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CIVIL LIABILITY OF PRINCIPAL FOR THE ACTS OF AGENT – A COMPARISON BETWEEN FRANCE AND MAURITIUS

Mauritian civil law is strongly influenced by French civil law, for historical reasons. Civil liability, tort and contractual law, is regulated in an almost same manner in the two countries. However, as French civil law is only a persuasive authority in Mauritius, the position of the French Court of Cassation is not always followed by the Mauritian Supreme Court. Moreover, even when the legal solutions in the two countries are the same, differences can exist between the contractual and tort liabilities of principals for the acts of their agents. This paper aims at critically analyzing the similarities and differences in the tort and contractual liabilities of principals for the acts of their agents in France and Mauritius.

Key words: *Civil Liability*. – *Principal*. – *Acts*. – *Agent*.

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1. INTRODUCTION

Republic of Mauritius is a small island country located in the Indian Ocean, and comprised of Mauritius Island, Rodrigues Island, the Cargados Carajos Shoals, the Agalega Islands, and the Chagos Archipelago.[1] The main feature of the Mauritian legal system is its hybrid (mixed) nature.[2] One part of the Mauritian laws is of common law origin, and those laws are written in English. There are also the laws inspired by the French legislation, and these laws are written in French (Domingue 2002, 67; Knetsch 2019, 198–199). On the one hand, the Mauritian Constitution,[3] the Administrative Law,[4] the Insolvency Law,[5] the Anti-Corruption Law,[6] and the Maritime Law[7] are of common law origin and written in English (Knetsch 2019, 198–199). On the other hand, the Civil Code of 1805,[8] the Commercial Code of 1809, and the Code of Civil Procedure of 1808 are of French inspiration, and are written in French. The Mauritian Criminal Code of 1838 is mostly of French origin, and written, in parallel, both in French and English.[9]

This mixed nature of the Mauritian legal system results from historical circumstances (Law Reform Commission 2010; Domingue 2002, 62; Agostini 1992, 21–22; Venchard 1982, 31; Agostini 2004, 116–117). When the French took possession of Mauritius, they applied their laws. However, in the early 19th century the French in Mauritius suffered a military defeat from the United Kingdom, which took possession of the island. The new colonial force in Mauritius established the organization of the courts based on the British model (Angelo 1970, 233–237). However, the laws previously adopted by the French, e.g., the Civil Code, remained in force thanks to Article 8 of the Act of Capitulation signed between the France and United Kingdom in 1810. The abovementioned Article has authorized the inhabitants of the island to retain their customs, *laws,* and religion (Agostini 1992, 21–22; Venchard 1982, 31; Angelo 1970, 237–239). Moreover, although the Mauritian courts are completely independent of their French counterparts, and the Supreme Court of Mauritius does not have any formal obligation to adopt the same

1 Britannica. 2024.

2 JuriGlobe. 2024.

3 The Constitution, General Notice 54/1968.

4 Law Reform Commission of Mauritius 2009, 12–14.

5 Insolvency Act of 2009, Act. 3/2009.

6 Prevention of Corruption Act of 2002, Act. 5/2022.

7 Merchant Shipping Act of 2007, Act 26/2007.

8 Adopted in 1805, the Civil Code came into force in 1808.

9 Criminal Code Act of 1838, Act 6/1838.

position as the French Court of Cassation (*Cour de cassation)* in civil law matters, most of the time the Mauritian Supreme Court will follow the position of the French Court of Cassation, if an article in the Mauritian Civil Code is identical or very similar to an article in the French Civil Code. The French case law and doctrine are a persuasive authority in Mauritius. It has been clearly stated in the judgment of the Supreme Court of Mauritius *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* of 2017[10] that "there is no legal obligation for the Mauritian Supreme Court to adopt the same position as the French Court of Cassation in a civil law matter, as pointed out in the previously quoted judgment of the Supreme Court of Mauritius *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* of 2017."[11]

Given the historical background of the Mauritian civil law, it is justified to compare the French civil law with the Mauritian civil law, which has been and still is strongly influenced by the former. Such a comparison can lead to ideas on how to amend and improve the Mauritian civil law.

Civil liability in Mauritius and France is composed of tort liability, on the one hand, and contractual liability, on the other.

Tort liability is a branch of civil law that is composed of only a few articles in the Mauritian Civil Code (Articles 1382–1386) and the massive case law of the Supreme Court of Mauritius on the subject matter. The situation is very similar in France today: tort liability is regulated in Articles 1240 through 1253 of the French Civil Code and the numerous judgments of the French Court of Cassation. The case law on tort law issues in France and Mauritius will be the same, given that Articles 1240 through 1244 of the French Civil Code, on the one hand, and Articles 1382 through 1386 of the Mauritian Civil Code, on the other hand, are very similar in most cases. There are three sources (*faits générateurs*) of tort law both in France and Mauritius, namely civil fault (Terré *et al.* 2022, 1073 ff.; Flour, Aubert, Savaux 2024, 181 ff.; Bufflan-Lanore, Larribau-Terneyre 2024, 863 ff.), act of an object (Terré *et al.* 2022, 1095 ff.; Flour, Aubert, Savaux 2024, 485 ff.;

[10] Supreme Court of Mauritius 2017 SCJ 411 *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor*: "It is appropriate to recall the practice that when it comes to the interpretation of a law borrowed from French law we stand guided for its interpretation by French doctrine and case law. One can quote in that respect the following passage from *L'Etendry v The Queen* [1953 MR 15]: 'the normal rule of construction laid down time and again by this court (...) is to the effect that when our law is borrowed from French law we should resort for guidance as to its interpretation to French doctrine and case law.'"

[11] "But, it has to be pointed out that the practice of relying on French authorities has always been for guidance and not in application of the stare decisis principle."

Bufflan-Lanore, Larribau-Terneyre 2024, 897 ff.) and act of another (Terré *et al.* 2022, 1150 ff.; Flour, Aubert, Savaux 2024, 383 ff.; Bufflan-Lanore, Larribau-Terneyre 2024, 937 ff.).

Contractual liability is defined similarly in France (Porchy-Simon 2024, 329; Tranchant, Egéa 2024, 98) and Mauritius.[12] The debtor of a contractual obligation must repair the harm suffered by the creditor due to the inexecution or defective execution of a contractual obligation. For instance, if the debtor does not pay the price agreed upon with the creditor or if they deliver to the debtor, in bad faith, goods with a hidden defect, the creditor may ask a court to order the debtor to compensate the creditor for the harm suffered (Porchy-Simon 2024, 339). Both in France and Mauritius, as a matter of principle, the debtor must compensate the creditor only for the harm reasonably foreseeable when the contract has been made (Porchy-Simon 2024, 339).[13] However, if the debtor has intentionally failed to fulfill their contractual obligation (*faute intentionnelle*) or if they have committed a serious fault (*faute grave*), they will have to compensate the creditor for the entire harm suffered, including the harm that was reasonably foreseeable when the contract was made (Porchy-Simon 2024, 339).[14] Unlike tort liability, where the tortfeasor can escape their liability for harm caused to another person if they prove that no fault has been committed, the debtor of a contractual obligation, which qualifies as obligation of a result, can avoid their contractual liability only if they prove force majeure, i.e., the existence of an external event of natural[15] or human origin[16] that is reasonably unforeseeable[17] and reasonably inevitable (Porchy-Simon 2024, 331; Tranchant, Egéa 2024, 100–101).[18]

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[12] Article 1147 of the Mauritian Civil Code. See the judgments of the Supreme Court of Mauritius 2010 SCJ 202 *Air Austral v. Hurjuk A. H. I*; 2015 SCJ 109 *Sotramon Ltd v. Mediterranean Shipping Company S. A.*; in the same matter Judicial Committee of the Privy Council 2017 UKPC 23 17 July 2017; Supreme Court of Mauritius 2018 SCJ 111 *Chuckravanen v. Esoof*; 2023 SCJ 369 *Quinn M. & Anor v. Societe Indigene Ltee* and 2023 SCJ 365 *Zoobair & Osman Properties Ltd & Ors v. Banque des Mascareignes Ltee*.

[13] Article 1150 of the Mauritian Civil Code.

[14] Article 1151 of the Mauritian Civil Code.

[15] It can be a flood, a fire, an earthquake, etc.

[16] It can be a war, an administrative measure, or a new state law.

[17] The event needs to be unforeseeable to a reasonable and careful person.

[18] The event's consequences need to be predictable to a reasonable and careful person. See the judgment of the Supreme Court of Mauritius 1972 SCJ 189 *Butan v. Rivière de Rempart Bus Services*.

Both in Mauritius and France, the civil liability of the principal, especially the employer, for the acts of their agent (employee) can be contractual or tort liability. Even though important similarities exist between the legal provisions adopted in France and Mauritius, there are also notable differences. This is why, in this paper, we will compare and analyze the similarities and differences of the civil liability of principals for the acts of their agents, with the view to find how to improve the Mauritian law on the civil liability of principals for the acts of agents.

The method used in this study is the traditional desk research method. Drawing upon an extensive reading of the case law, pertinent laws, books, articles, and other relevant documentary resources from both France and Mauritius, we will address the questions identified for this study and try to provide analytical and critical answers.

2. SIMILARITIES IN THE CONDITIONS FOR THE CONTRACTUAL AND TORT LIABILITIES OF PRINCIPAL

Two conditions appear to be common to tort and contractual liabilities in France and Mauritius: the requirement of a subordination link, and the requirement that a fault is committed in the fulfillment of the agent's mission.

2.1. The Requirement of a Subordination Link

An agent, both in French (Terré *et al.* 2022, 1174–1175; Flour, Aubert, Savaux 2024, 422–429; Wolmark, Peskine 2022, 32; Gauriau, Miné 2021, 145–146; Dockes, Auzero, Baugard 2021, 273; Gaudu, Bergeron-Canut 2021, 75) and Mauritian laws of civil liability,[19] can be defined as a person completing a task or fulfilling a mission in conformity with the orders given by their principal. The latter has the power to control the execution of the aforesaid mission and to apply the disciplinary sanction, if necessary. The subordination link between the principal and the agent is a prerequisite for the contractual and tort liability of the principal for the acts of their agent. Traditionally, both in France and in Mauritius, this subordination link is composed of the power of the principal to give orders to the agent, to control their execution (Cabrillac 2024, 300), and to apply the disciplinary

[19] See the judgment of the Supreme Court of Mauritius 2016 SCJ 56 *Dassruth R. P. v. Femi Publishing Co. Ltd. & Ors*.

sanctions against the agent, if necessary. However, more recently, this traditional definition had to be adapted to the employment contracts where the employee keeps important autonomy in the fulfillment of their contractual duties. For instance, high-skilled employees such as doctors and teachers have a lot of liberty in the organization of the fulfillment of their contractual duties, and the contents of their work is not usually controlled by employers. There is still a subordination link between these employees and their employers, provided that the latter has disciplinary power over the former and that the place and time of the fulfillment of the contractual obligations is determined by the employer (Dockès, Auzero, Baugard 2021, 280; Gaudu, Bergeron-Canut 2021, 75–77).

This condition for the civil liability of the principal reveals the importance of the legal power exercised over the agent by the principal, not only regarding the existence of the civil liability of the latter but also pertaining to the nature of this liability (Flour, Aubert, Savaux 2024, 420).

2.2. The Requirement That a Fault Is Committed in the Fulfilment of Agent's Mission

2.2.1. Tort Liability: A Civil Fault Must Be Committed in the Fulfilment of the Agent's Mission

Under Article 1242 of the French Civil Code and Article 1384 of the Mauritian Civil Code, which regulate tort liability of the principal for the acts of their agent, the former is liable in tort for the acts (civil faults) of the latter committed in the discharge of the functions of the latter. In other words, the principal is liable for the harm caused to third parties by their agent while fulfilling a mission forming part of the subordination link between the principal and agent (Terré *et al.* 2022, 1179; Bufflan-Lanore, Larribau-Terneyre 2024, 961; Cabrillac 2024, 301). For instance, teaching is the main function of a teacher working in a public school. If the teacher commits a civil fault during the fulfillment of their mission to teach, on a specific day and at a specific time, and this fault causes harm to a third party, then the public school, in its capacity as the principal, will be liable in tort to this third party, under Article 1242 of the French Civil Code and Article 1384 of the Mauritian Civil Code. Another example: if a driver working for a private company, while driving the CEO of the aforesaid company to an important meeting, hits a pedestrian and causes bodily harm to the latter, the company, as a principal, will be liable in tort to the victim of bodily harm for the civil fault of its driver. This logical rule is predicated on the power the principal exercises over their agent, this power is known as a subordination link.

Is the principal liable in tort for acts committed by the agent outside their functions (missions) but directly linked to their functions (Bufflan-Lanore, Larribau-Terneyre 2024, 962)? For instance, is a cinema liable in tort for bodily harm suffered by a young lady who has been raped in the cinema's toilet by a security agent working there (see Cabrillac 2024, 301)? Is a security agency liable in tort to the mother of a deceased person who has been tortured and killed, for financial reasons, by an employee of that security agency?[20] In these two examples, the agent has committed a civil fault, i.e., an act that a reasonable and careful person would have not committed in the same circumstances. Moreover, such an act definitely falls outside the agent's functions and missions. However, the act has been facilitated by the agent's functions, as the act has been perpetrated during the agent's working hours and at their workplace.

Both in France and Mauritius this question is known as abuse of functions (*abus de fonctions*). After some hesitation, the French Court of Cassation, which still plays the role of persuasive authority in Mauritius, exonerated the principal from tort liability for civil faults of their agent committed outside the functions of the latter, even though the commission of the fault was facilitated by the agent's functions. In its landmark case dated 19 May 1988, the Plenary Assembly of the French Court of Cassation announced that the principal would not be liable for civil faults of their agent, provided that the fault is committed outside the agent's functions, without the principal's authorization and for the pure personal interest of the agent.[21] The three conditions laid down in the 1988 Court of Cassation's judgment are cumulative (Bufflan-Lanore, Larribau-Terneyre 2024, 965). If one of them is missing, the principal will be liable in tort for the agent's acts. The same approach was adopted by the Supreme Court of Mauritius in the cases of *Mir v. IBL Ltd.*[22], *Dookhy M. & ORS v. SBM*[23] and *Beau Villa v. Chuckowree and Lamco Insurance Ltd.*[24]

The solution adopted both in France and in Mauritius is very logical: if the civil fault committed by the agent is detached from their functions, it would be difficult to understand why the principal should be liable for it in tort. The power exercised by the principal over their agent, which justifies the

[20] Supreme Court of Mauritius 2023 SCJ 195 *Mir v. IBL*.

[21] Dalloz 1988, 513.

[22] Supreme Court of Mauritius 2023 SCJ 195 *Mir v. IBL Ltd.*

[23] Supreme Court of Mauritius 2007 SCJ 1 *Dookhy M. & ORS v. SBM*.

[24] Supreme Court of Mauritius 1992 SCJ 83 *Beau Villa v. Chuckowree and Lamco Insurance Ltd.*

liability of the former for the acts of the latter, has not been respected, and in those circumstances, nothing justifies that the principal be liable in tort for the acts of the agent.

2.2.2. Contractual Liability: A Civil Fault Must Be Committed in the Fulfilment of the Agent's Mission

Both in France and in Mauritius, if a contract generates an obligation of result (*obligation de résultat*) (Flour, Aubert, Savaux 2024, 38), the debtor will escape their contractual liability by proving the existence of a force majeure event (Flour, Aubert, Savaux 2024, 39). If a contractual debtor (principal) uses their employees (agents) in the fulfillment of the contractual obligations, the debtor cannot be exonerated of the contractual liability by proving that the employee (agent) has not committed civil fault. In that sense, the exoneration of the principal, who is the contractual debtor of an obligation of result, is more difficult than the exoneration of the principal of their tort liability for the acts of the agent, where the principal can be exonerated of their liability in tort if they prove that the agent has not committed a civil fault. In the field of contractual liability, the absence of the debtor's (principal's) fault or their employee's (agent's) fault is the risk that the contractual debtor needs to bear. For instance, if a defective machine explodes while the debtor's employee is fulfilling the debtor's contractual obligation, this absence of civil fault of the employee and their employer (the contractual debtor) will not suffice to exonerate the employer (the contractual debtor) of their liability.

The situation radically changes when the employee (agent) of the contractual debtor (principal) commits a fault not forming part of their functions and missions *(abus de fonctions*) (Terré *et al.* 2022, 1184). If the employee commits a civil fault outside the limits of their missions and functions, they cannot be considered as a tool used by their employer in the fulfillment of their contractual obligations. In this case, the subordination link, i.e., the relationship of power, between the principal and agent justifying, the former's contractual liability for the acts of the latter, has ceased. From the legal point of view the agent becomes a third party, external to the contractual debtor, and as such their act can qualify as force majeure, provided that the act has been reasonably unforeseeable and reasonably inevitable for the employer, in terms of its consequences. The employer (principal) will thus be exonerated from their contractual liability, the act of their employee (agent) falling outside the scope of the latter's functions and missions and constitutes force majeure from the employer's (principal's) point of view.

This strong bond between civil fault and the missions and functions of an agent is even more visible in the obligations of means, where the debtor of a contractual obligation does not need to provide the creditor with a result, the former only needs to put their best efforts in the fulfillment of their contractual obligation. In other words, the debtor of the contractual obligation must not commit a civil fault in the fulfillment of the obligation of means: they have to do everything that a reasonable and careful person would have done in the same circumstances (Flour, Aubert, Savaux 2024, 38–39). If the agent used by his principal in the fulfillment of the latter's contractual obligations commits a civil fault, the principal will bear civil liability as if they have personally committed that fault. On the contrary, if the agent has not committed any civil fault in the fulfillment of their missions and functions, their principal will not be held liable for the harm suffered by other contractual party.

3. DIFFERENCES IN THE CONDITIONS FOR THE CONTRACTUAL AND TORT LIABILITIES OF THE PRINCIPAL

3.1. Inequal Importance of Civil Fault

3.1.1. Tort Liability: Requirement of a Civil Fault Committed by the Agent

In France and Mauritius, the principal may be declared liable in tort only for the acts of their agent that constitute a civil fault of the latter (Terré *et al.* 2022, 1178; Bufflan-Lanore, Larribau-Terneyre 2024, 960; Cabrillac 2024, 300). Both in France (Flour, Aubert, Savaux 2024, 214–216) and Mauritius,[25] the abstract test (*appreciation in abstracto*) is applied in the assessment of whether an act of the agent constitutes a tort fault or not. This means that the act of the agent will be compared to what a reasonable and careful person, exercising the same profession, would have done in the same circumstances (see Flour, Aubert, Savaux 2024, 216–217). If their act conforms with what a reasonable and careful person, exercising the same profession, would have done in the same circumstances, no tort fault can be linked to the agent. Consequently, the principal will bear no tort liability for the acts of the agent that do not entail any tort liability. This seems very logical, as it would be very difficult to understand, in terms of the principles of tort law, why the

[25] Supreme Court of Mauritius 2020 SCJ 63 *Neron Publications Co Ltd v. La Sentinelle Ltd & Ors*; Supreme Court of Mauritius 2019 SCJ 218 *Belloguet L.F. & Anor v. Mungur I. (DR) & Ors*; Supreme Court of Mauritius 2001 SCJ 60 *Cundasamy v. The Government of Mauritius* and Supreme Court of Mauritius 2023 SCJ 195 *Mir v. IBL*.

principal should be liable for an act for which the agent is not liable. We fully agree with Flour, Aubert and Savaux that the obligation to compensate the victim for their harm, where the agent has not committed civil fault and is simply involved in the harm caused to the victim, would be difficult to justify (Flour, Aubert, Savaux 2024, 430–431). However, it is necessary to point out that in the field of tort liability of parents for the acts of their minor children, the French Court of Cassation (*Cour de cassation*) applies logical nonsense: a parent will be held in tort even though their minor child has committed no civil fault (compare Flour, Aubert, Savaux 2024, 432; see also Bufflan-Lanore, Larribau-Terneyre 2024, 960–961).[26] The solution adopted by the French Court of Cassation can be easily understood in terms of the feeling of justice, as it provides the victim with compensation for bodily harm. However, the solution fails to be explained in terms of the principles of tort law in Mauritius, as it is difficult to understand why the parents should be held liable in tort for the acts of their minor children whose acts do not constitute a civil fault.

3.1.2. Contractual Liability: Limited Scope of the Civil Fault of the Agent

Very often, both in France and Mauritius, a debtor of a contractual obligation uses the services of employees in the fulfillment of their contractual obligations. For instance, a gardening company might use the services of its employees in the fulfillment of a contract made with a client. If ever the employees of the debtor cause harm to the client, this may entail civil liability of the debtor as principal, for the acts of their agents (employees).

Both in France (Terré *et al.* 2022, 942) and Mauritius, the obligations of result (*obligations de résultat*) must be differentiated from the obligations of means (*obligations de moyen*) as far as the principal's contractual liability for the acts of their agents is concerned. In Mauritius, the landmark case on this topic is the *Butan v. Rivière de Rempart Bus Services* case,[27] where the Supreme Court of Mauritius held that the obligation of the transporter to ensure the security of passengers is an obligation of result.

[26] The case is known in France as *arrêt Levert*: Cass. 2nd Civil Chamber, 10 May 2001, No. of pourvoi 99–11.287.

[27] Supreme Court of Mauritius 1972 SCJ 189 *Butan v. Rivière de Rempart Bus Services*.

In the obligations of result, the debtor needs to provide the creditor with the result specified in the contract. For instance, the gardening company needs to clean up the client's yard while respecting the client's property. In this type of obligation, the debtor cannot escape their contractual liability by proving that they or their employee has not committed a civil fault. The use of an employee in the fulfillment of the contractual obligations is the risk that needs to be assumed by the principal (employer) (Terré *et al.* 2022, 948–949). The only means for the employer to escape their contractual liability is to prove the existence of a force majeure event, i.e., an event external to the debtor and their employee, reasonably unforeseeable for the debtor and their employee and reasonably inevitable, in terms of consequences, for the debtor and their employee (Terré *et al.* 2022, 945–946). As the use of an employee in the fulfillment of the contractual obligations is not an external event for the principal as a contractual debtor, they will be liable for the acts of their employees even though they have not committed a civil fault. The contractual liability of the debtor for an obligation of result, regarding the acts of their agent, is thus more severe for the debtor than the tort liability of the principal for the acts of their agent. The principal can avoid tort liability by proving that the agent has not committed a civil fault, whereas the principal will bear the contractual liability for the harm caused to their client and will not be able to avoid it by proving that their employee (agent) had not committed a civil fault.

The situation is different in the obligations of means, where the debtor does not guarantee the result expected by the creditor. The debtor needs only to make their best efforts, and if the result expected by the creditor is not achieved, the debtor will not bear contractual liability for it (Terré *et al.* 2022, 942–943). In Mauritius, the landmark case on this topic is *Central Electricity Board v. Auckloo*.[28]

In this type of obligation, there are factors of risk that are not under the debtor's control, and it would be unfair to hold them liable for the absence of the result expected by the creditor. For instance, in the medical contract made by a private hospital and a client, the private hospital undertakes the obligation to provide the best service possible to the patient. The latter needs to be properly informed of the risks of the medical procedures to be done, the former has to properly apply the approved medical procedures, etc. However, the private hospital does not guarantee that the patient will be healed, as the full recovery of the patient depends on their prior medical

[28] Supreme Court of Mauritius 1981 MR 92 *Central Electricity Board v. Auckloo*.

condition as well as on their habits in everyday life. This is why the debtor is contractually liable only if they have not made the best efforts in the discharge of the contractual obligation, i.e., if they have committed a civil fault. If the debtor of the obligation of means has done everything that a reasonable and careful person would have done in the same circumstances, they have not committed any civil fault and will not be contractually liable (Terré *et al.* 2022, 943). The same applies to the employees (agents) of the debtor: their fault is treated as the personal fault of the contractual debtor (Flour, Aubert, Savaux 2024, 1231). For instance, if the doctor employed by the private hospital has done everything properly and has not committed a civil fault in the discharge of the obligation to provide the client with the health care service, their employer (principal) will not be contractually liable for any bodily harm suffered by the patient (Terré *et al.* 2022, 934, 948–949). In conclusion, the tort and contractual liabilities of the principal in the obligations of means have the same intensity, as they both require a civil fault to be committed by the agent to declare the principal liable.

3.2. Inequal Place of the Agent's Civil Immunity

3.2.1. Tort Liability: The Differences Between French and Mauritian Law on the Agent's Civil Immunity

Since the *Costedoat* case in France, i.e., the judgment of the Plenary Assembly of the Court of Cassation in France dated 25 February 2000, an agent having committed a nonintentional civil fault and having remained within the limits of their mission will benefit from civil immunity, meaning that the victim could not claim compensation for their harm from the agent (Flour, Aubert, Savaux 2024, 448–449, 454, 457; Bufflan-Lanore, Larribau-Terneyre 2024, 966–968).[29] For the time being, there is no such immunity in Mauritius. The new case law in France is explained by the fact that the principal is very often insured against the harm that their agents could cause to third parties and the principal's insurer will bear the financial charge of the compensation for the victim's harm. As such insurance is still not developed enough in Mauritius, we believe that, for the time being, there is no reason to suspend the personal subjective liability of the agent.

[29] Cass. Plen. Ass. 25 February 2000, No. of pourvoi 97–17.378. and 97.20.152.

3.2.2. Contractual Liability: Lack of the Agent's Civil Immunity

In both France and Mauritius, the agent that assisted the contractual debtor, their principal, in the fulfillment of the contractual obligation will not benefit from civil immunity. However, French law will likely follow the *Costedoat* case law even in the case of contractual liability, given the highly developed insurance coverage of the principal's liability for the harm caused by their agent. Given the fact that such insurance is still not very developed in Mauritius, the agent should remain personally and subjectively liable for the harm caused to the other party to the contract made with the principal.

4. STRICT V. SUBJECTIVE LIABILITY OF THE PRINCIPAL FOR THE ACTS OF THEIR AGENTS

4.1. Principal's Tort Liability: Strict (Objective) Liability Recommended

In France, the principal's tort liability for the acts of their agent is objective, i.e., completely independent of the principal's fault while choosing and monitoring the agent. Thus, even if the principal has chosen well and has monitored well their agent, this lack of the principal's fault will not entail the exoneration from their tort liability (Bufflan-Lanore, Larribau-Terneyre 2024, 970). The principal needs to prove force majeure, to be exonerated from tort liability (Bufflan-Lanore, Larribau-Terneyre 2024, 970). In the *Jhugdamby B. v. Private Secondary Education Authority* case,[30] the Mauritian Supreme Court held that the principal tort liability for the acts of their agents was strict (objective).[31]

Objective tort liability, where the principal cannot escape liability by proving that he has not committed a civil fault, seems to be the most suitable solution for Mauritius. As the principal usually benefits financially from their agent's activity, the objective tort liability, more severe than the traditional tort liability based on fault, seems to be reasonable. In France, this idea is known as "*risque-contrepartie*" (Flour, Aubert, Savaux 2024, 417–418; Bufflan-Lanore, Larribau-Terneyre 2024, 974; Cabrillac 2024, 299). Another

[30] Supreme Court of Mauritius 2022 SCJ 56 *Jhugdamby B. v. Private Secondary Education Authority*.

[31] "In respect of vicarious liability of the principal it is objective and strict, i.e., 'no fault liability'. It means that there is no need to prove fault on the part of the principal" (translated by author).

idea has been proposed to justify the principal's objective liability for the acts of their agents: the former guarantees the solvency of the latter, and this is why the principal's liability is strict (objective) (Flour, Aubert, Savaux 2024, 420–421).

4.2. The Principal's Contractual Liability: The Nature of the Liability Depending on the Nature of the Contractual Obligation

The strength of the principal's contractual liability for the acts of their agent involved in the execution of the former's contractual obligations will depend on the nature of the contractual obligation. If an obligation is the obligation of result, the liability of the principal for the acts of their agent is rather objective, as the principal cannot escape their contractual liability by proving that they have not committed a civil fault and that everything that a reasonable and careful person would have done in the same circumstanced has been done. The only cause for the exoneration of the principal is a force majeure event that is external to the contractual debtor (principal). Every element that is intern to the contractual debtor (principal) is a legal risk that they must bear. If an agent has not committed civil fault, that will not be the cause for the principal's exoneration from the contractual liability. On the other hand, force majeure is an exceptional risk, extern to the contractual debtor (principal) and it would not be fair that they bear the consequences of this risk, as it was not reasonably foreseeable and evitable when the contract was made.

In the obligations of means, the contractual liability of the principal for the acts of their agent is necessarily subjective. Only a civil fault, defined as the behavior that a reasonable and careful person would not have had in the same circumstances, can put contractual liability on the principal's shoulders. And the principal can be exonerated of their liability if they prove that the agent has not committed civil fault.

5. CONCLUSION

In this paper, we have critically analyzed the similarities and differences between tort and contractual liabilities in France and Mauritius. We have reached the conclusion that there is a common core of conditions for the application of the civil liability of principals for the acts of their agents, namely the subordination link and the requirement that civil fault has been committed by the agent in the fulfillment of their mission. The subordination

link reflects the legal power of the principal over their agent, justifying the civil liability of the former for the latter's acts. The same can be said for the requirement of a civil fault being committed by the agent in the fulfillment of their mission: if the agent's act falls outside their mission, the subordination link has not been respected and there is no justification for the principal's civil liability. On the other hand, we have noted an inequal place of civil fault in the tort and contractual liabilities of the principal, which is due to the differences in their nature. Moreover, the immunity of the agent is treated differently in contractual and tort liabilities of the principal, and differences exist also between French and Mauritian tort law. These differences are mainly due to the place of the principal's insurer in the compensation of the victim's harm. Finally, the differences in the nature of the principal's tort and contractual liabilities are due to the nature of these liabilities and the nature of the contractual obligations. Strict (objective) liability should be preferred to the subjective one, as far as possible, given the economic benefit that the principal earns while using the effort of their agent.

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