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Banking & Finance Insights

By BLC Robert

Contents

Greetings for the new year from all the members of BLC Robert & Associates!

We start our first 2017's edition with an exclusive interview with Dr Pierce, founder of Global Governance Services and author of the new Code of Corporate Governance for Mauritius. Dr Pierce shares with us his insight on the new code and its interplay with the revised Bank of Mauritius Guideline on Corporate Governance which applies to all local banking institutions.

The Mauritius Parliament has been very active in the last semester of 2016 and brought a number of landmark changes with the Finance Act 2016. We will give you an overview of the main legislative amendments affecting the banking and finance area in Mauritius.

After discussing the keys points of security interests under Mauritian law in our previous editions, this year we begin a new series on Derivatives in our feature "5 Things to Know".

Finally, we will continue our initiative of providing you with some practical legal information which we think would help in streamlining deals having Mauritius law elements with an F.A.Q on the concept of Major Transactions under Mauritian law.

Wishing you an enjoyable reading.

APARTES
Dr Chris Pierce*

Mauritius has recently published an updated Code of Corporate Governance (Code) with the ambition of strengthening the framework of rules and practices by which a board of directors ensures accountability, fairness, and transparency in a company's relationship with its all stakeholders. The Code is aligned with the revised guidelines of the Bank of Mauritius on Corporate Governance published in May 2016 applicable to the banking sector (Central Bank Guideline)

Dr Chris Pierce, who authored the Code, shares with us some reflections on the spirit behind the new Code and its interactions with the Central Bank Guideline.

With the first Code being launched in 2003 and with the benefit of 13 years of practical application, what were the main objectives in reviewing the Code?

The original Code for Mauritius was first published in October 2003. It has been held in high regard by both the national and the international business community. For example, the National Committee of Corporate Governance carried out a survey across the Mauritian business community in 2014 and identified that all respondents to the survey from public interest entities found the original Code to be clear and understandable. Also, for the past ten consecutive years, the Mo Ibrahim

Foundation has recognised Mauritius as having the highest standards of corporate governance in Africa, and the World Bank Group has commented favourably on the original Code in its governance evaluation of the country. There is a saying that if it is not broken it does not need to be fixed. However, the Code is now over 12 years old, and the majority of the respondents to the 2014 National Committee of Corporate Governance survey stated that they thought that the current Code needed to be revised. Reasons for revisions included the need to:

- align the Code with new laws and guidelines (e.g., the Bank of Mauritius guidelines);
- learn and apply governance lessons from the global financial crisis that began in 2008 and the BAI and Bramer Bank collapses in 2015;
- incorporate some of the recommendations made by the World Bank concerning governance in Mauritius in their Report on the observance of Governance Standards and Codes.
- identify and apply international best practices that have developed over the last 12 years.

Also if Mauritius wishes to maintain its leading position in the African Index of Governance, it must continually improve its governance practices since other countries are catching Mauritius up!

What are the weaknesses of the first edition which the new Code has tried to solve?

The original Code was over 140 pages long and many users found difficulty in navigating the sections. The new Code is just over one page long and contains eight principles! The new Code is therefore intended to be much more user friendly and easier to navigate.

The original Code developed generic guidance for all types of organisations but the new Code recognises that "one size does not and should not fit all". In the context of Mauritius, for example, the new Code recognises that important differences must be respected between sectors of the economy. Implementation guidance has therefore been developed for banks, non-banking financial institutions, public sector organisations, holders of category 1 global business licences, companies listed on the stock exchange and family businesses. Responsibility for an organisation's governance is being applied to the governing bodies of organisations that must now apply the principles contained in the new Code and then are required to explain how this application has taken place.

The new Code also focuses upon developmental topics and is designed to assist boards in thinking smarter and more effectively. It encourages organisations to focus upon their purpose, business model and value adding activities and does not use a rules based or a "*you shall not ...*" approach.

With a principles-based approach and the limited enforcement powers of the Financial Reporting Council, how do we, in the absence of regulatory supervision, ensure an effective application of the Code for an improvement of corporate

governance in the various sectors where there is no parallel regulation on corporate governance?

The new Code defines the purpose of corporate governance as facilitating effective, entrepreneurial and prudent management that can deliver the long-term success of an organisation. Corporate governance is therefore about what the board of an organisation does and how it sets the values of that organisation. Although corporate governance can be defined in many ways, this Code conceives it as an organisational framework of processes and attitudes that focuses on long-term continuity and success to add value to the organisation and build its reputation. Evidence of the beneficial impacts of good corporate governance is compelling. In particular, improvements in corporate governance are associated with increases in organisations' operational effectiveness and sustainability, financial efficiency, greater access to capital funding, higher values and stronger reputations. This new Code forms part of a larger body of existing laws, rules, regulations, principles and best practices that include:

- Laws of Mauritius (e.g., the Companies Act, 2001)
- Regulations
- Listing Rules (e.g., the Listing Rules for the Stock Exchange of Mauritius)
- Standards, guidelines and codes of best practice (e.g., Central Bank Guideline)
- Corporate rules and provisions (e.g., bylaws)
- Formal documents within an organisation (e.g., Board charters)

The new Code recognises that scandals arising from poor governance that impact upon banks and other public interest entities should primarily be dealt with by the law. BAI and Bramer Bank disputes should be resolved by the law in the law courts. The Code provides recommended good international governance practices and may be used as evidence in court that the organisation has been employing good governance standards.

What is the incentive for banks to also follow the Code where they are already subject to a set of mandatory provisions on corporate governance under the Central Bank Guideline with relevant sanctions in the case of non-compliance?

The incentive for applying the principles contained in the new Code focuses upon long-term continuity and success, adding value to the bank and building reputation. Evidence of the beneficial impacts of good corporate governance is compelling. In particular, improvements in corporate governance in banking are associated with increases in a bank's operational effectiveness and sustainability, financial efficiency, greater access to capital funding, higher values and stronger reputations.

> *“ if Mauritius wishes to maintain its leading position in the African Index of Governance, it must continually improve its governance practices since other countries are catching Mauritius up! ”*

There are numerous corporate scandals which have highlighted that board processes and decision-making have been strong-armed by the executive to the detriment of their respective companies. How can the appropriate checks be implemented for independent directors to contribute to risk strategy?

Risk is part of banking life, and avoiding all risk results in no achievement, no progress, no reward and no value creation. Risk management is a fundamental element of corporate governance involving the management of ‘tomorrow's surprises today’. Risk is associated with possible events which, should they occur, could prevent an organisation from fulfilling its mission, meeting its commitments and achieving its objectives. Risks may adversely affect the organisation's strategy, people, assets, environment or reputation.

The board is responsible for the governance of risk and should ensure that the organisation develop and execute a comprehensive and robust system of risk management. It is the responsibility of independent directors to determine the nature and extent of the principal risks the bank is willing to take in line with the business model and in achieving its strategic objectives—that is, assessing its risk appetite and tolerance. Once these risks have been identified, the board should agree on how these risks will be managed and mitigated and keep the organisation's risk profile under review. The board should satisfy itself that management systems include appropriate controls and should apply risk management standards and requirements from the Bank of Mauritius as may be applicable. The independent directors on the board should ensure that appropriate culture and reward systems have been embedded throughout the organisation.

The independent directors on the board should possess a reasonable knowledge of the risks specific to the entire spectrum of the organisation's activities and ensure that the processes in place enable complete, timely, relevant, accurate and accessible risk disclosure to shareholders and other stakeholders.

The independent directors on the board should oversee and ensure management's continual monitoring of risk, and management should consider and implement appropriate risk responses that involve the following: taking risk (when the risk is present, is within the risk tolerance and otherwise represents a missed opportunity); addressing risk when it is too high and when application of internal controls can mitigate it; transferring risk when the risk is too high but can be transferred to a third party; or terminating when the risk is too high and cannot be mitigated or transferred to a third party. Management should be held accountable to the board for the design, implementation and detailed monitoring of the risk management processes.

The board should ensure that risk management policies be communicated to management and all other employees as appropriate to their roles within the organisation and should satisfy itself that communication has been effective and understood.

It is the responsibility of the board to disclose information on the risk management processes, which, at a minimum, include the following:

- The structures and processes in place for the identification and management of risk. The three lines of defence model can be used as the primary means to demonstrate and structure roles, responsibilities and accountabilities. The three lines of defence in the risk management model are: management control; the various risk control and compliance oversight functions established by management; and independent assurance provided by internal audit.
- The methods by which internal control and risk management are integrated.
- The methods by which the directors derive assurance that the risk management processes are in place and effective.
- A brief description of each of the key risks identified by the organisation and the way in which each of these is managed.

The independent directors should state whether they have a reasonable expectation that the organisation will be a going concern and meet its liabilities as they fall due drawing attention to any qualifications or assumptions as necessary.

How does the Code address the issues of effectiveness and efficiency of independent directors in light some independent directors having a limited knowledge on the sector of operations of their companies and of their own legal and regulatory duties as directors?

The Code address the issues of effectiveness and efficiency of independent directors in light of limited knowledge on the sector of operations of their companies and of their own legal and regulatory duties by focusing upon the organisation having an effective director induction process. The new Code states that all directors should receive an induction and orientation upon joining the board. This process should contribute to ensuring a well-informed and competent board. It is vital therefore that a suitable induction and orientation programme be in place which meets the specific needs of both the organisation and the individual and enables any new director to make the maximum contribution as quickly as possible. Although it is the responsibility of the chairperson to ensure the relevance and quality of the programme of the induction and orientation training, it may often be delegated to the company secretary. Indicative content for director induction is listed on the National Committee of Corporate Governance website.

How does the Code tackle terms of office of directors? In your views, does a cooling-off period provided for under the Central Bank Guideline followed by a re-appointment really guarantee the independence criteria?

The new Code recommends that directors should be elected on a regular basis by shareholders. If board elections are not held every year, the election frequency should be stated in the annual report and an explanation provided. Each director should be elected by a separate resolution. In the papers accompanying a resolution to elect a non-executive director, the board should indicate its reasons for believing that an individual should be elected. All directors who wish to be re-elected should be submitted for re-election at the meeting of shareholders. For election of new directors brief biographical details of each director should be included in the notice published in the annual report to enable shareholders to take an informed decision on their election. Re-election should be subject to continued satisfactory performance. When proposing re-election, the chairperson should confirm to shareholders that, following a formal performance evaluation, the individual's performance continues to be effective and to demonstrate commitment to the role.

The board of a bank should contain independently minded directors. It should include an appropriate combination of executive directors, independent directors and non-independent non-executive directors to prevent one individual or a small group of individuals from dominating the board's decision taking. The new Code states that organisations should not sacrifice knowledge and industry experience in favour of independence. When considering independence, the new Code recommends that the board should take into account the following issues:

- Has the director been an employee of the organisation or group within the past three years?

- Has the director had within the past three years, a material business relationship with the organisation either directly or as a partner, shareholder, director or senior employee of a body that has such a relationship with the organisation?

- Has the director received additional remuneration from the organisation apart from a director's fee or as a member of the organisation's pension scheme?

- Is the director a nominated director representing a substantial shareholder?

- Has the director close family ties with any of the organisation's advisers, directors or senior employees?

- Has the director cross directorships or significant links with other directors through involvement in other companies or bodies?

Affirmative answers to any of the above questions would lead to a director being defined as non-independent. A board can have its own definition of independence, but if the board allows any material divergence from any of the above criteria, it should be fully explained in the corporate governance section of the annual report and on the website.

The Central Bank Guideline contains a more rigorous set of requirements for independence definitions of banks and has supremacy over the new Code, an illustration is the cooling-off period for re-appointment as an independent director after 6 years which is more rigorous than the new Code recommendation of 9 years.

As with the initiative of the integrity pledge being launched by the Mauritius Institute of Directors, would you think that a similar initiative should be taken on the code so that stakeholders are aware that there has been an evaluation of a particular company on compliance with good governance principles?

The new Code requires that the board states in its annual report that it has complied with the requirements of the Code The new Code also requires that the external auditors of an organisation provide an opinion that the disclosure made by the directors responsible for preparing the corporate governance report is consistent with the requirements of the code.

The combination of the statement by the board and the opinion of the auditor should ensure that shareholders and other stakeholders are aware that there has been an evaluation of a particular company on compliance with good governance principles. In addition the Financial Reporting Council is responsible for overseeing and regularly reporting on the level of compliance with the new Code.

Dr. Chris Pierce is the author of the National Code of Corporate Governance for Mauritius. He is the Chief Executive Officer of Global Governance Services Ltd. based in London. Chris has been a regular visitor to Mauritius over the last decade. In 2014, he was awarded the Bertin Medal in Sweden by the International Academy of Quality for his contribution to corporate governance globally over the last decade.

*Acknowledgment: We would like to thank Dr. Chris Pierce for his time and contribution to this article.

LEGISLATIVE UPDATES

The Minister of Finance and Economic Development presented the 2016/17 budget for the Government of Mauritius to the National Assembly on 29 July 2016. The theme of the budget was to usher a new era of development centered on 10 strategies. To set out the legislative framework for this vision, the National Assembly of Mauritius has passed The Finance (Miscellaneous Provisions) Act 2016 bringing amendments to various acts, including:

a) the Banking Act 2004;

b) the Bank of Mauritius Act 2004;

c) the Electricity Act 1939 and Central Electricity Board Act 1964;

d) the Public Procurement Act and Public Private Partnership Act;

e) the Financial Reporting Act 2004; and

f) the Financial Services Act 2007.

The Minister of Finance and Economic Development intends to also introduce the following:

a) the National Payment Settlement Bill; and

b) the Deposit Insurance Bill.

The Banking Act 2004

The Finance (Miscellaneous Provisions) Act 2016 (the "Finance Act") brings a number of amendments to the Banking Act 2004 (the "Banking Act") in areas relating to consolidated supervision and winding-up of banks, the introduction of a private banking licence and moves the business of investment banking from the purview of the Bank of Mauritius to that of the Financial Services Commission.

Consolidated regulation

In amending the Banking Act, the Finance Act seeks to provide the Bank of Mauritius, which is the bank and non-bank deposit taking regulator, with the regulatory tools to oversee the operations of a bank or non-bank deposit taking institution (each a "Financial Institution") as a group. In this context, the Bank of Mauritius has the power to supervise a wider group of affiliates of Financial Institutions which now includes entities who:

a) control the composition of the board of directors of a Financial Institution;

b) exercise, in the opinion of the Bank of Mauritius, significant influence on the Financial Institution in taking financial or policy decisions; or

c) are able to obtain economic benefits from the activities of a Financial Institution.

By virtue of the above amendment to the Banking Act, the Bank of Mauritius will extend its supervision to conglomerates or groups with interests, albeit minor, in Financial Institutions. For instance:

a) Auditors appointed by the Bank of Mauritius will have a right to access the records of an extended group of affiliates of Financial Institutions.

b) The Bank of Mauritius may carry out:

   i) Regular examinations of the operations and affairs of these affiliates.

   ii) Special examinations of the affairs of these affiliates to determine whether a Financial Institution is in sound financial condition and whether the banking laws or any enactment relating to anti-money laundering or prevention of terrorism are being complied with.

The Finance Act has also amended the functions of the Bank of Mauritius set out in the Bank of Mauritius Act 2004 so that the Bank of Mauritius is now responsible to regulate and supervise ultimate and intermediate financial holding companies, incorporated in Mauritius, and which have a Financial Institution within their groups.

The theme of a consolidated approach to regulatory oversight has been carried over to the determination of an application for a banking licence. As part of the application process for a banking licence, the Bank of Mauritius will now consider whether the corporate structure of the group, its geographical location or banking law in the home country of the group will hinder effective consolidated supervision where the applicant forms part of a group predominantly engaged in banking activities.

In line with its enlarged supervisory powers, the Bank of Mauritius Act 2004 has been amended to give the Bank of Mauritius the ability to request statistical information from the relevant competent authorities to carry out its functions as regulator. Moreover, the Bank of Mauritius will also be able to draw from the database maintained by the Mauritius Credit Information Bureau for its supervisory functions.

Varying the powers of a receiver

The Banking Act has been amended so that a receiver, who has taken possession of a Financial Institution pursuant to a compulsory liquidation, no longer has the power to continue the operations of that Financial Institution. Moreover, a receiver will no longer have the power to restore the Financial Institution to its board of directors.

Investment banking licence

The Finance Act has removed investment banking business as an activity licensed under the Banking Act. The Financial Services Act 2007 has also been amended resulting in the activity being regulated solely by the Financial Services Commission.

As a general rule, the Banking Act prevents entities other than banks from using the word bank in the description or title under which they carry business in Mauritius. The ability to use the word bank has not been extended to investment banks licensed under the Financial Services Act 2007 and as a result, entities who intend to carry out investment banking under the new regime set out in the Financial Services Act will no longer have the ability to use the word bank in their name. The Banking Act, however, provides an exception allowing subsidiaries of licensed banks to use the word bank in their name provided that they have authorisation from the Bank of Mauritius to do so.

The Financial Services Commission introduced the Financial Services (Investment Banking) Rules 2016 (the "*Investment Banking Rules*") on 9 December 2016 which applies to entities holding an investment banking licence issued under the Financial Services Act 2007. The Investment Banking Rules sets out the procedure for an investment banking application as well as the criteria that the Financial Services Commission will apply in considering applications. The Investment Banking Rules also sets out the manner in which a licencee should be managed, its capital requirements, internal control requirements and the requirements for adequate insurance cover relating to its activities.

Introduction of a private banking licence

The Banking Act has been amended to introduce a new stand-alone licence for private banking business. An entity licensed as a private bank will be able to carry out the business of offering banking and financial services and products to high-net-worth customers.

By the fact of including the offering of financial services and products within the scope of a private banking licence, an interesting question arises on the supervisory roles of the Bank of Mauritius and the Financial Services Commission. The reallocation of investment banking business under the purview of the Financial Services Commission suggested that a clear demarcation line had been drawn but by then allowing private banks to offer financial services and products to clients who are high-net-worth individuals, overlap between the two sectors still appears to be very much a live issue.

Where an entity has been licensed to exclusively carry out private banking business, it can be exempted from such provisions of the Banking Act as the Bank of Mauritius may determine. The Bank of Mauritius is due to publish its guideline to provide further details on private banking business.

Mauritian Civil Code

Capitalisation of interest

The provisions of the Mauritian Civil Code relating to the ability of *institutions agréées* (accredited institutions) to capitalise interest have been amended by the Finance Act. The Commercial Division of the Supreme Court recently clarified the position in the much welcome decision of *Inex Limited v The Development Bank of Mauritius* **(Inex)**. The Court considered Articles 1154 and 2202-6 of the Mauritian Civil Code which set out the provisions of Mauritian law on capitalisation of interest. Article 1154 provides that capitalisation of interest is only permissible if the overdue interest has been outstanding for a period of twelve months. Meanwhile, Article 2202-6 allows an *institution agréée* to capitalise interest provided that:

a) the term of the facility exceeds three years; and

b) the right to capitalise interest has been expressly reserved in the credit agreement.

The Court reaffirmed Article 2202-6 as a derogation of Article 1154 so that an entity which qualifies as an institution agréée may capitalise interest where the tenor of a loan exceeds three years without the need for the entity to wait for such interest to be outstanding for a period of twelve months.

The Finance Act has amended Article 2202-6 so that the article is now subject to the provisions of Article 1154. As a result, an institution agréée will no longer be able to capitalise interest where the tenor of a loan exceeds three years unless the interest has been outstanding for a period of twelve months. This amendment which goes against the decision of the Commercial Division will force banking institutions to review their practice on capitalisation of interest.

The Electricity Act 1939 and Central Electricity Board Act 1964

One of the strategies announced by the Minister of Finance and Economic Development is the launch of a new economic cycle by focusing on innovation, as well as boosting exports and private investments. To implement this strategy, The Finance Act 2016 amended The Electricity Act 1939, The Central Electricity Board Act 1964, The Public Procurement Act 2006 and the Public Private Partnership Act 2004.

In the 2016/17 budget, the Minister of Finance and Economic Development identified key areas where investment opportunities could be maximised. The Government of Mauritius plans to involve households in the production of electricity from solar photovoltaic systems to supply the national grid. In addition, the Government of Mauritius has announced that it is expecting to add a waste-to-energy project which will contribute up to 30MW of electricity to the national grid by 2019 and has identified sites on private land with potential hydro power generation capabilities. The Government of Mauritius also intends to facilitate the production of energy from bio-mass. The National Assembly has amended the Electricity Act in order to streamline the regulatory approval process for these projects.

The Public Procurement Act 2006 and Public Private Partnership Act 2004

The Public Procurement Act has been amended to require that public bodies seek the approval of the Central Procurement Board before amending works contracts where there are significant variations in contract value. In addition, the Public Private Partnership Act has been amended to allow the BOT Projects Unit to oversee all matters in connection with public private partnerships. The BOT Projects Unit was established under the Build Operate Transfer Projects Act 2016 as an office inside the Procurement Policy Office. The BOT Projects Unit is responsible for the formulation of policies, procedures and guidelines on BOT projects and to access feasibility reports in relation to specific BOT projects. By amending the Public Private Partnership Act to require that the BOT Projects Unit carry out these functions in relation to public private partnerships, the Government of Mauritius intends to optimise existing resources.

The Financial Reporting Act 2004

With the new code of corporate governance launched in 2016, the Government of Mauritius has amended the Financial Reporting Act 2004 to further bolster corporate governance in Mauritian companies. The Financial Reporting Act has been amended so that all companies listed on a stock exchange in Mauritius change external auditors every 7 years. In addition, the Financial Reporting Council has been given enhanced powers to impose penalties and fines on its licensees. Lastly, the National Committee on Corporate Governance now reports directly to the Financial Reporting Council.

Limited Liability Partnership Act 2016

Mauritius adds a new vehicle to its panel of structures available for the setting up of ventures with the Limited Liability Partnership Act (the "LLPA") which came into effect on 2 December 2016. In the same manner that the shareholders of limited companies enjoy limited liability, the LLPA carries over the concept of limited liability to the partners of an limited liability partnership. Every partner in the limited liability partnership enjoys limited liability protection against the obligations and debts of that limited liability partnership. The mode of operation of the limited liability partnership shall be spelt out in detail under a limited liability partnership agreement entered into between the partners which determines the manner in which the affairs of the limited liability partnership shall be conducted and the mutual rights and duties of the partners and their rights and duties in relation to the limited liability partnership.

5 THINGS TO KNOW ON OVER-THE-COUNTER DERIVATIVE TRANSACTIONS

Derivative instruments are contracts that can be used by end-users as a mechanism to manage the risks facing their businesses. In the past, derivative instruments were commonly entered into by borrowers as a way to protect themselves against the risk of a rise in the rates of interest. In the current low interest rate climate, this is no longer of primary concert to borrowers; derivative instruments can still, however, add value to end-users by addressing and reducing other forms of risks inherent in their businesses.

Derivative instruments can also add value to end-users by allowing them to allocate their financial resources efficiently; by entering into various forms of derivative instruments, end-users can increase their exposure to specific assets or asset classes at a lower cost than would otherwise have been available through spot contracts.

Derivative instruments can be traded on regulated exchanges. Where the parties enter into derivative instruments directly with each other rather than through a regulated exchange, they are termed 'over-the-counter' (OTC) derivatives. Here are 5 things to bear in mind before entering into OTC derivatives:

1. Corporate capacity: Much like any other type of corporate transaction, a corporate entity should ensure that it has the capacity to enter into OTC derivative transactions. The capacity of entities to enter into OTC derivative transactions may be limited in their constitutional documents. In relation to OTC derivative transactions specifically, certain entities such as pension funds, utilities companies and municipal entities are expressly limited from entering into OTC derivative transactions.

2. Clearing: As part of the international drive to increase stability of OTC derivative markets, the G20 in 2009 agreed that standardised OTC derivatives should be cleared through a central counterparty. Legislation requiring clearing of OTC derivatives has been adopted in various countries such as under Title VII of the Dodd-Frank Act in the United States of America and EMIR (the Regulation on OTC derivatives transactions, central counterparties and trade repositories) (Regulation 648/2012) in the European Union. Legislation implementing mandatory clearing of OTC derivatives has yet to be implemented in Mauritius, while the Financial Services Commission of Mauritius has stated that it is considering the proposals set out the a report on the requirements of clearing published by the Technical Committee of the International Organisation of Securities Commissions (IOSCO) in 2012.

3. Document platform: The International Swaps and Derivatives Association, Inc. (ISDA) is the trade association for participants in the OTC derivatives market and has developed a standard document platform for OTC derivatives. Parties intending to carry out OTC derivative transactions typically enter into an ISDA master agreement which is the framework agreement under which individual transactions will be carried out. There are two versions of the ISDA master agreement, the 1992 master agreement and the 2002 master agreement. Both master agreements are divided into two parts with the first part providing a standard set of non-commercial terms and conditions. It is market practice that the first part of the ISDA master agreement not be amended with the negotiated modifications incorporated into the second part, the ISDA schedule. The commercial terms of individual derivatives transactions are documented by a confirmation exchanged between the parties each time a transaction is entered into.

4. Legal issues: There are various legal issues which need to be considered before entering into OTC derivative transactions. Which legal issues arise is a factor of the jurisdiction of incorporation of each counterparty. In certain jurisdictions, dealing in derivatives can be considered as gambling and unless the counterparties satisfy the relevant gambling laws, the derivatives transactions may be declared void. It is therefore imperative that counterparties are confident that the proposed derivatives transactions will not violate any relevant gambling laws. Counterparties should also be satisfied that the transactions will not contravene insurance laws or any relevant financial regulatory laws. In addition to the general legal issues, the enforceability of the ISDA master agreement also requires thought. The ISDA master agreement uses a three-stage process as a way of reducing the credit risk that counterparties take on each other: (i) transactions are terminated upon the occurrence of trigger events, (ii) these transactions are valued and (iii) a single net sum to be paid by one counterparty to the other is calculated. This process is known as 'close-out netting' and is of central importance to the way in which the ISDA master agreement works. It is of utmost importance that counterparties ensure that close-out netting is enforceable under the governing law of the ISDA master agreement and any laws which will govern the insolvency of the counterparties.

5. Collateralisation: It is common for parties to OTC derivative transactions to provide collateral in support of their obligations under the master agreement. When entering into the ISDA master agreement, the parties may also agree that credit exposure will be dealt with by entering into ISDA credit support documentation. Under the mechanism provided under ISDA's credit support documentation, if the net value of transactions governed by an ISDA master agreement falls below a defined threshold, collateral in the form of cash or securities is delivered by the party who is out-of-the-money to its counterparty. ISDA has published various credit support documents including English or New York law credit support annexes, English law credit support deed and English or New York law standard credit support annexes.

FREQUENTLY ASKED QUESTIONS

MAJOR TRANSACTIONS

What is a major transaction?

Section 130 of the Companies Act 2001 (Act) qualifies the following of "major transaction":

- The acquisition or agreement to acquire assets of a value which is more than 75% of the value of the company's assets before the acquisition;
- The disposition or agreement to dispose of assets the value of which is more than 75% of the value of the company's assets before the disposition; or
- A transaction that has (or is likely) pursuant to which the company will acquire rights, interests or incur obligations or liabilities the value of which is more than 75% of the value of the company's assets before the transaction.

If a transaction is qualified as major, what should be done?

If the company has assessed a major transaction, the board shall not authorise the entry into this transaction unless it has been approved by a special resolution[1] of the shareholders of the company.

Are certain transactions exempted?

Yes. The provision of security by creation of a charge[2] over the assets of the company for the purpose of securing the repayment of money or the performance of an obligation is excluded from the scope of section 130 of the Act and does not constitute a major transaction. However, in some instance the agreement which creates the security also includes indemnity clause or a form of personal guarantee or undertaking to pay as principal debtors. Such provisions could constitute major transactions.

Are certain types of companies exempted?

Yes. Section 130 of the Act does not apply to investment companies which is defined under the Act as a company whose business consists of investing its funds principally in securities with the aim of spreading investment risks and giving to its members the benefit of the result of the management of its funds.

Should a lender dealing with the company be concerned about the provisions of Section 130 of the Act?

No. Anyone dealing with a company should not be concerned to see or inquire on the compliance with the requirements of a major transaction resolution. No debt incurred or contract entered into with the company should be considered as invalid or ineffective in absence of a major transaction resolution except in the case of actual notice of the counterparty person at the time the transaction was entered into that the company was acting in breach of the requirements of Section 130 of the Act.

1. Means a resolution approved by a majority of 75% or, a higher majority if required by the constitution of the company, of the shareholders entitled to vote.

2. For the purposes of the Act, the term charge means (i) a mortgage (ii) a fixed or floating charge under the Mauritian Code Civil (iii) a share pledge or debenture (iv) liens over plant, equipment, motor vehicles (v) charge over ship or aircraft (vi) attachment of proceeds (ix) an agreement to give a charge.


BOM/C/2016/11/13

COUNTRY UPDATES

Securities (Licensing) Rules

The Securities (Licensing) Rules 2007 have been amended to cater for a third category of investment adviser namely the Corporate Finance Advisory. This type of investment adviser is authorised to provide corporate finance advisory services with respect to securities transactions through printed materials or other means. This licence is applicable to corporate body only, not to individual. The minimum stated unimpaired capital requirements are MUR 1,000,000. The first schedule of the rules has been amended to incorporate the requirements for Representative of Investment Adviser.

FSC Mauritius and Abu Dhabi Global Market sign the Memorandum of Understanding

The Financial Services Commission, Mauritius (**"FSC** Mauritius") and the Abu Dhabi Global Market- Financial Services Regulatory Authority entered into a Memorandum of Understanding **("MoU")** on 19 December 2016 regarding Mutual Assistance and Exchange of Information.

The MoU sets forth the authorities' intent on mutual assistance and the exchange of information to better ensure enforcement and compliance with the respective laws and regulations of the jurisdictions of the authorities.

Launching of the Online Submissions Platform

The FSC Mauritius launched the Online Submissions Platform **("OSP")** on 1 December 2016. The OSP is an interactive platform which allows applicants to submit their application for Global Business Licences, financial activity licences and payment of processing and annual licence fees. The system also allows the FSC Mauritius and the Corporate Business Registration Department of the Registrar of Companies **("CBRD")** to have an open channel where information may be retrieved from the CBRD and operational matters handled in a seamless manner. The OSP is a new step in the integration of financial technology, and has been designed to be implemented in three phases:

- Phase 1 is the online submission for applicants seeking Global Business Licences and financial activity licences and payment of processing and annual licence fees;
- Phase 2 will cater for the renewal of licence fees – which will represent a major development in operational matters; and
- Phase 3 will allow for submission of applications for domestic players.

The introduction of the OSP is intended to enhance the efficiency of Mauritius as a place to carry on business.

Risk management Rules implemented for the insurance sector

The failure of the BAI group revealed that insurance companies were not robustly supervised. To address this issue, the FSC has introduced the Insurance (Risk Management) Rules. The rules apply to all insurers and require the maintenance of a risk management framework to enable the development and implementation of strategies, policies and procedures to manage material risks.

OTHER RECENT PUBLICATIONS

We have a number of recent publications available which provide a high level overview of a range of topics.
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