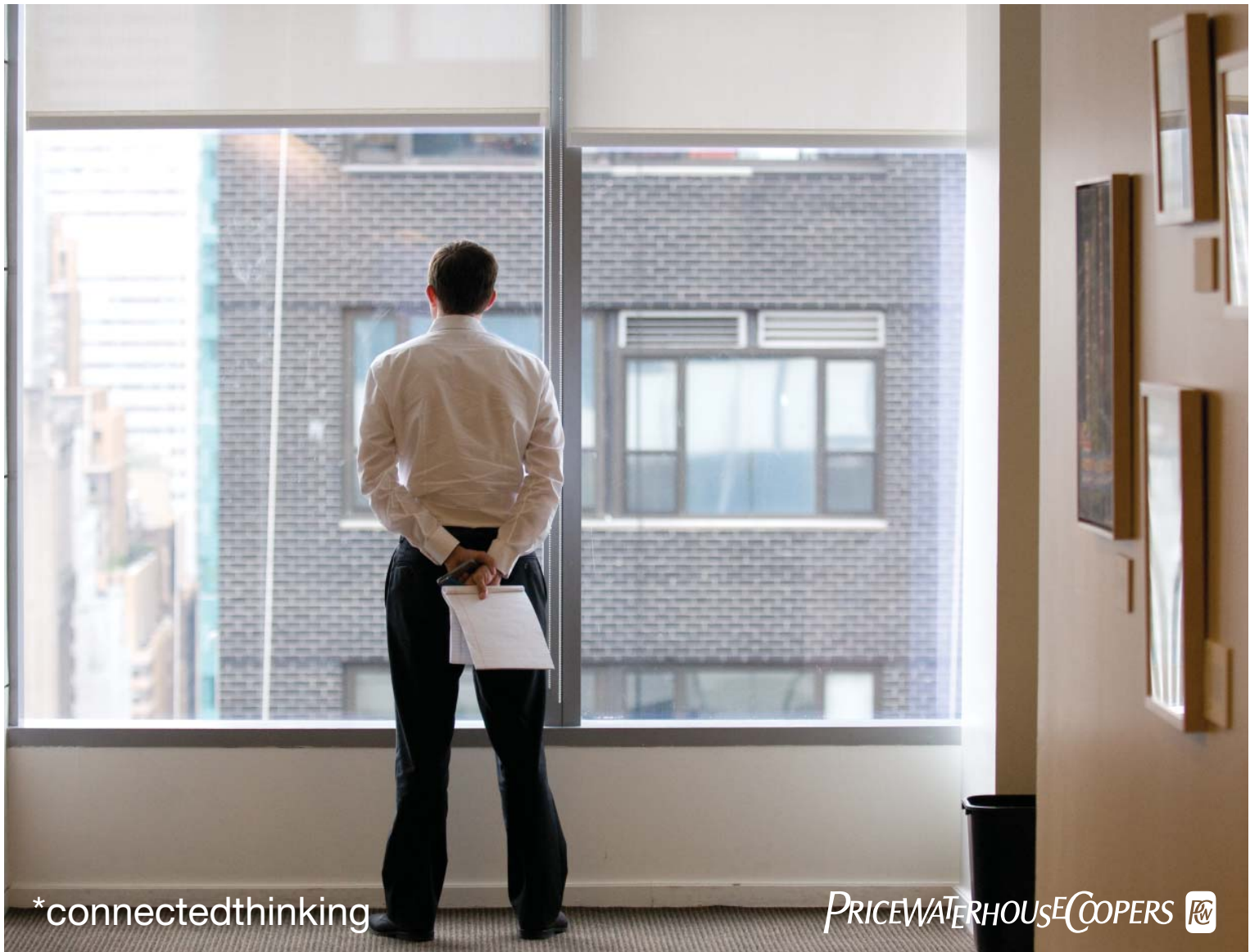


Bringing a different perspective*

Overview of The Voluntary Administration in
Mauritius



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Section 1

Brief overview of The Voluntary Administration Process

What is an Administration?

The Administration procedure is designed to hold a business together whilst plans are formed either to put in place a financial restructuring to rescue the company, or to sell the business and assets to produce a better outcome for creditors than would have been achieved through a liquidation.

Administration can also now be used as a mechanism to liquidate assets and distribute the proceeds to secured or preferential creditors. However this is not the primary purpose of the Administration option, introduced as part of the Insolvency Act 2009 (proclaimed on 1 June 2009). For instance, where the directors of a company believe their company is insolvent and/or feel that they need to protect the company's property against non-cooperative creditors, Administration could be considered as a protective measure.

Is Administration suitable for all companies?

A company with reasonable predictable profitability and cash-flows will benefit from an Administration as opposed to an insolvent company with few assets, limited prospects and poor cash-flow.

What is purpose of an Administration?

Administration offers an opportunity for a company to continue its trading activities. During the Administration, the day-to-day activities of a company have to be managed by a licensed Insolvency Practitioner (IP) for the benefit of that company's creditors.

The main priorities of an Administration are to:

- attempt to rescue the company as a going concern; or
- achieve a better outcome for the creditors of the company than would otherwise be achieved if the company were put directly into liquidation (this might entail the disposal of whole or part of the business).

What are the procedures to appoint an Administrator?

The IP may be appointed either by:

- the directors of the company, who have resolved that the company is insolvent or likely to become insolvent;
- the Court, which concluded that the company is insolvent or likely to become insolvent through an application made by (a liquidator or provisional liquidator, the Directors, the Registrar of Companies); and
- secured creditor(s) holding a charge or charges over the whole or substantially the whole of the company's property.

What happens to the directors and the contracts of employment of a company in Administration?

Directors of the company holding office may not exercise their function or power without the written approval of the Administrator. However the directors must submit a statement of the company's affairs to the Administrator within 7 days (post appointment).

Employment contracts are not automatically terminated when an Administrator is appointed, unless a notice has been served to terminate them within 21 days of the Administrator's appointment. Subsequently, the Administrator will settle those (pre-appointment) unpaid obligations.

How will the Administrator be indemnified?

The Administrator will be indemnified out of the company's property, and consequently will have a *lien* on the company's property to secure a right for indemnity.

What is an Administrator's role?

Regardless of the party/ies who may appoint an Administrator, his fiduciary duty will be to act in the interests of all creditors.

By taking control of the business affairs, the Administrator is required to investigate the company's affairs to salvage the company's business in the interest of the stakeholders.

Section 1

Brief overview of The Voluntary Administration Process (cont.)

What type of meetings shall an Administrator call?

First creditor meeting (10 days after Administration begins): to help the creditors of the company to constitute a committee that will consult with the Administrator about matters relating to the Administration, and to receive reports.

Watershed meeting: within the convening period (28 days after his appointment), the Administrator must circulate a statement to the company's creditors setting out his proposals for achieving the purpose of the administration. Notification of the meeting has to be advertised in a daily newspaper, and the watershed meeting needs to be held within 7 days of the end of the convening period.

The notice for the creditors to attend the meeting will contain a report prepared by the Administrator describing the state of the company's business position, including a statement setting out his proposals for one of the options described below to be considered:

- whether it is in the creditors' interest to execute a Deed of Company Arrangement
- whether the Administration should end; and
- whether it would be in the creditor's interest for the company to be placed in liquidation.

How will an Administrator satisfy reporting requirements?

Within six months (although the Court could sanction for a shorter reporting period), the Administrator has to file a statement of affairs to the Registrar of Companies and produce a copy to the Board of Directors.

Should the Administrator become aware of a potential fraud and/or any other offence perpetrated by a past or present officer or shareholder, then he must bring this to the attention of the Board.

What can a Deed of a Company Arrangement (DoCA) encompass?

The terms of the deed will highlight the following:

- the name of the appointee who will be the deed administrator;
- the nature and the duration of any moratorium period that the deed will provide;
- the prevailing condition/s and the circumstances for the deed to become into operation; and
- the approach to be adopted regarding distribution of the realised proceeds among the creditors.

The creditors may vary the agreed terms provided that the revised terms are not materially different from the original proposed agreed terms.

What are the obligations of the persons bound by the terms of the DoCA?

Persons bound by the terms of the DoCA will not be allowed to carry out actions which are not consistent with the agreed terms of the DoCA until the expiry of the administration period. The persons bound by the deed will consist of: company's creditors, the company, the company officers and shareholders, and the deed administrator.

What is the consequence of an administration?

Immediately on commencing the procedure to enter into administration, a moratorium is placed on any insolvency or other legal proceedings against the company and any pending winding-up petitions are suspended or dismissed, as stipulated in the deed as the case may be. If administrative receivers have already been appointed, they are required to vacate office.

In essence, this means that no-one can "knock the company over".

How should a company in Administration correspond?

Any letter or business document sent out by or on behalf of the company or administrator must show that the company is in administration and clearly state the name of the administrator and the fact that the affairs and business of the company are being managed by him. Reference to the appointment of the administrator must also be included on any website set up for the company.

How is an Administrator remunerated?

A Deed Administrator is entitled to draw reasonable remuneration for carrying out his duties and exercising his powers as Administrator.

The Court may also review and fix the Administrator's remuneration at a level that is reasonable subsequent to an application made by one of the following parties: an Administrator, an officer, a creditor or a shareholder of the company.

Can the Administrator resign and/or be removed from office?

- An Administrator can leave office by provision of a written notice to his appointer.
- The Court can remove through an application made by a creditor, a liquidator (if the company is in liquidation), the Registrar of the Companies or the Director.
- Creditors may not remove an administrator by a resolution passed at a creditors' meeting unless another suitable person, who has consented to accept the appointment, is appointed in his stead.

Section 2

Rescue Solutions

The priority of an administration situation is to salvage a company's business with a view to resume its activities as a going concern in the interest of all the stakeholders. Depending on the prevailing circumstances, a rescue scenario will be worked out. Highlighted below are potential methods that could be considered:

Creditor arrangement

This is achieved through a DoCA.

A DoCA is a legally binding deal with creditors, requiring in excess of 75% approval (in terms of total value of debt) from the company's creditors to repay all, or some, of the company's debts over an agreed period (from the company's future profits).

To "sweeten" the restructuring arrangement the terms might include a debt-to-equity swap option.

Creditors also have to demonstrate flexibility in terms of accepting potential "hair-cuts" on the amounts owed to them - eventually maximising recovery of the debts in the long-term - compared to the low recovery expected before any arrangement.

Application of Corporate Finance methodology

From a sale perspective: With specialist assistance supporting the Administrator, the whole or part of the business could be disposed of as a going concern. The difficulty in these instances is in attracting bidders in a short time period. Time is of essence and speed of execution is critical to protect jobs. However, the downside to this prevailing condition is that this action could be perceived as a "fire-sale" of the business. In those circumstances, the true economic value of the business is perhaps unlikely to be achieved.

From a buyers perspective: An Administration could present a good investment opportunity but with significant risks attached. As the transaction will have to be completed within a short time frame, this will mean that the scope for an extensive due-diligence will be difficult. The Administrator will be holding office for only a limited period of time. Consequently, the Administrator will not be in position to provide the normal warranties or other comforts (indemnities) that are normally sought by buyers in a normal sale transaction.

Pre-Packaged (Pre-Pack) administration solution

The pre-pack route is gaining prominence. It's usually a less expensive route. But it's mired with legal hurdles which have to be dealt with including discussions with various stakeholders e.g. union representatives.

In a pre-pack situation the performing assets would be transferred to a new Company (New Co) owned by creditors. Other parties would provide new finance, and would take a stake in the New Co. The non-performing assets would be left in the distressed company (termed as Old-Co) which would then be dissolved through a creditors' winding-up. The New Co would then continue its trading post administration.



Section 3

Ending Administration

Administration of the company ends when one of the events detailed below arises:

- a compromise is reached (within the convening period between the creditors and the company) the terms of which will be reflected in a DoCA;
- the purpose of the Administration has been sufficiently achieved;
- the Administrator is of the opinion that the purpose of the Administration cannot be achieved;
- creditors (with claims not less than 10% of the total value of all creditors' claim) resolve that the Administration should end, and may appoint a liquidator where the notice of the meeting sets out a proposed resolution in this regard;
- the Court terminates a DoCA on the application of one of these parties: the creditor, the company, the deed administrator, any other interested persons (the grounds for a Court's termination may arise when the Court is satisfied that an information breach may have occurred or there has been a material contravention of the deed by a person bound to it).

Subject to a number of conditions except with the leave of the Court, a director of a failed company shall not, for a period of 5 years, take part in the formation, promotion and management of a phoenix company.

Section 4

Definitions/Glossary

Receiver	(a) A person appointed to take position of property in receivership and deal with it as directed by the Court or the instrument of appointment; and (b) includes a person appointed as Receiver and Manager
Secured creditor	(a) A person entitled to a charge on or over property owned by a debtor; and (b) Includes the holder of a “gage”
Insolvency Practitioner	A person who is appointed under The Insolvency Act 2009 to be and holds office as a liquidator (other than the Official Receiver), receiver, manager or administrator
Administrator	A person who is appointed as administrator of a company in administration
Liquidator	The official receiver or a licensed insolvency practitioner appointed to wind up the affairs of a company
What is insolvency?	Insolvency arises when individuals or businesses have insufficient funds to cover their debts when they are supposed to be
Watershed meeting	The creditors' meeting called by the Administrator to decide of the future of a company and, in particular, whether the company and the creditors should execute a Deed of Company Arrangement
Corporate insolvency	A company becomes insolvent if it does not have enough assets to cover its debts and/or cannot pay its debts on the due dates. It is the directors' responsibility to know whether or not the company is trading insolvently and they can be held legally responsible for continuing to trade in that situation. The decision to appoint receivers, liquidators and administrators is the responsibility of appropriate funding bodies (i.e. banks and lending institutions, creditors, the courts or the company itself depending on the procedures)
Fixed charge	Security over specific assets such as property or shares
Floating charge	A charge on a property that may change from time to time in the ordinary course of business (e.g. stock, debtors). Such charge can be converted (or crystallised) into a fixed charge over these assets
Crystallisation	Crystallisation means the conversion of a floating charge into a fixed charge either: (a) Automatically (de plein droit), by reason of: (i) the death of the chargor, (ii) the chargor being judicially placed under receivership, (iii) a winding-up petition being filed against the chargor or a resolution for voluntary winding-up being passed by the chargor, or (iv) the winding-up of the chargor, or (b) At the option of the chargee, by reason of: (i) an express provision of the charge instrument, (ii) breach by the chargor of its obligations under the charge instrument or at law, or (iii) a third party seizing an asset encumbered by a floating charge
Deed Administrator	A person who is appointed the Administrator of a Deed of Company Arrangement
Phoenix Company	A company that at any time before or within 5 years after commencement of the winding up of a failed company or within the period prescribed by regulations, is incorporated, with or changes its name to the name of the failed company or a name that is substantially the same
Successor Company	A successor company is a company that acquires the whole or substantially the whole of the business of a failed company under arrangements made by the liquidator or receiver or made under a Deed of Company Arrangement
Unregistered Corporation	An unregistered corporation may be wound up. Unregistered corporation includes a partnership. Partnership means civil or commercial partnership, a <i>société</i> not registered under an enactment or a <i>société du fait</i>

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