# Insolvency and restructuring in Mauritius

**Mushtaq Namdarkhan, Shane Mungur,** and **Khalil Beebeejaun** of **BLC Robert & Associates** assess the Bank of Mauritius' support for companies and analyse the landscape of receiverships and administrations

The Mauritian economy was severely affected by the pandemic, shrinking by 15% in 2020. Numerous temporary measures were taken by the government to limit the damage caused by the pandemic to the economy.

The Bank of Mauritius (BOM) implemented a wide-ranging support programme to assist Mauritian businesses. This included a moratorium on loans granted to economic operators and small and medium enterprises impacted by the pandemic as well as authorising a reduction in the cash reserve ratio applicable to banks. Most of the support measures have now been unwound as most sectors are returning to pre-pandemic levels of economic activity, although the tourism sector remains exposed to external pressures.

From a macro-economic perspective, the BOM introduced, on January 13 2021, transitional measures for the regulatory capital treatment of IFRS 9 provisions which are aimed at reducing the impact of the pandemic on the provisioning levels of banks and non-bank deposit taking institutions in Mauritius.

The transitional measures allow financial institutions to add back a portion of their IFRS 9 provisions to their regulatory capital. The transitional measures will phase out over a four-year period. While these measures primarily impact banks, they also aim to avoid the tightening effects during periods of stress on bank lending to the wider economy and to ensure that the disclosures of financial institutions remain reliable.

In addition, the BOM established the Mauritius Investment Corporation Limited (MIC) in June 2020 as a wholly-owned subsidiary. The establishment of the MIC is in line with the mandate of the BOM of ensuring orderly and balance economic development as well as safeguarding the stability and soundness of the financial system. The MIC was established with the following objectives:

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- Assist systemically large, important and viable companies in Mauritius, which are financially impacted as a result of the Covid-19 pandemic and representing a direct threat to financial stability;
- Invest in companies in view of securing key basic necessities and support higher long-term growth as well as in companies geared towards a smart and innovation-driven for the future of Mauritius; and
- Support the development of return-generating key strategic assets and projects in Mauritius and the region.

As of May 2022, the MIC disbursed a total of MUR 45 billion ($1 billion) to 38 entities.

In its ambition to boost the Mauritian economy, the 2022 budget delivered by the Minister of Finance, Economic Planning and Development in June aimed to increase the ease of doing business in Mauritius. It announced an inter-ministerial committee to oversee the streamlining of licenses and permits in the construction, tourism, healthcare, and logistics industries. The budget also announced the removal of fees for incorporation of new companies.

Since the Covid-19 pandemic, the Government of Mauritius has also prohibited redundancies or closing down of companies which employ at least 15 employees in their undertakings, or the undertakings have an annual turnover of at least MUR 25 million, thus preserving the employment of their employees. This restriction was due to expire on June 30 2022, but the restriction has been extended to December 31 2022. As such, employers who employ 15 employees in their undertakings or the undertakings have an annual turnover of at least MUR 25 million cannot reduce the number of employees in their undertakings or close down their undertakings until the prohibition has expired unless the employers and the employees negotiate a settlement or compromise agreement (as applicable).

There are no permanent changes contemplated to the restructuring and insolvency regime in Mauritius. The Companies Act 2001 (the Companies Act) was amended in 2020 to temporarily disapply the requirement of directors to call for a meeting of the board of directors to consider whether a liquidator or administrator should be appointed where the directors believe that the company is unable to pay its debts as they fall due. It is expected that such amendment will eventually be repealed.

## Legal framework

The processes are mainly contained in the Insolvency Act 2009 (the Insolvency Act) and are (i) for individuals, bankruptcy; and (ii) for companies, liquidation, voluntary administration and receivership.

In respect of individuals, bankruptcy is the process whereby an insolvent individual is adjudged to be bankrupt by the court and a trustee in bankruptcy is appointed to realise his assets and distribute them in accordance with the order of priority in the Insolvency Act. The bankrupt is automatically discharged from bankruptcy three years after adjudication but may apply to court for an earlier discharge. Compositions, proposals and summary instalment orders are alternatives to bankruptcy.

In the case of companies, liquidation is the process whereby a liquidator is appointed to realise the assets of the company and distribute them in accordance with the provisions of the Insolvency Act. Voluntary administration is a process whereby an administrator is appointed with the primary objective of rescuing the company or as much of its business as is possible and if that cannot be achieved, to ensure a better return to creditors and shareholders than in a liquidation; to exit administration, the creditors need to vote at a watershed meeting either in favour of liquidation of the company, ending the administration or executing a restructuring plan called deed of company arrangement (DOCA).

Receivership normally entails a receiver being appointed by a secured creditor to realise the assets under receivership in favour of the appointing person, subject to prior ranking charges and having regard to the interests of unsecured creditors and the company.

The Companies Act also contains parts on compromises with creditors and schemes of arrangement, the latter requiring court approval.

When a secured creditor holds a mortgage or fixed charge on immovable property, it can also cause the property to be seized and sold judicially in accordance with the Sale of Immovable Property Act.

## Restructuring cases

A major source of concern has been the Supreme Court of Mauritius (Court of Civil Appeal) decision in *AAPCA v. Mauritius Revenue Authority* 2020 SCJ 397 ruling that a condition that the Mauritius Revenue Authority (the MRA) imposed that all proceeds of sale of an immovable property should be remitted to it was not abusive.

The Supreme Court relied on section 81A of the Income Tax Act to the effect that a liquidator, administrator or receiver ought to set aside from the property before disposal such sum to the satisfaction of the MRA to satisfy tax due and payable. The Supreme Court did not consider specific provisions on the ranking of claims in the Civil Code and Insolvency Act (which aim at providing a maximum number of creditors with a share of distribution and include tax claims). Unfortunately, the AAPCA decision has been followed in *Best Flour v. Mauritius Revenue Authority* 2021 SCJ 301. It remains to be seen whether those decisions will be upheld in further appeals. Unless they are overturned or legislation is clarified, those decisions will have a major impact on the choice by banks of the enforcement procedures so that they, and other creditors, are not ousted in favour of the MRA.

## Processes and procedures

The processes are contained in the Insolvency Act and are (i) for individuals, bankruptcy; and (ii) for companies, liquidation, voluntary administration and receivership.

As alternatives to bankruptcy for individuals, compositions, proposals and summary instalment orders are also provided for in the Insolvency Act. For companies, compromises with creditors and schemes of arrangement under the Companies Act are alternatives for restructuring.

Once a company is in liquidation, unless the liquidator agrees or the court orders otherwise, a person shall not: (i) commence or continue legal proceedings against the company or in relation to its property; or (ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company.

> *"The Mauritian economy was severely affected by the pandemic, shrinking by 15% in 2020"*

Once a company is in administration:

- No person shall enforce a charge over the company's property except with the administrator's written consent or with the permission of the court;
- The owner or lessor of property that was used or occupied by, or is in the possession of, the company shall not take possession of the property or otherwise recover it except with the administrator's written consent or with the permission of the court;
- Proceedings in a court against the company or in relation to any of its property shall not be commenced except with the administrator's written consent or with the permission of the court; and
- An enforcement process in relation to the company's property shall not be commenced or continued except with the permission of the court.

Groups of companies do not generally receive special treatment, although the following needs to be considered:

- During administration, a guarantee of a liability of the company shall not be enforced against a related company; and
- In a liquidation, the court may order that a related company pays a claim made against the company in liquidation, or that (if two or more related companies are in liquidation) the liquidations of the companies proceeds as if they were one company on terms that the court imposes.

Section 162 of the Companies Act requires a director who believes that a company is unable to pay its debts to convene a board meeting to consider whether to appoint a liquidator or administrator. If he fails to do so, or fails to vote in favour of such appointment at the board meeting, and the company subsequently goes into liquidation, the director may be personally liable for debts incurred when the company continued to trade while insolvent.

At the watershed meeting in an administration, the administrator is required

to convene separate classes of creditors to vote on one of the exit routes of administration. If separate classes vote differently, the court may cram down dissenting classes and approve a DOCA if (i) creditors representing at least 75% in value of all creditors voted in favour of the DOCA; and (ii) the court is satisfied that no provision of the DOCA would be unfairly prejudicial or unfairly discriminatory against one or more creditors or would be contrary to the interests of the company as a whole.

Voidable preferences, voidable gifts and voidable charges may be set aside during a liquidation or bankruptcy by the liquidator/trustee in bankruptcy, if such transactions were made within two years before the commencement of liquidation/bankruptcy and the debtor was unable to pay its debts at the time of the transaction (in the case of preferences, i.e. transactions enabling the creditor to get more than what he would otherwise obtain in the liquidation) or immediately after the transaction (in the case of gifts and charges).

In the case of a charge, it will not be set aside if it was taken for new consideration. If the transaction takes place within six months before the commencement of liquidation/bankruptcy, the company is presumed to have been insolvent at the time of or immediately after it (as applicable).

There are also provisions in the Insolvency Act and the Civil Code for setting asides transactions made with intent to defraud creditors.

Priority claims are contained in the Civil Code and (in the case of liquidation and bankruptcy) in the Fourth Schedule to the Insolvency Act. Generally, the insolvency practitioner's costs (administrator, liquidator or receiver), certain employee claims and certain claims of government agencies rank ahead of both secured and unsecured creditors.

In an administration, an administrator is personally liable for contracts entered into during administration or funding the company but he has a right to be indemnified from the assets of the company. Such right, in the event of a liquidation, ranks above other creditors but after the costs and expenses of liquidation, certain employee claims and certain claims of government agencies.

In a liquidation or bankruptcy, post-petition credit ranks ahead of all creditors but behind the costs of the liquidator/trustee in bankruptcy.

In the case of financial institutions, receivership and conservatorship are provided for by the Banking Act 2004; deposit liabilities have priority over all unsecured liabilities of the financial institution except the costs and expenses specified in the Insolvency Act as having priority over all the liabilities of the company in the event of a winding up. In the case of an insurer, the Insurance Act 2005 provides that any debt or other liability arising out of contracts of insurance or underwritten by an insurer rank in priority before any other claim against the assets of the insurer.

Companies regulated by the BOM, the Financial Services Commission and/or the Stock Exchange of Mauritius may require approval of those institutions for all or part of a reorganisation if they are of the view that it can have a relevant regulatory consequence. In the case of government agencies such as the MRA or local authorities, it has to be considered whether they would be amenable to any compromise of their claims in a reorganisation, especially if they consider that those claims have a higher ranking.

## Cross-border cases

The foreign business should be mindful of the rules on ranking of claims of creditors under the Civil Code and in the Insolvency Act. Any restructuring plan formulated outside of Mauritius would at a minimum have to ensure that creditors obtain at least the amounts expected under those priority rules.

Furthermore, if a restructuring plan formulated in accordance with a foreign law or by an order of a foreign court, and such plan is intended to bind all creditors without each creditor consenting individually, a creditor in Mauritius could contend that it is not bound by the plan and seek to enforce its claim in full against the Mauritian assets. The foreign business would then have to consider whether the plan can be recognised in Mauritius under the UNCITRAL Model Law on Cross-Border Insolvency or by way of *exequatur* order obtained from the Supreme Court of Mauritius.

A foreign debtor may be put into insolvency proceedings in Mauritius under Sub-Part I, Part 3 of the Insolvency Act. The foreign debtor may be would up where, inter alia, it is unable to pay its debts, or the Court issues an order that it is just and equitable for that entity to be wound up.

The rules on cross-border insolvency in Mauritius are based on the UNCITRAL Model Law on Cross-Border Insolvency. Under the applicable regime, it is possible for a foreign insolvency practitioner to apply to the Mauritian Court to obtain recognition of an insolvency process being undertaken abroad provided that the State of the insolvency practitioner has adopted insolvency rules substantially similar to the UNCITRAL Model Law. It is also possible to obtain recognition if the insolvency process is a foreign main proceeding or a foreign non-main proceeding (depending on whether the insolvency process is taking place in a state where the debtor has its 'centre of main interests' or 'establishment').

## Looking ahead

It would perhaps be desirable to see a more frequent use of compromises under the Companies Act 2001 rather than more formal and complex insolvency procedures under the Insolvency Act. Compromises could enable companies to restructure debts in a relatively short time without the stigma that often accompanies an insolvency process.

Since the amendments to the Insolvency Act in 2019 to provide that claims in receivership shall rank in priority as may be prescribed, it is high time for regulations to be passed to prescribe the ranking of claims as this is causing uncertainty in the market, especially given recent judgments of the Supreme Court suggesting that claims of the MRA rank above any other claim in a receivership.

In terms of where the market is heading in terms of legal developments, regulations prescribing the ranking of claims in receivership are expected to be passed.

With the phasing out of legislative measures that had been introduced to minimise the impact of the Covid-19 pandemic, different sectors will return to pre-pandemic levels of economic activity at different paces, and there may thus be a need to further restructure debts.

Moves by the BOM to increase its policy rate, economic shocks due to the Russia-Ukraine war and a depreciating local currency may lead to further strain on companies and with diminishing government support, a higher number of receiverships and administrations may be observed.