
REPORT ON OBSERVANCE OF STANDARDS & CODES

MAURITIUS

INSOLVENCY AND CREDITOR RIGHTS SYSTEMS

Prepared by a staff team¹ of the World Bank from information provided by the Mauritian authorities.

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EXECUTIVE SUMMARY

Systems for creditor protection and credit recovery in Mauritius offer modern protections, but court proceedings do not respond to the needs of a dynamic industry. Creditor rights are based on an hybrid legal system inspired by French substantive and English procedural laws which provides for a wide range of security devices. Constraints in the systems and illiquid markets typically result in low recoveries even for secured creditors. All types of security provided for under the Civil Code are available, but the fixed and floating charges remain the preferred bank's types of security, as holders have no choice but to appoint a receiver to operate and/or dispose of the pledged assets. While these features of the law reflect a strong system, secured creditors are prejudiced by delays in the judiciary system.

The legal framework for corporate insolvency in Mauritius is under review to remove the bias towards liquidation. It consists of three primary laws pertaining to traders (1888), commercial companies (Company Act 1984 and 2001), and protected cells (Protected Cell Companies Act 1999). The approach follows that of UK company law practice, only without a modern insolvency law. In practice, company liquidations produce little or no return to the unsecured creditors, and a comparatively low return even to non-banking secured creditors. There is no mechanism for rehabilitation, except with respect to Protected Cell Companies. Under the Company Act 2001, however, a debtor may enter into restructurings through amalgamations and voluntary compromises with creditors. The stronger rights afforded Banks under the fixed and floating charges enables them to take control over the company's assets, and play an important role in salvage of the business through a debt repayment plan, rescheduling or supervised restructuring. In January 2003, the GOM appointed a Steering Committee to review all aspects of insolvency and creditor rights regimes in the country with the objective of developing a new insolvency legislation.

The Bankruptcy Division of the Supreme Court has jurisdiction to deal with all matters of bankruptcy, insolvency or the winding-up of companies but the Supreme Court can hear in the exercise of its original jurisdiction actions relating to the internal administration of companies which results in many cases that orders can be made in Chambers which interfere or inhibit the jurisdiction of the Judge in bankruptcy. While the courts may always play a supervisory role, the lack of a regulatory regime governing the conduct of professionals constitutes a significant shortcoming in the overall system, which is partly compensated by the appointment by the banks of receivers who are members of international accounting firms networks applying generally accepted professional standards.

Nearly all corporate lending in Mauritius is secured, with unsecured lending accounting for about 2% to 7% of total corporate advances. Large domestic and foreign banks maintain relatively advanced procedures for managing credit defaults, and employ a wide-range of techniques for recovery and resolution. Smaller banks tend to have only a small or no recovery department and outsource most of the recovery work. While workout procedures have not been formalized, banks and financial institutions routinely employ workout techniques to reach amicable arrangements to reschedule debts and restructuring businesses. Banks prefer informal resolutions where possible, but exercise their power to appoint a receiver or liquidator under the floating and fixed charge instruments. Still banks complain of low recoveries and a slow court process.

¹ The team was led by Gordon Johnson (Lead Counsel), with assistance from Jacques Ferry (Consultant).

I. INTRODUCTION

1. The World Bank assessed the Mauritius insolvency and creditor rights systems pursuant to a joint IMF-World Bank initiative to develop reports on the observance of standards and codes ("ROSC"). The review was carried out in collaboration with the Ministry of Economic Development, Financial Services and Corporate Affairs, based on the World Bank *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* ("Principles")² during the week of October 28 to November 2, 2002. The assessment team interviewed a cross section of country stakeholders regarding the effectiveness of the legal infrastructure and its implementation supporting debtor-creditor relationships, corporate insolvency and credit risk management and resolution practices.

2. Conclusions in this assessment are based largely on a review of applicable legislation and information gathered through interviews conducted by the staff team during their mission, and other inputs provided by the Steering Committee on Insolvency and Creditor Rights set up by the Government of Mauritius in January 2003.³ The mission met with the Minister of Economic Development, Financial Services and Corporate Affairs, and senior officials and staff members of: (a) the Ministry of Economic Development, Financial Services and Corporate Affairs; (b) the Registrar of the Companies and Registrar General; (c) the Deputy Commissioner, Income Tax Department; and a wide range of stakeholders, institutions and professionals in the public and private sectors, including: (d) judges; (e) accountants; and (f) lawyers and barristers. Excellent cooperation was received.

3. The conclusions in this assessment are based largely on the above interviews, a review of applicable legislation, data and information. In addition, five commercial banks provided responses to a questionnaire pertaining to credit risk management and corporate recovery practices with respect to distressed assets. The mission met with some of these responding commercial banks to discuss their practices and experience in resolving and collecting non-performing loans.

II. DESCRIPTION OF COUNTRY PRACTICE

4. **The legal system in Mauritius is a hybrid system of law combining both civil and common law practices.** The substantive private law, except the company law and the bankruptcy law, is largely based on the Napoleonic Code while public and administrative laws draw essentially from English common law. The law relating to security interests and that relating to creditor's rights, including their enforcement, are mostly French inspired, except for the floating and fixed charges drawn from English law, and included in the Mauritian Civil Code (Civil Code). The co-existence of the two systems entails in some instances confusion in the laws interpretation and application.

² World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (April 2001), http://www.worldbank.org/ifa/rosc_icr.html.

³ Major legislation reviewed included, among others, the Bankruptcy Act 1888, Companies Act 1984, Companies Act 2001, Civil Code and Code of Civil Procedure (pertaining to creation, registration and enforcement of pledges, charges and security interests), other relevant legislation, regulations and related information including the report of the Presidential Commission, chaired by Lord Mackay, to examine and report on the structure and operation of the Judicial System and Legal Professions in Mauritius, February 1998. The Bank acknowledges the assistance of Banymandhub Boolell Chambers, as an advisor to the Bank on domestic legislation and practices in relevant areas.

5. **The Mauritian economy being a small economy still relies on traditional credit instruments, such as bank loans, leasing and investment lending.** The upsurge in the economic activity of banks in recent years is reflected in the substantial increase in claims from the private sector⁴ and claims on currency with the public.⁵ The various types of security provided for under the Civil Code, e.g. the pledge, the mortgage and the guarantee are available, but the fixed and floating charges remain the more widely used types of security and are available only to credit institutions and a limited number of institutions specified in the law.

A. CREDITOR RIGHTS AND ENFORCEMENT PROCEDURES

6. **Creditor's rights, other than the special rights that may be exercised in the event of an insolvency, are governed by the Civil Code.** Any creditor has a general right over the property and assets of a debtor and any creditor has the right to be treated equally with the other creditors unless priority is given to those creditors holding securities. The Civil Code lays down the rules governing the creditors' ranking upon enforcement of their rights. In addition to the securities/charges available under the Civil Code, any creditor has by law the benefit of a number of protective measures⁶ in order to protect his interests against the debtor and/or third parties. In practice the enforcement of such rights often prove difficult.

7. **Systems for creditor protection and credit recovery in Mauritius offer modern protections, but court proceedings, do not produce timely results and the issues are not adequately addressed, and illiquid markets may result in low recoveries, especially for unsecured creditors.** Unsecured debt is enforced by court action, in the first instance, by obtaining a payment order to collect on a debtor's assets. Prejudgment attachments or relief is available to prevent the disposition of assets by the debtor prior to obtaining judgment. Creditor rights are complicated partly by the hybrid nature of the legal system combining French substantive law and English procedural laws. Weaknesses in the court system are the most often cited as being detrimental to debt enforcement. Creditors report that court proceedings for execution or in bankruptcy are routinely delayed, resulting in diminished recoveries. Although statistics are not readily available, unsecured creditors report that actions in the lower courts can take 6-18 months, while proceedings in the Supreme Court can last 2-4 years.

8. **Secured creditors enjoy relatively broad protections and better remedies to enforce their claims in movable and immovable property.** The law provides for the traditional security interests over a broad range of assets, including: (i) security given personally by third parties to the debtor which is commonly called "*cautionnement*," personal guarantee or surety ("*sûreté personnelle*");⁷ and (ii) over property or assets ("*sûretés réelles*"). The mortgage is a reliable means of security, with the exception of the necessity to effect personal

⁴ According to the official figures of the Bank of Mauritius, the claims of banks against the private sector increased from Rs 35,002 millions in December 1996 to Rs 77,89 millions in December 2001.

⁵ Figures increased from Rs 5,051 millions in December 1996 to Rs 7,329 millions in December 2001.

⁶ Measures consist of the "*action oblique*" (CC 1166), the "*action directe*", the "*action paulienne*". The main difference between an *action paulienne* and an *action oblique* is that the former is based on fraud whereas the latter is based on the negligence of the debtor. The *action paulienne* is generally exercised by those creditors who had failed in the *action directe* and/or *action oblique*.

⁷ This first category of security interests is recognized as a right regarded commercially as security pertaining to certain transactions, such as assignment of receivables.

services on the debtor, in immovable property, although registration procedures need to be streamlined. Pledges or charges in personal property cover a broad range of assets and are widely used in trading and manufacturing sectors. Pledges are typically realized by a physical turnover of the goods or assets pledged to the pledgee, which is not feasible for modern business. Unfortunately, the Civil Code provides only for a limited non-possessory pledge (*gage sans déplacement*) in motor vehicles and tools and professional equipment. A pledge of shares is permissible under the Civil Code and under the Companies Act, but this too is subject to certain restrictions (i.e., *pactes commissoires*) that render it less effective in modern practice, as the share certificates cannot be placed into an escrow account. As in most countries, there are also a variety of statutory liens designed to protect contractors and service providers, although sometimes difficult to obtain and enforce in practice due to costly and onerous registration duties associated with the lien (e.g., builders' lien).

9. **Recognised Financial Institutions (banks, financial institutions and institutions agréés) have a higher degree of protection with respect to security.** The law provides for a pledge in favor of recognised financial institutions on intangible property such as bonds, debentures and shares that can be pledged as a security for the repayment of loans and banking facilities pursuant to a written instrument (CC 2129-2). The pledge affords an absolute preferential right over any other secured creditors with respect to the proceeds of sale of the pledged shares or debentures which may be used to reimburse the recognised financial institutions for money owed by the debtor or its surety.

10. **Banking and financial institutions also benefit from superior rights related to fixed and floating charges.**⁸ Fixed and floating charges can be granted on part or all of the debtor's assets or of its surety. Fixed charges are usually taken on immovable properties or specific movables (e.g., vehicles, equipments), are subject to *ad valorem* registration duty and are often taken for small amounts coupled with a personal guarantee. The chargor cannot dispose of the assets without the authorization of the financial institution, whereas under the floating charge, the chargor may dispose of the assets and as the registration duty for companies is a fixed one, so that most companies grant floating charges. The floating charge is a charge on present and future assets, which constitutes a charge on a pool of assets that are constantly changing, but which does not attach to any specific property. Upon the occurrence of a specified event, the charge crystallizes giving it priority over all interests other than previously existing fixed charges. Upon its conversion into a fixed charge, the floating charge give to the chargee the same rights and produces the same effects than a fixed charge on the assets of the chargor existing as of the date the crystallization takes place according to the deed constituting the charge and subject to the observance of the formalities prescribed by the law.

11. Fixed and floating charges typically contain clauses empowering financial institution, upon the occurrence of a breach, to appoint receivers or receivers and managers to take over the administration of the concern. Subject to the terms of the deed constituting the fixed charge, the chargee is entitled to exercise its rights without leave from the Court or any other formality, including to: (i) effect any seizure or attachment on the assets charged at any time, without giving notice when the debt becomes due; (ii) cause the assets seized to be sold, after a period of three weeks from the date of the

⁸ CC 2202 to 2203-7. Articles 2202-1 and 2202-2 provide that these charges may only be granted in favor of certain institutions (mostly banks), while other financing institutions (domestic or foreign) can also be recognized as a qualified institution by the Minister of Finance ("institutions agréés").

seizure; and (iii) sell pursuant to the Sale of Immovable Property Act, the immovable property seized. Furthermore the chargee can exercise the above rights notwithstanding any provisions of the Bankruptcy Act to the contrary even in case of prior enactment of a bankruptcy judgment against, or the existence of an attachment of the assets belonging to, the chargor.

12. **Registration of secured interests over movable or immovable properties is formalized through various registries, although high registration dues act as a deterrent.** Depending on the nature of the assets secured, registration is governed by a variety of regulations, including: (i) the registration pursuant to the Registration Duty Act, and the Stamp Duty Act; (ii) the inscription pursuant to the inscription of Privilege and Mortgages Act; and (iii) the Transcription of Mortgages Act. The registration provisions determine the existence of the right and the priority in ranking, and fix rights vis à vis third parties as of the date of inscription. High registration costs, however, act as deterrent to registration. The Civil Code provides that a secured creditor has (i) a preferential right (“*droit de preference*”) arising from a privilege, pledge, mortgage and fixed or floating charge and (ii) depending on the type of charge created, a right to trace the charged property in the hands of third parties (“*droit de suite*”). Such right is conferred on a creditor holding a mortgage, or a fixed charge on the property. Although a secured creditor may claim for his preferential right as set out in Civil Code 2142,⁹ however, there are circumstances where such preferential rights cannot be enforced, such as where a pledgee is entitled to exercise a right of retention and hold the charged property until full payment of the secured debt. The registration provisions follow a first-in-time first-in-right rule with respect to priorities.

13. **In practice, although the recording and registration formalities are provided for, searches can only be effected against payment of a minimum fee.** For instance, charges which have been created are not publicly available unless they have been inscribed at the Conservator of Mortgages. The inscription of the deed of title of property on immovable is made by name, not by piece of land. There is no master plan (cadastre) which make uneasy and sometimes impossible the ascertainment of the legal condition of immovable.

B. LEGAL FRAMEWORK FOR CORPORATE INSOLVENCY

14. **On the whole, the legal framework for commercial insolvency in Mauritius is inadequate, outmoded and inefficient, providing only for liquidation.** Commercial insolvency is governed by multiple laws, including: (i) the Bankruptcy Act 1888 (“BA 1888”) as concerns the traders, (ii) the Companies Act 1984 (“CA 1984”) for the limited liability companies registered according thereto, (iii) the Companies Act 2001 (“CA 2001”) as far as limited life companies are concerned, (iv) the Protected Cell Companies Act 1999 (“PCC Act”) regarding the administrative receivership of a cell and the administration order in respect of a Protected Cell Company (“PCC”), and (v) the Code de Commerce regarding companies that have been dissolved. The above referenced laws are oriented almost exclusively towards liquidation, which in practice produces little or no return to unsecured creditors, and a comparatively low return even to non-bank secured creditors. In a bankruptcy proceeding, the debtor is replaced by an administrator or liquidator who takes charge of the property or assets for the benefit of the creditors.

⁹ Article 2142 “ les causes légitimes de préférence sont les privilèges et hypothèques ainsi que les sûretés fixes ou flottantes”

Debtors often engage in various delay tactics to buy time, which increases the administrative burdens for the bankruptcy judges on the Supreme Court that handle all insolvency proceedings, among other cases. The two judges together with two registrars are currently handling a considerable number of cases, most of which are not exclusively bankruptcy cases.¹⁰

Table 1: Bankruptcy Statistics

	Totals
Number of incorporated companies	40,609
Winding Up Proceedings by Companies for period 1994–2001 under Companies Act 1984.	
(i) No. of companies which started winding up procedures	8,062
(ii) No. of companies wound up	3,458
(iii) No. of companies that started procedures for receivership	308
(iv) No. of companies that ended procedures for receivership	126

Source: Companies Registry

Company liquidation and winding-up procedures

15. **Company law provides for liquidation and winding up procedures.** The applicable provisions governing the winding-up and liquidation of companies are still to be found under the Companies Act 2001 that became effective on December 1, 2001, and replaced the Companies Act 1984, which was repealed. The new Companies Act was designed to deal only with the core requirements of a company, as matters pertaining to insolvency are expected to be treated in a new insolvency law.

16. **In a voluntary winding-up, the shareholders decide to wind-up the company.**¹¹ This occurs where the shareholders decide to wind-up the company in accordance with a reorganization plan (“Members’ voluntary winding-up”) or where the company is unable to pay its debts (“Creditors’ voluntary winding-up”). If the company is insolvent, the directors may lodge an application with the Registrar of Companies indicating that the company cannot continue its business, and appointing a provisional liquidator¹² to exercise all the functions and powers of a liquidator for one month from the date of his appointment or for such period until the appointment of an Official Receiver or liquidator. Shareholders then pass a resolution to wind up the company. The effect of a voluntary winding-up is that as from the date of its commencement, the company ceases to carry on its business activities, except insofar as may be necessary, in the liquidator’s opinion, for the beneficial winding-up of the company.

¹⁰ It remains to be determined whether the Commercial Court will have jurisdiction over the Sociétés Commerciales and Sociétés Civiles.

¹¹ CA 1984, Sections 251 and 252.

¹² The provisional liquidator is appointed upon or after presentation of a petition and before the making of the winding-up order. The essence of the appointment of a provisional liquidator is its temporary nature such that certain restrictions and limitations follow from there. Typically, the powers of the Provisional Liquidators are limited to taking possession of, collecting and protecting the assets of the company (section 223 (2) and 227 (1) of the CA 1984), such assets not to be distributed or parted with until further order. The primary object of appointing a provisional liquidator is therefore mainly to preserve the status quo pending the hearing of the petition and to prevent third party access to the company’s assets.

- *Members' voluntary winding-up*¹³ In a members' winding-up process, the company is closed down pursuant to the shareholders' plan. The procedure requires a declaration of "solvency" by the directors. A member's winding up shall commence at the time of the passing of a special resolution. If profits are left in the company at the time the members decide to wind up the business, this profit and any remaining assets, after paying creditors, would be distributed to the members or shareholders. Where it appears that the company is unable to pay its debt within the period of 12 months after the commencement of the winding-up, the members' voluntary winding-up may turn into a creditors' winding-up. The liquidator appointed in the members' meeting at which the resolution for winding up was passed, shall therefore summon a meeting of creditors and lay down before them a statement of affairs of the company.
- *Creditors' voluntary winding-up*¹⁴ This procedure is commenced when the company has become insolvent – that is, unable to pay its debts as they become due in the normal course of business or where the total liabilities and stated capital of the company exceeds the value of assets.¹⁵ Usually, in a creditor's winding up, the company is deemed insolvent and there is no requirement for a solvency declaration. The company must first summon a meeting of creditors. At such a meeting, a winding-up resolution is proposed, and the creditors have the option of appointing another liquidator, who will proceed with the distribution of the assets or the sale of such assets and the distribution of the proceeds amongst the creditors.

17. **A winding-up procedure is compulsory if the company is insolvent.**¹⁶ The process is commenced when a listed person – whether company, shareholders or creditors (including a prospective or contingent creditor) – applies for the winding up of the company before the bankruptcy court. Upon presentation of a petition or thereafter, the court appoints an official receiver or other competent person to serve as provisional liquidator.¹⁷ An order for a compulsory winding-up of a company operates in favor of the creditors and contributories as if made on the joint petition of the creditor and contributory. Upon issuance of the winding-up order and appointment of the provisional liquidator, all proceedings against the company are stayed. The liquidator takes custody or control of all the company's property, reviews its financial statements, and submits a report to the Court. In carrying out his functions, the liquidator takes note in the first instance of any instructions from the creditors or contributories at general meetings, or alternatively from the committee of inspection where these do not conflict with the former.

18. **Seizure procedures impair the value of the assets.** Seizure of assets is not automatic, but must comply with several procedures, including notice to the debtor, crystallization of the charge, inventory, and sale of the property. The dispossession of the assets therefore occurs prior to the application for the sale of the property being made by

¹³ CA 1984, sections 253 to 255.

¹⁴ CA 1984, sections 256 to 259.

¹⁵ The "solvency test" was recently introduced under the CA 2001, section 6, so that the assessment may now be made at a number of specific phases of a company's activities (e.g. redemptions, distributions, etc.).

¹⁶ CA 1984, sections 216 to 250.

¹⁷ The official receiver plays an important role in the compulsory winding-up procedures, serving as liquidator unless another liquidator has been appointed so to act. When the Official receiver acts as liquidator, his powers are wider than those of the other liquidators. If the official receiver is not appointed as liquidator, he will still have supervisory powers over the conduct and activities of the liquidator.

the creditor before the Bankruptcy Court. By the time the sale takes place, public knowledge of the distressed nature of the assets tends to result in sales at liquidation values, typically significantly lower than if the business were sold as a going concern. A significant number of liquidations and asset sales are conducted out of Court pursuant to Civil Code procedures, by receivers appointed by creditors according to the deeds constituting the charges. In such case, the procedure can be conducted more efficiently in terms of length of the liquidation procedure, which in practice typically exceeds six months in most cases. The decision to put a company into liquidation may alone take 6 months, with a winding up taking up to 10 years as in the case of insurance companies.

Business amalgamations and compromises

19. **Unlike most industrial countries which now have a formal reorganization statute, there is no similar process under Mauritian law to rescue a financially distressed but viable business other than under the Companies Act 2001.**¹⁸ The insolvency law establishes no procedure for rescuing a financially distressed business, whereas company legislation (as in the case of winding up) offers several options including creditor compromises or amalgamations of the business. Thus, under the insolvency law and procedures, there is little opportunity to preserve the business as a going concern with the prospect of maximizing the ultimate value and recovery for creditors. The only exception appears to be provided under the Protected Cell Companies Act 1999, which provides for appointment of an administrator. The PCC Act is relatively new, and the efficiency of the provisions relating to the appointment of an administrator have not yet been fully tested in practice. The existing Insurance Act does provide for an administrator to be appointed.

20. **Most business rescues and restructurings are conducted under the company legislation, which allows amalgamations, takeovers¹⁹ and compromises.** In an amalgamation procedure,²⁰ an amalgamation proposal is first prepared by the amalgamating companies. This must be approved by the board of each amalgamating company by resolution indicating that the amalgamation is in the best interest of the company and will maintain the solvency of the business. The boards of both companies are also obliged to give full information to shareholders and creditors, who are entitled to take a position, and must give written notice to secured creditors at least 28 days prior to the amalgamation. Upon approval by the shareholders of each company, relevant documentation is delivered to the Registrar of Companies. An inexpensive 'short form amalgamation' procedure exists for related companies (CA 2001, s. 247), including: (i) a holding company seeking to amalgamate with one or more wholly owned subsidiaries (CA 2001, 245 and 246); and (ii) two or more companies, each of which is directly or indirectly wholly owned by the same company that seek to amalgamate as a single company.

21. **A creditor compromise is a form of debt restructuring authorized by CA 2001.** A compromise between a company and its creditors, includes: (a) canceling all or part of a debt of the company; (b) varying the rights of its creditors or the terms of a debt; or (c) relating to an alteration of a company's constitution that affects the likelihood of the

¹⁸ Examples include Australia, Canada, France, Germany, Japan, United Kingdom, and the United States.

¹⁹ Technically outside the scope of this review, takeovers under the Company Act 1984, Schedule 15, remain applicable under CA 2001. The "takeover scheme" is one that involves the making of an offer for the acquisition of shares, including any share to which the offeror is beneficially entitled. CA 1984, 2(1).

²⁰ Company Act 2001, sections 245 and 246 [hereinafter "CA 2001"].

company being able to pay a debt. A compromise may be proposed by the board of directors, a receiver appointed in relation to the whole or substantially the whole of the assets and undertaking of the company, a liquidator of the company, or with leave of court by a creditor or shareholder of the company. A compromise approved by creditors or a class of creditors of a company assumes that all affected creditors or classes approve the compromise, which becomes binding on the company and on all creditors. Where a particular creditor was omitted from the voting process, upon petition, the court may exempt such creditor from the effect of the compromise. During the compromise period, secured creditors are not prevented from exercising any rights to take possession of, realize, or otherwise deal with company property over which they hold a charge.

C. REGULATORY FRAMEWORK FOR INSOLVENCY

Institutional Framework and Capacity

22. **Respect for the rule of law, the judiciary, and the legal profession, is high in Mauritius, but judicial procedures contain certain weaknesses that render the process slow.** As indicated above, the legal system of Mauritius is well established and is based upon a unique combination of French and common-law provisions and principles which have been successfully blended to accommodate the situation, history, traditions and communities of Mauritius. Reliability of the legal system to resolve disputes will enhance the primary dispute resolution mechanism. Improving the conditions of service of the judiciary and the judicial infrastructure will be important in this regard with respect to general enforcement and insolvency procedures.

23. **The Bankruptcy Division of the Supreme Court has jurisdiction to deal with all matters of bankruptcy, insolvency or the winding-up of companies.**²¹ By law a division of the Supreme Court, the Bankruptcy Court is hierarchically below the Supreme Court sitting in its original and appellate capacity. The jurisdiction of the Bankruptcy Division is vested in and exercised by the Master and Registrar concurrently with the Judges of the Supreme Court. While in practice the Master and Deputy Master and two Registrars deal with all cases lodged before the Bankruptcy Division, in the exercise of its original jurisdiction, the Supreme Court may hear actions relating to the internal administration of companies. In many instances, this has resulted in orders made in Chambers which interfere or inhibit the jurisdiction of the Judge in bankruptcy. Furthermore, where the alleged debtor opposes a serious defense as to the debt, the law provides that the Judge in bankruptcy must refer defenses to the competent court. Notably, Bankruptcy Court Judges also deal with company matters. There is an acknowledged need to review the jurisdiction and procedural aspects of the Bankruptcy Court within the Supreme Court.

24. **The specialized nature of the bankruptcy court has produced judges with a high degree of knowledge and skill on bankruptcy matters, although there is no formal requirement that the Master of the Bankruptcy Division or judges of the Supreme Court have the relevant expertise in these matters.** In view of the increasing intricacy of the matters being brought before the Bankruptcy Court, and the growing need and demand for academic issues relating generally to corporate legislation and specifically to winding-up and bankruptcy, it is important that relevant expertise be maintained by those handling such cases. One solution would be to establish a separate commercial court

²¹ Courts Act 1945, Section 62(1).

to deal with commercial and bankruptcy matters. The Presidential Commission set up to examine and report upon the structure and operation of the Judicial System and Legal Professions of Mauritius (February 1998) recommended that the Bankruptcy Court be integrated into the original jurisdiction of the Supreme Court which would avoid possible duplication or competing jurisdiction, however, this does not address the increasing needs for commercial resolutions. What is important is that courts of broad competency in commercial matters be vested with appropriate jurisdiction, including with respect to insolvency and bankruptcy, and that emphasis be placed on specialization of judges handling these matters. In bankruptcy cases, the court with competent jurisdiction should also maintain broad powers to resolve disputes and defenses to claims or other issues related to the administration of bankruptcy cases, to promote efficiency and continuity in the decision-making process.

Regulatory Framework

25. **There is no supervisory body responsible for regulating the conduct of insolvency administrators and liquidators.** The general consensus appears to be that there is no need for an additional supervisory body. The Court typically supervises the activities of the insolvency administrators. Nevertheless, a regulatory framework is essential to ensuring that receivers, administrators and liquidators are competent and duly licensed and supervised in carrying their functions. This will ensure that minimum standards of practice and expertise are maintained and that the system operates with the highest level of efficiency and integrity. There should also be the introduction of codes of professional conduct for insolvency practitioners as well as a supervisory body which would oversee the conduct of such practitioners and ensure the protection of information in insolvency matters and safeguard against conflicts of interests and related party situations. In view of the fundamentally “legal” nature of the insolvency procedures, specific provisions may be designed to encourage lawyers to act as insolvency practitioners.²²

26. **Receivers acting under an appointment by a financial institution with respect to a floating or fixed charge typically have greater competence and are held to higher standards under professional rules governing accountants.** The law does not provide for judicial supervision over receivers appointed by creditors. In practice, the deed creating the charge includes provisions respecting the appointment of a receiver in the case of default and the entire process is conducted outside the control or supervision of the courts. The liability of the Receiver pursuant to CA 1984, section 191, is absolute and prevails notwithstanding any agreement that may be made to the contrary.²³ A receiver who enters into possession of any assets of a company for the purpose of enforcing a charge is liable for (i) the debts incurred, (ii) goods purchased, (iii) property hired, leased, used or occupied by him. A receiver or manager of the company’s property has a duty to exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of the sale. The Receiver also has an affirmative duty to pay the preferential debts of which he has notice out of any assets coming into his hands in priority to all other

²² Certain persons are precluded from acting in this capacity, including: (i) corporations; (ii) undischarged bankrupts; (iii) persons holding a mortgage on property of the company; and (iv) auditors of the company. CA 1984, Sections 189 and 224.

²³ See *Saxon Management Ltd v/s State Commercial Bank Ltd*. (receiver is first and foremost the agent of the company and should try to get the best possible bid to safeguard the interests of the shareholders. The sale is normally effected upon advertisements for tender being made.)

creditors. A Receiver's liability does not prejudice his rights against the company or any other person. Moreover, the duty of a receiver to act reasonably is somewhat subjective and efficient and effective outcomes are difficult to measure in practice.

27. **The Court has a “droit de regard” over the activities of persons involved in the winding up of a company.** For instance the Court may, on the application of any creditor, contributory or liquidator examine the conduct of a receiver and manager where it appears that the receiver or manager of the property of a company has (i) misapplied, or retained, or became liable or accountable for any money or property of the company or (ii) has been guilty of any misfeasance or breach of duty in relation to the company. The Court may also compel the receiver or manager to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks fit, or to contribute such sums to the assets of the company by way of compensation.

D. CREDIT RISK MANAGEMENT AND INFORMAL CORPORATE WORKOUTS

Credit risk management

28. **Nearly all corporate lending by all banks (large and small) is secured, with unsecured lending ranging from approximately 2% to 7% of the total corporate lending.** Preferred security includes fixed and floating charges over all kinds of collateral, with preference being given to first rank fixed charges on immovable property (land, buildings, and fixtures), plant and machinery, equipment, and liquid assets (e.g., cash deposits and certificates, insurance policies and Treasury Bills). Floating charges are also common on immovable and movable assets, including inventory and receivables. Corporate, parental and personal guarantees are also a common and complementary form of security.

29. **Large banks and foreign banks maintain effective internal procedures for managing credit defaults, and employ a wide-range of techniques for recovery and resolution, while smaller banks either have very small or no recovery departments and outsource most of the recovery work.** A few of the foreign banks maintain very sophisticated methods for tracking and monitoring default levels, with domestic and smaller banks utilizing lesser degrees of monitoring and tracking of data and statistics. Bank and legal staff in recovery departments typically are expected to have a strong working knowledge of a wide range of recovery and resolution techniques. The range of recovery varies widely among banks, with nearly all reporting a preference for amicable resolutions, despite which recoveries are often low and drawn out over a period of 3-7 years. Consistent with the types of lending in Mauritius, the highest levels of default as a percentage of lending by industry tended to be highest in the areas of agriculture, manufacturing, construction and traders. Levels of non-performing loans (NPLs) were slightly higher among domestic banks, possibly characteristic of a generally smaller and more selective lending base for foreign banks. Based on results reported over the past five years, some banks reported slight increases.

Informal Workout Procedures

30. **While workout procedures have not been formalized, banks and financial institutions routinely employ workout techniques to reach amicable arrangements to reschedule debts and restructure businesses.** Consistent with the practices in many countries, a wide range of approaches are employed to rescue viable business with a view

to ensuring debt recovery. These include the usual techniques of requiring cost cutting measures and downsizing the workforce, disposing of non-core assets or units of the business, and the taking of additional collateral to secure repayment. These measures are more effective and useful for large debtors, thus leaving small debtors very much under the threat of inevitable insolvency. If the workout attempts fail, banks generally have no recourse other than to appoint a receiver and to dispose of their collateral. An organized program of conciliation under the supervision of the courts or independently could be an effective approach to promoting more effective workouts among a wider range of businesses.

III. SUMMARY OF ASSESSMENT FINDINGS AND CONCLUSIONS

31. **Creditor rights and enforcement procedures** on the whole offer modern protections and were found to be largely observant of the Principles. In several areas, however, the procedures and practice could be improved to achieve a higher level of effectiveness and more efficient results:

- *Security interests.* Banks and financial institutions and “institutions agréées” enjoy a privileged status in Mauritius with a wide array of reasonably effective security devices, including the right to appoint a receiver under a floating or fixed charge. The same is not true for non-bank and other non-financial creditors. In regard to both groups, it is also notable that non-possessory pledges have had limited application to date, extending mainly to equipment and vehicles. These limitations impede the prospects for developing new modern forms of financing.
- *Registration.* This is another area where the process was found to have a qualified rating of largely observant. Notwithstanding the existence of registries, recording and registration formalities were not always easily accessible, such as certain charges that have not been inscribed. A key problem is the high cost of registration duties, which act as a deterrent to registration. The procedures complicate the giving of notice, which is essential to protect providers of credit. The system of registration is in the process of being computerized, which will significantly improve the access of creditors to the information.
- *Enforcement.* The process of enforcement is the main area in which the system was found to contain material defects or shortcomings that made enforcement costly and slow. For secured creditors, the cost of enforcement is high and is generally paid up front even before the court determines to open a proceeding based on the petition. The one exception to this is where the law permits a self help remedy through appointment of a receiver to dispose of secured assets under a fixed or floating charge.

32. **The legal framework for corporate insolvency** does not respond to the needs of a modern industry given its bias towards liquidation. While the law reflects a patchy state of compliance with the principles, many aspects of the law and process are either materially non-observed or non-observed. Notably, the process is also governed by many laws, including the outmoded law for traders (1888), and more recent company legislation that supports a variety of procedures for voluntary and compulsory winding-up. Liquidation of a company produces little or no return to the unsecured creditors, and a comparatively low return even to non-bank secured creditors. The proposed review of the legislation in insolvency matters will bring a modern framework for company

rehabilitations, despite provisions in the Company Act 2001 supporting compromises between companies and their creditors. Protected Cell Companies are also an exception to the rule. Rather than address the specific shortcomings for improvement, it will be important to introduce new modern legislation that updates and integrates the current fragmented framework, which is already contemplated in the forthcoming insolvency legislation. A second area that deserves closer review relates to the treatment of worker rights in a manner that both protects the priority of secured creditors under their respective security instruments while establishing a more reliable solution to address the needs of workers, such as the creation of a worker guaranty payment fund. This matter needs to be studied further.

33. **The implementation framework** was found to be largely or fully observant with respect to the courts, and largely observant in regard to regulation pertaining to insolvency practitioners. Particular areas for improvement include:

- *Court specialization and training.* The existence of a specialized court to deal with bankruptcy is a considerable advantage in promoting consistency and efficiency in the process. A potential downside of the current court structure is its adjunct nature as a division of the Supreme Court. While there is no evidence that the concurrent jurisdiction has been a problem, the process of appeals may well be slowed or hampered. More significantly, there is no commercial court to deal with a broad range of commercial and company matters, which is clearly needed to promote a wider and more efficient system for resolving commercial disputes and cases. Such a court would be a more logical companion for the bankruptcy court. For the same reasons, more exposure by Judges in commercial matters should be encouraged.
- *Regulation of and competency requirements for practitioners.* Although, there is no supervisory body responsible for regulating the conduct of insolvency administrators and liquidators, the general consensus is that an independent body is not required. While the impact of this gap is less felt due to the active role of receivers, acting as licensed accountants, regulation generally is important to ensure proper performance of duties by receivers, administrators and liquidators to maintain high standards and competency among the profession of insolvency practitioners acting under order of the court. Notably, the insolvency law is expected to lay down the qualifications and responsibilities of these practitioners. It has been proposed that the Financial Reporting Council and Institute of Professional Accountants (to be established following the recommendations of the ROSC on Accounting and Auditing), and the Bar Council / Law Society should have enforcement powers.

34. **Credit risk management and informal corporate workout practices** are inconsistently applied. Compliance in this area was partial, revealing a flexible approach to problems of default risk that affords banks and financial institutions scope to determine whether or not to adopt appropriate practices and procedures for managing risk. On balance, the practice reveals a different story and demonstrates that banks are typically proactive in pursuing consensual informal resolutions, resulting in debt reschedulings and restructurings. The range of experience remains at a relatively basic level of sophistication, and more often than not the end result is the appointment of a receiver to dispose of the assets.

IV. POLICY RECOMMENDATIONS

35. **Policy Recommendations.** The authorities appointed a Steering Committee, which reviewed and expressed views on this assessment and the recommendations. To the extent possible, the assessment team has endeavored to incorporate those comments, as and where appropriate. The following policy recommendations are made in each of the four areas:

Creditor rights and enforcement

- Creditors rights and enforcement areas which are essentially sound require some fine tuning to (i) broaden the use of security interests on movable and immovable property to a broader group of credit providers (not only banks and financial institutions); and (ii) ascertain the maximization of the value of the assets for sale upon seizure.
- Enforcement procedures should be streamlined further by accelerated debt recovery rules and more efficient procedures for execution, enforcement and auctions.
- A master plan should be elaborated in order to ascertain clearly the proprietary rights of pieces of land and buildings owners and fully and freely accessible to the public at the Registrar General. The computerization of the whole registry system is to be strongly encouraged and should include all entries made in the books onto the computer.
- Credit Information Bureau should be established in Mauritius.
- The government should encourage the development of Credit Rating Agencies.

Legal framework for corporate insolvency

- A global reform of the insolvency procedures should be pursued in order to provide Mauritius with a modern and efficient commercial insolvency law. This should include integrated procedures for insolvency, as well as a procedure for rehabilitation that are consistent with international best practices, as set forth in the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*. Areas of particular consideration for the new law should take into account, without limitation, the following:²⁴
 - necessary amendments to the Bankruptcy Act and Bankruptcy Rules to take care of both traders, non-traders and companies insolvencies;²⁵
 - harmonious and uniform recovery procedures for all debts, including amounts due to the State;

²⁴ The World Bank acknowledges and thanks the Steering Committee for its more detailed recommendations for specific areas to be taken into account in the new law.

²⁵ Although typically outside the scope of the Insolvency and Creditor Rights ROSC, these issues are fundamentally important for a growing credit-based market and the insolvency laws should embrace traders and non-traders alike.

- explicit provisions relating to outstanding claims of the State and private sector claims, e.g. VAT, Income Tax, National Pensions Fund etc.;
 - appropriate priority rankings for creditors;
 - the abolition of the Zero-hour rule in respect of payment system participants.
- A study should be carried out to look into the feasibility of creating an Employees' Fund to adequately protect workers in cases of business closure / liquidation / cessation.²⁶
 - A detailed study should be carried out in the area of asset securitisation within the framework of the insolvency legislation.

Implementation framework

- Consideration should be given to establishing a commercial court that would handle both commercial and bankruptcy matters. The current Bankruptcy Division court might continue to serve as a specialized appellate court for commercial cases. The Commercial Court should be set up with several specialized Divisions to be more effective.
- In connection with the new insolvency law, clear rules should be established to ensure effective regulation of practitioners serving as official receivers and liquidators.

Credit risk management and informal Corporate workouts

- Develop informal rules and a guide for addressing credit risk management practices.
- Provisions to be made in law to address confidentiality issues as regards informal workouts or changeover of debts from one bank to another.
- Review relevant laws and regulations in the enabling framework to maximize incentives for corporate restructuring. Informal procedures might also include the establishment of a voluntary mediation program under the courts to facilitate informal workouts where necessary. Such a procedure could be established in connection with the new commercial court framework to encourage resolution of a wider range of commercial disputes.

²⁶ There are various successful models for worker guaranty payment funds, especially in Europe (e.g., Germany). Such a guaranty fund would have the advantage of enabling the government to remove the current priority in favor of certain worker claims that are paid on a *pari passu* basis with secured claims, so as to reduce the credit risks for lenders and thereby promote more affordable credit markets.