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A CORPORATIVE OVERVIEW OF THE CORPORATE RESCUE CULTURE IN MAURITIUS

Roopanand Mahadew

[1](*University of Mauritius*)

Abstract: The article assesses the corporate rescue culture in Mauritius from a comparative perspective using the UK and US legal frameworks on insolvency. The particular focus is on administration as a mode of corporate rescue. The existing laws relevant to the subject matter in Mauritius is examined and critically analysed in line with what exists under the corresponding legal framework in the two mentioned case studies. This comparative assessment results in recommendations and lessons learnt for the corporate rescue culture of Mauritius.

Keywords: Corporate rescue, Mauritius, Corporate Law, Bankruptcy, Administration
Research Area: Corporate law
Paper Type: Research Paper

1. INTRODUCTION

The aim of any corporate body is to generate profit and expand its activities to reach new corporate heights. However, very often, due to various reasons, sometimes within and sometimes outside the control of the corporate bodies, they find themselves in financial difficulties with the danger of bankruptcy constantly looming. Indeed, Murray (2019) states that according to the American Bankruptcy Institute, 26,000 businesses have gone bankrupt from 2013 to 2017 in the US. This is also a concern in the Uk (Fransk and Sussman, 2000). It is against this harsh reality that the concept of corporate rescue has become essential and instrumental towards the success of corporate bodies. The rescue culture is, therefore, a critical aspect of the law of insolvency in general. It normally consists of formal and informal measures, including legal methods such as administration and comprises for the former and managerial actions, corporate reorganisation and governance for the latter (Translegal, 2019).

There has been an abundance of literature on corporate rescue as an academic subject matter which is worthy of a brief consideration here. According to Finch (2012), rescue procedures in corporate insolvency means going beyond day-to-day managerial responses to corporate troubles and it is seen as a major intervention necessary to avoid an eventual failure of the company. The main aim of corporate rescue is to provide for an alternative to a financially ailing but economically viable company (Law Teacher, 2018). Kharbanda and Stallworthy (1988) have defined rescue culture as the process of *strategies for rescuing companies in distress*. According to Rajak (1987) rescue includes 'more advantageous realisation of assets than would be available on liquidation'. Finch (2009) has also stated that 'the drastic actions that rescue necessarily involve will almost inevitably entail changes in the management, financing, staffing or the modus operandi of the company'. The main aim of the rescue culture is, therefore, to freeze the enforcement of creditors' claims for a defend period and to enable the company in question to recover from temporary cash flow hardships.

The rescue culture has become a cornerstone of insolvency law regime across the world, particularly driven by the Cork Committee in the UK which was tasked with studying and recommending ways to rescue companies in financial difficulties in 1977 (Omar, 2013). Mauritius has also been influenced by this significant change and it today has its legal regime on corporate rescue, hugely inspired by the UK but with its own specificities customised to

its own reality. The aim of this article is, therefore, to critically compare and analyse the corporate rescue legal regime against the ones existing in the UK and US. The article proceeds with the different types of formal and informal measures that exist in Mauritius towards the rescue cultures in a comparative fashion with the US and UK as case studies. For each measure, a critical comparison is proposed before the article is concluded with a series of recommendations.

2. ADMINISTRATION

Administration of a corporate body as a form of corporate rescue is considered as a formal measure. The Insolvency Act 2009 is the main law that provides for the legal framework on administration. Article 213 clearly stipulates the objectives of administration which is to provide to companies in hardships to continue to exist or, if existence is not possible, to result in a better return for the company's creditors and shareholders than would result from the immediate winding up of the company. It is clear from the definition that the Mauritian law on administration does adopt a positive and constructive approach towards the rescue culture. It emphasises on the effort to allow a company to exist and also takes into consideration the interest of creditors and shareholders.

In the UK, the administration is regulated by Schedule B1 of the Insolvency Act 1986 which has been updated by the Enterprise Act 2002 (Armour and Mokal: 2004). While the Mauritian provision on the objective of administration is considerably similar to the British one, section 3 of the Schedule B1 provides for one additional purpose of administration which is missing from the Mauritian one - that purpose is to realise property in order to make a distribution to one or more secured or preferential creditors. Another major difference between the law in Mauritius and UK is that the latter lays much emphasis on the way the administrator must realise its duties with section 4 clearly stating that the administrator of a company must perform his functions as quickly and efficiently as is reasonably practicable. Section 4(b) also imposes an obligation on the administrator to refrain from harming the interests of creditors of the company under administration.

There is no doubt that an administrator under Mauritian law will also be compelled to perform his duties in the same way as the one in the UK. However, in Mauritius, the source of the law for the way in which the administrator has to perform would be coming from case law or from principles and theories of insolvency law such as fiduciary duties and duties of skill and care as indicated by the Supreme Court of South Australia in the case of Macks v Viscariello in 2017 citing the High Court of Australia decision of Spies v The Queen 2000. However, it is argued that providing for the ways in which the administrator must perform directly in the main law itself has the more probative force and does not depend on the interpretation of courts in an indirect and sometimes subjective manner. This no doubt brings more consistency and clarity in the law. This is, therefore, an area in which the Mauritian law on the rescue culture may draw lessons and inspiration from the corresponding British Law.

In the US, rescue proceedings of corporate bodies are regulated by Chapter 11 of the US Bankruptcy Code (McCormack, 2008: 515). The major difference between, on one hand, US and, on the other hand, UK and Mauritius is that in the US there is no requirement of proving insolvency in order for a company to undergo rescue procedures under Chapter 11 of the Bankruptcy Code. The UK uses the insolvency or likelihood of insolvency condition to trigger and invoke the procedure of administration. Section 11 of the Schedule B1 of the Insolvency Act 1986 provides that an administration order may be made by the court only if it is satisfied that the company is unable or likely to become unable to repay its debts as upheld in the case of Highberry Limited v Colt Telecom Group plc (2002). In Mauritius, a

company may appoint an administrator only if the director resolve that the company is insolvent as per section 162 of the Companies Act 2001 and Section 215(6) of the Insolvency Act 2009. It is argued that the US legislation on administration is more progressive compared to the UK and Mauritius as it provides for the possibility of administration without the condition of insolvency of the company to be compulsorily present.

2.1 Qualifications and appointment of administrator

Qualifications and appointment of an administrator are regulated by Section 215 of the Insolvency Act 2009 in Mauritius. In essence, a person will qualify to act as an administrator if (1) he is a natural person (2) he is not disqualified to act as a liquidator (3) he is a qualified insolvency practitioner. According to section 215(3), the person appointed as an administrator must consent to his appointment in writing and file the same to the Registrar of Companies. The corresponding UK provisions are to be found from sections 6 to 9 of the Insolvency Act 1986 of UK and it is more or less similar to the Mauritian legal provisions on the matter with the exception of the additional mentioned criteria of the administrator being a natural person in Mauritian law. As for the US, it is interesting to note that there is no administrator appointed under the US Bankruptcy Code. Chapter 11 of the Code only provides for the appointment of a trustee or an examiner for the purpose of 'conducting an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or any other irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if such appointment is in the interest of creditors, equity security holders and other interests of the estate or if the debtor's fixed, liquidated, unsecured debts other than debts for goods, services, or taxes or owing to an insider exceed $5 million'. It has to be noted that the regime in the US is significantly different compared to Mauritius and UK with the absence of the concept of administrator and the use of the concept of trustee and examiner instead.

Under section 215 of the Insolvency Act 2009 of Mauritius, an administrator may be appointed by (1) the company where the director resolve that the company is insolvent (2) by a secured creditor holding a charge over the company's property and when the charge becomes enforceable (3) the court after appreciating that the company is insolvent and that its survival can be achieved by administration in a more advantageous way as compared to an immediate winding up. It is noted that under Mauritian law, unsecured creditors are allowed to appoint an administrator which is contrary to the Indian insolvency law namely the Indian Companies Act 2013. This is similar to what is provided under both UK and US law. Indeed, under UK law, any creditor can apply to the court for an administration under section 12 of the Insolvency Act 1986. In the US, a Chapter 11 proceeding may be commenced by three or more entities which are either the holders of a claim against the company or the subject of a bona fide dispute against the company. This encourages financing of companies by unsecured creditors also since they are guaranteed a course of action in appointing an administrator through the court. This is in line with international practice in favour of permitting even unsecured creditors to file for the initiation of rescue proceedings in relation to the company (Interim Report of The Bankruptcy Law Reform, 2015).

It is also important to highlight that under UK law, it is not allowed to appoint an administrator of a company which effects or carries out contracts of insurance under section 9(2) of Schedule B1 of the Insolvency Act 1986. However, this is in contract with Mauritian law which allows for it after amendment brought to the Insurance Act 2005. Accordingly, if the liabilities of an insurance company in Mauritius exceeds its assets by at least one billion rupees, the Minister of Financial Services may request for the appointment of an

administrator. The administrator appointed under the Insurance Act 2005 has the same power as the one appointed under the Insolvency Act.

2.2 Removal of administrator

According to section 219 of the Insolvency Act 2009, an administrator may be removed or may cease to hold office on (1) resignation by written notice delivered to the company and his appointer (2) disqualification of the administrator in case of bankruptcy or conviction by any corporate acts (3) removal by courts on application of a creditor or Director of Insolvency and (4) removal by creditors further to a resolution passed at the creditors' meeting which also must compulsorily appoint another administrator. It is noted that under UK law, the resignation of administrator is not at direct and straightforward as under Mauritian law. Section 219(1) provides that the administrator may resign by giving written notice as mentioned above. In contrast to this, section 87 of the UK Insolvency Act 1986, an administrator may resign only in prescribed circumstances whereby another administrator has already been appointed. This is a good measure as it allows for the continuation of the rescue process and discourages potential administrators to leave when they feel that their task is becoming more and more challenging.

2.3. Duties of administrator

The duties of an administrator are, in essence, to be found from section 222 to section 237 of the Insolvency Act 2009. These duties can be synthesised as follows: (1) to file an account of the administrator's receipts and payments with the Director of Insolvency 6 months after his appointment and for every 6 months period afterwards (2) Investigate the financial affairs of the company and opine on whether it is in the best interest of creditors to execute a deed of companies arrangement (3) report an commission of an offence of dishonesty, negligence, breach of duty or trust in respect of the company's affairs by a past or present director or shareholder (4) call for creditors meeting in respect to the appointment of a committee of inspection (5) call for a watershed meeting within 28 days of the date of commencement of administration. It is noted that similar provisions do exist in the UK Insolvency Act 1986 regarding the above-mentioned duties of administrators as provided for from sections 49 to 58.

Administrators under both the UK and the Mauritian Insolvency Act do enjoy extensive powers. Indeed, according to section 223 of the Mauritian Insolvency Act 2009, the extensiveness of the power is evidenced by the following wordings (1) begin, continue, discontinue and defend legal proceedings (2) carry on, to the extent necessary for the administration, the business of the company (3) appoint an agent to do anything that the administrator is unable to do. However, the corresponding provision from the UK Insolvency Act 1986 seems to be more general and encompassing. In fact, section 59(1) provides that 'the administrator of a company may do anything necessary or expedient for the management of the affairs, business and property of the company'. It is argued that the nature of this provision can be both a positive and a negative aspect. It is positive and encompassing in the sense that it allows for the administrator to conduct any task and activity that is necessary for the company during the administration. The administrator is thus not bound by a limited provision as is the case under section 223 of the Mauritian Insolvency Act 2009. On the contrary, it may prove to be negative as it allows for leeway in terms of what the administrator is allowed to do. Sometimes, it may become challenging to assess whether a particular task or undertaking was genuinely necessary to be done by the administrator.

In contrast to UK and Mauritius, US Bankruptcy Code tends to focus more on the functions of the trustee or examiner (since there is no concept of an administrator under US

law of insolvency) rather than powers. Indeed, section 1106 of Chapter 11 of the Bankruptcy Code provides that the trustee shall file a statement of any investigation conducted under paragraph (3) of this subsection including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate.

2.4 Effects of administration

The effect of administration under Mauritian law is particularly focused on the directors (section 224), employees (section 225), the company's property (section 226) and its shares (section 227). Section 224 provides that, while directors are not removed from office under administration, they are only allowed to exercise their powers after the prior written consent of the administrator. The same section also requires the directors to provide to the administrator a written statement concerning the affairs of the company within 7 days of the commencement of administration. This is similar to section 64 of the UK Insolvency Act 1986 which provides that a company in administration or an officer of a company in administration may not exercise a management power without the administrator‘s consent. It has to be noted here that the Mauritian law requires express and written consent of the administrator for the director to act whereas the British law mentions ‘without consent’ without specificity the nature of the consent. This is certainly an added value of the Mauritian law on this specific matter. It is indeed easier to prove that consent was or was not given if a written statement is required as compared to an oral consent which may be difficult to prove in case of a dispute. Another difference between the two legal regimes is that the UK one explicitly confers the power of administrator to remove a director as per section 61 of the UK Insolvency Act 1986. Such direct power is not conferred to the administrator under Mauritian law.

In terms of the effect of administration on employees, the Insolvency Act 1986 of UK is silent over the matter. In contrast and rightly so, the Mauritian Insolvency Act 2009 dedicates a detailed section on the effect on employees. Section 225 provides that (1) appointment of administrator does not automatically terminate an employment agreement (2) the administrator is not personally liable for any obligation of the company under the employment contract (3) the administrator is personally liable for the payment of wages and salary of the employee during the period of administration. It has to be agreed that one of the stakeholders that are most affected by a company on the verge of closing down is workers and employees. It is refreshing to see that the Mauritian law has provided for parameters regulating the relationship between the administrator and the employees.

In relation to properties of the company, section 226 in Mauritius provides that no dealing which involves the property of the company is valid unless done with the approval of the administrator. In addition, no one can enforce a charge over the property of the company with the approval of the administrator. The way section 226 has been drafted highlights more the necessity for the approval of the administrator when other persons are dealing with the property of the company. Again, this is in contrast with section 68 of the UK Insolvency Act 1986 which simply provides that the administrator of a company shall manage its affairs, business and property. Even though it is implicit from the section that the approval of the administrator would be required, the corresponding Mauritian provision is more explicit and direct on the question of approval of administrator pertaining to the properties of the company.

2.5 End of administration

Under Mauritian insolvency law, the instances during which an administrator may come to an end are as follows: (1) No watershed meeting held within 28 days of appointment of administrator (2) if creditors decide that administration should be ended (3) If the court appoints a liquidator (4) When a Deed of Company Arrangement (DOCA) is executed. At the outset, it is noted that the Insolvency Act 2009 does not dedicate a specific sub-part to the subject of end of administration unlike the UK law. Indeed, the UK Insolvency Act 1986 dedicates section 76 to 86 exclusively on the end of the administration. It provides for (1) automatic end of administration (2) Court ending administration on application of administrator (3) termination of administration where objective achieved (4) court ending administration on application of a creditor. This enhances the clarity in the law and allows for adjudication which is harmonised.

3. COMPROMISE WITH CREDITORS

A compromise is an arrangement made between one or more credits and it involves an agreement between a borrower and a creditor in which it is accepted by the latter that an amount less than that borrowed will be returned to him since the company of the borrower is in financial difficulties (Financial Industry Regulatory Authority, 2013). Compromise with creditors is considered as a formal measure under the rescue culture and it is a method which is quite popular in other countries such as UK, New Zealand and US. In South Africa, procedural and substantive aspects of compromise were elaborately explained in the case of The Commissioner of South African Revenue Services v Logikal Consulting (Pty) Ltd and others.

It is the Companies Act 2001 that regulates this procedure in Mauritius. According to Section 253 of the Companies Act 2001, a compromise has the effect of (1) cancelling all or part of a debt of the company (2) varying the rights of its creditors or the terms of a debt (3) relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt. Further, section 254 provides for the lists of persons who may propose a compromise which includes (1) the Board of directors of the company (2) a receiver appointed in relation to the whole or substantially the whole of the assets and undertaking of the company (3) a liquidator of the company (4) with the leave of the Court, any creditor or shareholder of the company. The proponent of a compromise has the legal obligation to compile a list of creditors who would be affected by the compromise, setting out (1) the amount owing or estimated to be owing to each of them and (2) the number of votes which each of them is entitled to cast on a resolution approving the compromise according to section 255 of the Companies Act 2001. It is noted that the approval of all concerned creditors is mandatory for the compromise to be valid and binding. Compromise seems to have its own advantages in the sense that it is a 'win-win' situation and it is less costly to the company compared to having to appoint an administrator as another rescue method. It is also a procedure which has the flexibility and ease of operation while also being multilateral and transparent (Walker, 2009: 17-19).

While compromise with creditors does exist under UK law, it is not as explicitly explained in the Companies Act 2006 of UK as compared to the Mauritian one. Section 899 provides only one direct section on the matter entitled 'court sanction for compromise arrangement'. Similar to Mauritius, the company, a creditor or member of the company and the liquidator or administrator may make such an application for a compromise. One major difference is that under UK law, an administrator is allowed to propose a compromise which is not the case in Mauritius and in Mauritius a receiver is allowed to propose a compromise

which is not the case in the UK. In addition, with regard to the approval of a compromise by creditors, the Mauritian law only refers to approval by a majority in value present at the creditors meeting whereas the Companies Act 2006 of UK clearly mentions 'a majority in number representing 75% in value'.

In the US, insolvent companies are not required to file for protection under the U.S. Bankruptcy Code. Companies can attempt to restructure their obligations, the operations and their contracts "informally" by direct negotiation with creditors. These informal insolvency proceedings are known as "work-outs" and often result in a "forbearance" agreement, which is a contract between the insolvent company and its creditors. There can be separate 'forbearance" agreements, for example, one for secured lenders and one for unsecured creditors (Association of International Credit and Trade Finance Professionals, 2013: 7). In comparison with UK and Mauritius, the compromise with creditors is a less formal procedure which is somehow at the discretion to the borrower and creditor. While a written agreement is required, the procedures are not formally elaborated upon by the US Bankruptcy Code.

4. INFORMAL MEASURES

As highlighted in the introduction, corporate rescue is also inclusive of some measures that tend to be more informal compared to the formal and legally provided provisions on administration and compromise which are procedures activated when the company is likely to be insolvent. For example, managerial actions, corporate reorganisation and corporate governance can be considered as informal measures in the sense that there need not be a likelihood of insolvency for these measures to be taken. However, it is true that if relevant and considerable managerial actions are taken, if companies are re-organised and re-structured in a timely manner and if principles of corporate governances are always applied and respected, it diminishes the danger of insolvency and thus indirectly they can be considered as informal measures of the corporate rescue culture.

5. MANAGERIAL ACTIONS

There are a number of actions that can be taken by the management of a company in order to prevent it from being wound up. In Mauritius, companies may take actions such as (1) Issuing shares regulated by sections 46 to 62 of the Companies Act 2001 (2) sale of underutilised assets (3) reduction of costs - renegotiating salaries and wages or outsourcing some functions of the business (4) re-financing of corporate debts (5) retention of employees who are efficient (6) moving business premises to lower-cost locations (7) adoption of a business continuity management culture (8) seeking experts advice on debt recovery and restructuring (9) forensic accounting services hired and adopting long term strategic planning. There are rules and procedures to be followed provided by the law for all the managerial actions cited above. Direct or indirect laws may apply to such actions. However, there is no proper plan or approach available in a generic way to deal with financial hardships by these informal measures. They are carried out or adopted on a case to case basis without any guidelines as to how they will prove to be a form of corporate rescue.

This is in sharp contrast to what we have in the UK. The 'London Approach', developed in the 1970s and designed to secure the cooperation of financial support for companies with liquidity problems (Goode, 1990) has been successful in resolving financial distress with large UK companies, especially for the large multi-bank financed companies. The British Bankers Association defined the 'London Approach' as 'a non-statutory and informal framework introduced with the support of the Bank of England for dealing with temporary support operations mounted by banks and other lenders to a company or group in financial difficulties, pending a possible restructuring' (British Bankers' Association, 2004).

The rescue work is organised on a contractual basis, through which the potentially conflicting problems of company creditors are resolved through voluntary cooperation and coordination between the participating parties without having to resort to statutory backing (Xie, 2016). There is a lack of such approaches in the Mauritian context which can be useful if adopted.

6. CORPORATE RE-ORGANISATION AND CORPORATE GOVERNANCE

Corporate re-organisations consist of various possibilities such as mergers and consolidations, amalgamations and acquisitions. Normally, one company would only like to merge or to acquire or to amalgamate with another company which is financially in sound health. While they are not regarded as formal measures towards corporate rescue, they can be seen as measures that will ascertain the financial stability of a company and will prevent a condition of insolvency. Likewise, principles of corporate governance, if effectively adopted and followed by a company, can be considered as an essential mechanism to prevent insolvency (Tomasic: 2009: 5). In contrast to the UK, Mauritius has gone one step further when it comes to the application of the National Code of Corporate Governance for Mauritius (2016). In the UK, corporate governance principles are to be found in the UK Corporate Governance Code which derives its importance from the Financial Conduct Authority's Listing Rules which are themselves given statutory authority under the Financial Services and Markets Act 2000 (Section 2(4)(a)). The UK Corporate Governance Code adopts a 'comply or explain' approach whereas the Mauritian one is based on the 'apply and explain' approach. The Mauritian Code is there relatively more enforceable than the British one. In addition, under the Financial Reporting Act 2004, recently amended in 2017, Section 23 establishes a Review Committee to ensure compliance with the Code by Public Interest Entities. Furthermore, section 79 of the same law provides the possibility to the Financial Reporting Council to fine entities up to the amount of one million in cases of proven non-compliance with the Code after assessment by the Review Committee. These measures, therefore, enhances the application of the principles of corporate governance which eventually can be considered as informal measures to prevent insolvency. Therefore, indirectly, both corporate re-organisations and corporate governance can be considered as informal measures preventing insolvency and thus indirect measures of corporate rescue.

7. CONCLUSION AND RECOMMENDATIONS

The foundational law on corporate rescue in Mauritius is strong enough and it has proven to be effective so far. This article has shown that, in comparison with UK and US, it does have some positive aspects, sometimes more progressive than what exists in the countries used as case studies. There are however some aspects where improvement is possible in order to bolster and render more effective formal and informal measures towards the corporate rescue. In this context, the following recommendations can be considered to achieve the aim of a robust legal framework on corporate rescue in Mauritius:

- The fiduciary duties and duty of skill and care for administrators can be included with more details in the Insolvency Act of Mauritius.
- Sensitisation for companies on the existence and applicability of rescue measures especially for small companies.
- a change in mindset in terms of acknowledging corporate rescue as a positive thing towards protecting creditors and giving a last chance to the company to survive rather than a negative connotation of corporate rescue as the bell ring of the collapse of a company.

- Drawing inspiration from countries, other than the UK and the US, which have a better and more innovative legal framework, institutions and practices on the subject of corporate rescue.

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