hoi Fat 1975 MR 23).

The Sale of immoveable property Act and the Succession and Wills Act provide for the liquidation of a société (art.1844-8 Code de commerce).

14.3.3 Company Law

The Company Act 2001 is perhaps one of the most important pieces of legislation for traders, directors, secretary companies, shareholders and debentures. Under the Company Act 1984, a company was required to have a constitution in the form of a Memorandum and Articles of Association but these requirements are no longer needful under the Companies Act 2001.

A company may issue shares (section 51 of the Companies Act 2001) and a company satisfies a solvency test if it is able to pay its debts as they become due in the ordinary course of business and that the value of the company’s assets is greater that the value of its liabilities, including contingent liabilities.

However, it is advisable to have a constitution, which sets the rights, duties, powers and obligations of the company, directors and shareholders. The constitution of the company is adopted and revoked by a special resolution.

The business and affairs of a company cannot be managed in the absence of a director. Under the Companies Act 2001, there is no need to have two directors (section 128 of the CA 2001) but there may be a board of directors who act together. If there are two directors, at least one must be a resident in Mauritius (sect. 132 of the CA 2001).

A director must act in good faith and exercise his functions with care, diligence and skill (section 160 of the CA 2001). He must not disclose any confidential information (sect. 153 of the CA 2001). This explains why section 133 of the Companies Act 2001 imposes that a person under 18 years cannot be a director of a company or a person over 70 years of age (public company), that person must not be an undischarged bankrupt or a person of unsound mind. He may be removed
by an ordinary resolution of the shareholders passed at a meeting called for the purpose that includes the removal of a director (section 138 of the CA 2001). He has the right to resign.

Courts have wide powers to protect shareholders against different forms of abuse by directors. The Registrar of Companies must be informed of any change of director (section 142 of the CA 2001) and if he has not been informed, every director of a company commits an offence and is liable on conviction to a fine not exceeding Rs50,000.

In the interest of the company and its shareholders, there are annual board meetings, meeting of shareholders and for the approval of financial meetings, special meetings are held. For inspection purposes, share register, company records and accounting records are made statutory (section 91, 190 and 193 of the CA 2001).

14.3.3.1 Small Private Company

A company has a legal personality and a name (Registrar of Companies). In Mauritius, it is important to note that there are one-person companies and small private companies compared to large companies (such as company limited by shares, company limited by guarantee, company limited by shares and guarantee, unlimited company, foreign company and limited life company).

The advantage of a small private company is that there is no need to appoint a secretary and/or an auditor and they have the option to file either financial summary or financial statements. In case they decide to file Financial Statements, it is understood that the Financial Statements must comply with regulations made under the Act or any regulations made under the Mauritius Accounting and Auditing Standards Committee Act 1989.
Activities

1. M. Seeda meurt soudainement dans une société en nom collectif. Expliquez les conséquences de ce décès?

2. Pourquoi les donations entre époux doivent faire l’objet d’un acte authentique?

3. Que comprenez vous par une clause léonine?


5. Quelle sera la position de la cour en cas d’hostilités, d’inexécution des obligations par un associé en nom?

6. Que ferez-vous dans l’hypothèse que deux associés contestent leurs parts sociales dans une société?

7. Quelles sont les conséquences si dans une société en nom collectif, un seul des associés refuse de donner son autorisation pour une cession des parts sociales?
14.4 GENERAL BUSINESS AND FINANCE LEGISLATION

In a world of business and transactions, companies and entrepreneurs need money and funds. They also need equipment and materials to run their business.

14.4.1 Source of Finance for the Entrepreneurs

There are, inter alia, some pieces of legislations which the entrepreneur needs to know. They are the Hire Purchase and Credit Sale Act, the Consumer Protection Act, the Income Tax Act 1995, the Securities Act 2005 and the Companies Act 2001.

14.4.2 Hire Purchase

Hire Purchase agreement is very popular because consumers like the hire purchase company buy electrical goods or equipment they need. Though there is an agreement, it has long been decided that a hire-purchase agreement is not a straightforward contract of sale (Helby v. Mathews 1895). The hire purchase company buys equipment (computers, cars, plant and machinery) from the firm (hirer firm) to use it provided there is a series of regular payments with interest and provided the hire purchase company remains the legal owner of the equipment until all payments have been made.

Banks and financial institutions are large and powerful organisations, which provide credit facilities. However, consumers are tempted to borrow money and to overreach their resources. In Mauritius, the Hire Purchase and Credit Sale Act provide a certain degree of protection for the consumer. In England, for example, in addition to the Hire Purchase Act 1938 there is the Consumer Credit Act 1974.

In Mauritius, according to The Consumer Protection Act 1991 a credit sale agreement and a hire purchase agreement have the same meaning as in the Hire Purchase Act and Credit Sale Act. The Hire Purchase Act and Credit Sale Act construed a credit sale agreement as an ‘agreement for the sale of goods on credit and under which the dealership in the goods passes to the buyer upon the sale’ and a ‘hire purchase agreement’ means ‘an agreement for the sale of goods under which the
property in the goods shall pass to the hirer upon payment of the whole amount due by instalments.’

14.4.3 Leasing

There are equipment manufacturers who are ready to rent equipment to the lessee. Unlike hire purchase agreement, the lessee does not become the owner of the equipment or material as the lessor or leasing company (Ford, General Motors) retains legal title.

The lessor is therefore the owner of the asset and the lessee the user of the asset. Lessees pay rents over a certain period of time only (operating lease) with regular fixed payments. This type of financing is very popular in leasing aircraft and ships.

In a competitive world there are risks as well. After the lease, the material may become obsolete and the lessor will bear costs for reparation, maintenance and insurance (operating lease) whereas in a finance lease, the lessee this time has to bear costs for reparation, maintenance and insurance though the lessor retains legal title. Above all there is a contract between the lessor and the lessee but there is no right for cancellation or termination. At the end of the period lease, the lessor is expecting to recover full payment lease of the equipment, plus interest, over the period of the lease.

As stated above, consumers may overreach their resources when credit facilities are available. Under the Hire Purchase and Credit Sale Act a leasing contract means ‘a leasing contract entered into by a company providing lease financing and which is approved as a tax incentive company under the First Schedule of the Income Tax Act 1995’.
14.4.4 Factoring

Business needs money. Small or large firms need money to continue businesses but very often their customers are unable to pay their debts.

Firms take risks when they sell goods to customers because there are always invoices (factures), which are left unpaid. Consequently, they have to chase late debtors and late payers. In such circumstances, they need money urgently and factors are the most appropriate solution to help survive cash flow problems especially for struggling young companies whose customers failed to pay their debts.

But who is a factor? What are the advantages and disadvantages of factoring and the three types of services they offer to firms with debtors?

By definition factoring or invoice finance is the sale of a firm’s account receivable to a financial institution known as a factor and a factor can therefore be defined as a financial institution that buys a firm’s accounts receivables and collects the debt.

14.4.5 Shares and Securities

Companies need money and one way of obtaining it is to issue shares. In fact, it allows companies to raise capital. Shares also provide for the financing of most companies explaining to some extent why, by principle, a company may not purchase its own share (Trevor v. Whitworth 1887). Company’s securities may be divided into shares and debentures. There are different types of shares: preference shares (Andrews v. Gas Meter 1897) and share capital.

In Company Law, the word ‘capital’ is used as the money and assets raised by the company by the issues of shares.
To the exception of private companies only a public limited company may offer its shares to the public. A public offer is an invitation to the public at large to buy the shares. Shares bought for the first time are known as subscription and the buyer is known as a subscriber. In practice, an issuing house offers shares to the public for purchase but the issuing house may also place its shares with the clients. Shareholders (those owning ordinary or equity shares) have pre-emption rights.

However, before raising capital from the investing public the latter must, at first, require some measures of protection because each person owes to the other a duty of care and will be liable for negligence if that duty is breached (*Mutual Life and Citizens’ Assurance Co. Ltd v. Evat* 1971 1 All ER 150).

At the end of this unit, you must be able to understand some legal aspects of public securities and secondly how funds are raised. With regard to pieces of legislations, which exist in Mauritius, this unit shall also focus on some statutory instruments such as the Securities Act 2005 and the Companies Act 2001.

Securities are forms of investments of different kinds such as shares traded on the stock exchange (*infra*) and bonds issued by Government and public authorities. Indeed, how is a security construed in law? There is no proper definition of a security as such.

Nonetheless, the New Zealand Securities Act 1978 in its section 2D(1) defines ‘security’ as ‘‘any interest or right to participate in any capital, assets, earnings, royalties or other property of any person’’ (*R v. Smith* 1991 5 NZCLC 67, 120). According to Justice Wylie, in the case of *R v. Smith*: “Interest implied some proprietary interest and not a mere contractual right to delivery.”

### 14.4.6 Financial Markets Regulation

In Mauritius, the main piece of legislation, which provides for security regulations is found in the *Securities Act 2005*. Part X provides for the powers of the Securities Commission. Debentures give loans to the company but according to the Securities Act 2005, ‘‘securities’’ include, *inter alia*, shares, units, bonds, rights and warrants as well.
According to section 2 of the Securities Act 2005:

“Securities includes-

(a) shares, units, debentures, bonds, or options on these securities;
(b) depositary receipts or similar instruments or treasury bills;
(c) rights, warrants or interests in respect of securities mentioned in paragraphs (a) and (b);
(d) such interests or instruments specified in Part III of the Schedule;…”

It is to be noted that in New Zealand, the definition of “security” is expanded to include an equity security, a debt security, a unit in a unit trust, an interest in a superannuation scheme, a life insurance policy, any interest or right that is declared by regulations to be a security for the purposes of the Securities Act; and any renewal or variation of the terms or conditions of a security.

And “securities exchange” means: “a market, exchange, place or facility, including an organised over the counter market, that provides for bringing together, on a regular basis, buyers, and sellers of securities to negotiate or conclude purchases or sales of securities.”

A person shall establish, maintain or operate a securities exchange in Mauritius, whether physically, electronically or otherwise, unless the person holds securities exchange licence issued by the Commission under this Act (section 9 of the Securities Act).

Offers and issues of securities are in the form of a document known as the prospectus (Articles 67 and 68 of the Securities Act 2005). Section 68 (1) (c) enacts that: “No person shall make an offer of securities to the public, unless the Commission has given a provisional registration to the prospectus.”

In England there is, of course, the Financial Services Act coupled with the Stock Exchange Listing, which govern the issuing of shares. It is implied that directors of a company can issue shares to the public (section 80 of the Companies Act 1985) provided they have been authorized to do so but they must do so for the benefit of the company (Percival v. Wright 1902 2 Ch 421).
Otherwise, it would be an abuse of the directors’ powers (*Howard Smith Ltd v. Ampol Petroleum Ltd 1974 AC 821*).

### 14.4.7 Scope of Securities

What is the scope of securities? It has been found that securities include shares, debentures, rights, warrants or interests (*infra*). But how far is this definition extended to include trusts and life polices for example?

#### a. A Loan

Is a loan a security? In the case of *DFC Financial Services Ltd v. Abel 1991 5 NZCLC 67, 016* it was argued that the loan offered amounted to a security and could therefore not be enforced by the lender if offered without a prospectus in existence but Justice Fischer held that the offer of a loan was not an offer of a security because under the New Zealand Security Act, security is defined in section 2(1) to include the right to be paid money that is lent to any person and this is intended to refer to the investor’s right of repayment, not an investor’s contractual right to insist upon drawing down funds following an agreement of loan.

#### b. Debt Securities

In New Zealand, according to the Securities Act (Sect. 2 of the Act) a debt security is defined as any interest in or right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing by, any person. The definition includes a debenture, debenture stock, bond, note, certificate of deposit, convertible note, an interest or right that is delivered by regulations to be a debt security for the purposes of the Act; any renewal or variation of the terms or conditions of a debt security.

#### c. Debentures

Debentures are loans to the company. And since there is no share in the company’s equity the main purpose of a debenture is that it creates or acknowledges a debt (*Australian Secured Deposits Ltd v. Automobile Association (Canterbury) Inc. 1972 NZLR 438*). As it has been studied in Unit 4, securities are secured, fixed and floating debentures.
d. Equity Securities
Equity securities are shares (preference shares and company stocks) which prosper with the company and in contrast with debentures, they increase in value as a result of the company’s increased prosperity.

14.4.8 Scope of the Securities Act
The Securities Act 2005 contains 163 sections, which are related, *inter alia*, to:

   a. Public offering of shares. Section 3(1) of the Securities Act 2002 enacts that: “This Act shall apply to public offerings of shares owned by the Government of the Republic of Mauritius but shall not apply to debt securities or treasury bills issued or guaranteed by the Republic of Mauritius or such other country as may be prescribed.”

   b. Offer. Offer is defined at section 67 which provides that: “For the purposes of this Act, a person shall be deemed to make an offer or distribution of securities where that person invites or solicits another person (a) to purchase or subscribe to securities that have never been issued (b) to enter into an agreement for the underwriting of securities; (c) to purchase securities underwritten; (d) to distribute securities previously offered without a prospectus; or (e) to purchase securities, other than securities acquired on a securities exchange in normal market operations, previously issued and held by a person, including an issuer and where the offer or distribution is made from Mauritius, or received in Mauritius.” According to the decision given in *Orr v. Martin* 1991 5 NZCLC the term ‘offer’ is given a far broader meaning than in the law of contract.

d. The Prospectus. According to Beck and Borrowdale, “Securities offered to the public may not be allotted unless at the time of subscription there was in existence a registered prospectus relating to the securities. Effectively, the offer of securities to the public necessitates registration of a prospectus.”

e. The Public and Offer to the Public. The definition of the term “public” and “offer to the public” is still uncertain. Case laws have tried to fill in the loophole such that founding shareholders and promoters of a company were not members of the public (Kepler Developments Ltd v. Stanway 1988 4 NZ CLC 64, 690), an offer to renew an investment was an offer to the public (Re Loan and Finance Dunedin Ltd 1990 5 NZCLC 66, 367) when 42 existing members have accepted to do so, Barclays’ offer to the defendant to purchase Swiss bonds was considered as an offer to the public (Barclays New Zealand Ltd v. Gillies 1990 5 NZCLC 66,659), an offer made by way of initial advertisement was considered to be an offer to the public (Orr v. Martin 1991 5 NZCLC 67,383), once a company approached investors through brokers, Justice Hansen in Robt Jones Investments Ltd v. Gardner 1988 4 NZCLC 64,412 held that prima facie an offer was made to the public, but when the defendant decided to join Lloyd’s syndicates there was no offer to the public but if nobody accepts the offer it does not mean that it is not an offer to the public (Securities Commission v. Kiwi Co-operative Dairies Ltd 1995 7 NZCLC 260,828).

14.4.9 Stock Exchange


Another piece of legislation, which provides for the stock exchange in Mauritius, is the Securities Act 2005 (supra). In fact, sub-part B of the same Act provides for licensing, regulatory functions and demutualisation.
According to section 23 of the Securities Act 2005: “The Stock Exchange of Mauritius Ltd shall be deemed to be licensed as a securities exchange under this Act and shall be governed by the provisions of this Act, any regulations made under this Act and any Financial Service Commission Rules.”

Under the Companies Act a debenture stock: a) ‘‘means a debenture by which a company or a debenture holders’ representative acknowledges that the holder of the stock is entitled to participate in the debt owing by the company under the agency deed; and b) includes loan stock;..’’

Activities

1. What do you understand by factoring?

2. Why is it important for an entrepreneur to have capital?

3. Who are debenture holders?

14.5 LICENSES

A party may own the intellectual property or informational rights and obligates him or herself to transfer rights in the property or information to the licensee. The licensee is the party who is granted limited rights in or access to the intellectual property or informational rights.

The licensor and the licensee may enter into an agreement called the licensing agreement that expressly states the terms of their agreement.
14.6 EMPLOYEE AND EMPLOYERS’ RIGHTS

Introduction
Both the Labour Act 1975 and the Industrial Relations Act 1973 are repealed. In 2008, the legislature promulgated the Employment Rights Act 2008 (Act No. 33 of 2008) and the Employment Relations Act 2008. The Constitution, which is the supreme law of law, also provides some statutory enactment with respect to the protection of the fundamental rights of the individuals in Mauritius. Thus, any employee is protected against slavery (section 6) and discrimination (section 16). The Employment Rights Act 2008 also lays emphasis on discrimination at work with regard to age, race, colour, caste, creed, sex, sexual orientation, HIV status, religion, political opinion, place of origin, national extraction or social origin (section 4.5 (a) of the Employment Rights Act 2008).

14.6.1 Courts in Mauritius

There is the Industrial Court (instituted for the first time by the Industrial Courts Ord. 1944). Jurisdiction of the Industrial Court and the Reviewing Authority are found in the Industrial Courts Act 1973 (Section 3 of the Industrial Court Act provides that there shall be an Industrial Court with exclusive civil and criminal jurisdiction to try any matters arising out of the enactments set out in the First Schedule or of any regulations made under those enactments and with such other jurisdiction as may be conferred upon it by any other enactment).

14.6.2 Court of Rodrigues

In Rodrigues, there is the Court of Rodrigues and powers of this Court are found in the Court of Rodrigues Jurisdiction Act (section 3. General jurisdiction of Magistrate).

Section 4(2) of the Industrial Court Act enacts that: “Where the Island of Rodrigues is assigned to a Magistrate of the Intermediate Court or to a District Magistrate, the Chief Justice may direct that Magistrate to hear and determine in Rodrigues any matter over which the Industrial Court has exclusive jurisdiction.”
14.6.3 Powers of the Industrial Court

The Industrial Court tries cases related to labour law but what are the powers of the Industrial Court? It is presided by a Magistrate and shall sit in such number of divisions as the Chief Justice may direct (Section 6 of the Industrial Court 1973). Litigants may appeal to the Reviewing Authority and/or to the Supreme Court, the highest jurisdiction in the country.

The Magistrate of the Industrial Court shall freely give his advice, guidance or help to any person who applies to him in the settlement out of court of a dispute arising or which is likely to arise in respect of a matter within the jurisdiction of the Court, even though no action has been entered or complaint made (Section 5 of the Industrial Court Act 1973–Informal Powers).

14.6.4 The Definition of a Worker

Who is a worker? In Maxo Products Ltd v. Permanent Secretary, Ministry of Labour SCJ 225 1999, the Supreme Court held that: “A worker is defined as ‘a person who has entered into or works under an agreement or contract of apprenticeship with an employer, whether by way of casual work, manual work, clerical work or otherwise and however remunerated but does not include a person whose basic wage or salary is at a rate in excess of Rs 70,000 per annum (now Rs 240,000 as amended by Act 37 (2001)). Mr Parmessur did not come within the limited definition of worker (as he earns more than Rs 70,000 per year). It was held that the Magistrate of the Industrial Court had therefore no jurisdiction to entertain his claim.” By contrast, the Supreme Court took another approach in Kosseal v. Dauget 1994 SCJ 216 where it was held that: “Although Mr Kosseeal earns more than Rs 70,000 per year, the Industrial Court simply had nothing to do with the definition of a worker and it has, nevertheless jurisdiction to consider the matter because the Industrial Court ‘shall have exclusive jurisdiction to hear and determine any civil or criminal proceedings under this Act’. Review was allowed and the matter was referred to the Industrial Court.”
### 14.6.5 Court Fees, Costs and Judgment

The Industrial Court charges for costs. However, no court fees shall be chargeable before the Industrial Court on any proceedings commenced by the Permanent Secretary on behalf of any worker against this employer. The Permanent Secretary of the Ministry of Work shall represent the employee on his name but the Permanent Secretary of the Ministry of Work is not a party to the suit- *Lee v. Labonne & Ors 1980 MR 33*. And once an employee had claimed from the relevant Court, he may not claim under the other one, the Court held in *Perrine v. Duke Haberdashers Co. Ltd 1986 MR 127*.

### 14.6.6 The Reviewing Authority

The aim of the Reviewing Authority is to provide litigants who may not be able to afford the legal costs of an appeal, to request for a review of the decision of the Industrial Court Magistrate. The matter is heard before the Chief Justice or any such judge as he may depute for the purpose (Section 12 of the Industrial Court Act). In *Ghoolet v. Gaytree Textiles 1992 MR 105*, the Reviewing Authority was constituted of two judges. The Reviewing Authority shall communicate its decision to the Magistrate who shall record the decision and, where necessary, amend his judgment accordingly within 6 weeks (Section 14 of the Industrial Court Act 1973).

A Reviewing Authority is a subordinate Court (*Mauritius Tuna Fishing and Canning Entreprises Ltd v. Manne 1989 MR 115*) and its decision is reviewable - *Gaytree Textiles v. Ghoolet 1992 MR 105*. However, there cannot be a review where the Judge to whom the application for review is referred sets aside the request- *Keerodhur v. J.R. Overseas Investment Ltd 1993 SCJ 381*.

### 14.6.7 The Employment Rights Act 2008

The *Employment Rights Act 2008* introduces, *inter alia*, the Workfare Programme (Part IX of the *Employment Rights Act 2008*), Compensation at work, Violence at Work (Part XI of the *Employment Rights Act 2008*) and the Labour Advisory Council (Part XIV of the *Employment Rights Act 2008*). There are various enactments with regard to job contractors (Part XII of the...
ERA 2008), records and administration of employees at work with regard to registration of employers, keeping of records, labour inspection, power to make inquiries and to summon, and the complaint procedure. The ERA 2008 ends up with some miscellaneous provisions, which are linked with interpretation of statutes (repeal and commencement). The new piece of legislation is directly linked with:

- The Employers-Employees relations with various rights such as rights against discrimination (Sect. 16 of the Constitution),
- Agreements between employers and employees (Part II of the ERA 2008),
- The minimum age for employment (Part III of the ERA 2008), hours of work (Part IV of the ERA 2008),
- Remuneration (Part V of the ERA 2008),
- Other conditions of employment such as transport, various leaves (annual leave, sick leave, paternity leave) and
- Various facilities to be afforded to the employee; entitlement of workers in the sugar industry (Part VII of the ERA 2008), termination of employment (Part VIII of the ERA 2008).

14.6.8 Notice of Agreement and Protection against Termination of Agreement between Employers and Employees

There are three sections where the legislature puts emphasis on the notice of termination of agreement and protection against termination of agreement between employee and employer, the workfare programme which is new in the legislation (Part IX of the ERA 2008), compensation (Part X of the ERA 2008) and violence at work (Part XI of the ERA 2008).

Part VIII-Termination of Agreement of the Employment Rights Act 2008 is important since an agreement may be terminated either by the employer (for example, he fails to pay the remuneration due under the agreement to a worker) or by the employee (for example, when he is absent from work for three (3) consecutive working days without good and sufficient cause (Carosin v. Rogers and Co. Ltd 1985 MR 74/SCJ 100) for a first time, where a worker is ill-
treated by his employer or where he is absents himself from work without good and sufficient cause, for three (3) consecutive working days on a second or subsequent occasion, the employer may consider that the worker has broken his agreement).

14.5.9 The Employment Relations Act 2008

The Employment Relations Act 2008 is another piece of legislation where all employers and employees have a right to be member of trade unions. Trade unions must be registered. Once more, the Constitution protects the fundamental rights of the individuals because every worker shall have the right to join or not to join a trade union, take part in all its activities, serve as a trade union member and take part as an officer of the union.

It is a corporate body with a name and a general assembly. Amendments (change of name of a trade union, for example), if necessary, are discussed by resolutions and approved by the general assembly. A trade union may be dissolved upon approval of a resolution to that effect in accordance to rules but where rules provide for a special fund, dissolution shall have effect only if a majority of members contributing to the fund approve it at a general assembly and the manner in which the asset of the fund will be disposed of.

Two or more trade unions may amalgamate to form a trade union and two or more unions may form a federation and two or more federations may form a confederation by resolution approved in accordance with the rules of the individual unions; in the case of a federation and the rules of each federation in the case of a confederation. All federations and confederations shall be registered.

The Employment Relations Act 2008 provides for collective bargaining with a code of practice (it shall give guidance to the promotion of good employment relations and effective bargaining, and will be a reference for the determination of a grievance for the Tribunal, the Commission or the Industrial Court) and labour disputes, dispute settlement procedures and various labour institutions.
In case of dispute, a report should be made in writing and it should specify the parties to the dispute. In case of voluntary arbitration, parties refer the dispute jointly to the Employment Relations Tribunal or to an arbitrator appointed by them. The Tribunal has a delay of 90 days to enquire into the dispute and make an award (an award is binding on the parties to the dispute) thereon. The period was only of 30 days when the Commission for Conciliation and Mediation referred to the Tribunal a dispute relating to the Fire Services and the Prison Services.

The Employment Relations Tribunal is, however, not empowered to enquire in any dispute where the dispute relates to an issue within the exclusive jurisdiction of the Industrial Court or an issue pending before a Court of law or before the Commission for Conciliation and Mediation. On receiving a report of a dispute the Commission for Conciliation and Mediation ascertains whether the report is receivable, that is, whether it has fulfilled all the requirements of the law. If it has not, it is rejected within 7 days and parties are accordingly notified. Any party aggrieved by the rejection of the dispute may within 21 days of the notice of rejection appeal to the Tribunal against such rejection. The Employment Relations Tribunal has 60 days to hear the appeal and make an order. It either confirms or revokes the decision of the Commission.

**Activities**

1. What are the two pieces of legislations, which have been promulgated in 2008?

2. What do you understand by ‘misconduct’? Discuss.

3. Explain to what extent the Constitution protects the fundamental rights of the workers in Mauritius?

4. Explain in which circumstances an employer may terminate an agreement?

5. What are the powers of the Industrial Court Magistrate?

6. The Reviewing Authority. Explain.
14.7 LAW OF CONTRACT

14.7.1 Introduction

The law of contract in Mauritius is inspired from French law. In England, Pothier’s *Treatise on the Law of Obligations* was translated into English in 1806. In 1879, Anson wrote *Principles of the English Law of Contract* but Savigny, a French author, influenced him.

In a contract, at least three elements must be present: the agreement made by offer and acceptance, the intention to create legal relations between themselves and the value they have agreed. Capacity (a minor cannot contract with another one for example), consent, content of the contract, the form and legality of some factors, may affect a contract and may render it null and void (article 1108 of the Civil code).

As a matter of security and precaution, contracts are made in writing (bill of exchange, cheques, transfer of shares in a limited company, consumer credit contracts), that is, a notarial deed. These types of contract include leases or mortgage but in Mauritius it is not necessary for a contract of work to be in writing (contrat consensuel) whereas for a contract of marriage, all ingredients must be present (contrat solennel).

14.7.2 Types of Contracts

There are different types of contracts (*sui generis*): contrat de vente (1582 Civil code), le mandat (article 1984 Civil code), le contrat d’entreprise, le contrat de travail, le contrat de transport just to name a few.

14.7.3 Conditions

There must be an offer and an acceptance, which must be distinguished from a mere supply of information and/or an invitation to treat (the display of an article with a price on it in a shop
window is merely an invitation to treat and it is in no sense an offer for sale the acceptance (mere passive inaction is not acceptance- *Felthouse v. Bindley* 1862) of which constitutes a contract-*Fisher v. Bell* 1961). As stated, it is made in writing such that acceptance which introduces any new terms is a counter-offer (*Butler Machine Tool Co v. Ex-cell-O Corp England* 1979).

In *Harvey v. Facey* 1893, the plaintiff telegraphed to the defendant ‘Will you sell us Bumber Hall Pen? Telegraph lowest cash price’. The defendant telegraphed in reply ‘Lowest price for Bumber Hall Pen, 900 pounds. The plaintiff telegraphed to accept what he regarded as an offer; the defendant made no further reply. The Court held that the defendant’s telegram was merely a statement of his minimum price if a sale were to be agreed. It was not an offer, which the plaintiff could accept. No contract had been made.

A contract is terminated after a lapse of time (because an offer may be expressed to last for a specified time-*Ramsgate Victoria Hotel Co. v. Montefiore* 1866), rejection, revocation of an offer (an offeror may revoke his offer at any time before acceptance-*Payne v. Cave* 1789), failure of a condition (if the condition is not satisfied the offer is not capable of acceptance-*Financings Ltd v. Stimson* 1962) or termination by death (unless the offeree accepts it in ignorance of the offeror’s death-*Bradbury v. Morgan* 1862).

**Activities**

1. Explain article 1108 of the Civil Code.

2. What do you understand by ‘force majeure’?

3. What are the different types of contract?
14.8 INTERNATIONAL BUSINESS LAW: NEGOTIABLE INSTRUMENTS (BILL OF EXCHANGE, CHEQUES AND PROMISSORY NOTES)

Introduction

In international business, traders need money. There are three types of negotiable instruments: bills of exchange, cheques and promissory notes. A cheque is merely a form of bill of exchange drawn on a bank whilst promissory notes are a mere promise by a person to pay money to another (for example, a bank note).

14.8.1 Bills of Exchange

A bill of exchange is similar to the modern cheque, except that it is made out by the seller who is owed the money and not by the person who owes the money.

By definition, a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

The main uses of bills of exchange are to give credit and/or transfer money without actually carrying the cash. The advantage of a bill of exchange is that a buyer may obtain credit when the seller draws a bill of exchange (the drawer) ordering the buyer to pay the price on a date some time in the future (the drawee). The drawee accepts the bill of exchange by signing across the face of the bill accompanied by the date (acceptance of a bill) and returns it to the seller. If the drawee fails to accept the bill of exchange when the seller sends it, then the bill is said to be dishonoured for non-acceptance.

The seller signs at the back of the bill and obtains his money by discounting the bill to a financial institution (holder of the bill as a an order bill and if the seller signs without indicating who is to be the new holder then it is a bearer bill), which has its profit when he recovers the full price
from the buyer. The seller has his cash, the buyer pays when the bill matures, that is, when the payment date arrives. The bill is discharged.

The financial institution only takes the risk of non-payment and to sue if the buyer fails to pay when the bill matures (the bill is said to be dishonoured for non payment). Payment, alteration of a bill of exchange and cancellations discharged a bill.

14.8.2 Cheques

By virtue of section 71 BEA, a cheque is a bill of exchange drawn on a banker payable on demand. By definition a cheque is:

« An unconditional order in writing addressed by one person to a bank signed by the person giving it requiring the bank to pay on demand a sum certain in money to or to the order of a specified person or to bearer. »

<table>
<thead>
<tr>
<th>State Bank Ltd.</th>
<th>01/01/2002.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quatre Bornes.</td>
<td></td>
</tr>
<tr>
<td>Pay to Mr AB ten thousand Rs only.</td>
<td>10,000Rs.</td>
</tr>
<tr>
<td></td>
<td>MR CD</td>
</tr>
</tbody>
</table>

1. Terminology: The bank on whom the cheque is drawn is the paying banker and the bank who collects is the collecting banker.

2. Duties of customer: Duty of care. The very important House of Lords in the case of London Joint Stock Bank v. Macmillan and Arthur 1918 AC 777 decided that the contract between banker and customer places on the customer a duty towards his banker to take reasonable care in drawing cheques so as to guard alterations. In this case facts were as follows:
A clerk of M prepared a bearer cheque for signature by M. The amount appeared in figures as £2 but did not appear in words at all. M signed it. The clerk altered the figure of £120, wrote in this amount in words and obtained payment from M’s banker. The House of Lords held that the loss was caused by breach of the duty of care which it owed to his banker with the result that the banker was entitled to debit M’s account with the full amount of the cheque. Lord Finlay stated that the ‘customer is bound to take usual and reasonable precautions to prevent forgery’.

3. Duties of banker: General duty of care. A bank owes a contractual duty to take reasonable care in its conduct of the customer’s business. If, for example, the customer is a company the bank will be liable for honouring cheques drawn by the directors for unauthorised purposes if the facts should have put the banker on inquiry. This is in line with the case of Selangor United Rubber Estates Ltd v/s Cradock No.3 1968 1 WLR 1555, 1968 2 ALL ER 1073.

4. Duty to honour cheques. A banker owes a duty to his customer to honour his cheque up to the amount of his credit balance or agreed overdraft, if any. If the banker wrongly refuses to honour a cheque, the customer can claim substantial damages without proof of actual loss if the customer is a trader. Other customers can only claim nominal damages unless actual loss is proved.

5. Duty not to pay without authority. The bank will be liable not only for wrongly paying a cheque. Thus, the bank will be liable if, for example:

1. It pays a countermanded cheque, or
2. It pays a cheque which is void for material alteration, or
3. It pays a cheque on which the drawer’s signature is forged.

In all these cases, the general rule is that the bank cannot debit the customer’s account. There are, however, 3 exceptions to this rule:

a. Negligence: if the wrongful payment was due to the careless manner in which the customer drew a cheque, the customer bears the loss - London Joint Stock Bank v/s Macmillan and Arthur.
b. **Estoppel:** if a customer discovers that his signature to a cheque has been forged, he is under a duty to notify his bank promptly and because of his failure to do so, the bank is not bound to repay the money - *Greenwood v. Martins Bank 1933 AC 51.*

c. **Subrogation:** if the bank wrongfully pays a debt due from the customer to one of his creditors, this debt will be extinguished.

6. **Duty of secrecy:** The relationship between bankers and customers is clearly a confidential one. A breach of this duty will give rise to an action for damages, which will be nominal unless actual loss is proved. However, that duty was subject to exceptions:
   a. Where the bank is compelled by law to divulge,
   b. In the public interest,
   c. For the banker’s own protection,
   d. When the customer consents.

7. **General crossing:** By virtue of section 74(1) BEA, a general crossing consists of 2 parallel transverse lines across the face of the cheque with or without the words « and company » or any abbreviation thereof.

8. **Special crossing:** By virtue of section 74(2) BEA, where a cheque bears across its face the name of a banker, the cheque is crossed specially to that banker.

### 14.8.3 Promissory Notes

The law applicable to BE applies also to promissory notes but, however, the following provisions do not apply to promissory note:
   a. Presentment of acceptance,
   b. Acceptance,
   c. Acceptance supra protest,
   d. Bills in a set.
A promissory note is an unconditional promise in writing made by one person to another signed by the banker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer. (Here, it is to be noted that the maker is the person who gives the promise to pay).

Port-Louis.

1st January 2002

I promise to pay Mr AB the sum of 10,000Rs for value received.

Mr CD.

Vide the case of Pedron v. Gujadhur 1924 MR 103. This judgment was reversed in 1982 by Bissessur v. The Queen.

Activities

1. Define a bill of exchange.

2. What do you understand by a bearer bill?

3. What do you understand by an order bill?

4. How is a bill of exchange discharged?

5. What are the risks of a bill of exchange?

6. What is the difference between a bill of exchange and a cheque?
14.9 HEALTH AND SAFETY LEGISLATION


14.9.1 Duties of Employers

Section 5 of the OHSWA 1988 enacts that:

“5. Duties of employers

(1) Every employer shall, so far as is reasonably practicable, ensure the safety, health and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends shall include in particular-

(a) The provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work;

(b) The provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(c) Arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(d) The provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the safety and health at work of his employees;

(e) The maintenance of any place of work under the employer's control, including the means of access to and egress from it, in a condition that is safe and without risks to health, so far as is reasonably practicable.
(3) Every employer shall conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their safety or health.

(4) Every employer shall consult representatives of his employees who sit on the safety and health committee with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the safety and health at work of the employees, and in checking the effectiveness of such measures.

(5) (a) Where the total power used or generated by the machinery installed at any place of work exceeds 750 kilowatts, the employer shall appoint in writing a registered professional engineer to be in general charge of all such machinery, and shall notify the Chief Factory Inspector of any such appointment.

(b) The registered professional engineer may be appointed either on a full-time or part-time basis.

(c) A registered professional engineer appointed under this subsection, who carries out such duties for -

(i) the whole of his working time, shall not act in such capacity for more than three separate places of work; or

(ii) part of his working time, shall not, without the written permission of the Permanent Secretary, act in such capacity for more than one place of work.

(6) Where the total power used or generated by machinery installed at a place of work does not exceed 750 kilowatts, the employer shall appoint, in writing, a competent person to be in general charge of the machinery.

(7) No employer shall levy or permit to be levied on any of his employees any charge in respect of anything done or provided in pursuance of this Act.”
14.9.2 Duties of Employees

Section 6 of the OHSWA 1988 enacts that:

“6. Duties of employees

(1) Every employee shall, while at work -
    (a) Take reasonable care for the safety and health of himself and of other persons who may be affected by his acts or omissions at work;
    (b) Cooperate with his employer in the discharge of any duty or requirement placed upon the employer under this Act;
    (c) Wear any protective equipment or clothing provided by the employer in pursuance of this Act at all times when there is a risk of bodily injury against which the equipment or clothing affords protection;
    (d) Report forthwith to his employer the loss, destruction or other defect in the protective equipment or clothing; and
    (e) Not smoke at the place of work, except at specific areas demarcated for that purpose.

(2) Any person who, willfully or recklessly damages, interferes with or misuses anything provided in the interests of safety, health or welfare in pursuance of this Act shall commit an offence.”

14.9.3 Dangerous Machinery

The term ‘dangerous machinery’ is enacted in sections 28, 29, 30 and 31 of the OSHWA 1988.

“28. Training and supervision of young persons working at dangerous machines

(1) No young person shall work at any machine specified in the Third Schedule, unless he has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed, and -
(a) Has received sufficient training in work at the machine; or

(b) Is under adequate supervision by a person who has a thorough knowledge and experience of the machine.

(2) No young person shall be required to clean any part of any machine where the cleaning thereof would expose him to risk of injury from any moving part of the machine.”

“29. Dangerous Machinery

(1) Every dangerous part of every machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every employee or person working on the premises as it would be if securely fenced.

(2) Where any dangerous part of any machinery cannot, by reason of the nature of the operation, be secured by means of a fixed guard, the requirements of subsection (1) shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.

(3) Any material being worked upon, in or at a machine shall be securely fenced unless it is in such a position as to be as safe to every employee or person at the place of work as it would be if securely fenced.

(4) Without prejudice to the generality of subsection (1), the provisions of this section shall apply to any part of machinery which is dangerous -

(a) By reason of the ejection of any part of the machinery or the material being worked upon; or
(b) By reason of its proximity to any fixed part of the structure or any fixed object.

(5) Without prejudice to the generality of subsection (4)(b), no traversing part of any machine and no material carried thereon shall be allowed to approach within a distance of 500 millimetres of such fixed part of the structure or fixed object.

(6) Sufficiently clear and unobstructed space shall be provided and maintained at every machine while it is in motion or use to enable the work to be carried on safely."

“30. Provisions as to Unfenced Machinery

(1) In determining whether any part of machinery is in such a position or of such construction as to be as safe to every employee or person at the place of work as it would be if securely fenced -

(a) no account shall be taken of any person carrying out, while that part of machinery is in motion, an examination thereof or any lubrication or adjustment shown by the examination to be immediately necessary, if the examination, lubrication or adjustment can only be carried out while that part of machinery is in motion; and

(b) in the case of any part of transmission machinery used in any process with respect to which the Permanent Secretary has declared, by certificate in writing, that he is satisfied that, owing to the continuous nature of such process, the stopping of that part would seriously interfere with the carrying on of the process, no account shall be taken of any person carrying out in the place of work, by such methods and in such circumstances and subject to such conditions as
may be specified in the certificate, any such lubrication or any mounting or shifting of belts.

(2) The provisions of this section shall apply only where the examination, lubrication or other operation is carried out by persons who have attained the age of eighteen, and all such other conditions as may be specified by the Permanent Secretary are complied with.

31. **Construction and Maintenance of Fencing**

All fencing and other safeguards shall be of substantial construction and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary.”

**Activities & Case Law**

Read the following case law:


14.10 FAIR TRADE

For an enterprise to work properly, there must be fair trade instead of ‘passing off” and/or infringement to patents, trademarks and copyright. According to Dr R P Gunputh (in ‘Droit de la Propriété Intellectuelle à Maurice’):


Mauritius is also a member of OMC, OMPI, The Berne Convention, the Universal Copyright Convention, the Nice Convention 1957 (marques), the Locarno Convention 1968 (dessins et modèles), the Strasbourg Convention (brevets) and TRIPS.

Among the most important piece of legislation is the *Fair Trading Act (supra)*, which finds support from the following legislations to fight against unfair trade and competition:

- *The Protection against Unfair Practices (Industrial Property Rights) Act 2002*
- *The Copyright Act 1997*
- *The Electronic Transactions Act 2000*
- *The Information and Communication Technologies Act 2001*

### 14.11 LEGAL BARRIERS TO SOCIAL ENTREPRENEURSHIP

There are various pieces of legislations and everybody must comply to strict rules and regulations for good governance. Unfortunately, there are legal barriers to social entrepreneurship. We can list a few of them.

- Entrepreneurs need money and funds in order to raise their business and sometime they are not able to do so.
- In Mauritius, the world of business and trade is even more complex with pieces of legislations, which have been borrowed from England, France and New Zealand just to name a few.
- Employers have to comply with rules and regulations in order to satisfy their employees and their clients but they do not always do so.
- Consumers are tempted to borrow money which are sometimes beyond their resources.
- In Mauritius, there are sociétés, which undergo dissolution and liquidation once associés do not agree (mésentente grave) among themselves.
• Trademarks and intellectual property rights are not respected. CD RoM and inventions are easily fabricated and sold on the street at a price lower than their market price.
• The Mauritian economy has to fluctuate with international financial crisis: the currency goes down, importation gets worse and some local firms have to close their doors.
• Disasters, malaria and pests may destroy the economy of a country (tourists are not attracted in countries where there are AIDS, pests and diseases).
• The economy is unstable where there are conflicts (Madagascar, Comores, Djibouti) and where countries are undermined by corruption in different sectors of the country.

14.12 SUMMARY

Legal aspects of entrepreneurship are complexed and it is not always easy to handle with various pieces of legislations, which have been from foreign legislations. In addition to these obstacles, there is a certain number of precedents which are complete this study and you are invited to read these cases, as decided by our highest court: the Supreme Court of Mauritius.

14.13 FURTHER READINGS