

# Banking & Finance Insights

*By BLC*

## Contents

- 2 APARTES
- 4 LEGISLATIVE UPDATES
- 5 5 THINGS TO KNOW
- 6 FAQs
- 6 COUNTRY UPDATES
- 7 OTHER RECENT PUBLICATIONS

Welcome to this inaugural edition of Banking & Finance Insights, a new BLC publication that seeks to address topical issues in the areas of banking and finance in Mauritius and globally.

The financial world continues to be marked by unprecedented changes ushered by economic forces, new players and products, with a parallel onslaught of financial regulation in the wake of recent events. We felt it was high time that there be a platform which addresses the legal specificities of this industry.

This newsletter shares the insights of erudite contributors on live topics; we are honoured that learned Professor Philip R Wood CBE, QC (Hon) has accepted to associate himself with us for this first edition with his outlooks on the challenges of providing collateral in the context of global transactions.

The Mauritius Parliament has also been very active for the past months and brought a number of landmark changes with the Finance Act 2015. We will give you an overview of the main legislative amendments affecting the banking and finance area in Mauritius and a snapshot of the market developments.

Finally, we have provided some exclusive features which aim to provide practical legal information which we think would help in streamlining deals having Mauritius law elements.

Wishing you an enjoyable reading.

This newsletter contains information about banking and finance. It is intended to provide a brief overview of the topics with which it deals and does not necessarily cover every aspect of these topics. The information is not advice, and should not be treated as such. You must not rely on the information in this newsletter as an alternative to legal advice from an appropriately qualified professional. If you have any specific questions about any legal matter covered in this publication please consult us. You should never delay seeking legal advice, disregard legal advice, or commence or discontinue any legal action because of information in this newsletter.



## APARTES

### with Professor Philip R Wood CBE, QC (Hon)\*

#### Uncitral Guide On Secured Transactions

The intricacies of taking security in cross-border and global transactions are the subject of ceaseless discussions both between practitioners and academics in many jurisdictions. In some instances debate has prompted extensive, and in others, limited reforms in this area. For a couple of years now Mauritius has been thinking of reforming the law applicable to secured transactions, which is founded in the Mauritius Code Civil and the Code de Commerce, themselves built on the Napoleonic codes.

In issuing a reform paper on Secured Transactions Reform in 2013, the Mauritius Law Reform Commission considered, amongst other things, the 2006 French Reform, the World Bank technical reports, the Article 9 of the American Uniform Commercial Code, Personal Property Acts, the 2007 United Nations Commission on International Trade Law (UNCITRAL) guide on secured transactions and the OHADA Acte Uniforme Révisé. However no amendment to the legislation is yet in the pipeline.

The Mauritius Law Reform Commission's 2013 paper was part of the discussions during the April 2015 seminar on the Droit du contrat et des suretes dans l'Océan Indien organised by the Mauritius Institute for Judicial and Legal Studies under the aegis of l'Association Henri Capitant, the Centre de Recherche Juridique de Reunion Island and the French Institut de Recherche en Droit des Affaires.

We have asked Prof. Philip R Wood CBE, QC (Hon) his views on how the 2007 UNCITRAL Guide on Secured Transactions (UNCITRAL Guide) could assist in the modernisation of Mauritius secured transactions law (see note).

#### Speaking of a reform of Mauritius laws on secured transactions, is the UNCITRAL Guide a relevant option?

**Prof. Wood:** *There is no question that it is worth Mauritius thinking about the Uncitral Guide on secured transactions, particularly having regard to the exceptionally important role played by Mauritius in international legal contracts and the fact that it is a model for many other countries. Generally speaking, in principle, it is worth upgrading security interests to a more streamlined version if the local regime is limited, as it is in many jurisdictions originally based on the Napoleonic regime.*

#### What are the key aspects of the UNCITRAL Guide that would commend themselves to Mauritius?

**Prof. Wood:** *There are some sensible and commendable aspects of Uncitral Guide including the fact that it contemplates that a debtor can create security over all its present and future assets universally, that the security can secure all present and future obligations, that enforcement is self-help and that there is minimal formality. The Uncitral Guide is based on article 9 of the US Commercial Code and versions have been adopted elsewhere, e.g. in Australia, New Zealand, most Canadian provinces and Jersey, at least.*

#### Why do you think that only few jurisdictions have adopted the UNCITRAL Guide up to now?

**Prof. Wood:** *Article 9 was drafted in the 1940s at a time when security interests in most US states, including New York, were extremely weak and nothing approaching the scope and simplicity of the English universal security interest. In some ways article 9 is a creature of its times and it was hard to change because so many states had accepted it. This version extends to various transactions which are not core security interests such as financial leases, hire purchase and retention of title so that the more restrictive rules applicable to security interests apply to these transactions as well. The question is not whether the quasi-security title finance transactions are like security, which they often are, but rather whether the overall regime should be restrictive or liberal.*

*In addition, article 9 is in my view too complicated in dealing separately with so many different assets including very complex priority rules when it should now be possible to produce a statute which would be much simpler.*

**“in principle, it is worth upgrading security interests to a more streamlined version”**

*More generally, there is a degree of bureaucracy in enforcement, there are restrictions on assignment and the UNCITRAL Guide excludes from its scope many assets which again could be covered by general state, including land.*

## How does the UNCITRAL Guide tackle enforcement of security rights in insolvency?

**Prof. Wood:** *The compulsory reference to the law of the state where insolvency proceedings are opened is tight and the rules about the impact on insolvency follow the pro debtor chapter 11 style, e.g. freezes on enforcement and the neutralising of contract termination clauses.*

## In conclusion, is the UNCITRAL Guide flexible enough for Mauritius?

**Prof. Wood:** *If Mauritius adopts these provisions, then it would be necessary to have carve-outs for the financial sector, which would increase the international complexity.*

Note: The 2007 Guide was adopted by the General Assembly of the member's states on 11 December 2008, to promote low-cost credit by enhancing the availability of secured credit. To assist States in modernizing their secured transactions laws, the Guide contains recommendations on all issues that need to be addressed in a modern law on security rights in all types of movable asset.

The Guide is based on the concept of "security right" which is wider than the "security interests" to include all types of right in movable property created by agreements to secure payment or other performance of an obligation. It captures transactions secured by arrangements tending to be used as security such as retention-of-title sales, financial leases, transfers of goods and assignments of receivables for security purposes and some aspects of outright assignment of receivables by way of security.

Some of the objectives of the Guide are:

- To enable parties to obtain security rights in a simple and efficient manner.
- To enhance certainty and transparency by providing for registration of a notice of a security right in a general security rights registry.
- To establish clear and predictable priority rules.
- To facilitate efficient enforcement of a secured creditor's rights.
- To harmonise secured transactions laws, including conflict-of-laws rules relating to secured transactions.

## US Foreign Accounts Tax Compliance Act (FATCA)

What are do you think about the global application of FATCA?  
- The extraterritorial scope of this US tax gathering exercise is quite breath-taking and the costs are largely borne by foreign financial institutions. The problem mainly arises because the US is one of the few countries which charges income tax on the basis of US citizenship as opposed to domicile or residence. Some commentators have said that the increased tax take would not be very large. Banking secrecy is almost a thing of the past in many countries.

## Administration And Other Business Rescue Procedures

### How successful are rescue procedures?

It is probably the case that virtually all advanced jurisdictions have got a version of a rehabilitation statute (except Hong Kong) and a great many emerging jurisdictions do as well. One of the main uses of the statutes is for pre-packagings whereby the court rubber-stamps a private workout. More than 90% of financial difficulties are resolved by private workouts and there is no question in my view that these are by far the best and economical solution. The real difference between jurisdictions lies mainly in the degree of intensity of the stays on creditors which in turn reveals whether or not the jurisdiction protects creditors or debtors. Creditors are typically banks who carry the savings of the people so that protecting creditors is largely in substance a protection for the savings of the citizen. In the application of a rescue statute of this type, Mauritius should pay particular caution with regard to stays on the enforcement of security and I certainly do not favour stays on contract terminations or on set-off.

\*Acknowledgment: Special thanks to Prof. Wood for his support, time and contribution to this Newsletter.



*Philip R Wood CBE, QC (Hon) is Special Global Counsel at Allen & Overy LLP. He heads the Allen & Overy Global Law Intelligence Unit. Professor Wood is a Visiting Professor of International Financial Law at the University of Oxford. He is Yorke Distinguished Visiting Fellow at the University of Cambridge and Visiting Professor at Queen Mary College, University of London*



## LEGISLATIVE UPDATES

In implementing its first budget since the 2014 general elections, Parliament passed the Finance Act 2015 which amends various statutes, including:

- the Banking Act 2004;
- the Bank of Mauritius Act 2004;
- the Borrowers Protection Act 2007; and
- the Income Tax Act 1995.

### Banking Act 2004

#### Exemptions from moneylender licence

Up until December 2013, the activity of moneylending in Mauritius by entities not specifically licensed as Mauritian banks under the Banking Act 2004 (BA) was governed by the Moneylenders Act 1960 (MLA). The MLA was repealed on 21 December 2013 and certain licensing requirements for moneylenders were moved under the BA.

Under the MLA, foreign lenders were expressly exempted from the licensing requirements but these provisions were not transposed with the same clarity in the BA.

The Finance Act 2015 adopted in May 2015 brought amendments to the BA clarifying the scope of the moneylender's licence. In a new schedule 4, the BA provides an exhaustive list of persons exempted from moneylender's licence, amongst which:

- a) A banker, an insurer or an institution not conducting lending as its primary object but as an incidental activity.
- b) A body corporate, incorporated and expressly empowered, or any other person expressly empowered, by any other enactment to lend money.

- c) An organisation whose operations are of an international character and which is approved by the Minister.
- d) A specialised financial institution licensed by the central bank to engage in lending activities.
- e) A person licensed under the Financial Services Act 2007.
- f) Any trustee in the exercise of his functions under the Trusts Act 2001.

These exemptions dissipate creeping uncertainties further to the abrogation of the MLA that foreign banks, foreign financial institutions, funds and holders of global business licences under the Financial Services Act 2007 needed a licence to lend to Mauritian or foreign entities.

However, these new provisions open the debate regarding the need for a licence for intra-group lending between domestic holding companies and their subsidiaries and the overlap, if any, with the treasury management licence issued by the Financial Services Commission.

The Bank of Mauritius has not yet issued any guideline or circular on the exact scope of application of the exemptions.

#### Specialised financial institution

In light of the Government's target to position the small and medium enterprise sector as a significant pillar of the economy, the Banking Act 2004 has been amended to enable the setting up of a new type of entity: the specialised financial institution. This entity will be regulated by the Bank of Mauritius and we await guidance from the Bank of Mauritius setting out the regulatory framework in respect of its implementation.

### Bank of Mauritius Act 2004

#### Payment systems

The Bank of Mauritius Act 2004 has been amended such that the regulation of payment systems and payment scheme providers now falls within the regulatory scope of the Bank of Mauritius.

Regulation in this area prior to the amendment was fragmented, with the Bank of Mauritius overseeing the management of payment systems and clearing houses being regulated by the Securities Act 2005 and, in the case of the Central Depository & Settlement Co. Ltd which clears transactions of the country's primary exchange, The Securities (Central Depository, Clearing and Settlement) Act 1996. The amendment to the Bank of Mauritius Act 2004 thus results in a consolidated approach with the Bank of Mauritius being responsible for regulating, licensing, registration and overseeing of payment systems, clearing houses and the issuance of payment instruments.

At this stage, we await detailed regulations intended to set out the mechanics in relation to the amendments.

## Borrowers Protection Act 2007

### Due diligence of guarantors

All loans granted for a sum not exceeding MUR 2,000,000 are subject to a distinct set of rules intended under by the Borrowers Protection Act 2007 to protect consumers.

In the 2014 case of *Bramer Banking Corporation Ltd v Garrioch A M V & Anor* 2014 SCJ 127, the Supreme Court of Mauritius ruled that it is the responsibility of the principal debtor to bring to the lender a guarantor who has the capacity to contract and who holds property sufficient to discharge the obligations contracted. The Supreme Court reiterated that the lender is under no obligation to ensure that a guarantor has capacity to contract and sufficient assets to discharge the obligations being secured.

The amendments to the Borrowers Protection Act reverse the Supreme Court's decision and now require that the lender perform appropriate due diligence on the debt repayment capacity of the guarantor in addition to that of the principal debtor.

## Income Tax Act 1995

### Levy on banks

The Income Tax Act 1995 has been amended to introduce a special levy on banks regulated by the Bank of Mauritius.

As from 1st July 2015 and until June 2018, each bank must pay a levy amounting to 3.4 % of book profit and 1% of operating income on its income derived from banking transactions with non-residents and entities holding a Global Business Licence issued by the Financial Services Commission of Mauritius. Additionally, each bank shall pay a levy of 10% on the chargeable income derived from sources other than those listed above.

As from July 2018, each bank shall pay a levy of 1.7% on book profit and 0.5% on operating profit.



## 5 THINGS TO KNOW ON SHARE PLEDGES

### Taking a pledge over shares issued by a Mauritian company

Under Mauritian laws, a pledge is the actual or constructive delivery of possession of an asset by way of security. The principles are derived from French law. Below are 5 things you should bear in mind when take a pledge over shares issued by a Mauritian company:

**1. Applicable law** Private international law of security interest would guide that the law applicable to a share pledge is the law governing the shares i.e. the law of the jurisdiction of incorporation of the issuer of the shares. Following this principle, a pledge over shares issued by a Mauritian company should be governed by Mauritian laws, this will ensure that the security is properly created, perfected and will be directly enforceable.

**2. Several legal regimes** There are different regimes of share pledges available under Mauritian law which would offer more or less flexibility to the parties depending on the status of the beneficiary (bank under the Banking Act 2004, a financial institution), the nature of the transaction which is secured (civil or commercial) or the status of the issuer of the shares (a company holding a licence from the Financial Services Commission).

**3. Status of the grantor** The grantor does not have to be a principal debtor.

**4. No registration** There is no need to register a share pledge with the Registrar General for its validity and enforceability in Mauritius. Registration remains an option for other reasons.

**5. Release** Upon discharge of the secured obligation, the release of the security is straight-forward and does not require additional formalities or filings to be effective.

## FREQUENTLY ASKED QUESTIONS

### Tax and interests in lending transactions

**Will a borrower based in Mauritius have to deduct amounts from withholding tax on interest payments made to an overseas lender?**

No, there is currently no withholding tax on interest payments made by a Mauritian borrower to a foreign lender.

**Is there any limit on the level of interest that can be charged on loans in Mauritius?**

There is no concept of criminal or usurious interest rate under Mauritian law. However, the courts may revise an agreement if

it considers that the lender has abused its position or rights in imposing a rate of interest which would be seen as unfair. This determination is made on a case by case basis. Whilst default interest can be imposed, penalty interest can be declared as void and unenforceable where the courts determine that the lender has abused its position.

**Does the taking of security in Mauritius result in a lender being liable to tax in Mauritius?**

No, taking of security in Mauritius by a foreign lender will not by itself cause the lender to be liable to tax in Mauritius. However, some expenses in the form of registration fees, stamp duties or other similar taxes may be incurred in connection with registration and enforcement of some security interests.



### E-Registry: on-line registration a reality!

Having completed the first phase of the Mauritius eRegistry Project, the Registrar General and Conservator of Mortgages is now embarking on implementing the next phase which will witness its services moving onto an electronic platform. From this platform, and upon the completion of the final phase of the Mauritius eRegistry Project, interested parties will be able to submit documents creating security interests such as mortgages or fixed and floating charges and other documents to be registered for inscription and/or registration.

### South Africa and Mauritius amend the double taxation convention

The revised Double Taxation Avoidance Agreement between South Africa and Mauritius will be effective as from 1st January 2016 following the memorandum of understanding between the two countries on 22nd May 2015.

## COUNTRY UPDATES

### India and Mauritius agree to a new protocol in respect of the Double Taxation Avoidance Convention between the two countries

Following the last session of the Joint Working Group on the Double Taxation Avoidance Convention between India and Mauritius held in June 2015, the Government of India and the Government of Mauritius have agreed to a protocol amending the Double Taxation Avoidance Convention. The players of the Mauritian global business industry have engaged in dialogue with various ministries of the Government of Mauritius to better understand the impact of the changes proposed on the global business sector.

### Creation of the Ministry of Financial Services, Good Governance and Institutional Reforms

The cabinet appointments following the 2014 general elections saw a reallocation of various ministerial portfolios resulting in the creation of the Ministry of Financial Services, Good Governance and Institutional Reforms. In light of this, the Financial Services Commission has been removed from the administrative control of the Ministry of Finance and Economic Development and is now overseen by the Ministry of Financial Services, Good Governance and Institutional Reforms.

## Tax information exchange with Austria

On the 10th March 2015, Mauritius and Austria signed a Tax Information Exchange Agreement. With this new bilateral agreement, Austria and Mauritius are set to embark on new avenues of economic cooperation with the facilitation of investments and trade within a framework of exchange of information between the respective tax authorities.

## OECD Mutual Convention on Mutual Administrative Assistance in Tax Matter

On the 23rd June 2015, Mauritius signed the Mutual Convention on Mutual Assistance in Tax Matters (Convention) with the Organisation for Economic Cooperation and Development (OECD). It is the seventh member of the African Tax Administration Forum to join the Convention and becomes the 87th jurisdiction participating to this global instrument to fight international tax avoidance and evasion.

---

## OTHER RECENT PUBLICATIONS

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

### **BLC Locus (July 2015) - Investment Promotion**

[http://www.icontact-archive.com/zvi55WNmFZrBGhyccEc\\_ZLwTe4Uu6B32?w=3](http://www.icontact-archive.com/zvi55WNmFZrBGhyccEc_ZLwTe4Uu6B32?w=3)

### **Mauritius Privy Council judgements**

<http://www.iflr.com/Article/3420350/IFLR-magazine/Mauritius-Privy-Council-judgments.html>

### **Mauritius in favour of arbitration**

<http://www.iflr.com/Article/3439499/IFLR-magazine/Mauritius-In-favour-of-arbitration.html>

### **Mauritius Budget 2015-2016**

<http://www.iflr.com/Article/3447526/IFLR-magazine/Mauritius-Budget-2015-2016.html>

### **Mauritius Privy Council upholds FSC decision**

<http://www.iflr.com/Article/3455879/IFLR-magazine/Mauritius-Privy-Council-upholds-FSC-decision.html>

### **Eyes on the Money**

<http://www.africalegalnetwork.com/wp-content/uploads/2014/12/Eyes-on-the-Money.pdf>

# BANKING & FINANCE CONTACTS

For any query on this newsletter please contact:

## **Iqbal Rajahbalee**

Managing Partner  
iqbal.r@blc.mu

## **Valerie Bisasur**

Senior Associate  
valerie.bisasur@blc.mu

## **Shane Mungur**

Legal Executive  
shane.mungur@blc.mu

## **Telephone**

(+230) 403 2400  
(+230) 403 2401

## **Address**

2nd Floor, The Axis,  
26 Bank Street, Cybercity  
Ebène, 72201, Mauritius

## **Website**

[www.blc.mu](http://www.blc.mu)



BOTSWANA | BURUNDI | ETHIOPIA | KENYA | MALAWI | MAURITIUS | NIGERIA | RWANDA | SUDAN | TANZANIA | UGANDA | ZAMBIA

In Association with **HARNEYS**

BLC Chambers BRN: C07059923. BLC Chambers is a member of ALN, a network of independent leading law firms in Africa. ALN is affiliated with Anjarwalla Collins & Haidermota. For more information on ALN visit [www.africalegalnetwork.com](http://www.africalegalnetwork.com). Harneys is a British Virgin Islands, Cayman Islands, Cyprus and Anguilla law firm and is not a member of ALN.

**BLC has been rated as a Band 1 Firm by Chambers and Partners and as a Top Tier law firm by the IFLR**

This newsletter contains information about banking and finance. It is intended to provide a brief overview of the topics with which it deals and does not necessarily cover every aspect of these topics. The information is not advice, and should not be treated as such. You must not rely on the information in this newsletter as an alternative to legal advice from an appropriately qualified professional. If you have any specific questions about any legal matter covered in this publication please consult us.

You should never delay seeking legal advice, disregard legal advice, or commence or discontinue any legal action because of information in this newsletter.