MAURITIUS

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GENERAL

Legislation

1. What main legislation is applicable to insolvencies and reorganizations?

The Insolvency Act 2009 (the Insolvency Act) and the Companies Act 2001 (the Companies Act) are the main statutes applicable to insolvencies and reorganizations in Mauritius.

More specifically, the Insolvency Act regulates the voluntary administration, receivership and winding-up of debtor companies, while the Companies Act regulates procedures like schemes of arrangements and compromises with creditors.

Excluded entities and excluded assets

2. What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

The Insolvency Act and the Companies Act apply to:

- companies incorporated in Mauritius;
- the Mauritius-registered branch of a company incorporated outside of Mauritius;
- unregistered corporations; and

- to a lesser extent, partnerships registered in Mauritius.

Presumably, these legislation do not apply to government departments or other entities created by specific statutes.

Public enterprises

3. What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

When used in this article, the term 'government-owned enterprise' refers to an enterprise set up by a specific statute. Such an enterprise can be called a 'board', 'authority' or 'corporation'. A distinction may be made with a company incorporated under the Companies Act whose ownership or control rests with the government. For the avoidance of doubt, such a company is treated as a regular company under Mauritian legislation.

The insolvency of a government-owned enterprise (eg, the State Trading Corporation) would be governed by the statute setting up that enterprise. The rights of the creditors would be regulated by the statute relating to that public enterprise. Some of these statutes do not cater for the winding-up of the government-owned enterprise and, if the government decides to wind up that enterprise, either the existing statute will need to be amended or a specific statute passed to cater for the winding-up of that enterprise.

Protection for large financial institutions

4. Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

No.

Courts and appeals

5. What courts are involved? What are the rights of appeal from court

orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Bankruptcy Division of the Supreme Court is the first instance for cases relating to companies' restructuring or insolvency matters. It is possible to appeal against an order made by the Supreme Court before the Court of Civil Appeal. There is an automatic right of appeal from a final judgment. There is a need to obtain permission to appeal from an interlocutory judgment.

Security to proceed with an appeal is minimal (usually less than US$1,000).

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

6. What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

The Insolvency Act uses the terms 'liquidation' and 'winding-up' interchangeably and thus, reference to one term includes reference to the other.

A voluntary liquidation may be either a members' voluntary liquidation (MVL) or a creditors' voluntary liquidation (CVL).

The process for MVL starts when the board of directors makes a declaration that the company will be able to pay its debts in full within a period of 12 months after the commencement of the winding-up. The MVL then commences when the shareholders pass a special resolution to wind up the company and appoint a liquidator.

The process of CVL starts when the board of directors takes the view that the company is insolvent and calls a meeting of shareholders and creditors to decide whether to appoint a liquidator. In the meantime, the board of directors may appoint a provisional liquidator for a maximum term of one month.

Voluntary reorganizations

7. What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Voluntary administration

The board of directors of a debtor company may appoint an administrator if the debtor company is insolvent or likely to become insolvent.

Scheme of arrangement or compromise with creditors

A debtor company may consider either a scheme of arrangement (a court procedure) or a compromise with creditors (an out-of-court procedure) as a means by which to restructure or reorganize itself voluntarily.

The scheme of arrangement is a very useful and malleable tool that provides a wide range of restructuring mechanisms. A debtor company may apply to the Supreme Court and propose a scheme of arrangement that may involve the restructuring or reorganisation of creditors' rights. The Supreme Court will require approval of the majority creditors through meetings. Creditors whose rights are not so dissimilar as to make it impossible for them to consult together with a view to a common interest must be regrouped in a single class. Others will be regrouped in other classes.

If the board of directors of a company is of the view that the company is, or is likely to be, unable to pay its debts as they fall due, the board may initiate a compromise with creditors. If approved by the creditors at a meeting convened for that purpose, the compromise is binding on the company and all creditors. Meetings may be segregated by classes of creditors.

Successful reorganizations

8. How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release

non-debtor parties from liability and, if so, in what circumstances?

Creditors are divided into classes. All classes must approve the proposed compromise for it to become effective. To the extent that a compromise will extinguish the debt of a creditor secured by a third-party guarantor, the compromise may have the effect of releasing a third-party guarantor from its obligations.

Involuntary liquidations

9. What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A creditor may place a debtor into involuntary liquidation by petitioning the Supreme Court. It will be a court-supervised process as opposed to a voluntary winding-up. Grounds for petitioning the Supreme Court include:

- the debtor company is unable to pay its debts;
- the directors or managers of the company have acted to conceal the assets of the debtor company or remove assets outside the jurisdiction with the intent to defeat creditors;
- an inspector under Part XV of the Companies Act has reported that they are of the opinion that the debtor company is unable to pay its debts and should be wound up or that it is in the interests of the public or of the shareholders or creditors that the debtor company should be wound up;
- the period, if any, fixed for the duration of the debtor company by its constitution has expired or an event (if any) has occurred that requires the dissolving of the debtor company according to the constitution;
- the Supreme Court is of the opinion that it is just and equitable to do

so; and

- a licensee of the Financial Services Commission has carried on business in Mauritius in contravention of the Financial Services Act 2007 or the Securities Act 2005.

Once opened, a winding-up supervised by the Supreme Court differs from a voluntary winding-up principally from a procedural perspective. In addition to the usual reporting requirements, the liquidator reports to the Supreme Court. However, the substantive rights of creditors or duties of the liquidator remain unchanged from a voluntary winding-up.

Involuntary reorganizations

10. What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Voluntary administration

An administrator may be appointed by a secured creditor holding a charge over the whole, or substantially the whole, of the property of the debtor company. The secured creditor (or a receiver appointed by the secured creditor) can appoint an administrator if the charge has become, and is still, enforceable. The secured creditor cannot appoint an administrator if the debtor company is in liquidation.

In addition, a creditor may apply to the Supreme Court to appoint an administrator and the Supreme Court may appoint an administrator if:

- the debtor company is or may become insolvent;
- the survival of the debtor company and the assets as a going concern can be reasonably achieved in the event of an administrator being

appointed;

- a more advantageous realization of the assets of the debtor company and any related company may be achieved than on an immediate winding-up;

- the appointment of an administrator may achieve a more advantageous realization or a more expeditious settlement of a duty or liability owed by any person to the debtor company or any related company; or

- it is just and equitable to do so.

There are no significant differences between the voluntary administration where the administrator was appointed by a creditor and the receivership of a receiver appointed by the Supreme Court.

Receivership

A creditor may appoint a receiver at any time provided the relevant instrument confers such right to the creditor.

In addition, a creditor who has the benefit of an instrument granting it the right to appoint a receiver may apply to the Supreme Court to appoint a receiver and the Supreme Court may appoint a receiver if:

- the debtor company has failed to pay a debt due to the creditor, or has otherwise failed to meet any obligation to the creditor, or that any principal money borrowed by the debtor company or interest is in arrears for more than 21 days;

- the debtor company proposes to sell or otherwise dispose of the secured property in breach of the terms of any instrument creating the security or charge; or

- it is necessary to do so to ensure the preservation of the secured property for the benefit of the creditor.

There are no significant differences between the receivership of a receiver appointed by a creditor and the receivership of a receiver appointed by the Supreme Court.

Expedited reorganizations

11. Do procedures exist for expedited reorganizations (eg, 'prepackaged' reorganizations)?

Mauritian statutes do not expressly provide for expedited reorganizations, but it is arguably possible to implement a pre-agreed plan as part of the process of voluntary administration or receivership under the right circumstances.

Unsuccessful reorganizations

12. How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

Whether it is a scheme of arrangement, voluntary administration, deed of company arrangement (DOCA) or compromise with creditors, the plan may be defeated if the requisite majority of creditors vote against it. It is improbable that the Supreme Court will intervene against a decision of a clear majority of creditors or other stakeholders.

In addition, a DOCA, even if approved by creditors, may be reviewed by the Supreme Court for compliance with the relevant provisions of the Insolvency Act.

Corporate procedures

13. Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

A company may apply for its removal from the registers kept by the Registrar of Companies on the basis, among other things, that it has ceased to carry on

business, has discharged in full its liabilities to all its known creditors and has distributed its surplus assets in accordance with its constitution and the Companies Act.

A company that has been removed from the registers kept by the Registrar of Companies as part of a corporate process (instead of bankruptcy proceedings) may be restored to the registers upon application by an eligible stakeholder. Indeed, it seems that the principal difference between a corporate procedure to remove a company from the registers of the Registrar of Companies and bankruptcy proceedings is one of finality. The 'defunct' status of a company that has been removed from the registers is precarious.

Conclusion of case

14. How are liquidation and reorganisation cases formally concluded?

Liquidations are concluded by the dissolution of the debtor company.

A voluntary administration ends at the conclusion of the watershed meeting.

A DOCA terminates automatically in accordance with its term. In addition, a DOCA may be terminated earlier than its term by the Supreme Court or pursuant to a resolution of the creditors.

A receivership terminates upon the receiver ceasing to act as receiver.

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

15. What is the test to determine if a debtor is insolvent?

A cash-flow test; that is, the debtor company must be unable to pay its debts as they become due.

If a debtor company fails to pay an amount of more than 250,000 Mauritian rupees (approximately US$5,550) requested in a statutory demand, being a

prescribed form document, within 30 days of the date of service of the demand, or does not apply to the Supreme Court to set aside the statutory demand within 14 days of the date of service of the demand, there is a presumption, for the next calendar month, that the debtor company is unable to pay its debts as they become due.

Mandatory filing

16. Must companies commence insolvency proceedings in particular circumstances?

A director who believes that the company is unable to pay its debts as they fall due must call a meeting of the board of directors to consider whether the board of directors should appoint a liquidator or administrator to the company.

Where a director fails to do so, and at the time of that failure the company is unable to pay its debts as they fell due and is subsequently placed in liquidation, the Supreme Court may on the application of the liquidator or of a creditor of the company make an order that the director is liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.

The board of directors has a further duty to consider if it should appoint a liquidator or an administrator or to carry on the business of the company.

If a meeting was called but the board of directors did not resolve to appoint a liquidator or administrator, and at the time of the meeting there were no reasonable grounds for believing that the company was able to pay its debts as they fell due and the company is subsequently placed in liquidation, the Supreme Court may on the application of the liquidator or of a creditor of the company make an order that the directors, other than those who attended the meeting and voted in favour of appointing a liquidator or an administrator, be liable for the whole or part of any loss suffered by creditors of the company as a result of the company continuing to trade.

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

17. If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Where a director fails to call a meeting of the board of directors to consider if the board of directors should appoint a liquidator or administrator to the company, and at the time of that failure the company was unable to pay its debts as they fell due and is subsequently placed in liquidation, the Supreme Court may on the application of the liquidator or of a creditor of the company make an order that the director is liable for the whole or part of any loss suffered by creditors of the company as a result of the company continuing to trade.

Directors' liability – other sources of liability

18. Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganization actions? Can they be subject to sanctions for other reasons?

Directors are not personally liable for their company's obligations towards third parties. On the other hand, directors can be personally liable for civil and criminal penalties in respect of specific offenses provided in the Companies Act and, in some instances, they may be disqualified from acting as director of other companies.

Directors' liability – defenses

19. What defenses are available to directors and officers in the context of an insolvency or reorganisation?

A director will not be liable for the liabilities of the company if the director had reasonable grounds for believing that the company is able to pay its debts as they fall due at the time that the company incurs that liability, or the director had voted for the appointment of a liquidator or administrator at a meeting of the board of directors to consider if the board of directors should appoint a liquidator or administrator to the company.

Shift in directors' duties

20. Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The directors of a company may, in certain circumstances, have a common law duty to the company to consider or act in the interests of the creditors of the company. This common law duty is, however, owed to the body of creditors of the company and not to a particular creditor.

In effect, upon this common law duty being triggered, the directors must conduct the affairs of the company in such a manner that no harm is caused to the interests of the creditors of the company as a general body.

Although this is said to be a 'duty to creditors', a breach of this duty cannot be directly enforced by the creditors, individually or collectively. An action against the directors for breach of this common law duty to the creditors may only be brought by the company or its liquidator.

This common law duty is triggered when the company is either at the point of or in the vicinity of insolvency.

Directors' powers after proceedings commence

21. What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Upon appointment of an administrator, a receiver or a liquidator, the directors remain in office but their powers and functions are substantially reduced and they are left with residual powers only. One example of such residual power is the power to commence proceedings on behalf of the company to dispute the validity of the appointment of the relevant office holder.

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

22. What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganizations? In what circumstances may creditors obtain relief from such prohibitions?

Upon commencement of winding-up, there is an automatic stay on proceedings against the company. That stay may be lifted, or new proceedings may be commenced against the company, with the leave of the Supreme Court only, and the Supreme Court has the power to impose such terms as it deems appropriate.

There is also a statutory moratorium of enforcement proceedings during the voluntary administration of a debtor company.

Also, creditors bound by a deed of company arrangement (DOCA) will only be able to enforce their claims against the debtor company in accordance with the provisions of the DOCA or if allowed to do so by the Supreme Court.

Doing business

23. When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

A company is usually expected to continue trading following the appointment of an administrator. The administrator is personally liable for debts incurred during administration in respect of financing provided to the company, services rendered, or property hired, leased or occupied. The administrator has a statutory indemnity from the assets of the company for such payments. The Supreme Court may exempt the administrator from some of those liabilities.

A company is not expected to continue trading during its liquidation. The liquidator will usually take actions to wind down the business only; for example, the liquidator will seek to sell the assets of the company. A liquidator is generally not personally liable for debts incurred during winding-up, although in practice third parties dealing with the company in liquidation will usually seek assurances from the liquidator that they will be paid any dues accrued during the liquidation.

Post-filing credit

24. May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

A company in voluntary administration or liquidation is able to obtain unsecured loans or credit. It is not certain whether a company in voluntary administration is allowed to avail itself of secured loans. On the other hand, a company in liquidation is eligible to avail itself of secured loans.

An administrator is personally liable for the loans or credits availed during voluntary administration. The administrator has statutory indemnity from the assets of the debtor company that would cover these loans as well.

A lender providing loans or credits has a priority claim in the liquidation and will be paid out of the first bucket of priorities (that is the liquidator’s fees and costs).

Sale of assets

25. In reorganizations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

Administration

The administrator's role includes continuing to carry on the business and managing the property and affairs of the company. In addition, an administrator has the power to dispose of all or part of the business or property.

To the extent that the administrator concludes an asset sale only and has received the approval of any third party who has the benefit of a contractual or statutory right of consent, the third-party purchaser will acquire the assets free and clear of liabilities.

DOCA

The deed administrator may sell property to the extent that the DOCA expressly allows it to do so. The DOCA will also provide for the third-party consents required to undertake the sale of any property.

Receivership

Provided the instrument of appointment gives the receiver the power to sell, when selling a property under receivership, the receiver has the duty to obtain the best price obtainable as at the time of sale.

To the extent that the receiver concludes an asset sale only and has received the approval of any third party who has the benefit of a contractual or statutory right of consent, the third-party purchaser will acquire the assets free and clear of liabilities.

Winding-up

A liquidator has the power to sell the assets of the company.

To the extent that the liquidator concludes an asset sale only and has received the approval of any third party who has the benefit of a contractual or statutory right of consent, the third-party purchaser will acquire the assets free and clear of liabilities.

Negotiating sale of assets

26. Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse bids

The Insolvency Act does not regulate the bidding process and leaves it to the liquidator to decide on the appropriate process depending on the circumstances. Although a liquidator could adopt a stalking horse bidding process and, having regard to the local market practice, it remains to be seen whether such a system would assist the liquidator in obtaining the best price obtainable in the circumstances.

Credit bids

Credit bids are not regulated under the Insolvency Act and must be assessed in light of restrictions against set-off or unfair preference to creditors during liquidation.

Rejection and disclaimer of contracts

27. Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

A liquidator has the power to disclaim onerous property, including unprofitable

contracts to which the company is party. The disclaimer determines the counterparty's rights under the contract upon the disclaimer becoming effective and entitles the counterparty to an unsecured claim against the company.

The disclaimer of an unprofitable contract does not, except so far as is necessary to release the debtor company from a liability, affect the rights or liabilities of any other person.

The liquidator must notify every person whose rights are, to the knowledge of the liquidator, affected by the disclaimer within 28 days of the disclaimer.

Intellectual property assets

28. May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

There is no statutory stay of an IP licensor's right to terminate a debtor company's right to use IP upon commencement of a liquidation or reorganisation. An IP licensor's right will be governed by the relevant contractual provisions. If both parties are willing to continue the relationship or the relevant contract does not provide for the IP licensor's right to terminate, then the debtor company is lawfully able to continue using the IP.

Personal data

29. Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

The rules regarding protection of personal data that would apply to an otherwise solvent company will continue to apply to a company in liquidation or undergoing a reorganisation. Under the Mauritian data privacy laws, which adopt similar principles as the European GDPR, there are restrictions for the

transfer of personal data outside of Mauritius. In many circumstances, the transfer of personal data to a purchaser in Mauritius is not forbidden.

Arbitration processes

30. How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

It is unseen for parties to use arbitration in liquidation or reorganisation proceedings. Although these principles have not been tested, it is believed that certain matters that deal with the debtor company's public policy cannot be arbitrated, and that only private law matters like a claim under a contract could be arbitrable even after the commencement of liquidation of a debtor company.

Disputes relating to private law matters affecting the debtor company and arising after the commencement of the winding-up procedure are arguably arbitrable, with the leave of the Supreme Court.

CREDITOR REMEDIES

Creditors' enforcement

31. Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Generally, a secured creditor wishing to enforce its security over assets with a view to realizing the same would do so by appointing a receiver over the assets. The receiver is appointed in accordance with the terms of the instrument of security, and this is a fairly uncontroversial process.

Certain types of securities like a pledge over shares may entitle the creditor, in certain circumstances, to transfer the pledged shares to itself or to a third party

outside of court proceedings.

Unsecured credit

32. What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Once a debtor company is placed in voluntary administration or liquidation, there is a stay of enforcement proceeding by unsecured creditors.

Outside of voluntary administration or liquidation, an unsecured creditor's recourse will necessarily start with a judgment (absent an acknowledgement from the debtor company) against the debtor company. The unsecured creditor will be able to seek interim attachments if there is a risk of dissipation of assets or value thereof. An interim injunction may also be available to the unsecured creditor.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

33. During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

Voluntary administration

Following the appointment of an administrator, a first creditors' meeting is held within 10 days of the appointment of the administrator to decide whether to replace the administrator or to set up a creditors' committee.

The voluntary administration ends with a watershed meeting where creditors vote on the future of the debtor company.

Liquidation

Creditors are convened to a meeting during the initial stage of a creditors' voluntary winding-up. In addition, meetings of creditors are convened annually in respect of each successive 12-month period.

Information and liquidator's reporting obligations

Where a committee of inspection is constituted, the creditors may request the liquidator to furnish any financial information in relation to the debtor company at any time during the winding-up. Otherwise, the liquidator must file a report, in the form of an affidavit, with the director of insolvency for each six-month period and at the time of termination of the winding-up.

Creditor representation

34. What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

Voluntary administration

The creditors may resolve, at the first creditors' meeting, to set up a creditors' committee.

The functions of a creditors' committee are to consult with the voluntary administration about matters relating to the voluntary administration and to receive and consider reports by the administrator.

Only a creditor, the agent of a creditor under a general power of attorney or a representative of a creditor is eligible to become a member of a creditors' committee.

The Insolvency Act does not prevent a creditors' committee from retaining advisers, but it is unheard of for a creditors' committee to retain advisers.

Given that the Insolvency Act is silent on this aspect, it is presumed that the members of the creditors' committee will bear the expense of any advisers retained by the creditors' committee.

Creditors' voluntary liquidation

A committee of inspection may be set up in a court winding-up or a creditors' voluntary winding-up. they have the power to request the liquidator to furnish any financial information in relation to the debtor company at any time during the winding-up.

There can be a maximum of five members of the committee of inspection, who can be either creditors or third parties.

The Insolvency Act does not prevent a committee of inspection from retaining advisers, but it is unheard of for a committee of inspection to retain advisers. Given that the Insolvency Act is silent on this aspect, it is presumed that the members of the committee of inspection will bear the expenses of any advisers retained by the committee of inspection.

Enforcement of estate's rights

35. If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

The mere fact that the liquidator has no assets to pursue a claim does not entitle a creditor to pursue the estate's remedies. The liquidator has the sole control of the debtor company's property, including claims.

A liquidator is entitled to assign a claim to a third party for valuable consideration. The liquidator will need to ensure that it complies with its statutory duties when doing so.

Claims

36. How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognized? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

A provable debt is a present, future, certain or contingent debt or liability.

The liquidator determines the deadline by which a proof of debt may be submitted by creditors.

A creditor whose claim has been disallowed by the liquidator has recourse to the Supreme Court to reverse or vary the decision of the liquidator. The Supreme Court may also reduce the amount of the claim. The creditor must apply to the Supreme Court within 15 business days of receipt of the liquidator's decision.

Where a proof of debt relates to a contingent or uncertain amount, the liquidator may, either on its own or with the assistance of the Supreme Court, determine the amount of the claim. This estimate is reviewable by the Supreme Court.

The Insolvency Act does not regulate or prevent the transfer of claims by creditors. Claims can include interest up to the date of commencement of the winding-up.

If any surplus assets remain after the payment of all admitted claims, the liquidator must pay interest at the prescribed rate on those claims from the date of commencement of the winding-up to the date on which each claim is paid, and where the amount of the surplus assets is insufficient to pay interest in full on all claims, payment abates rateably among all claims.

If any surplus assets remain after the payment of interest in accordance with the preceding paragraph, the liquidator must pay interest on all admitted claims

from the date of the commencement of the liquidation up to the date on which the claim is paid at a rate equal to the excess between the prescribed rate and the rate contained in the relevant contract or the applicable judgment rate, as the case may be. Where the amount of the surplus assets is insufficient to pay interest in full on all claims, payment abates rateably among all claims.

Set-off and netting

37. To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Set-off

Mutual credit and set-off is possible between the debtor company and its counterparty (even a related person). However, there can only be mutual credit and set-off in respect of transactions occurring during the six months preceding the commencement of winding-up if the counterparty, not being a related person, did not have reason to suspect that the debtor company was unable to pay its debts.

Furthermore, there can only be mutual credit and set-off in respect of transactions occurring during the two years preceding the commencement of winding-up if the counterparty, being a related person, did not have reason to suspect that the debtor company was unable to pay its debts.

There are exceptions applicable to an amount paid or payable by a shareholder as the consideration, or part of the consideration, for the issue of a share or in satisfaction of a call in respect of an outstanding liability of the shareholder made by the board of directors or by the liquidator.

Netting arrangements in financial contracts

The general rule pursuant to Part V of the Insolvency Act is that netting arrangements in qualified financial contracts (including swaps and derivatives)

are enforceable against a debtor company even after commencement of insolvency proceedings. Even multi-branch netting under qualified financial contracts remains enforceable.

Modifying creditors' rights

38. May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The Supreme Court is bound by the priority ranking provided for in the Insolvency Act and does not have discretion to change the priority ranking of a creditor's claim.

Priority claims

39. Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganizations? Which have priority over secured creditors?

Certain amounts due to the government, including to tax authorities, have priority over secured creditors.

Employment-related liabilities

40. What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

If it is proposed to implement a redundancy as part of a restructuring of the debtor company, the redundancy must be approved by the Redundancy Board. The Redundancy Board will approve the proposed redundancy if:

- the debtor is over-indebted and not economically viable and any further debt would increase the risk of the debtor company being insolvent;

and

- the restructuring may enable the debtor company to manage the repayment of its debts without being insolvent and to dispose of adequate cash flow to continue its operations.

The debtor company must apply to the Redundancy Board at least 30 days prior to the proposed redundancy.

If the Redundancy Board does not approve the proposed redundancy, it may order the debtor company to pay compensation equal to three months' remuneration per year of service.

There is currently a debate as to whether a company in liquidation ought to apply to the Redundancy Board prior to terminating the employment agreements of the employees as part of the winding-up of the debtor company.

Pension claims

41. What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

Amounts owed to private pension schemes are not afforded any preferential treatment and are treated as unsecured claims.

Environmental problems and liabilities

42. Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The environmental laws do not make a distinction between pre-appointment and post-appointment. Thus, during insolvency or reorganisation proceedings,

the relevant insolvency officeholder will need to ensure that the debtor company complies with the relevant environmental laws. To the extent that an environmental law imposes personal liability on the controller or manager of a debtor company for breach of environmental law, the relevant insolvency officeholder could possibly be personally liable.

Liabilities that survive insolvency or reorganisation proceedings

43. Do any liabilities of a debtor survive an insolvency or a reorganisation?

Voluntary administration

The outcome of the watershed meeting during a voluntary administration will determine how the debtor company will deal with the creditors' claims.

Receivership

Unfulfilled claims as at the end of a receivership will remain live against a debtor company as the debtor company continues in existence thereafter. The unfulfilled claims will seek to enforce their claims to the extent that the debtor company owns any significant remaining asset.

Liquidation

The liability of a debtor company towards a creditor will be discharged upon completion of the liquidation and realization of all assets of the debtor company. The amount distributed to that creditor will be taken as full and final discharge of that creditor's claim towards the debtor company.

Distributions

44. How and when are distributions made to creditors in liquidations and reorganizations?

Administration

The terms of a deed of company arrangement that is approved at a watershed meeting will set out the mechanisms for payment of claims to creditors.

Receivership

There is no prescribed date by which a receiver must utilize amounts received by it to fulfil the claims of the relevant creditors.

Liquidation

The liquidator must distribute dividends to creditors with convenient speed. Unless the liquidator, after consulting the committee of inspection (if any), is satisfied that there is sufficient reason for postponing the declaration of the dividend to a later date, the liquidator must declare and pay the first dividend within six months of its appointment.

Unless there is sufficient reason to the contrary, the liquidator must declare and distribute subsequent dividends at intervals of not more than six months.

SECURITY

Secured lending and credit (immovables)

45. What principal types of security are taken on immovable (real) property?

Fixed or floating charges and mortgages are the most common forms of securities availed by secured creditors over real property.

Secured lending and credit (movables)

46. What principal types of security are taken on movable (personal) property?

Pledges are the most common type of security taken on movable property.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

47. What transactions can be annulled or set aside in liquidations and reorganizations and what are the grounds? Who can attack such transactions?

The following types of transaction can be set aside in the winding-up of a company:

- voidable preference transaction – a transaction made at a time when the company is unable to pay its due debts and that enables another person to receive more towards satisfaction of a debt than that person would receive, or would be likely to receive, in the winding-up;
- voidable charge – a charge given within two years immediately before the date of the commencement of winding-up and at a time when the company was unable to pay its due debts;
- alienation of property with intent to defraud a creditor, within five years immediately before the date of commencement of winding-up;
- voidable gift – a gift made within two years immediately before the date of the commencement of winding-up and at a time when the company was unable to pay its due debts; and
- a transaction for inadequate or excessive consideration, made within two years immediately before the date of commencement of winding-up.

These claims can only be brought during the winding-up. It is the liquidator of the debtor company who has authority to commence proceedings to set aside historical transactions.

The liquidator must follow the prescribed process by, among other things, sending a notice to the debtor company's counterparty against whom the

liquidator intends to recover property.

However, the Supreme Court will not set aside a transaction where the debtor company's counterparty proves that:

- they acted in good faith;
- a reasonable person in their position would not have suspected that the debtor was, or would become, unable to pay its due debts; and
- they gave value for the property or altered their position in the reasonably held belief that the transfer of the property to them was valid and would not be set aside.

Equitable subordination

48. Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no restrictions on claims by related parties or non-arm's length creditors (including shareholders) against companies, whether during voluntary administration, receivership or liquidation.

Lender liability

49. Are there any circumstances where lenders could be held liable for the insolvency of a debtor?

There are no tested circumstances in which lenders could be held liable for the insolvency of a debtor. It has been mooted, but not yet tested, that a lender who provided credit to a debtor company at a time when there was no reasonable prospect of that debtor company being able to honour the credit, or at a time when the debtor company was insolvent and there was no plan for its restructuring, may be liable for the claim.

GROUPS OF COMPANIES

Groups of companies

50. In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Absent any contractual arrangements to that effect (eg, pursuant to third-party guarantees), the Supreme Court may order, if it is just and equitable to do so, that a company that is related to the debtor company pay to the liquidator any claim made in the liquidation.

In addition, the Supreme Court may also order, if it is just and equitable, that the liquidation of two or more related companies proceed as if they were one company.

When deciding whether it is just and equitable, the Supreme Court will have regard to, among other things:

- the extent to which any of the companies took part in the management of any of the other companies;
- the conduct of any of the companies towards the creditors of any of the other companies;
- the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies; and
- the extent to which the businesses of the companies have been combined.

Combining parent and subsidiary proceedings

51. In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes?

May the assets and liabilities of the companies be pooled for distribution purposes?

Given that each company forming part of the corporate group has its own separate legal personality, an insolvency proceeding relating to one company does not automatically trigger an insolvency proceeding of another company within the group.

The Supreme Court may order, if it is just and equitable, that the liquidation of two or more related companies proceed as if they were one company.

INTERNATIONAL CASES

Recognition of foreign judgments

52. Are foreign judgments or orders recognized, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

The general principle is that a final judgment duly obtained in the courts of a foreign jurisdiction should be enforceable in Mauritius on exequatur proceedings upon satisfaction of all the requisite conditions for an application for exequatur as set out below:

- the judgment must still be valid and capable of execution in the country where it was delivered;
- the judgment must not be contrary to any principle affecting public order;
- the defendant must have been regularly summoned to attend the proceedings; and
- the court that delivered the judgment must have had jurisdiction to deal with the matter submitted to it.

Presumably because the UNCITRAL Model Law on Cross-Border Insolvency has been implemented into our municipal law pursuant to Part VI of the Insolvency Act without significant deviation, Mauritius is not a party, as far as the author is aware, of any treaty on international insolvency.

The legislator has enacted the Reciprocal Enforcement of Judgments Act 1923 to provide for the recognition of certain judgments from superior courts of England and Wales. Otherwise, Mauritius is not a party, as far as the author is aware, of any treaty on the recognition of foreign judgments.

UNCITRAL Model Laws

53. Have any of the UNCITRAL Model Laws on Cross-Border Insolvency been adopted or is adoption under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency has been implemented into the Mauritian municipal law pursuant to Part VI of the Insolvency Act without significant deviation.

The legislator has not taken steps to adopt the UNCITRAL Model Law on Enterprise Group Insolvency or the Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

Foreign creditors

54. How are foreign creditors dealt with in liquidations and reorganizations?

In accordance with the UNCITRAL Model Law on Cross-Border Insolvency rules, foreign creditors have the same rights regarding the commencement of, and participation in, a Mauritian insolvency proceeding as creditors in Mauritius.

The rights of foreign creditors do not affect the ranking of claims in a

Mauritian insolvency proceeding or the exclusion of foreign tax and social security claims from such a proceeding.

Cross-border transfers of assets under administration

55. May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Where the Supreme Court recognizes foreign proceedings in relation to a debtor, whether main or non-main, and where necessary to protect the assets of the debtor or the interest of the creditors, the Supreme Court may entrust the administration or realization of all or part of a debtor's assets located in Mauritius to a foreign representative or another person designated by the Supreme Court.

In addition, as an interim relief before an application for recognition is decided upon and where it is urgently needed to protect the assets of the debtor company or the interests of the creditors, the Supreme Court may entrust the administration or realization of all or part of the debtor's assets located in Mauritius to the foreign representative or another person designated by the Supreme Court, with a view to protecting and preserving the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy.

COMI

56. What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The Insolvency Act does not define the test to be applied for determining COMI. Given that Part IV of the Insolvency Act, implementing the

UNCITRAL Model Law on Cross-Border Insolvency, was proclaimed and became effective fairly recently, there are as yet no known tried or tested cases.

It is likely that the Supreme Court will follow best international practice in this area and inspire itself from the test adopted by other common law countries such as Australia, New Zealand and the United Kingdom.

Cross-border cooperation

57. Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognize foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

The Insolvency Act implements the UNCITRAL Model Law for Cross Border Insolvency systems for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings without substantial deviation.

Given that Part VI of the Insolvency Act came into effect in 2019, we have not yet come across any judicial pronouncements on matters relating to the recognition of foreign proceedings or requiring cooperation with foreign courts.

Cross-border insolvency protocols and joint court hearings

58. In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Given that Part VI of the Insolvency Act came into effect in 2019, we have not

yet come across any publicly available judicial pronouncements on communications or joint hearings with courts in other countries in cross-border cases.

Winding-up of foreign companies

59. What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

Under Part VI of the Insolvency Act, and provided a foreign main proceeding has been recognized in Mauritius beforehand, insolvency proceedings (including court-driven insolvency proceedings) may be commenced in Mauritius in relation to the assets held by the debtor company in Mauritius. The effects of those proceedings are limited to the assets of the debtor company that are located in Mauritius and, to the extent necessary to implement cooperation and coordination with foreign courts and foreign insolvency representatives in relation to the other assets of the debtor that, under the laws of Mauritius, should be administered in those proceedings.

In addition, the Supreme Court has a residual power under section 132 of the Insolvency Act and section 286 of the Companies Act to appoint a liquidator to a foreign company carrying on business in Mauritius on the application of, among other things, the liquidator appointed in the country of incorporation of that country or a creditor. The liquidator will have the power to only recover and realize assets in Mauritius with the objective of paying the net amount recovered and realized to the liquidator of the foreign company appointed in the country of incorporation.

UPDATE AND TRENDS

Trends and reforms

60. Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting

domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

A technical committee has been set up to propose a new waterfall for the ranking of claims when distributing the proceeds of realization of assets by a receiver. Otherwise, the author is not aware of any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders.

**** The information in this chapter was accurate as at September 2023.***