

INTRODUCTION – THE LEGISLATIVE FRAMEWORK IN MAURITIUS

The Mauritian Parliament undertook an overhaul of the insolvency regime in 2009 by passing the Insolvency Act No. 3 of 2009 (the “Insolvency Act”). The model upon which the netting arrangements have been enacted under the Insolvency Act is based on the 2006 Model Netting Act by the International Swaps and Derivatives Association.

In order to give certainty as to which law would apply to transactions involving those intermediary-held securities which are also being used as collateral or guarantees in the derivative markets, the Mauritian Parliament has adopted the Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary (the PRIMA approach has been adopted).

RECOGNITION AND ENFORCEABILITY OF CLOSE-OUT NETTING AND SET-OFF PROVISIONS UNDER MAURITIAN LAW

QUALIFIED FINANCIAL CONTRACTS

The Insolvency Act creates a very flexible and business-friendly framework for Mauritius-incorporated counterparties wishing to enter into netting and collateral arrangements. Provisions relating to netting arrangements in qualified financial contracts are set out in Part V of the Insolvency Act which captures a very wide array of financial contracts, including, without limitation, swaps, futures, options, derivatives, securities contracts including a margin loan and an agreement to buy, sell, borrow or lend securities, collateral arrangements, commodities contracts, among others.

Further the Insolvency Act expressly provides that a qualified financial contract shall not be void or unenforceable by reason of being a contract of wager or gambling. This provision removes any prior doubt regarding the enforceability of netting arrangements in relation to wager contracts. This stems from earlier controversies arising in civil jurisdictions such as Mauritius in relation to agreements of a highly speculative nature, which agreements could be construed as contracts for gambling or wager, and therefore, unenforceable.

MUTUALITY IN DEALINGS: THE QUALIFIED FINANCIAL CONTRACTS EXCEPTION

Section 309 of the Insolvency Act provides that for set-off provisions to be effective in a contract, there has to be mutuality of dealings between the parties to such contract. However, Section 343 of the Insolvency Act allows for an express derogation from Section 309 relating to mutual credits and set-offs for netting agreements in qualified financial contracts.

In effect, Section 343 makes it clear that the provisions of a netting agreement for the determination of a net balance of the close-out values, market values, liquidation values or replacement values calculated in respect of accelerated and/or terminated payment or delivery obligations or entitlements under one or more qualified financial contracts will not be affected by the provisions of Section 309 limiting the exercise of rights to set off, offset or net out obligations, payment amounts or termination values owed between an insolvent party and another party.

Section 343 of the Insolvency Act therefore expressly overrides statutory set off as provided for in Section 309 and recognises contractual set off in netting agreements.

ACCELERATION PROVISIONS IN QUALIFIED FINANCIAL CONTRACTS

Any provision in a qualified financial contract that results in the acceleration and termination of a transaction upon a bankruptcy filing to terminate the transactions contemplated by such contract at any time is enforceable as per the terms of the qualified financial contract. It is irrelevant whether the bankruptcy default provision operates automatically or requires the non-defaulting party to give notice to the defaulting party; Mauritian law recognises either way of terminating automatically or contractually.

COLLATERAL ARRANGEMENTS UNDER QUALIFIED FINANCIAL CONTRACTS – THE POSITION IN THE INSOLVENCY OF THE COLLATERAL-PROVIDER

As a general rule under Mauritian law, any Mauritian company which is either insolvent or is about to go into insolvency may seek the protection of the Court by going into voluntary administration.

However, this general rule is displaced in the case of qualified financial contracts because section 339 of the Insolvency Act provides that the provisions of a netting agreement are enforceable in accordance with its terms, including against an insolvent party, and will not be stayed, avoided or otherwise limited by (a) any action of the liquidator; (b) any other enactment relating to bankruptcy, reorganisation, composition with creditors, receivership, conservatorship or any other insolvency proceeding to which the insolvent party may be subject; or (c) any other enactment that may be applicable to the insolvent party.

In addition, under section 346 of the Insolvency Act, unless otherwise agreed to by the parties and notwithstanding any other enactment, the realisation, appropriation and/ or liquidation of collateral under a collateral arrangement shall take effect or occur without any requirement that prior notice be given to, or consent be received from, any party, person or entity.

CROSS-BORDER INSOLVENCY

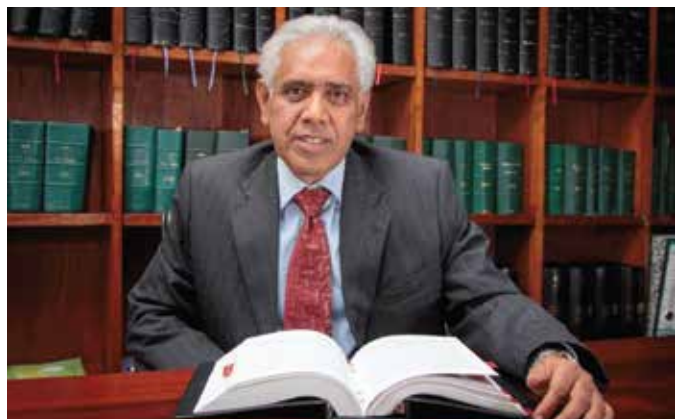
Mauritian law does not yet recognise cross-border insolvency. Therefore, if Mauritius-incorporated counterparty were to go into bankruptcy, insolvency, liquidation, administration or reorganization (including voluntary administration), it is doubtful whether, merely on account of the bankruptcy, insolvency, liquidation, administration or reorganization of such Mauritian counterparty, any foreign secured creditor would not be prevented from enforcing its security interest under a foreign jurisdiction if it so wishes. However, this is obviously subject to the views of counsel in the relevant jurisdiction where enforcement would be sought.

MADUN GUJADHUR CHAMBERS: DERIVATIVES / INSOLVENCY PRACTICE

Madun Gujadhur Chambers regularly advises international associations including the Futures and Options Association ("FOA") / FIA Europe ("FIA-E") from a Mauritius law perspective and provides netting and collateral opinions which are available to members of the FOA / FIA-E and updated on a regular basis. We are often asked to advise the leading financial institutions / investment banks / prime brokerage institutions on the enforceability of close-out netting and set-off provisions under ISDA and other standard form agreements (including prime brokerage agreements) against counterparties incorporated or registered in Mauritius. This typically involves an analysis of the extent to which the laws of Mauritius recognise the enforceability of such provisions in pre- and post-insolvency circumstances.

We would be delighted to discuss how Madun Gujadhur Chambers can help your clients access the various advantages of the Mauritius portal through the use of a Mauritius-incorporated vehicle as counterparty to a qualified financial contract.

About the authors:



MOORARI GUJADHUR

Moorari is the Head of Chambers at Madun Gujadhur Chambers. He specialises in all aspects of corporate/ commercial law with a strong track record in banking & finance, capital markets, investment funds and insolvency & restructuring. Moorari is regularly instructed for promoters and lenders, including international finance agencies and international investment banks, and works with many of the leading international law firms. Moorari is also acknowledged by peers as a key player in international arbitration matters.

Moorari holds a law degree from the University of Buckingham and has been called to the Bar of England and Wales and to the Bar of Mauritius.



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VITHIL DABEE

Vithil's practice has a strong focus on non-contentious banking and finance transactions, investment funds and insolvency/ restructuring matters. Vithil is regularly instructed for promoters and lenders, including the international investment banks and other global financial institutions, and works with many of the leading international law firms. He is also regularly involved in the provision of advice to fund managers and investors in relation to several investment funds.

Vithil holds a law degree from the University of Cambridge and has been called to the Bar of England and Wales and to the Bar of Mauritius. Prior to starting his career in Mauritius, Vithil trained and qualified as a solicitor with a magic circle law firm in London and was also seconded to the Paris office of the firm.



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