INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 5F Guidance Text

Mauritius

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CONTENTS

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IN INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN MAURITIUS

Welcome to Module 5F, dealing with the insolvency system of Mauritius. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of Mauritian insolvency laws;
- a relatively detailed overview of the Mauritian insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Mauritius.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2024**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2024 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Mauritius:

- the background and historical development of insolvency law in Mauritius;
- the various pieces of primary and secondary legislation governing Mauritian insolvency law;
- the operation of the Companies Act 2001, Insolvency Act 2009 and other legislation in regard to bankruptcy, liquidation and corporate rescue;
- the rules of international insolvency law as they apply in Mauritius; and
- the rules relating to the recognition of foreign judgments in Mauritius.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Mauritian insolvency law; and
- be able to answer questions based on a set of facts relating to Mauritian insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through the text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO MAURITIUS

Mauritius is located approximately 500 miles (800 km) to the east of Madagascar within the Indian Ocean. It has additional territories, including Rodrigues Island, situated around 340 miles (550 km) to the east, the St Brandon (also known as Cargados Carajos Shoals), positioned 250 miles (400 km) to the northeast, and the Agalega Islands, located 580 miles (930 km) to the north of the main island. Furthermore, Mauritius asserts its sovereignty over the Chagos Archipelago, which includes Diego Garcia, situated roughly 1,250 miles (2,000 km) to the northeast. This claim is subject to a dispute with Britain.

Mauritius is a tropical island country situated off the southeastern shoreline of the African continent within the Indian Ocean. This nation is characterised by its volcanic origin, featuring picturesque lagoons, palm-lined beaches, and extensive coral reefs encircling a significant portion of its coastline.

The plateau is flanked by petite mountains that might have originated as the perimeter of an ancient volcano. A significant portion of the country's land area, more than half, is suitable for cultivation, primarily dedicated to the cultivation of sugarcane, which serves as the principal export crop.

Before the first Portuguese sailors visited it in the early 16th century, the island of Mauritius was uninhabited. Arab sailors who originally found the island are said to be the origin of its name, Dina Arobi. In 1598, a Dutch squadron landed at Grand Port and named the island Mauritius, in honour of Prince Maurice van Nassau, stadtholder of the Dutch Republic.

After the Dutch left the island, it became a French colony and was renamed Isle de France in 1715. On 3 December 1810, the French surrendered the island to the United Kingdom during the Napoleonic Wars. Under British rule, the island's name reverted to Mauritius. During the British reign, slaves from Madagascar were brought to Mauritius to work in sugarcane fields and in or about 1832, there was a move by the procureur-general to abolish slavery without compensation to the slave owners. This gave rise to discontent, and, to avoid an eventual rebellion, the government ordered all the inhabitants to surrender their arms. Slavery was gradually abolished over several years after 1833.

The economy of Mauritius was significantly impacted by the abolition of slavery. To work in the sugar cane plantations, the planters imported a considerable number of indentured workers from India. About 500,000 indentured servants were on the island between 1834 and 1921.

Roughly two-thirds of the populace can trace their ancestry back to Indo-Pakistani origins, primarily descendants of indentured laborers who were brought to the island to work in the sugar industry during the 19th and early 20th centuries. Around one-fourth of the population has a Creole background, which signifies a mixed heritage of French and African ancestry, while there exist smaller communities of Chinese and Franco-Mauritian descent.

Mauritius operates as a parliamentary democracy, employing a single legislative chambers system patterned after the Westminster System. The Prime Minister holds executive authority, while the President serves as the Head of State. The judiciary functions independently and is separate from the legislative and executive branches.

The Constitution of Mauritius adheres to the Westminster model. The legal framework of Mauritius has adopted principles and regulations concerning trade and commerce, encompassing areas such as shipping, finance, banking, company law, negotiable instruments, and insolvency. The development of legislation and the interpretation of statutes have been significantly influenced by English law and legal principles. The Republic of Mauritius achieved autonomy from Great Britain in 1968 and subsequently transitioned into a Republic in 1992. Despite this change in status, Mauritius has maintained its membership in the Commonwealth.

It is worth noting that the island sustains a diversified developing economy, hinging on the export of manufactured goods, agricultural production, tourism, and financial services. Mauritius is also positioning itself as a central hub for investment in Africa. To date, Mauritius has successfully negotiated and finalised around 46 Double Taxation Avoidance Agreements (DTAA)[1] and the country is home to a thriving community of 12,616 active Global Business Companies (GBCs), which collectively held an estimated total asset value of USD 812 billion in 2021.

Furthermore, Mauritius is actively establishing its reputation as a knowledge centre for Africa and has become an attractive destination for international universities. Approximately 35 universities and awarding bodies from the United Kingdom offer qualifications that are recognised both in Mauritius and the United Kingdom. Building on their success within the local market, these institutions are now drawing in foreign students, particularly from various African nations, through international marketing efforts.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

Mauritius operates under a legal system that can be described as a fusion of civil and common law traditions, incorporating principles from both the French Code Napoleon and British

[1] https://www.mra.mu/index.php/taxes-duties/international-taxation/double-taxation-agreements.

common law. Mauritius has a legal system that is based on a mixture of both civil law and common law traditions, with elements influenced by French and British legal systems. A few laws had been promulgated during that the French reign on the island. Most of those laws dealt with criminal law and procedure, which is why, when the five Napoleonic Codes were enacted in France at the beginning of the 19th century, only the Code Civil,[2] the Code de Commerce[3] and the Code de Procédure Civile[4] were extended to the French colony.

Most of the laws enacted in Mauritius between 1810 and 1840 were set out in two columns, one in French and one in English, the most noteworthy being the Penal Code Ordinance of 1838, which is now the Mauritian Criminal Code.[5] The British occupiers contended that the word "*loix*" in the Act of Capitulation referred to substantive law, so that they felt free to legislate for their colony along English lines in matters of civil and criminal procedure, including the law of evidence, except that the provisions of the Code Civil relating to the limitations on oral testimony[6] were retained.

Later in the 19th century, the Mauritian legislature, which used to be the Council of Government (later to become the Legislative Assembly and finally the National Assembly), enacted a number of laws in the commercial field. Thereafter, and until this day, our laws have followed the English pattern and, except for the four Codes referred to above, and are subject to the terms of what used to be the Interpretation and Common Form Ordinance, and what is now the Interpretation and General Clauses Act.[7]

Mauritius has a civil code known as the Code Civil Mauricien, which is based on the French Napoleonic Code. It covers areas of civil law, including contracts, property, family law, and obligations. Additionally, criminal law is codified in the Criminal Code and Criminal Procedure Act.

Although most of its legislations are derived from English laws, Mauritius' commercial legislations are derived from the New Zealand's legislature. The country's Companies Act[8] (the Companies Act 2001) and Insolvency Act[9] (the Insolvency Act 2009), introduced in 2001 and 2009 respectively, are influenced mostly by New Zealand's Company Act and Insolvency Act.

The system in Mauritius is adversarial and the Supreme Court of Mauritius (Supreme Court) has held that the rules of evidence are derived from an adversarial model of justice.[10]

The standard of proof applied in commercial matters is to satisfy the court on a balance of probabilities.[11]

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2 Act 109 of 1805.
3 Act 208 of 1809.
4 Act 177 of 1808.
5 Act 6 of 1838.
6 Civil Code, arts 1341 *et seq*.
7 Act 33 of 1974.
8 Act 15 of 2001.
9 Act 3 of 2009.
10 *Mrs Ho Niook Sen v A S Sen Wong Chin* 1995 SCJ 296.
11 *Saturn Investments Sarl v Wah Bon Ching Edmond & Ors* 2016 SCJ 5.

4.2 Institutional framework

The highest court on the island is the Supreme Court of Mauritius, possessing comprehensive authority to adjudicate civil and criminal cases under all laws, except disciplinary laws, and any additional jurisdiction and powers conferred upon it by the Constitution or other legislation. After attaining Republic status, Mauritius has preserved its right of appeal to the Judicial Committee of the Privy Council.[12]

Section 76 of the Constitution[13] provides that there shall be a Supreme Court for Mauritius which shall have unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law and such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.

The Supreme Court consists of the Chief Justice who shall be appointed by the President acting after consultation with the Prime Minister; the Senior Puisne Judge appointed by the President, acting in accordance with the advice of the Chief Justice; and the Puisne Judges appointed by the President, acting in accordance with the advice of the Judicial and Legal Service Commission.[14]

4.2.1 Divisions of the Supreme Court

Section 41(1) of the Courts Act[15] provides that there shall be, for the dispatch of civil and criminal business of the Supreme Court, such divisions of the Supreme Court as the Honourable Chief Justice thinks fit, including a Financial Crimes Division, a Land Division, a Family Division, and a Commercial Division.

The Commercial Division shall have original jurisdiction to hear and determine any matter:

(i) the Insolvency Act 2009 and the Companies Act 2001;

(ii) relating to banking, bills of exchange, offshore business, patents and trademarks or passing off; and

(iii) arising out of a contract as the Chief Justice may direct.[16]

Any interim application relating to any of the above matters shall be heard and determined by a Judge of the Commercial Division.

Commercial disputes are dealt within the Commercial Division and all matters of bankruptcy, insolvency or the winding up of companies are usually within the competence of its Bankruptcy Division.

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12 The Constitution, s 81.
13 GN 54/1968.
14 The Constitution, s 77.
15 Act 5 of 1945.
16 The Courts Act, s 41D.

However, the Commercial Division of the Supreme Court is vested with unlimited jurisdiction to hear and determine any civil matter including cases under the jurisdiction of the Companies Act 2001 (including bankruptcy proceedings) and non-commercial cases.[17]

Any commencement of proceedings and further pleadings before the Commercial Division of the Supreme Court is to be made online via the electronic filing system.[18] While the rules that set up the electronic filing of documents apply to all courts, the electronic filing system is currently only available at the Commercial Division of the Supreme Court.

4.2.2 The Director of the Insolvency Service

The Director of the Insolvency Service is the insolvency regulator responsible to overview insolvency proceedings in Mauritius. The Director of the Insolvency Service is the Registrar of Companies and is in charge of a division known as the Insolvency Service.[19]

The functions of the Insolvency Service are to:

(a) keep under review the law and practice relating to the insolvency of individuals, companies and other corporate bodies in Mauritius and make recommendations to the Registrar of Companies on any changes considered to be necessary;

(b) have an overview of the administration of insolvency in Mauritius and in particular the administration of insolvency under the Insolvency Act 2009;

(c) receive reports from the Official Receiver on the administration of insolvencies and monitor the performance of the Official Receiver and report to the Registrar of Companies on any resourcing or other needs in relation to the effective performance of the Official Receiver's functions;

(d) monitor the performance of prescribed companies and related companies of prescribed companies and report to the Companies Supervisory Committee on the performance and financial stability of such companies and to take such action as is required in that respect;

(e) monitor the performance of Insolvency Practitioners and, where required, make application to the Court for the discipline or removal of an Insolvency Practitioner;

(f) in association with and after conferring with all relevant professional bodies, set rules and provide guidance governing the performance and conduct of Insolvency Practitioners;

(g) in association with all relevant professional bodies, foster the development of training and in-service seminars to enhance the skills and encourage improved standards of performance on the part of Insolvency Practitioners;

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17 *Mauritius Commercial Bank Ltd v Maudarbocus* (2015 SCJ 448).
18 *Courts (Electronic Filing of Documents) Rules 2012* GN No 118 of 2012.
19 Insolvency Act 2009, s 370.

(h) carry out research, commission studies, disseminate information and provide public education in the area of consumer credit, budgeting advice and insolvency administration;

(i) establish and maintain communication and liaison with international agencies, including the International Commission on Trade Law, in the area of international insolvencies and insolvency administration as may be necessary for the furtherance by the Insolvency Service of its functions; and

(j) advise the Minister through the Registrar of Companies generally on any matter relating to the law and practice of insolvency and insolvency administration.[20]

4.2.3 Official Receiver

The Official Receiver is an officer of the Court.[21] His powers are set out in the Fifth Schedule of the Insolvency Act 2009 as set out below, namely to:

(a) hold property;

(b) commence, continue, discontinue and defend legal proceedings;

(c) with the leave of the Court, continue in the Official Receiver's name legal proceedings begun by the bankrupt before adjudication;

(d) refer a dispute to arbitration;

(e) compromise debts, claims and liabilities, present or future, actual or contingent, or ascertained or not, subsisting or believed to subsist between the bankrupt and any person, on whatever terms are agreed;

(f) make a compromise or an arrangement with creditors, or persons claiming to be creditors, in respect of debts provable in the bankruptcy;

(g) accept as consideration for the sale of any of the bankrupt's property money to be paid in the future, on terms (including terms as to security) that the Official Receiver thinks appropriate;

(h) make a compromise or an arrangement in respect of a claim that arises out of, or is incidental to, the bankrupt's property, whether it is a claim by the Official Receiver or a claim by a person against the Official Receiver;

(i) carry on the bankrupt's business, if it is necessary or advantageous in order to dispose of it, and for that purpose may employ and pay any person, including the bankrupt;

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[20] *Idem*, s 369 (3).
[21] *Idem*, s 371.

(j) use money in the bankrupt's estate for the repair, maintenance, upkeep or renovation of the bankrupt's property, whether or not the work is necessary to salvage the property;

(k) borrow money whether with or without providing security over the bankrupt's property;

(l) employ any person to do anything that must be done in the course of the administration of the bankruptcy, including the receipt and payment of money;

(m) appoint a lawyer;

(n) prove and draw a dividend in respect of any debt due to the bankrupt;

(o) if any of the bankrupt's property cannot be readily or advantageously sold because of its peculiar nature or other special circumstances, divide it in its existing form among the creditors according to its estimated value;

(p) give receipts and sign discharges and releases for any money that the Official Receiver receives, so that the person who pays the money is effectively discharged from any responsibility for how the money is used;

(q) execute a power of attorney, deed or any other document for the purpose of carrying into effect the provisions of the Insolvency Act 2009;

(r) exercise in relation to the bankrupt's property any power conferred on a trustee under the Trusts Act 2001 or by the Court under that Act; and for the purposes of those powers the Official Receiver is a trustee of the bankrupt's property;

(s) exercise any authority or power or do any act in relation to the bankrupt's property that the bankrupt could have exercised or done if he was not bankrupt; and

(t) in respect of any particular estate or estates:

(i) appoint an agent to act for the Official Receiver;

(ii) delegate to that agent any or all of the powers conferred by this Schedule;

(iii) revoke the agent's appointment; and

(iv) set the agent's remuneration, which must be paid out of the estate.[22]

Where the Official Receiver has been appointed as liquidator, he shall have the same powers as a liquidator as will be set out below.

[22] *Idem*, Fifth Sched.

4.2.4 Insolvency Practitioners

Under the Insolvency Act 2009, an Insolvency Practitioner is defined as a person ordinarily resident in Mauritius who is appointed under that Act to be and holds office as a liquidator (other than the Official Receiver), receiver, manager or administrator.[23]

An Insolvency Practitioner is either a law practitioner, a qualified auditor, a member of the Institute of Chartered Secretaries and Administrators of the United Kingdom or a member of the Chartered Institute of Management Accountants of United Kingdom and registered with the Director of the Insolvency Service.[24]

The Director of the Insolvency Service is responsible to keep and maintain a register of Insolvency Practitioners in which there shall be entered the name, address and qualifications of every Insolvency Practitioner.[25]

The Director is also required keep under review the conduct and performance of persons appointed to be Insolvency Practitioners and may require any document or information concerning an Insolvency Practitioner to be provided to the Director by the Official Receiver or by the Court or the Registrar of Companies or by any other Insolvency Practitioner or by any person who is or has been an auditor of a company in which the Insolvency Practitioner has held office.[26]

Where the Director of the Insolvency Service, as a result of the outcome of an inquiry carried out by him or otherwise, considers that there is reasonable ground to believe that the Insolvency Practitioner is unfit to act as such by reason of persistent failure to comply with this Insolvency Act 2009; the seriousness of the failure to comply with the Insolvency Act 2009; or misconduct or serious incompetence on the part of the Insolvency Practitioner, he may apply to the Court for a prohibition order.[27]

Self-Assessment Exercise 1

Briefly describe the insolvency framework applicable in Mauritius and how it is regulated by the country's institutional framework.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

[23] *Idem,* s 2.
[24] Insolvency (Qualifications of Insolvency Practitioners) Regulations 2012.
[25] Insolvency Act 2009, s 374.
[26] *Idem*, s 375.
[27] *Idem*, s 376.

5. SECURITY

Securities are financial instruments used to secure the repayment of banking facilities. They are used as a means of raising capital and investing in financial markets. Securities can take various forms, and they play a crucial role in the global financial system including in Mauritius.

Securities are legal mechanisms intended to ensure the timely settlement of a debt. They constitute guarantees which a lender or creditor receives from a borrower or debtor and which may be enforced by the creditor, should the debtor default upon his payment obligations or become insolvent.

Securities may be created by operation of the law or through a contract, in favour of natural or moral persons, including particular institutions. They may be granted over movable or immovable property, or be provided by a person.

5.1 Fixed and floating charges

There are primarily two types of securities preferred by financial institutions, namely a fixed charge and a floating charge. These charges are governed by the provisions of articles 2202 *et seq* of the Civil Code. These types of securities can be taken by prescribed financial institutions listed under the Institution Agréées Regulations 1988[28] (for example, a bank is prescribed institution).[29]

Fixed and floating charges are subject to the Inscription of Privileges and Mortgages Act 1946,[30] the Registration Duty Act 1804,[31] the Insolvency Act 2009 and the Companies Act 2001.

5.2 Fixed charges

Fixed charges are generally granted over immovable property, and the property given as security is clearly specified and particularised in the deed. It burdens the entirety of the charged property and cannot be deemed to be divided or to cover only part of the property.[32] It should be noted that a property burdened by a fixed charge cannot be disposed of by the debtor without the approval in writing of the institution which holds the charge.

A fixed charge can be created in virtue of a private or notarial deed. The deed must be registered with the Registrar General of Mauritius and inscribed in the public registers kept at the office of the Conservator of Mortgages. The inscription is mandatory and it affects the validity of the charge.[33] Fixed charges may be enforced either in accordance with the terms of the deed creating them or in accordance with the powers of enforcement conferred by the law.

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28 GN 7 of 1988.
29 Civil Code, art 2202-2.
30 Act 73 of 1946.
31 Act 36 of 1804.
32 Civil Code, art 2202-16.
33 *Idem*, art 2202-15.

A fixed charge executory without the need for a notice *Commandement* to be served prior to seizing the burdened property. The enforcement of fixed charges is effected by a Power to Seize given to an Usher of the Supreme Court. The seized property is sold before the Master's Court of the Supreme Court in accordance with the provisions of the Sale of Immovable Property Act.[34] The sale price is attributed to all the creditors of the borrower, with privilege and / or secured creditors in priority.

5.3 Floating charges

A floating charge is a charge which burdens all present and future assets of the borrower, be it movable or immovable. For a floating charge, no specific property needs to be particularised given that the security may also be granted on any properties to be acquired in the future.[35] Similar to fixed charges, an instrument creating the floating charge can be made by private or notarial deed and have to be registered with the Registrar General of Mauritius and inscribed in the public registers kept at the office of Conservator of Mortgages.[36]

A floating charge takes its ranking among the other secured creditors and in respect of the assets charged as from the date of its inscription with the Conservator of Mortgages. Therefore, the date of inscription will determine the rank of the security.

A floating charge is an executory title, which means that there is no need for a judicial enforcement. However, enforcement will be subject to crystallisation (converting) of the floating charge into a fixed charge by drawing up an inventory of the specific assets over which the charge will be realised.

The conversion into a fixed charge does not affect the ranking of the security which will remain determined by the date of inscription of the floating charge. Once the assets have been identified and crystalised into a fixed charge, the beneficiary may proceed to the realization of the security based on the nature of the underlying asset. Therefore, it can be executed in the same way as a fixed charge is executed.

The process of crystallisation of floating charges is governed by the Civil Code which provides that a floating charge is crystallised:

- on the death of the debtor;
- when a seizure has been ordered against the debtor by a competent Court;
- when a debtor company has been liquidated or wound up; or
- when a debtor association or *societe* has been dissolved.[37]

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34 Act 14 of 1864.
35 Civil Code, art 2202-37.
36 *Idem,* art 2202-15.
37 Civil Code, art 2202-40.

Once the crystallisation has been effected, the creditor shall proceed with the inventory of the assets of the debtor.[38]

5.4 Personal guarantee

This is a form of security where a person stands as a guarantor for a debt taken by another person (the principal debtor). Under this type of security, the guarantor becomes liable to pay the debt of the principal debtor once the latter starts defaulting on his payments. There are two types of guarantees, namely (a) simple guarantee, and (b) joint guarantee.

Simple guarantee is the situation where the guarantor will be made answerable for the debt only when the principle debtor defaults on his payments. The guarantor may avail himself of the following two defences:

(a) *Benefice de discussion:* the guarantor hereby requests the creditor to seize and sell the assets of the principal debtor which would help in the satisfaction of the debt. In this regard, the guarantor will have to indicate to the creditor the assets which he knows the principal debtor owns but the creditor does not; or

(b) *Benefice de division*: this applies where there are several guarantors. When faced with legal proceedings, one of the guarantors may request that he is to be made answerable for the debt only in proportion to his share in the debt together with the other guarantors.

It should be noted that the guarantor may also renounce his right to the benefits of discussion and division in the loan agreement.[39]

In a joint guarantee, the guarantor is jointly and *in solido* liable for the debt with the principal debtor. That is, a debt contracted by the debtor equally binds the guarantor who is then referred to as a co-debtor. In such a case, the creditor can ask for repayment of the debt wholly either from the principal debtor or from the guarantor. Payment made by either the debtor or the guarantor exonerates the other from the debt. Benefit of discussion and benefit of division do not apply here. This is the most common type of guarantee taken by banks.

5.5 Mortgages - *Hypothèque*

A mortgage is a form of security taken over immovable properties and can be contractual, legal or judicial.[40] It is governed by the provisions of articles 2163 *et seq* of the Civil Code. However, only a mortgage entered into by agreement of the debtor and the creditor is relevant for financial institutions. A mortgage is taken against a debt and it is in nature not divisible with regards to the immovable property it burdens. It subsists even when there is a change in ownership.

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[38] *Idem*, art 2202-49.
[39] *Idem*, art 2021.
[40] *Idem*, art 2165.

A mortgage agreement is deemed to be null and void unless it is by way a notarial deed.[41] The agreement must imperatively specify the amount guaranteed and the properties being used as collateral must be designated. The assets that can be mortgaged are immovable properties that are commercially available and their accessories deemed to be immovable and the usufruct of the same assets and accessories during its duration.

A mortgage is inscribed under the Inscription of Mortgages and Privileges Act 1946.[42] The creditor must annex to the deed document a memorandum (*bordereau*) requesting that it be inscribed into the registers of the Conservator of Mortgages. Although no specific delay is provided by the law, the date of the inscription will affect the rank of the mortgage and is valid for 40 years. The inscription can be renewed within the period of inscription.

A mortgage can also be created judicially. A judge can, on the application of a creditor, order that a mortgage be created over a debtor's immovable property where a debt is compromised by the debtor's situation or behaviour.[43]

5.6 *Privilèges immobiliers*

A *privilège immobilier* confers a right on a creditor in relation to immovable property to be preferred to other creditors, including creditors under a mortgage deed.[44] Different *privilège immobilier* holders are ranked according to the type of *privilège* held.[45] There is a distinction between *privilège immobilier général* (PIG) and *privilège immobilier spécial* (PIS).

For a PIS, the seller or those contributing to the acquisition of the immovable property must inscribe their privilege within two months (the prescribed period) of the deed of sale of the property. The rank of the privilege is determined by the deed of sale.[46] If a mortgage is created over an immovable property during the prescribed period, this does not prejudice the privileged creditor's rights.[47] Non-compliance with the inscription requirements renders the PIS null and void. The claim of the creditor then still subsists, but he is treated as an ordinary creditor ranking after all secured creditors.[48]

5.7 *L'antichrèse*

L'antichrèse is a pledge created over immovable property. It must be in writing to be valid. It is different from a mortgage in that the creditor has no possessory right over the immovable property and can only enjoy the rent from the immovable property (and other money that the building may bring). The creditor must deduct rent from interest charged to the debtor and then from the capital owed.[49]

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41 *Idem*, art 2177.
42 *Idem,* No 28.
43 *Idem,* art 2173.
44 *Idem*, art 2155.
45 *Idem,* arts 2143 and 2144.
46 *Idem*, art 2156.
47 *Idem*, art 2162, p 1.
48 *Idem*, art 2162, p 2.
49 *Idem*, art 2130.

The creditor does not acquire the immovable property by default of payment of the debtor and any clause stating otherwise is null and void.[50]

In the case of non-compliance, the deed witnessing the *antichrèse* is null and void. The claim still subsists but the creditor is treated as an ordinary creditor ranking after all secured creditors**.**

5.8 *Gage*

A *gage* is governed by the provisions of article 2073 of the Civil Code.[51] This type of security allows the creditor to be paid in preference to other creditors. It must be created by a deed, before a notary or under private signatures, that is duly registered.[52] It must include the amount due by the debtor and the nature of the property / goods given in pledge. The pledged asset must be handed over by the debtor either to the creditor or to an agreed third party, who then has a property right on the pledged asset.

5.9 *Gage sans déplacement*

A *gage sans déplacement* is governed by the provisions of article 2095 of the Civil Code.[53] It is created on motor vehicles and professional, industrial and agricultural equipment. The debtor keeps possession of the pledged assets. However, on registration of the pledge, the debtor is deemed to have transferred title to the creditor and to retain the pledged asset for the benefit of the creditor. Such pledges are created by a deed under private signatures or before a notary.

A pledge created on a motor vehicle[54] or on professional, industrial and agricultural equipment[55] must be created by a deed before a notary or under private signatures, and must be registered with the Registrar General as well as with the National Transport Authority.[56]

Such pledges can also be created within the relevant deed of sale. If so, the deed of sale must be signed by the creditor, the debtor and the buyer, including the other requirements listed under articles 2103 and 2115 of the Civil Code.

To be valid, the pledge must be registered within two months of the date of the pledge.
In the case of non-compliance with the deed creation requirements under the Civil Code, the pledge is not valid and is unenforceable.[57]

5.10 *Gage spéciale au profit des banques*

Articles 2129-1 *et seq* of the Civil Code govern a *gage spécial au profit of the banques*. A debtor has the option to provide a creditor bank a unique security over specific instruments. A signed

[50] *Idem*, art 2133.
[51] *Idem*, art 2073.
[52] *Idem, art 2074.*
[53] *Idem, art 2095.*
[54] *Idem*, art 2100.
[55] *Idem, art 2114.*
[56] *Idem, art 2118.*
[57] *Idem, art 2117.*

blank, undated transfer form without an amount entered creates this particular pledge solely on shares or debentures (actions or obligations), allowing the securities to be sold.[58] For financial facilities that can be supported by written documentation, this particular guarantee is enforceable. There is no further official prerequisite.[59]

Self-Assessment Exercise 2

Question 1

Briefly compare the different types of securities available in Mauritius.

Question 2

Briefly describe the different steps involved for a secured creditor to enforce its floating charge.

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

In Mauritius, the primary legal framework regularising insolvency proceedings is the Insolvency Act 2009. It is complemented by the Companies Act 2001, along with regulations established under the Companies Act 2001 and legal precedents. The insolvency law basically encompasses (i) bankruptcy for individuals, and (ii) voluntary or court liquidation, voluntary administration, and receivership for companies.

The role of the Supreme Court (Commercial Division) is a significant one, in particular in giving directions to Insolvency Practitioners and approving the receiver's or liquidator's remuneration, fees, expenses generally controlling the process. The Court deals with cases involving insolvency on a daily basis and often render judgments which are upheld on appeal.

The Mauritian insolvency legislations is mostly creditor-friendly without however denying access to justice / judicial intervention to debtors. In light of Mauritius' position as an international financial centre, the role of creditors (predominantly based in foreign jurisdictions), has played an important role in the development and policy of Mauritius' insolvency law. In that context, the provisions dealing with Cross-Border Insolvency contained in the Insolvency Act 2009 was proclaimed in July 2019 introducing the rules governing cross-border insolvency in Mauritius based mainly on the UNCITRAL Model Law on Cross-Border Insolvency.

[58] *Idem*, art 2129-3.
[59] *Idem*, art *2129-5*.

6.2 Personal / consumer bankruptcy

Bankruptcy is the procedure by which a court declares an insolvent person bankrupt, at which time the Official Receiver is appointed to liquidate the debtor's assets and distribute them in line with the priority order of the Insolvency Act 2009. The provisions relating to Bankruptcy are set out under Part II of the Insolvency Act 2009.

The assets of the bankrupt mentioned above are limited to such:

(a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation up to a maximum value assessed by the Official Receiver of MUR 100,000[60] or such other amount as may be prescribed or agreed to by resolution of the creditors;

(b) such clothing, bedding, furniture, household equipment and provisions as are necessary to satisfy the basic domestic needs of the bankrupt and his family, up to a maximum value assessed by the Official Receiver of MUR 100,000 or such other amount as may be prescribed or agreed by resolution of the creditors;[61] and

(c) property held by the bankrupt on trust for any other person[62]

Under the Insolvency Act 2009, a debtor is adjudicated bankrupt where (a) a creditor of the debtor petitions the Court for a bankruptcy order,[63] or (b) the debtor petitions the Court for a bankruptcy order; and the Court makes the bankruptcy order.[64]

6.2.1 Grounds for adjudication

The Court shall make a bankruptcy order where it is established to the satisfaction of the Court[65] that there has been:

(i) failure to comply with a bankruptcy notice;

(ii) departure from Mauritius with intent to defeat or delay a creditor;

(iii) notification in writing by the debtor to a creditor that he has suspended, or proposes to suspend, payment of his debts; or

(iv) admission to creditors that the debtor is insolvent.

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60 Insolvency Act 2009, s 29(2)(a).
61 *Idem*, s 29(2)(b).
62 *Idem*, s 29(2)(c).
63 *Idem*, s 4(1)(a).
64 *Idem*, s 4(1)(b).
65 *Idem*, s 4(2)(a).

6.2.2 Creditors' petition

An unsecured creditor may petition the Court for a bankruptcy order where: (a) the debtor owes the creditor MUR 100,000 or more or, where two or more creditors join in the application, the debtor owes a total of MUR 100,000 or more to those creditors between them, (b) one of the grounds for adjudication set out above is established to the satisfaction of the Court, (c) the debt is a specific sum (*une somme certaine*), and (d) the debt is payable either immediately or at some certain future time.[66]

A petition for a bankruptcy order may be made by (i) a creditor, (ii) creditors jointly where there are two or more creditors, or (iii) the trustee, provisional trustee or supervisor of a debtor.[67]

It is important to note that a secured creditor may petition the Court for a bankruptcy order where: (i) the petition contains a statement that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of all the bankrupt's creditors, or (ii) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt.[68]

The Insolvency Act 2009 provides that a debtor against whom a bankruptcy order may be made must:

(a) be domiciled in Mauritius; and

(b) (i) be present in Mauritius on the day on which a petition for a bankruptcy order is presented; or

(ii) have, at any time in the period of three years ending with that day –

(1) been ordinarily resident, or had a place of residence, in Mauritius; or

(2) have carried on business in Mauritius.[69]

6.2.3 Bankruptcy notice

A creditor may petition the Court for a Bankruptcy Order against a debtor where the latter fails to comply with a Bankruptcy Notice. A bankruptcy notice is a type of notice that shall:

(a) require the debtor, in relation to the judgment debt or the sum ordered to be paid under a final order or the amount otherwise claimed to be owing –

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[66] *Idem*, s 5(1).
[67] *Idem*, s 5(2)(a).
[68] *Idem*, s 5(2)(b).
[69] *Idem*, s 5(3).

(i) to pay the amount owing, including any interest to the date of payment of a debt that carries interest, plus costs;

(ii) to give security for the amount owing that satisfies the creditor or the Court; or

(iii) to compromise[70] the amount owing on terms that satisfy the Court or the creditor;

(b) state what are the consequences if the debtor does not comply with the bankruptcy notice; and

(c) be served on the debtor in Mauritius or, with the Court's permission, outside Mauritius.[71]

6.2.4 Failure to comply with bankruptcy notice

There shall be failure to comply with a bankruptcy notice under section 8(2) of the Insolvency Act 2009 where:

(a) a creditor has obtained a final judgment or final order against the debtor for any amount;

(b) execution of the judgment or order has not been stayed by a Court;

(c) the debtor has, within 42 days before the date of the petition for a bankruptcy order, been served with a bankruptcy notice; and

(d) the debtor has not, within 14 days after service of the notice (in Mauritius) complied with the requirements of the notice; or satisfied the Court that he has a cross-claim against the creditor.[72]

A creditor who has obtained a final judgment or a final order includes a person who is for the time being entitled to enforce a final judgment or final order.

There shall be failure to comply with a bankruptcy Notice under section 8(3) of the Insolvency Act 2009 where the:

(a) debtor is indebted to the creditor in relation to a provable debt;

(b) debtor has within 42 days before the date of the petition for a bankruptcy order been served with a bankruptcy notice;

(c) debtor has not within 14 days after service of the notice (in Mauritius) complied with the requirements of the notice; or satisfied the Court that the debtor has a cross-claim against the creditor; and

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70 Compromise agreements will be dealt with further below.
71 Insolvency Act 2009, s 6.
72 *Idem*, s 8.

(d) bankruptcy notice informs the debtor that if the debtor disputes the debt or claims that any indebtedness on the part of the debtor to the creditor is less than MUR 100,000, the debtor may appear before the Court in opposition to any petition filed by the creditor to have the debtor adjudicated bankrupt and provide a cause that –

(i) he does not owe a debt to the creditor; or

(ii) that he does owe a debt to the creditor, but the debt is less than MUR 100,000.

A cross-claim is defined as a counterclaim, set-off or cross-demand that is equal to, or greater than, the judgment debt or the amount that the debtor has been ordered to pay; and the debtor could not use as a defence in the action or proceedings in which the judgment or the order, as the case may be, was obtained.

6.2.5 Hearing of a petition

The Court may, at its discretion, stay or adjourn the hearing of a petition conditionally or unconditionally: (a) for obtaining further evidence, (b) to direct the Director of the Insolvency Service to prepare a report under section 17 on whether the debtor should make a proposal or be placed under a summary instalment order, or (c) for any other just cause.[73]

The Court may also, at its discretion, refuse to adjudicate the debtor bankrupt where:

(a) the creditor has not established the requirements set out under the Insolvency Act 2009;

(b) the creditor has not established that the debtor has been served with the bankruptcy notice;

(c) the debtor satisfies the Court that he is able and willing to pay his debts; or

(d) it is just and equitable or there is other sufficient cause that the Court does not make a bankruptcy order.[74]

The Court may stay a creditor's petition for a bankruptcy order or even refuse the petition where the creditor's petition for a bankruptcy order relies on the ground that the debtor failed to comply with a bankruptcy notice, and the debtor has appealed against the judgment or order underlying the bankruptcy notice or the judgment for non-payment of trust money, as the case may be, and the appeal is still to be determined.[75]

6.2.6 Debtor's petition

The Insolvency Act 2009 provides that a debtor may file a petition with the Court to have himself adjudicated bankrupt on the ground that he is unable to pay his debts where he has combined

[73] *Idem*, s 16.
[74] *Idem*, s 9(2).
[75] *Idem*, s 10.

debts of MUR 100,000 or more provided, he also files with the Court a statement of his affairs in the prescribed form which is not, in the Court's opinion, incorrect or incomplete.[76]

It is important to point out that a debtor's petition shall not after presentation be withdrawn without leave of the Court.

6.2.7 Summary administration

The Court may issue a certificate for the summary administration of the bankrupt's estate, where, on hearing of a debtor's petition, the Court makes a bankruptcy order and the Court is satisfied that:

(a) the aggregate amount of the bankruptcy debts so far unsecured would be less than MUR 500,000 (called the minimum amount); and

(b) within the period of five years ending with the filing of the petition the debtor has neither been adjudicated bankrupt nor made a composition with his creditors in satisfaction of his debts or a proposal.[77]

6.2.8 Interim Receiver

The Court may make an order appointing the Official Receiver as Interim Receiver, on all or part of the debtor's property, at any time before making a bankruptcy order where a creditor's petition for a bankruptcy order has been filed.

The Court may authorise the Official Receiver to: (a) take possession of any property, (b) sell any perishable property or property that is likely to fall rapidly in value, or (c) control the debtor's business or property as directed by the Court.

The Insolvency Act 2009 however provides that an order for the Official Receiver's control of the debtor's business must be confined to what is necessary, in the Court's opinion, for conserving the debtor's property.[78]

6.2.9 Effect of adjudication

The date of an adjudication, and the commencement of a bankruptcy, shall be the date and time when the Court made the bankruptcy order and the Court shall record on the bankruptcy order the date and time when the order was made.

Moreover, the Court shall notify the Official Receiver as soon as possible after an order of adjudication is made.

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[76] *Idem*, s 15.
[77] *Idem*, s 19.
[78] *Idem*, s 20.

Where a debtor is adjudged bankrupt, he shall, subject to the Insolvency Act 2009, be disqualified from being elected to any public office and such disqualification shall be removed and shall cease when the adjudication in bankruptcy is annulled, or when the debtor obtains his discharge with a certificate from the Court to the effect that his bankruptcy was caused by misfortune without any misconduct on his part.[79]

6.2.10 Duties of Official Receiver

On adjudication the Official Receiver shall advertise the adjudication in the prescribed manner as soon as practicable. On the other hand, the bankrupt shall file with the Official Receiver a statement of his affairs if the bankrupt has not already done so.

The Official Receiver may call a meeting of the bankrupt's creditors and proceedings to recover any debt in the bankruptcy shall be stayed. Moreover, a creditor is not entitled to begin or continue an execution, attachment or other process and shall not have any remedy against the bankrupt's property or person, for the recovery of a debt provable in the bankruptcy.

The property of the bankrupt vests in the Official Receiver.

6.2.11 Meeting of creditors

The Official Receiver shall, after adjudication, call the first meeting of the bankrupt's creditors. The Official Receiver shall call the meeting as soon as practicable after adjudication and, unless there are special circumstances, not less than five weeks after adjudication, by sending a notice of the time and place of the meeting by ordinary post to –

(a) the bankrupt, at the bankrupt's last known address;

(b) each creditor named in the bankrupt's statement of affairs, at the address given in the statement of affairs or at any other address that the Official Receiver believes is the creditor's address; and

(c) any other creditor known to the Official Receiver.[80]

He shall advertise the time and place of the meeting in such manner as may be prescribed. The calling, holding and effect of the first meeting shall be governed by the First Schedule.

6.2.12 Duties of bankrupt

A bankrupt shall, to the utmost of his power, aid in the realisation of his property and the distribution of the proceeds amongst his creditors and shall –

[79] *Idem*, s 21.
[80] *Idem*, s 26.

(i) give a complete and accurate list of his property and of his creditors and debtors and such other information as to this property as the Official Receiver requires;

(ii) attend before the Official Receiver whenever called upon to do so; and, if required to do so by the Official Receiver verify any statement by affidavit;

(iii) disclose to the Official Receiver as soon as practicable any property which may be acquired by him before his discharge and would be divisible amongst his creditors;

(iv) supply to the Official Receiver such information as he may require regarding his expenditure and sources of income after adjudication;

(v) execute such power of attorney, transfer or instrument, in relation to his property and the distribution of the proceeds amongst his creditors, as are required by the Official Receiver, prescribed or directed by the Court;

(vi) deliver on demand any of his property that is divisible amongst his creditors and is under his possession or control to the Official Receiver;

(vii) deliver on demand to the Official Receiver any property that is acquired by him before his discharge; and

(viii) immediately notify the Official Receiver in writing of any change of his address, his employment or his name.[81]

Moreover, a bankrupt shall give the Official Receiver the information and details that are necessary to prepare a statement of the financial position of the bankrupt's estate. Where required by the Official Receiver, the bankrupt shall, within a reasonable time of adjudication, prepare and deliver to the Official Receiver full, true and detailed accounts and statements of his financial position that show details of the bankrupt's –

(a) trading and stocktaking; and

(b) profit and losses during any period in the three years before the adjudication.

6.2.13 Bankrupt entering business

An undischarged bankrupt shall not, without the consent of the Official Receiver or the Court, directly or indirectly –

(a) enter into, carry on, or take part in the management or control of any business;

(b) be employed by a relative of the bankrupt; or

[81] *Idem*, s 40.

(c) be employed by a company, trust, trustee, or any partnership or unincorporated association that is carrying on a business, that is managed or controlled by a relative of the bankrupt.[82]

6.2.14 Official Receiver's powers

The Official Receiver shall have and exercise the powers set out in the Fifth Schedule of the Insolvency Act 2009.

It should be noted that the Official Receiver is empowered to sell the bankrupt's property by public auction or public tender to one or more persons, in such parcels or in such order as he thinks fit. Generally, the Official Receiver will proceed with the sale of the bankrupt's property following the first creditors' meeting, however he is duly empowered to proceed with the sale before the first creditors' meeting.[83]

6.2.15 Automatic discharge

A bankrupt is automatically discharged from bankruptcy three years after adjudication but may apply to be discharged earlier.

A bankrupt will however not be automatically discharged where the (a) Official Receiver or a creditor has objected to the automatic discharge and the objection has not been withdrawn at the end of three years after adjudication, (b) bankrupt has to be publicly examined and that examination has not taken place, or (c) bankrupt is undischarged from an earlier bankruptcy.

On discharge, a bankrupt is released from all debts provable in the bankruptcy except those incurred by fraud or fraudulent breach of trust to which the bankrupt was a party amongst others.[84]

6.2.16 Annulment of adjudication

The Court may, on the application of the Official Receiver or any person interested, annul an adjudication where the Court (a) considers that the bankrupt should not have been adjudicated bankrupt, (b) is satisfied that the bankrupt's debts have been fully paid or satisfied, (c) considers that the liability of the bankrupt to pay his debts should be reviewed because there has been a substantial change in the bankrupt's financial circumstances since the date of adjudication, or (d) has approved a composition under section A of Sub-Part IV of Part II of the Insolvency Act 2009.[85]

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82 *Idem*, s 43.
83 *Idem*, s 54.
84 *Idem*, s 57.
85 *Idem*, s 67.

6.2.17 Alternatives to bankruptcy

6.2.17.1 Composition

The creditors of a bankrupt may accept a composition in satisfaction of the debts due to them from the bankrupt by passing a special resolution that contains the terms of the composition to be known as the preliminary resolution.[86]

The composition shall be of no effect unless the creditors confirm the composition by a second special resolution known as the confirming resolution which shall be passed within one month after the preliminary objection is passed.[87]

The Court shall have to approve a composition if it is to be binding and a composition approved by the Court binds all the creditors in respect of provable debts due to them by the bankrupt. The Court shall approve the composition within one month after confirming resolution is passed.

The Court may however refuse to approve a composition where it considers that (a) the terms of the composition are not reasonable or are not calculated to benefit the general body of creditors, (b) the bankrupt is guilty of misconduct that justifies the Court in refusing, qualifying, or suspending the bankrupt's discharge, or (c) for any other reason(s).[88]

As soon as practicable after the Court has approved a composition the bankrupt and the Official Receiver shall execute a deed of composition for putting it into effect and he shall apply to the Court for confirmation of the deed.[89] The Bankrupt shall execute the deed of composition within five working days after the Court approves the composition or within -such other additional time that the Court allows.

6.2.17.2 Proposal

An insolvent[90] may make a proposal to creditors for the payment or satisfaction of his debts. The proposal may include an offer (a) to assign all or any of the insolvent's property to a trustee for the benefit of the creditors, (b) to pay the insolvent's debts by instalments, (c) to compromise the insolvent's debts at less than 100 cents in the rupee, (d) to pay the insolvent's debts at some time in the future, or (e) for any other arrangement for the satisfaction of the insolvent's debts.[91]

The proposal may include any other conditions for the benefit of the creditors and may be accompanied by a security or guarantee.[92]

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86 *Idem*, s 69.
87 *Idem*, s 70.
88 *Idem*, s 72(3).
89 *Idem*, s 73.
90 Under this section, an insolvent means a person who is not bankrupt, but who is unable to pay his debts as they become due.
91 Insolvency Act 2009, s 79.
92 *Idem*, s 79(3).

After the proposal has been accepted by the creditors at a meeting of creditors called by the trustee appointed by the Court, the latter shall, as soon as practicable apply to the Court for approval of the proposal and send notice of the hearing of the application to the insolvent and to every known creditor.[93]

6.2.17.3 Summary instalment order

The Official Receiver may make a summary instalment order where he is satisfied that the debtor's total unsecured debts that would be provable in the debtor's bankruptcy are not more than MUR 500,000 or such amount as may be prescribed and the debtor is unable immediately to pay those debts.[94]

The summary instalment order shall provide that the debtor pays his debts by instalments or otherwise; and the debts are paid in full or at the earliest date that the Official Receiver considers appropriate.[95]

The payment of instalments under a summary instalment order may be spread over a period of up to (a) three years, or (b) five years, if justified by special circumstances.[96]

A summary instalment order shall appoint a suitable and willing person to supervise compliance by the debtor with the terms of the summary instalment order.[97]

Self-Assessment Exercise 3

Question 1

Briefly describe the powers of the Official Receiver upon adjudication.

Question 2

Briefly describe the role of the Interim Receiver.

Question 3

Describe the effect of a bankruptcy order on a bankrupt's ability to carry out business and on his estate.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

93 *Idem*, s 79(6).
94 *Idem*, s 87.
95 *Idem*, s 87(2).
96 *Idem*, s 87(3).
97 *Idem*, s 87(5).

6.3 Corporate liquidation

Under the Insolvency Act 2009, the winding up of a company may be effected by way of a:

(a) winding up order made by the Bankruptcy Division of the Supreme Court (the Court);

(b) voluntary winding up commenced by a resolution passed by the company; or

(c) resolution of creditors passed at the watershed meeting.[98]

6.3.1 Voluntary winding up

A voluntary winding up may be a (i) creditors' voluntary winding up where the company is insolvent and the liquidator is appointed by a meeting of creditors, or (ii) shareholders' voluntary winding up where the company is solvent and the liquidator is appointed by a shareholders' meeting.[99]

6.3.2 Shareholders' voluntary winding up

In a shareholders' voluntary winding up, the shareholders of the company must pass a special resolution[100] that the company be wound up. The directors cannot pass a resolution in respect of such type of winding up.

One of the conditions of a shareholders' voluntary winding up is that the directors should sign a declaration of solvency to the effect that they have formed the opinion that the company will be able to pay its debt in full within a period not exceeding 12 months after the commencement of the winding up.[101]

If the company is insolvent, it cannot be wound up by way of a shareholders voluntary winding up. However, if the company is able to pay their debts in full within a period not exceeding 12 months after the commencement of the winding up, a shareholder's winding up procedure can be followed.[102]

The company must lodge with the Director of the Insolvency Service a copy of the winding up resolution within seven days of the resolution. Notice of the winding up resolution must be given in one daily newspaper and in the Gazette, within 10 days of the winding up resolution.[103]

Before such notices are given, the directors or, in case there are more than two directors, the majority of the directors must make a written declaration to the effect that they have made an

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98 *Idem*, s 100.
99 *Idem*, s100(2).
100 A special resolution is adopted where a majority in number representing 75% in value of the creditors or class of creditors voting in person or by proxy vote in favour of the resolution.
101 Insolvency Act 2009, s 139.
102 *Idem*, s 139(1)(b).
103 *Idem*, s 137(3).

enquiry into the affairs of the company and at a meeting of the directors, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of winding up.[104]

A statement of affairs showing the:[105]

(a) assets of the company and the total amount expected to be realised therefrom;

(b) liabilities of the company; and

(c) estimated expenses of winding up,

should be attached to the declaration.

The declaration must be made at the meeting of directors and within 28 days immediately preceding the passing of the winding up resolution. The declaration should be lodged with the Director of the Insolvency Service before the date on which the notices of the meeting at which the resolution for the winding up of the company is made are sent out.[106]

A liquidator is appointed for the purpose of winding up the affairs and distributing the assets of the company. Where a liquidator is of opinion that the company will not be able to pay or provide for the payment of its debts in full within the period stated in the declaration of solvency, he shall forthwith summon a meeting of the creditors; and lay before the meeting a statement of the assets and liabilities of the company.[107]

The creditors may at the meeting appoint some other person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company instead of the liquidator appointed by the company. Where the creditors appoint some other person the winding up shall proceed as if the winding up were a creditors' winding up.[108]

6.3.3 Creditors' winding up

A company may be wound up by way of creditor's winding up when the company is insolvent.[109] The directors must cause a meeting of the creditors of the company to be summoned at which a winding up resolution is to be proposed (as further illustrated below).[110] The shareholders of the company also need to hold a meeting in relation to the winding up of the company, in order to pass a special resolution that the company be wound up.

[104] *Idem*, s 139(1).
[105] *Idem*, s 139(2).
[106] *Idem*, s 139(3).
[107] *Idem*, s 140.
[108] *Ibid.*
[109] *Idem*, s 142(1).
[110] *Idem*, s 142(2).

The Insolvency Act 2009 defines "inability to pay debts" in the ordinary course of business as meaning subject to section 179 of the Insolvency Act 2009, where:

(a) the company has failed to comply with a statutory demand;

(b) execution issued against the company in respect of a judgment debt has been returned unsatisfied;

(c) a person entitled to a charge over all or substantially all of the property of the company has appointed a receiver under the instrument creating the charge; or

(d) a compromise between a company and its creditors has been put to a vote in accordance with Part XVII and Part XVIII of the Companies Act 2001 but has not been approved.[111]

Where it appears to the directors of a company that the company is insolvent, the directors may, prior to the holding of a general meeting for the passing of a special resolution that a company shall be wound up, lodge with the Director of the Insolvency Service a declaration (declaration of insolvency) and deliver a copy thereof to the Official Receiver stating that the:

(a) company cannot by reason of its liabilities continue its business; and

(b) meetings of the company and of its creditors have been summoned for a date not later than one month of the date of the declaration and the directors must forthwith appoint a provisional liquidator who will exercise all the powers of a liquidator in a creditor's winding up.[112]

The appointment of the provisional liquidator will continue for one month from the date of his appointment or for such further period as the Official Receiver may allow or until the appointment of a liquidator, whichever occurs first.

The company must within 14 days give notice of the appointment of a provisional liquidator and the lodging of the declaration in one daily newspaper and in the government gazette. A winding up is deemed to have commenced where a provisional liquidator is appointed at the time when a declaration is lodged.

The directors of the company must cause a meeting of the creditors of the company to be summoned for the day or the day next following the day on which there is to be held the meeting at which a winding up resolution is to be proposed. The notice of the meeting of creditors must be to be sent by post to the creditors at the same time as the notice of the meeting of the company are sent.[113]

The directors must convene the meeting at a time and place convenient to the majority in value of the creditors and must (a) give at least seven days' notice of the meeting to the creditors and

[111] *Idem*, s 178.
[112] *Idem*, s 142.
[113] *Idem*, s 142(2).

(b) send to each creditor together with a statement showing the names of all creditors and the amounts of their claims. The notice of the meeting of the creditors must be advertised at least seven days before the meeting in one daily newspaper.[114]

The directors must produce before the meeting of creditors a full statement of the company's affairs showing in respect of assets, the method and manner in which the valuation of the assets was arrived at, together with a list of the creditors and the estimated amount of their claims to be laid before the meeting of creditors. The directors must appoint one of their number to attend the meeting.[115]

The director so appointed must attend the meeting and must disclose to the meeting the company's affairs and the circumstances leading to the proposed winding up.

The creditors may appoint one of their number or the director appointed to preside at the meeting. The chairman will at the meeting determine whether the meeting has been held at a time and place convenient to the majority in value of the creditors and his decision will be final. Where the chairman decides that the meeting has not been held at a time and place convenient to that majority, the meeting will lapse and a further meeting shall be summoned by the company as soon as is practicable.[116]

During the meeting the creditors may nominate a person to be the liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the directors nominate different persons the person nominated by the creditors shall be the liquidator, and if no person is nominated by the creditors, the person nominated by the directors shall be the liquidator. Upon the appointment of a liquidator, all the powers of the directors shall cease.[117]

It must be noted that the creditors at a meeting summoned, or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons, whether creditors or not.[118]

Where a committee of inspection is appointed, the directors may, either at the meeting at which the winding up resolution is passed or at any time subsequently in a general meeting, appoint such number of persons not being more than five as it thinks fit to act as members of the committee. A committee of inspection appointed will meet at least once every year.[119]

Where a voluntary winding up continues for more than one year, the liquidator must at the expiry of the first year from the commencement of the winding up and of each succeeding year but not more than three months later, summon a general meeting of the company and the

[114] *Idem*, s 142(4).
[115] *Idem*, s 142(5).
[116] *Idem*, s 142(7).
[117] *Idem*, s 143(1).
[118] *Idem*, s 141(1)(a).
[119] *Idem*, s 144(3).

creditors, and must lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year.[120]

Where the affairs of the company have been fully wound up, the liquidator shall as soon as possible –

(a) make up an account showing how the winding up has been conducted and the property of the company has been disposed of, and

(b) call a general meeting of the company, or in the case of a creditors' voluntary winding up a meeting of the company and the creditors and shall lay the account before the meeting.[121]

A meeting shall be called by advertisement published in at least one daily newspaper and be published at least one month before the meeting.[122] The liquidator shall within seven days lodge a notice of the holding of the meeting and of its date together with a copy of the account with the Director of the Insolvency Service and deliver a copy of the notice to the Official Receiver.[123]

The quorum at a meeting of the company shall be two and at a meeting of the company and the creditors shall be two shareholders and two creditors, and if a quorum is not present at the meeting, the liquidator shall *in lieu* of the notice lodge a notice together with a copy of the account, that the meeting was summoned and that no quorum was present.[124]

The company shall be dissolved on the expiry of three months after the notice has been lodged and, if a quorum is reached, a copy of the notice has been delivered to the Official Receiver.[125]

6.3.4 Winding up by Court

A creditor, amongst others, can petition to the Court for the winding up of the company under one of the several prescribed grounds for winding up including on the ground that the company is unable to pay its debts when they fall due.[126]

Under section 102 of the Insolvency Act 2009 a company may, whether or not it is being wound up voluntarily, be wound up under an order of the Court, upon a petition to wind up the company being presented.[127]

The petition may *inter alia* be presented by any of the following persons:

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[120] *Idem*, s 150(1).
[121] *Idem*, s 151(1).
[122] *Idem*, s 151(2).
[123] *Idem*, s 151(3).
[124] *Idem*, s 151(4).
[125] *Idem*, s151(5)
[126] *Idem*, s 102(5)(b).
[127] *Idem*, s 102.

(i) the company;

(ii) a contributory or any person who is the heir of a deceased contributory or the trustee in bankruptcy of the estate of a contributory;

(iii) a shareholder;

(iv) a creditor, including a contingent or prospective creditor, of the company;

(v) a liquidator;

(vi) the Director of the Insolvency Service (the Director); or

(vii) the Financial Services Commission, where the company is a licensee thereof.[128]

The Court may, on the presentation of a petition under section 102 of the Insolvency Act 2009 and before the making of a winding up order, appoint the Official Receiver or any other qualified person to be provisional liquidator on being satisfied that:

(a) there are reasonable grounds for believing that the company is unable to pay its debts; or

(b) any of the property of the company available to meet its debts is at risk or may be removed from Mauritius.[129]

The Official Receiver or the provisional liquidator will have and exercise all the functions and powers of a liquidator.

The petition for winding up can include a prayer to the Court that a designated person be appointed as liquidator. However, if the Court does not appoint such person as provisional liquidator, the Official Receiver will be acting as provisional liquidator.

On hearing a petition to wind up the company, the Court may in its discretion either grant the petition and make a winding up order or dismiss the petition or adjourn the hearing conditionally or unconditionally. However, a winding up order cannot be refused on the following grounds, namely that the:

(a) assets of the company have been charged to an amount equal to or in excess of those assets; or

(b) company has no assets.[130]

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[128] *Idem*, s 102(2).
[129] *Idem*, s 108.
[130] *Idem*, s 104. See *Airports of Mauritius v Airway Coffee* (2016) SCJ 163 and *Building & Civil Engineering Co Ltd v Flacq Shopping Mall Ltd* (2016) SCJ 213.

If a winding up order is made by the Court, the Official Receiver will, unless another person has been appointed, become the provisional liquidator, and continue to act as such until he or another person becomes liquidator and is capable of acting as such. Upon the appointment of the liquidator, the liquidator must consent in writing to his appointment.

The liquidator so appointed must give written notice of his appointment to the Director within 14 days of his appointment. In case there is any change in the situation of his office, notice to that effect must be lodged with the Director. If the liquidator resigns or is removed from office, a notice to that effect must also be lodged with the Director and a copy of the notice must be delivered to the Registrar of the Court and the Official Receiver.

The liquidator must also provide security to the satisfaction of the Official Receiver and satisfactory evidence that he holds professional indemnity insurance. He must also provide the Official Receiver with such information and such facilities for inspecting the books of the company as may be required for him to perform his duties.

On the appointment of the liquidator, all the powers of the directors will cease, except so far as the committee of inspection or, if there is no such committee, the creditors approve the continuance thereof.[131]

With effect from the commencement of the liquidation of a company, the liquidator has custody and control of the company's assets. Although, the directors remain in office but cease to have powers, functions, or duties other than those required or permitted under the Act.[132]

Unless the liquidator agrees or the Court orders otherwise, a person shall not commence or continue legal proceedings against the company or in relation to its property; or exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company.[133]

Unless the Court orders otherwise, a share in the company shall not be transferred and a shareholder shall not exercise a power under the constitution of the company; and the constitution of the company shall not be altered.[134]

There shall be delivered to the liquidator a statement as to the affairs of the company, in the form of an affidavit, as at the date of the winding up order showing:[135]

(a) the particulars of its assets, including any inventory of stock, debts and liabilities;

(b) the names and addresses of its creditors;

(c) the charges held by them;

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[131] Insolvency Act 2009, s 143(4).
[132] *Idem*, s 145.
[133] *Idem*, s 154. See *SBI (Mauritius) Ltd v VIEO Industries Ltd & Anor* (2016) SCJ 174.
[134] *Idem*, s 154 (1)(d).
[135] *Idem*, s 113.

(d) the dates on which the charges were created; and

(e) such further information as the liquidator may require.

6.3.5 The liquidator

The principal duty of the liquidator is to act in a reasonable and efficient manner so as to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with the Insolvency Act 2009; and where there are surplus assets remaining, distribute them, or the proceeds of the realisation of the surplus assets.[136]

A liquidator shall within seven days of being appointed or being notified of his appointment, give public notice of his appointment; the date of the commencement of the liquidation; and the address and contact number to which, during normal business hours, inquiries may be directed by a creditor or shareholder; within seven days of being appointed or being notified of his appointment, submit to the Director notice of his appointment.[137]

Every liquidator shall within 28 days after the expiry of the period of six months from the date of his appointment and of every subsequent period of six months lodge with the Director an affidavit giving an account of his receipts and payments and stating the steps taken in the winding up and deliver a copy of the affidavit to the Official Receiver and the Director.[138]

A liquidator who considers that the company or any person has –

(a) committed an offence in relation to the company;

(b) been guilty of any negligence, default, breach of duty or trust in relation to the company; or

(c) committed any offence that is material to the liquidation under the Companies Act 2001, the Securities Act, the Financial Services Act 2007 or the Criminal Code,

shall as soon as practicable submit a written report of that fact to the Director and give him such information or documents, and such assistance, including further reports, and access to and facilities for inspecting and taking copies of any documents, as the Director may require.[139]

A liquidator powers are set out in the Sixth Schedule of the Insolvency Act 2009.[140]

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[136] *Idem*, s 115.
[137] *Idem*, s 117(1)(a).
[138] *Idem*, s 117(1)(d).
[139] *Idem*, s 117(5).
[140] *Idem*, Sixth Sched.

6.3.6 Provable debt and proof of debt / proof of claim

A provable debt is a present, future, certain or contingent debt or liability which a creditor may prove in a bankruptcy or a winding up and that a debtor owes at the time of adjudication or in the case of a company on the commencement of the winding up; or after adjudication but before discharge or in the case of a company after the commencement of the winding up and before dissolution, by reason of an obligation incurred by the debtor before adjudication or dissolution as the case may be.[141]

A proof of debt is the document that a creditor submits, to the Official Receiver in the case of a bankruptcy or to a liquidator in the case of a company winding up, for the purpose of proving the debt.[142]

A debt is proved when a decision is made by the Official Receiver or liquidator to admit the debt in accordance with the Second Schedule as being a debt provable in the bankruptcy.[143]

The Second Schedule regulates the manner in which a proof of debt is to be submitted and is to be examined and the procedure to be followed in relation to the proving of debts, including the options available to a secured creditor and the procedure to be followed by a secured creditor.[144]

The creditor shall bear the costs of proving the debt, unless the Court makes an order directing that the bankrupt's estate or company in winding up is to pay the creditor's costs.[145]

6.3.7 Mutual credit and set-off

Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor and another person –

(a) an account shall be taken of what is due from one party to the other in respect of those credits, debts, or dealings;

(b) an amount due from one party to the other shall be set off against an amount due from the other party; and

(c) only the balance of the account may be proved in a bankruptcy or a liquidation, or is payable to the Official Receiver or liquidator, as the case may be.[146]

It should however be noted that a related person is not entitled under this section to claim the benefit of a set-off arising from –

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[141] *Idem*, s 305(1).
[142] *Idem*, s 305(3).
[143] *Idem*, s 305(4).
[144] *Idem*, s 306(1).
[145] *Idem*, s 306(3).
[146] *Idem*, s 309(1).

(a) a transaction made within the restricted period, being a transaction[147] by which the related person[148] gave credit to the debtor or the debtor gave credit to the related person; or

(b) the assignment within the restricted period to that person of a debt owed by the debtor to another person,

unless the related person proves that, at the time of the transaction or assignment, the related person did not have reason to suspect that the debtor was unable to pay his or its debts as they became due.[149]

6.3.8 Voidable preference

A transaction by a debtor may be set aside by the Court on the application of the Official Receiver or a liquidator where it is a voidable preference; and was made within two years immediately before adjudication or commencement of the winding up.[150]

A voidable preference is a transaction by the debtor that is made at a time when the debtor is unable to pay his due debts and enables another person to receive more towards satisfaction of a debt by the debtor than that person would receive, or would be likely to receive, in the bankruptcy or liquidation.[151]

"Transaction" means any of the following steps taken by the debtor:

(i) conveying or transferring the debtor's property;

(ii) creating a charge over the debtor's property;

(iii) incurring an obligation;

(iv) undergoing an execution process;

(v) paying money (including money paid in accordance with a judgment or an order of a Court); or

(vi) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.[152]

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147 "Restricted period" means the period of two years before the date of an adjudication or the commencement of a winding up.
148 "Related person" means a related company and includes a director of a company in liquidation.
149 Insolvency Act 2009, s 309(2).
150 *Idem*, s 313(1).
151 *Idem*, s 313(2)(a).
152 *Idem*, s 313(2)(b).

It is important to note that a transaction that is made within six months immediately before the debtor's adjudication or the commencement of the winding up is presumed, unless the contrary is proved, to be made at a time when the debtor is unable to pay his due debts.[153]

6.3.9 Voidable charge

A charge over any property or undertaking of a debtor may be set aside by the Court on the application of the Official Receiver or a liquidator where the charge was given within two years immediately before the date of thedebtor's adjudication or the commencement of the winding up and immediately after the charge was given, the debtor was unable to pay his / its due debts.[154]

A charge given by a debt under an agreement to give the charge that was made before the period of two years immediately before the date of adjudication or the commencement of the winding up may not be set aside.[155]

A charge may however not be set aside where the charge secures money actually advanced or paid, or the actual price or value of property sold or supplied, or any other valuable consideration given in good faith, by the charge holder to the debtor at the time when, or at any time after, the charge was given.[156]

Also, a charge or security may not be set aside where the charge is a substitute for an existing charge that was given by the debtor more than two years before the date of adjudication or the commencement of the winding up.[157]

A debtor who gives a charge within six months immediately before the date of adjudication or the commencement of the winding up is presumed, unless the contrary is proved, to have been unable to pay his or its due debts immediately after giving the charge.[158]

6.3.10 Alienation of property with intent to defraud a creditor

Every alienation of property made by a debtor within five years immediately before the date of adjudication or the commencement of the winding up of the debtor with intent to defraud a creditor may be set aside by the Court on the application of the Official Receiver or a liquidator.[159]

This section would however not apply to any estate or interest in property alienated to a purchaser in good faith not having at the time of the alienation notice of the intention to defraud any creditor.[160]

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[153] *Idem*, s 313(3).
[154] *Idem*, s 314(1).
[155] *Idem*, s 314(2).
[156] *Idem*, s 315(1).
[157] *Idem*, s 315(2).
[158] *Idem*, s 316.
[159] *Idem*, s 319(1).
[160] *Idem*, s 319(2).

6.3.11 Voidable gifts

A gift by a debtor to another person may be set aside by the Court on the application of the Official Receiver or a liquidator where the debtor made the gift within two years immediately before the date of adjudication or the commencement of the winding up and the debtor was unable to pay his or its due debts immediately after making the gift.[161]

A gift that is made within six months immediately before the date of the debtor's adjudication or the commencement of the winding up is presumed, unless the contrary is proved, to be made at a time when the debtor is unable to pay his or its due debts.[162]

6.3.12 Procedure for setting aside voidable transaction[163]

To initiate the setting aside of a voidable transaction to which this section applies, the Official Receiver or liquidator shall, as soon as practicable, serve a notice on the other party to the transaction and any other party from whom the Official Receiver or liquidator intends to recover.

The notice shall be in writing, state the Official Receiver's or liquidator's address, specify the voidable transaction to be set aside, describe the property or state the amount that the Official Receiver or liquidator wishes to recover state that the person named in the notice may object to the setting aside of the transaction if that person sends a written notice of objection to the Official Receiver or liquidator within 28 days after the notice has been served on that person; and state that the transaction will be set aside as against the person named in the notice if that person does not object.

A voidable transaction is automatically set aside as against a person named in the notice if that person has not objected, by the sending of a notice by the Official Receiver or liquidator to the person not later than five working days after the expiry of the 28 days' notice.

A notice of objection shall state the reasons for objecting and the Court may, on the application of the Official Receiver or liquidator, set aside the voidable transaction in any case where a person named in the notice has given a notice of objection.

The procedure above applies to:

(a) a voidable preference;

(b) a voidable charge;

(c) an alienation of property with intent to defraud a creditor; and

(d) a voidable gift.

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[161] *Idem*, s 320(1).
[162] *Idem*, s 320(2).
[163] *Idem*, s 321.

6.3.13 Netting agreement

The provisions of a netting 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 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 the insolvent party may be subject to, or (c) any other enactment that may be applicable to the insolvent party.[164]

After the commencement of insolvency proceedings in relation to a party, the only right or obligation, if any, of either party to make / receive payment or delivery under a netting agreement shall be equal to its net entitlement / net obligation with respect to the other party as determined in accordance with the terms of the applicable netting agreement.[165]

Any power of a liquidator to assume or repudiate individual contracts or transactions will not prevent the termination, liquidation or acceleration of all payment or delivery obligations or entitlements under one or more qualified financial contracts entered into under or in connection with a netting agreement, and will apply, if at all, only to the net
amount due in respect of all such qualified financial contracts in accordance with the terms of such netting agreement.[166]

6.3.14 Limitation of insolvency law prohibiting set-off

The provisions of a netting agreement which provide 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 entered into will not be affected by the laws 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.[167]

Moreover, the liquidator of an insolvent party may not avoid or set aside any –

(a) transfer, substitution or exchange of cash, collateral or any other interests under or in connection with a netting agreement from the insolvent party to the non-insolvent party; or

(b) payment or delivery obligation incurred by the insolvent party and owing to the non-insolvent party under or in connection with a netting agreement,

on the ground of it constituting a preference, a transfer during a suspect period or an onerous contract by the insolvent party to the non-insolvent party, unless there is clear and convincing evidence that the non-insolvent party made the transfer or incurred the obligation with actual

[164] *Idem*, s 339.
[165] *Idem*, s 340.
[166] *Idem*, s 342.
[167] *Idem*, s 343.

intent to hinder, delay, or defraud any entity to which the insolvent party was indebted or became indebted, on or after the date the transfer was made or the obligation was incurred.[168]

6.3.15 Pre-emption

It should be noted that no stay, injunction, avoidance, moratorium, or similar proceeding or order, whether issued or granted by a Court, administrative agency, liquidator or otherwise, shall limit or delay application of otherwise enforceable netting agreements.[169]

6.3.16 Multi-branch netting agreement

The liability of an insolvent branch or agency of a foreign party or its liquidator in Mauritius under a multi-branch netting agreement shall be calculated as of the date of the termination of the qualified financial contracts entered into under the multi-branch netting agreement in accordance with its terms and shall be limited to the lesser of the global net payment obligation and the branch / agency net payment obligation.[170]

The liability under this section of the insolvent branch or agency of the foreign party or its liquidator shall be reduced by any amount otherwise paid to or received by the non-insolvent party in respect of the global net payment obligation pursuant to such multi-branch netting agreement which if added to the liability of the liquidator under this section would exceed the global net payment obligation.[171]

6.3.17 Distribution of assets

The Official Receiver or a liquidator shall pay, out of the money received by him by the realisation of the property of a debtor, the preferential claims set out in the Fourth Schedule to the extent and in the order of priority specified in that Schedule.[172]

After paying the preferential claims above, the Official Receiver or the liquidator shall pay any remaining money to the general creditors.[173]

In the case of a company in winding up the liquidator, after paying the general creditors, shall distribute the company's surplus assets:

(a) in accordance with the provisions of the company's constitution; or

(b) where the company's constitution does not contain provision for the distribution of surplus assets or the company does not have a constitution, to shareholders rateably.[174]

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[168] *Idem*, s 344.
[169] *Idem*, s 345.
[170] *Idem*, s 348(1)(a).
[171] *Idem*, s 348(1)(b).
[172] *Idem*, s 328(1).
[173] *Idem*, s 328(4).
[174] *Idem*, s 328(6).

6.3.18 Dissolution and release of liquidator

Where a liquidator has:

(a) realised all the property of the company or so much as can in his opinion be realised without needlessly protracting the liquidation;

(b) distributed a final dividend, if any, to the creditors;

(c) adjusted the rights of the contributories among themselves; and

(d) made a final return, if any, to the contributories;

or where the liquidator has resigned or been removed from his office, the liquidator may apply to the Court for an order that he be released or for an order that he be released and that the company be dissolved.[175]

The liquidator shall present to the Court an account showing how the winding up has been conducted and the property of the company has been disposed of. Where an order is made that the company be dissolved, the company shall from the date of the order be dissolved accordingly.[176]

An order of the Court releasing a liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company or otherwise in relation to his conduct as liquidator.[177]

6.3.19 Alternative to liquidation

6.3.19.1 Compromises

The policy behind the compromise provisions is to allow a company in financial difficulty to reach satisfactory accommodation with its creditors, with the certainty that creditors cannot act inconsistently with the scheme once it has been sanctioned. Once sanctioned, the scheme is binding on all participating creditors, whether or not they voted in favour or even attended the meeting.[178]

Section 253 of the Companies Act 2001 defines a compromise as one between a company and its creditors, including a compromise:

- cancelling all or part of a company's debt;

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[175] *Idem*, s 122 (1).
[176] *Idem*, s 122 (2).
[177] *Idem*, s 122 (3).
[178] *Buttle v Allen* (1993) 6 NZCLC 260, 296 and *American Bistro (Christchurch) Ltd v Commissioner of Inland Revenue* (1997) 8 NZTC 13, 369.

- varying the rights of its creditors or the terms of a debt; or

- relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt. [179]

A "creditor" includes a person who, in a liquidation, would be entitled to claim that a debt is owing to that person by the company, and also includes a secured creditor.[180]

The word "compromise" implies some accommodation on each side and is not apt to describe a total surrender.[181] Third parties can also be involved in compromises and are often crucial to the implementation of a compromise.[182]

6.3.19.2 Compromise proposal

The board of directors of the debtor company, a receiver appointed in relation to the whole or substantially the whole of the assets and undertaking of the company, a liquidator, or (with the leave of the Court) any creditor or shareholder of the company may propose a compromise if that person has reason to believe that a company is or will be unable to pay its debts.[183]

Where the Court grants leave to a creditor or shareholder to propose a compromise, it may make an order directing the company to supply to the creditor or shareholder, within such time as may be specified, a list of the names and addresses of the company's creditors showing the amounts owed to each of them, or such other information as may be specified to enable the creditor or shareholder to propose a compromise.[184]

6.3.19.3 Notice of proposed compromise and meetings of creditors

The proponent (the person who proposes the compromise) must compile a separate list of each class of the company's creditors, being the creditors known to the proponent and who would be affected by the proposed compromise. The list must set out the amount owing or estimated to be owing to each of the creditors and the number of votes which each of the creditors is entitled to cast on a resolution approving the compromise.[185]

The proponent must then give to each known creditor, the company, any receiver or liquidator, and register with the Registrar:

(a) a notice of an intention to hold a meeting of creditors (or classes thereof) for the purpose of voting on the resolution; and

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[179] Companies Act 2001, s 253.
[180] *Idem*, s 2.
[181] *Re Savoy Hotel Ltd* [1981] Ch 351 and *Re NFU Development Trust* [1972] 1 WLR 1548.
[182] *Te Runanga o Ngai Tahu v Glenharrow Holdings Ltd HC Christchurch* CIV-2005-409-15, 12 August 2005.
[183] Companies Act 2001, s 254(1).
[184] *Idem*, s 254(3).
[185] *Idem*, s 255(1).

(b) a statement:

(i) containing the name and address of the proponent and the capacity in which the proponent is acting;

(ii) containing the address and telephone number to which enquiries may be directed during normal business hours; and

(iii) setting out the terms of the proposed compromise and the reasons for it;

(iv) setting out the reasonably foreseeable consequences for creditors of the compromise;

(v) setting out the extent of any interest of a director in the proposed compromise;

(vi) explaining the proposed compromise and any amendment to it proposed at a meeting of creditors or any class thereof will he binding on all creditors, or on all creditors of that class, if approved;

(vii) containing details of any procedure proposed as part of a proposed compromise for varying the compromise following its approval; and

(c) a copy of the list or lists of creditors referred to above.[186]

6.3.19.4 Determination of separate classes of creditor

Part XVII of the Companies Act 2001 contemplates a compromise being entered into by a company's creditors or any class of them and requires meetings to be summoned of the creditors concerned but provides no indication as to the manner in which such classes are to be constituted.[187]

The question whether a single meeting is sufficient or separate class meetings must be held depends on whether it can be said that the company is entering into a single composite arrangement with all the creditors affected by the scheme of whether it is in reality entering into separate but interdependent arrangements with different classes of its creditors.[188]

The Courts give a liberal meaning to the word "class" in the context of proposals or compromises with creditors. Classes should depend upon the similarity or dissimilarity of their rights against the company and the way in which those rights are affected by the proposal, and not upon the similarity or dissimilarity of their private interests arising from matters extraneous to such rights.[189]

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[186] *Idem*, s 255(2).
[187] Idem, Part XVII.
[188] *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin [2001] HKCFA 54; [2001] 3 HKLRD 634 at 15 per Lord Millet NPJ, citing Re Hawk Insurance Company Ltd [2001] EWCA Civ 241.*
[189] *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin [2001] HKCFA 54; [2001] 3 HKLRD 634 at 17 per Lord Millet NPJ*, no 196.

The Courts will strive to give the term "class" a meaning that will prevent the section resulting in confiscation and injustice, and confine it to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[190]

Creditors with vested rights are not necessarily to be regarded as a different class from creditors whose rights are contingent. The test is rather one of whether or not the persons who, prima facie, appear to constitute the class of unsecured creditors should be dissected into separate classes by reason of some particular matter so affecting the rights of some as to render it impossible for them to pursue their own interests concurrently with their participating in the pursuit of the interests of the class of which they appear to be members.[191]

A compromise (including any amendment which is proposed at the relevant meeting) is approved by the creditors or the relevant class thereof if at a meeting of the creditors or that class conducted in accordance with section 142 of the Insolvency Act 2009 and the First Schedule to the Insolvency Act 2009, the compromise including any amendment, is adopted.[192]

6.3.19.5 Meeting of creditors

The company must cause a meeting of the creditors of the company to be summoned and at least seven days written notice of the meeting of creditors must be sent to all creditors. The notice must be accompanied by a statement showing the names of all creditors and the amounts of their claims. Notice of the meeting of the creditors must be advertised at least seven days before the date of the meeting in two daily newspapers.

The directors must cause a full statement of the company's affairs showing, in respect of assets, the method and manner in which the valuation of the assets was arrived at, together with a list of the creditors and the estimated amount of their claims to be laid before the meeting of creditors; and appoint one of their number to attend the meeting. The director so appointed must attend the meeting and disclose to the meeting the company's affairs and the circumstances leading up to the proposed winding up.

The creditors may appoint one of their number or the director appointed to preside at the meeting. The chairman must at the meeting determine whether the meeting has been held at a time and place convenient to the majority in value of the creditors and his decision shall be final. Where the chairman decides that the meeting has not been held at a time and place convenient to that majority the meeting will lapse and a further meeting must then be summoned by the company as soon as is practicable.

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[190] *Wilder Transport Ltd v CIR* (1999) 19 NZTC 15, 120; *The NZ Municipalities Cooperative Insurance Ltd v Dunedin City Council* (1989) 4 NZCLC 65; and *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573.

[191] *Re Fax Marine Pty Ltd* [1967] 1 NSWR 145 at 148 (NSWSC), *cited in Wilder Transport Ltd v CIR* (1999)19 NZTC 15, 120.

[192] Companies Act 2001, s 256.

6.3.19.6 Voting at the meeting of creditors

According to section 152 of the Insolvency Act 2009, for a compromise entered into between a company and its creditors to be binding on the company, the compromise must be sanctioned by a special resolution. Similarly, for a compromise to be binding on the creditors, the compromise must be voted upon by (i) three-fourths in value of the creditors, and (ii) one half of the number of persons who are creditors for MUR 5,000 or more.

The proponent of the compromise must give written notice of the result of the voting to each known creditor, the company, any receiver or liquidator, and the Registrar of Companies.

6.3.19.7 Variation of compromise

A compromise which has been approved under section 256 of the Companies Act 2001 may be varied either:[193]

(i) in accordance with any procedure for variation which is incorporated in the compromise as approved; or

(ii) by the approval of a variation of the compromise in accordance with Part XVII which, for that purpose, will apply with such modifications as may be necessary as if any proposed variation where a proposed compromise.

6.3.20 Powers of Court

6.3.20.1 Powers in respect of procedural requirements

On the application of the proponent of the compromise, or the company, the Court may give directions in relation to a procedural requirement imposed by Part XVII, or waive or vary any such requirement if it is satisfied that it would be just to do so.[194]

6.3.20.2 Powers in respect of enforcement of creditors' claims

The proponent of the compromise, or the company, can apply to the Court for an order that, during a period specified in the order, beginning not earlier than the date on which notice was given of the proposed compromise and ending not later than 14 days after the date on which notice was given of the result of the voting on it:[195]

(a) proceedings in relation to a debt owing by the company be stayed; or

(b) a creditor refrain from taking any other measure to enforce payment of a debt owing by the company.

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[193] *Idem*, s 257(1).
[194] *Idem*, s 258(1)(a).
[195] *Idem*, s 258(1)(a).

These powers are not however sufficient to overcome the incentives for creditors to pursue full reimbursement rather than participate in a compromise, which it has been suggested, has led to the compromise procedure being rarely used.

The Court's power to restrain proceedings or enforcement of a debt does not affect the right of a secured creditor during that period to take possession of, realise, or otherwise deal with, the property of the company over which that creditor has a charge.

6.3.20.3 Dissatisfied creditors' recourse to the Courts

The Court only becomes involved on the application of a creditor (or an application under Part XVII). If the Court is satisfied, on the application of a creditor who is entitled to vote on a compromise that:[196]

(i) insufficient notice of the meeting or of any of the matters required to be notified was given to that creditor; or

(ii) there was some other material irregularity in obtaining approval of the compromise; or

(iii) in the case of a creditor who voted against, the compromise is unfairly prejudicial to that creditor, or to the class of creditors which that creditor belongs,

the Court may order that the creditor is not bound by the compromise or may make such other order as it thinks fit.

Applications for such orders must be made not later than 14 days after the date on which notice of the result of the voting was given to the creditor.[197]

The Courts require that the proposal be fair and reasonable to those affected by it. They weigh the interests of the applicants, and any special majority supporting them, against the interests of any dissentient minority, and see their role as protecting the minority from that degree of change to which it is unreasonable to require all shareholders to submit. This approach seems particularly relevant to the question of whether a compromise is "unfairly prejudicial" to a dissenting creditor. However, the degree of change to which it is reasonable to expect a minority to submit remains unclear.

6.3.21 Effect of compromise in liquidation

Once a compromise has been approved, the Court may, on the application of the company, a receiver appointed in relation to the property of the company; or (with the Court's leave) any creditor or shareholder of the Company, make such order as the Court thinks fit with respect to the extent, if any, to which the compromise will continue in effect and be binding on the liquidator if the company is put into liquidation. The court also has power, on the application of

[196] *Idem*, s 258(3).
[197] *Idem*, s 258(4).

the same classes of persons, to make such orders after the company has been put into liquidation, although in this latter situation the liquidator also has power to apply (*in lieu* of the company).

6.3.22 Arrangements

The term "arrangement" is defined to include a reorganisation of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both these methods.[198]

6.3.23 Winding up of limited life company

A limited life company is dissolved in accordance with section 290 of the Companies Act 2001:

(a) when the period fixed for the duration of the company expires;

(b) where the shareholders of the company pass a special resolution requiring the company to be wound up and dissolved; or

(c) where the constitution of the company so provides, upon the happening of any one or more of the following events as are stipulated in the constitution:

  (i) the bankruptcy, death, insanity, retirement, resignation, withdrawal, expulsion, termination, cessation or dissolution of a shareholder;

  (ii) the transfer of any share or other interest in the company in contravention of the constitution of the company,

  (iii) the-redemption, repurchase or cancellation of all the shares of a shareholder of the company; or

  (iv) the occurrence of any other event (whether or not relating to the company or a shareholder) on which it is provided in the constitution that the company is to be dissolved.[199]

Upon dissolution of a limited life company, an administrator is designated to act by resolution of the shareholders of the dissolved company for the purpose of winding up of the company. If they fail to pass such a resolution, the Court may appoint an administrator.[200]

The administrator need not be a registered Insolvency Practitioner under the Insolvency Act 2009 but shall be a natural person.

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[198] *Idem*, s 261.
[199] *Idem*, s 290.
[200] *Idem*, s 290 (2)(a).

Self-Assessment Exercise 4

Question 1

In what circumstances will a company be considered insolvent in Mauritius, and who are entitled to petition for the winding up of a company?

Question 2

Describe the different types of winding up of a company in Mauritius.

Question 3

Briefly describe what are voidable transactions and the procedure to set aside a voidable transaction.

Question 4

A creditor wishes to initiate insolvency proceedings against a company. In the meantime, the creditor has reason to believe that the debtor may alienate property belonging to it. What are the options available to the creditor?

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.4 Receivership

Receivership is an important aspect of corporate insolvency in Mauritius, governed by the Insolvency Act 2009. Receivership provides a mechanism for the secured creditor to take control of the company's assets and manage them in order to repay the debt owed. Receivership is a valuable tool for creditors as it allows them to have a greater degree of control over the insolvency process and increases their chances of recovering their outstanding claims.

A receiver may be appointed under any instrument that confers on a charge the power to appoint a receiver or by the Court.[201] An instrument that creates a charge in respect of property and undertaking of a company may confer on the chargee the power to appoint a receiver or a receiver and manager of the property and undertaking or of that part which is secured by the charge.[202] A receiver appointed under an instructing conferring the power on a chargee to appoint a receiver shall do so in writing and he shall be an agent of the charger unless the instrument provides otherwise.

[201] Insolvency Act 2009, s 181.
[202] *Idem*, s 183(2).

A receiver will be appointed by the Court on the application of a chargee or any other interested person and on notice to the company where (a) the company has failed to pay a debt due to the chargee or has otherwise failed to meet any obligation to the chargee, of that any principal money borrowed by the company or interest is in arrears for more than 21 days, (b) the company proposes to sell or otherwise dispose of the secured property in breach of the terms of any instrument creating the security or charge, or (c) it is necessary to do so to ensure the preservation of the secured property for the benefit of the chargee.[203]

Unless stated otherwise, a receiver covers a person appointed as a receiver and manager. A manager means a person appointed under section 183 to carry on a company's business and dispose of its undertaking.

Upon appointment of a receiver, such receiver shall comply with the provisions of section 187 of the Insolvency Act 2009, namely by giving notice of his appointment to the charger, giving public notice of his appointment and by notifying the Registrar of Companies and the Director of Insolvency within seven days from the date of his appointment.[204]

Where a receiver is appointed under an instrument, he shall act in accordance with the powers and authorities provided therein. As regards a Court-appointed receiver, the powers of the receiver will be limited to the powers conferred by the Court. In addition to the powers conferred by the instruction or the court order, a receiver shall exercise the powers set out in the Eighth Schedule.[205]

The receiver exercises the powers conferred upon it to the exclusion of the board of directors or the charger.[206] A receiver may execute in the name and on behalf of the company every document necessary or incidental to the exercise of the receiver's powers and a document signed on behalf of a company by a receiver shall be deemed to have been properly signed on behalf of the company.[207]

Where a receiver is appointed in respect of the property of a company, the company and every director of the company shall within seven days make available to the receiver all books, documents and information relating to the property in receivership in the company's possession or under the company's control and if required to do so by the receiver, verify by affidavit that the books, documents and information are complete and correct.[208]

Moreover, the directors of the company shall within 14 days after receipt of the notice of the receiver's appointment, or such longer period as may be allowed by the Court, make out and submit a statement as to the affairs of the company.[209]

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[203] *Idem*, s 186. See *Bonnet des Arnoux v BPCE International et Outre Mer* (2016) SCJ 241.
[204] *Idem*, s 187.
[205] *Idem*, Eighth Sched.
[206] *Idem*, s 190(3).
[207] *Idem*, s 193.
[208] *Idem*, s 194 (1)(a).
[209] *Idem*, s 194 (1)(c). See *Ramrachheya v Gangoosirdar & MCB Ltd* (2010) SCJ 293.

A receiver shall exercise his powers in good faith and in a manner which he believes on reasonable grounds to be in the interests of the person in whose interest he was appointed.[210]

While acting in accordance with the above, a receiver shall exercise his powers with reasonable regard to the interests of (a) the charger, (b) persons claiming, through the chargor, interests in the property in the receivership, (c) unsecured creditors of the chargor, and (d) sureties who may be called upon to fulfil obligations of the chargor.[211]

More importantly, a receiver who exercises a power of sale of property in a receivership owes a duty to the chargor to obtain the best price reasonably obtainable as at the time of sale.[212]

The Insolvency Act 2009 was amended in 2017 to regulate the remuneration to which a receiver is entitled. The Act provides that the remuneration shall be determined by the:

(a) chargee, where the receiver is appointed pursuant to an instrument of charge; or

(b) Court upon an order appointing the receiver.[213]

The remuneration of the receiver cannot not exceed such percentage, as may be prescribed,[214] of the gross realisation proceeds on disposal of assets and any amount received in respect of the property in receivership.

It is important to take note of a recent judgment of the Supreme Court, *AAPCA v Mauritius Revenue Authority*,[215] where Court of Civil Appeal ruled that a condition imposed by the Mauritius Revenue Authority (the MRA), namely that all proceeds of sale of an immovable property should be remitted to it, was not abusive.

The Supreme Court relied on section 81A of the Income Tax Act[216] to the effect that a liquidator, administrator or receiver ought to set aside from the property before disposal such sum to the satisfaction of the MRA to satisfy tax due and payable.

The Supreme Court did not consider specific provisions on the ranking of claims in the Civil Code and Insolvency Act 2009 (which aim at providing a maximum number of creditors with a share of distribution and include tax claims). The *AAPCA* decision has been followed in *Best Flour v Mauritius Revenue Authority*.[217] It remains to be seen whether those decisions will be upheld in further appeals. Unless they are overturned or legislation is clarified, those decisions will have a major impact on the choice by banks of the enforcement procedures so that they, and other creditors, are not ousted in favour of the MRA.

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[210] *Idem* s 197(1).
[211] *Idem* s197(3). See *Aquachem Ltd v Delphis Bank* (1992) MR 288.
[212] *Idem*, s 197(5).
[213] *Idem*, s 197A.
[214] The Insolvency (Remuneration of Receiver) Regulations 2019.
[215] 2020 SCJ 397.
[216] Income Tax Act, s 81A.
[217] 2021 SCJ 301.

Self-Assessment Exercise 5

Question 1

Differentiate between a receiver and a receiver manager.

Question 2

Brief set out the instance which allows a creditor to appoint a receiver on a company.

Question 3

Briefly set out the powers of a receiver manager of a company.

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

6.5 Administration (corporate rescue)

The object of an administration is to provide for the business, property and affairs of a company to be administered in a way that:

(a) provides the opportunity for the company or as much as possible of its business, to continue in existence; or

(b) if it is not possible for the company or its business to continue in existence, results in a better return for the company's creditors and shareholders than would result from the immediate winding up of the company.[218]

Part III, Sub-Part IV of the Insolvency Act 2009 deals with the voluntary administration regime in Mauritius.

The administration begins where an administrator is appointed and ends where

(i) a deed of company arrangement is executed by the company and the deed's administrator;

(ii) the company's creditors resolve that the administration should end;

(iii) the company's creditors appoint a liquidator by a resolution passed at a watershed meeting;

(iv) the Court orders that the administration end because it is satisfied that the company is solvent, or that for any other sufficient reason the administration should cease;

[218] Insolvency Act 2009, s 213.

(v) the convening period expires without a watershed meeting having been held or without an application having been made to extend it, and the administration ends at the end of that period;

(vi) a watershed meeting ends without a resolution that the company execute a deed of arrangement, and the administration ends at the end of that meeting;

(vii) the company fails to execute a proposed deed of company arrangement within the time allowed; or

(viii) the Court appoints a liquidator or an interim liquidator and the administration ends at the time when the order is made.[219]

6.5.1 Appointment of administrator

An administrator must be a natural person who is not disqualified to act as a liquidator or who is not disqualified to be an Insolvency Practitioner.[220]

Administration is initiated on the appointment of an administrator, by any of the following:

(a) the company, where in the opinion of the directors voting for the resolution, the company is insolvent or is likely to become insolvent. A reference to the "company" appointing an administrator, means a decision of the company's board of directors;[221]

(b) where the company is in liquidation, the liquidator, where he thinks that the company is insolvent or is likely to become insolvent;

(c) where a provisional liquidator has been appointed, the provisional liquidator where he thinks that the company is insolvent or is likely to become insolvent;

(d) a secured creditor holding a charge over the whole, or substantially the whole, of the company's property where the charge has become and is still enforceable; or

(e) the Court on application made by a creditor, the liquidator or the Director of Insolvency or the Registrar of Companies, where it is satisfied that:

- the company is or may become insolvent;
- the survival of the company and the assets as a going concern are reasonably capable of being achieved in the event of an administrator being appointed;
- a more advantageous realisation of the assets of the company and any related company may be achieved than on an immediate winding up;

[219] *Idem*, s 214.
[220] *Idem*, s 215.
[221] See *Aldridge v Mordaunt Estates Ltd* (2011) SCJ 186.

- the appointment of an administrator may achieve a more advantageous realisation or a more expeditious settlement of a duty or liability owed by any person to the company or any related company; or

- it is just and equitable to do so.[222]

Two or more persons may be appointed administrators and, in that case, an administrator's function or power may be performed or exercised by any one of them, or by any two or more of them together, except so far as the order, instrument, or resolution appointing them provides otherwise.[223]

6.5.2 Powers of the administrator

While a company is in administration, the administrator has control of the company's business, property and affairs. He is required to investigate the company's affairs and consider possible ways of salvaging the company's business in the interests of creditors, employees and shareholders and may carry on that business and manage that property and those affairs with the objective of salvaging the company's business in the interests of creditors, employees and shareholders.

He is empowered to terminate or dispose of all or part of that business and may dispose of any of that property; and may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not in administration.

The administrator's powers include those to begin, continue, discontinue, and defend legal proceeding or appoint an agent to do anything that the administrator is unable to do.

6.5.3 Effect of administration

It should however be noted that an administrator cannot remove the directors of the company from office. However, a director of a company that is in administration may not exercise or perform, or purport to exercise or perform, a function or power as an officer of the company except with the prior, written approval of the administrator; or as permitted under the Insolvency Act 2009.[224]

The appointment of an administrator does not automatically terminate an employment agreement to which the company is a party. He is personally liable for payment of wages or salary that accrue during the administration under a contract of employment entered into before the administration, unless the administrator has given notice of the termination of the contract within 21 days of his appointment.[225]

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[222] Insolvency Act 2009, s 215(9).
[223] *Idem*, s 216.
[224] *Idem*, s 224.
[225] *Idem*, s 225.

A transaction or dealing by a company in administration, or by a person on behalf of the company, that affects the company's property is void unless the transaction or dealing was entered into –

(a) by the administrator, on the company's behalf;

(b) with the administrator's prior written consent; or

(d) under an order of the Court.[226]

Similarly, a share in a company in administration shall not be transferred and the rights or liabilities of a shareholder of the company may not be altered.[227]

6.5.4 The duties of the administrator

As soon as practicable after the administration of a company begins, the administrator shall -

(a) investigate the company's business, property, affairs, and financial circumstances; and

(b) form an opinion about whether it would be in the creditor's interest for –

(i) the company to execute a deed of company arrangement;

(ii) the administration to end; or

(iii) a liquidator to be appointed.[228]

An administrator must call –

(a) the first creditors' meeting, for the appointment, if any, of a committee of creditors;

(b) a watershed meeting; and

(c) such other creditors' meetings as may be required by the creditors' committee or the administrator.[229]

The objective of the voluntary administration procedure is to ensure the continuation or "rescue" of the company's business, or such of it as is practicable, as a going concern, or if that is not possible, to yield a better return to the company's stakeholders than would result from an immediate winding up.

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[226] *Idem*, s 226.
[227] *Idem*, s 227.
[228] *Idem*, s 228.
[229] *Idem*, s 232.

Therefore, an administrator may carry on the company's business and manage its property and affairs with the objective of salvaging its business in the interests of the company's stakeholders. In so doing, an administrator is required to investigate the company's affairs and consider possible ways of salvaging its business in the interests of creditors, employees, and shareholders.[230]

6.5.5 First creditors' meeting

The aim of the first creditors' meeting is to decide whether to appoint a creditors' committee and, if so, to appoint its members; and whether to replace the administrator. It is important to note that the said meeting must be held within 10 days after the date on which the administration begins. The administrator shall have to give written notice of the meeting to as many of the company's creditors as disclosed by the records kept by the company, as is reasonably practicable and by publishing a notice of the meeting in a daily newspaper.[231]

6.5.6 Watershed meeting

The administrator shall convene the watershed meeting within the convening period which is the period of 28 days after the date on which the administrator is appointed and includes any period for which it is extended by the Court.[232]

As stated above, the Court may, on the administrator's application, extend the convening period, but shall not do so if the application is made after the convening period has expired, unless the Court is satisfied that a substantial injustice will result if the convening period is not extended.[233]

Along with the written notice meeting, the administrator shall enclose:

(a) a report by the administrator –

  (1) about the company's business, property, affairs and financial circumstances; and

  (2) any other matter material to the creditors' decisions to be considered at the meeting; and

(b) a statement setting out the administrator's opinion, with reasons for that opinion, about whether it would be in the creditors' interests for the –

  (1) company to execute a deed of company arrangement;

  (2) administration to end; or

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[230] *Idem*, s 222(1)(c).
[231] *Idem*, s 234.
[232] *Idem*, s 237(2).
[233] *Idem*, s 237(3).

(3) company to be placed in liquidation; and

(c) if a deed of company arrangement is proposed, a statement setting out the details of the proposed deed.[234]

A watershed meeting may be adjourned to a day that is not more than 42 days after the first day on which the meeting was held, unless the Court, on the administrator's application, orders that the meeting be adjourned for more than 42 days.[235]

At a watershed meeting, the creditors may (a)resolve that the company execute a deed of company arrangement specified in the resolution, (b) resolve that the administration should end, or (c) unless the company is already in liquidation, by resolution appoint a liquidator.[236]

At a meeting of creditors or class of creditors, a resolution is adopted if a majority in number representing 75% in value of the creditors or class of creditors voting in person, or by proxy vote or by postal vote, vote in favour of the resolution.[237]

6.5.7 Protection of company property

During the administration of a company no person shall enforce a charge over the property of the company, except with the administrator's written consent, or with the permission of the Court.[238]

Similarly, during the administration of a company, the owner or lessor of property that was used or occupied by, or is in the possession of, the company shall not take possession of the property or otherwise recover it, except with the administrator's written consent, or with the permission of the Court.[239]

Moreover, proceedings in a Court against the company or in relation to any of its property during the administration shall not be commenced or continued, except with the administrator's written consent or with the permission of the Court on terms that the Court thinks appropriate.[240]

An enforcement process in relation to the company's property shall not be commenced or continued except with the permission of the Court and on terms that the Court thinks appropriate.[241]

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[234] *Idem*, s 237(6).
[235] *Idem*, s 239.
[236] *Idem*, s 240.
[237] *Idem*, s 232(3).
[238] *Idem*, s 242.
[239] *Idem*, s 243.
[240] *Idem*, s 244.
[241] *Idem,* s 246.

6.5.8 Deed of company arrangement (DOCA)

When the creditors, at a watershed meeting, have resolved that the company execute a deed of company arrangement, the deed administrator shall prepare such document.

The DOCA shall specify the following:

(i) who is the deed administrator;

(ii) the property of the company (whether or not it is already owned by the company when it executes the deed) that will be available to pay creditors;

(iii) the nature and duration of any moratorium period for which the deed provides;

(iv) to what extent the company will be released from its debts;

(v) the conditions (if any) for the deed to come into operation;

(vi) the circumstances in which the deed terminates;

(vii) the order in which the proceeds of realisation of the property will be distributed among creditors who are bound by the deed; and

(viii) the day, which must not be later than the day when the administration began, on or before which creditors' claims must have arisen if they are to be admissible under the deed.[242]

The DOCA is executed by the company in administration and the deed administrator within 21 days after a watershed meeting has approved it. The company may not execute a deed unless the board of the company has, by resolution, authorised the deed to be executed by the company or on its behalf.[243]

As soon as practicable after a deed of company arrangement is executed, the deed administrator shall send to each creditor a written notice of the execution of the deed, publish the notice in a daily newspaper, and file a copy of the deed with the Registrar of Companies and the Director.[244]

No person shall in so far as he would be bound by a deed if it had already been executed -

(a) do anything inconsistent with the deed, except with the permission of the Court; or

(b) take a step that is prohibited under the Act

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[242] *Idem*, s 260.
[243] *Idem*, s 261(2)(a).
[244] *Idem*, s 288.

during the period between a resolution passed at the watershed meeting that the company execute a deed of company arrangement and the sooner of –

(i) execution of the deed by the company and the deed administrator; or

(ii) expiry of the period during which the deed may be executed.[245]

Where the creditors at a watershed meeting have passed a resolution that the company execute a deed of company arrangement, and the company fails to do so within the deadline for execution, the administrator shall apply to the Court for the appointment of a liquidator to the company; or if the company is already in liquidation, apply to the Court for the liquidation to resume.[246]

A deed of company arrangement binds the:

(a) company's creditors;

(b) company;

(c) company's officers and shareholders; and

(d) deed administrator.[247]

Moreover, a deed of company arrangement binds all creditors including secured creditors in respect of claims that arise on or before the day specified. A secured creditor may not realise or otherwise enforce his charge except so far as the deed provides for the secured creditor to realise or enforce his charge and the secured creditor at the watershed meeting voted in favour of the resolution as a result of which the company executed the deed or where the Court makes an order to that effect.[248]

A person who is bound by a deed of company arrangement shall not, while the deed is in force:

(a) apply, or continue with an application, to the Court for the appointment of a liquidator of the company;

(b) except with the Court's permission, begin or continue proceedings against the company or in relation to any of its property; or

(c) except with the Court's permission, begin or continue an enforcement process against the company's property.[249]

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[245] *Idem*, s 263.
[246] *Idem*, s 264.
[247] *Idem*, s 265.
[248] *Idem*, s 266.
[249] *Idem*, s 267.

A deed of company arrangement releases the company from a debt only insofar as the deed provides for the release and the creditor concerned is bound by the deed.[250]

A deed of company arrangement may be terminated –

(a) by the Court on application by the company, creditor, deed administrator or any other interested person;

(b) by a resolution of the creditors; or

(c) automatically, where the deed specifies circumstances in which the deed will terminate, and those circumstances occur.[251]

6.5.9 Court supervision of administration

The Court has supervisory authority in relation to an administrator's conduct and, upon the application of a creditor or shareholder of the company (amongst others), may make such order as it thinks appropriate if the administrator manages the company's assets or affairs so as to prejudice the company's creditors or shareholders or if they default in filing a return, account or other document or fail to give a notice as required by the Insolvency Act 2009.[252]

The Court in *Lo Seen Chong v Alridge*[253] made reference to section 258(2), particularly that:

> "A deed administrator may sell existing shares in the company (a) with the consent of the shareholder in question, or (b) where the shareholder does not consent, with the permission of the court given on the application of the administrator, held that the legislator has also under section 258(2) spelled out who are those entitled to challenge the decision of the administrator to apply for authorization to the Court to sell. Here again, the legislator had in mind application made by the administrator and not the deed administrator."

A transaction or dealing by the company or a person acting on its behalf that affects the company's property is void unless entered by the administrators or with their consent or else by order of the Court.[254]

Self-Assessment Exercise 6

Question 1

Briefly describe the aim of administration of a company.

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[250] Idem, s 269.
[251] Idem, s 272.
[252] *Idem*, s 279.
[253] (2012) SCJ 108.
[254] Insolvency Act 2009, s 226.

Question 2

Briefly describe the effect of administration on the company, its employees and its directors.

Question 3

Briefly describe how an administration begins and ends.

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

The provisions dealing with Cross-Border Insolvency contained in the Insolvency Act 2009 was only proclaimed in July 2019. The rules on cross-border insolvency in Mauritius are based on the UNCITRAL Model Law on Cross-Border Insolvency and is set out under the ninth schedule of the Insolvency Act 2009.[255] The Model Law was designed to provide a template of uniform legislative provisions to assist acceding States to equip their insolvency laws with a modern, harmonised and fair framework for dealing with cross border insolvency matters and to provide effective mechanisms for dealing with cases of cross-border insolvency.

The aim of the purpose of the Ninth Schedule is to provide effective mechanisms for dealing with cases of cross-border insolvency so far as to promote the objectives of –

(a) co-operation between courts and other competent authorities of Mauritius and foreign states involved in cases of cross-border insolvency;

(b) providing greater legal certainty for trade and investment;

(c) providing the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) providing protection and maximisation of the value of the debtor's assets; and

(e) facilitating the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The provisions set out under the Ninth Schedule of the Insolvency Act 2009 dealing with cross-border insolvency applied only where:

[255] *Idem*, Ninth Sched.

(a) assistance is sought in Mauritius by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign state in connection with a Mauritius insolvency proceeding; or

(c) a foreign proceeding and a Mauritius insolvency proceeding in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participation in, a Mauritius insolvency proceeding.[256]

In accordance with Ninth Schedule, an insolvency administrator, which includes a liquidator of the Official Receiver under the Insolvency Act 2009, is empowered to act in a foreign state on behalf of a Mauritius insolvency proceedings[257] as permitted by the foreign law.[258]

The foreign representative must apply to the Supreme Court for recognition of the foreign proceedings in which the foreign representative has been appointed. An application for recognition shall be accompanied by:[259]

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in sub-paragraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.[260]

The application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

The foreign proceeding shall be recognised as a foreign main proceeding if it is taking place in the state where the debtor has the centre of its main interests; or as a foreign non-main proceeding if the debtor has an establishment in the foreign state.[261]

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[256] *Idem*, s 1.

[257] A collective judicial or administrative proceeding pursuant to the law in Mauritius relating to the bankruptcy, liquidation, receivership, judicial management, statutory management, or voluntary administration of a debtor, or the reorganisation of the debtor's affairs, under which the assets and affairs of the debtor are administered, or the assets of the debtor are or will be realised for the benefit of secured or unsecured creditors.

[258] Insolvency Act 2009, Ninth Sched, s 5.

[259] *Idem*, s 9.

[260] *Idem*, s 15(2).

[261] *Idem*, s 17(2).

From the time of filing an application for recognition until the application is decided upon, the Supreme Court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including –

(a) staying execution against the debtor's assets;

(b) entrusting the administration or realisation of all or part of the debtor's assets located in Mauritius to the foreign representative or another person designated by the Court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor; and

(d) providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's affairs, rights, obligations or liabilities.[262]

Upon recognition by the Supreme Court of a foreign proceeding that is a foreign main proceeding:

(a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor's assets is stayed; and

(c) the right to transfer, encumber, or otherwise dispose of any assets of the debtor is suspended.[263]

Upon recognition by the Supreme Court of a foreign proceeding, the foreign representative has standing to initiate any action that an insolvency administrator may take in respect of a Mauritius insolvency proceeding that relates to a transaction (including any gifts or improvement of property or otherwise), security, or charge that is voidable or may be set aside or altered.[264]

When the foreign proceeding is a foreign non-main proceeding, the Court must be satisfied that the action relates to assets that, under the laws of Mauritius, should be administered in the foreign non-main proceeding.[265]

The Ninth Schedule allows a foreign representative[266] to apply to commence a Mauritius

[262] *Idem*, s 19.
[263] *Idem*, s 20.
[264] *Idem*, s 23(1).
[265] *Idem*, s 23(2).
[266] Foreign representative means a person or body, including one appointed to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

insolvency proceeding if the conditions for commencing such a proceeding are otherwise met. Moreover, upon recognition by the Supreme Court of a foreign proceeding, the foreign representative is entitled to participate in a Mauritius insolvency proceeding regarding the debtor.[267]

Foreign creditors have the same rights regarding the commencement of, and participation in, a Mauritius insolvency proceeding as creditors in Mauritius, and it does not affect the ranking of claims in a Mauritius insolvency proceeding or the exclusion of foreign tax and social security claims from such a proceeding.[268]

Moreover, upon recognition by the Supreme Court of a foreign proceeding, the foreign representative may, provided the requirements of the laws of Mauritius are met, intervene in any proceeding in which the debtor is a party.[269]

Self-Assessment Exercise 7

Briefly analyse the application of the provisions relating to cross-border insolvency.

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

The recognition and enforcement of foreign court judgments is governed by the Civil Procedure Code and the Civil Code, which provide that a foreign judgment must have official execution authorisation to be enforced in Mauritius. The legal framework under which a judgment delivered outside of the Republic of Mauritius is enforced and recognised is under article 546 of the Mauritian *Code de Procedure Civile*.[270]

A foreign judgment can be enforced as long as it is still valid and capable of execution in the country where it has been delivered. An application for the exequatur is made to the Supreme Court by way of motion supported by affidavit, requesting an order making executory the judgment delivered in another jurisdiction. A duly authenticated certificate evidencing the fact that the judgment is final and has not been appealed against must be annexed to the affidavit.

An application to enforce a foreign judgment must be accompanied by an affidavit relating the facts exhibiting the judgment, along with a verified, certified or duly authenticated copy of the judgment itself. Documents that are in neither English nor French must be translated and certified. The documents submitted at the time of the application must be legalised.

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[267] Insolvency Act 2009, Ninth Sched, s 12.
[268] *Idem*, s 13(1).
[269] *Idem*, s 24.
[270] *Code de Procedure Civile*, art 546.

A party seeking to enforce a judgment from a country that is a signatory to the HCCH Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961 (Apostille Convention) need not legalise the judgment through diplomatic or consular means. However, the following requirements must be fulfilled:

(i) the foreign judgment must bear the seal of the foreign court;

(ii) the last page of the judgment must bear the signature of an officer from the foreign court;

(iii) a certificate of the foreign court stating that the judgment has not been appealed against must be provided; and

(iv) the judgment must be apostilled.

A party seeking to enforce a judgment from a country that is not a signatory to the Apostille Convention can do so through Mauritian diplomatic agents or consular agents, who certify:

(i) the authenticity of the signature;

(ii) the capacity in which the person signing the document has acted; and

(iii) where appropriate, the identity of any seal or stamp.

Once a judgment is rendered executory, a party can seek to enforce it after the 21-day appeal period has elapsed, in the same way as it would have enforced a judgment delivered by a domestic court,

The conditions for granting official recognition and enforcement of a foreign judgment have been set out by the Supreme Court in the case of *D' Arifat v Lesueur*[271] as follows:

(i) the judgment must still be valid and be capable of execution in the country where it was delivered;

(ii) it must not be contrary to any principle affecting public order;

(iii) the defendant must have been regularly summoned to attend the proceedings; and

(iv) the court which delivered the judgment must have had jurisdiction to deal with the matter submitted to it.

[271] (1949 MR 191).

Self-Assessment Exercise 8

Briefly describe the procedure for recognition of foreign judgments in Mauritius and the criteria which the Court will take into account before granting recognition.

For commentary and feedback on self-assessment exercise 8, please see APPENDIX A

9. INSOLVENCY LAW REFORM

The Registrar of Companies along with Insolvency Practitioners, the Government of Mauritius, Mauritius Revenue Authority Officials, banks, and consultants from the World Bank are currently holding working sessions with the aim to bring reforms to the Insolvency Act 2009.

No further information is available on those proposed reforms for the time being.

10. USEFUL INFORMATION

- The Insolvency Act 2009: https://companies.govmu.org/Documents/legislation/Insolvency%20Act%202009/Insolvency%20Act%202009.pdf
- The Companies Act 2001: https://companies.govmu.org/Documents/legislation/Companies%20Act%202001.pdf
- *Code Civil:* https://attorneygeneral.govmu.org/Documents/Laws%20of%20Mauritius/A-Z%20Acts/C/Code%20Civil%20Mauricien.pdf
- *National* Assembly: https://mauritiusassembly.govmu.org/mauritiusassembly/
- Supreme Court Website (judgments and legislation): https://supremecourt.govmu.org/
- Registrar of Companies: https://companies.govmu.org/Pages/default.aspx
- Attorney General's Office (All published legislation): https://attorneygeneral.govmu.org/Pages/Laws%20of%20Mauritius/AZ%20Acts/ActsAZ.aspx

APPENDIX A: FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Briefly describe the insolvency framework applicable in Mauritius and how it is regulated by the country's institutional framework.

Commentary and Feedback on Self-Assessment Exercise 1

Mauritius operates dual English and French legal system incorporating principles from both the French Code Napoleon and British common law. Mauritius has a legal system that is based on a mixture of both civil law and common law principles traditions, with elements influenced by French and British legal systems.

Legislation is now passed by the National Assembly and since then the Mauritian legal system has followed the English way.

It should however be noted that the Mauritius' commercial legislation is derived from the New Zealand's legislature. The country's Company Act 2001 and Insolvency Act 2009 are influenced mostly by the New Zealand's Company Act and Insolvency Act 2009.

The system in Mauritius is adversarial and the Supreme Court of Mauritius (Supreme Court) has held that the rules of evidence are derived from an adversarial model of justice (*Mrs Ho Niook Sen v A S Sen Wong Chin*). The standard of proof applied in commercial matters is to satisfy the court on a balance of probabilities (*Saturn Investments Sarl v Wah Bon Ching Edmond & Ors*).

The Supreme Court of Mauritius under section 76 of the Constitution is the highest court in Mauritius, possessing comprehensive authority to adjudicate civil and criminal cases under all laws, except disciplinary laws, and any additional jurisdiction and powers conferred upon it by the Constitution or other legislation. The country has however retained its ability and right of appeal to the Judicial Committee of the Privy Council.

The Commercial Division shall have original jurisdiction to hear and determine any matter under the Insolvency Act 2009 and the Companies Act 2001, including the insolvencies of companies and individuals.

The Director of the Insolvency Service is the authority responsible to overview insolvency proceedings in Mauritius. The Director of the Insolvency Service is also responsible to keep and maintain a register of Insolvency Practitioners in which there shall be entered the name, address and qualifications of every Insolvency Practitioner. The Director is also required keep under review the conduct and performance of persons appointed to be Insolvency Practitioners and

may require any document or information concerning an Insolvency Practitioner to be provided to the Director by the Official Receiver or by the Court or the Registrar of Companies or by any other Insolvency Practitioner or by any person who is or has been an auditor of a company in which the Insolvency Practitioner has held office.

The Director of the Insolvency Service is also empowered to take disciplinary actions against Insolvency Practitioners.

Self-Assessment Exercise 2

Question 1

Briefly compare the different types of securities available in Mauritius.

Question 2

Briefly describe the different steps involved for a secured creditor to enforce its floating charge.

Commentary and Feedback on Self-Assessment Exercise 2

Question 1

Securities are financial instruments used to secure the repayment of banking facilities when raising capital and investing in financial markets.

Fixed and floating charges are governed by the provisions of articles 2202 *et seq* of the Civil Code. These can be taken by prescribed financial institutions listed under the Institution Agréées Regulations 1988. Fixed charges are generally granted over immovable property, and the property given as security is clearly specified and particularised in the deed. It can be created in virtue of a private or notarial deed and must be registered with the Registrar General of Mauritius and inscribed in the public registers kept at the office of the Conservator of Mortgages.

A floating charge is a charge which burdens all present and future assets of the borrower, be it movable or immovable. For a floating charge, no specific property needs to be particularised given that the security may also be granted on any properties to be acquired in the future. It can be made by private or notarial deed and have to be registered with the Registrar General of Mauritius and inscribed in the public registers kept at the office of Conservator of Mortgages.

Its enforcement is subject to crystallisation (converting) of the floating charge into a fixed charge by drawing up an inventory of the specific assets over which the charge will be realised.

A personal guarantee is a form of security where a person stands as a guarantor for a debt taken by another person. A simple guarantee is the situation where the guarantor will be made answerable for the debt only when the principle debtor defaults on his payments unless he can invoke the defences of *Benefice de discussion* or *Benefice de division*.

In a joint guarantee, the guarantor is jointly and *in solido* liable for the debt with the principal debtor. That is, a debt contracted by the debtor equally binds the guarantor who is then referred to as a co-debtor.

A mortgage is a form of security taken over immovable properties and can be contractual, legal or judicial. It is governed by the provisions of articles 2163 *et seq* of the Civil Code. It is taken against a debt and it is in nature not divisible with regards to the immovable property it burdens. It subsists even when there is a change in ownership. A mortgage must be inscribed under the Inscription of Mortgages and Privileges Act 1946.

A *privilège immobilier* confers a right on a creditor in relation to immovable property to be preferred to other creditors, including creditors under a mortgage deed. Different *privilège immobilier* holders are ranked according to the type of *privilège* held. There is a distinction between *privilège immobilier général* (PIG) and *privilège immobilier spécial* (PIS).

L' antichrèse is a pledge created over immovable property. It is different from a mortgage in that the creditor has no possessory right over the immovable property and can only enjoy the rent from the immovable property (and other money that the building may bring). The creditor must deduct rent from interest charged to the debtor and then from the capital owed. The creditor does not acquire the immovable property by default of payment of the debtor and any clause stating otherwise is null and void. In the case of non-compliance, the deed witnessing the *antichrèse* is null and void. The claim still subsists but the creditor is treated as an ordinary creditor ranking after all secured creditors.

A *gage* is governed by the provisions of article 2073 of the Civil Code. This type of security allows the creditor to be paid in preference to other creditors. It must be created by a deed, before a notary or under private signatures, that is duly registered. The pledged asset must be handed over by the debtor either to the creditor or to an agreed third party, who then has a property right on the pledged asset.

A *gage sans déplacement* is governed by the provisions of article 2095 of the Civil Code. It is created on motor vehicles and professional, industrial and agricultural equipment. The debtor keeps possession of the pledged assets. However, on registration of the pledge, the debtor is deemed to have transferred title to the creditor and to retain the pledged asset for the benefit of the creditor. Such pledges are created by a deed under private signatures or before a notary.

A *gage spécial au profit* of the *banques* is created in virtue of the Civil Code's articles 2129-1 *et seq*. A debtor has the option to provide a creditor bank a unique security over specific instruments.

Question 2

The enforcement of a floating charge is subject to crystallisation and inventory of the assets of the debtor.

The process of crystallisation of floating charges is governed by the Civil Code which provides that a floating charge is crystallised:

- on the death of the debtor;
- when a seizure has been ordered against the debtor by a competent Court;
- when a debtor company has been liquidated or wound up; or
- when a debtor association or *societe* has been dissolved.

Once the crystallisation has been effected, the creditor shall proceed with the inventory of the assets of the debtor.

The enforcement is effected by a Power to Seize given to an Usher of the Supreme Court. The seized property is sold before the Master's Court of the Supreme Court in accordance with the provisions of the Sale of Immovable Property Act. The sale price is attributed to all the creditors of the borrower, with privilege and / or secured creditors in priority.

Self-Assessment Exercise 3

Question 1

Briefly describe the powers of the Official Receiver upon adjudication.

Question 2

Briefly describe the role of the Interim Receiver.

Question 3

Describe the effect of a bankruptcy order on a bankrupt's ability to carry out business and on his estate.

Commentary and Feedback Self-Assessment Exercise 3

Question 1

The Official Receiver's powers are set out in the Fifth Schedule of the Insolvency Act 2009. The Official Receiver is empowered to:

(a) hold property;

(b) commence, continue, discontinue and defend legal proceedings;

(c) with the leave of the Court, continue in the Official Receiver's name legal proceedings begun by the bankrupt before adjudication;

(d) refer a dispute to arbitration;

(e) compromise debts, claims and liabilities, present or future, actual or contingent, or ascertained or not, subsisting or believed to subsist between the bankrupt and any person, on whatever terms are agreed;

(f) make a compromise or an arrangement with creditors, or persons claiming to be creditors, in respect of debts provable in the bankruptcy;

(g) accept as consideration for the sale of any of the bankrupt's property money to be paid in the future, on terms (including terms as to security) that the Official Receiver thinks appropriate;

(h) make a compromise or an arrangement in respect of a claim that arises out of, or is incidental to, the bankrupt's property, whether it is a claim by the Official Receiver or a claim by a person against the Official Receiver;

(i) carry on the bankrupt's business, if it is necessary or advantageous in order to dispose of it, and for that purpose may employ and pay any person, including the bankrupt;

(j) use money in the bankrupt's estate for the repair, maintenance, upkeep or renovation of the bankrupt's property, whether or not the work is necessary to salvage the property;

(k) borrow money whether with or without providing security over the bankrupt's property;

(l) employ any person to do anything that must be done in the course of the administration of the bankruptcy, including the receipt and payment of money;

(m) appoint a lawyer;

(n) prove and draw a dividend in respect of any debt due to the bankrupt;

(o) if any of the bankrupt's property cannot be readily or advantageously sold because of its peculiar nature or other special circumstances, divide it in its existing form among the creditors according to its estimated value;

(p) give receipts and sign discharges and releases for any money that the Official Receiver receives, so that the person who pays the money is effectively discharged from any responsibility for how the money is used;

(q) execute a power of attorney, deed or any other document for the purpose of carrying into effect the provisions of this Act;

(r) exercise in relation to the bankrupt's property any power conferred on a trustee under the Trusts Act 2001 or by the Court under that Act; and for the purposes of those powers the Official Receiver is a trustee of the bankrupt's property; and

(s) exercise any authority or power or do any act in relation to the bankrupt's property that the bankrupt could have exercised or done if he was not bankrupt; and

(t) in respect of any particular estate or estates –

- appoint an agent to act for the Official Receiver;
- delegate to that agent any or all of the powers conferred by this Schedule;
- revoke the agent's appointment; and
- set the agent's remuneration, which must be paid out of the estate.

Question 2

An Interim Receiver is appointed on all or part of the debtor's property, at any time before making a bankruptcy order where a creditor's petition for a bankruptcy order has been filed. The role of the Interim Receiver is subject to the Court's authorisation and is to (a) take possession of any property, (b) sell any perishable property or property that is likely to fall rapidly in value, or (c) control the debtor's business or property as directed by the Court.

The role of the Interim Receiver is mainly for conserving the debtor's property.

Question 3

Where a debtor is adjudged bankrupt is disqualified from being elected to any public office. Moreover, an undischarged bankrupt cannot without the consent of the Official Receiver or the Court, directly or indirectly (a) enter into, carry on, or take part in the management or control of any business, (b) be employed by a relative of the bankrupt, or (c) be employed by a company, trust, trustee, or any partnership or unincorporated association that is carrying on a business, that is managed or controlled by a relative of the bankrupt.

The bankrupt's whole estate is under the control of the Official Receiver.

Self-Assessment Exercise 4

Question 1

In what circumstances will a company be considered insolvent in Mauritius, and who are entitled to petition for the winding up of a company?

Question 2

Describe the different types of winding up of a company in Mauritius.

Question 3

Briefly describe what are voidable transactions and the procedure to set aside a voidable transaction.

Question 4

A creditor wishes to initiate insolvency proceedings against a company. In the meantime, the creditor has reason to believe that the debtor may alienate property belonging to it. What are the options available to the creditor?

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

A company will be insolvency where it is unable to pay its debts. The Insolvency Act 2009 defines "inability to pay debts" in the ordinary course of business as meaning subject to section 179 of the Insolvency Act 2009, where:

(a) the company has failed to comply with a statutory demand; execution issued against the company in respect of a judgment debt has been returned unsatisfied;

(b) a person entitled to a charge over all or substantially all of the property of the company has appointed a receiver under the instrument creating the charge; or

(c) a compromise between a company and its creditors has been put to a vote in accordance with Part XVII and Part XVIII of the Companies Act 2001 but has not been approved.

A petition to wind up by a company may be presented by:

- the company;
- a contributory or any person who is the heir of a deceased contributory or the trustee in bankruptcy of the estate of a contributory;
- a shareholder;
- a creditor, including a contingent or prospective creditor, of the company;
- a liquidator;
- the administrator;
- the Director of the Insolvency Service or the Registrar of Companies; or
- the Financial Services Commission, where the company is a licensee or a past licensee thereof.

Question 2

Under the Insolvency Act 2009, the winding up of a company may be effected by way of a winding up order made by the Court; or by way of creditors' or members' voluntary winding up.

A voluntary winding up may be a (i) creditors' voluntary winding up where the company is insolvent and the liquidator is appointed by a meeting of creditors, or (ii) shareholders' voluntary winding up where the company is solvent and the liquidator is appointed by a shareholders' meeting.

In a shareholders' voluntary winding up, the shareholders of the company must pass a special resolution that the company be wound up. A liquidator is appointed for the purpose of winding up the affairs and distributing the assets of the company. Where a liquidator is of opinion that

the company will not be able to pay or provide for the payment of its debts in full within the period stated in the declaration of solvency, he shall forthwith summon a meeting of the creditors; and lay before the meeting a statement of the assets and liabilities of the company.
A company may be wound up by way of creditor's winding up when the company is insolvent. The directors must cause a meeting of the creditors of the company to be summoned at which a winding up resolution is to be proposed. The shareholders of the company also need to hold a meeting in relation to the winding up of the company, in order to pass a special resolution that the company be wound up.

A creditor, amongst others, can petition to the Court for the winding up of the company under one of the several prescribed grounds for winding up including on the ground that the company is unable to pay its debts when they fall due. Under section 102 of the Insolvency Act 2009, a company may, whether or not it is being wound up voluntarily, be wound up under an order of the Court, upon a petition to wind up the company being presented. On hearing a petition to wind up the company, the Court may in its discretion either grant the petition and make a winding up order or dismiss the petition or adjourn the hearing conditionally or unconditionally. However, a winding up order cannot be refused on the following grounds that the (a) assets of the company have been charged to an amount equal to or in excess of those assets, or (b) company has no assets.

Question 3

A voidable preference is a transaction by the debtor that is made at a time when the debtor is unable to pay his due debts and enables another person to receive more towards satisfaction of a debt by the debtor than that person would receive, or would be likely to receive, in the bankruptcy or liquidation.

"Transaction" means any of the following steps taken by the debtor:

(a) conveying or transferring the debtor's property;

(b) creating a charge over the debtor's property;

(c) incurring an obligation;

(d) undergoing an execution process;

(e) paying money (including money paid in accordance with a judgment or an order of a Court); or

(f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

To initiate the setting aside of a voidable transaction to which this section applies, the Official Receiver or liquidator shall, as soon as practicable, serve a notice on the other party to the transaction and any other party from whom the Official Receiver or liquidator intends to recover.

The notice shall be in writing, state the Official Receiver's or liquidator's address, specify the voidable transaction to be set aside, describe the property or state the amount that the Official Receiver or liquidator wishes to recover state that the person named in the notice may object to the setting aside of the transaction if that person sends a written notice of objection to the Official Receiver or liquidator within 28 days after the notice has been served on that person; and state that the transaction will be set aside as against the person named in the notice if that person does not object.

A voidable transaction is automatically set aside as against a person named in the notice if that person has not objected, by the sending of a notice by the Official Receiver or liquidator to the person not later than five working days after the expiry of the 28 days' notice.

A notice of objection shall state the reasons for objecting and the Court may, on the application of the Official Receiver or liquidator, set aside the voidable transaction in any case where a person named in the notice has given a notice of objection.

Question 4

The creditor may apply to the Court under section 108 of the Insolvency Act 2009 for an Order from the Court, on the presentation of a petition under section 102 of the Act and before the making of a winding up order, to appoint the Official Receiver or any other qualified person to be provisional liquidator where:

(a) there are reasonable grounds for believing that the company is unable to pay its debts; or

(b) any of the property of the company available to meet its debts is at risk or may be removed from Mauritius.

Self-Assessment Exercise 5

Question 1

Differentiate between a receiver and a receiver manager.

Question 2

Brief set out the instance which allows a creditor to appoint a receiver on a company.

Question 3

Briefly set out the powers of a receiver manager of a company.

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

A receiver is a person appointed to take possession of property in receivership and deal with it as directed by the Court or the instrument of appointment; and includes a person appointed as receiver and manager. A manager means a person appointed under section 183 to carry on a company's business and dispose of its undertaking.

Question 2

A receiver may be appointed under any instrument that confers on a charge the power to appoint a receiver or by the Court. A receiver appointed under an instruction conferring the power on a chargee to appoint a receiver shall do so in writing and he shall be an agent of the charger unless the instrument provides otherwise.

A receiver may also will be appointed by the Court on the application of a chargee or any other interested person and on notice to the company where (a) the company has failed to pay a debt due to the chargee or has otherwise failed to meet any obligation to the chargee, of that any principal money borrowed by the company or interest is in arrears for more than 21 days, (b) the company proposes to sell or otherwise dispose of the secured property in breach of the terms of any instrument creating the security or charge, or (c) it is necessary to do so to ensure the preservation of the secured property for the benefit of the chargee.

Question 3

The receiver exercises the powers conferred upon it to the exclusion of the board of directors or the charger. A receiver may execute in the name and on behalf of the company every document necessary or incidental to the exercise of the receiver's powers and a document signed on behalf of a company by a receiver shall be deemed to have been properly signed on behalf of the company.

The powers of a receiver are set out under the Eighth Schedule of the Insolvency Act 2009. The receiver is empowered:

(a) to enter into possession and take control of property of the company in accordance with the terms of that order or instrument;

(b) to lease, let on hire or dispose of property of the company;

(c) to grant options over property of the company on such conditions as the receiver thinks fit;

(d) to borrow money on the security of property of the company;

(e) to insure property of the company;

(f) to repair, renew or enlarge property of the company;

(g) to convert property of the company into money;

(h) to carry on any business of the company;

(i) to take on lease or on hire, or to acquire, any property necessary or convenient in connection with the carrying on of a business of the company;

(j) to demand and recover, by action or otherwise, income of the property in receivership;

(k) to issue receipts for income recovered;

(l) to inspect at any reasonable time books or documents that relate to the property in receivership and that are in the possession or under the control of the company;

(m) to exercise, on behalf of the company, a right to inspect books or documents that relate to the property in receivership and that are in the possession or under the control of a person other than the company;

(n) to change the registered office or address for service of the company;

(o) to execute any document, bring or defend any proceedings or do any other act or thing in the name of and on behalf of the company;

(p) to draw, accept, make and endorse a bill of exchange or promissory note;

(q) to engage or discharge employees on behalf of the company;

(r) to appoint a solicitor, accountant or other professionally qualified person to assist the receiver;

(s) to appoint an agent to do any business that the receiver is unable to do, or that it is unreasonable to expect the receiver to do, in person;

(t) where a debt or liability is owed to the company – to prove the debt or liability in a bankruptcy, insolvency or winding up and, in connection therewith, to receive dividends and to assent to a proposal for a composition or a scheme of arrangement;

(u) to make or defend an application for the winding up of the company; and

(v) to refer to arbitration any question affecting the company.

Self-Assessment Exercise 6

Question 1

Briefly describe the aim of administration of a company.

Question 2

Briefly describe the effect of administration on the company, its employees and its directors.

Question 3

Briefly describe how an administration begins and ends.

Commentary and Feedback on Self-Assessment Exercise 6

Question 1

The aim of the administration under section 213 Insolvency Act 2009 is to provide for the business, property and affairs of a company to be administered in a way that provides the opportunity for the company or as much as possible of its business, to continue in existence or if it is not possible for the company or its business to continue in existence, results in a better return for the company's creditors and shareholders than would result from the immediate winding up of the company.

Question 2

Upon the appointment of an administrator, the directors are not removed from office. However, under section 225 of the Insolvency Act 2009, a director of a company in administration may not exercise or perform, or purport to exercise or perform, a function or power as an officer of the company except with the prior, written approval of the administrator; or as permitted under the Insolvency Act 2009.

Similarly, under section 225 of the Insolvency Act 2009, the appointment of an administrator does not automatically terminate an employment agreement to which the company is a party. He is however personally liable for payment of wages or salary that accrue during the administration under a contract of employment entered into before the administration, unless the administrator has given notice of the termination of the contract within 21 days of his appointment.

Question 3

Under the Insolvency Acy, the process of administration begins when an administrator is appointed for the Company. The administrator, under section 215 of the Insolvency Act 2009, is appointed when:

(a) the company, where in the opinion of the directors voting for the resolution, the company is insolvent or is likely to become insolvent;

(b) where the company is in liquidation, the liquidator, where he thinks that the company is insolvent or is likely to become insolvent;

(c) where a provisional liquidator has been appointed, the provisional liquidator where he thinks that the company is insolvent or is likely to become insolvent.

(d) a secured creditor holding a charge over the whole, or substantially the whole, of the company's property where the charge has become and is still enforceable; or

(e) the Court on application made by a creditor, the liquidator or the Director of Insolvency or the Registrar of Companies, where it is satisfied that:

- the company is or may become insolvent;
- the survival of the company and the assets as a going concern are reasonably capable of being achieved in the event of an administrator being appointed;
- a more advantageous realisation of the assets of the company and any related company may be achieved than on an immediate winding up;
- the appointment of an administrator may achieve a more advantageous realisation or a more expeditious settlement of a duty or liability owed by any person to the company or any related company; or
- it is just and equitable to do so.

The administration of a company ends where:

(a) a deed of company arrangement is executed by the company and the deed's administrator;

(b) the company's creditors resolve that the administration should end;

(c) the company's creditors appoint a liquidator by a resolution passed at a watershed meeting;

(d) the Court orders that the administration end because it is satisfied that the company is solvent, or that for any other sufficient reason the administration should cease;

(e) the convening period expires without a watershed meeting having been held or without an application having been made to extend it, and the administration ends at the end of that period;

(f) a watershed meeting ends without a resolution that the company execute a deed of arrangement, and the administration ends at the end of that meeting;

(g) the company fails to execute a proposed deed of company arrangement within the time allowed; or

(h) the Court appoints a liquidator or an interim liquidator and the administration ends at the time when the order is made.

Self-Assessment Exercise 7

Briefly analyse the application of the provisions relating to cross-border insolvency.

Commentary and Feedback on Self-Assessment Exercise 7

The provisions relating to cross-border insolvency was only proclaimed in July 2019 and they are based on the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law is reproduced under the Ninth Schedule of the Insolvency Act 2009 and it is designed The Model Law was designed to provide a template of uniform legislative provisions to assist acceding States to equip their insolvency laws with a modern, harmonised and fair framework for dealing with cross border insolvency matters and to provide effective mechanisms for dealing with cases of cross-border insolvency.

The provisions set out under the Ninth Schedule of the Insolvency Act 2009 dealing with cross-border insolvency is applicable where:

(a) assistance is sought in Mauritius by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign state in connection with a Mauritius insolvency proceeding; or

(c) a foreign proceeding and a Mauritius insolvency proceeding in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participation in, a Mauritius insolvency proceeding.

Self-Assessment Exercise 8

Briefly describe the procedure for recognition of foreign judgments in Mauritius and the criteria which the Court will take into account before granting recognition.

Commentary and Feedback on Self-Assessment Exercise 8

The procedure governing the recognition and enforcement of foreign judgments in Mauritius is set out under the article 546 of the *Code de Procedure Civile*.

It is essential that for a judgment to be enforced it is valid and capable of execution in the country where it has been delivered. It is enforced by way of motion and affidavit before the Supreme Court of Mauritius and should be accompanied with the certificate confirmed that the judgment is final and has not been appealed against.

The Supreme Court on deciding whether to recognise a foreign judgment will take into account the criteria set out in the case of in the case of *D' Arifat v Lesueur*, namely whether:

(i) the judgment is still valid and capable of execution in the country where it was delivered;

(ii) it is not contrary to any principle affecting public order;

(iii) the defendant has been regularly summoned to attend the proceedings; or

(iv) the court which delivered the judgment must have had jurisdiction to deal with the matter submitted to it.

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