

## OFFSHORE

# Smooth finish

Individual and corporate insolvency in Mauritius is now governed by a new act that aims to simplify the current legal framework. By **Malcolm Moller**

**I**nsolvency in Mauritius is now governed by the new Insolvency Act 2009. Prior to this insolvency was governed by the Bankruptcy Ordinance 1888, the Companies Act 1984 and 2001 and the Insolvency Act 1982. The main objectives of the new act are to consolidate and modernise the legal framework for insolvency by updating and integrating it into a modern, comprehensive regime covering both individual and corporate insolvency.

The 2009 act reflects the objectives of the government to effectively balance the interests of debtors, creditors and other stakeholders. It includes provisions for alternatives to bankruptcy and winding up, cross-border insolvency and netting arrangements in financial contracts (ie International Swaps and Derivatives (ISDA) agreements). Financial institutions lending to Mauritius-incorporated entities will want to become familiar with the provisions of the 2009 act. This article will look at the new act from the point of view of debt financing, including the enforceability of the ISDA agreements.

#### Netting arrangements

The general rule is that the provisions of a netting

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agreement will be enforceable in accordance with its terms, including against an insolvent party and, where applicable, against a guarantor or other person providing security for the insolvent party. Netting provisions will not be stayed, avoided or otherwise limited by any action of the liquidator, any other enactment relating to bankruptcy, reorganisation, composition with creditors, receivership, conservatorship or any other insolvency proceeding that the insolvent party may be subject to, or indeed any other enactment that may be applicable to the insolvent party.

The act further provides that, unless there is clear and convincing evidence that the non-insolvent party made a transfer or incurred the obligation with actual intent to hinder or defraud any entity to which the insolvent party was indebted on or after the date the transfer or obligation was made, a liquidator may not avoid or set aside any transfer or payment of any kind incurred by the insolvent company and owing to the non-insolvent party under a netting agreement, on the grounds of preference, a transfer during a suspect period or an onerous contract by the insolvent company.

#### Voidable transactions

The 2009 act has now introduced a new test for 'voidable transactions'. The old 'ordinary course of business' test has now been substituted with a new test known as the 'running account principle'.

Under the new rules a transaction may be set aside by the court if the transaction was made within two years before commencement of the liquidation, if it was made when a company is unable to pay its due debts, and if it enabled the creditor to receive more than it would have in liquidation.

Under the new regime, where there is a 'continuing business relationship', the liquidator must look at all transactions as if they were a single

transaction. Section 313 of the new act clarifies this 'running account principle' as being "where, in the course of the relationship, the level of the debtor's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship".

#### Voidable charges

The act gives a broad definition of 'charge' taking into account and accepting all different types of security, including unregistered agreements whereby the debtor has agreed to give priority payment to a claim. Section 314 outlines how a charge may be set aside and states that a charge over any property may be set aside by the court if it was given within two years immediately prior to the commencement of a winding-up and immediately after the charge the company was unable to pay its due debts. This means that charges granted to a lender within two years are now vulnerable and those granted within six months of a winding-up order are presumed, unless the contrary is proved, to be made when the debtor is unable to pay its due debts.

#### Procedures to set aside a voidable transaction

It is now the liquidator that must commence proceedings to set aside a voidable transaction. Section 321 sets out the procedure, and to initiate this a liquidator must serve a notice in writing, specifying the voidable transaction to be set aside, describing property to be recovered and providing the person named in the notice with the opportunity to object within 28 days after the date of service.

If the named person has not objected the liquidator must serve a notice not later than five working days after the expiry of the 28-day time limit and the voidable transaction is set aside automatically. However, if the person objects the liquidator cannot set aside the transaction except by referring to the courts.

#### Conclusion

Financial institutions lending to Mauritius-incorporated entities in particular should consider incorporating the essential elements of 'statutory demand' in their acceleration notices etc to comply with the 2009 act and to ensure efficient and speedy enforcement in an event of default of a Mauritius borrower. ■  
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