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Consumer law and policy in Africa*: The mauritian mixed system case study*

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Abstract
Mauritian law is a mixed or hybrid system where both French law and English law prevail on the small island nation after more than three centuries of colonialism but the quantum of each law differs from one substantial law to another. In other words, civil law and criminal law are French based because the substantive law is found in the Civil Code (CCM) and the Penal Code respectively both of French inspiration. The Code de Commerce is not a proper Code *per se* as it only compiles various legislations, protocols and conventions coupled with some very few articles on traders and some *sociétés commerciales* of French inspiration but otherwise the law of company is governed by The Companies Act inspired from the *New Zealand Act 1995*. There are Acts of Parliament (infra) which are in the form of statutes but most of them are inspired from English Law and legislations. However, nothing prevents the Mauritian legislator to borrow foreign legislations apart from France and England to implement them as our domestic law. Thus, consumer law in Mauritius is good hybrid of French and English Law. In the absence of any key legislation on the sales of goods relevant provisions on consumer law such as, *inter alia*, transfer of goods, risks and liability of debtor or creditor is found in the Civil Code (CCM) but the Supreme Court of Mauritius inspires from strong binding precedents of the House of Lords and/or *Cour de cassation* to enlighten its own decisions provided the law is the same or whenever there is similarity in UK and Mauritian legislations which is very often the case, or when articles of the French Civil Code and Mauritian Civil Code are the same. This article enlightens consumer law and policy in Mauritius in various aspects of product safety and liability, transfer of goods or perishable goods.

Keywords: consumer protection, Mauritian consumer protection law, product safety and liability, defective goods

Introduction
Following two successive colonisation by France (1715-1810) and the British Empire (1810-1968) the small island of Mauritius inherited both French and English law. Following naval battles between the two great nations the British empire took control of the island to improve its commercial trade However, The Act of Capitulation, 1810 provides in its Article 8 that "the inhabitants would preserve their religions, laws and customs''. As a result, the French Code Napoleon (1804), the French Code de Commerce (1809) and the French Code Penal (1791) survived as a first generation of legislations, and still prevail on the island coupled with English inspired legislations and common law form part of our domestic law making it a 'mixed system'.

In Mauritius, The Consumer Protection Act 1991 and The Hire Purchase and Credit Sale Act remain the most important pieces of legislations on the sale of goods with a view to protection the consumers but the Civil Code of French inheritance remains the main source of substantive civil and commercial contracts as reflected in most Supreme Court's judgment [1]. In addition to these legislations there are an additional set of legislations which also aim to protect the consumer's rights. As a member of regional blocks (COMESA or SADC) it has also concluded important economic partnership agreements in the form of bilateral or regional agreements with various African countries to enhance trade and business both in terms of export and export but in order to make Mauritius a financial hub the legislator has passed legislations to make Mauritius a secured place for investors to invest and a safe place to make business. As a result, the Republic of Mauritius is now a business hub for both consumers in Mauritius and Africa whilst India and China are both competing to attract consumers in Africa using Mauritius as a bridge to do business in Africa. Over and above there are bilateral agreements and international covenants and treaties Mauritius has signed and ratified with other countries.

In terms of sales of goods between buyers and sellers of a civil nature or *droit de vente*, provisions of the French inspired Code Civil prevail in terms of Section 10 of the Interpretation and General Clauses Act but in terms of legislations English inspired law or legislations would prevail in a mixed system like Mauritius. In commercial contracts, the relevant piece of legislation is the *Hire Purchase Act* but where there are intellectual rights issues the Mauritian legislator has passed the *Trade Marks Act*, *The Fair Trading Act 1979* and *The Hire Purchase and Credit Sale Act 1964* which also deal with commercial contracts. Most legislations in Mauritius are modeled on English statutes and *The Hire Purchase and Credit Sale Act 1964* is modeled on the English *Hire Purchase Act 1938*, which is now repealed in England and replaced by the *Sales of Goods Act 1979* after the original *Sales of Good Act* was passed in 1893. Modes of payments under most commercial contracts are provided as per *The*

[1] Supremecourt.intnet.mu and all relevant cited cases may be obtained freely from lawanswers.me

Bills of Exchange Act where cheques are a particular type of payment between buyers and sellers.

However, despite Mauritius borrowed and inspired from English legislations it has its own specificity and must be dealt with cautiously. Indeed, there are relevant articles of the Civil Code which come into play and in particular circumstances irrespective it is civil or commercial contract as it leaves intact the general principles of contract, which is French based in Mauritius similar to the substantive offences under our Criminal Code, and save to some exceptions (conspiracy), is French based but both French and English procedures are more English based law in terms of injunctions or estoppel. These ''English'' procedures are fast, place the litigation in *statu quo* and consumers have relief promptly before a judge in chambers pending the decision of the Supreme Court.

Therefore, this article on consumer protection and policy in Mauritius will reflect to what extent this symbiosis between French civil Law and English legislations and common law come into operations in terms of interpretation and application in Mauritius, in a relatively huge architecture of legislations unduly scattered, explaining why precedents are borrowed from English and why French doctrine and precedents are cited in most of our local judgments including this paper especially where ours are mute on the subject-matter because it make sense to borrow French doctrine and precedents provided our law are similar. But if the law is not clear English rules of interpretation prevail over French rules of interpretation (*les travaux préparatoires*) coupled with maxims of interpretation and dictum of English Lords at a time when the English Sale of Goods Act 1893 was passed was to codify common law due to a lack of uniform law of sale throughout the United Kingdom (UK).

In Mauritius, prior to independence, the key piece of a second generation of legislations regulating contracts of sale of goods are The Hire Purchase and Credit Sale Act 1964 followed by, *inter alia*, The Borrower Protection Act 2007 (Act No. 2 of 2007), The Consumer Protection (Price and Supplies Control) Act (Act 12/1998), The Essential Commodities Act 1991 (Act No. 8 of 1991), The Food Act 1998 (Act1/19980) and other ordinance such as The Customs Duties (Refunds on local purchases) Ordinance 1966 (Ordinance 19 of 1966) and legislations such as The Shops Act 1942, The Moneylenders Act 1960, The Customs Tariff (Special Levy) Act 1973 (Act 60 of 1973), The Legal Aid Act 1974, The Competition Act 2003 (Act 6 of 2003) or The Food Act 1998 (Act 1 of 1998) also protect the consumers in Mauritius. There is the Mauritius Standard Bureau Act 1993 (Act12/1993) and coupled with the Mauritius Standard Bureau (National Management Systems Certification Scheme) Regulations' 2008 the Mauritius Standards Bureau [2] is responsible for the proper norms in Mauritius. The Information and Communication Technologies Act 2001, coupled with the Penal Code, has just been amended to punish consumers for abusive language on the internet [3].

List of Legislations on Consumer Protection in Mauritius

1. Advertisements Regulation Act 1930 Act 4/1930
2. Air Transport (Passenger Servitude charge) Act 1970 Act 29/1970
3. Ayurvedic and other Traditional charge) Act 1970 Act 29/1970
4. Animal Diseases Act 1925 Act 9/1925
5. Air Transport (Passenger Service charge) Act 1970 Act 29/1970
6. Banking Act 1988 Act No. 41 of !988
7. Bankrutpcy Act RL 1/287-Nov. 1914
8. Bills of Exchange Act RL 1/287-Nov.18, 1914
9. Borrower Protection Act 2007 (Act No. 2 of 2007)
10. Business and Trade Names (Prohibition) Act 6/1988
11. Business Registration Act 2002 Act 40/2002
12. Brokers Act RL 1/325- July 28, 1945
13. Central Tender Board Act 2000 Act No. 32 of 2000
14. Customs Tariff Act 1969 Act 59/1969
15. Copyright Act 1997
16. Customs Act 1988 Act47/1988
17. Customs Tariff Act 1969 Act 59/1969
18. Code de Commerce
19. Competition Act 2003 (Act 6 of 2003)
20. Consumer Protection (Price and Supplies Control) Act 12/ 1998
21. Customs Act 1988 Act No. 47 of 1988-Jan.1/1989
22. Customs Duties (refund on local purchasers) Ordinance 1966 (Ordinance 19 of 1966)
23. Customs Tariff Act RL 2/253-Jan. 1. 1970
24. Customs Tariff (Special Levy) Act 1973 (Act 60 of 1973)
25. Courts Act RL 2/5-March 7, 1945
26. Constitution RL 1/1-March 12, 1968
27. The Copyright Act 1997 No.12 of 1997
28. Criminal Code RL 2/59-Dec. 29, 1838
29. Electricity Act 1939 Act 21/1939
30. Essential Commodities Act 1991 Act 8/1991
31. Environment Protection Act 1991 Act 34/ 1991
32. Exchange control Act RL 2/641
33. Excise Act 1994 Act 14/1944
34. Fair Trading Act 1979
35. Food Act 1998 Act 1/ 1998
36. Granary Act 1933 Act 17/1933
37. Ground Water Act 1969 Act 55/1969
38. Hotel and Restaurant Tax Act 1986 Act 11/1986
39. Hire Purchase and Credit Sale Act 1964
40. Independent Broadcasting Authority Act 9/2000
41. Inflammable liquids and Substances Act 1952 Act 51/1952
42. Information and communication Technologies Act 2001 Act 44/2001
43. International Arbitration Act 2008
44. Jewellery Act 1999 Act 25/1999
45. Legal Aid Act 1974
46. Meat Act 1974 Act 54/1974
47. Patents Act 1875 Act 11/1835
48. Pawnbrokers Act 1872 Act 22/1872
49. Pesticides Control Act 1970 Act 54/1970
50. Registration Duty Act RL 4/445-Dec. 17, 1804
51. Shops Act 1942
52. Value Added Tax Act 1998 Act No.2/1998

Under the complexity of our Mauritian mixed system the structure of this paper follows a traditional one in order to

[2] http://msb.intnet.mu/English/Pages/default.aspx

[3] Section 28 Fraudulent retention of THE POSTAL SERVICES ACT 2002. Any person who fraudulently opens, retains, willfully. secretes, keeps or detains, or, when required by any officer of the postal service, neglects or refuses to deliver up- (a) any postal packet in course of post and which ought to have been delivered to any other person; or (b) any postal packet in course of post or any mail bag which has been found by him or by any other person, shall commit an offence.

respond to questions which are often asked: how the consumer is protected in a country where Civil Law prevails in a mixed system oscillating between common law and legislations which are most very often inspired and borrowed from England? After an Introduction, and since consumer law involves transfer of property it would be important beforehand to understand at different steps of our case study to deal with the consumer sale of goods in a mixed system like Mauritius, followed by the protection of the consumer in case of product safety and liability and this article will close with a conclusion and some references.

Consumer Protection: The implementation of French civil law in commercial contracts

English Commercial Law covers, *inter alia*, sales of goods whereas French Commercial Law or *Droit des Affaires* covers, *inter alia*, *les actes de commerce* and *les sociétés en général*. Which law covers commercial contracts in France just like in Mauritius is in fact treated as *Les Contrats Spéciaux* under the sale of goods irrespective they are civil or commercial sale. Thus, as soon as there is a commercial contract civil law takes the lead generating a certain number of obligations on the seller to deliver a thing with all its guarantees and for the buyer to take possession of a thing provided they are agreeable on the price. In addition, still under civil law there are some additional obligations (*obligation de moyens*, *obligation de résultat* or *obligation de sécurité*) which find their application in the sale of a thing under *la responsabilité contractuelle.*

Therefore, there are also some additional few points to remember when consumer protection law is in issue in Mauritius: first, the Civil Code, as it is actually, embodied the sale of goods and the substantive law applies to all contracts irrespective they are civil or commercial as it is under under French Civil Law. According to French doctrine [4], as it is the case in Mauritius as well, there is no distinction between civil and commercial contracts *per se* and the Civil Code on transfer of a thing applies to both moveable and immoveable properties [5].

"La catégorie des contrats commerciaux n'existe pas en tant que telle. Tout contrat peut être civil, commercial ou mixte. Tout dépend des personnes qui contractent et du dessein qu'elles poursuivent. Ainsi, un contrat sera commercial quand il est passé par un commerçant pour les besoins de son commerce. Il a alors un caractère commercial pour les besoins de son commerce. Il a alors un caractère commercial, du moins vis-à-vis de la partie qui agit de cette façon. Ce caractère peut être partagé par les deux co-contractants et la convention est ainsi entièrement commerciale. S'il est unilatéral, le contrat est mixte. Le seul moyen de distinguer les contrats commerciaux des contrats civils tient donc à la qualité des parties''.

Second, save to some exceptions [6] where French Civil Law is inapplicable consumer protection law in Mauritius enclose a certain number of obligations [7] which are typically of French Civil Law inspiration (both French doctrine and jurisprudence) and they find a privilege seat in our Mauritian Civil Law as well. Whenever there is a transfer of a thing the importance of *une obligation de garantie* [8] for instance is clearly explained by Pr Voirin and Pr Goubeaux (Droit Civil,Tome I, 27e édition, LGDJ, p.372, note 811, 1999):

811. L'obligation de garantie: " Qu'est-ce que la garantie? Dans tout contrat qui implique un transfert de propriété ou de jouissance la partie à qui incombe ce transfert n'est pas libérée par la 'délivrance de la chose. Elle doit encore 1. Assurer à son cocontractant une possession ou une jouissance paisible : de là, la garantie du trouble et de l'éviction ; 2 Lui assurer une possession ou une jouissance : de là, la garantie des vices. 824. L'acheteur a une option. Il peut- ou bien demander la résolution de la vente ; il restituera la chose et se fera rembourser le prix payé ; - ou bien se borner à demander la restitution d'une partie du prix, le contrat étant maintenu. Toutefois, l'acheteur qui a déjà revendu la chose perd le droit d'agir en résolution ; quant au cessionnaire d'un office ministériel, il n'a jamais l'exercice de l'action en résolution. En outre, lorsqu'il est de mauvaise foi c'est-à-dire qu'il connaissait l'existence du vice ou, selon la jurisprudence, lorsqu'il est un professionnel, le vendeur doit payer des dommages-intérêts en plus de la restitution du prix (par exemple, il doit indemniser l'acheteur pour le trouble que lui a causé le vice de la chose dans l'exercice de sa profession). Article 1645. Dans le cas contraire (vendeur de bonne foi, non professionnel), il ne doit rembourser que le prix d'acquisition et les frais du contrat selon l'article 1646 [9]''.

Third, a professional seller compared to a seller *non professionnel* (who may escape liability if proves that he was of good faith [10]) is always of bad faith under French Civil Law as he is supposed to know all hidden defects in a thing he is selling. This is the approach undertaken by the French *Cour de cassation* [11] which, in its quality as *jurisprudence protectrice*, bends in favour of the buyer-victim. In addition, a buyer-victim may take benefit of his insurance policy which guarantees a thing sold to him within a certain number of years (*clause extensive*) and/or *le contrat de service après-vente* for maintenance and reparation (cars, computers, photocopy machines or electronic goods) against payment only as it does not over hidden defects, which is a different issue.

In the overall, there are therefore an abundant architecture of legislations and provisions of the Civil Code to protect the consumer in Mauritius but it has never been the intention of the Mauritian legislator to follow European Directives (Directive 25 May 1999) as it is applicable in France because Mauritian consumer law is deeply rooted in its common law-civil law and European Directives are not sources of law *per se*. Between French and English law, our courts are following

[4] Dutilleul F.et Delebecque Ph. (2002), Droit Privé, Contrats civils et commerciaux, p. 21, note 19, Précis Dalloz, 6e édition, 954 p.

[5] There are hidden defects in buildings are dealt under article 1646-1 CCM.

[6] Le French Code Rural is inapplicable in Mauritius, but there are legislations of English inspiration (Local Government Act) which prevail.

[7] These obligations are, *inter alia*, l'obligation du vendeur, l'obligation de l'acheteur, l'obligation de délivrer la chose, l'obligation de payer le prix convenu entre les parties, l'obligation de garantie but this list is not exhaustive.

[8] Article 1625 CCM provides : « La garantie que le vendeur doit à l'acquéreur, a deux objets : le premier est la possession paisible de la chose vendue ; le second, les défauts cachés de cette chose ou les vices rédhibitoires. » De plus, selon l'article 1641 CCM « Le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellement cet usage, que l'acheteur ne l'aurait pas acquise, ou n'en aurait donné qu'un moindre prix, s'il les avait connus. »

[9] Article 1646 CCM provides "If the seller was ignorant of the faults of the thing, he shall only be bound to restitution of the price, and to reimburse to the purchaser the expenses occasioned by the sale''.

[10] Cass.3e civ., 16 nov. 1988, D., 1988, IR 288

[11] Cass.1re civ., 24 nov. 1954, JCP, 1955, II.8565

the French Civil Law on *Droit de Vente* which is exactly the same in France save, however, to some few exceptions (*infra*), so that in the final run the buyer-victim may claim *dommages-intérêts* following an *action rédhibitoire* or an *action estimatoire* based on article 1644 CCM [12]. Indeed, *a fortiori* under French Civil Law the buyer-victim must obtain reparations irrespective the seller is good or of bad faith because the seller is presumed (irrefragable presumption) to know all hidden defects in the thing under sale and to pay damages as per article 1645 CCM [13]. The seller can escape liability and there are three options which are open to him: in case of good faith [14], *en cas de force majeure* or he may enjoy his right to a *subrogation légale* [15] entering therefore an action (*action récursoire*) against *le fabriquant de la chose*.

Consumer protection under French civil law and commercial contracts in a mixed system

As explained, it is trite law that the French Civil Law of Contract is applicable in Mauritius together with French doctrine and precedents of the French *Cour de Cassation.* And coupled with decisions based on common law and/or statutory enactments of the House of Lords they form part of our law, and decisions of the Supreme Court of Mauritius. Therefore, decisions of the Supreme Court of Mauritius reflect to what extent foreign decisions find a place in our local judgments. Some few relevant cases have been discussed as a matter of clarity in the subjectmatter (*infra*).

The Dual Nature of Consumer Protection in Mauritius.

In the absence of any key legislation on consumer protection of the sale of goods in Mauritius, in contrast to England or France where we normally inspire and borrow our legislations, under consumer protection of goods we still remain guided by the predominantly French civil and commercial contracts as they are actually under the Mauritian Civil Code, which provides in fact for the substantive law whenever there is transfer of goods coupled with article 1135 CCM [16]. But it has never been the intention of the Mauritian legislator to depart from it despite the coming into force of, *inter alia*, *The Hire Purchase and Credit Sale Act 1964* or *The Consumer Protection Act 1991 (Act 11 of 1991)*. Sec. 3 (1) of the *Consumer Protection Act* enacts that: « No person shall supply any goods which suffer from any fault with regard to any prescribed quality, quantity, potency, purity or standard or, in the case of any machinery or motor vehicle, with regard to the quality, nature or manner of its performance ».

It is trite law that UK common law still forms part of our sources of law. As a result any precedent on sale of goods borrowed from common law may be implemented in our local decisions to form part of our domestic law, as another source of law, which already so abundant. Therefore, doctrine and precedents inspired from the French *Cour de cassation* on sale and transfer of goods also form part of our civil law as colonial law, and there has been no reform up to now and has there been any the Mauritian legislator is considering same actually. We inherited the Code Napoleon, 1804 which cohabit with other legislations of English inspiration.

Consumer Protection and Perishing Goods under English Law in Mauritius as per Common Law.

It is important to point out that neither the term 'perish' or 'defective goods' is covered by key legislations such as the Hire Purchase and Credit Sale Act 1964 or The Consumer Protection Act 1991 (Act 11 of 1991). The rationale behind the law is that irrespective it is 'defective goods' or 'perish' the judiciary would interpret them as per their ordinary meaning, and which makes sense.

In England, prior to the coming of the UK *Sale of Goods Act 1893*, the position at common law was that in the case of a contract of sale, if unbeknown to the parties the goods did not exist at the time the contract was made, there was no liability to pay the price. An illustration appears in *Couturier v Hastie 1856 5 HL Cas 673 (HL)* where both the seller and the buyer believed that the cargo of corn existed but, however, unknown to both parties who have entered into a contract of sale, the ship's captain had the previous month sold the corn to a third party as it was starting to ferment. The buyer repudiated the contract and consequently the seller brought an action against the buyer for the price. The House of Lords held that as the contract had contemplated the existence of the corn which, unbeknown to the parties, had ceased to exist because of the earlier sale, the buyer was not liable to pay for the goods because they were not in inexistence at the time the contract was made. In other words, a buyer is not generally obliged to pay the price if the seller is unable to deliver the goods. After the common law was codified in the form of the Sale of Goods Act 1979 it is made statutory that where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void (section 6 of the UK SGA 1979).

Just like in England depending when the goods have been transferred there is a similar approach in France and Mauritius which rely on the *transfert des risques* and as a result the date when the goods are transferred and delivered [17] become an important issue as to the existence of the hidden defect which existed (or not) at the time of the delivery and *le droit commun* provides that an action is entered *dans un bref délai* [18] that is as soon as the buyer becomes aware of the defect (*dies a quo, dies ad quem*). In addition, French courts have decided on a case to case basis following an expert opinion evidence and the delay to enter an action starts when the buyer-victim takes cognizance of the expert's report.

Sale of Goods under French Inspired Law in Mauritius

[12] Article 1644 CCM provides "In the cases of articles 1641 and 1643, the purchaser has the election to return the thing and to obtain restitution of the price (*action rédhibitoire*), or to keep the thing and to cause such a portion of the price to be restored to him (*action estimatoire*) as shall by competent persons". *L'action rédhibitoire* results in the nullity of the contract of sale for hidden defects within a *bref délai* but the court would decide whether the reduction in price is justified or not. *L'action estimatoire* finds its importance in civil or commercial contracts when the buyer-victim is unable to return back the thing to the seller such as when he has sold the thing-Cass.com., 17 mai 1982, Bull.civ., IV, no 182, D., 1983, IR 479.

[13] Article 1645 CCM

[14] In this case article 1646 CCM would be applicable to sellers who are not experts or professionnels

[15] Article 1251-3 CCF

[16] Article 1135 CCM provides « Agreements bind not only as to what is expressed therein, but further as regards all the consequences which equity, usage, or law attribute to an obligation by its nature''. In Manuel v Ibrahim Cassam, the Supreme Court applies la théorie des suites du contrat as averred in article 1135 CCM

[17] Cass.com.10 déc. 1973, D., 1974, IR 64, D., 1975, 122

[18] Article 1648 CCM

In Mauritius, in the absence of any clear stipulation on the sale of goods in our law of a hybrid nature reference is therefore made to *le droit commun* and, as a result of this lacuna, is governed by relevant articles of the Civil Code (CCM), which is of French inheritance.

Title III, Chapter III and article1134 to article 1155 of the Civil Code clearly stipulate for the effect of obligations in case there is a transfer of a thing in cases of sale of goods (*vente d'un corps certain* but not *dans les choses de genre* such as sugar, oil, wine which need to be separated and measured first) and/or in all contracts which are *synallamatiques emportant un effet translatif de propriété* (including donations and exchanges). In order words, the sale of goods is applicable in case of sale d'un *corps certain* only and certainly not to goods which are classified as *corps de genre*. As an illustration, in the case of *Ramloll v Société de Reunion 1917 MR 4*, the Supreme Court went on to say that:

> "The risks of a sale of goods which are to be weight, counted or measured are shifted to the purchaser when those goods have been so weight, counted or measured''.

It also allows the debtor to take all the necessary steps and make all possible diligence to perform his contract and to abide to all obligations as per the terms of the contract itself. If the debtor still fails to honour his obligations as *per* the terms of the contract the creditor proprietor may finally decide to have recourse to damages to force the execution of the contract, irrespective it is civil or commercial contract as in both circumstances there is *un effet translatif de propriété*, at the expense of the debtor (Banymandhub v Kwan Chung Woo 1965 MR 102) unless a *writ* of injunction is prayed and ordered for by the relevant court in favour of the debtor or obligations between debtor and creditor are extinguished by nullity or rescission [19]. In *Nundurchand v Dabeedun 1981 MR 241*, the Supreme Court of Mauritius brought some enlightments precising that where a party to a contract makes it clear that it does not intend to fulfill his obligations under the contract the other party needs not apply for a rescission of the contract under article 1184 CCM but may directly sue for damages under article 1142 CCM [20]. Since, as explained earlier, commercial contracts remains under the aegis of the Civil Code in Mauritius within the sphere of *convention synallagmatique* and reference may be made to the doctrine of Pr. Camerlynck's book-at page 460-

276. Dans le contrat de travail, convention synallagmatique, l'inexécution de ses obligations par l'une des parties permet à l'autre de demander en justice 1'exécution forcée ou de provoquer la résolution du contrat, avec dommages-intérêts, conformément aux dispositions générales de l'article 1184 du Code civil.

However, following both English and French doctrine the debtor-buyer may escape liability in case of a *cas de force majeure* [21] provided it satisfies the three conditions of being *imprévisible*, *irrésistible* and *un element extérieur* or in case no summation or *mise en demeure* has been served on him because there has been no *sommation de payer*. The creditor proprietor has recourse to insurance policy to cover losses and risks of accident at sea and it is safer for the debtor, in return, to include relevant clauses in the contract of sale of goods such as *la clause limitative de non-responsabilité totale ou partielle* or *la clause pénale* [22], where the debtor has agreed to pay a certain sum in case of nonperformance of his obligations [23] but the amount may be too poor or excessive and the judge has a discretion to reduce or increase it (Vallet v Mauritius Southern Sun Hotel 1990 MR) to exercise his equitable powers conferred on him by article 1152 CCM and 1231 CCM [24]. Encyclopédie Dalloz Droit CivilVol. III Vo. Clause Pénale –

"61. Le caractère forfaitaire de la peine tient à ce que, par la clause pénale, les parties ont voulu prévenir toute discussion sur le montant de la sanction et de la réparation à devoir au créancier pour le cas où le débiteur ne respecterait pas son engagement principal. Aux évaluations incertaines des juges, les contractants ont préféré établir à l'avance le montant de la peine. Comme l'exprime l'alinéa 1er de l'article 1152, conformément au principe posé par l'article 1134 du code civil: "lorsque la convention porte que celui qui manquera de l'exécuter payera une certaine somme à titre de dommages-intérêts, il ne peut être alloué à l'autre partie une somme plus forte ni moindre." Forfaitaire, la peine doit s'exécuter telle qu'elle a été fixée par les parties. 266. La garantie contre les vices cachés n'a pas seulement lieu dans la vente. Elle a étendue à d'autres contrats tels le bail ou le prêt à usage. Mais c'est dans le contrat de vente qu'elle a surtout vocation à s'appliquer, à l'égard de toutes les choses, meubles ou immeubles".

Consumer Protection: The Issue of product safety and liability in a mixed system

The issue of product safety and liability is not as easy as it pretends especially in Mauritian mixed system. If there is a mixture of law, legislations and regulations there is also as a result a choice under which law a consumer wished to be protected: under civil law, commercial law or the law of torts? In addition, there is Penal Law and issues as to embezzlement of a thing may also arise. However, the issue here is how French Civil Law in terms of its Civil Code, doctrine and precedents find its application in a mixed system with regard to product safety and liability? In Mauritius, there is no particular agency to solve disputes apart from the Supreme Court of Mauritius.

The Complexed Nature of Consumer Protection in a Mixed System

Issues on product safety and liability are also based on French Civil Law, and there shall be no departure from it at least for

[19] Article 1234 CCM.

[20] Article 1142 CCM provides "Every obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor''.

[21] Article 1147 CCM provides: "The debtor is condemned, if there be ground, to the payment of damages and interest, either by reason of the non-performance of the obligation or by reason of delay in its execution, as often as he cannot prove that such non-performance proceeds from a foreign cause which cannot be imputed to him, although there be no bad faith on his part''.

[22] 1152 CCM: "when the agreement imports that he who shall fail in executing it shall pay a certain sum under the title of damages, there can be allowed to the other party neither a greater not a less sum''. In Coowar v Jhoboo 1977 MR 152, the Supreme Court observed that "a penal clause fixing before held as a lump sum the damages claimable in the event of the fault''.

[23] Article 1226 CCM provides: "The penal clause is that by which a person, in order to assure the performance of an agreement binds himself to something in case of non-performance''.

[24] Article 1231 provides: "A penalty may be modified by the judge when the principal obligation has been executed in part''.

the time being. Therefore, we are guided in Mauritius by relevant articles of the Civil Code coupled, once more, with doctrine and precedents borrowed from French authors and decisions of the French *Cour de cassation*. Thus, flaws, defects, hidden defects which render the 'thing' improper for the use to which it is destined as per article 1641 and articles which follow of the Civil Code extends to include *une obligation de sécurité* so as to protect the consumer, who is victim of these defects, as much as possible. However, this *obligation de sécurité* covers both the sphere of civil and commercial contracts (*supra*) and the law of torts, which is of French inspiration, because all contracts in French Civil Law are also *contrats synallagmatiques* in nature generating obligations, to include to such extent implied duties as well, between the parties to a contract(s).

If the substantive French Civil Law is followed relevant legislations on consumer protection, such as The Consumer Protection Act 1991 and The Hire Purchase and Credit Sale Act (*supra*), are not neglected. Indeed, under this plethora of law and legislations and the complex nature of a mixed system it is therefore important not to say crucial for the consumer to know under which law or legislations he wished to be protected in order not to misguide a court of law because *la théorie de la règle de non cumul* [25] (Perrine v Duke Haberdashers Ltd) is imposed upon him in both civil and commercial disputes and litigations. Under French Civil Law according to Pr Voirin et Pr Goubeaux (Droit Civil, 1999):

"Les différents régimes de responsabilité ont chacun leur domaine propre et sont exclusifs les uns des autres: ''non-cumul'' des responsabilités contractuelle et délictuelle''.

Similarly, there legislations which are of European inspiration in the form of directives find no application in Mauritius. As an illustration, there is a Directive du Conseil des Communautés Européennes dated 25 juillet 1985 on *la responsabilité du fait des produits défectueux* which is in the form of a *loi française du 19 mai 1998*, and which has been implemented in the French Civil Code in the form of articles 1386-1 to article 1386-16 to protect French consumers against defective products. These new articles have never been implemented in our local Civil Code but we are still guided by article 1384 of the Civil Code.

Whatsoever, to be classified as a *produit*, ''un bien meuble doit avoir été mis en circulation et c'est la première transmission qui constitue la mise en circulation du produit''.

In the same rationale, if a consumer-victim of a defective product, irrespective it is in France or Mauritius, does not find any protection under any enactment he may still have recourse to *la responabilité de droit commun,* and which is the most open cause of action to victims of defective products in France or Mauritius. Over and above the consumer have several options with more chance to succeed against a seller of bad faith and/or a professional seller.

L'Obligation du Fait des Choses

It is trite law that we are still under the influence of French Civil Law in terms of torts or *droit de la responsabilité civile.* Shall there be any accident derived from, *inter alia*, a defective thing liability goes on the *gardien de la chose* as per article 1384 of the Civil Code, the leading article of the civil Code on French torts or liability, such that "A person is responsible not only for the injury which is caused by his own act, but also for that which is caused by the act of persons for whom he is bound to answer, or by things which he has had under his care". The French Cour de cassation has largely elaborated on the ''gardien est celui qui a l'usage, la direction et le contrôle de la chose [26]''. According to the French Cour de cassation where we normally inspire from relevant cases it was held that proof may well be based upon presumptions such that : « si l'action en responsabilité du fait d'un produit défectueux exige la preuve du dommage, du défaut et du lien de causalité entre le défaut et le dommage, une telle preuve peut résulter de présomptions, pourvu qu'elles soient graves, précises et concordantes » (1re Civ., 24 janvier 2006, Bull. 2006, I, n° 35, p. 34, pourvoi n° 02-16.648).

Defective products may be dangerous and cause bodily harm in the form of involuntary homicide or involuntary wounds and blows as per relevant articles of the Mauritian Penal Code inspired from the French Penal Code 1791. Under these two types of actions, civil or criminal which must not coincide because they are independent and autonomous, an action is entered before the relevant court but in most cases an action is entered before a civil jurisdiction which is prescribed for a period of 10 years as per article 2270 [27] CCM. The *gardien de la chose* cannot escape liability in case the consumer-victim has suffered prejudices and damages unless there has been a case of *force majeure* (*supra*), and both French and English Law are unanimous of this theory, exonerating the liability of the seller or *faute exclusive ou partielle de la vicitme*. Quoting Pr. Voirin and Pr. Goubeaux who went to say that:

"969. La force majeure est constituée par un cataclysme naturel, le fait d'un tiers ou celui de la victime, présentant un double caractère: il était normalement imprévisible et irrésistibles. En principe, la preuve qu'un tel évènement est intervenu dans la réalisation du dommage exonère totalement le défendeur, car le dommage se serait produit de toute façon quelle qu'ait pu être son attitude (la force majeure est donc la seule cause directe ou la seule cause adéquate du dommage)''.

There is one important issue under French Civil Law whenever there is *une responsabilité du fait des choses* is that there is exclusion *de la présomption de faute* (as per note 941 infra).Therefore, how can *le gardien de la chose* be exempted from liability? With regard to burden of proof, the onus of proof is generally on the victim *du fait actif de la chose* and *du lien de causalité* but which is not necessarily true because according to French precedents, which are dominant actually, the burden is on the seller that the thing was perfectly normal when the damage(s) occurred. It is sufficient for a person-*gardien de la chose*-to prove that he has lost *''l'usage, la direction et le contrôle de la chose''* to be exempted from liability which is important in consumer protection law. On this issue, Pr. Voirin and Pr. Goubeaux enlightened the liability of a person who has the *garde de la chose* especially if it is dangerous when they wrote clearly that:

"941. La garde est-elle divisible?- En principe, non : la garde est indivisible et alternative, c'est-à-dire qu'une chose n'a qu'un gardien à la fois. Cependant, dans des hypothèses qui restent exceptionnelles, la jurisprudence dissocie la garde de la structure de la chose et celle de son comportement. La

[25] La Cour de cassation n'admet pas le cumul ou le chevauchement des actions, ce qui aurait pour effet de tourner la condition d'exercice de l'action en garantie dans un bref délai- Cass.civ.1re, 14 mai 1966, Bull.civ. I, no 213

[26] Ch. Réun. 2 décembre 1941, D.c. 1942.25

[27] Article 2270 CCM provides: ''Sous réserve des dispositions particulières de la loi, les actions personnelles se prescrivent par dix ans''.

première incombe au propriétaire, qui répond des dommages causés par les vices internes de la chose, la seconde à l'utilisation qui est responsable des dommages résultant du maniement de la chose (Cass.civ., 1re, 1o juin 1960, Bull. civ., II, no 368 : affaire dite 'de l'oxygène liquide'' dans laquelle le propriétaire a été déclaré responsable pour l'explosion de bouteilles de gaz comprimé, survenue alors que celles-ci étaient confiées à un transporteur. Cette distinction des deux gardes a été ensuite appliquée dans d'autres cas d'accidents causés, selon la formule des arrêts, par des 'choses dotées d'un dynamisme propre susceptible de se manifester dangereusement''.

Consumer-victims may suffer physically and/or morally. It is open to them to enter an *action directe* against the insurance [28] of the seller to put the insurance company into cause to claim damages par *tierce-opposition*, another procedure borrowed from French Civil Procedure. To evaluate the quantum of damages a court of law in Mauritius would come to an assessment taking into consideration relevant articles of the Civil Code (Articles 1983-1 to 1983-92) and clauses of the insurance policy subscribed by the seller-defendant. The delay to enter an action is prescribed for a period of ten years (1983-37 CCM).

Sale of Defective Goods or Concealed Faults under French Inspired Civil Law in Mauritian CCM.

Decisions of the Supreme Court based on the Mauritian Civil Code are binding precedents. Goods are sometime defective, have hidden defects or are perishable with time. Sometime, the seller of bad faith or *de mauvaise foi*, but which is not a requirement of the Civil Code, may be aware of these hidden defects or *vices cachés* but may still sell same to a purchaser. The rights to give information and advice on a 'thing' to be sold remain on the seller prior to the sell and he may be liable for same if he failed to his *obligation de conseil* [29]. Nevertheless, there is a presumption of fact [30] as form of evidence which plays in favour of the buyer: that the purchase may either be aware of the defects in order to have a discount which is plausible or the hidden defect is totally unknown to him. Based on Roman Law, where the sale of two actions are then open to him either to nullify the contract of sale (*l'action rédhibitoire*) within a prescribed delay [31] of 6 months which is most common or a reduction in the price of the sale (*l'actio destimatoria ou quanti minoris* as per article 1644 CCM) within a prescribed delay of 1 year.

Again, the Civil Code contains all necessary provisions on quality, defect and hidden defects of a thing sold. We may refer to articles 1641-1649 of the Civil Code linked with guarantee against defects in the thing sold. At this stage, it is important to point out there is no mention of goods or merchandises in the Civil Code but the sale and purchase of a 'thing', and that shall be construed as including all types of properties irrespective they are moveable or immovable properties. In a mixed system like ours there is both French Civil Law (*Droit de Vente*) and English inspired-borrowed legislations (The Sale of Immoveable Property Act). In such circumstances, the French Civil Law constitutes the substantive law and the English inspired-borrowed law contain sufficient enactments on the procedure to be followed.

Let us turn to the study of these relevant articles. Article 1641 [32] of the Civil Code remains one of the leading articles on the relation buyer-seller in terms of hidden defects. It provides that:

"The seller is bound to warranty in respect of hidden defects in the thing sold which render it improper for the use [33] to which it is destined, or which so far diminish such use, that the buyer would not have purchased it, or would not have given so large a price, if he had known them".

The Civil Code makes a distinction between defects that are hidden and those that are not. Indeed, the seller is not bound against apparent faults and such as the purchaser might have cognizance of himself [34] but the latter is still protected under the *exception non adimpleti contractus* if he refuses to pay as an action is nullity of the sale is bared to him [35]. In other words, the hidden defect must not be of minor defects. Prior to the purchase of goods the buyer must be on his guard and this is in line with the principle of *caveat emptor* and the burden of proof in him to prove the existence of a hidden defect in the thing sold to him and which was unknown to him, the nature of the goods sold and the knowledge the seller had that the goods were defective or have hidden defects because upon him lies a irrefragable presumption. However, the seller is bound against hidden defects, even though he was not aware of them, unless in such case it have been stipulated that he should not be bound to any warranty [36].

In France civil law, there is the doctrine of *droit de retention* [37], which has been retained and available under Mauritian law of consumer protection, that is the seller has the right to retain a thing until payment based on, inter alia, article 1630 CCM (Huzooree v Lam Yuen Wah 2013 SCJ 479). In case of hidden defects unknown to him, the purchaser has the election either to return the thing and to obtain restitution of the price (*action rédhibitoire*), or to keep the thing and to cause such a product of the price to be restored to him (*action*

[28] Lemême v New India Insurance 1969 SCJ 8, Abson Pack Ltd v Seagull Insurance Ltd 1992 MR 252, Sauzier v Lam Ko International 1992 MR, Saga Textiles Ltd v Mauritius Eagle Insurance 1994 MR 1465, Mauritius Eagle Insurance v CEB 1995 MR 241, Pierre v Swan Insurance Cie Ltd 1996 MR

[29] Cass.1re civ., 8 avril 1986

[30] Cass.1re civ., 21 juill. 1987; Cass.1re civ., 31 mars 1954, D., 1954, 417

[31] In French Law just like in Mauritian Law there is no delay for the hidden defect to be known to the buyer. However, there is a delay to enter an action in the relevant court. In France, it is prescribed for 10 ans as per the directive du 25 juillet 1985 (loi française du 19 mai 1998).

[32] Article 1641 is not applicable for hidden defects in the sale of immovable property classified as *immeuble à construire*. Cass.3e civ., 25 janv. 1995, Bull.civ., III, no 31

[33] Le vice cause un trouble d'une certaine gravité dans l'usage de la chose-Cass.3e civ., 17 janv. 1990

[34] Article 1642 CCM provides "The seller is not bound against hidden defects and such as the purchaser might have taken cognizance of himself''. However, as per French precedents the buyer may still refuse to purchase, to pay or to take the goods upon *livraison de la chose*

[35] Cass.3e civ., 3 janv. 1979, Bull.civ., III, no 3, RTD., 1979.807

[36] Article 1643 CCM

[37] Section 1182 0 of Code Civil Mauricien : ''Lorsque l'obligation a été contractée sous une condition suspensive, la chose' qui fait la matière de la convention demeure aux risques du débiteur qui ne s'est obligé de la livrer que dans le cas de l'événement de la condition. Si la chose' est entièrement périe sans la faute du débiteur, l'obligation est éteinte. Si la chose' s'est détériorée sans la faute du débiteur, le créancier a le choix ou de résoudre l'obligation, ou d'exiger la chose' dans l'état où elle se trouve, sans diminution du prix. Si la chose' s'est détériorée par la faute du débiteur, le créancier a le droit' ou de résoudre l'obligation, ou d'exiger la chose' dans l'état où elle se trouve, avec des dommages et intérêts.

estimatoire) as shall be settled by competent persons [38]. It is different for a thing sold by a professional seller where the buyer may choose at his own discretion to have the thing repaired especially for electronic materials [39]. In case a 'thing' with the hidden defects have been perished in consequence of such bad qualities, the loss falls upon the seller, who shall be bound towards the purchaser to a restitution of the price and to other compensations but a loss happening by accident is placed to the account of the purchaser [40].

The onus remains on the purchaser to bring an action in nullity annulling the sale [41] within a short interval in order to have all the necessary proof and evidence about a 'thing' with hidden defects or which are perishable to the knowledge of the seller. It is important to point out that in Mauritius, in the absence of any law of evidence, the English Law of evidence shall prevail in Mauritius [42].

L'Obligation de Sécurité in a Mixed System

Unless an action has been entered under French torts, it is also open in a mixed system for a victim to enter under the law of contracts termed as *la responsabilité contractuelle*. This theory is based on the French doctrine of *les obligations de moyens* and *les obligations de résultat*. However, since there is also an additional *obligation de garantie* (*supra*) which is more pronounced in the relation buyer-seller in consumer law therefore an *obligation de sécurité* becomes even more apparent in the sale of goods or *vente*. In France, where we have inherited our Civil Law, a *directive communautaire* (25 July 1985) has been implemented in its legislations (loi no 98-389 du 19 mai 1998) but has not been followed in our law. This is the basic foundation of our law of contracts governing the sale of goods as well such that conventions legally entered into cannot be removed by the mutual consent of the parties, or for causes which the law authorises and they must be executed in good faith [43] (Vacoas Transport v Pointu 1970 MR 35). There are risks, borrowed from Roman Law (*res perit domino*), and we find guidance in article 1138 of the Civil Code which, without being in the nature of a public order, provides that the obligation to deliver a thing is perfect by the consent merely of the contracting parties. It renders the creditor proprietor, and puts the thing upon his risk from the instant at which it ought to have been delivered, although the delivery have not been actually made unless the debtor should have delayed delivering it; in which case the thing remains at the risk of the latter.

Under French law, the buyer remains the owner of the 'thing' and endure all the risks until delivery and to look after same as a good father of a family [44]. Therefore, it is trite law that the defendant, in the case of Malac Cie v Cie Financière 1885 MR 131, by taking possession of cargoes without being entitled to them was subject to an *obligation de donner* and is therefore bound to keep the cargoes until delivery and to deliver same to their lawful owners when called up to do so and until then, the defendant was bound to take care of the goods until delivery as a *bon père de famille*. Furthermore, under civil law, agreements bind not only as to what is expressed therein, but further as regards all the consequences which equity, usage, or law attribute to an obligation by its nature[45](*Manuel v Ibrahim Cassam*). In the absence of any relevant case in Mauritius related to serious injury reference may be made to the case of Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944), where a bottle of Coca-Cola exploded causing serious injury to a consumer in the United States. It was held that

> ''*Upon an examination of the record, the evidence appears sufficient to support a reasonable inference that the bottle here involved was not damaged by any extraneous force after delivery to the restaurant by defendant. It follows, therefore, that the bottle was in some manner defective at the time defendant relinquished control, because sound and properly prepared bottles of carbonated liquids do not ordinarily explode when carefully handled''.*

In the local case of *L.Iyemparooma v CIP Ltee* 2010 INT 178, concerning a defective bottled mineral water the Intermediate Court stated that: ''Bottled mineral water is said to be defective when it is unwholesome or polluted as to be non-potable and constituting a risk to health and the test to be applied is an objective test that is that what a reasonable consumer would expect of such type of product. According to the doctrine of Philippe Le Tourneau in his book Droit de la Responsabilité et des Contrats, 7ème édition, Produits défectueux, note 8421:

"L'attente légitime d'un consommateur quant à la sécurité d'un produit qu'il utilise n'est pas la même selon les produits: Elle est plus grande pour un médicament que pour une arme, pour une bouteille d'eau plate que pour une bonbonne de gaz. L'attente légitime est proportionnelle à l'innocuité naturelle du produit et inversement proportionnelle à son danger potentiel…"

Hence the expectations of the reasonable consumer as to the safety of bottled water for drinking purposes are higher than that of a gas cylinder''.

The creditor proprietor is discharged of risks by a summon or *une mise en demeure* [46] or other equivalent act (*acte d'huissier, un commandement de payer*, a simple letter, a notice to pay from an attorney-at-law of even a *citation en justice* would suffice) provided it is made in writing (*Tankoe v Ovide 1869 MR 43/44*) to fix the date at which damages [47] start to run (*Attorney General of Seychelles v Armitage 1958 MR 71* and *Obiter Dyna Motors v Vent Services Ltd*). Consequently, there is no summon or *mise en demeure* after

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[38] Article 1644 CCM provides "In the cases of articles 1641 and 1643, the purchaser has the election to return the thing and to obtain restitution of the price, or to keep the thing and to cause such a portion of the price to be restored to him as shall by competent persons".

[39] Cass.civ., 11 avril 1933, DH, 1933.331

[40] Article 1647 CCM.

[41] With respect to moveable 'thing', article 1657 CCM provides "In the matter of sale of provisions and moveable effects, the disannulling of the sale shall take place absolutely and without summons, for the benefit of the purchaser, after the expiration of the term agreed on for taking them away''.

[42] Section 162 of the Court Act, 1945 provides "162 English law of evidence to be followed "Except where it is otherwise provided by special laws now in force in Mauritius or hereafter to be enacted, the English law of evidence for the time being shall prevail and be applied in all courts of Mauritius".

[43] Article 1134 of the Civil Code

[44] Article 1137 CCM

[45] Article 1135 CCM

[46] Article 1139 CCM provides "The debtor is deemed guilty of delay, either by a summons or other equivalent act, or by the effect of the agreement, when it imports that, without need of an act and by the sole lapse of the term, the debtor shall be in delay''.

[47] Articles 1145 CCM provides "If the obligation is not to do, he who contravenes it therein is indebted in damages and interest by the single act of contravention''.

the date fixed by the parties (*Ramdin Ltd v Padaruth 1956 MR 69*). In *Colonial Government v N 1899 MR 28* it was held that, *inter alia*, a *mise en demeure* informs the debtor that the creditor insists upon execution of the contract [48].

Conclusion

Shall we inspire from the UK Sale of Goods there hall be indeed an unnecessary duplication: there is a very close similarity in terms of protection of the consumer between the UK Sales of Goods and relevant provisions on sale of goods (*droit de vente*) in the Mauritian Civil Code in terms of, *inter alia*, risks until delivery of the goods, hidden defects, perishable goods, the liability of the buyer and the principle of *caveat emptor*, the nullity of the contract of sale and damages to the buyer or in case of *force majeure*. It is the government policy to come up with new reforms. To the exception of colonial law, which is actually in the form of a Civil Code or Penal Code [49], it has never been also the intention of the Mauritian legislature to implement French or English legislations in our domestic law for the time being or to come up with new legislations inspired from England despite reforms proposed by the Law Reform Commission [50] (LRC) in this area of the law because our legislations on consumer protection are also obsolete. For the time being, and since we inherited the Code Napoléon in 1804 in addition to the Civil Code, what our courts are following are French doctrine and relevant precedents of the French *Cour de cassation*. In the same breath, we have not followed any directive which is the case in France (directive du 25 mai 1999) and there is no *French Code de la Consommation* in Mauritius.

Références

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2. Encyclopédie Dalloz Droit CivilVol. III Vo. Clause Pénale
3. Voirin and Goubeaux, Droit Civil,Tome I, 27e édition, LGDJ, p.372, note 811, 1999.

[48] Article 1147 CCM provides "The debtor is condemned, if there be ground, to the payment of damages and interest, either by reason of the non-performance of the obligation or by reason of delay in its execution, as often as he cannot prove that such non-performance proceeds from a foreign cause which cannot be imputed to him, although there be no bad faith on his part''.

[49] The Code de Commerce 1809 survived but most of its provisions are in fact a compilation of conventions and Supreme Court Rules and civil procedure.

[50] All necessary reforms are found on the LRC's website *(http://lrc.govmu.org/English/Documents/Reports%20and%20Papers/45%20rep-law-071009.pdf)*