

**Sri Lanka – Technical Inputs to the Rescue, Rehabilitation and Insolvency Bill**

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## **Explanatory Note to Technical Inputs**

This is a short explanatory note to accompany the technical inputs to the Rescue, Rehabilitation and Insolvency Bill prepared by the World Bank in collaboration with, and with the guidance of, the Law Commission of Sri Lanka.

### **Objective, Rationale and Influences**

There are two key statutes that govern Sri Lanka's insolvency regime. For corporates, the key statute is the Companies Act 2007 (the Companies Act). For individuals, including those who are running MSMEs as sole proprietors, the key statute is the Insolvency Ordinance 1854 (the Ordinance). A number of weaknesses were identified in the existing insolvency regime, with recommendations to bring the framework more in line with best practices and address the needs of financially distressed firms (large and small) as well as consumers.<sup>1</sup>

The overall intent of the technical inputs is to develop the existing legal framework for insolvency in Sri Lanka with modern and efficient procedures that facilitate (1) the restructuring and rescue of financially distressed but viable companies; and (2) a fresh start for financially distressed natural person entrepreneurs and small businesses debtors. It was determined that to the extent possible, the existing legal framework should be used (rather than a new, wholesale model adopted). This is for several reasons: first, insolvency law touches broadly on numerous other areas of law, such as taxation, labor, property rights and contract law. Therefore, it is critical to ensure that any amendments work effectively within Sri Lanka's broader legal regime and there is overall cohesion between different pieces of legislation. Secondly, given that many stakeholders are already familiar with the existing framework, it is useful to keep existing legal principles and concepts in place in order to prevent disruption in the market and significant hurdles for the stakeholders, such as lawyers and judges, who will have to implement the legislation.

The technical inputs incorporate extensive guidance from the Law Commission on how to make the law work effectively, having regards to Sri Lanka's distinct political, legal and economic environment. The technical inputs are also informed by international best practice guidance including the World Bank's *Principles of Effective Insolvency and Creditor/Debtor Regimes*,<sup>2</sup> UNCITRAL's *Legislative Guide on Insolvency Law*,<sup>3</sup> and the World Bank's *Report on the Treatment of Natural Person Insolvency*.<sup>4</sup>

### **Structure and Contents**

As presently structured, the proposal is for a unified insolvency law dealing with the insolvency of natural person and corporate debtors collectively.

The structure is as follows:

- **Part I** contains preliminary matters, including definitions and the name of the law. We draw your particular attention to section 4 at page 25 which suggests Objectives of the law. Subsection 4(1) sets out the objectives of the parts of the law dealing with corporations, and subsection 4(2) sets out the objectives of the parts of the law dealing with natural person and small business debtors.
- **Part II** deals with Institutional Arrangements. These will require careful consideration by the Government of Sri Lanka. The key recommendations are for the

<sup>1</sup> See World Bank Sri Lanka's Insolvency and Creditor/Debtor Regimes (ICR) Technical Note, November 2022

<sup>2</sup> Available at: <https://openknowledge.worldbank.org/entities/publication/de2cc5c4-c1ec-55eb-ad20-d27e916d000f>

<sup>3</sup> Available at: [https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency\\_law](https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law)

<sup>4</sup> Available at: <https://documents1.worldbank.org/curated/en/668381468331807627/pdf/771700WP0WB0In00Box377289B00PUBLIC0.pdf>

establishment of a new regulatory authority to regulate insolvency practice and insolvency practitioners, and help promote transparency, ethical conduct and the more efficient handling of insolvency cases. Such a regulator is considered a core institution for an effective insolvency regime.<sup>5</sup>

- **Parts III-IX** contain the provisions for the insolvency and rescue of natural persons (which will include small unincorporated businesses, the majority of micro and small businesses in Sri Lanka). These are almost entirely new provisions, given there is negligible existing practice of personal insolvency in Sri Lanka to build upon. The key new concept is the availability of a fresh start for eligible debtors by the discharge of eligible debts – a concept that has been shown in the literature to be essential in encouraging entrepreneurship by mitigating the risk of good-faith debtors.<sup>6</sup> There is a pre-discharge waiting period to allow for some repayment to creditors, and safeguards and sanctions to prevent abuse by debtors.
- **Parts X and XI** contain procedures for company rescue in order to save viable enterprises. The main procedures are administration and a ‘compromises’ process. In administration, control of the operations of the company is ceded to a qualified insolvency professional under the overall supervision of the courts. Although different in detail from a US-style “chapter 11” debtor-in-possession model, the revised restructuring procedures have the same goal of ensuring that economically viable but distressed enterprises can be saved and continue to function in the economy.
- **Part XI-1** addresses specialized debt restructuring arrangements for micro, small and medium-sized corporates.
- **Parts XII-XIV** deal with liquidation, receivership and insolvency. Where possible, these build on what is already contained in the *Companies Act* while also modernizing by reference to other legal frameworks including the United Kingdom and New Zealand. The objective with these amendments is to ensure efficiency and facilitate the exit of non-viable firms, so as to free up productive resources for reallocation (or, in the case of receivership, an efficient enforcement mechanism).
- **Part XV** (together with Schedule 7) deal with cross border insolvency. It is recommended to adopt the *UNCITRAL Model Law on Cross Border Insolvency* subject to appropriate modifications necessary for it to work in Sri Lanka. This will send a strong signal to foreign investors that Sri Lanka has adopted standardized best-practice procedures that will facilitate cross-border insolvency cases and protect both foreign as well as domestic creditors.

**Parts XVI and XVII** deal with miscellaneous matters including offences and transition provisions.

<sup>5</sup> World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* (2021), at p 9. Available at: <https://openknowledge.worldbank.org/entities/publication/de2cc5c4-c1ec-55eb-ad20-d27e916d000f>

<sup>6</sup> World Bank, *Debt Resolution and Business Exit – Insolvency Reform for Credit, Entrepreneurship, and Growth* (2014). Available at: <https://documents1.worldbank.org/curated/en/912041468178733220/pdf/907590VIEWPOIN003430Debt0Resolution.pdf>

## Introductory Notes

1. Matters highlighted in green are commentary to assist the reader.
2. Matters highlighted in yellow reflect matters requiring policy decisions.
3. Where text is struck through / marked in red, this reflects edits from the draft circulated in November 2023.
4. Points marked “TBC” are subject to input from the Law Commission or Legal Draftsman’s Office.
5. All references to secondary legislation, Ministers, gazettes and other matters of domestic law will need to be reviewed for consistency with Sri Lankan practice.
6. All provisions that would create offences are for particular review by stakeholders, including as to levels of penalty and lengths of sentence that would apply.
7. All provisions that would impose deadlines are for particular review by stakeholders.
8. This technical input is not intended to provide legal advice and is subject in all respects to the views of Sri Lankan qualified lawyers.
9. All titles, names of procedures, and things of this nature should be taken as working titles only, subject to decision by the Government of Sri Lanka.
10. This technical input is provided on the understanding that capacity-building, of an appropriate nature and extent, will be undertaken in the short term.
11. Limitations on the scope of the World Bank exercise:
  - a. it does not address the resolution and insolvency of financial corporates (for example, banks, insurance firms and finance companies);
  - b. it does not include a review of security interests, and it does not address netting arrangements in financial contracts or financial collateral arrangements;
  - c. it does not address matters that are ultimately company law matters, even if potentially associated with insolvency (in particular in relation to companies and charges registers);
  - d. it does not address disqualifications and restrictions placed on bankrupt natural persons by sectoral legislation or legislation of other government departments;

- e. it does not address the interaction of reformed legislation with other credit market infrastructure, in particular credit reporting legislation;
- f. all existing transitional provisions are disregarded-;
- g. matters other than those relating to financial distress are outside the scope of the World Bank exercise. To the extent that provisions (particularly those that would cover the liquidation of solvent companies) would apply other than in the context of financial distress, they are for particular review by stakeholders.
- h. matters relating specifically to the financial distress of public utilities (for example, in connection with electricity, water and transport) are outside the scope of the World Bank exercise.

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[Long title TBC]

[Enacting formula TBC]

## Part I – Introductory and Preliminary

### 1. Short title and commencement date

(1) This Act may be cited as the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X].

(2) This Act contains a new code for – [Such a provision might be necessary to highlight that the legislation represents a significant break from the past and that it should be interpreted on its own terms, without undue regard to historic provisions.]

(a) the timely, efficient and impartial rescue and rehabilitation of individuals and viable enterprises in financial distress; and

(b) the timely, efficient and impartial closure of non-viable enterprises,  
and is to be interpreted accordingly.

(3) [TBC]

### 2. Application

[TBC]

### 3. Definitions and interpretation

(1) In this Act[, unless the context otherwise requires,] –

“administration creditors’ committee” means a committee established under section [\*] (*Creditors’ committee in administration*);

“approved”, with respect to pre-administration costs, means pre-administration costs that have been approved in such manner as may be prescribed;

“assetless company” means a company in liquidation that has insufficient assets to meet the likely costs, charges and expenses of the liquidation and the remuneration of the liquidator and has no reasonable prospect of paying any distribution to creditors;

“Authority” means the [Insolvency Regulation and Conduct Authority];

“bank” means [a licensed commercial bank or a licensed specialised bank];

“bank account” means an account held at a bank;

“Bankruptcy Trustee” shall have the meaning given to it in section [\*] (*General functions and official title of the Bankruptcy Trustee*);

“close family member” means [TBC];

“commencement” –

- (a) with respect to the administration of a company, shall have the meaning given to it in section [•]  
(*When administration commences*);
- (b) with respect to the deed administration of a company, shall have the meaning given to it in  
section [•](2) (*When deed administration commences and deed administrator appointed*);
- (c) with respect to a bankruptcy, shall have the meaning given to it in section [•] (*Commencement of  
bankruptcy*);
- (d) with respect to the liquidation of a company, shall have the meaning given to it in section [•]  
(*When liquidation commences*);
- (e) with respect to the provisional liquidation of a company, shall have the meaning given to it in  
section [•](3) (*Appointment of provisional liquidator*);
- (f) with respect to the receivership of property of a company, shall have the meaning given to it in  
section [•] (*When receivership commences*);

“Companies Act” means the Companies Act, No. 07 of 2007[, as amended from time to time];

“company” means [a company incorporated under the Companies Act or an existing company, and  
includes an off-shore company for the purposes of Part XI of the Companies Act];

“contributory”, with respect to a company –

(a) [means –

(i) every shareholder of the company, and every person to whom a share has been  
transmitted by operation of law; and

(i) every other person liable to contribute to the assets of the company in the event of  
its liquidation; and

(b) includes, for the purposes of all proceedings for determining and all proceedings prior to final  
determination of the persons who are contributories, any person alleged to be a contributory  
within the meaning of paragraph (a)].

“creditor”, with respect to a company, includes a person to whom the company owes a debt or is under a  
liability, whether present or future, whether certain or contingent, and whether ascertained or sounding in  
damages;

“director”, with respect to a company, includes – **[draws on definition in CA 2007, s 529(1)]**

(a) a person occupying the position of director of the company, by whatever name called; and

(b) for the purposes of the definition in this subsection of “involved party” and sections [•]  
(Functions of the Official Receiver), [•] (Qualifications of administrators), [•] (Qualifications of  
liquidators), [•] (Qualifications of receivers), [•] (Misfeasance of a director or other officer before  
administration or liquidation) and [•] (Offence relating to administration or liquidation) –

(i) a person in accordance with whose directions or instructions a person referred to in  
paragraph (a) may be required or is accustomed to act;

(ii) a person in accordance with whose directions or instructions the board of the  
company may be required or is accustomed to act; and

(iii) a person who exercises or who is entitled to exercise or who controls or who is  
entitled to control the exercise of powers which, apart from the articles of the company,  
would be required to be exercised by the board,

but the provisions of paragraph (b) shall not apply to a person if and to the extent that the person acts only in a professional capacity;

“encumbrance” means security of every kind;

[“enforce”, with respect to an encumbrance over property of a company or an individual, includes –

- (a) giving notice converting a floating charge into a fixed charge;
- (b) entering into possession or custody or assuming control of property of the company or individual by way of enforcement of the encumbrance;
- (c) appointing a receiver of property of the company or individual under an instrument, under section [•] (Appointment of receiver under an instrument), by way of enforcement of the encumbrance;
- (d) applying to court under section [•] (Court may appoint a receiver) for the appointment of a receiver of property of the company or individual by way of enforcement of the encumbrance;
- (e) appointing a person to enter into possession or custody or assume control of property of the company or individual, as agent for –
  - (i) the grantee of the encumbrance; or
  - (i) the company or individual,by way of enforcement of the encumbrance;
- (f) exercising, as grantee of the encumbrance or as a receiver or person so appointed, a right or remedy existing because of the encumbrance, whether arising under an instrument, under an enactment or otherwise; and
- (g) [taking a step with a view to recovery of a debt under the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990];

“essential good or service” means –

- (a) electricity;
- (b) relevant information technology;
- (c) telecommunications services; and
- (d) water;

“Fiscal” includes any officer charged with the execution of a writ or of another legal process;

“floating charge” means a charge that, when it was created, was a floating charge within the meaning of section 427(1) of the Companies Act;

“goods” means tangible movable property of every kind;

“grantee”, with respect to an instrument that creates an encumbrance, means the person entitled to the benefit of the instrument;

“hire-purchase agreement” includes [a conditional sale agreement, chattel leasing arrangement and retention of title agreement]; intended to reflect CA 2007, s 400 para (b)

“Insolvency Holding Account” means the account referred to in section [•](3) (*Application of surplus money*);

“Insolvency Practitioner” means a person registered by the Authority as such under Part [•] (*Institutional Arrangements*), Sub-Part [•] (*Insolvency Practitioners*);



“Insolvency Surplus Account” means the account referred to in section [•](4) (*Application of surplus money*);

“insolvent” with respect to an individual, shall have the meaning given to it in section [•](1) (*Inability to pay debts*), and with respect to a company, shall have the meaning given to it in section [•](2) (*Inability to pay debts*); shall have the meaning given to it in section [•] (*Inability to pay debts*);

“involved party”, with respect to a company, means –

- (a) a person who has taken part in the formation, promotion or management of the company;
- (b) a past or present shareholder of the company;
- (c) a past or present director or other officer of the company;
- (d) a past or present administrator, deed administrator, liquidator, special manager or receiver of property of the company; or
- (e) someone who purports or has purported to be an administrator, deed administrator, liquidator, special manager or receiver of property of the company;

“liquidation contributories’ committee” means a committee established under section [•] (*Contributories’ committee in liquidation*);

“liquidation creditors’ committee” means a committee established under section [•] (*Creditors’ committee in liquidation*);

**“mortgage” includes a charge over property for securing money or money’s worth;**

**“mortgagee” includes a person from time to time deriving title under the original mortgagee, but does not include a receiver;**

“office holder” means a Bankruptcy Trustee, authorised intermediary, personal insolvency administrator, personal insolvency agent, administrator, deed administrator, liquidator, provisional liquidator or receiver;

“officer”, with respect to a [body corporate], includes a director, manager or secretary, and **[executive or member of the senior management team];**

“pre-administration costs”, with respect to a company, means costs, charges and expenses incurred by and remuneration of an administrator in relation to the company before the company entered into administration and with a view to such entry into administration and to furthering the achievement of the objective referred to in paragraph (d) of section [•] (*Role of administrator*);

“preferential claim” means a claim referred to in paragraph 1, 2 or 7 of the [•] Schedule (*Preferential Claims in Liquidation*);

“property” means property of every kind, whether real or personal, tangible or intangible, and includes interests of every kind, whether present or future, certain or contingent, arising out of, or incidental to, property;

“property in receivership” means property in respect of which a receiver is appointed;

**“public notice” means [notice published in the [Gazette] or in a newspaper in general circulation nationally or in the locality where the debtor’s affairs are principally conducted or on a website provided for this purpose by the Authority or by such other means as may be prescribed];**

["receiver"<sup>7</sup> means a receiver or a manager or a receiver and a manager in respect of any property, who is or would be (as the context requires) appointed –

- (a) under an instrument; or
- (b) by the court,

under this Act, whether or not ~~the person appointed is empowered~~ that person is or would be empowered to sell any of the property in receivership], ~~[but does not include –~~

(g) ~~a mortgagee who, whether personally or through an agent of the mortgagee, exercises a power to –~~

- ~~(a) receive income from property subject to a charge;~~
- ~~(b) enter into possession or custody or assume control of property subject to a charge; or~~
- ~~(c) sell, convey or transfer property subject to a charge;] or~~

~~(h) an agent of any such mortgagee,~~

and "receivership" shall have the corresponding meaning;

"Registrar" shall have the meaning given to it in the Companies Act;

"related company" means [TBC<sup>8</sup>];

"related party" means [TBC];

"relevant date" means –

- (a) in the case of an administration, or a liquidation that was immediately preceded by an administration, the date of commencement of the administration;
- (b) in the case of a liquidation that was not immediately preceded by an administration, the date of commencement of the liquidation; and
- (c) in the case of a receivership, the date of commencement of the receivership.

"relevant information technology" means –

- (a) computer hardware and software;
- (b) data storage and processing, including in relation to cloud services;
- (c) information, advice and technical assistance in relation to the use of information technology;
- (d) point-of-sale terminals; and
- (e) website hosting;

"replacement administrator" means an administrator who is or would be (as the context requires) appointed under Part [•] (*Administration*) to replace an administrator;

"replacement deed administrator" means a deed administrator who is or would be (as the context requires) appointed under Part [•] (*Administration*), including under section [•](2) (*Removal and replacement of deed administrator*), to replace a deed administrator;

<sup>7</sup> Law Commission to consider where in the Act references should be made to receivers/receiverships under other legislation.

<sup>8</sup> Law Commission to insert appropriate language. Possible options discussed included metrics of control or "significant control" (voting or board control), or borrowing from the definition of an "associate company".

“replacement liquidator” means a liquidator who is or would be (as the context requires) appointed under this Part [•] (*Liquidation*) to replace a liquidator;

“replacement receiver” means a receiver who is or would be (as the context requires) appointed under Part [•] (*Receivership*) to replace a receiver;

“secured creditor” means a creditor with the benefit of an encumbrance;

~~“serve as an Insolvency Practitioner” means being appointed as or undertaking the role of an administrator, deed administrator, liquidator, provisional liquidator or receiver;~~

“serve as a key office holder” means being appointed as or acting as a Bankruptcy Trustee, personal insolvency administrator, personal insolvency agent, administrator, liquidator, provisional liquidator or receiver;<sup>9</sup>

“shareholder”, with respect to a company, means [a shareholder within the meaning of section 86 of the Companies Act];

~~“statutory demand” shall have the meaning given to it in section [•] (*Inability to pay debts*)~~ means a written demand, in such form as may be prescribed, requiring a company to pay a sum that is due;

“telecommunications services” means the conveyance from one device to another by a line, radio frequency, satellite transmission or other medium of a sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of a person using the device;

“transaction at an undervalue” shall have the meaning given to it in section [•] (*Transaction at an undervalue*);

“uncalled capital” includes any amount payable in respect of the issue of shares or under the articles of a company;

“hire-purchase agreement” and “conditional sale agreement” have the same meanings as in the Consumer Credit Act 1982.

“finance lease” has the same meaning as in the Finance Leasing Act 2000.

“voidable transaction” means –

- (a) a voidable preference;
- (b) a voidable encumbrance; or
- (c) an alienation with intent,

which terms shall have the meanings given to them in sections [•] (*Voidable preference*), [•] (*Voidable encumbrance*) and [•] (*Alienation of property with intent to hinder, delay or defeat a creditor*) respectively;

“working day” means a day other than Saturday, Sunday or a public holiday.

[TBC whether to include definitions of “administration”, “bankruptcy”, “deed administration”, “in administration”, “in liquidation”, “liquidation”, “personal debt restructuring”, “provisional liquidation” (and any similar/related terms)]

<sup>9</sup> Sections relating to insolvency practitioners should be carefully considered when institutional arrangements for insolvency practitioners are progressed.

[TBC whether to include a definition of “proof of debt”]

- (2) [Where a term defined in the Companies Act is used but not defined in this Act, it shall have the meaning given to it in the Companies Act.]
- (3) In this Act –
- (a) references to an encumbrance over the whole, or substantially the whole, of a company’s property and undertaking include references to two or more encumbrances over the property of the company where the property of the company subject to those encumbrances together is the whole, or substantially the whole, of the company’s property and undertaking; and
  - (b) except in section [\*] (*Official Receiver and Deputy Official Receivers*), references to the Official Receiver include references to a Deputy Official Receiver acting on behalf of or standing in the place of the Official Receiver under subsection (6) of that section.
- (4) [This Act shall be interpreted and applied so as to secure that a reference to an event or thing shall include its virtual or digital equivalent so that (for example) –
- (a) references to a book, document, record or the like include data and information held in electronic form;
  - (b) references to “delivery” or “making available” books, documents, records, property or the like include affording access to and transmission of the same; references to “writing” include graphical communication by any electronic means;
  - (c) “references to “advertisement” or “notice” include publication on a dedicated website (including one provided for that purpose by the Authority) notified (where necessary to be effective) in writing; and
- other equivalents may from time to time be prescribed or permitted by secondary legislation].

#### 4. Objects

- (1) The goals of Parts III [Personal Insolvency: Principles] to Part IX [Personal Insolvency Offences] include –
- (a) To promote economic activity and to reduce social costs of insolvency by relieving the honest individual debtor from the weight of oppressive indebtedness, and permitting him or her to start afresh free from the obligations consequent upon business and economic misfortunes.
  - (b) To encourage entrepreneurship and support the rehabilitation and rescue of micro, small, and medium enterprises - including unincorporated businesses, partnerships, and sole proprietorships, partnerships, and other unincorporated businesses - by restructuring the debts of viable businesses and offering a second chance to entrepreneurs.
  - (c) To support credit markets by enhancing the efficient recovery of debts by creditors to the extent that the means of insolvent individual debtors, and the goals specified paragraphs (a) and (b), reasonably permit.
- (2) The goals of Parts [\*] (~~Debt Protection Moratorium Order~~), [\*] (~~Personal and Small Business Debt Restructuring Arrangements~~), [\*] (~~Debt Rehabilitation Orders~~), [\*] (~~Bankruptcy~~), [\*] (~~Administration~~), [\*] (~~Compromises~~) and [\*] (~~Liquidation~~) include –

- (a) to maximise the value of a debtor's property and recoveries by creditors, including by preserving viable businesses suffering financial distress; and
  - (b) the timely, efficient, and impartial resolution of insolvencies.
- (3) The goals of this Act include –
- (a) To enhance predictability and reduce unnecessary losses of value by encouraging creditors to cooperate in producing outcomes beneficial to the interests of creditors as a whole and the public interest.
  - (b) To support credit markets by providing safeguards against misconduct in credit transactions.
  - (c) To support the integrity of the legal process by providing safeguards against inappropriate use of insolvency protections and by providing for the regulation, supervision, and discipline of the insolvency profession.

## Part II – Institutional Arrangements

### *Official Receiver*

#### 5. Official Receiver and Deputy Official Receivers

- (1) The [Director General of the Authority] shall appoint as officers –
  - (a) a suitable person to be Official Receiver; and
  - (b) one or more suitable persons to be Deputy Official Receivers, to act on behalf of or stand in the place of the Official Receiver where this is necessary or expedient.
- (2) The Official Receiver and Deputy Official Receivers shall discharge their duties under the authority and directions of the [Director General of the Authority], and they shall also be officers of the court.
- (3) The Official Receiver and Deputy Official Receivers –
  - (a) shall hold office on such terms and conditions as the [Director General of the Authority] may direct; and
  - (b) may be removed from office by a direction of the [Director General of the Authority].
- (4) The Director General of the Authority shall monitor the conduct and performance of the Official Receiver and Deputy Official Receivers, and may require the Official Receiver to provide to the Director General of the Authority any document or information that may concern the conduct and performance of the Official Receiver and Deputy Official Receivers.
- (5) Deputy Official Receivers shall discharge their duties and exercise their powers subject to the control and direction of the Official Receiver.
- (6) Any Deputy Official Receiver may act on behalf of or stand in the place of the Official Receiver and while so doing shall –

- (a) have all of the authority and powers of the Official Receiver; and
- (b) be subject to the same restrictions and limitations as are imposed on the Official Receiver by this Act or any regulation made thereunder.

#### **6. Functions of the Official Receiver**

The functions of the Official Receiver shall be –

- (a) to serve as liquidator or provisional liquidator;
- (b) to make applications for the disqualification of directors, and undertake associated activities;
- (c) to deal with the Insolvency Holding Account and Insolvency Surplus Account, and undertake associated activities;
- (d) to exercise powers and duties in respect of the conduct of debtors, including the powers specified in section [•] (*Powers of the Official Receiver as regards the debtor's conduct*);
- (e) to exercise duties in connection with bankruptcy, including the duties specified in section [•] (*General duties of the Official Receiver as to the bankruptcy*);
- (f) to make applications under section [•] (*Misfeasance*); and
- (g) any other functions provided for in this Act or any regulation made thereunder.

#### **7. Office and name of Official Receiver**

- (1) The Official Receiver may –
  - (a) sue and be sued in the name of “The Official Receiver of the property of [inserting the name of the debtor in bankruptcy or of the company in liquidation]”; and
  - (b) in that name, do any act necessary or expedient to be done in the execution of the Official Receiver's office.
- (2) The Official Receiver may [administer oaths and take declarations] and may appear in court and examine on oath a debtor in bankruptcy or the directors and other officers of a company in liquidation or any other person who appears in a proceeding under this Act, under such evidentiary and other procedural rules as may be prescribed.
- (3) [The Official Receiver may execute any document by signing the private name of the Official Receiver under the official name of Official Receiver, but nothing in this subsection shall prevent the Official Receiver from executing a document by affixing the seal of the office of Official Receiver thereto.]

#### **8. Acting as Official Receiver when a creditor**

- (1) An Official Receiver (A) shall not be appointed, act or continue to act as such in relation to a debtor in bankruptcy if –
  - (a) A is a creditor of the debtor (except in the capacity of Official Receiver in relation to another debtor in bankruptcy or the liquidator or provisional liquidator of a company); and
  - (b) the creditors decide, by resolution, that they do not wish A to act as such.

- (2) An Official Receiver (A) shall not be appointed, act or continue to act as liquidator or provisional liquidator of a company if –
- (a) A is a creditor of the company (except in the capacity of Official Receiver in relation to a debtor in bankruptcy or the liquidator or provisional liquidator of another company); and
  - (b) the creditors decide, by resolution, that they do not wish A to act as such.
- (3) Where the creditors adopt a resolution of the kind referred to in subsection (1)(b) or subsection (2)(b), the Director General of the Authority shall appoint another person from those appointed under section [•] (*Official Receiver and Deputy Official Receivers*) to replace A.

### *Insolvency Supervisor and Regulator*

#### **9. [Insolvency Regulation and Conduct Authority]**

- (1) There shall be [within the [Securities and Exchange Commission of Sri Lanka, a division] to be called the [Insolvency Regulation and Conduct Authority].
- (2) The [Securities and Exchange Commission of Sri Lanka] shall assign to the Authority such staff ~~within the Registrar's office as the Registrar~~ [Securities and Exchange Commission of Sri Lanka] considers necessary for the effective and efficient performance of ~~its~~ **the Authority's** functions.
- (3) The functions of the Authority shall be to –
- (a) keep under review the law and practice relating to insolvency of individuals and companies in Sri Lanka and make recommendations to [the Minister] on any changes considered to be necessary;
  - (b) register, renew the registration of, and cancel or suspend the registration of, persons ~~to serve as~~ Insolvency Practitioners;
  - (c) keep and maintain a register of Insolvency Practitioners;
  - (d) impose conditions on –
    - (i) individual Insolvency Practitioners;
    - (ii) all Insolvency Practitioners; and
    - (iii) Insolvency Practitioners of one or more specified classes;
  - (e) in association with all relevant professional bodies, foster the development of training to enhance the skills of and encourage improved standards of performance on the part of, Insolvency Practitioners;
  - (f) maintain a list of requirements with which a person must comply in order to ~~serve~~ **be registered** as an Insolvency Practitioner, and make arrangements for assessing compliance with those requirements; **intended to allow for e.g. the establishment of examination and continuing professional development requirements, and the setting up of corresponding assessment arrangements**
  - (g) set rules and standards, and provide guidance, regarding the conduct and performance of Insolvency Practitioners;

- (h) monitor the conduct and performance of Insolvency Practitioners;
- (i) establish and maintain procedures for the receipt, handling and adjudication of complaints against Insolvency Practitioners, including as to redress in instances where complaints are upheld;
- (j) impose disciplinary sanctions on Insolvency Practitioners on such grounds and of such nature as may be prescribed, and make application to the court for the discipline or removal from office of an Insolvency Practitioner or for a prohibition order;
- (k) participate in court proceedings relating to the conduct or performance of an Insolvency Practitioner; [intended to provide for participation as e.g. amicus curiae or similar]
- (l) monitor the conduct and performance of the Official Receiver and receive reports from the Official Receiver as requested or in accordance with a prescribed schedule for periodic reporting on any matter relating to the performance of the Official Receiver's functions under this Act and any regulation made thereunder and report to the [Registrar of Companies / Securities and Exchange Commission of Sri Lanka] on the conduct and performance of the Official Receiver and any resourcing or other needs in relation to the effective performance of the Official Receiver's functions;
- (m) issue practice directions setting out the procedure to be followed for doing any act required to be done under this Act and any regulation made thereunder;
- (n) set rules and standards, and provide guidance, regarding the carrying out of the role of Bankruptcy Trustee, authorised intermediary, personal insolvency administrator, personal insolvency agent, administrator, deed administrator, liquidator, provisional liquidator or receiver;
- (o) establish and maintain a personal insolvency register in accordance with this Act;
- (p) carry out research, commission studies, disseminate information and provide public education in the area of insolvency of individuals and companies;
- (q) establish and maintain communication and liaison with domestic and international agencies as may be necessary for the performance by the Authority of its functions;
- (r) advise [the Minister] on any matter relating to the law and practice of insolvency of individuals and companies; and
- (s) perform such other functions as may be required by any regulation made under this Act.

#### **10. Director General of the Authority**

- (1) A person shall be appointed from time to time, by the Minister, to be the Director General of the Authority.
- (2) The Director General of the Authority shall manage the Authority and shall have ultimate responsibility for the performance by the Authority of its functions.

#### **11. Protection of act or omission**

- (1) In this section, "relevant individual" means –
  - (a) an employee of the Authority;



- (b) a former employee of the Authority;
  - (c) the Director General of the Authority;
  - (d) a former Director General of the Authority;
  - (e) a member of any committee of the Authority; and
  - (f) a former member of any committee of the Authority.
- (2) No suit, prosecution or other legal proceeding shall lie against the Authority or any relevant individual for any act or omission done in the performance or exercise of any function, power or duty conferred or imposed upon such person by this Act or any regulation made thereunder, unless such act or omission is established to have been done in bad faith.
- (3) In the event of any suit, prosecution or other legal proceeding referred to in subsection (2) against a relevant individual, the Authority shall bear all reasonable expenses of the relevant individual in relation to the proceeding, until final determination in the proceeding.

## Insolvency Practitioners

### 11A. Individuals who are qualified to serve as key office holders

Other than the Official Receiver with respect to a bankruptcy, liquidation or provisional liquidation, an individual is qualified to serve as a key office holder in respect of an activity only if –

- (a) the person is registered by the Authority as an Insolvency Practitioner;
- (b) the person's registration is not suspended under section [\*] (Suspension of registration);
- (c) the person's registration is not subject to any condition imposed under section [\*] (Conditions) that prevents the person from serving as a key office holder in respect of the activity;
- (d) the person is not an undischarged bankrupt debtor;
- (e) the person has not been judged to be of unsound mind under the Mental Diseases Ordinance (Cap. 227); **see CA 2007, ss 202(2)(e), 213(1)(d), 383(1)(e), 412(1)(f) and 436(1)(f)**;
- (f) the person is not subject to a prohibition order made under section [\*] (Prohibition orders); and
- (g) the person is not prohibited under section 213 of the Companies Act, or by an order made under section 214 of the Companies Act, from being appointed or acting as an office holder.

### 11B. Body corporate may not be appointed or act as office holder

A body corporate may not serve as a key office holder or be appointed or act as an office holder of any other kind.

## 12. Registration

- ~~(1) Other than the Official Receiver with respect to a liquidation or provisional liquidation, an individual is not qualified to serve as an Insolvency Practitioner in respect of an activity unless –~~
- ~~(a) the person is registered by the Authority as an Insolvency Practitioner;~~
  - ~~(b) the person's registration is not suspended under section [\*] (Suspension of registration);~~

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- (c) ~~the person's registration is not subject to any condition imposed under section [∗] (*Conditions*) that prevents the person from acting as an Insolvency Practitioner in respect of the activity;~~
- (d) ~~the person is not an undischarged bankrupt debtor;~~
- (e) ~~the person has not been judged to be of unsound mind under the Mental Diseases Ordinance (Cap. 227); **see CA 2007, ss 202(2)(e), 213(1)(d), 383(1)(e), 412(1)(f) and 436(1)(f)**~~
- (f) ~~the person is not subject to a prohibition order made under section [∗] (*Prohibition orders*); and~~
- (g) ~~the person is not prohibited under section 213 of the Companies Act, or by an order made under section 214 of the Companies Act, from acting as an Insolvency Practitioner.~~
- (2) An individual may apply to the Authority, in such manner and upon the payment of such registration fee as may be prescribed, for registration as an Insolvency Practitioner.
- (3) Following an application under subsection ~~(2)~~**(1)**, the Authority –
- (a) shall follow such procedure as may be prescribed, including as to appeals; **and**
  - (b) **shall, in accordance with that procedure and subject to subsection (5), register the person as an Insolvency Practitioner.**
- (4) The Authority shall maintain a list of requirements with which a person must comply in order to ~~serve be~~ **registered** as an Insolvency Practitioner, which shall include –
- (a) such requirements for professional qualifications and professional experience as the Authority considers appropriate;
  - (b) passing such examinations as the Authority considers appropriate;
  - (c) such other criteria as the Authority considers appropriate; and
  - (d) such other criteria as may be prescribed.
- (5) The Authority shall ensure that the list of requirements maintained under subsection ~~(4)~~**(3)** is publicly available.
- (6) The Authority may not register a person as an Insolvency Practitioner unless it is satisfied that the person –
- (a) is a fit and proper person to serve as ~~an Insolvency Practitioner~~ **a key office holder**; and
  - (b) complies with the requirements ~~in~~ **for registration as an Insolvency Practitioner maintained under subsection (4)****(3)**.
- (7) The Authority may register a person as an Insolvency Practitioner for a fixed period (subject to renewal, cancellation or suspension of the registration under this Part (*Insolvency Practitioners*)).
- (8) ~~A body corporate may not serve as an Insolvency Practitioner.~~

**13. Conditions**

- (1) The Authority may at any time impose a condition on the registration of all registered Insolvency Practitioners, or on registered Insolvency Practitioners of one or more specified classes, that limits the types of activity that such Insolvency Practitioners may undertake.
- (2) The conditions imposed under subsection (1) may include compliance with such continuing professional development requirements as the Authority considers appropriate.
- (3) Without prejudice to subsection (1), the Authority may at any time impose a condition on the registration of an Insolvency Practitioner that limits the types of activity that the Insolvency Practitioner may undertake.
- (4) Subject to such conditions as may be prescribed, an Insolvency Practitioner may apply to the Authority for the variation or removal of a condition imposed on that Insolvency Practitioner under subsection (3).
- (5) Following an application under subsection (4), the Authority shall follow such procedure as may be prescribed, including as to appeals.

**14. Renewal of registration**

- (1) An individual may apply to the Authority, in such manner and upon the payment of such renewal fee as may be prescribed, for renewal of the individual's registration as an Insolvency Practitioner.
- (2) Following an application under subsection (1), the Authority –
  - (a) shall follow such procedure as may be prescribed, including as to appeals; and
  - (b) shall, in accordance with that procedure and subject to subsection (3), renew the registration of the person as an Insolvency Practitioner.
- (3) The Authority may not renew the registration of a person as an Insolvency Practitioner unless it is satisfied that the person –
  - (a) is a fit and proper person to serve as an Insolvency Practitioner a key office holder; and
  - (b) complies with the requirements in for registration as an Insolvency Practitioner maintained under section [·](4)(3) (Registration).
- (4) The Authority may renew the registration of a person as an Insolvency Practitioner for a fixed period (subject to further renewal, cancellation or suspension of the registration under this Part (Insolvency Practitioners)).

**15. Cancellation of registration**

- (1) The Authority may cancel a person's registration as an Insolvency Practitioner –
  - (a) if it is satisfied on reasonable grounds that –
    - (i) the person has died;
    - (ii) the person obtained the registration by making a false or misleading representation or declaration;

- (iii) the person does not meet the requirements for acting ~~registration~~ as an Insolvency Practitioner maintained under section [•](4)(3) (*Registration*);
  - (iv) the person does not meet or has not met a condition imposed on the person's registration as an Insolvency Practitioner under section [•] (*Conditions*);
  - (v) ~~the person does not comply with or has not complied with the requirement in section [•](1) (*Insurance*);~~ or
  - (vi) the person is otherwise not a fit and proper person to serve as an ~~Insolvency Practitioner~~ ~~a key office holder~~;
- (b) as a type of disciplinary action under section [•](2) (*Disciplinary action*);
  - (c) if the person is the subject of a prohibition order made under section [•] (*Prohibition orders*);
  - (d) if the person is prohibited under section 213 of the Companies Act, or by an order made under section 214 of the Companies Act; or
  - (e) if the person so requests.
- (2) With respect to cancellation of a registration under subsection (1), the Authority shall follow such procedure as may be prescribed, including in the case of paragraphs (a)(ii), (a)(iii) and (a)(iv) as to –
- (a) giving the Insolvency Practitioner a prior opportunity to be heard on the matter; and
  - (b) appeals.
- (3) ~~For so long as a person's registration as an Insolvency Practitioner is cancelled under subsection (1), the person shall not serve as a key office holder.~~

## **16. Suspension of registration**

- (1) The Authority may suspend a person's registration as an Insolvency Practitioner –
- (a) as the first step under section [•](3) (*Register of Insolvency Practitioners*);
  - (b) if it is satisfied on reasonable grounds that the person does not meet the requirements for acting ~~registration~~ as an Insolvency Practitioner maintained under section [•](4)(3) (*Registration*);
  - (c) if it is satisfied on reasonable grounds that the person does not meet or has not met a condition imposed on the person's registration as an Insolvency Practitioner under section [•] (*Conditions*);
  - (d) ~~if it is satisfied on reasonable grounds that the person does not comply with or has not complied with the requirement in section [•](1) (*Insurance*);~~
  - (e) if it makes an inquiry into the conduct or performance of the Insolvency Practitioner under section [•](2) (*Inquiry into conduct and performance*); or
  - (f) as a type of disciplinary action under section [•](2) (*Disciplinary action*),
- on such terms and conditions as it thinks fit.
- (2) With respect to suspension of a registration under subsection (1), the Authority shall follow such procedure as may be prescribed, including in the case of paragraphs (a), (b) and (c) as to –
- (a) giving the Insolvency Practitioner a prior opportunity to be heard on the matter; and
  - (b) appeals.

- (3) ~~Where~~ **For so long as** a person's registration as an Insolvency Practitioner is suspended under subsection (1), the person ~~may~~ **shall** not serve as an ~~Insolvency Practitioner~~ **a key office holder** during the period for which the registration is suspended.
- (4) The Authority shall review suspended registrations at such times or on such occasions as may be prescribed, and in any event at or around the time at which the suspension is to end.
- (5) With respect to review of a suspended registration under subsection (4), the Authority shall follow such procedure as may be prescribed, including as to –
  - (a) giving the Insolvency Practitioner a prior opportunity to be heard on the matter; and
  - (b) appeals.

#### **17. Register of Insolvency Practitioners**

- (1) The Authority shall keep and maintain a register of Insolvency Practitioners, in which shall be entered the name, address and qualifications of every Insolvency Practitioner.
- (2) Within five working days after each appointment of an Insolvency Practitioner as an administrator, deed administrator, liquidator or receiver, the Insolvency Practitioner shall give written notice of the appointment to the Authority.
- (3) With respect to an Insolvency Practitioner, where the Authority receives a notice of an event referred to in paragraphs (a), (b), (c), (d) and (e) of section [•](2) (*Notice of specified events*) or has reasonable grounds to suspect that any of those events has occurred, the Authority may, subject to subsection (5), take the following steps in the order in which they are specified –
  - (a) first, suspend the Insolvency Practitioner's registration as an Insolvency Practitioner, pending –
    - (i) the disposal by the court of the application referred to in paragraph (c)(i); or
    - (ii) the determination referred to in paragraph (c)(ii);
  - (b) second, undertake an inquiry under section [•] (*Inquiry into conduct and performance*); and
  - (c) third, either –
    - (i) make an application to the court under section [•] (*Prohibition orders*); or
    - (ii) determine that it is not appropriate to make such an application.
- (4) Subject to subsection (7), the Authority shall, against the name of a person named in the register of Insolvency Practitioners, enter ~~against the person's name~~ each of the following circumstances –
  - (a) that the person's registration as an Insolvency Practitioner has been suspended under section [•] (~~Cancellation~~ **Suspension of registration**);
  - (b) that the person's registration as an Insolvency Practitioner has been cancelled under section [•] (~~Suspension~~ **Cancellation of registration**) **or has otherwise ended without being renewed**;
  - (c) that the person has been suspended or removed from professional practice by any professional body, or that the Authority has been advised by a professional body [or has reasonable grounds

to suspect] that the person has been suspended or removed from professional practice by any professional body;

- (d) that the person is the subject of a prohibition order made under section [•] (*Prohibition orders*);
- (e) that the person is prohibited under section 213 of the Companies Act, or by an order made under section 214 of the Companies Act, from ~~acting as an Insolvency Practitioner~~ **being appointed or acting as an office holder**;
- (f) that the person has ceased to practise as an Insolvency Practitioner;
- (g) that the person has died.

(5) For the purposes of subsection (4)(f), a person who serves as an Insolvency Practitioner shall be deemed to be practising as an Insolvency Practitioner.

(6) Where an entry against a person's name has been made under any of paragraphs (a), (b), (c), (d), (e) and (f) of subsection (4), and **the Authority is satisfied that –**

- (a) the corresponding circumstances no longer exist; **or**
- (b) **the entry was erroneous,**

the Authority shall ~~update~~ **amend** the register to reflect that this is the case.

(7) Where a person has ceased to practise as an Insolvency Practitioner and a corresponding entry has been made against the person's name under subsection (4)(f), and unless subsection (6) applies with respect to that entry, the Authority need not enter against the person's name any of the circumstances referred to in paragraphs (a), (b), (c), (d), (e) and (g) of that subsection.

(8) The extent to which, and the manner in which, the register of Insolvency Practitioners shall be made available to third parties for access, searching, statistical purposes and research purposes, shall be as may be prescribed.

## **18. Insurance**

- (1) An Insolvency Practitioner shall maintain appropriate insurance against the liability that the Insolvency Practitioner may incur.
- (2) The Authority may from time to time specify [by instrument] what constitutes appropriate insurance for the purposes of subsection (1).
- (3) An Insolvency Practitioner who fails to comply with subsection (1) shall be guilty of an offence. **[Provision for offence – approach TBD]**

## **19. Notice of specified events**

- (1) In this section, "specified event" means each of such events as may be prescribed.
- (2) An Insolvency Practitioner shall, in such manner as may be prescribed, give the Authority notice of the following events –

- (a) the making of an order of the court under section [•](2)(a) (*Order to enforce administrator's or deed administrator's duties*), [•](2)(a) (*Order to enforce liquidator's or provisional liquidator's duties*) or section [•](2)(a) (*Order to enforce receiver's duties*), to comply with a duty, against the person;
  - (b) the making of an order of the court under section [•] (*Removal of administrator or deed administrator from office by court*), section [•] (*Removal of liquidator or provisional liquidator from office by court*) or section [•] (*Removal of receiver from office by court*) against the person;
  - (c) the making of a prohibition order under section [•] (*Prohibition orders*) against the person;
  - (d) the making of an order of the court under section 214 of the Companies Act against the person;
  - (e) the suspension or removal of the person from professional practice by any professional body;
  - (f) the removal of the person from office under section [•] (*Removal of administrator from office by creditors*);
  - (g) the removal of the person from office under section [•] (*Replacement administrator*) or [•] (*Replacement liquidator*); and
  - (h) the occurrence of any other specified event.
- (3) A notice under subsection (2) shall be given within five working days after –
- (a) the day on which the Insolvency Practitioner became aware of the occurrence of the event; or
  - (b) if earlier, the day on which the Insolvency Practitioner could reasonably be expected to have become aware of the occurrence of the event.
- (4) An Insolvency Practitioner who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

## **20. Notice of other events**

An Insolvency Practitioner may send to the Authority a report specifying any matter that, in the opinion of the Insolvency Practitioner, should be brought to the notice of the Authority.

## **21. Inquiry into conduct and performance**

- (1) The Authority shall monitor the conduct and performance of Insolvency Practitioners and may ~~require~~ **request** the Official Receiver, the Registrar, any Insolvency Practitioner, or any person who is or has been a special manager or an auditor of a company of which an Insolvency Practitioner has been appointed as administrator, deed administrator, liquidator or receiver, to provide to the Authority any document or information that may concern an Insolvency Practitioner's or former Insolvency Practitioner's conduct or performance.
- (2) The Authority may make an inquiry into the conduct or performance of an Insolvency Practitioner, or former Insolvency Practitioner, where permitted under section [•](3) (*Register of Insolvency Practitioners*) or section [•](2) (*Disciplinary action*) to do so.
- (3) For the purposes of an inquiry under subsection (2), the Authority may by written notice –

- (a) subject to section [•] (*Documents required by office holder*), ~~require~~ **request** a director or shareholder of a company or any other person including the secretary of any relevant professional body to deliver to the Authority such books, records or documents of a company in that person's possession or custody or under that person's control relating to the subject matter of the inquiry as the Authority may determine; and
- (b) ~~require~~ **request** –
- (i) a person who has taken part in the formation, promotion or management of a company;
  - (ii) a past or present shareholder of a company;
  - (iii) a past or present director or other officer of a company;
  - (iv) a past or present administrator, deed administrator, liquidator, special manager or receiver of property of a company;
  - (v) a person who is or has been an employee of a company;
  - (vi) a person who is acting or has at any time acted as a lawyer for a company (**but subject to legal advice privilege or litigation privilege**);
  - (vii) an accountant or auditor of a company; or
  - (viii) another person having knowledge of the affairs of a company,
- to do any of the things specified in subsection (4), if and to the extent reasonable.
- (4) The things referred to in subsection (3) are to –
- (a) attend on the Authority at such time and place as the Authority may request;
  - (b) provide the Authority with such information about the affairs, business, property or financial circumstances of the company as the Authority may request;
  - (c) be examined on oath by a representative of the Authority on any matter relating to the affairs, business, property or financial circumstances of the company, under such evidentiary and other procedural rules as may be prescribed;
  - (d) assist the Authority in its inquiry to the best of the person's ability.
- (5) The Authority shall pay to a person referred to in subsection (3)(b), not being an employee of the company, the reasonable travel and other expenses that are incurred in complying with a request **made** under subsection (4)**(3)(b)**.
- (6) No suit, prosecution or any other legal or other proceeding (including a disciplinary proceeding by any professional body or authority having jurisdiction in respect of professional conduct) shall lie against any person in respect of disclosure in good faith of information ~~to the Authority~~ under this section.
- (7) On the application of the Authority, the court may order a person who has failed to comply with a request made under this section to –
- (a) comply with the request; or



- (b) attend before the court and be examined on oath, under such evidentiary and other procedural rules as may be prescribed,

where it is satisfied that such compliance or examination (as the case may be) –

- (c) is necessary for the performance by the Authority of one or more of the functions set out in section [•](3) (*Insolvency Regulation and Conduct Authority*); and
- (d) would not be unreasonably oppressive to the person.

## **22. Disciplinary action**

(1) In this section, “disciplinary action” means –

- (a) the imposition of disciplinary sanctions on such grounds and of such nature as may be prescribed;
- (b) the making of an application to the court for –
  - (i) the discipline or removal from office of an Insolvency Practitioner;
  - (ii) the discipline of a former Insolvency Practitioner; or
  - (iii) a prohibition order under section [•] (*Prohibition orders*).

(2) Subject to subsection (3), where the Authority concludes, or determines that there are reasonable grounds to conclude, that an Insolvency Practitioner or former Insolvency Practitioner –

- (a) while registered as an Insolvency Practitioner, does not meet or has not met a condition imposed on the person’s registration as an Insolvency Practitioner under section [•] (*Conditions*);
- (b) is contravening or has contravened a requirement under –
  - (i) this Act or any regulation made thereunder, including rules and standards set by the Authority regarding the conduct and performance of Insolvency Practitioners;
  - (ii) any other Act;
  - (iii) any rule of law or Rules of Court; or
  - (iv) any order or direction of the court,in a manner that has materially adversely affected or may materially adversely affect the interests of –
  - (v) creditors;
  - (vi) contributories; or
  - (vii) persons dealing in good faith with a debtor;
- (c) that an order of the court under section [•](2)(a) (*Order to enforce administrator’s or deed administrator’s duties*), [•](2)(a) (*Order to enforce liquidator’s or provisional liquidator’s duties*) or section [•](2)(a) (*Order to enforce receiver’s duties*), to comply with a duty, was made against the person;

- (d) that an order of the court under section [•] (*Removal of administrator or deed administrator from office by court*), section [•] (*Removal of liquidator or provisional liquidator from office by court*) or section [•] (*Removal of receiver from office by court*) was made against the person;
  - (e) that the person is the subject of a prohibition order made under section [•] (*Prohibition orders*);
  - (f) is prohibited under section 213 of the Companies Act, or by an order made under section 214 of the Companies Act, from ~~acting as an Insolvency Practitioner~~ **being appointed or acting as an office holder**; or
  - (g) is failing or has failed in a material respect to comply with a direction of the Authority, the Authority may –
    - (h) undertake an inquiry under section [•] (*Inquiry into conduct and performance*); and
    - (i) take such disciplinary action as it thinks fit.
- (3) With respect to a former Insolvency Practitioner, subsection (2) shall not apply to any matter that relates solely to a time more than six years before the Insolvency Practitioner ceased to practise as an Insolvency Practitioner.
- (4) For the purposes of subsection (3), a person who serves as an Insolvency Practitioner at any time shall be deemed to be practising as an Insolvency Practitioner at that time.
- (5) Under subsection (2), the Authority may take one or more types of disciplinary action in relation to a single matter.
- (6) With respect to the taking of disciplinary action under subsection (2), the Authority shall follow such procedure as may be prescribed, including as to –
- (a) giving the Insolvency Practitioner a prior opportunity to be heard on the matter; and
  - (b) appeals.

### **23. Interpretation**

For the purposes of sections [•] (*Registration*) to [•] (*Disciplinary action*), references to the Authority shall[, unless the context otherwise requires,] include references to a committee thereof.

### **24. Inducement to be appointed as administrator or liquidator**

- (1) Subject to subsection (2), any person who gives or agrees or offers to give to any contributory or creditor of a company any valuable consideration with a view to securing the person's own appointment, or to securing or preventing the appointment of some other person, as the company's administrator or liquidator shall be guilty of an offence. [Provision for offence – approach TBD] **[Draws on CA 2007, s 384; intended among other things, to capture administrators (who are not referred to in that section)]**
- (2) The negotiation or discussion in good faith of remuneration for ~~undertaking the role of~~ **acting as an** administrator or liquidator shall not constitute a contravention of **subsection (1)**.

## 25. Prohibition orders

- (1) On the application of the Authority, the court shall make in relation to a person a prohibition order for a period not exceeding five years, where the court is satisfied that a person meets the condition in subsection (2).
- (2) The condition referred to in subsection (1) is that the person is unfit to serve as an ~~Insolvency Practitioner~~ **a key office holder** by reason of –
  - (a) persistent failures to comply; or
  - (b) the seriousness of one or more failures to comply,with one or more of the duties referred to in sections [•](1) (*Order to enforce administrator's or deed administrator's duties*), [•](1) (*Order to enforce liquidator's duties*) and [•](1) (*Order to enforce receiver's duties*).
- (3) A person to whom a prohibition order applies shall not serve as an ~~Insolvency Practitioner~~ **a key office holder**.
- (4) In making a prohibition order, the court may, if it thinks fit –
  - (a) impose any term or condition;
  - (b) make any other ancillary order.
- (5) A copy of every prohibition order shall, within five working days after the making of the order, be sent by the court to the Authority.
- (6) Evidence that on two or more occasions within the immediately preceding five years –
  - (a) a court has made an order in respect of the same person, under any of sections [•](2)(a) (*Order to enforce administrator's or deed administrator's duties*), [•](2)(a) (*Order to enforce liquidator's duties*) and [•](2)(a) (*Order to enforce receiver's duties*), to comply with a duty; or
  - (b) an application for an order to comply with a duty has been made in respect of the same person under any of those sections, and in each case the person has complied with the applicable duty after the making of the application and before the hearing,is, in the absence of special reasons to the contrary, evidence of persistent failures to comply for the purposes of subsection (2)(a).
- (7) Any person who fails to comply with a prohibition order shall be guilty of an offence. [Provision for offence – approach TBD]

## 26. Appeals

With respect to any **act or** decision of the Authority under this Part (*Insolvency Practitioners*), an appeal shall lie to the **[District Court]** ~~[Administrative Appeals Tribunal]~~.

## 27. Acting when not permitted to do so

A person who is appointed or acts as an ~~administrator, deed administrator, liquidator or receiver~~ **office holder** at a time when the person is not permitted to do so shall be guilty of an offence. [Provision for offence – approach TBD]

## 28. Interests statement

- (1) An interests statement signed by a person shall, in such level of detail as may be prescribed, disclose –

- (a) each circumstance, relationship or other fact or matter that gives rise to, or could reasonably be perceived as giving rise to, a conflict of interest for the person, in relation to the role in connection with which the interests statement is required;
  - (b) the nature of each actual or perceived conflict of interest; and
  - (c) how the person intends to manage each actual or perceived conflict of interest.
- (2) Before a person signs an interest statement, the person shall make the inquiries that are reasonably necessary for ensuring that the interests statement is complete.
- (3) Any person who signs an interests statement, where –
- (a) the interests statement is false or misleading in a material particular; and
  - (b) the person either –
    - (i) knows that the interests statement is false or misleading in a material particular; or
    - (ii) omits to disclose any fact or matter, knowing that the omission makes the interests statement false or misleading in a material particular,
- shall be guilty of an offence. [Provision for offence – approach TBD]

#### **29. Statement of pre-administration costs**

A statement of pre-administration costs, if prepared, shall include –

- (a) details of the work done for which, and any agreements under which, the costs, charges and expenses were incurred and the remuneration was charged;
- (b) an explanation of why the work –
  - (i) was done before the administration of the company commenced; and
  - (ii) was with a view to furthering the achievement of the objective referred to in paragraph (d) of section [\*] (*Role of administrator*);
- (c) the unpaid amounts of the pre-administration costs, setting out separately –
  - (i) costs, charges and expenses incurred; and
  - (ii) remuneration charged;
- (d) the previously paid amounts (if any) of the pre-administration costs, setting out separately –
  - (i) costs, charges and expenses incurred; and
  - (ii) remuneration charged; and
- (e) such other information as may be prescribed.

### **Part III – Personal Insolvency: Principles**

#### **30. Personal Insolvency Procedures and Personal Insolvency Orders**

- (1) For the purposes of this Act, a Personal Insolvency Order includes

- (a) A Debt Protection Moratorium Order;
  - (b) An order confirming the coming into effect of a Debt Restructuring Arrangement;
  - (c) A Debt Rehabilitation Order; and
  - (d) A Bankruptcy Order;
- (2) For the purposes of this Act, a Personal Insolvency Procedure includes
- (a) The Personal Debt Protection Moratorium procedure under Part 3;
  - (b) The Debt Restructuring Arrangement procedure under Part 4;
  - (c) The Debt Rehabilitation Order procedure under Part 5; and
  - (d) The Bankruptcy procedure under Part 6.
- (3) For the purposes of Parts III, IV, V, VI, VII, VIII, and IX, “legal proceedings” includes, where relevant, mediation and arbitration.
- (4) In relation to a Personal Insolvency Procedure, “creditor” includes a person to whom a debtor owes a debt or is under a liability, whether present or future, and whether certain or contingent.
- (5) In relation to a Personal Insolvency procedure, “debtor” means
- (a) Before a Personal Insolvency Order has been made, the individual in respect of whom an application or proposal has been made or is being prepared; and
  - (b) After a Personal Insolvency Order has been made, the individual in respect of whom an order has been made.
- (6) In relation to a Bankruptcy procedure, “bankrupt debtor” means the debtor in respect of whom a Bankruptcy Order has been made.

### **31. Protected Property**

- (1) The categories of property of a debtor listed under subsection 4 are *protected property*, for the purposes of
- (a) determining the debtor's eligibility for a Debt Rehabilitation Order under section [65 Eligibility for a Debt Rehabilitation Order] below,
  - (b) establishing terms of a Debt Restructuring Arrangement under section [45 Debt Restructuring Arrangements: Eligibility Criteria]; and
  - (c) determining the composition of the Bankruptcy Estate under section [115 Description of Bankruptcy Estate].
- (2) Protected property as established under this section
- (a) Does not form part of the Bankruptcy Estate under section [Description of Bankruptcy Estate]; and
  - (b) Are is excluded from the calculation of available assets under sections [Debt Restructuring Arrangements: Eligibility Criteria] and [Eligibility for a Debt Rehabilitation Order].

- (3) Under section [Debt Restructuring Arrangements: Mandatory Provisions] below, the terms of Debt Restructuring Arrangement must not provide for the sale, for the benefit of creditors or intermediaries, of any protected property of the debtor.
- (4) In addition to the protection of a debtor's reasonable income under section 34, the categories of protected property are: [As taken from the current provisions of civil procedure on property exempted from execution in satisfaction of a court judgment.]
- (a) The debtor's necessary household furniture and effects, including clothing, for the debtor and the debtor's relatives and dependents;
  - (b) The debtor's necessary tools of trade, business, and agriculture;
  - (c) Where the debtor is engaged in agriculture, such quantity of agricultural land as may be necessary for providing for the support of the debtor and his or her dependents;
  - (d) Professional instruments and library necessary for the carrying on of the debtor's profession or business, of such value as may be prescribed in secondary legislation;
  - (e) Books of accounts;
  - (f) Mere rights to sue for damages;<sup>10</sup>
  - (g) Any right of personal service;
  - (h) Any expectancy of succession by survivorship or other merely contingent or possible right of interest;
  - (i) A right to future maintenance and all maintenance, alimony and costs ordered in matrimonial suits or maintenance actions;
  - (j) any house or other dwelling, together with such extent of land appurtenant thereto as the Court may consider necessary for its enjoyment, which is not mortgaged as security for the payment of the whole or part of the sum claimed in a personal insolvency procedure which
    - (i) is the actual residence of the debtor at the time of the procedure; and
    - (ii) has been such residence from the time of the initiation of the procedure together with such extent of land appurtenant thereto as the Court may consider necessary for its enjoyment;
  - (k) the amount standing to the credit of an employee's individual account in the Employees' Provident Fund established under the Employees' Provident Fund Act, or in any other provident fund or pension established for the benefit of employees in any employment, to the extent prescribed in section 4 below;
  - (l) The debtor's tenancy under a short-term residential rental accommodation agreement;
  - (m) A motor vehicle, if necessary for the reasonable domestic, trade, or employment needs of the debtor and the debtor's relatives and dependents (up to a maximum value of xxxx rupees)
  - (n) Property held by a debtor on trust for any other person; and
  - (o) Any such other categories as may be prescribed by secondary legislation.

<sup>10</sup> This language mirrors the *Civil Procedure Law*. However, a stakeholder gave feedback to the effect that it should not be included here.

- (5) Where a house or other dwelling, which is the actual residence of the debtor, is mortgaged as security for the payment of a sum claimed by a secured creditor in a personal insolvency procedure, [The principle in Sri Lankan law as conveyed by the Law Commission is that (a) when a home is subject to a mortgage the home is available to the secured creditor for realization of the mortgage security (b) But the home is not available to general creditors for the purposes of liquidation and distribution to unsecured creditors. The aim of this subsection (5) is to embody this principle in personal insolvency law. The wording may need to be checked to ensure that it conveys this point clearly.]
- (a) The interest of the secured creditor in the house or dwelling is limited to the amount of indebtedness outstanding in favour of the secured creditor; and
  - (b) Any remaining interest of the debtor in the house or dwelling, where the value of the house exceeds the amount of indebtedness outstanding in favour of the secured creditor, shall constitute protected property.
- (6) Where a debtor has acquired possession of an item falling within subsection 4(a)-(d) above by means of a hire-purchase agreement, lease agreement, or other form of finance agreement, the interest of the debtor under benefit of the hire-purchase agreement, lease agreement, or other form of finance agreement, shall constitute protected property, and shall not be available for the benefit of general creditors. [The idea behind this provision is that certain essential assets may be acquired by finance agreements, such as hire-purchase or lease agreements. Legal uncertainty has arisen in some jurisdictions as to whether a debtor who uses such an asset in her/his business should be permitted to retain use of the asset, and whether the debtor's interest under the agreement should be available in principle for liquidation for the benefit of general creditors – i.e., does the protection of "tools of the trade" apply only to chattels, or to choses in action under which a debtor acquires and possesses the essential chattels. This provision purports to clarify, in a manner consistent with the above provisions drawn from existing Civil Procedure law, that both the chattels themselves and the chose in action giving the debtor rights in those chattels, should be categorised as protected property. It is important to note, however, that the rights of creditors under these finance agreements largely remain intact. Discrete provisions addressing the rights of creditors and debtors under these vendor-finance agreements are included in each procedure below.]
- (7) Under this Act, it shall not be appropriate to contemplate the potential sale of any protected property of the debtor for the purposes of determining whether the debtor is unable to pay his or her debts as they become due. [This additional subsection clarifies that a debtor can be insolvent even in circumstances in which it could be argued that the debtor could pay his or her debts as they fall due by selling assets which constitute protected property. If certain assets of the debtor are deemed to be off-limits to creditors, there should be no expectation that the debtor is required to sell these assets. Therefore, an assessment of the ability of the debtor to pay debts as they fall due must in fact ascertain whether the debtor can pay debts as

they fall due while retaining protected property. This subsection addresses a point considered by the Irish Supreme Court case of *Re O'Connor*, [2023] IESC 31

- (8) In a Personal Insolvency Procedure, “insolvency-related term” is a provision of an agreement for the supply of an essential good or service to a debtor under which –
- (a) the agreement or the supply would terminate, or any other thing would take place, because the personal insolvency procedure commences; or
  - (b) the supplier would be entitled to terminate the agreement or the supply, or to do any other thing, because a personal insolvency procedure commences;

### 32. Contributions and Entitlements under the Employees Provident Fund and other Provident Funds

- (1) Contributions, entitlements, or amounts payable under the Employees’ Provident Fund established under the Employees’ Provident Fund Act, or in any other provident fund or pension established for the benefit of employees in any employment,
- (a) shall constitute protected property; and
  - (b) shall not constitute after-acquired property under this Act.
- (2) ~~When a debtor who is a party to a personal insolvency procedure receives a lump-sum payment (an “entitlement pay-out”) from the Employees’ Provident Fund established under the Employees’ Provident Fund Act, or in any other provident fund or pension established for the benefit of employees in any employment, the payment received shall constitute after-acquired property.~~
- (3) For the purposes of this Act, amounts paid in respect of a debtor by an employer of the debtor as contributions under the Employees’ Provident Fund established under the Employees’ Provident Fund Act, or in any other provident fund or pension established for the benefit of employees in any employment,
- (a) shall not constitute after-acquired property under this Act; and
  - (b) shall not constitute income of the debtor.
- (4) Where a debtor who is a party to a personal insolvency procedure is in receipt of regular payments from the Employees’ Provident Fund established under the Employees’ Provident Fund Act, or ~~in~~ from any other provident fund or pension established for the benefit of employees in any employment, these payments shall not constitute after-acquired property, but shall constitute income for the purposes of:
- (a) ~~determining the debtor’s eligibility for a Debt Rehabilitation Order under section [43] below,~~
  - (b) establishing terms of a Debt Restructuring Arrangement under section [23]; and
  - (c) the making of a Bankruptcy Debt Repayment Order or Bankruptcy Debt Repayment Agreement under sections [106]-[107].
- (5) Nothing in this section shall remove the obligation of a debtor under a personal insolvency procedure to make full disclosure of his or her property in a statement of the debtor’s financial affairs.



### 33. Protection of a Reasonable Income

- (1) Under any personal insolvency procedure, a debtor shall not be required to make contributions from his or her **protected** income, ~~the effect of which would be to reduce the income of the debtor below what is necessary for meeting the reasonable needs of the debtor and his or her dependents.~~ **which** for the purposes of this Act, ~~protected income~~ means the income of a debtor necessary for meeting the reasonable needs of the debtor and his or her dependents.
- (2) For the purposes of this Act, and subject to subsection (5), the following amounts shall constitute a debtor's protected income:
  - (a) a personal monthly allowance of the debtor of 100,000 rupees; and
  - (b) where the debtor has dependents, an additional monthly allowance of 100,000 rupees in respect of each dependent of the debtor, **up to a total additional monthly allowance of 400,000 rupees.**<sup>11</sup>
- (3) For the purposes of this Act, and subject to subsection (5), the debtor's monthly surplus income is, barring the existence of exceptional circumstances, the amount by which a debtor's monthly income exceeds **the debtor's protected income.**
  - (a) ~~The debtor's personal monthly allowance of 100,000 rupees; and~~
  - (b) ~~Where the debtor has dependents, an additional monthly allowance of 100,000 rupees for each dependent of the debtor.~~
- (4) Where exceptional circumstances particular to the debtor and/or his or her dependents mean that their reasonable needs are greater than would be the case in the absence of such exceptional circumstances,
  - (a) the debtor's protected income may exceed the amounts specified in subsection (3); but
  - (b) the debtor's protected income may only exceed the amounts specified in subsection (3) to the extent necessary to meet the reasonable needs of the debtor and his or her dependents.
- (5) For the purposes of this Act, the debtor's income comprises every payment in the nature of income which is from time to time made to him or her or to which he or she from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment, and, subject to section 4, any payment under a pension scheme.
- ~~(6) Secondary legislation may vary the monetary values specified in subsections (3) and (4).~~
- (7) Secondary legislation may prescribe rules or guidance as to the calculation of the income necessary for meeting the reasonable needs of the debtor and his or her dependents in a case where exceptional circumstances particular to the debtor and/or his or her dependents mean that their reasonable needs are greater than would be the case in the absence of such exceptional circumstances.

<sup>11</sup> This edit reflects a suggestion from a peer reviewer that imposing a cap would be beneficial to avoid an excessively high protected income in cases of a debtor with a large number of dependents.

### 34. Included and Excluded Debts

- (1) Unless otherwise provided in this Act, an included debt means a debt which meets the conditions of subsection (2), and which is not an excluded debt.
- (2) The category of included debts includes all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the
  - (a) Debt Protection Moratorium Order;
  - (b) Order confirming the coming into effect of a Debt Restructuring Arrangement;
  - (c) Debt Rehabilitation Order; or
  - (d) Bankruptcy Order.
- (3) The category of included debts also includes any debt or liability to which the debtor became subject to after the making of any of the orders specified in subsection (2), by reason of any obligation incurred by the debtor before the making of any of the orders specified in subsection (2).
- (4) The following debts are excluded debts:
  - (a) any debt or liability incurred by fraud or fraudulent breach of trust to which the bankrupt was a party;
  - (b) any debt or liability for which the bankrupt has obtained forbearance through fraud to which the bankrupt was a party;
  - (c) any obligation to pay maintenance or alimony, and all maintenance, alimony and costs ordered in matrimonial suits or maintenance actions;
  - (d) any liability in respect of a fine imposed for an offence except, in the case of a penalty imposed for an offence under an enactment relating to the public revenue or of a recognisance, with the consent of the [Ministry of Finance];
  - (e) a liability to pay damages in respect of personal injuries to any person under a tort committed recklessly or intentionally by the debtor, for negligence, nuisance or breach of a statutory, contractual or other duty, being in either case damages in respect of personal injuries to any person;<sup>12</sup>
- (5) ~~A debtor may be discharged from any debt referred to in subsections (4)(f) and (4)(g) by a certificate in writing of the Commissioner-General of Inland Revenue.~~
- (6) Excluded debts are not provable in bankruptcy.
- (7) For the purposes of determining a debtor's eligibility for a Debt Rehabilitation Order under section 43 below, the calculation of the amount of the debtor's liability under his or her total debts shall not include excluded debts.
- (8) The moratorium under a Debt Protection Moratorium Order under section 15 shall not apply to an excluded debt.

<sup>12</sup> These edits have been made in response to suggestions by a peer reviewer.

- (9) A Debt Restructuring Arrangement shall not apply to an excluded debt, except where the relevant creditor consents to the inclusion of its debt under the Arrangement.
- (10) A Debt Rehabilitation Order shall not apply to an excluded debt.
- (11) The discharge under sections 50 and 122 below shall not discharge the debtor from liability in respect of excluded debts.
- (12) The completion of a Debt Restructuring Arrangement under section 36 does not release the debtor from liability under an excluded debt, except where the relevant creditor has consented to the discharge of its debt under the terms of the Arrangement.

### **35. Duties of Debtors under Personal Insolvency Procedures**

- (1) For the purposes of this section, an insolvency official includes
  - (a) The Official Receiver;
  - (b) An authorised intermediary;
  - (c) A personal insolvency agent;
  - (d) A personal insolvency administrator; or
  - (e) A Bankruptcy Trustee.
- (2) In addition to any other duty imposed on a debtor by this Act, a debtor who is a party to a personal insolvency procedure is under the obligations specified in this section.
- (3) A debtor who participates in any personal insolvency procedure is under an obligation
  - (a) To provide to an insolvency official and to the court, where required by section 36 and any other provision of this Act, a full statement of the debtor's financial affairs, including the disclosure of his or her income, assets, and liabilities;
  - (b) to supply to the relevant insolvency official any such information as the official may require regarding the debtor's expenditure and sources of income, and
  - (c) to provide any records, accounts and documents reasonably required by the insolvency official.
- (4) A debtor who participates in any personal insolvency procedure shall cooperate fully in the procedure, and shall comply with any reasonable request from the insolvency official to provide assistance, documents, and information necessary for
  - (a) The application of the procedure to the debtor's case; or
  - (b) The carrying out of the insolvency official's functions.
- (5) Where at any time after the commencement of a personal insolvency procedure, **other than in the normal course of business carried on by the debtor or in the normal family affairs of the debtor,**
  - (a) any property is acquired by the debtor; or
  - (b) there is any other material **and unexpected** change in the debtor's financial circumstances,

the debtor shall, as soon as is reasonably practicable, give the relevant insolvency official notice of the property or, as the case may be, of the increase in the debtor's income.

- (6) Where at any time after the commencement of a personal insolvency procedure there is a change in the debtor's address, employment, name, or other material personal information, the debtor shall, as soon as is reasonably practicable, give the relevant insolvency official notice of the change of details.
- (7) A debtor who is a party to a personal insolvency procedure shall inform the relevant insolvency official, as soon as reasonably practicable, after becoming aware of any material inaccuracy or omission in the statement of the debtor's financial affairs.
- (8) A debtor must take all the steps in relation to the debtor's property and income that are
  - (a) Required under this Act;
  - (b) Prescribed by secondary legislation made under this Act;
  - (c) Directed to be done by the court by an order made in reference to a particular insolvency procedure; or
  - (d) Reasonably required by the relevant insolvency official.
- (9) A debtor who is a party to a personal insolvency procedure
  - (a) Shall not pay to creditors any additional payments, in respect of debts existing prior to the coming into effect of an applicable personal insolvency procedure, above a value of [xxx] other than those paid through an insolvency official under the terms of the procedure; and
  - (b) Shall not transfer, lease, grant security over, or otherwise dispose of any interest in property above a value of [xxx], otherwise than through the insolvency official under the terms of the procedure.
- (10) A debtor who is a party to a personal insolvency procedure shall not, either alone or with any other person, obtain credit in an amount of more than [xxx] from any person without informing that person that he or she is a party to a personal insolvency procedure.
- (11) Where a debtor who is a party to a Debt Rehabilitation Order or a Bankruptcy Order wishes to leave Sri Lanka
  - (a) The debtor shall first obtain the consent of the court, and
  - (b) the court shall not unreasonably refuse such consent.

### **36. Statement of the Debtor's Financial Affairs**

- (1) Subject to any additional details as may be prescribed, and unless otherwise required by a provision of this Act or an order of court, a statement of debtor's financial affairs shall include,
  - (a) A list of creditors;
  - (b) A schedule of assets and liabilities;
  - (c) A schedule of current income and current expenditure;

- (d) A statement of the amount of monthly net income, itemised to show how the amount is calculated; and
  - (e) A statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the making of an application, or preparation of a proposal, under a procedure under this Act;
  - (f) any guarantees given by the debtor in respect of the debts of another person; and
  - (g) the security (if any) held by each creditor in respect of its debt.
- (2) A statement of financial affairs made by a debtor under this Act shall be verified by means of **affidavit**.
- (3) **Secondary legislation may prescribe a form, known as a Standardised Financial Statement, to be used where it is required under this Act to prepare a statement of the debtor's financial affairs.**

### **36A. Essential Services in Personal Insolvency**

(1) In a Personal Insolvency Procedure –

“essential good or service” means –

- (a) electricity;
- (b) relevant information technology;
- (c) telecommunications services; and
- (d) water;

“insolvency-related term” is a provision of an agreement for the supply of an essential good or service to a company ~~debtor~~ under which –

- (a) the agreement or the supply would terminate, or any other thing would take place, because the administration of the company ~~personal insolvency procedure~~ commences; or
- (b) the supplier would be entitled to terminate the agreement or the supply, or to do any other thing, because the administration of the company ~~personal insolvency procedure~~ commences;

“relevant information technology” means –

- (a) computer hardware and software;
- (b) data storage and processing, including in relation to cloud services;
- (c) information, advice and technical assistance in relation to the use of information technology;
- (d) point-of-sale terminals; and
- (e) website hosting; and

“telecommunications services” means the conveyance from one device to another by a line, radio frequency, satellite transmission or other medium of a sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of a person using the device.

## Part IV – Debt Protection Moratorium Order

### 37. Debt Protection Application

- (1) Subject to this Part, an ~~insolvent individual~~, a debtor who wishes to prepare a proposal for a Debt Restructuring Arrangement, apply for a Debt Rehabilitation Order, or apply for a Bankruptcy Order, may present to the Court a Debt Protection Application, in a form which complies with subsections (2) and (3) **[and any requirements as may be specified in secondary legislation]**.
- (2) The debt protection application of the ~~insolvent individual~~ debtor must include the following information:
  - (a) The full name, date of birth, and residential address of the ~~insolvent individual~~ debtor,
  - (b) Any trading names and/or names and addresses of any business carried on by the ~~insolvent individual~~ debtor,
  - (c) The written consent of the ~~insolvent individual~~ debtor to the making of any enquiries relating to the ~~insolvent individual~~ debtor by the Official Receiver, and
  - (d) The written consent of the ~~insolvent individual~~ debtor to the disclosure and processing of personal data of the ~~insolvent individual~~ debtor, by the Official Receiver, to the extent necessary.
- (3) The application must include the following information to the extent that the information is known by the ~~insolvent individual~~ debtor, and is relevant to the case:
  - (a) Details of the creditors of the ~~debtor insolvent individual~~ and the relevant debts owed to each creditor,
  - (b) Details as to any security held by any creditor, and the nature of the security held by a creditor,
  - (c) Details of any debt collection agent or other third party instructed by a creditor of the ~~debtor insolvent individual~~ for the purposes of collection or enforcement of a debt, and
  - (d) Details of any advisor, agent, or representative who has been instructed by the ~~debtor insolvent individual~~ to act on his or her behalf.
- (4) Any person who makes a Debt Protection Application must
  - (a) Take reasonable care to ensure the accuracy of any information provided, and
  - (b) Not deliberately withhold relevant information from the application.

### 38. Criteria for making Debt Protection Moratorium Order

- (1) On receipt of a debt protection application, the court must consider whether to make a Debt Protection Moratorium Order in relation to the ~~insolvent individual~~ debtor applicant.
- (2) In considering a debt protection application, the [Court] may
  - (a) Request that the Official Receiver make such enquiries as it considers necessary to assist the court in considering whether the ~~insolvent individual~~ debtor meets the eligibility criteria specified in subsection 4, and
  - (b) stay consideration of the application until the Official Receiver has received satisfactory answers to such enquiries.
- (3) In considering a debt protection application, the [Court] should presume that the criteria in [subsection (4)] are met if that appears to the [Court] to be the case at the application date from the information supplied in

the application, and the [Court] has no reason to believe that the information supplied is incomplete or inaccurate.

- (4) An insolvent individual debtor will be eligible for a Debt Protection Moratorium Order only if the insolvent individual debtor -
- (a) Is unable, or is unlikely to be able, to pay some or all of his or her debts as they become fall due;
  - (b) Is domiciled in Sri Lanka; or at any time within three years before the date of the Debt Protection Application;
    - (i) Was ordinarily resident, or had a place of residence in Sri Lanka; or
    - (ii) Carried on business in Sri Lanka;
  - (c) Is not currently a bankrupt debtor;
  - (d) Is not subject to a Debt Restructuring Arrangement under Part 4;
  - (e) Has not been subject to a Debt Rehabilitation Order under Part 5 within 1 year prior to the date of the Debt Protection Application;
  - (f) Has not been subject to a Bankruptcy Order under Part 6 within 5 years prior to the date of the Debt Protection Application;
  - (g) Has not been subject to a Debt Protection Moratorium Order under Part 5 within 12 months prior to the date of the Debt Protection Application.
- (5) Having considered a debt protection application, the [Court] must make a Debt Protection Moratorium Order in relation to the insolvent individual debtor if the [Court] considers that
- (a) the insolvent individual debtor meets the eligibility criteria in subsection 4,
  - (b) the [Court] has no reason to believe that the insolvent individual debtor has made any material false representation or omission in making the application, and
  - (c) the debts to be covered by the Debt Protection Moratorium Order are included debts in accordance with section 8.
- (6) On the making a Debt Protection Moratorium Order, the [Court] shall direct the Official Receiver to record in the [Personal Insolvency Register], in addition to such other details as may be prescribed by secondary legislation under section 19,
- (a) details of the insolvent individual debtor,
  - (b) the date of issue of the Order,
  - (c) the date on which the Moratorium period is due to cease,
  - (d) any extension of the Moratorium period, including the date on which an extended moratorium period is due to cease,
- (7) Having considered a debt protection application, the [Court] must refuse an application to make a Debt Protection Moratorium Order in relation to the insolvent individual debtor if the [Court] considers that
- (a) the insolvent individual debtor does not meet the eligibility criteria in subsection 4,
  - (b) the debts to be covered by the Debt Protection Moratorium Order are not [included debts] for the purposes of [section 8], or

- (c) the insolvent individual debtor has made any material false representation or omission in making the application or on supplying any accompanying information.

### 39. Effect of Debt Protection Moratorium Order

- (1) A moratorium commences on the date of a Debt Protection Moratorium Order in relation to each included debt owed by the insolvent individual debtor I.
- (2) Subject to [subsection 3], during the moratorium period, a creditor of the insolvent individual debtor to whom an included debt is owed
- (a) Has no remedy in respect of the debt, and
  - (b) Shall not take any actions to
    - (i) Require an insolvent individual debtor to pay interest that accrues on an included debt during a moratorium period, [The idea here is that we are referring to the contractual interest rate, rather than, say, a statutory rate of interest. Interest will not accrue during the Moratorium, and a creditor cannot require a debtor subsequently to pay such interest after the end of the Moratorium (subsection (7)).]
    - (ii) Require an insolvent individual debtor to pay fees, penalties, or charges in relation to an included debt that accrue during a moratorium period,
    - (iii) Require an accelerated payment by the insolvent individual debtor to the creditor,
    - (iv) [record in the Credit Reference Information Bureau any default on the part of the insolvent individual debtor in making payments which would have fallen due during the moratorium period, but for the existence of the Debt Protection Moratorium order],
    - (v) Contact an insolvent individual regarding payment of an included debt, otherwise than at the request of the insolvent individual debtor,
    - (vi) Initiate or continue any legal proceedings against the insolvent individual debtor in relation to an included debt,
    - (vii) Collect, secure, recover, or demand payment of an included debt,
    - (viii) Execute or enforce a judgment or order of a court or tribunal against the insolvent individual debtor,
    - (ix) Obtain a warrant,
    - (x) Recover goods in the possession of the insolvent individual debtor,
    - (xi) Enforce security held in respect of an included debt,
    - (xii) [obtain possession of a premises in which the insolvent individual debtor is residing under a tenancy agreement into which the insolvent individual debtor has entered with a relevant creditor],
    - (xiii) Take any of the actions in this subsection against another person who is jointly liable with the insolvent individual debtor to whom the moratorium relates,



- (xiv) Take any of the actions in this subsection against another person who has guaranteed the debts of the insolvent individual debtor to whom the moratorium relates, or
- (xv) Take possession of, or otherwise recover, any goods of the type specified in section 31(4)(a)-(d) above [Protected Property] that are used by or in the possession of, the debtor, where the creditor is the owner or lessor of the goods, take possession of the property or otherwise recover it, ~~Terminate a hire purchase agreement, lease agreement, finance lease, or other finance similar agreement by means of which an insolvent individual has purchased~~ ~~acquired possession of~~ goods of the type specified in section 31(4)(a)-(d) above [Protected Property]. [The aim of this new provision is to clarify that during the temporary period of the moratorium, a creditor should not terminate a finance agreement under which a debtor has purchased an essential asset. Language here aims for consistency with provisions such as s. 197 below.]
- (xvi) Instruct an agent to take any of the actions mentioned in [paragraphs (i)-(xv) above.
- (3) While a Debt Protection Moratorium remains in force, a court may exceptionally give permission for a creditor to take an action listed in paragraphs 2(b)(v) to 2(b)(xvii), where the [court] considers that
- (a) Exceptional circumstances mean that it is reasonable to allow the creditor to take the action, and
  - (b) The action will not
    - (i) Cause undue detriment to the insolvent individual debtor to whom the moratorium relates,
    - (ii) Unfairly prejudice any other creditor; or
    - (iii) Significantly undermine the protections of the moratorium.
- (4) A Debt Protection Moratorium Order does not prevent the commencement or continuation of any criminal proceedings against an insolvent individual debtor.
- (5) Any action taken contrary to this section shall be null and void.
- (6) Nothing in this section affects a creditor's entitlement to the benefit of any execution or other legal process or distress against an insolvent individual debtor or property of the insolvent individual debtor where the execution or other legal process or distress was completed before the making of the Debt Protection Moratorium Order, where
- (a) an execution against movable or immovable property is completed by seizure, or the entry into possession of a receiver or a person charged with execution, and a completed sale; and
  - (b) an attachment of a debt is completed by satisfaction of the debt.
- (7) At the end of the moratorium period, neither a creditor nor its agent is entitled to-
- (a) Require an insolvent individual debtor to pay interest, fees, penalties, or charges referred to in subsection 2(b)(i)-(iii) that accrued during the moratorium period,

- (b) Treat the non-payment during the moratorium period by the insolvent individual of interest, fees, penalties, or charges as a default or breach by the insolvent individual debtor under the agreement between the creditor and the insolvent individual debtor, or
- (c) record in the Credit Reference Information Bureau any non-payment during the moratorium period by the insolvent individual debtor of interest, fees, penalties or charges.

#### 40. Duration of Debt Protection Moratorium Order

- (1) A Debt Protection Moratorium commences when a court makes a Debt Protection Moratorium Order.
- (2) Subject to subsection [3], a Debt Protection Moratorium continues for [60] days from the date on which it commenced under subsection (1), unless
  - (a) The Moratorium is cancelled in accordance with section 42 48,
  - (b) The Moratorium ends with the death of the insolvent individual debtor under subsection (5); or
  - (c) The Moratorium ends under subsection (6) with the making of a Personal Insolvency Order as specified in section 30 Personal Insolvency Procedures and Personal Insolvency Orders.
- (3) On application by the insolvent individual debtor, [a Court] may extend the moratorium period by an additional period not exceeding [90] days, where-
  - (a) The [Court] is satisfied that the insolvent individual debtor has acted in good faith and with reasonable expedition, and
  - (b) [The Court] is satisfied that the extension of the moratorium period will serve the objectives of this Act, including by allowing the debtor time to prepare an application for a Debt Restructuring Arrangement under Part 4.
- (4) A Court may extend the moratorium period under subsection (3) no more than four times, and for a total period not exceeding [360] days. [Input from the Working Group would be useful here, as to the appropriate extent to which renewals of the Moratorium period should be permitted. Ultimately there may be an element of policy preference here.]
- (5) Where an insolvent individual debtor dies during a Moratorium period, the Moratorium ends on the day after the day on which the insolvent individual debtor died.
- (6) Where a Personal Insolvency Order is made in respect of the debtor, the Moratorium ends on the date of the Personal Insolvency Order.
- (7) Where a Moratorium period ends in accordance with subsections (2), (5), or (6), 3, or (4), the Official Receiver shall cause all information relating to the Moratorium to be removed from the [Personal Insolvency Register].

#### 41. Obligations of insolvent individual debtors during Debt Protection Moratorium

- (1) During a Debt Protection Moratorium, an insolvent individual debtor must
  - (a) Inform the Official Receiver if there is any material change in the insolvent individual debtor's circumstances or financial position,

- (b) Make any payment due in relation to an ongoing liability as it falls due to be paid during the moratorium period,
  - (c) Not obtain additional credit, either alone or jointly with any other person, that at any one point in time collectively exceeds \$[x].
  - (d) Not dispose of any assets **other than in the normal course of business carried on by the debtor or in the normal family affairs of the debtor**, and
  - (e) Cooperate with the Official Receiver in a reasonable manner.
- (2) In addition to the obligations specified in subsection (1), during a Debt Protection Moratorium, an ~~insolvent individual~~ **debtor** is subject to any relevant duties of debtors specified in section 11 above which may reasonably apply to the circumstances of a Debt Protection Moratorium.
- (3) Any action contrary to subsection (1) shall be null and void.

#### **42. Creditor Objection to Debt Protection Moratorium**

- (1) A creditor who receives notification of a Debt Protection Moratorium under this Part may apply to [the court] to object to the Moratorium.
- (2) A creditor's application to object to a Debt Protection Moratorium under subsection (1) above must be based on one or more of the following grounds, namely that-
- (a) the ~~insolvent individual~~ **debtor** does not meet the eligibility criteria in section 14,
  - (b) the debts to be covered by the Debt Protection Moratorium are not [included debts] for the purposes of section 8,
  - (c) the ~~insolvent individual~~ **debtor** has made any false representation or omission in making the application or on supplying any accompanying information,
  - (d) the ~~insolvent individual~~ **debtor** has failed, in a material manner, to comply with the duties specified in section 17 above, or
  - (e) the Debt Protection Moratorium Order causes irreparable harm to the interests of the creditor.
- (3) A creditor's application to [court] to object to a Debt Protection Moratorium must be made within a period of [xx] days beginning with the day on which the Debt Protection Moratorium commences.
- (4) A creditor must provide notice to the debtor of an application to object to a Debt Protection Moratorium, including the grounds on which the application is based.
- (5) Where on an application under this section the [court] is satisfied as to any of the grounds specified in subsection (2) above, the [court] may do either or both of the following, namely-
- (a) Where to do so would not unfairly prejudice any other creditor, make an order directing that the Debt Protection Moratorium shall not apply in whole or in part to the creditor who made the application to court,
  - (b) Make an order cancelling the Debt Protection Moratorium in respect of any other debt and/or creditor to which the Moratorium applies.

- (6) Where a [court] has made an order under subsection (5) above, the [court] may require the debtor to pay any interest, fees or charges that accrued during the Moratorium period in respect of a debt to which the Moratorium applies.
- (7) In any case where a [court] makes an order under subsections (5) and/or (6), the [court] must notify the debtor, the Official Receiver, and any creditors to whom the order under subsection (5) applies.
- (8) Where a [court] notifies the Official Receiver under subsection (7), the Official Receiver must, **within a period of [x] days,**
  - (a) Cause an entry to be made in the [Personal Insolvency Register], and
  - (b) Send a notification of the court order made under subsection (5), and any requirements made under subsection (6), to any affected creditor.

## Part V: ~~Personal and Small Business~~ **Individual** Debt Restructuring Arrangements

### 43. Personal and Small Business Debt Restructuring Arrangements

- (1) This part establishes a Debt Restructuring Arrangement procedure, under which a debtor, with the assistance of an insolvency intermediary, can negotiate a flexible repayment arrangement with ~~her or his~~ **the debtor's** creditors, in **or towards** satisfaction of the debtor's outstanding liabilities.
- (2) The Debt Restructuring Arrangement procedure aims to enable debtors who hold realisable assets and income to obtain a discharge of debt and economic rehabilitation without recourse to bankruptcy, while ensuring that such debtors make a reasonable contribution to the repayment of their debts.
- (3) The Debt Restructuring Arrangement procedure aims to enable the rehabilitation and rescue of ~~unincorporated businesses, partnerships, and sole proprietorships, partnerships, and other~~ **unincorporated businesses** through the restructuring of debts via negotiation between debtors and creditors.

### 44. Debt Restructuring Arrangements: General Conditions

- (1) Subject to the provisions of this Act, a debtor who satisfies the eligibility criteria specified in section 22 ~~45~~ **Debt Restructuring Arrangements: Eligibility Criteria** may make a proposal to creditors for a Debt Restructuring Arrangement in respect of the satisfaction or restructuring of the debtor's debts.
- (2) A proposal for a Debt Restructuring Arrangement may be made and submitted by a debtor, or on behalf of a debtor by a personal insolvency agent, in accordance with the provisions of this Part and any secondary legislation.
- (3) A personal insolvency agent may also act, after the coming into effect of a Debt Restructuring Arrangement, as a personal insolvency administrator.

- (4) In accordance with sections 61 and 62 ~~38 and 39~~, secondary legislation may prescribe rules regulating the performance of the functions of personal insolvency agents and personal insolvency administrators under this Part.
- (5) Two or more proposals for a Debt Restructuring Arrangement may be dealt with as one proposal where
- (a) the personal insolvency agent considers that they could reasonably be dealt with together because of the financial relationship of the debtors involved; and
  - (b) the terms of each of the proposals specify details of how the Arrangements should be administered together, including
    - (i) the treatment of joint and individual assets and the treatment of joint and individual debts;
    - (ii) whether the approval of each of the Arrangements is to be contingent on the approval of another Arrangement;
    - (iii) the effect of the failure or early termination of one Arrangement on any other Arrangement; and
    - (iv) how any joint payments, made by two or more debtors, should be apportioned between the creditors.

#### **45. Debt Restructuring Arrangements: Eligibility Criteria**

- (1) A debtor will be eligible for a Debt Restructuring Arrangement when he or she meets all of the following criteria:
- ~~(a) The debtor has net monthly surplus income as defined by section x, of at least [100,000 rupees];~~
  - ~~(b) The debtor has available assets, excluding protected property as defined by section [x], worth at least [200,000 rupees];~~
  - (c) The debtor is unable, or is likely to be unable to pay some or all of his or her debts as they fall become due;
  - (d) The debtor is domiciled in Sri Lanka; or at any time within three years before the date of the making of a proposal for a Debt Restructuring Arrangement
    - (i) Was ordinarily resident, or had a place of residence in Sri Lanka; or
    - (ii) Carried on business in Sri Lanka;
  - (e) The debtor is not currently a bankrupt debtor;
  - (f) Is not subject to a [Debt Rehabilitation Order] under Part 5;
  - ~~(g) Has not been subject to a [Debt Rehabilitation Order] within 1 year prior to the date of the making of a proposal for a Debt Restructuring Arrangement~~
  - ~~(h) Has not been subject to a Bankruptcy Order within 5 years prior to the date of the making of a proposal for a Debt Restructuring Arrangement; and~~
  - ~~(i) Has not been subject to a Debt Protection Moratorium Order within 12 months prior to the date of the making of a proposal for a Debt Restructuring Arrangement.~~

~~(2) Secondary legislation may vary the monetary values specified in subsection (1).~~

#### 46. Debt Restructuring Arrangements: Mandatory Provisions

- (1) A Debt Restructuring Arrangement must authorise a person, firm, or body to act as a personal insolvency administrator in relation to the arrangement.
  - (2) A Debt Restructuring Arrangement may authorise or require the personal insolvency administrator to
    - (a) Carry on the debtor's business, or trade on the debtor's behalf or in the debtor's name;
    - (b) Realise the assets of the debtor; or
    - (c) **Collect**, Administer or distribute any funds of the debtor.
  - (3) A Debt Restructuring Arrangement shall not provide for the debtor to make payments under the arrangement, in respect of included debts, for a period of a longer duration than
    - (a) **[3] years; or**
    - (b) **If the value of the debtor's included debts exceed [10 million rupees], [7] years.**<sup>13</sup>
  - (4) A Debt Restructuring Arrangement shall provide for the payment, before any other debts are paid, of
    - (a) The costs, charges, and expenses of the personal insolvency agent and personal insolvency administrator, that are properly incurred in respect of the Arrangement;
    - (b) Those debts specified as having priority in liquidation under the [•] Schedule (Preferential Claims in Liquidation), unless the holder of a particular priority debt claim agrees to a different treatment of such claim;
  - (5) For the purposes of subsection 4(a) and Schedule (Preferential Claims in Liquidation), the charges incurred by a personal insolvency agent and/or personal insolvency administrator for the supply of an essential good or service are an expense of the Arrangement.
  - (6) A Debt Restructuring Arrangement shall not require the debtor to sell or dispose of any protected property as specified in section 31 Protected Property.
  - (7) In accordance with section 34 Protection of a Reasonable Income, a Debt Restructuring Arrangement
    - (a) shall provide for a debtor to retain sufficient income necessary for meeting the reasonable needs of the debtor and his or her dependents, and
    - (b) shall not require the debtor to make payments from the debtor's protected income.
  - (8) A Debt Restructuring Arrangement shall provide that the circumstances of the debtor be reviewed by the personal insolvency administrator at regular intervals, not exceeding intervals of 12 months.
- (9) Notwithstanding subsection (3), a Debt Restructuring Arrangement may provide for the continuance of payments, after the completion of the Arrangement under section 59, on any debt on which the last payment is due, under the original terms of the debt, after the time of completion of the Arrangement under section 59. **This new subsection aims to clarify that while an Arrangement is limited to a repayment plan of****

<sup>13</sup> The time periods indicated here are those determined by the Law Commission. However, a peer reviewer has expressed that it would be preferable for these periods to be shorter.

37 years, certain long-term debts will have maturity dates beyond this timeline (e.g. mortgages) and can continue to be paid beyond the 37 year timeline. For example, a mortgage may be restructured as part of an Arrangement, under which some interest and/or principal could be written down and the term extended etc. See also s. 59(7) below, which deals with the issue by providing that a secured debt will not be discharged except to the extent provided in the Arrangement.

#### 47. Debt Restructuring Arrangements: Secured Creditors and Property Rights

- (1) A Debt Restructuring Arrangement may include terms providing for the satisfaction or restructuring of both unsecured and secured debts.
- (2) Subject to the rules on creditors' approval of a debtor's proposal under ~~section 28~~ **section 51 Creditor Approval of Debt Restructuring Arrangement**, a Debt Restructuring Arrangement may provide for the treatment of security, which may include:
  - (a) the sale or disposition of the asset that is the subject of the security;
  - (b) the surrender of the security to the debtor; or
  - (c) the retention by the secured creditor of the security.
- (3) Subject to the rules on creditors' approval of a debtor's proposal under ~~section 28~~ **section 51 Creditor Approval of Debt Restructuring Arrangement**, a Debt Restructuring Arrangement may include terms
  - (a) modifying the rights of a secured creditor; and/or
  - (b) providing that a secured creditor will not realise its security while the arrangement is in force.
- (4) Subject to the rules on creditors' approval of a debtor's proposal under ~~section 28~~ **section 51 Creditor Approval of Debt Restructuring Arrangement**, a Debt Restructuring Arrangement may include terms providing for the reduction of the principal sum due in respect of a secured debt, only where the Arrangement specifies that the amount of the reduced principal sum is not less than the value of the security.
- (5) Subject to the rules on creditors' approval of a debtor's proposal under **section 51 Creditor Approval of Debt Restructuring Arrangement**, a Debt Restructuring Arrangement may provide for
  - (a) the curing, within a reasonable time, of any default; and
  - (b) maintenance of payments while the Arrangement is in effecton any secured debt on which the last payment is due after the **time of** completion of the Arrangement under **section 59 Completion of Debt Restructuring Arrangement**.
- (6) Subject to the rules on creditors' approval of a debtor's proposal under ~~section 28~~ **section 51 Creditor Approval of Debt Restructuring Arrangement**, a Debt Restructuring Arrangement may provide for the
  - (a) Curing, within a reasonable time, of any default ~~in respect of rent arrears~~; and
  - (b) maintenance of rent payments while the Arrangement is in effect

arising under a tenancy agreement ~~tenancy agreement~~ into which the debtor has entered with a relevant creditor.

- (7) Subject to the rules on creditors' approval of a debtor's proposal under section 51 ~~Creditor Approval of Debt Restructuring Arrangement~~, a Debt Restructuring Arrangement may provide for the
- (a) ~~Curing, within a reasonable time, of any default in respect of rent arrears; and~~
  - (b) ~~maintenance of instalment payments while the Arrangement is in effect~~
- ~~arising under a hire purchase agreement, tenancy agreement finance lease, or other similar agreement, into which the debtor has entered with a relevant creditor.~~

#### **48. Debt Restructuring Arrangements: Appointment of Personal Insolvency Agent**

- (1) Where a debtor wishes to make a proposal for a Debt Restructuring Arrangement, he or she must appoint a person, firm, or body, to act as a personal insolvency agent.
- (2) If the debtor and the personal insolvency agent so agree, the person, firm, or body appointed to act as a personal insolvency agent may also act as a personal insolvency administrator in respect of the proposed Debt Restructuring Arrangement under section ~~46~~ 23.
- (3) On being appointed under subsections **(1) and** (2), the personal insolvency agent shall
  - (a) Confirm in writing to the debtor that the personal insolvency agent has consented to act in the role of personal insolvency agent in respect of the debtor's Debt Restructuring Arrangement proposal;
  - (b) If he or she consents to act as personal insolvency administrator on the coming into effect of the Debt Restructuring Arrangement, confirm this consent in writing to the debtor; and
  - (c) Notify the Official Receiver of his or her appointment to act as a personal insolvency agent, and, where relevant, a personal insolvency administrator.
- (4) A personal insolvency agent who agrees to assist a debtor in preparing a Debt Restructuring Arrangement shall
  - (a) Make such reasonable enquiries into the debtor's property and financial affairs so as to be able to assess with reasonable accuracy the debtor's financial situation; and
  - (b) Prepare a Debt Restructuring Arrangement in the manner specified by this Part, and in the form which may be prescribed in secondary legislation.
- (5) For the purpose of enabling the personal insolvency agent to assist in the preparation of a proposal for a Debt Restructuring Arrangement, the debtor shall submit to the personal insolvency agent a statement disclosing fully, to the best of his or her knowledge, all of the debtor's financial affairs, in accordance with section [12] above.



- (6) Secondary legislation may prescribe that, on his or her appointment, a personal insolvency agent must provide certain information or advice to the debtor regarding the appropriateness of a Debt Restructuring Arrangement.
- (7) Secondary legislation may prescribe details regarding the functions of personal insolvency agents in assisting a debtor in the preparation and submission of a proposal for a Debt Restructuring Arrangement.

**49. Debt Restructuring Arrangements: Preparation of Debtor Proposal**

- (1) A debtor who meets the criteria in section 22 45 Debt Restructuring Arrangements: Eligibility Criteria may prepare, with the assistance of a personal insolvency agent, a proposal for a Debt Restructuring Arrangement.
- (2) Details regarding the form of a proposal for a Debt Restructuring Arrangement may be prescribed in secondary legislation.
- (3) The proposal for a Debt Restructuring Arrangement must
  - (a) Be signed by the debtor;
  - (b) Have endorsed on it the name of
    - (i) the person, firm, or body who is acting as a personal insolvency agent; and
    - (ii) the person, firm, or body who is willing to act as a personal insolvency administrator on the coming into effect of the Debt Restructuring Arrangement.
- (4) The proposal for a Debt Restructuring Arrangement must include a statement of the personal insolvency agent confirming that he or she is of the opinion that
  - (a) The debtor satisfies the eligibility requirements of **section 45 Debt Restructuring Arrangements: Eligibility Criteria 22**;
  - (b) To the best of the personal insolvency agent's knowledge, the information contained in the debtor's statement of financial affairs is complete and accurate;
  - (c) The proposal has a reasonable prospect of being approved and implemented; and
  - (d) The proposal offers a reasonable means of facilitating the economic rehabilitation of the debtor while allowing fair contributions to creditors from the debtor's available resources.
- (5) The proposal for a Debt Restructuring Arrangement must include, in addition to any requirements prescribed by secondary legislation, a statement of the debtor's financial affairs.
- (6) The statement of the debtor's financial affairs, as required by subsection (5), must set out the information prescribed in section 12 above.
- (7) The proposal for a Debt Restructuring Arrangement must include a statement of the debtor's consent to
  - (a) the Official Receiver making such enquiries as it considers necessary to determine whether the debtor meets the eligibility criteria specified in [section 45 22],
  - (b) the postponement of the consideration of the Debt Restructuring Arrangement proposal by the Official Receiver until the Official Receiver has received satisfactory answers to such enquiries, and

- (c) the disclosure by the Official Receiver of personal data of the debtor to creditors and other third parties to the extent necessary for the making and consideration of a Debt Rehabilitation Order application; and
  - (d) the disclosure to the Official Receiver, by creditors, government agencies, or any other relevant third parties, of personal data of the debtor, to the extent necessary for the making and consideration of a Debt Rehabilitation Order application.
- (8) The proposal for a Debt Restructuring Arrangement must include a statement of the debtor's acknowledgement that, on making a proposal for an Arrangement, the debtor becomes subject to any relevant duties of debtors specified in section 36 44 above which may reasonably apply to the circumstances of a proposal for a Debt Restructuring Arrangement.
- (9) On the preparation by the debtor with the assistance of the personal insolvency agent, of a proposal that satisfies the requirements of this section, the personal insolvency agent shall submit the proposal to the Official Receiver.
- ~~(10) On receipt of a proposal under subsection (9), the Official Receiver shall cause notice of the Debt Restructuring Arrangement proposal, including the name, address, and description of the debtor, and the date of the proposal, to be published in~~
- ~~(a) the Personal Insolvency Register; and~~
  - ~~(b) The Sri Lanka Gazette.<sup>14</sup>~~
- (11) Secondary legislation may prescribe details as to the form of notice to be provided by the Official Receiver under subsection (10):

#### **50. Debt Restructuring Arrangement Negotiation Meeting**

- (1) The personal insolvency agent must seek a decision from the debtor's creditors as to whether they approve the proposal for a Debt Restructuring Arrangement.
- (2) The decision by the debtor's creditors to approve or reject the proposal shall be made by a Debt Restructuring Arrangement negotiation meeting.
- (3) The personal insolvency agent shall consider the convenience of creditors and the debtor in fixing the date and venue for the negotiation meeting, which may take place in-person or via digital communication means.
- (4) The personal insolvency agent must send to every known creditor, who is a creditor in respect of an included debt,
  - (a) Notice of the negotiation meeting;

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<sup>14</sup> Consideration should be given to the appropriate extent of notice. Issues to be considered include the need to give creditors an opportunity to come forward with claims; and the risk of stigmatizing the Arrangement procedure and removing some of the incentives to use it over a formal procedure. Additional notice requirements to those suggested in these draft inputs might include publication in a newspaper or online.

- (b) A copy of the proposal for a Debt Restructuring Arrangement, including all of the requirements specified in section 49 Debt Restructuring Arrangements: Preparation of Debtor Proposal;
  - (c) A creditor's claim form;
  - (d) A postal vote form and electronic mail vote template;
  - (e) A statement asking each creditor to decide whether it approves or rejects the proposed Debt Restructuring Arrangement;
  - (f) A statement of the date on which the negotiation meeting will be held, that date being at least [xx] working days after the sending of the statement; and
  - (g) A statement to the effect that a creditor who does not attend the negotiation meeting, or does not cast a postal vote or electronic mail vote, shall be deemed to have accepted the proposal for a Debt Restructuring Arrangement.
- (5) A creditor who has submitted a creditor's claim form, in a manner satisfying any requirements which may be prescribed by secondary legislation, may vote on the proposal by
- (a) sending a postal vote that reaches the personal insolvency agent before or at the negotiation meeting; or
  - (b) sending an electronic mail vote that reaches the personal insolvency agent before or at the negotiation meeting.
- (6) If the personal insolvency agent trustee receives a postal vote, or other communication of assent or dissent as prescribed, before or at the meeting, this vote or communication has effect as if the creditor had been present and voted at the meeting.

#### **51. Creditor Approval of Debt Restructuring Arrangement**

- (1) The personal insolvency agent shall facilitate and chair the Debt Restructuring Arrangement negotiation meeting.
- (2) Subject to the provisions of this Part and any such rules as may be prescribed by secondary legislation, the First Schedule (Procedures for Meetings of Creditors and Contributories) shall apply to the following matters regarding the holding of a meeting referred to in this section:
  - (a) Proxies
  - (b) Chairperson
  - (c) Quorum
  - (d) Adjourned meetings.
- (3) At the negotiation meeting, the creditors may
  - (a) Conduct such examination of the debtor as is reasonable to clarify the debtor's financial circumstances;

- (b) Adjourn the meeting [for a maximum period of x days] to allow further investigation of the debtor's affairs, by passing a resolution of a majority of creditors in value;
  - (c) Accept the proposal, by passing a resolution, in accordance with subsection (3) or (4), that sets out the final terms of the Debt Restructuring Arrangement;
  - (d) With the consent of the debtor, modify or amend the proposal, by passing a resolution, in accordance with subsection (3) or (4), that sets out the final terms of the Debt Restructuring Arrangement;
  - (e) Appoint the personal insolvency agent as personal insolvency administrator of the Debt Restructuring Arrangement, or appoint another person, firm, or body who
    - (i) is willing to act as personal insolvency administrator; and
    - (ii) has consented in writing to the appointment and has not withdrawn the consent at the time of appointment;
  - (f) With the consent of the debtor, include such terms in the Debt Restructuring Arrangement with respect to the supervision of the affairs of the debtor as they may deem advisable.
- (4) The resolution accepting the proposal must be decided by a majority of creditors in value not representing less than [xx] 75 per cent of the total amount of the debtor's debts due to creditors entitled to vote. A proposal is approved where the claims of those creditors voting in favour of the proposal represent a majority in value of the claims of all creditors entitled to vote.<sup>15</sup>
- (5) Where the proposal includes terms modifying or limiting the rights of secured creditors, in a manner specified in section 24 or otherwise, the resolution must include the assent of—proposal is approved where the claims of those secured creditors voting in favour of the proposal represent more than 75 per cent of the value of the claims of secured creditors entitled to vote.
- (a) Creditors representing more than [xx] 75 per cent of the value of the secured debts due to secured creditors entitled to vote; and
  - (b) Creditors representing more than [xx] per cent of the value of the unsecured debts due to unsecured creditors entitled to vote.
- (6) Where the proposal includes terms modifying or limiting the rights of creditors under hire purchase agreements, finance leases, or any similar agreement, in a manner specified in section 47 24 or otherwise, ... the proposal is approved where the claims of such creditors voting in favour of the proposal represent more than 75 per cent of the value of the claims of such creditors entitled to vote. [This new subsection has been informed by discussion with our peer reviewers and is an effort to balance the rights of creditors under vendor-finance transactions with the need to prevent the unnecessary seizure of essential assets of the debtor. The position is effectively to treat vendor-lenders in the same manner as secured creditors – they can agree to have their rights modified by super majority. We are open to suggestions as to appropriate wording to describe these creditors and transactions under Sri Lankan law.]

<sup>15</sup> The 75% figure was determined by the Law Commission. However, it is recommended to reduce this figure to 50%, in line with guidance from a peer reviewer.

(7) Where the proposal

- (a) Does not include terms modifying or limiting the rights of a secured creditor to realise its security;  
or
- (b) provides for the sale or disposal of the asset subject to security for the benefit of the relevant secured creditor,

the relevant secured creditor may not vote on the proposal.

(8) Where the proposal

- (a) Does not include terms modifying or limiting the rights of a creditor under a hire purchase agreement, finance lease, or similar agreement; or
- (b) provides for the sale or disposal, for the benefit of the creditor, of the asset subject to the hire purchase agreement, finance lease, or similar agreement,

the relevant creditor may not vote on the proposal.

(9) A creditor who does not

- (a) attend the negotiation meeting;
- (b) cast a postal vote; or
- (c) cast an electronic mail vote,

shall be deemed to have accepted ~~accepted~~ **voted in favour** of the proposal for a Debt Restructuring Arrangement.

(10) Where no creditor votes, the proposed Personal Insolvency Arrangement shall be deemed to have been approved under this section.

(11) For the avoidance of doubt, a creditor who does not

- (a) Submit a creditor's claim form under section 50;
- (b) Attend the negotiation meeting under this section;
- (c) Cast a postal vote under this section; or
- (d) Cast an electronic mail vote under this section,

shall not be entitled to bring an application to object to a court order confirming the coming into effect of the Arrangement under section 56.

[This is a new subsection, which is based on the experience of the recent Irish Supreme Court case of O'Flynn v O'Driscoll [2023] IESC 32, in which a failure of the Irish legislation to define which creditors could object to the coming into effect of an arrangement allowed a creditor who opposed the whole insolvency process to refuse to engage in efforts to negotiate and approve a proposal, before subsequently objecting to the arrangement once other creditors had voted to approve it. I have reviewed our draft, and I think that our section 56 is probably sufficiently clear to prevent this type of strategy from working for a creditor under our framework. I thought it might be useful to add this subsection, however, to make this position clear. I also think a clear subsection has the effect of forewarning creditors that they must act on their rights and engage with the process – it is not sufficient for a creditor to sit on its rights and subsequently try to overturn the whole process once the debtor and other creditors have agreed a proposal.]

- (12) Where the creditors at a negotiation meeting do not accept the proposal,
- (a) The personal insolvency agent shall endorse the proposal “not accepted by creditors” and return it to the Official Receiver; and
  - (b) The Debt Restructuring Arrangement procedure shall terminate.

**52. Submission of Approved Debt Restructuring Arrangement to Official Receiver**

- (1) After the proposal has been accepted by the creditors, the personal insolvency agent must, as soon as practicable, submit to the Official Receiver
- (a) a notice of the result of the creditor vote at the Debt Restructuring Arrangement negotiation meeting; and
  - (b) the final terms of the Debt Restructuring Arrangement.
- (2) On receiving the documents set out in subsection (1), the Official Receiver must confirm that the terms of the Debt Restructuring Arrangement satisfy the provisions of this Part.
- (3) On confirming that the terms of the Debt Restructuring Arrangement satisfy the provisions of this Part, the Official Receiver must issue a certificate recommending a Debt Restructuring Arrangement.
- (4) On issuing a certificate recommending a Debt Restructuring Arrangement, the Official Receiver must
- (a) present this certificate, together with notice of the result of the creditor vote at the negotiation meeting and the final terms of the Debt Restructuring Arrangement, to the appropriate [court]; and
  - (b) notify the debtor, the personal insolvency agent, and all creditors listed in the Arrangement, of the issuance of the certificate.
- (5) The Official Receiver may only refuse to issue a certificate recommending a Debt Restructuring Arrangement if;
- (a) The Arrangement does not satisfy the provisions of this Part; or
  - (b) The Official Receiver becomes aware of a material inaccuracy in the debtor’s statement of financial affairs or accompanying documents;
  - (c) The Official Receiver becomes aware of a material change in the debtor’s circumstances that was not foreshadowed in the debtor’s statement of financial affairs or accompanying documents;
  - (d) The Official Receiver is of the opinion that the terms of the Debt Restructuring Arrangement are not reasonable or are not fair to the debtor and the creditors as a whole.
- (6) If the Official Receiver refuses to issue a certificate recommending a Debt Restructuring Arrangement, the Official Receiver must
- (a) Provide reasons for this refusal to the debtor, personal insolvency agent, and creditors of this refusal; and
  - (b) notify the appropriate court of its recommendation that the court not confirm the coming into effect of the Debt Restructuring Arrangement.

**53. Court Confirmation of Debt Restructuring Arrangement**

- (1) Where the [Court] receives a recommendation from the Official Receiver with respect to a Debt Restructuring Arrangement under section 52 29, the court shall consider the recommendation, together with any accompanying documentation.
- (2) When considering a recommendation under this section, the [Court] shall be entitled to treat a certificate issued by the Official Receiver under section 52 29 as evidence of the matters certified therein.
- (3) The court must, when considering a recommendation under this section, hear any objection to the recommendation that is made by a creditor, the debtor, or the personal insolvency agent.
- (4) The court, where an objection has been made under subsection (3), or where it requires further information or evidence for the purpose of its arriving at a decision, may hold a hearing, which hearing shall be on notice to the Official Receiver, the personal insolvency agent, the debtor, and the creditors.
- (5) Having considered the recommendation, the [Court] must make an Order confirming the coming into effect of the Debt Restructuring Arrangement if it considers that
  - (a) the Debt Restructuring Arrangement satisfies the criteria in this Part,
  - (b) the making of the Debt Restructuring Arrangement has complied with the procedural requirements of this Part; and
  - (c) the court has no reason to believe that the terms of the Debt Restructuring Arrangement are not reasonable or are not fair to the debtor and the creditors as a whole.
- (6) On confirming the coming into effect of the Debt Restructuring Arrangement, the [Court] shall direct the Official Receiver to record in the [Personal Insolvency Register], in addition to such other details as may be prescribed by secondary legislation,
  - (a) details of the debtor,
  - (b) the date of issue of the Order, and
  - (c) a statement of the rights of creditors to object to the Debt Restructuring Arrangement under section 56 33.
- (7) On the making an order confirming the Debt Restructuring Arrangement, the [Court] shall direct the Official Receiver to
  - (a) Inform the debtor, personal insolvency agent, and personal insolvency administrator of the issue of order and the coming into effect of the Debt Restructuring Arrangement; (b)
  - (b) Inform the debtor of the duties of debtors under section 35 Duties of Debtors under Personal Insolvency Procedures of this Act, to the extent that these duties apply, for the duration of the Debt Restructuring Arrangement;
  - (c) Inform each creditor of the debtor of the issue of the order and the coming into effect of the Debt Restructuring Arrangement; and
  - (d) Inform each creditor of the rights of creditors to object to the Debt Restructuring Arrangement under section 56 Challenge of Debt Restructuring Arrangement.

**54. Effect of Court Confirmation of Debt Restructuring Arrangement**

- (1) A Debt Restructuring Arrangement that is approved by the court is binding on all the creditors who hold included debts and are affected by the terms of the Arrangement.
- (2) The court order confirming the coming into effect of the Debt Restructuring Arrangement is conclusive as to the validity of the Arrangement.
- (3) Following the court order confirming the coming into effect of the Debt Restructuring Arrangement, the Arrangement remains in effect according to its terms until
  - (a) It is completed in accordance with this terms and section 59 36; or
  - (b) It is terminated under section 58 35.
- (4) While a Debt Restructuring Arrangement is in effect, a creditor who holds an included debt-
  - (a) Shall not take any actions to recover or enforce the debt, and
  - (b) In particular, shall not take any actions to
    - (i) Contact an insolvent individual debtor regarding payment of an included debt, otherwise than at the request of the debtor or the personal insolvency administrator, or in accordance with the terms of the Arrangement,
    - (ii) Initiate or continue any legal proceedings against the debtor in relation to an included debt,
    - (iii) Collect, secure, recover, or demand payment of an included debt,
    - (iv) Subject to subsection (8), execute or enforce a judgment or order of a court or tribunal against the debtor,
    - (v) Obtain a warrant,
    - (vi) Recover goods in the possession of the debtor,
    - (vii) Enforce security held in respect of a debt,
    - (viii) obtain possession of a premises in which the debtor is residing under a tenancy agreement into which the debtor has entered with the relevant creditor, unless the requirements of subsection (6) are met;
    - (ix) If the Arrangement so provides, take any of the actions in this subsection against another person who is jointly liable with the debtor to whom the Debt Restructuring Arrangement relates;
    - (x) If the Arrangement so provides, take any of the actions in this subsection against another person who has guaranteed the debts of the debtor to whom the Debt Restructuring Arrangement relates;
    - (xi) Terminate a hire-purchase agreement, lease agreement, or other finance agreement by means of which an insolvent individual has purchased goods of the type specified in section 31(4)(a)-(d) above [Protected Property]; or [The aim of this new provision is



to clarify that during the period of the Arrangement, a creditor should not terminate a finance agreement under which a debtor has purchased an essential asset.]

(xii) Instruct an agent to take any of the actions mentioned in [paragraphs (i)-(xi) above]

(5) While a Debt Restructuring Arrangement is in effect, a [court] may exceptionally give permission for a creditor to take a step listed in subsection (4), where the [court] considers that

- (a) Exceptional circumstances mean that it is reasonable to allow the creditor to take the step, and
- (b) The step will not
  - (i) Cause undue detriment to the debtor to whom the Arrangement relates,
  - (ii) Unfairly prejudice any other creditor; or
  - (iii) Significantly undermine the objectives of the Arrangement.

(6) While a Debt Restructuring Arrangement is in effect in respect of a debtor, a court may exceptionally give permission for a relevant creditor to obtain possession of a premises in which the debtor is residing under a tenancy agreement into which the debtor has entered with the relevant creditor, only if

- (a) The duration of the tenancy contract has expired during the course of the Debt Restructuring Arrangement;
- (b) the debtor owes arrears of rent to relevant creditor of an amount of more than [x] months of rent; and the court considers that it is more likely than not that the debtor will be unable to maintain ongoing rent payments over the course of the Arrangement; or
- (c) an application of a relevant creditor to obtain possession of the premises is based on grounds other than the debtor's non-payment of rent. [The idea behind subsection (6)(c) is that circumstances may arise under which a landlord has a right, under a tenancy agreement or under landlord-tenant/property law, to evict a tenant on a ground unrelated to the tenant's insolvency and default in paying rent. For example, where a tenant has damaged a property or otherwise breached obligations of the tenant. These grounds would depend on the terms of tenancy agreements and property law, and are not to be specified in insolvency legislation.]

(7) While a Debt Restructuring Arrangement is in effect in respect of a debtor, a court may exceptionally give permission for a relevant creditor to terminate a hire-purchase agreement, lease agreement, or other finance agreement by means of which an insolvent individual has purchased goods of the type specified in section 31(4)(a)-(d) above [Protected Property], where

- (a) The debtor owes arrears under the hire-purchase agreement, lease agreement, or other finance agreement of an amount more than [x] monthly repayments, and the court considers that it is more likely than not that the debtor will be unable to maintain ongoing repayments over the course of the Arrangement; or
- (b) An application of a relevant creditor to terminate the hire-purchase agreement, lease agreement, or other finance agreement, and to obtain possession of the goods purchased by means of the

agreement, is based on grounds other than the debtor's default in making repayments under the agreement.

The aim of this provision is to strike a balance between protecting essential assets of the debtor which were acquired through a finance agreement (e.g., a lease) while preserving the rights of creditors to terminate such an agreement and repossess the underlying asset where appropriate. It follows discussions with the Working Group on the appropriateness of special provisions to deal with small business assets purchased through transactions such as leases. I would be grateful if the Working Group could review for compatibility with Sri Lankan law – particularly whether the terminology of "hire purchase agreement, lease agreement, or other finance agreement" is appropriate.

- (8) Nothing in this section affects a creditor's entitlement to the benefit of any execution or other legal process or distress against a debtor or property of the debtor where the execution or other legal process or distress was completed **at least 180 days** before the court order confirming the coming into effect of the Debt Restructuring Arrangement, where
- (a) an execution against movable or immovable property is completed by seizure, or the entry into possession of a receiver or a person charged with execution, and a completed sale; and
  - (b) an attachment of a debt is completed by satisfaction of the debt.
- (9) While the Debt Restructuring Arrangement is in effect, a supplier of an essential good or service shall not –
- (a) refuse to supply the good or service to a debtor, by reason of the debtor's default in paying charges due for the good or service in relation to a period before the coming into effect of the Arrangement;
  - (b) make it a condition of the supply of the good or service to a debtor, that payment be made of outstanding charges due for the good or service in relation to a period before the coming into effect of the Arrangement; or
  - (c) rely on an insolvency-related term of the agreement for the supply of the good or service, except with the prior, written consent of the personal insolvency administrator.
- (10) The personal insolvency administrator may give consent under subsection (9)(c) where it is satisfied that the reliance on the insolvency-related term is necessary to put the Debt Restructuring Arrangement into effect and to serve the objectives of the Debt Restructuring Arrangement as specified in section 43 Personal and Small Business Debt Restructuring Arrangements.
- (11) The personal insolvency administrator is not liable in damages for declining to give consent under subsection (9)(c).
- (12) A Debt Restructuring Arrangement does not prevent the commencement or continuation of any criminal proceedings against a debtor.
- (13) Any action taken contrary to this section shall be null and void.
- (14) Where a person has acquired an interest in property or any other right under a transaction with a creditor which arose from an action taken by a creditor or creditor's agent which was contrary to this section, the

nullity of that action shall not prejudice the rights of that person, where that person dealt with the creditor in good faith and for value.

- (15) Where a Debt Restructuring Arrangement does not include terms modifying or limiting the rights of a secured creditor, nothing in this section shall affect the right of a secured creditor to enforce its security.
- (16) Where a Debt Restructuring Arrangement includes terms modifying or limiting the rights of a secured creditor, in a manner specified in section 47 24 or otherwise, a secured creditor may only enforce its security in accordance with the terms of the Arrangement.
- (17) Where a Debt Restructuring Arrangement does not include terms modifying or limiting the rights of a creditor under a hire purchase agreement, finance lease, or any similar agreement, nothing in this section shall affect the right of a creditor under a hire purchase agreement, finance lease, or similar agreement to enforce its property rights under such agreement.
- (18) Where a Debt Restructuring Arrangement includes terms modifying or limiting the rights of a creditor under a hire purchase agreement, finance lease, or any similar agreement, in a manner specified in section 47 24 or otherwise, a creditor may only enforce its property rights under such agreement in accordance with the terms of the Arrangement.

[These subsections replace stricken provisions above regarding secured creditors and creditors under vendor-credit finance agreements. While the stay of enforcement only provides to included debts, it is nonetheless perhaps too broad to include a provision preventing secured creditors holding included debts from enforcing security. Instead, subsections (15) and (16) aim to make clear that where an Arrangement does not propose to limit secured creditors' claims, such creditors can proceed with enforcement. Of course where these creditors have agreed to compromise their claims in some way, they must abide by that compromise. A similar approach is then adopted to creditor-owners under vendor-credit style "quasi-security" transactions. We await confirmation that the wording used in relation to the vendor-credit transactions is appropriate under Sri Lankan law.]

#### **55. Duties of Debtor under Debt Restructuring Arrangement**

- (1) While the Debt Restructuring Arrangement is in effect, the debtor must satisfy any duties of debtors under section 35 44 which reasonably apply throughout the duration of the Arrangement.
- (2) In addition to any duties specified in section 35 44 above, the debtor must do everything that is necessary to put the Debt Restructuring Arrangement into effect.

#### **56. Challenge of Debt Restructuring Arrangement**

- (1) A creditor who is bound by a Debt Restructuring Arrangement may apply to [the court] to object to a court order confirming the coming into effect of the Arrangement.
- (2) A creditor's application to object to a ~~Debt Restructuring Arrangement~~ ~~Debt Protection Moratorium~~ under subsection (1) above must be based on one or more of the following grounds, namely that-
  - (a) the ~~insolvent individual~~ debtor does not meet the eligibility criteria in section 45 22;
  - (b) the Debt Restructuring Arrangement does not comply with the mandatory provisions specified in section 46 23;
  - (c) the making and confirmation of the Debt Restructuring Arrangement has not complied with the procedural requirements of this Part;

- (d) a debt to be covered by the Debt Restructuring Arrangement is not an [included debt] for the purposes of section 34 8,
  - (e) the debtor has made any material false representation or omission in making his or her statement of financial affairs, or on supplying any accompanying information; or
  - (f) the Debt Restructuring Arrangement causes unfair prejudice to the interests of the creditor.
- (3) A creditor's application to [court] to object to a Debt Restructuring Arrangement must be made within the period of [28] days beginning with the day on which the Debt Restructuring Arrangement comes into effect.
- (4) A creditor must provide notice to the debtor, and the personal insolvency administrator, of an application to object to a Debt Restructuring Arrangement, including the grounds on which the application is based.
- (5) Where on an application under this section the [court] is satisfied as to any of the grounds specified in subsection (2) above, the [court] may do any of the following, namely-
- (a) Where to do so would not unfairly prejudice any other creditor, make an order directing that the Debt Restructuring Arrangement shall not apply in whole or in part to the creditor who made the application to court,
  - (b) Direct the personal insolvency administrator to use the variation procedure under section 57 Variation of Debt Restructuring Arrangement to seek a decision from creditors as to whether they approve a revised proposal; or
  - (c) Make an order cancelling the Debt Restructuring Arrangement in respect of any other included debt and/or creditor.
- (6) Where a [court] has made an order under subsection (5) above, the [court] may require the debtor to pay any interest, fees or charges that accrued in respect of an included debt during the period in which the Debt Restructuring Arrangement was in effect.
- (7) Where a court has made an order under subsection (5)(c) above with the effect of cancelling the Debt Restructuring Arrangement in respect of all included debts and all creditors, the court shall also make an order establishing a temporary moratorium on creditor remedies, which shall endure for a period of [21] days and shall have the same effect as a Debt Protection Moratorium under section 39. [This new subsection responds to a comment from Peer Reviewer 2 to the effect that a temporary debt protection moratorium may be necessary when a Restructuring Arrangement is cancelled, in order to avoid a race to enforce against the debtor.]**
- (8) In any case where a [court] makes an order under subsections (5) and/or (6), the [court] must notify the debtor and the personal insolvency administrator, the Official Receiver, and any creditors to whom the order under subsection (5) applies.
- (9) Where a [court] notifies the Official Receiver under subsection (7), the Official Receiver must, within a period of [x] days,
- (a) Cause an entry to be made in the [Personal Insolvency Register], and
  - (b) Send a notification of the court order made under subsection (5), and any requirements made under subsection (6), to any affected creditor.

**57. Variation of Debt Restructuring Arrangement**

- (1) Where a court has made an order confirming the coming into effect of the Debt Restructuring Arrangement under section 53 30, the Arrangement may be varied in accordance with its terms and subject to this section.
- (2) A personal insolvency administrator, whether on his or her own initiative or the request of a debtor or creditor, shall propose a variation of a Debt Restructuring Arrangement where
  - (a) It appears to the personal insolvency administrator that there has been a material change in the debtor's circumstances, and
  - (b) The personal insolvency administrator is satisfied that there is a reasonable prospect that a variation that addresses such circumstances would be approved by the debtor's creditors and implemented.
- (3) Where the conditions in subsection (2) apply, the personal insolvency administrator shall, as soon as is reasonably practicable,
  - (a) Require the debtor to complete an updated statement of the debtor's financial affairs, in accordance with section 36 42 above;
  - (b) Assist the debtor in preparing a proposal for a variation of the Debt Restructuring Arrangement;
  - (c) Seek the consent of the debtor to the proposal and to the seeking of creditor approval of the proposal; and
  - (d) Write to each affected creditor to ask them to indicate whether the proposal should be accepted.
- (4) When writing to each affected creditor under subsection (3) in respect of a proposal to vary a Debt Restructuring Arrangement, the personal insolvency administrator must
  - (a) Provide the creditor with a copy of
    - (i) the proposal; and
    - (ii) the updated statement of the debtor's financial affairs; including details of the material change in the debtor's circumstances;
  - (b) Provide the creditor with a statement to the effect that
    - (i) The debtor satisfies the eligibility requirements of section 45 Debt Restructuring Arrangements: Eligibility;
    - (ii) To the best of the personal insolvency agent's knowledge, the information contained in the debtor's updated statement of financial affairs is complete and accurate;
    - (iii) the proposal is a reasonable means of addressing the relevant change in the debtor's circumstances; and
    - (iv) The proposal has a reasonable prospect of being approved and implemented.
  - (c) Ask the creditor to provide a written response, via physical or electronic mail, setting out whether or not the proposal should be accepted; and

- (d) Inform the creditor of the need to provide this response to the personal insolvency practitioner in advance of a stated deadline, which shall be at least [xx] days after the proposal has been provided to each creditor.
- (5) A proposal to vary a Debt Restructuring Arrangement is accepted if
- (a) The debtor provides consent in writing to the variation of the Arrangement;
  - (b) The personal insolvency administrator writes to affected creditors of a debtor under this section;
  - (c) Replies accepting the proposal are provided, before the deadline stated in subsections (4) and (5), ~~by a majority of creditors in value not representing less than [xx] per cent of the total amount of the debtor's debts due to creditors entitled to vote;~~ **by creditors whose claims represent a majority in value of the claims of all creditors bound by the Arrangement.**
  - ~~(4)~~ Where the proposal includes terms modifying or limiting the rights of secured creditors, replies accepting the proposal are provided, before the deadline stated in subsections (4) and (5), **by secured creditors whose claims of whom represent more than 75 per cent of the value of the claims of secured debts bound by the Arrangement.** ~~;~~ **and**
    - ~~(i) — Creditors representing more than [xx] per cent of the value of the unsecured debts due to creditors entitled to vote.~~
- (6) For the purposes of subsection (5), a creditor who does not provide a response to the personal insolvency administrator before a deadline of [xx] days after the proposal has been provided to each creditor under subsection (4), shall be deemed to have stated that the proposal to vary the Debt Restructuring Arrangement should be accepted.
- (7) When a proposal to vary a Debt Restructuring Arrangement has been accepted, the personal insolvency administrator shall, as soon as is reasonably practicable, submit to the Official Receiver
- (a) a notice of the creditor responses approving the variation to the Debt Restructuring Arrangement; and
  - (b) the final terms of the varied Debt Restructuring Arrangement.
- (8) On receiving the documents set out in subsection (7), the Official Receiver must issue a certificate recommending the confirmation of the varied Debt Restructuring Arrangement.
- (9) On issuing a certificate recommending the confirmation of a varied Debt Restructuring Arrangement, the Official Receiver must
- (a) present this certificate, together with notice of the creditor approval of the proposal to vary the Debt Restructuring Arrangement, and the final terms of the varied Arrangement, to the appropriate [court]; and
  - (b) notify the debtor, the personal insolvency administrator, and all creditors listed in the Arrangement, of the issuance of the certificate.

- (10) Where the [appropriate court] receives a recommendation from the Official Receiver with respect to a variation of a Debt Restructuring Arrangement under subsection (9), the court shall consider the recommendation, and make an order confirming the coming into effect of the varied Arrangement.
- (11) Where the court makes an order confirming the coming into effect of the varied Arrangement under subsection (10), the provisions of this Part apply to the varied Arrangement as if the varied Arrangement were an Arrangement confirmed under section 53 Court Confirmation of Debt Restructuring Arrangement.

#### **58. Termination of Debt Restructuring Arrangement**

- (1) The debtor, acting with the personal insolvency administrator, and creditors may at any time terminate a Debt Restructuring Arrangement through the acceptance by a majority of [x]% in value of creditors of a proposal by the debtor to terminate the Arrangement.
- (2) Any of the following persons may apply to the court for an order terminating a Debt Restructuring Arrangement:
- (a) The debtor;
  - (b) A creditor;
  - (c) The personal insolvency administrator; or
  - (d) The Official Receiver.
- (3) An application by a debtor or creditor for an order terminating a Debt Restructuring Arrangement shall include an application for a bankruptcy order against the debtor.
- (4) An application under subsection (a) must be based on one or more of the following grounds:
- (a) A material inaccuracy or omission has been found in the statement of the debtor's financial affairs, which causes a material detriment to a creditor;
  - (b) the making and confirmation of the Debt Restructuring Arrangement has not complied with the procedural requirements of this Part;
  - (c) The debtor, when the Debt Restructuring Arrangement was proposed, did not satisfy the eligibility criteria under section 45 Debt Restructuring Arrangements: Eligibility Criteria;
  - (d) The debtor persistently did not comply with the duties and obligations imposed on him or her under the Debt Restructuring Arrangement, under sections 35 and 55 8 and 32;
  - (e) Since the coming into effect of the Debt Restructuring Arrangement, the debtor has been convicted of an offence under this Act;
  - (f) The debtor is in arrears in respect of payments under the Debt Restructuring Arrangement of an amount corresponding to a period of not less than three months;
  - (g) The debtor has failed to carry out any action reasonably necessary to put the Debt Restructuring Arrangement into effect; or
  - (h) The debtor has unreasonably refused to consent to a variation of the Debt Restructuring Arrangement.
- (5) On hearing an application under subsection (2), the court may

- (a) Dismiss the application;
  - (b) Terminate the Debt Restructuring Arrangement; or
  - (c) Order that the personal insolvency administrator prepare a proposal for a variation of the Debt Restructuring Arrangement under section 57 34.
- (6) Where a [court] has made an order under subsection (5) above, the [court] may require the debtor to pay any interest, fees or charges that accrued in respect of an included debt during the period in which the Debt Restructuring Arrangement was in effect.
- (7) In any case where a [court] makes an order under subsections (5), the [court] must notify the debtor and the personal insolvency administrator, the Official Receiver, and any creditors to whom the order under subsection (5) applies.
- (8) Where a [court] notifies the Official Receiver under subsection (7), the Official Receiver must, within a period of [x] days, cause an entry to be made in the [Personal Insolvency Register] recording the fact of the termination.

#### **59. Completion of Debt Restructuring Arrangement**

- (1) A Debt Restructuring Arrangement is completed when all of the obligations that it created have been discharged, unless the Arrangement has been terminated earlier under section 58 35.
- (2) When an Arrangement is completed under subsection (1), the personal insolvency administrator must, within [x] business days of the completion,
- (a) provide the debtor with a certificate of completion; and
  - (b) give notice to the Official Receiver of the certificate of completion.
- (3) The certificate of completion is prima facie evidence of the facts stated in it.
- (4) When a Debt Restructuring Arrangement is completed under subsection (1), the debtor's included debts are cancelled, and the debtor is not liable to pay any part of the debts, including any interest, fees or charges which may have become payable in relation to those debts.
- (5) The completion of a Debt Restructuring Arrangement does not release the debtor from any excluded debts.
- (6) The completion of a Debt Restructuring Arrangement does not, except to the extent provided in the terms of the Arrangement,
- (a) Release anyone else from a debt that he or she owes jointly with the debtor; or
  - (b) Release a guarantor from the guarantee that the guarantor gave for the debtor's debt.
- (7) The completion of a Debt Restructuring Arrangement does not, except to the extent provided in the terms of the Arrangement, release the debtor from liability under any secured debts or from liability in respect of any portion of a secured debt.
- (8) When the Official Receiver receives the certificate of completion specified in subsection (2) above, the Official Receiver shall
- (a) Record the successful completion of the Debt Restructuring Arrangement in the Personal Insolvency Register, and



- (b) Within [x] months of such receipt, remove from the Personal Insolvency Register all information recorded in it in respect of the completed Arrangement.

(9) For the avoidance of doubt, when a Debt Restructuring Arrangement is completed under subsection (1), the Debt Restructuring Arrangement is no longer in effect, and the moratorium on creditor remedies under section 54(4) ceases to apply.

**60. Duties of Personal Insolvency Administrator under Debt Restructuring Arrangement**

- (1) The duties of the personal insolvency administrator under a Debt Restructuring Arrangement include
  - (a) Generally giving effect to the Arrangement;
  - (b) Dealing with the debtor's property in the manner specified in the Arrangement;
  - (c) Giving information about the administration of the Arrangement to the debtor when the debtor makes a reasonable request for the information;
  - (d) Giving information about the administration of the Arrangement to a creditor who
    - (i) is bound by the Arrangement;
    - (ii) makes a reasonable request for the information
  - (e) Giving information about the administration of the Arrangement to the Official Receiver; and
  - (f) Considering whether the debtor has committed an offence under this Act; and
  - (g) Referring to the Official Receiver or to relevant law enforcement authorities any evidence of any offence by the debtor under this Act, any regulation made under this Act, or any other applicable enactment.
- (2) The personal insolvency administrator shall not be reimbursed for expenses incurred in administering the Arrangement unless those expenses are of a kind specified in the relevant proposal for a Debt Restructuring Arrangement.
- (3) The personal insolvency administrator shall
  - (a) Not pay any money received into a personal bank account of the personal insolvency administrator; and
  - (b) maintain a separate bank account for receiving all monies paid by debtors under Debt Restructuring Arrangements, and shall not pay any money out of the account otherwise than
    - (i) For purposes related to the administration of Debt Restructuring Arrangements;
    - (ii) In accordance with this Act; or
    - (iii) In accordance with a direction of the Court.
- (4) The personal insolvency administrator shall transmit monies paid by debtors under Debt Restructuring Arrangements to creditors in the agreed proportion on a timely basis.
- (5) The personal insolvency administrator shall maintain complete and accurate records of the account of monies received from the debtor and the monies disbursed to creditors under a Debt Restructuring Arrangement.

- (6) The personal insolvency administrator shall maintain regular contact with the debtor and conduct a review of the Debt Restructuring Arrangement
- (a) At least once in every period of 12 months; and
  - (b) At such other times as may be required by the circumstances of the operation of the Arrangement.
- (7) Where the circumstances of the debtor have changed in a material respect, the personal insolvency administrator, in consultation with the debtor, shall give due consideration as to whether the procedure for varying the Debt Restructuring Arrangement under section 57 Variation of Debt Restructuring Arrangement should be commenced.

#### **61. Personal Insolvency Agents**

- (1) A personal insolvency agent, when performing the functions of a personal insolvency agent under this Part,
- (a) Does not act as agent of the debtor;
  - (b) Does not act as agent of any creditor or creditors;
  - (c) Shall engage in the personal insolvency agent's professional capacity with the debtor and creditors to seek, if possible, to achieve a solution which is satisfactory to both the debtor and to creditors; and
  - (d) Shall exercise professional independent judgment, having regard to the rules and duties specified in this Act and any rules, standards, and guidance made by the Authority under this section.

This new subsection responds to a query from Peer Reviewer 2 as to the legal status of the personal insolvency agent and of the personal insolvency administrator. The Peer Reviewer had asked whether the agent/administrator holds the status of agent of the debtor, and whether the agent/administrator is an officer of the court. The position under the laws of countries such as England/Wales and Ireland is that an insolvency practitioner under an arrangement procedure is not an agent of the debtor, but rather must act independently in exercising professional judgment in following the rules and furthering the aims of the relevant legislation. The wording I have included here reflects this position. It is based on wording drawn from judicial statements in cases of *Re a Debtor (No. 222 of 1990)*, *ex parte Bank of Ireland and others (No. 2)* [1993] BCLC 233 (England and Wales) and *Re Meeley (A Debtor)* [2019] 1 IR 235 and *Re Darren Reilly* [2017] IEHC 558 (Ireland).

- (2) In accordance with section 11 of this Act, the Insolvency Regulation and Conduct Authority may set rules and standards, and provide guidance, regarding the conduct and performance of personal insolvency agents in the operation of the Debt Restructuring Arrangement procedure. A person may serve as a personal insolvency agent only if the person
- (a) Is qualified under section 11A to serve as a key office holder with respect to the proposed Debt Restructuring Arrangement
  - (b) Has certified in writing that the person is qualified under section 11A to serve as a key office holder with respect to the proposed Debt Restructuring Arrangement; and
  - (c) Has consented in writing to the appointment as a personal insolvency agent and has not withdrawn consent at the time of appointment.
- (3) A person may not serve as a personal insolvency agent unless the person is registered as an Insolvency Practitioner under this Act.

(4) A personal insolvency administrator is subject to the provisions in sections 14 to 29 relating to the registration and regulation of Insolvency Practitioners.

## 62. Personal Insolvency Administrators

- (1) A personal insolvency administrator, when performing the functions of a personal insolvency administrator under this Part,
- (a) Does not act as agent of the debtor;
  - (b) Does not act as agent of any creditor or creditors;
  - (c) Shall engage in the personal insolvency administrator's professional capacity with the debtor and creditors to put the Debt Restructuring Arrangement into effect; and
  - (d) Shall exercise professional independent judgment, having regard to the rules and duties specified in this Act and any rules, standards, and guidance made by the Authority under section [9] (*[Insolvency Regulation and Conduct Authority]*).

[This new subsection responds to a query from Peer Reviewer 2 as to the legal status of the personal insolvency agent and of the personal insolvency administrator. The Peer Reviewer had asked whether the agent/administrator holds the status of agent of the debtor, and whether the agent/administrator is an officer of the court. The position under the laws of countries such as England/Wales and Ireland is that an insolvency practitioner under an arrangement procedure is not an agent of the debtor, but rather must act independently in exercising professional judgment in following the rules and furthering the aims of the relevant legislation. The wording I have included here reflects this position. It is based on wording drawn from judicial statements in cases of *Re a Debtor (No. 222 of 1990)*, *ex parte Bank of Ireland and others (No. 2)* [1993] BCLC 233 (England and Wales) and *Re Meeley (A Debtor)* [2019] 1 IR 235 and *Re Darran Reilly* [2017] IEHC 556 (Ireland).]

- (2) A person may serve as a personal insolvency administrator only if the person
- (a) Is qualified under section 11A to serve as a key office holder with respect to the Debt Restructuring Arrangement
  - (b) Has certified in writing that the person is qualified under section 11A to serve as a key office holder with respect to the Debt Restructuring Arrangement; and
  - (c) Has consented in writing to the appointment as a personal insolvency administrator and has not withdrawn consent at the time of appointment.

(3) A person who, with the person's consent, is appointed or acts as a personal insolvency administrator knowing that any of the requirements of paragraphs (a) and (b) of subsection (2) has not been met, shall be guilty of an offence. [Provision for offence – approach TBD]

~~(4) In accordance with section 11 of this Act, the Insolvency Regulation and Conduct Authority may set rules and standards, and provide guidance, regarding the conduct and performance of personal insolvency administrators in the operation of the Debt Restructuring Arrangement procedure.~~

~~(5) A person may not serve as a personal insolvency administrator unless the person is registered as an Insolvency Practitioner under this Act.~~

~~(6) A personal insolvency administrator is subject to the provisions in sections 14 to 29 relating to the registration and regulation of Insolvency Practitioners.~~

### 63. Debt Restructuring Arrangements: Court Directions

(1) The Official Receiver, or a personal insolvency administrator, may make an application to the court for directions or an order in relation to any matter arising in connection with a Debt Restructuring Arrangement.

(2) On an application under subsection (1), the court may

- (a) Give the Official Receiver or personal insolvency administrator directions as the court deems appropriate;
- (b) Make an order for the enforcement of any duty of the debtor arising under sections 11 and 32 of this Act;
- (c) Treat the application as an application for Termination of the Debt Restructuring Arrangement under section 35; or
- (d) Order the personal insolvency administrator to commence the procedure for the variation of the Debt Restructuring Arrangement under section 34.

## Part VI: Debt Rehabilitation Orders

### 64. Debt Rehabilitation Order

(1) This Part establishes an alternative procedure to Bankruptcy, for resolving the case of a debtor who has no income or assets above the stated threshold values set out under subsection 65(1) Eligibility for a Debt Rehabilitation Order below.

(2) The goals of this Part include

- (a) To provide urgent economic rehabilitation and relief from over-indebtedness to insolvent debtors who hold no means of making a reasonable contribution to the repayment of their debts.
- (b) To resolve in a timely, efficient, and impartial manner, with minimal procedural complexity and expense, cases of insolvency in which the levels of outstanding debt and resources of the debtor do not justify the use of a formal Bankruptcy procedure.

- (3) The Debt Rehabilitation Order procedure does not affect the rights of secured creditors.

**65. Eligibility for a Debt Rehabilitation Order**

- (1) A debtor will be eligible for a Debt Rehabilitation Order when he or she meets all of the following criteria:

- (a) The debtor has total debts (apart from any excluded debt) that amount to less than [2 million rupees]; [this is intended to reflect the threshold for the Small Claims Tribunal and should be adjusted over time to reflect that figure]
- (b) The debtor has net monthly surplus income, as defined by section 34 6, of [100,000 rupees] or less;
- (c) The debtor has available assets, excluding protected property as defined by section 31 3, worth [200,000 rupees] or less;
- (d) The debtor is unable to pay his or her debts as they become fall-due;
- (e) The debtor is domiciled in Sri Lanka; or at any time within three years before the date of Debt Rehabilitation Order application
  - (i) Was ordinarily resident, or had a place of residence in Sri Lanka; or
  - (ii) Carried on business in Sri Lanka;
- (f) The debtor is not currently a bankrupt debtor;
- ~~(g) Is not subject to a [Debt Restructuring Arrangement] under [Part 4]~~
- (h) Has not been subject to a [Debt Rehabilitation Order] within 1 year prior to the date of the Debt Rehabilitation Order Application
- (i) Has not been subject to a Bankruptcy Order under Part 6 within 5 years prior to the date of the Debt Rehabilitation Order Application; and
- ~~(j) Has not been subject to a Debt Protection Moratorium Order under Part 3 within 12 months prior to the date of the Debt Rehabilitation Order Application.~~

~~(2) Secondary legislation may vary the monetary values specified in subsection (1).~~

- ~~(3) A debtor will be rendered ineligible for a Debt Rehabilitation Order where a breach of the debtors' duties as specified in section 11 has~~

- ~~(a) materially contributed to the debtor's inability to pay his or her debts; or~~
- ~~(b) materially contributed to the dissipation of the debtor's assets.~~

**66. Application for a Debt Rehabilitation Order**

- (1) A debtor who meets the criteria in **section 65 Eligibility for a Debt Rehabilitation Order** may apply, on her or his own initiative or through an authorised intermediary, to the Official Receiver for a Debt Rehabilitation Order.
- (2) The form of an application for a Debt Rehabilitation Order may be prescribed in secondary legislation, **in a manner consistent with the aims of the procedure as specified in section 64.**
- (3) An application for a Debt Rehabilitation Order shall be accompanied by such fee (if any) as may be prescribed in secondary legislation.

- (4) An application for a Debt Rehabilitation Order must include, in addition to any requirements prescribed by secondary legislation, a statement of the debtor's financial affairs, in accordance with section 36 **Statement of the Debtor's Financial Affairs** above.
- (5) In making an application for a Debt Rehabilitation Order, the debtor consents to
- (a) the Official Receiver making such enquiries as it considers necessary to determine whether the debtor meets the eligibility criteria specified in [section 65 Eligibility for a Debt Rehabilitation Order],
  - (b) the postponement of the consideration of the Debt Rehabilitation Order application by the Official Receiver until the Official Receiver has received satisfactory answers to such enquiries,
  - (c) the disclosure by the Official Receiver of personal data of the debtor to creditors and other third parties to the extent necessary for the making and consideration of a Debt Rehabilitation Order application; and
  - (d) the disclosure to the Official Receiver, by creditors, government agencies, or any other relevant third parties, of personal data of the debtor, to the extent necessary for the making and consideration of a Debt Rehabilitation Order application.
- (6) On submitting an application for a Debt Rehabilitation Order, the debtor becomes subject to any relevant duties of debtors specified in section 35 Duties of Debtors under Personal Insolvency Procedures above which may reasonably apply to the circumstances of a Debt Rehabilitation Order application.
- (7) Secondary legislation may prescribe details regarding the functions of authorised intermediaries in assisting a debtor in the preparation and submission of an application for a Debt Rehabilitation Order.
- (8) Where secondary legislation prescribes a fee under subsection (3), the fee must be set at a level consistent with the goals of the procedure as specified in section 64.

**67. Criteria for making a Debt Rehabilitation Order**

- (1) For the purposes of determining a Debt Rehabilitation Order application, the Official Receiver shall apply the following presumptions.
- (2) The Official Receiver must presume that the debtor is unable to pay her or his debts at the time of determining the application if
- (a) that appears to the Official receiver to be the case at the application date from the information supplied in the application and the Official Receiver has no reason to believe that the information supplied is incomplete or inaccurate; and
  - (b) the Official Receiver has no reason to believe that, by virtue of a change in the debtor's financial circumstances since the application date, the debtor may be able to pay his debts.
- (3) The Official Receiver must presume that all other conditions specified in **section 65 Eligibility for a Debt Rehabilitation Order** above are satisfied if

- (a) that appears to the Official Receiver to be the case at the application date from the information supplied in the application and the Official Receiver has no reason to believe that the information supplied is incomplete or inaccurate;
  - (b) any verification checks prescribed by secondary legislation have been made; and
  - (c) the Official Receiver has no reason to believe that, by virtue of a change in the debtor's circumstances since the application date, any condition may no longer be satisfied.
- (4) References in this section to information supplied in the application includes information provided to the Official Receiver in support of the application, or in response to any enquiries of the Official Receiver.

**68. Official Receiver Recommendation: Debt Rehabilitation Order**

- (1) This section applies where an application for a Debt Rehabilitation Order has been made.
- (2) The Official Receiver may postpone consideration and determination of an application for Debt Rehabilitation Order until such time as the debtor has provided satisfactory responses to any enquiries made by the Official Receiver in relation to the debtor's application.
- (3) The Official Receiver must determine the Debt Rehabilitation Order application by
  - (a) Deciding whether to refuse the application; or
  - (b) If the Official Receiver does not refuse it, by issuing a certificate recommending a Debt Rehabilitation Order.
- (4) On issuing a certificate recommending a Debt Rehabilitation Order, the Official Receiver must
  - (a) present this certificate, together with the Debt Rehabilitation Order application and any supporting documentation, to the appropriate [court]; and
  - (b) notify the debtor, and any authorised intermediary assisting the debtor, of the issuance of the certificate.
- (5) The Official Receiver may only refuse the application if the Official Receiver is authorised to do so by any of the following provisions of this section.
- (6) The Official Receiver may refuse the application if the Official Receiver considers that
  - (a) The application does not meet all of the requirements imposed under section 67;
  - (b) The conditions specified under section 65 43 have not been satisfied;
  - (c) The debtor has not responded satisfactorily to any enquiries of the Official Receiver within time periods established by the Official Receiver when making enquiries; or
  - (d) The debtor has made any material false representation or false omission in making the application or in supplying an additional information to support the application.
- (7) If the Official Receiver refuses an application, the Official Receiver must give reasons in writing for this refusal.

**69. Court Determination of Debt Rehabilitation Order Application**

- (1) Where the [appropriate court] receives a recommendation for a Debt Rehabilitation Order under section 68, the court shall consider the recommendation, together with any accompanying documentation.

- (2) When considering an application under this section, the [Court] shall be entitled to treat a certificate issued by the Official Receiver under section 68 46 as evidence of the matters certified therein.
- (3) Having considered a recommendation for a Debt Rehabilitation Order, the [Court] must make a Debt Rehabilitation Order in relation to the insolvent individual if the [Court] considers that
  - (a) the debtor meets the eligibility criteria in **section 65 Eligibility for a Debt Rehabilitation Order**, and
  - (b) the [court] has no reason to believe that the debtor has made any false representation or omission in making the application, and
- (4) Having considered a recommendation for a Debt Rehabilitation Order, the [Court] must refuse an application to make a Debt Rehabilitation Order in relation to the debtor if the [Court] considers that
  - (a) the debtor does not meet the eligibility criteria in **section 65 Eligibility for a Debt Rehabilitation Order subsection 4**, or
  - (b) the debtor has made any material false representation or omission in making the application or on supplying any accompanying information.
- (5) On the making a Debt Rehabilitation Order, the [Court] shall direct the Official Receiver to record in the [Personal Insolvency Register], in addition to such other details as may be prescribed by secondary legislation,
  - (a) details of the debtor,
  - (b) the date of issue of the Order, and
  - (c) the date on which the Order is due to cease.
- (6) On the making a Debt Rehabilitation Order, the [Court] shall direct the Official Receiver to
  - (a) Inform the debtor of the issue of the Debt Rehabilitation Order;
  - (b) Inform the debtor of the duties of debtors under section 35 44 of this Act, to the extent that these duties apply for the duration of the Debt Rehabilitation Order;
  - (c) Inform each known creditor of the debtor of the issue of the Debt Rehabilitation Order and the inclusion of each known creditor's debt; and
  - (d) Inform each known creditor of the debtor of the rights of creditors to object to the Debt Rehabilitation Order under section 74 52.

#### **70. Effect of Debt Rehabilitation Order**

- (1) While a Debt Rehabilitation Order is in effect in respect of a debtor, a creditor of the debtor to whom an included debt is owed-
  - (a) Has no remedy in respect of the debt,
  - (b) Shall not take any actions to recover or enforce the debt, and
  - (c) In particular, shall not take any actions to
    - (i) Contact a debtor regarding payment of an included debt, otherwise than at the request of the debtor or the debtor's representative,



- (ii) Initiate or continue any legal proceedings against the debtor in relation to an included debt,
- (iii) Collect, secure, recover, or demand payment of an included debt,
- (iv) Execute or enforce a judgment or order of a court or tribunal against the debtor,
- (v) Obtain a warrant,
- (vi) Recover goods in the possession of the debtor,
- (vii) obtain possession of a premises in which the debtor is residing under a tenancy agreement into which the debtor has entered with the relevant creditor, unless the requirements of subsection (2) are met;
- ~~(viii) Take any of the actions in this subsection against another person who is jointly liable with the debtor to whom the Debt Rehabilitation Order relates;~~
- ~~(ix) Take any of the actions in this subsection against another person who has guaranteed the debts of the debtor to whom the Debt Rehabilitation Order relates;~~
- (x) **Take possession of, or otherwise recover, any goods of the type specified in section 31(4)(a)-(d) above [Protected Property] that are used by or in the possession of, the debtor, where the creditor is the owner or lessor of the goods; Terminate a hire-purchase agreement, finance lease, or any other similar agreement by means of which an insolvent individual has purchased a debtor has acquired possession of goods of the type specified in section 31(4)(a)-(d) above [Protected Property]; or [The aim of this new provision is to clarify that during the temporary period of the DRO moratorium, a creditor should not terminate a finance agreement under which a debtor has purchased an essential asset.]**
- (xi) Instruct an agent to take any of the actions mentioned in [paragraphs (i)-(x) above]

(2) **While a Debt Rehabilitation Order is in effect in respect of a debtor, a court may exceptionally give permission for a relevant creditor to obtain possession of a premises in which the debtor is residing under a tenancy agreement into which the debtor has entered with the relevant creditor, only if**

- (a) The duration of the tenancy contract has expired during the course of the Debt Rehabilitation Order;**
- (b) the debtor owes arrears of rent to relevant creditor of an amount of more than [x] months of rent; and the court considers that it is more likely than not that the debtor will be unable to maintain ongoing rent payments over the duration of the Order; or**
- (c) an application of a relevant creditor to obtain possession of the premises is based on grounds other than the debtor's non-payment of rent.**

(3) While a Debt Rehabilitation Order is in effect, a [court] may exceptionally give permission for a creditor to take a step listed in subsection (1)(c), where the [court] considers that

- (a) Exceptional circumstances mean that it is reasonable to allow the creditor to take the step, and
- (b) The step will not

- (i) Cause detriment to the debtor to whom the Order relates,
- (ii) Unfairly prejudice any other creditor; or
- (iii) Significantly undermine the protections of the Order.

(4) [While a Debt Rehabilitation Order is in effect in respect of a debtor, a court may exceptionally give permission for a relevant creditor to terminate a hire-purchase agreement, finance lease, or any other similar agreement, by means of which a debtor has acquired possession of an insolvent individual has purchased goods of the type specified in section 31(4)(a)-(d) above [Protected Property], where

- (a) The debtor owes arrears under the hire-purchase agreement, finance lease, or other similar finance agreement of an amount more than [3] [x] monthly repayments, and the court considers that it is more likely than not that the debtor will be unable to maintain ongoing repayments while the Debt Rehabilitation Order is in force; or
- (b) An application of a relevant creditor to terminate the hire-purchase agreement, lease agreement, or other finance agreement, and to obtain possession of the goods purchased by means of subject to the agreement, is based on grounds other than the debtor's default in making repayments under the agreement. ]

[The aim of this provision is to strike a balance between protecting essential assets of the debtor which were acquired through a finance agreement (e.g., a lease) while preserving the rights of creditors to terminate such an agreement and repossess the underlying asset where appropriate. It follows discussions with the Working Group on the appropriateness of special provisions to deal with small business assets purchased through transactions such as leases. I would be grateful if the Working Group could review for compatibility with Sri Lankan law – particularly whether the terminology of "hire-purchase agreement, finance lease, or other similar agreement" is appropriate.]

- (5) While a Debt Rehabilitation Order is in effect in respect of a debtor, a supplier of an essential good or service shall not –
- (a) refuse to supply the good or service to a debtor, by reason of the debtor's default in paying charges due for the good or service in relation to a period before the making of the Order;
  - (b) make it a condition of the supply of the good or service to a debtor, that payment be made of outstanding charges due for the good or service in relation to a period before the making of the Order; or
  - (c) rely on an insolvency-related term of the agreement for the supply of the good or service.
- (6) A Debt Rehabilitation Order does not prevent the commencement or continuation of any criminal proceedings against a debtor.
- (7) Any action taken contrary to this section shall be null and void.
- (8) Nothing in this section shall affect the right of a secured creditor to enforce or otherwise deal with his or her security.

- (9) Nothing in this section affects a creditor's entitlement to the benefit of any execution or other legal process or distress against a debtor or property of the debtor where the execution or other legal process or distress was completed **at least 180 days** before the making of the Debt Rehabilitation Order, where
- (a) an execution against movable or immovable property is completed by seizure, or the entry into possession of a receiver or a person charged with execution, and a completed sale; and
  - (b) an attachment of a debt is completed by satisfaction of the debt.
- (10) While the Debt Rehabilitation Order is in effect, the debtor the debtor must satisfy any duties of debtors under section **35 44** which reasonably apply.
- (11) Where, under subsection (5), a creditor has continued to supply a debtor with essential goods or services, the Official Receiver shall provide for payment to be made to the relevant creditor in respect of such continued supply, from the income of the debtor.
- (12) Where a person has acquired an interest in property or any other right under a transaction with a creditor which arose from an action taken by a creditor or creditor's agent which was contrary to this section, the nullity of that action shall not prejudice the rights of that person, where that person dealt with the creditor in good faith and for value.

#### **71. Duration of Debt Rehabilitation Order**

- (1) The Debt Rehabilitation Order continues in effect until an Order of Discharge has been made under section 72 Discharge of Debts, which shall be made as soon as practicable after the expiry of a period **of 1 year** from the date of the Debt Rehabilitation Order.
- (2) However, the Debt Rehabilitation Order can continue for a period longer than **that specified in subsection (1)** if the [Court] extends the Order under sections **73, 75 or 76**, for the purposes of properly considering whether the Debt Rehabilitation Order should be terminated or converted.
- (3) When the [court] extends an Order under subsection (2)(b), the court must specify an alternative date for discharge, which must be no later than **[xx] days** after the expiry of the initial period of 1 year from the date of the **Debt Rehabilitation Order**.

#### **72. Discharge of Debts<sup>16</sup>**

- (1) In advance of the expiry of a period of 1 year from the date of the Debt Rehabilitation Order, the Official Receiver shall
- (a) issue a Certificate of Discharge to the debtor; and
  - (b) make an application to court for an order confirming the discharge of the debtor.
- (2) If the Official Receiver has not yet made an application under subsection (1) within a period of [30] days after the expiry of a period of 1 year from the date of the Debt Rehabilitation Order, the debtor may bring an application to court for an order confirming the discharge of the debtor.

<sup>16</sup> The procedure for discharge outlined in this section reflects the guidance of the Law Commission. However, a peer reviewer suggested that it would be preferable for discharge to occur without the need for an application to court.

- (3) On receiving an application under subsection (1), the court shall, within 90 days, make an order of discharge, unless an application to terminate or convert the Debt Rehabilitation Order has been made under sections 75 or 76 53 or 54 below.
- (4) The court order made under subsection (3) shall provide that the debtor is discharged from the Debt Rehabilitation Order on the expiry of a period of [1] year from the date of the Debt Rehabilitation Order.
- (5) On discharge from the Debt Rehabilitation Order, the debtor's included debts are cancelled, and the debtor is not liable to pay any part of the debts, including any interest, fees or charges which may have become payable in relation to those debts.
- (6) The discharge of debts under this section does not release the debtor from any debt or liability specified as an excluded debt under section 31(4) 8.
- (7) A discharge under this section does not release from any liability any person who, at the date of the discharge, was
  - (a) A business partner of the discharged debtor;
  - (b) A co-trustee with the discharged debtor;
  - (c) Jointly bound or contracted with the discharged debtor; or
  - (d) a guarantor or in the nature of a guarantor of the discharged debtor.

**73. Official Receiver to Supervise Debt Rehabilitation Order**

- (1) While a Debt Rehabilitation Order is in effect, the Official Receiver shall manage the case and supervise the financial affairs of the debtor, in furtherance of the goals of the Debt Rehabilitation Order procedure including those specified in section 64 Debt Rehabilitation Order.
- (2) In addition to remaining subject to the duties of debtors specified in section 35 44 above, at any time following an application for a Debt Rehabilitation Order and until a Debt Rehabilitation Order ceases to have effect, a debtor must
  - (a) disclose to the Official Receiver such information as to her or his affairs;
  - (b) attend meetings with the Official Receiver;
  - (c) notify the Official Receiver as soon as reasonably practicable if he or she becomes aware of any material error in her or his application, or any material change in her or his circumstances; and
  - (d) do all such other things;as the Official Receiver may reasonably require for the purpose of carrying out the functions of the Official Receiver under this section.
- (3) The Official Receiver may carry out an investigation of any matter that appears to the Official Receiver to be relevant for the purpose of carrying out the functions of the Official Receiver under this section.
- (4) The Official Receiver may require any person to give him such information and assistance as the Official Receiver may reasonably require in carrying out the functions of the Official Receiver under this section.
- (5) Secondary legislation may prescribe further details as to the procedures to be followed by the Official Receiver in exercising powers under this section.

- (6) The Official Receiver may make an application to the court for directions or an order in relation to any matter arising in connection with a Debt Rehabilitation Order.
- (7) On an application under subsection (6), the court may
- (a) Give the Official Receiver directions as the court deems appropriate;
  - (b) Make an order for the enforcement of any duty of the debtor arising under section 35 44 of this Act;
  - (c) Treat the application as an application for Termination of the Debt Rehabilitation Order under section 75 53;
  - (d) Treat the application as an application for Conversion of the Debt Rehabilitation Order under section 76 54; or
  - (e) Make an order extending the duration of the Debt Rehabilitation Order for the limited purposes of permitting the Official Receiver to complete an investigation, provided that
    - (i) the court must specify an alternative date for discharge, which must be no later than [90] [xx] days after the expiry of the initial period of 1 year from the date of the Order; and
    - (ii) The court has due regard to any unfairness to the debtor which might result from the extension of the Order period; and to the extent to which an extension will further the goals of the Debt Rehabilitation Order procedure, including those specified in section 64 Debt Rehabilitation Order.

#### **74. Creditor Objection to Debt Rehabilitation Order**

- (1) A creditor to whom an included debt is owed may apply to the [court] to object to
- (a) The making of the Debt Rehabilitation Order; or
  - (b) The inclusion under the Debt Rehabilitation Order of the creditor's debt; or
- (2) An objection under subsection (1) must
- (a) be made at most [xx] days after the date at which the Official Receiver informed creditors of their right to object to the Order under subsection 69(6) 47(6);
  - (b) be made by the lodging by the creditor of a notice of objection with the [court], on notice to the debtor and the Official Receiver;
  - (c) be based on based on grounds referred to in subsection (3).
- (3) The grounds on which an objection to an Order must be based are limited to the following:
- (a) The debtor did not satisfy the eligibility criteria under section 65 43 at the time of the making of a debt Rehabilitation Order application; or
  - (b) There is a material inaccuracy in the Debt Rehabilitation Order application, or in any material provided by the debtor in support of the application, which has caused a material detriment to the applicant.

- (4) On receiving an application to object to the Order, the court shall fix a date for a hearing of this application, to take place **within [xx] days** of the receipt of the application.
- (5) The court shall provide notice to the debtor, creditors and the Official Receiver of the hearing of the application to object to the Order [in the usual manner].
- (6) On receiving an application to object to the Order, the [court] may require the Official Receiver
  - (a) to provide information to the [court] which may assist the court in reaching a determination; or
  - (b) to conduct an investigation into any matter that appears to the [court] to be relevant to the making of a determination.
- (7) On receiving an application to object to the Order, the court may extend the duration of the Order for the purposes of properly considering the matter, provided that
  - (a) Such extension should not exceed a period **of [x] months** beyond the initial duration of the Order; and
  - (b) The court has due regard to
    - (i) any unfairness to the debtor which might result from the extension of the Order period; and
    - (ii) the extent to which an extension will further the goals of the Debt Rehabilitation Order procedure, including those specified in section 64 Debt Rehabilitation Order.
- (8) On the hearing of an application to object to the Order, **if the court finds that the** grounds referred to in subsection (3) above have not been established, the court shall
  - (a) dismiss the objection; and
  - (b) **Require the objecting creditor to pay a sum of [x] rupees.**<sup>17</sup>
- (9) On the hearing of an application to object to the Order, if the court finds that any of the grounds referred to in subsection (3) above have been established, the court may
  - (a) Terminate the Debt Rehabilitation Order; or
  - (b) Make an order amending the Debt Rehabilitation Order, including by removing the debt which was the subject of the objection under this section.

#### **75. Termination of Debt Rehabilitation Order**

- (1) The Official Receiver may, while the Debt Rehabilitation Order remains in effect, apply to the [court] to request the termination of the Debt Rehabilitation Order.
- (2) An application to terminate an Order under subsection (1) must
  - (a) **be made at least [xx] days** before the date at which discharge would otherwise occur under section ~~71~~ <sup>50</sup> but for this application;
  - (b) be made by the lodging by the Official Receiver of a request for termination with the [court], on notice to the debtor and all known creditors; and

<sup>17</sup> This edit reflects advice from a peer reviewer that there should be some costs imposed on creditors who bring spurious challenges to the discharge of a debtor who falls into the low income, low asset category.

- (c) be based on based on grounds referred to in subsection (3).
- (3) The grounds on which an application to terminate an Order must be based are limited to the following:
- (a) The debtor did not satisfy the eligibility criteria under section 65 Eligibility for a Debt Rehabilitation Order at the time of the making of a Debt Rehabilitation Order application;
  - (b) There is a material inaccuracy in the Debt Rehabilitation Order application, or in any material provided by the debtor in support of the application; or
  - (c) The debtor has not complied, to the satisfaction of the Official Receiver, with the duties of debtors set out in sections 35 Duties of Debtors under Personal Insolvency Procedures and 70 Effect of Debt Rehabilitation Order.
- (4) On receiving an application to terminate to the Order, the court shall fix a date for a hearing of this application, to take place **within [xx] days of the receipt of the application.**
- (5) The court shall provide notice to the debtor, creditors, and Official Receiver of the hearing of the application to terminate to the Order [in the usual manner].
- (6) On receiving an application to terminate the Order, the [court] may require the Official Receiver
- (a) to provide information to the [court] which may assist the court in reaching a determination; or
  - (b) to conduct an investigation into any matter that appears to the [court] to be relevant to the making of a determination.
- (7) On receiving an application to terminate the Order, the court may extend the duration of the Order for the **limited** purposes of properly considering the matter, provided that
- (a) Such extension **should not exceed a period of 90 days [x] months** beyond the initial duration of the Order; and
  - (b) The court has due regard to
    - (i) **The need for appropriate investigation of an objection where a creditor or creditors may otherwise suffer unfair prejudice;**
    - (ii) any unfairness to the debtor which might result from the extension of the Order period; and
    - (iii) the extent to which an extension will further the goals of the Debt Rehabilitation Order procedure, including those specified in section 64 Debt Rehabilitation Order.
- (8) On the hearing of an application to terminate the Order, the court must dismiss the application to terminate if it finds that the grounds referred to in subsection (3) above have not been established.
- (9) On the hearing of an application to terminate the Order, if the court finds that any of the grounds referred to in subsection (3) above have been established, the court may
- (a) Terminate the Debt Rehabilitation Order;
  - (b) Provide for the termination of the Debt Rehabilitation Order to take effect on such terms and at such time a the court may specify;
  - (c) Convert the Debt Rehabilitation Order into a Bankruptcy Order under section **76 54**; or

(d) Make an order for enforcement of a duty of the debtor as specified in sections 35 44 and 70. 54;  
or

(e) ~~Make an order extending the duration of the Debt Rehabilitation Order, provided that~~

~~(i) Such extension **should not exceed a period of [x] months** beyond the initial duration of the Order; and~~

~~(ii) The court has due regard to~~

~~(a) any unfairness to the debtor which might result from the extension of the Order period; and~~

~~(b) the extent to which an extension will further the goals of the Debt Rehabilitation Order procedure, including those specified in section 64 Debt Rehabilitation Order.~~

(10) On termination of the Debt Rehabilitation Order under subsection (9),

(a) the debts that became unenforceable under section 70 50 on the making of the Order become enforceable; and

(b) the debtor becomes liable to pay any interest, fees or charges that may have accrued.

#### **76. Conversion into Bankruptcy Order**

(1) The Official Receiver may, while the Debt Rehabilitation Order remains in effect, apply to the [court] to request the conversion of the Debt Rehabilitation Order into a Bankruptcy Order.

(2) An application to convert an Order under subsection (1) must

(a) be made **at least [xx] days** before the date at which discharge would otherwise occur under section 71 50 but for this application;

(b) be made by the lodging by the Official Receiver of a request for conversion with the [court], on notice to the debtor and all known creditors; and

(c) be based on based on grounds referred to in subsection (3).

(3) The Official Receiver may apply to the court to convert an Order on the grounds that

(a) the debtor, due to a change of financial circumstances, no longer satisfies the eligibility criteria under section 65 Eligibility for a Debt Rehabilitation Order;

(b) There is a material inaccuracy in the Debt Rehabilitation Order application, or in any material provided by the debtor in support of the application; or

(c) The debtor has not complied, to the satisfaction of the Official Receiver, with the duties of debtors set out in sections 35 Duties of Debtors under Personal Insolvency Procedures and 70 Effect of Debt Rehabilitation Order.

(4) On receiving an application to convert the Order, the court shall fix a date for a hearing of this application, **to take place within [xx] days of the receipt** of the application.



- (5) The court shall provide notice to the debtor, creditors, and Official Receiver of the hearing of the application to convert the Order [in the usual manner].
- (6) On receiving an application to convert the Order, the [court] may require the Official Receiver
- (a) to provide information to the [court] which may assist the court in reaching a determination; or
  - (b) to conduct an investigation into any matter that appears to the [court] to be relevant to the making of a determination.
- (7) On receiving an application to convert the Order, the court may extend the duration of the Order for the **limited** purposes of properly considering the matter, provided that
- (a) Such extension **should not exceed a period of 90 days [x] months** beyond the initial duration of the Order; and
  - (b) The court has due regard to
    - (i) **The need for appropriate investigation of an objection where a creditor or creditors may otherwise suffer unfair prejudice;**
    - (ii) any unfairness to the debtor which might result from the extension of the Order period; and
    - (iii) the extent to which an extension will further the goals of the Debt Rehabilitation Order procedure, including those specified in section 64 Debt Rehabilitation Order.
- (8) On the hearing of an application to convert the Order, the court must dismiss the application to convert the Order if it finds that the grounds referred to in subsection (3) above have not been established.
- (9) On the hearing of an application to convert the Order, if the court finds that the grounds referred to in subsection (3) have been established, the court may
- (a) Convert the Debt Rehabilitation Order into a Bankruptcy Order; or
  - (b) If the court considers that the debtor ought to be given the opportunity to make arrangements for making payments towards her or his debts, convert the Order into a Debt Protection Moratorium Order under Part 3.
- (10) When a Debt Rehabilitation Order is converted into a Bankruptcy Order under subsection (9), the waiting period for discharge from Bankruptcy under section 121 shall be deemed to have begun on the date of the making of the Debt Rehabilitation Order under section **69 47**.
- (11) Where a court makes an Order under subsection 9(b), the provisions of sections 39 Effect of Debt Protection Moratorium Order, 40 Duration of Debt Protection Moratorium Order, 41 Obligations of ~~insolvent individual~~ **debtors** during Debt Protection Moratorium, and 42 Creditor Objection to Debt Protection Moratorium shall apply.

**77. Official Receiver may Apply for Preservation Order**

- (1) This section applies if
- (a) The Official Receiver intends to apply for termination of the Debt Rehabilitation Order under section 75 Termination of Debt Rehabilitation Order;

- (b) The Official Receiver intends to apply for conversion under section 76 Conversion into Bankruptcy Order; or
  - (c) The Official Receiver intends to apply for revocation of discharge under section 78 Revocation of Discharge; and
- the Official Receiver has formed the view that the debtor has concealed assets or misled the Official Receiver.
- (2) On the application of the Official Receiver, the court may make an order for the preservation of the debtor's assets pending the making of a court order under sections 75, 76, or 78. ~~53, 54, or 56.~~
  - (3) An order to preserve the debtor's assets
    - (a) May be on the terms and conditions that the court thinks fit; and
    - (b) Is effective, unless the court states otherwise, from the time that the order is made.

#### **78. Revocation of Discharge**

- (1) The court may, on the application of the Official Receiver or a creditor, and after notice to the debtor and a hearing, revoke a discharge under section 72 ~~50~~ above.
- (2) An application to revoke a discharge under this section may only be made at a time before **12 months** ~~4 year~~ after the discharge.
- (3) The court may only revoke a discharge under this section if the court is satisfied that
  - (a) The discharge was obtained through the fraud of the debtor; or
  - (b) The debtor fraudulently failed to disclose income and/or property to the Official Receiver, where such income and/or property were not **protected income and/or protected property** ~~excluded income or assets~~ under the rules of sections 31, 32, and 33 ~~6, 7, and 9~~ of this Act; and the applicant did not know of such fraud, or such fraudulent failure to disclose, until after discharge.
- (4) The revocation of a discharge does not prejudice or affect the rights or remedies that any person other than the debtor would have had if the discharge had not been revoked.
- (5) On revocation of a discharge under this section,
  - (a) the debts that were cancelled under section 72 ~~50~~ become again enforceable; and
  - (b) the debtor becomes liable to pay any interest, fees or charges that may have accrued while the Debt Rehabilitation Order was in effect, or after the debtor was discharged.

#### **79. Authorised Intermediaries**

- (1) In accordance with section 9 ~~14~~ of this Act, the Insolvency Regulation and Conduct Authority may set rules and standards, and provide guidance, regarding the conduct and performance of authorised intermediaries in the operation of the Debt Rehabilitation Order procedure.

[this role need not necessarily be filled by a licensed insolvency practitioner. The legislation should be able to operate without formalizing the role of authorized intermediaries. If a scheme of authorization is to be put in place, it could be developed by the Authority, and would presumably be less rigorous than the process for authorizing insolvency practitioners.]

- (2) The Insolvency Regulation and Conduct Authority may set standards and rules for the authorisation, by the Ministry of Justice or other government body, of a person, class of person, or organisation, to perform the functions of authorised intermediaries under this Part.
- (3) In exercising its powers under subsections (1) and (2), the Authority shall have regard to the goals of the procedure as specified in section 64, and shall ensure that any rules, standards, and guidance relating to authorised intermediaries facilitate access to the procedure for debtors with low levels of income and assets.

## Part VII: Bankruptcy

### Chapter 1: Bankruptcy Applications and Bankruptcy Orders

#### Sub-Part A: Debtor Application for Bankruptcy Order

##### 80. Debtor Application for Bankruptcy Order

- (1) A debtor ~~who is not eligible for a Debt Rehabilitation Order application under s 65~~ **[Debt Rehabilitation Order]** may make an application to court in accordance with this Chapter for a Bankruptcy Order to be made in respect of him or her.
- (2) A debtor may make an application for a Bankruptcy Order only on the ground that the debtor individual is unable to pay his or her debts.
- (3) ~~A debtor may not make an application for a Bankruptcy Order where the debtor has previously made an application for a previous Bankruptcy Order within six months prior to the date of the subsequent application.~~

##### 81. ~~Eligibility for Debtor Application for Bankruptcy Order~~ **Debtor to be domiciled in Sri Lanka**

- (1) A debtor ~~who is not eligible for a Debt Rehabilitation Order application under s 65~~ will be eligible for a Bankruptcy Order when he or she meets the following criteria:
  - (a) ~~The debtor has net monthly surplus income, as defined by section 6, of at least [xx];~~
  - (b) ~~The debtor has available assets, excluding protected property as defined by section [x], worth at least [xxx]; and~~
  - (c) ~~In addition, will be eligible for a Bankruptcy Order only when he or she~~ **the debtor** is domiciled in Sri Lanka; or at any time within three years before the date of the making of the application for a Bankruptcy Order,
    - (i) Was ordinarily resident, or had a place of residence in Sri Lanka; or
    - (ii) Carried on business in Sri Lanka (including through membership of a partnership or firm).

**82. Criteria for Bankruptcy Order on Debtor Application**

- (1) A debtor's application for a Bankruptcy Order must include
  - (a) A statement of the debtor's financial affairs in accordance with sections 35(3) and 36 42, the form of which may be prescribed by secondary legislation; and
  - (b) Such other information as may be requested by the court.
- ~~(2) A debtor's application for a Bankruptcy Order may not be withdrawn except with leave of the court.~~
- (3) A debtor must notify the court if, at any time between the presentation of an application for a Bankruptcy Order and the court's decision regarding the making of a Bankruptcy Order,
  - (a) the debtor becomes able to pay his or her debts.; or
  - ~~(b) the debtor becomes aware that a bankruptcy petition has been presented to the court in relation to the debtor.~~

**83. Making of Bankruptcy Order on Debtor Application**

- (1) After receiving an application for a Bankruptcy Order, a court must decide [within a period of xx days] whether
  - (a) The eligibility criteria of sections 80 and 81 60 are met;
  - (b) The debtor is unable to pay his or her debts;
  - (c) No bankruptcy petition is pending in relation to the debtor at the date of the court decision; and
  - (d) No Bankruptcy Order has been made in respect of any of the debts which are the subject of the application at the date of the court decision.
- (2) After receiving an application for a Bankruptcy Order, a court may at any time request from the debtor any information that the court considers necessary for the purpose of deciding whether a Bankruptcy order should be made.
- (3) If the court is satisfied that the requirements of subsection (1) are met, the court shall make a Bankruptcy Order in respect of the debtor.
- (4) If the court is not satisfied that the requirements of subsection (1) are met, the court shall refuse to make a Bankruptcy Order in respect of the debtor, and shall give notice to the debtor
  - (a) of the reasons for the refusal;
  - (b) of the possibility of reviewing the decision under subsection (5).
- (5) Where the court has refused to make a Bankruptcy Order, the debtor may request that the court review the available information; and on this review the court must
  - (a) Confirm the refusal to make a Bankruptcy Order; or
  - (b) Make a Bankruptcy Order in respect of the debtor.
- (6) Where the court makes a Bankruptcy Order, it shall, as soon as reasonably practicable,
  - (a) Provide a copy of the Order to the debtor;
  - (b) Provide a copy of the Order to the Official Receiver; and
  - (c) Provide notice of the order to each known creditor of the debtor.

- (7) Where the court makes a Bankruptcy Order, the Official Receiver shall cause notice of the Bankruptcy Order, including the name, address, and description of the debtor, and the date of the Order, to be published in
- (a) the Personal Insolvency Register;
  - (b) a local newspaper;<sup>18</sup> and
  - (c) the Sri Lanka Gazette.
- (8) Secondary legislation may prescribe details as to the form of notice to be provided by the Official Receiver under subsection (9).
- (9) The date of the Bankruptcy Order shall, for the purposes of this Act, be the date of the commencement of the Bankruptcy.

### *Sub-Part B: Creditor Petition for Bankruptcy Order*

#### **84. Petition for Bankruptcy Order**

- (1) ~~An individual~~ **A party** may apply for a Bankruptcy Order against a debtor in accordance with the following provisions of this Sub-Part.
- (2) A petition for a Bankruptcy Order against a debtor under this Sub-Part may be presented by
- (a) A creditor;
  - (b) Creditors jointly where there are two or more creditors;
  - (c) The Official Receiver.
- (3) The Official Receiver may petition for a Bankruptcy Order against a debtor
- (a) Where the court has made an order terminating a Debt Restructuring Arrangement under section ~~58~~ **35** above; or
  - (b) Through a request for the conversion of a Debt Rehabilitation Order into a Bankruptcy Order under section ~~76~~ **54** above.

#### **85. Bankruptcy Petition: Debtor Conditions**

- (1) A petition for a Bankruptcy Order against a debtor may only be brought when ~~he or she~~ **the debtor is ineligible for a Debt Rehabilitation Order application under section 65** ~~meets the following criteria:~~
- (a) ~~The debtor has net monthly surplus income, as defined by section 33~~ **6**, of at least ~~[xx]~~ **[xx]**;
  - (b) ~~debtor has available assets, excluding protected property as defined by section [x], worth at least [xxx]; and~~
- (2) A petition for a Bankruptcy Order against a debtor may only be brought when **the debtor** ~~he or she~~ is domiciled in Sri Lanka; or at any time within three years before the date of the making of the application for a Bankruptcy Order,

<sup>18</sup> This language reflects guidance from the Law Commission. However, there was subsequently guidance from a peer reviewer that consideration should be given to whether the reference to a local newspaper is outmoded.

- (i) Was ordinarily resident, or had a place of residence in Sri Lanka; or
- (ii) Carried on business in Sri Lanka (including through membership of a partnership or firm).

**86. Bankruptcy Petition: Court Powers of Withdrawal, Stay, and Dismissal**

- (1) A bankruptcy petition shall not be withdrawn without the leave of the court.
- (2) When a bankruptcy petition is presented to the court, the court has a general power, if it appears to appropriate to do so on the grounds that there has been a procedural irregularity or for any other reason,
  - (a) To dismiss a bankruptcy petition; or
  - (b) To stay proceedings on a bankruptcy petition, on such terms and conditions as it thinks fit.
- (3) When a bankruptcy petition is presented to the court, and the court considers that it would be appropriate to allow the debtor to make a proposal for a Debt Restructuring Arrangement, the court may
  - (a) Stay proceedings on the bankruptcy petition; and
  - (b) Invite the debtor to present an application for a Debt Protection Moratorium Order under Part 3 above.
- (4) At any time after the presentation of a petition and before the making of a Bankruptcy Order,
  - (a) The court may stay any action, execution or other legal process against the property or person of the debtor, and
  - (b) any court in which proceedings are pending against a debtor may, on proof that a petition has been presented against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.
- (5) Where there is more than one petition for a bankruptcy order, and one petition has been stayed or adjourned by the Court, the Court may, if there is a good reason,
  - (a) make a bankruptcy order on the ~~petition application~~ that has not been stayed or adjourned; and
  - (b) dismiss the petition that has been stayed or adjourned on terms that the Court thinks appropriate.
- (6) Where a creditor's petition for a Bankruptcy Order relates to more than one debtor, the Court may refuse to make an order in relation to one or more of the debtors without affecting the petition in relation to the remaining debtor or debtors.

**87. Grounds of Creditor Petition**

- (1) A creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented
  - (a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds [2,000,000 rupees]; **this is intended to reflect the threshold for the Small Claims Tribunal and should be adjusted over time to reflect that figure**
  - (b) the debt is for a liquidated sum;

- (c) the debt is payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain future time;
- (d) the debt, or each of the debts, is a debt in **respect of which a pre-bankruptcy default has occurred** which the debtor appears to be unable to pay; and
- (e) there is no outstanding application to set aside a bankruptcy notice in respect of the debt or any of the debts.

~~(2) The court may not make a bankruptcy order on the petition of a secured creditor unless~~

- ~~(a) the creditor has established that the amount of the debt exceeds the value of the charge by **[500,000 rupees]**; and either~~
- ~~(b) the petition contains a statement by the secured creditor that it is willing, in the event of a bankruptcy order being made, to give up its security for the benefit of all the bankrupt's creditors, or~~
- ~~(c) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by the secured creditor of the estimated value of the security at the date of the petition.~~

#### **88. Bankruptcy Notice and Inability to Pay**

- (1) A bankruptcy notice under this Act shall be in the prescribed form, and shall
  - (a) require the debtor, in relation to a debt owed to a petitioning creditor,
    - (i) to pay the debt, including any payable interest and costs;
    - (ii) to give security for the amount owing to the satisfaction of the petitioning creditor; or
    - (iii) to compound the debt to the satisfaction of the petitioning creditor;
  - (b) shall state the consequences of non-compliance with the notice, and
  - (c) shall be served on the debtor in Sri Lanka, or with the court's permission, outside Sri Lanka.
- (2) A bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless
  - (a) the debtor notifies the creditor in writing that he disputes the validity of the notice because it overstates the amount actually owing; and
  - (b) the debtor makes that notification within the time specified in the notice for the debtor to comply with the notice.
- ~~(3) Where a bankruptcy notice overstates the amount actually owing by the debtor, the debtor complies with that notice by~~
  - ~~(a) Taking steps that would have constituted a compliance with the notice had the actual amount due been correctly specified therein; and~~
  - ~~(b) Taking those steps within the time specified in the notice for the debtor to comply.~~
- (4) For the purposes of section 6687(1)(d), **a pre-bankruptcy default has occurred** the debtor appears to be unable to pay a debt if, but only if, the conditions of subsections (5) or (6) are satisfied.

- (5) The requirements of this subsection are that, where a debtor owes an included debt of an amount of **2,000,000 million xxxx** or more to a petitioning creditor,
- (a) the petitioning creditor to whom the debt is owed has served on the debtor a bankruptcy notice,
  - (b) at least **[three weeks]** have elapsed since the demand was served; and
  - (c) the demand has been neither
    - (i) complied with; nor
    - (ii) set aside **[IN ACCORDANCE WITH RULES]**;
- (6) The requirements of this subsection are that
- (a) a creditor has obtained a final judgment or final order against the debtor for an amount of **2,000,000 million xxxx** or more; and
  - (b) execution or other process issued in respect of the debt has been returned unsatisfied in whole or in part.

#### **89. Court Decision on Petition for Bankruptcy Order**

- (1) On receiving a petition for a Bankruptcy Order, the court may make a Bankruptcy Order if it is satisfied that conditions of sections **84, 87, and 88** ~~63, 66 and 67~~ have been met.
- (2) The court may dismiss the petition if it is satisfied that the debtor is able to pay all his or her debts or is satisfied
- (a) That the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented;
  - (b) That the acceptance of that offer would have required the dismissal of the petition; and
  - (c) That the offer has been unreasonably refused;
- (3) In determining for the purposes of subsection (2) whether the debtor is able to pay all his or her debts, the court shall take into account **all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the petition.** ~~his or her contingent and prospective liabilities.~~
- (4) Where the court makes a Bankruptcy Order, it shall, as soon as reasonably practicable,
- (a) Provide a copy of the Order to the debtor;
  - (b) Provide a copy of the Order to the Official Receiver; and
  - (c) Provide notice of the order to each known creditor of the debtor.
- (5) On the making a Bankruptcy Order, the [Court] shall direct the Official Receiver to record in the [Personal Insolvency Register], in addition to such other details as may be prescribed by secondary legislation,
- (a) details of the debtor,
  - (b) the date of issue of the Order, and
  - (c) the date on which the debtor is due to be discharged under sections 111 to 112.
- (6) Where the court makes a Bankruptcy Order, the Official Receiver shall cause notice of the Bankruptcy Order, including the name, address, and description of the debtor, and the date of the Order, to be published in



- (a) the Personal Insolvency Register;
  - (b) a local newspaper;<sup>19</sup> and
  - (c) the Sri Lanka Gazette.
- (7) Secondary legislation may prescribe details as to the form of notice to be provided by the Official Receiver under subsection (6).
- (8) The date of the Bankruptcy Order shall, for the purposes of this Act, be the date of the commencement of the Bankruptcy.

#### **90. Interim Receiver**

- (1) The court may, if it is shown to be necessary for the protection of the debtor's property, at any time after the presentation of a petition and before the making of a Bankruptcy Order, appoint the Official Receiver to be Interim Receiver of the debtor's property.
- (2) The Court may make an order under subsection (1) at any time before it makes a bankruptcy order.
- (3) As part of the order or, on the application of a creditor or the Official Receiver, subsequently, the Court may authorise the Official Receiver to –
- (a) take possession of any property;
  - (b) sell any perishable property or property the value of which is likely to significantly diminish if it is not immediately disposed of;
  - (c) control the debtor's business or property as directed by the Court; or
  - (d) exercise, in relation to the debtor, any of the powers vested in the Bankruptcy Trustee by section 80 in relation to a debtor in respect of whom a bankruptcy order has been made.
- (4) The court must confine the effect of an order for the Official Receiver's control of the debtor's property or business to what is necessary, in the Court's opinion, for conserving the debtor's property.
- (5) The appointment of the Official Receiver as Interim Receiver of the debtor's property shall be advertised by him in such manner as may be prescribed.
- (6) Where an interim receiver is appointed, section 92 74 applies for the period between the appointment and the making of a Bankruptcy Order on the petition, or the dismissal of the petition, as if the appointment were after the making of such an Order.
- (7) Where an interim receiver is appointed, sections [121] and [122] shall apply as if a bankruptcy order had been made against the debtor.

## ***Chapter 2: Effect of Bankruptcy Order***

#### **91. Commencement of Bankruptcy**

- (1) The Bankruptcy of a debtor in respect of whom a Bankruptcy Order has been made

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<sup>19</sup> This language reflects guidance from the Law Commission. However, there was subsequently guidance from a peer reviewer that consideration should be given to whether the reference to a local newspaper is outmoded.

- (a) commences with the day on which the order is made; and
  - (b) continues until the individual is discharged under this Part.
- (2) It shall be presumed that an act was done, or a transaction entered into or effected, after the date of commencement, but the presumption shall not apply if the contrary is proved.
- (3) Unless a bankruptcy order is the subject of an appeal –
- (a) no one may later assert that the making of the Bankruptcy Order was not valid or that a prerequisite for commencement was absent; and
  - (b) the Bankruptcy Order shall be binding on every person.

## **92. Stay of Proceedings and Remedies**

- (1) Subject to [subsection 3], after the making of a Bankruptcy Order, a creditor of the bankrupt debtor to whom a debt provable in the bankruptcy is owed-
- (a) Has no remedy in respect of the debt,
  - (b) Shall not take any actions to recover or enforce the debt, and
  - (c) In particular, shall not take any actions to
    - (i) Contact a bankrupt debtor regarding payment of a provable debt, otherwise than at the request of the debtor,
    - (ii) Initiate or continue any legal proceedings against the bankrupt debtor in relation to a provable debt,
    - (iii) Collect, secure, recover, or demand payment of a provable debt,
    - (iv) Execute or enforce a judgment or order of a court or tribunal against the bankrupt debtor,
    - (v) Obtain a warrant,
    - (vi) Recover goods in the possession of the bankrupt debtor,
    - (vii) Enforce security held in respect of a provable debt,
    - (viii) obtain possession of a premises in which the bankrupt debtor is residing under a tenancy agreement into which the bankrupt debtor has entered with a relevant creditor, unless the requirements of subsection (3) are met,
    - (ix) Take any of the actions in this subsection against another person who is jointly liable with the bankrupt debtor,
    - (x) Take any of the actions in this subsection against another person who has guaranteed the debts of the bankrupt debtor,
    - (xi) **Terminate a hire-purchase agreement, finance lease agreement, or any other similar finance agreement by means of which a debtor has acquired possession of an insolvent individual has purchased goods of the type specified in section 31(4)(a)-(d) above [Protected Property]; or [The aim of this new provision is to clarify that during**

the Bankruptcy, a creditor should not terminate a finance agreement under which a debtor has purchased an essential asset.]

- (xii) Instruct an agent to take any of the actions mentioned in [paragraphs (i)-(xi) above]
- (2) While a Bankruptcy Order is in effect in respect of a bankrupt debtor, a [court] may exceptionally give permission for a creditor to take an action listed in paragraphs 2(c)(i) to 2(c)(xii), where the [court] considers that
- (a) Exceptional circumstances mean that it is reasonable to allow the creditor to take the action, and
  - (b) The action will not
    - (i) Cause undue detriment to the bankrupt debtor,
    - (ii) Cause unfair prejudice to any other creditor, or
    - (iii) Significantly undermine the objectives of the Bankruptcy process.
- (3) While a Bankruptcy Order is in effect in respect of a bankrupt debtor, a court may exceptionally give permission for a relevant creditor to obtain possession of a premise in which the bankrupt debtor is residing under a tenancy agreement into which the debtor has entered with the relevant creditor, only if
- (a) The duration of the tenancy contract expires during the course of the Bankruptcy Debt Rehabilitation Order;
  - (b) the debtor owes arrears of rent to relevant creditor of an amount of more than [3] [x] months of rent; and the court considers that it is more likely than not that the debtor will be unable to maintain ongoing rent payments over the duration of the Bankruptcy Order; or
  - (c) an application of a relevant creditor to obtain possession of the premises is based on grounds other than the debtor's non-payment of rent.
- (4) Subject to subsection (7) below, subsection (1) (2) does not affect the right of a secured creditor of the bankrupt debtor to enforce its security.
- ~~(5) Nothing in this section affects a sequestration order made against the insolvent individual at least 21 days before the start of the moratorium.~~
- (6) Where, under subsections (10), (11), and (12), a creditor has continued to supply a debtor with essential goods or services, the Bankruptcy Trustee shall provide for payment to be made to the relevant creditor in respect of such continued supply, from the Bankruptcy Estate and/or the income of the bankrupt debtor.
- (7) Where any goods of a bankrupt debtor are held by any person by way of pledge, pawn or other security,
- (a) the Official Receiver may, after giving notice in writing of his or her intention to do so, inspect the goods; and
  - (b) where such a notice has been given to any person, that person is not entitled, without leave of the court, to realise his or her security unless he or she has given the Bankruptcy Trustee a reasonable opportunity of inspecting the goods and of exercising the bankrupt debtor's right of redemption.
- (8) Any action taken contrary to this section shall be null and void.

(9) While a Bankruptcy Order is in effect in respect of a debtor, a court may exceptionally give permission for a relevant creditor to terminate a hire-purchase agreement, finance lease agreement, or any other similar finance agreement by means of which a debtor has acquired possession of an insolvent individual has purchased goods of the type specified in section 31(4)(a)-(d) above [Protected Property], where

- (a) The debtor owes arrears under the hire-purchase agreement, lease agreement, or other finance agreement of an amount more than [3] [x]-monthly repayments, and the court considers that it is more likely than not that the debtor will be unable to maintain ongoing repayments over the course of the Bankruptcy; or
- (b) An application of a relevant creditor to terminate the hire-purchase agreement, finance lease agreement, or any other similar finance agreement, and to obtain possession of the goods purchased by means of subject to the agreement, is based on grounds other than the debtor's default in making repayments under the agreement. [The aim of this provision is to strike a balance between protecting essential assets of the debtor which were acquired through a finance agreement (e.g., a lease) while preserving the rights of creditors to terminate such an agreement and repossess the underlying asset where appropriate. It follows discussions with the Working Group on the appropriateness of special provisions to deal with small business assets purchased through transactions such as leases. I would be grateful if the Working Group could review for compatibility with Sri Lankan law – particularly whether the terminology of "hire-purchase agreement, lease agreement, or other finance agreement" is appropriate.]

(10) While a Bankruptcy Order is in effect in respect of a debtor, a supplier of an essential good or service shall not –

- (a) refuse to supply the good or service to a debtor, by reason of the debtor's default in paying charges due for the good or service in relation to a period before the commencement of the Bankruptcy;
- (b) make it a condition of the supply of the good or service to a debtor, that payment be made of outstanding charges due for the good or service in relation to a period before the commencement of the Bankruptcy; or
- (c) rely on an insolvency-related term of the agreement for the supply of the good or service, except with the prior, written consent of the Bankruptcy Trustee.

(11) The Bankruptcy Trustee may give consent under subsection (9)(10)(c) where it is satisfied that the reliance on the insolvency-related term serves the interests of the bankrupt debtor and creditors as a whole.

(12) The Bankruptcy Trustee is not liable in damages for declining to give consent under subsection (9)(10)(c).

### 93. Statement of Financial Affairs

- (1) After commencement of the Bankruptcy, the bankrupt debtor shall file with the Official Receiver a statement of the debtor's financial affairs in accordance with section 36 42, unless he or she has already filed a statement under section 82 64.
- (2) Where no statement or, in the Official Receiver's view, no sufficient statement of affairs has been filed under section 61, the Official Receiver shall, as soon as practicable after commencement of the Bankruptcy, send to the bankrupt debtor a notice stating –
  - (a) that the bankrupt debtor shall file a statement in the prescribed form of the debtor's affairs; and
  - (b) the time when the statement shall be filed.
- (3) The Official Receiver shall send the notice to the address of the bankrupt debtor given in the petition for a Bankruptcy Order or the bankrupt debtor's last known address and the debtor's last known electronic mail address, if any.
- (4) The bankrupt debtor shall file the statement of the debtor's financial affairs with the Official Receiver within
  - (a) 21 days of commencement of the Bankruptcy; or
  - (b) after receiving the Official Receiver's notice under subsection (2).
- (5) At any time after filing a statement of financial affairs with the Official Receiver, the bankrupt debtor may file additional or amended statements or answers.

### 94. Meeting of Creditors in Exceptional Cases

- (1) The Official Receiver may, after commencement of the Bankruptcy, call a meeting of the bankrupt debtor's creditors, where the Official Receiver considers it necessary appropriate
  - (a) in light of due to the exceptionally high value of assets potentially available for distribution to creditors in the case; or
  - (b) due to the existence of any other exceptional circumstances which mean that the holding of a creditor's meeting will serve the proportionate and just resolution of the case.
- (2) If the Official Receiver elects to call a meeting of creditors, the meeting shall be called as soon as practicable after commencement and, unless there are special circumstances, not less than 5 weeks thereafter, by sending a notice of the time and place of the meeting by ordinary post and, if practicable, electronic mail to –
  - (a) the debtor, at the debtor's last known physical and electronic mail address;
  - (b) each creditor named in the statement of the debtor's financial affairs, at the physical and electronic mail address given in the statement of financial 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.
- (3) The Schedule [*Procedures for Meetings of Creditors and Contributories*] shall apply to the calling, holding and effect of any meeting of creditors.

- (4) The Official Receiver may call subsequent meetings of creditors after the first meeting of creditors.
- (5) The Official Receiver shall call a subsequent meeting if required to do so by one-quarter in number and value of the creditors who have proved their debts.
- (6) A meeting of creditors and the resolutions passed at the meeting are valid even if some creditors did not receive the notice of the meeting, unless the Court orders otherwise.

**95. Public Examination of Bankrupt in Exceptional Cases**

- (1) Where a Bankruptcy Order has been made, the Official Receiver or Bankruptcy Trustee may at any time before the discharge of the bankrupt debtor apply to the court for the public examination of the bankrupt debtor, where the Official Receiver or Bankruptcy Trustee is of the opinion that

There is a material inaccuracy in the statement of the debtor's financial affairs, which ought to be questioned in public; or

- (a) The bankrupt debtor has failed to comply with the duties of debtors under sections 35 44, 93 72, 111-113 91-93, or any other relevant provision of this Act.
- (2) Unless the court otherwise orders, the Official Receiver or Bankruptcy Trustee shall make an application under subsection (1) if notice requiring him or her to do so is given to him or her, by one of the bankrupt debtor's creditors, with the concurrence of not less than one-half, in value, of those creditors, on the grounds that
  - (a) There is a material inaccuracy in the statement of the debtor's financial affairs, which ought to be questioned in public; or
  - (b) The bankrupt debtor has failed to comply with the duties of debtors under sections 35 44, 93 72, 111-113 91-93, or any other relevant provision of this Act.
- (3) On an application under subsection (1) or (2), the court shall direct that a public examination of the bankrupt debtor shall be held on a day appointed by the court; and the bankrupt debtor shall attend on that day and be publicly examined as to his affairs, dealings and property.
- (4) The following may take part in the public examination of the bankrupt debtor and may question him or her concerning his or her affairs, dealings and property, namely—
  - (a) the Official Receiver;
  - (b) the Bankruptcy Trustee, if his or her appointment has taken effect; and
  - (c) any creditor of the bankrupt who has submitted a proof in the bankruptcy.
- (5) If a bankrupt debtor without reasonable excuse fails at any time to attend his or her public examination under this section, the court may, for the purpose of bringing that person and anything in his or her possession before the court, cause a warrant to be issued
  - (a) For the arrest of the bankrupt debtor; and
  - (b) For the seizure of any books, papers, records, money, or goods in the bankrupt debtor's possession.

- (6) The court may authorise a bankrupt debtor arrested under a warrant issued under subsection (5) to be kept in custody, and anything seized under such a warrant to be held, until the bankrupt debtor is brought before the court under the warrant **which shall occur as soon as practicable** ~~or until such other time as the court may order.~~
- (7) Under this section, the court may also, on the application of the Official Receiver or the Bankruptcy Trustee, summon to appear before it
- (a) The spouse or former spouse of the bankrupt debtor;
  - (b) Any person known or believed to have any property comprised in the Bankruptcy Estate in his or her possession;
  - (c) Any person known or believed to be indebted to the bankrupt debtor; and
  - (d) Any person appearing to the court to be able to give information concerning the bankrupt debtor or the dealings, affairs, or property of the bankrupt debtor **but subject to legal advice privilege or litigation privilege.**
- (8) Where the court has summoned a person to appear before it under subsection (7), the provisions of this section apply to such person as if he or she is a bankruptcy debtor.
- (9) Where it appears to the court, on consideration of any evidence obtained under this section, that any person has in his or her possession any property comprised in the Bankruptcy Estate, the court may, on the application of the Official Receiver or the Bankruptcy Trustee, order that person to deliver such property to the Official Receiver or the Bankruptcy Trustee at such time, in such manner, and on such conditions as the court sees fit.
- (10) Where it appears to the court, on consideration of any evidence obtained under this section, that any person is indebted to the bankrupt debtor, the court may, on the application of the Official Receiver or the Bankruptcy Trustee, order that person to pay to the Official Receiver or the Bankruptcy Trustee at such time, in such manner, and on such conditions as the court sees fit, the whole or part of the amount due.

### ***Chapter 3: Appointment of Official Receiver and Bankruptcy Trustee***

#### **96. Official Receiver becomes Bankruptcy Trustee**

- (1) On the making of a Bankruptcy Order, the Official Receiver becomes trustee of the property of the bankrupt debtor (the "Bankruptcy Trustee"), unless the court appoints another person under subsection (2).
- (2) If, when the Bankruptcy Order is made, there is a personal insolvency administrator of a Debt Restructuring Arrangement in respect of the debtor under Part 4, the court may on making the Bankruptcy Order appoint the personal insolvency administrator of the Arrangement as Bankruptcy Trustee.
- (3) Where a person becomes Bankruptcy Trustee under this section, the person must give notice of that fact to the bankrupt debtor's creditors (or, if the court so allows, advertise it in accordance with the court's directions).

### 97. Appointment of Trustees

- (1) It shall be possible for creditors to appoint, by a resolution of a majority in value of creditors, some fit person other than the Official Receiver as Bankruptcy Trustee.
- (2) A person shall be deemed fit to act as Bankruptcy Trustee where **he or she**
  - (a) has not been previously removed from the office of Bankruptcy Trustee for misconduct or neglect of duty;
  - (b) is not or has not been within the period of two years immediately preceding the date of commencement of the Bankruptcy been a creditor of the debtor;
  - (c) Is qualified under section 11A to serve as a key office holder with respect to the Bankruptcy;
  - (d) Has certified in writing that the person is qualified under section 11A to serve as a key office holder with respect to the Bankruptcy; and
  - (e) Has consented in writing to the appointment as a Bankruptcy Trustee and has not withdrawn consent at the time of appointment.
- (3) On an application to court by a creditor of the bankrupt debtor, the court shall confirm the appointment of the Bankruptcy Trustee unless the court considers that
  - (a) The appointment has not been made by a majority in value of the creditors voting;
  - (b) the person appointed is not fit to act as trustee in accordance with subsection (2); or
  - (c) The relationship between the person and the bankrupt debtor, the property of the bankrupt debtor, or the creditor makes it difficult for the person to act with impartiality and in furtherance of the goals of the bankruptcy process.
- (4) On approving an application for the appointment of a person as Bankruptcy Trustee under subsection (3), the court shall issue a certificate confirming this person's appointment.
- (5) The appointment of a Bankruptcy Trustee shall take effect as from the date of the certificate.
- (6) A person who, with the person's consent, is appointed or acts as a Bankruptcy Trustee knowing that any of the requirements of paragraphs (a), (b), or (c) of subsection (2) has not been met, shall be guilty of an offence. [Provision for offence – approach TBD]

### 98. Removal of Trustee and Vacation of Office

- (1) Under this section, a person other than the Official Receiver who has been appointed as Bankruptcy Trustee may be removed from office.
- (2) A Bankruptcy Trustee may be removed only by
  - (a) An order of the court; or
  - (b) A ~~by~~ resolution of a majority in value of creditors **at a meeting convened** specially for the purpose of removing a trustee.
- (3) Where the creditors of the bankrupt debtor decide to remove a Bankruptcy Trustee, they may appoint another person as Trustee in his or her place, in accordance with section 97 Appointment of Trustees.



- (4) Where the decision to remove a Bankruptcy Trustee is made under subsection (3), the decision does not take effect until the creditors of the bankrupt debtor appoint another person as Trustee in his or her place.
- (5) The Bankruptcy Trustee (not being the Official Receiver) shall vacate office if he or she
  - (a) ceases to be a fit person in accordance with section 97 Appointment of Trustees, or
  - (b) ceases to satisfy any qualifications prescribed by secondary legislation.
- (6) On an application by a bankrupt debtor, a creditor, or the Official Receiver, the court can remove a Trustee on the grounds of misconduct or neglect of duty.
- (7) The Bankruptcy Trustee may resign his or her office by giving notice of his or her resignation to the court and the Official Receiver.
- (8) The Bankruptcy Trustee shall vacate office if the Bankruptcy Order is annulled.
- (9) During any vacancy in the office of Bankruptcy Trustee, the Official Receiver shall act as Bankruptcy Trustee.

#### **99. Release of Trustee**

- (1) Where the Official Receiver has ceased to be the Bankruptcy Trustee and a person is appointed in his or stead, the Official Receiver shall have his or her release with effect from the time at which the court issues a certificate of the appointment of a Bankruptcy Trustee under section 97 Appointment of Trustees.
- (2) If the Official Receiver while he is the trustee gives notice to the [court] that the administration of the Bankruptcy Estate is for practical purposes complete, he or she shall have his or her release with effect from such time as the court may determine.
- (3) A person other than the Official Receiver who has ceased to be the Bankruptcy Trustee shall have his or her release with effect from the following time, that is to say—
  - (a) where the person has died, the time at which notice is given to the court and Official Receiver that that person has ceased to hold office;
  - (b) in the following cases, **28 days after the** the time at which notice is given to the court and Official Receiver that that person has ceased to hold office
    - (i) the person has been removed from office by a decision of the bankrupt's creditors under section 98 Removal of Trustee and Vacation of Office and the creditors have not decided against his release; or
    - (ii) the person has resigned under section 98(7); ~~or~~
    - (iii) ~~the person has died;~~
  - (c) in the following cases, such time as the court may, on an application by the person, determine—
    - (i) the person has been removed from office by a decision of the bankrupt's creditors and the creditors have decided against his or her release,
    - (ii) the person has vacated office under section 98(5); or
    - (iii) the person has been removed from office by the court,

- (4) Where the person is removed from office by a decision of the bankrupt debtor's creditors, any decision of the bankrupt debtor's creditors as to whether the person should have his or her release must be made by a resolution of a majority in value of creditors.
- (5) Where a Bankruptcy Order is annulled, the Bankruptcy Trustee at the time of the annulment has his or her release with effect from such time as the court may determine.
- (6) Where the Official Receiver or the Bankruptcy Trustee has his or her release under this section, he or she shall, with effect from the time specified in the preceding provisions of this section, be discharged from all liability.

## ***Chapter 4: Functions and Duties of Bankruptcy Trustee***

### **100. General Functions and Official Title of Bankruptcy Trustee**

- (1) The "Bankruptcy Trustee" is the trustee in bankruptcy of the Bankruptcy Estate, and has the description, function, duties, and powers specified in this section and in any other provisions of this Act.
- (2) This Chapter applies in relation to any Bankruptcy where either—
  - (a) the appointment of a person as Bankruptcy Trustee takes effect, or
  - (b) the Official Receiver becomes Bankruptcy Trustee.
- (3) The function of the Bankruptcy Trustee is to get in, realise and distribute the Bankruptcy Estate in accordance with the following provisions of this Part; and in the carrying out of that function and in the management of the Bankruptcy Estate the Bankruptcy Trustee is entitled, subject to those provisions, to use his or her own discretion.
- (4) It is the duty of the Bankruptcy Trustee, if he or she is not the Official Receiver—
  - (a) to furnish the Official Receiver with such information,
  - (b) to produce to the Official Receiver, and permit inspection by the Official Receiver of, such books, papers and other records, and
  - (c) to give the Official Receiver such other assistance,as the Official Receiver may reasonably require for the purpose of enabling him or her to carry out his or her functions and duties in relation to the Bankruptcy.
- (5) The official name of a Bankruptcy Trustee shall be "the trustee of the property of a bankrupt" (inserting the name of the bankrupt), and by that name the Bankruptcy Trustee may, in any part of Sri Lanka or elsewhere,
  - (a) hold property of every description;
  - (b) make contracts;
  - (c) sue and be sued;
  - (d) enter into any engagements binding on himself or herself, and his or her successors in office;and

- (e) do all other acts necessary or expedient to be done in the execution of his or her office.

**101. Powers of Bankruptcy Trustee**

- (1) The Bankruptcy Trustee may exercise any of the powers specified in this section.
- (2) Power to carry on any business of the bankrupt debtor so far as may be necessary for winding it up beneficially and so far as the Bankruptcy Trustee is able to do so without contravening any requirement imposed by or under any enactment.
- (3) Power to bring, institute or defend any action or legal proceedings relating to the property comprised in the Bankruptcy Estate.
- (4) Power to accept as the consideration for the sale of any property comprised in the Bankruptcy Estate a sum of money payable at a future time subject to such stipulations as to security or otherwise as the creditors' committee or the court thinks fit.
- (5) Power to mortgage or pledge any part of the property comprised in the Bankruptcy Estate for the purpose of raising money for the payment of the bankrupt debtor's debts.
- (6) Power, where any right, option or other power forms part of the Bankruptcy Estate, to make payments or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of the right, option or power.
- (7) Power to make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of debts provable in the bankruptcy.
- (8) Power to make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the Bankruptcy Estate made or capable of being made on the Bankruptcy Trustee by any person.
- (9) Power to sell any part of the property for the time being comprised in the Bankruptcy Estate, including the goodwill and book debts of any business.
- (10) Power to refer to arbitration, or compromise on such terms as may be agreed, any debts, claims or liabilities subsisting or supposed to subsist between the bankrupt debtor and any person who may have incurred any liability to the bankrupt debtor.
- (11) Power to make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the Bankruptcy Estate made or capable of being made by the Bankruptcy Trustee on any person.
- (12) Power to give receipts for any money received by the Bankruptcy Trustee, being receipts which effectually discharge the person paying the money from all responsibility in respect of its application.
- (13) Power to prove, rank, claim and draw a dividend in respect of such debts due to the bankrupt debtor as are comprised in his estate.
- (14) Power to exercise in relation to any property comprised in the Bankruptcy Estate any powers the capacity to exercise which is vested in the Bankruptcy Trustee under this Part of this Act.
- (15) For the purposes of, or in connection with, the exercise of any of his powers under this Part of this Act, the Bankruptcy Trustee may, by his or her official name—

- (a) hold property of every description,
- (b) make contracts,
- (c) sue and be sued,
- (d) enter into engagements binding on himself or herself and, in respect of the Bankruptcy Estate, on his or her successors in office,
- (e) employ an agent,
- (f) execute any power of attorney, deed or other instrument;

and he or she may do any other act which is necessary or expedient for the purposes of or in connection with the exercise of those powers.

**102. Creditors' Committee in Cases where the Official Receiver is not the Bankruptcy Trustee**

- (1) Subject to subsection 2, a bankrupt debtor's creditors may, in accordance with rules which may be prescribed by secondary legislation, establish a committee (known as "the creditors' committee") to exercise the functions conferred on it by or under this Act.
- (2) The bankrupt debtor's creditors shall not establish such a committee, or confer any functions on such a committee, at any time when the Official Receiver is the Bankruptcy Trustee.

**103. Court Review of Action of Bankruptcy Trustee**

- (1) If a bankrupt debtor or any of his or her creditors or any other person is dissatisfied by any act, omission or decision of a Bankruptcy Trustee, he or she may apply to the court.
- (2) On an application under subsection (1) the court may
  - (a) confirm, reverse or modify any act or decision of the Bankruptcy Trustee;
  - (b) may give the Bankruptcy Trustee directions; or
  - (c) may make such other order as it thinks fit.
- (3) The Bankruptcy Trustee may apply to the court for directions in relation to any matter arising under the Bankruptcy.

**104. Trustee Remuneration, Expenses, and Costs**

- (1) The Bankruptcy Trustee may charge remuneration for carrying out his or her duties and exercising his or her powers as Bankruptcy Trustee at the amount or rates
  - (a) fixed by the court; or
  - (b) prescribed under secondary legislation or charged according to rates prescribed under that secondary legislation.

(2) The [Minister] may make regulations that fix or prescribe the amount or rates of remuneration chargeable under this section.

- (3) All bills and charges of barristers and solicitors, managers, accountants, auctioneers, brokers, and other persons, not being trustees, shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing

officer shall satisfy himself before passing such bills and charges that the employment of such barristers and solicitors and other persons, in respect of the particular matters out of which such charges arise, has been duly sanctioned. The sanction must be obtained before the employment, except in case of urgency, and in such cases it must be shown that no undue delay took place in obtaining the sanction.

**105. Trustee to Maintain Accounts and Provide Information**

- (1) Whenever required by any creditor to do so, the Bankruptcy Trustee,
  - (a) shall provide the creditor with a list of the creditors in the Bankruptcy showing the amount of the debt due to each creditor; and
  - (b) shall be entitled to charge for such list the sum of [\$xxx], or such other sum as may be prescribed in secondary legislation.
- (2) Whenever requested by a resolution of the majority in value of creditors, the Bankruptcy Trustee,
  - (a) shall provide any requesting creditor with a statement of the accounts up to the date of such request; and
  - (b) shall be entitled to charge for the provision of such accounts the sum of [\$xxx], or such other sum as may be prescribed in secondary legislation, which may be repaid to any requesting creditor from the Bankruptcy Estate if the court so directs.
- (3) The Bankruptcy Trustee shall maintain proper books in the manner which may be prescribed by secondary legislation.
- (4) Any creditor of the bankrupt debtor, subject to the control of the court, may inspect any books maintained under subsection (3).
- (5) Where the Bankruptcy Trustee is a person other than the Official Receiver, the Bankruptcy Trustee shall from time to time, as may be prescribed, and not less than once in every year during the continuance of the Bankruptcy, transmit to the Official Receiver a statement showing the proceedings in the Bankruptcy up to the date of the statement,
- (6) Secondary legislation may prescribe particulars to be included in the Official Receiver's statement under subsection (5), and the form of such statement.
- (7) The Official Receiver
  - (a) shall examine the statements transmitted under subsection (5);
  - (b) shall call the Bankruptcy Trustee to account for any misfeasance, neglect, or omission, which may appear on the said statements or in his accounts or otherwise; and
  - (c) may require the Bankruptcy Trustee to make good any loss which the Bankruptcy Estate may have sustained by the misfeasance, neglect or omission.

**106. Audit of Bankruptcy Trustee Accounts**

- (1) Every Bankruptcy Trustee shall, at such times as may be prescribed in secondary legislation or ordered by a court, but not less than twice in each year during his or her tenure of office, send to the Official Receiver an account of his or her receipts and payments as such Trustee.

- (2) The account shall
  - (a) be in a form prescribed in secondary legislation or ordered by a court; and
  - (b) be verified by statutory declaration in the prescribed form.
- (3) If the Official Receiver considers it necessary for the proportionate and just resolution of the case, shall cause the accounts so sent to be audited.
- (4) For the purposes of an audit under subsection (3), the Bankruptcy Trustee shall furnish the auditor with such information as the auditor may require, and the auditor may at any time require the production of and inspect any books or accounts kept by the Trustee.
- (5) When any such account has been audited, a copy shall be filed and kept by the Official Receiver, and another copy shall be filed with the court, and each copy shall be open to the inspection by a creditor, the bankrupt debtor, or any person interested.

#### **107. Duty of Bankruptcy Trustee in Relation to Money**

- (1) The Bankruptcy Trustee shall pay all money received by the ~~Trustee administrator~~ into an account or accounts established for the purpose at one or more banks.
- (2) Rules regarding the payment of funds into a bank account by the Bankruptcy Trustee **may be prescribed by secondary legislation.**
- (3) The Bankruptcy Trustee may invest money that is not immediately required to be paid out in the administration of an estate in financial products, to such extent (if any) and subject to such terms and conditions as may be prescribed.
- (4) The Bankruptcy Trustee shall not pay any money received into a personal bank account of the Bankruptcy Trustee.

### **Chapter 5: Debts in Bankruptcy**

#### **108. Debts provable in Bankruptcy**

- ~~(1) In this Chapter, "debt" has the meaning provided in section 411.~~
- (2) Only debts defined as included debts under section 33 Included and Excluded Debts shall be provable in a Bankruptcy.
- (3) A debt defined as an excluded debt under section 33 Included and Excluded Debts shall not be provable in a Bankruptcy.
- (4) Subject to this section, the proof of any debt provable in Bankruptcy by a secured or unsecured creditor of the bankrupt debtor and the admission or rejection of any proof shall take place in accordance with [section 414 ~~400~~ Proofs of debt and proving debts].
- (5) A secured creditor holding a fixed security over property of the **Bankruptcy Estate** ~~Bankrupt debtor~~ may

- (a) ~~rely on the security, while leaving the property in the possession or control of the Bankruptcy Trustee;~~
- (b) enforce the security, where the secured creditor is entitled to do so; or
- (c) surrender the property subject to the security to the Bankruptcy Trustee for the benefit of the creditors as a whole and claim as an unsecured creditor for the whole debt.
- (6) A secured creditor who exercises the option referred to in subsection 6(a) shall account to the Bankruptcy Trustee for any surplus remaining from the net amount realised, after –
- (a) satisfaction of any debt owing to the grantee of any fixed security over any part of the property that ranks prior to the secured creditor's fixed security, determined as at the commencement of the Bankruptcy; and
- (b) satisfaction of the full amount of the debt, determined as at the commencement of the Bankruptcy.
- (7) A Bankruptcy Trustee may by written notice require a secured creditor within 20 working days after receiving the notice –
- (a) to exercise the option referred to in subsection 6(a) or the option referred to in subsection 6(b); and
- (b) if the creditor elects to exercise the option referred to in subsection 6(b), to do so within that period.
- (8) A secured creditor on whom notice has been served under subsection (7) (9) who fails to comply with the notice
- (a) is to be taken as having surrendered the property subject to the security to the Bankruptcy Trustee for the benefit of the creditors as a whole; and
- (b) may claim as an unsecured creditor for the whole debt.

#### 109. Mutual credit and set-off

- (1) ~~Section 400A applies to situations in which there have been mutual credits, mutual debts or other mutual dealings between a Bankrupt debtor and a person who seeks or, but for the operation of that section, would seek to have a claim admitted in a Bankruptcy.~~
- (2) ~~Subject to subsections (3), (4) and (5), where there have been mutual credits, mutual debts or other mutual dealings between a Bankrupt debtor and a person who seeks or, but for the operation of this section, would seek to have a claim admitted in a Bankruptcy, by way of proof of debt –~~
- (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 shall be set off against an amount due from the other party; and~~

(c) ~~only the balance of the account shall be admitted as a provable debt or be payable to the~~  
**Bankruptcy Trustee as part of the Bankruptcy Estate.**

(2) ~~For the purposes of subsection (1), mutual credits, mutual debts and other mutual dealings do not include—~~

(a) ~~any debt arising out of an obligation incurred at any time after commencement of the~~  
**Bankruptcy** or after which the person had notice of—

(i) ~~ongoing proceedings on a Bankruptcy application relating to the bankrupt debtor~~  
~~under section 80 *Debtor Application for Bankruptcy Order*; or~~

(ii) ~~a pending Bankruptcy petition relating to the bankrupt debtor under section~~  
~~84 *Petition for Bankruptcy Order*.~~

(b) ~~any debt acquired by the person, by assignment or otherwise, under an agreement~~  
~~entered into at any time after commencement of the **Bankruptcy** or after which the person had~~  
~~notice of—~~

(i) ~~ongoing~~ proceedings on a Bankruptcy application relating to the bankrupt  
debtor ~~under section 80 *Debtor Application for Bankruptcy Order*; or~~

(ii) ~~a pending Bankruptcy petition relating to the bankrupt debtor under section~~  
~~84 *Petition for Bankruptcy Order*.~~

(4) ~~For the purposes of this section, such rules on determining amounts as may be prescribed under section 400-411~~  
~~(Proofs of debt and proving debts) apply.~~

(5) ~~Where an amount due from the **bankrupt debtor** to the person referred to in subsection (1) includes both preferential~~  
~~claims and claims that are not preferential claims, the amount due from the person to the **bankruptcy debtor** shall~~  
~~under subsection (1)(b) be set off rateably against such claims.~~

## **110. Priority of Debts in Bankruptcy**

(1) A **Bankruptcy Trustee** shall apply the proceeds of realisation of the **Bankruptcy Estate** in or towards satisfaction of the claims, determined as at the **commencement of the Bankruptcy**, set out in the [•] Schedule (Preferential Claims in Liquidation), to the extent and in the order of priority specified in that Schedule.

(2) Without prejudice to paragraph 8 of the [•] Schedule (Preferential Claims in Liquidation), "**Bankruptcy Estate** property of the company" in subsection (1) shall not include property subject to an encumbrance unless one of paragraphs (a), (b), (c), (d) and (e) of section [•](1) (Power of liquidator to deal with property subject to an encumbrance) applies.

(a) The secured creditor has surrendered the property subject to the security under section 108(5); or

(b) The secured creditor has not surrendered the property subject to the security under section 108(5), but has confirmed to the Bankruptcy Trustee that it does not intend to enforce the security.



- (3) After paying claims in accordance with subsection (1), the **Bankruptcy Trustee** shall apply the proceeds of realisation of **the Bankruptcy Estate** in or towards satisfaction of general claims, determined as at the **commencement of the Bankruptcy**.
- (4) The claims referred to in subsection (3) rank equally among themselves and shall be satisfied in full unless the proceeds of realisation of **the Bankruptcy Estate** are insufficient to satisfy them, in which case the proceeds shall abate rateably among all such claims.
- (5) After paying claims in accordance with subsection (3), interest as from the **commencement of the Bankruptcy** calculated in such manner as may be prescribed shall be paid on the claims referred to in paragraphs (1) and (3).
- (6) The claims referred to in subsection (5) rank equally among themselves with respect to the interest referred to in that subsection, and such interest shall be paid in full unless the proceeds of realisation of **the Bankruptcy Estate** are insufficient to pay it, in which case the proceeds shall abate rateably among all of the claims referred to in that subsection with respect to that interest.
- (7) After paying claims in accordance with subsection (5), the Bankruptcy Trustee shall apply the surplus proceeds of realisation of the Bankruptcy Estate [to the Bankrupt debtor].
- (8) Where, before the commencement of **Bankruptcy**, a creditor has agreed to accept a lower priority in respect of a debt than that which it would otherwise have under this section, nothing in this section shall prevent the agreement from having effect according to its terms.

## ***Chapter 6: Duties of Debtor in Bankruptcy***

### **111. General Duties of Bankrupt Debtor**

A bankrupt debtor in respect of whom a Bankruptcy Order has been made shall be subject to the duties of debtors under personal insolvency procedures under section 11.

### **112. Duties of debtor as to discovery and realization of property.**

- (1) In addition to the duties specified in section 11 above, a bankrupt debtor in respect of whom a Bankruptcy Order has been made shall, to the utmost of his or her power, aid in the realisation of his or her property and the distribution of the proceeds amongst his or her creditors and shall
  - (a) Attend before the Bankruptcy Trustee whenever called upon to do so; and, if required to do so by the Bankruptcy Trustee, verify any statement by affidavit;
  - (b) Execute such power of attorney, transfer or instrument, in relation to his or her property and the distribution of the proceeds amongst his or her creditors, as are required by the Bankruptcy Trustee;
  - (c) Deliver on demand any of his or her property that is divisible amongst his or her creditors and is under his or her possession or control to the Bankruptcy Trustee; and

- (d) Deliver on demand to the Bankruptcy Trustee any property that is acquired by him or her before discharge.
- (2) A bankrupt debtor shall, even after discharge from bankruptcy, continue to cooperate with any request that the Bankruptcy Trustee may reasonably require for the purposes of carrying out his or her necessary functions under this Act.

### **113. Financial Information**

- (1) The bankrupt debtor shall provide the Bankruptcy Trustee with the information and details that are reasonably necessary to prepare a statement of the financial position of the debtor's estate.
- (2) Where the Bankruptcy Trustee considers it necessary and a proportionate use of resources, the Trustee may require the bankrupt debtor to assist in the preparation of full, true, and detailed accounts and statements of the bankrupt debtor's financial position, showing details of
  - (a) the bankrupt debtor's trading and stocktaking; and
  - (b) the bankrupt debtor's profit and losses during any period in the 3 years before the commencement.
- (3) Where required by the Bankruptcy Trustee, the bankrupt debtor shall, within a reasonable time following a request from the Bankruptcy Trustee, prepare and provide to the Bankruptcy Trustee, to the extent possible, details necessary to prepare the accounts and statements specified in subsection (2).
- (4) For the bankrupt debtor to prepare the accounts and statements referred to in subsection (2) –
  - (a) the Bankruptcy Trustee shall give the debtor full access to the bankrupt debtor's books and papers in the Bankruptcy Trustee's possession; and
  - (b) where the Bankruptcy Trustee thinks it necessary, the bankrupt debtor shall be assisted by an accountant at the expense of the bankrupt debtor's property.

## ***Chapter 7: Property of Debtor in Bankruptcy***

### **114. Description of Bankruptcy Estate**

- (1) The property of the bankrupt debtor divisible amongst his or her creditors, and in this Act referred to as the Bankruptcy Estate, shall not comprise any of the protected property specified in sections 31 and 32 ~~6 and 7~~.
- (2) Subject to subsection (1), the Bankruptcy Estate shall comprise
  - (a) All property belonging to or vested in the bankrupt debtor at the commencement of the Bankruptcy; and
  - (b) Any property which, by virtue of any of the following provisions of this Chapter, forms part of that estate or is treated as forming part of that estate.

- (3) In this Chapter, property, in relation to the bankrupt debtor, includes reference to any power exercisable by the bankrupt debtor over or in respect of property in or outside Sri Lanka for the bankrupt debtor's own benefit.
- (4) For the purposes of this Chapter, property which forms part of the Bankruptcy Estate
  - (a) does so subject to the rights of any person other than the bankrupt debtor, and
  - (b) a secured creditor may take possession of and realise and otherwise deal with property over which he has a security charge, disregarding any rights the secured creditor has surrendered under given up under section 66 and any rights which have otherwise been given up in accordance with section 108 87 or in such manner as may be prescribed by secondary legislation.
- (5) This section shall apply to any other enactment under which any property is to be excluded from a bankrupt debtor's estate.

#### **115. Vesting of Property in Bankruptcy Trustee**

- (1) Until a Bankruptcy Trustee is appointed,
  - (a) the Official Receiver shall, in accordance with section 96 75, be the Bankruptcy Trustee for the purposes of this Act, and,
  - (b) immediately on a Bankruptcy Order being made, the Bankruptcy Estate shall vest in the Official Receiver.
- (2) On the appointment of a person other than the Official Receiver as Bankruptcy Trustee, the Bankruptcy Estate shall vest immediately in the Bankruptcy Trustee appointed.
- (3) Where any property which is, or is to be, comprised in the Bankruptcy Estate vests in the Official Receiver, whether under this section or under any other provision of this Chapter, it shall so vest without any conveyance, assignment or transfer.
- (4) The certificate of appointment of a Bankruptcy Trustee shall for all purposes of any law in force in any part of Sri Lanka requiring registration or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property and may be registered and recorded accordingly.
- ~~(5) Where property is excluded from the Bankruptcy Estate as protected property under section 6, but it appears to the Bankruptcy Trustee that the realisable value of the whole or any part of that property exceeds the cost of a reasonable replacement for that property or that part of it, the Bankruptcy Trustee may
  - (a) Add that property, or that part of it, for the Bankruptcy Estate; and
  - (b) Apply funds from the Bankruptcy Estate to the purchase for the bankrupt debtor of a reasonable replacement for any property added to the Bankruptcy Estate in this manner.~~

#### **116. After-Acquired Property**

- (1) Subject to sections **31 Protected Property, 32 Contributions and Entitlements** under the Employees Provident Fund and other Provident Funds, and **114 Description of Bankruptcy Estate** and **130**

**Undervalued Transactions**, between the commencement of the bankruptcy and the discharge of the debtor all property, excluding protected property, that the bankrupt debtor acquires or that passes to the bankrupt debtor shall constitute after-acquired property.

- (2) All after-acquired property shall vest in the Bankruptcy Trustee.
- (3) The powers that the bankruptcy debtor could have exercised in, over, or in respect of after-acquired property for the bankrupt debtor's own benefit shall vest in the Bankruptcy Trustee.
- (4) For the avoidance of doubt,
  - (a) income of the bankrupt debtor shall not constitute after-acquired property; and
  - (b) Income of the bankrupt debtor shall only be claimed for the Bankruptcy Estate through the means specified in sections 125 and 126.

#### **117. Possession of property by trustee**

- (1) The Bankruptcy Trustee shall, as soon as may be, take possession of books, documents and other records which relate to the property or affairs of the bankrupt debtor, which
  - (a) belong to the bankrupt debtor; or
  - (b) are in his or her possession or under his or her control.
- (2) The Bankruptcy Trustee shall, in relation to and for the purpose of acquiring or retaining possession of the Bankruptcy Estate, be in the same position as if he or she were a receiver of the property appointed by the court, and the court may, on his or her application, enforce such acquisition or retention accordingly.
- (3) Where any part of the Bankruptcy Estate consists of stock or shares in a company, shares in a ship, or any other property transferable in the books of any company, office, or person, the Bankruptcy Trustee may exercise the right to transfer the property to the same extent as the bankrupt debtor might have exercised if he or she had not become bankrupt.
- (4) Where any part of the Bankruptcy Estate consists of things in action,
  - (a) such things shall be deemed to have been duly assigned to the Bankruptcy Trustee; and (
  - (b) notice of the deemed assignment need not be given except in so far as it is necessary, in case where the deemed assignment is from the bankrupt debtor, for protecting the priority of the Bankruptcy Trustee.
- (5) In addition to the general duties of the bankrupt debtor under section 111 94, the bankrupt debtor shall deliver up to the Bankruptcy Trustee possession of any property, books, papers or other records of which he or she has possession or control and of which the Bankruptcy Trustee is required to take possession.
- (6) Any banker or agent of the bankrupt debtor or any other person who holds any property to the account of, or for, the bankrupt debtor shall pay or deliver to the trustee
  - (a) all property in his or her possession or under his or her control which forms part of the Bankruptcy Estate; and
  - (b) which he or she is not by law entitled to retain as against the bankrupt debtor or Bankruptcy Trustee.

(7) If any of the following is in possession of any property, books, papers or other records of which the Bankruptcy Trustee is required to take possession, namely—

- (a) the Official Receiver,
- (b) a person who has ceased to be trustee of the Bankruptcy Estate, or
- (c) a person who has been the personal insolvency administrator of a Debt Restructuring Arrangement approved in relation to the bankrupt debtor under Part 4,

that person shall deliver up possession of the property, books, papers or records to the Bankruptcy Trustee.

(8) If any person without reasonable excuse fails to comply with any obligation imposed by this section, he or she is guilty of a contempt of court and liable to be punished accordingly (in addition to any other punishment to which he or she may be subject).

#### **118. Seizure of property of bankrupt**

- (1) At any time after a Bankruptcy Order has been made, the court may, on the application of the Official Receiver or the Bankruptcy Trustee, issue a warrant authorising the person to whom it is directed to seize any property comprised in the Bankruptcy Estate, or any books, papers or records relating to the Bankruptcy Estate which are, in the possession or under the control of the bankrupt debtor or any other person who is required to deliver the property, books, papers or records to the Bankruptcy Trustee.
- (2) A warrant issued under subsection (1) may direct that the Bankruptcy Trustee shall be provided with reasonable access to the physical and electronic mail of the bankrupt debtor, where required for the performance of the functions of the Bankruptcy Trustee and the administration of the Bankruptcy Estate.
- (3) Any person executing a warrant under this section may, for the purpose of seizing any property comprised in the Bankruptcy Estate or any books, papers or records relating to the Bankruptcy Estate, break open
  - (a) any premises where the bankrupt debtor or anything that may be seized under the warrant is or is believed to be; and
  - (b) any receptacle of the bankrupt which contains or is believed to contain anything that may be so seized.
- (4) If, after a Bankruptcy Order has been made, the court is satisfied that any property comprised in the Bankruptcy Estate, or any books, papers or records relating to the Bankruptcy Estate are concealed in any premises not belonging to the bankrupt debtor, it may issue a warrant authorising any police officer or officer of the court to search those premises for the property, books, papers or records.
- (5) A warrant under subsection (4) shall not be executed except in accordance with its terms.
- (6) Secondary legislation may prescribe details for the execution of a warrant issued under subsection (4).

**119. Disclaimer of Onerous Property**

- (1) The Bankruptcy Trustee may disclaim onerous property in accordance with sections 315 326 Disclaimer of Onerous Property and 316 327 Requirement to Elect whether or not to Disclaim.

**120. Power to Allow Debtor to Manage Property**

- (1) The Bankruptcy Trustee, with permission of the court or when a resolution of a majority in value of creditors so authorises, may appoint the bankrupt debtor himself or herself
- (a) to superintend the management of the Bankruptcy Estate or of any part thereof, or
  - (b) to carry on the trade (if any) of the bankrupt debtor for the benefit of his or her creditors, and in any other respect to aid in administering the property, in such manner and on such terms as the Bankruptcy Trustee may direct.

**121. Goods on Hire-Purchase, Finance Lease, or any other similar agreement**

- (1) Where –
- (a) the bankrupt debtor purchased **acquired possession of** goods under a hire-purchase agreement, finance lease, ~~agreement~~, or **any other finance similar** agreement, before commencement; and
  - (b) a creditor –
    - (i) took possession of the goods within **21 days** before commencement of the Bankruptcy, and after commencement still possesses them; or
    - (ii) takes possession of the goods after commencement,

the creditor shall not sell or dispose of the goods or part with possession of them (except for storage or repair), until **28 days** after the date of commencement of the Bankruptcy, unless the Bankruptcy Trustee consents in writing to the creditor selling or disposing or parting with possession of the goods before the expiry of that period.

- (2) The Bankruptcy Trustee may, notwithstanding any provision of the hire purchase agreement, **finance lease agreement**, or other **finance similar** agreement –
- (a) within a period of **28 days** from the date of the commencement of the Bankruptcy introduce a buyer for the goods and the bankrupt debtor's indebtedness to the creditor shall be reduced to the extent of the amount paid by the buyer to the creditor for the goods; or
  - (b) at any time before the creditor sells or agrees to sell the goods following the expiry of that period, settle the bankrupt debtor's obligations as debtor and retain the goods as part of the debtor's estate.
- (3) Where –

- (a) a creditor has taken possession of goods purchased under a hire purchase agreement, **finance** lease agreement, or other **finance similar** agreement, whether before or after the commencement of the bankrupt debtor's Bankruptcy; and
- (b) the Bankruptcy Trustee has not taken any action under subsection (2),

the creditor may prove in the Bankruptcy for the amount that the creditor was entitled to recover from the bankrupt debtor.

(4) Where –

- (a) the bankrupt debtor purchased goods under a hire purchase agreement, **finance** lease agreement, or other **finance similar** agreement before commencement of the Bankruptcy; and
- (b) at the date of commencement of the Bankruptcy the creditor –
  - (i) has not taken possession of the goods; or
  - (ii) has taken possession of them and has not sold or disposed of or parted with possession of them,

the creditor may assign the goods to the Bankruptcy Trustee, and, if it does so, may prove in the bankruptcy for the net balance due to the creditor under the agreement.

#### **122. Limitation of trustee's powers in relation to copyright**

- (1) Where the Bankruptcy Estate comprises the copyright in any work or any interest in such copyright, and the bankrupt debtor is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the Bankruptcy Trustee
  - (a) shall not be entitled to sell, or authorise the sale of, any copies of the work, or to perform or authorise the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt debtor, and
  - (b) shall not, without the consent of the author or of the court, be entitled to assign the right or transfer the interest or to grant any interest in the right by licence, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt debtor was liable to pay.

#### **123. Protection of official receiver and trustee from personal liability in certain cases**

- (1) This section applies where
  - (a) the Bankruptcy Trustee has seized or disposed of any property in the possession or on the premises of a bankrupt debtor,
  - (b) and the Bankruptcy Trustee had no notice of any claim by any person in respect of the property.

- (2) Where, in the circumstances specified in subsection (1), the Bankruptcy Trustee subsequently gains notice that the said property was not, at the date of the commencement of the Bankruptcy, the property of the bankrupt debtor,
- (a) No suit, prosecution or other legal proceeding shall lie against the Bankruptcy Trustee for any loss or damage arising from such seizure or disposal sustained by any person claiming such property, and
  - (b) The Bankruptcy Trustee shall not be personally liable for the costs of any proceedings taken to establish a claim in respect of such property,
- unless such seizure or disposal is established to have been done in bad faith.

#### **124. Second Bankruptcy**

- (1) Where, before discharge, a Bankruptcy Order is made in respect of the bankrupt debtor for a second time –
- (a) subject to subsection (2), any property that is acquired by, or has passed to, the bankrupt debtor since the first Bankruptcy, including property acquired or that has passed since the second Bankruptcy, shall vest in the Bankruptcy Trustee in the second Bankruptcy; and
  - (b) any surplus in the second Bankruptcy is an asset in the estate in the first Bankruptcy, and shall be paid to the Bankruptcy Trustee in the first Bankruptcy.
- (2) The Court may, if it thinks it appropriate, order that the following assets or their proceeds shall vest in the Bankruptcy Trustee in the first Bankruptcy –
- (a) assets in the second Bankruptcy that, in the Court's opinion, were acquired independently of the creditor in the second Bankruptcy; and
  - (b) assets in the second Bankruptcy that devolved upon the bankrupt debtor.
- (3) Where the Bankruptcy Trustee receives notice that a creditor has filed a petition for a second Bankruptcy, he shall –
- (a) hold property in his possession that has been acquired by, or passed to, the bankrupt debtor since the first Bankruptcy until the application for a second Bankruptcy has been dealt with; and
  - (b) transfer the property and its proceeds, less any deduction for the Bankruptcy Trustee's fees, costs, charges and expenses, to the Bankruptcy Trustee in the second Bankruptcy where the creditor's petition results in a second Bankruptcy, or if a Bankruptcy Order is made in respect of the debtor on his own application.

#### **125. Debt Repayment Order**

- (1) Under this section, a "Debt Repayment Order" means an order of the court claiming for the Bankruptcy Estate a portion of the income of the bankrupt debtor.
- (2) The court may make a Debt Repayment Order claiming for the Bankruptcy Estate so much of the income of the bankrupt debtor during the period for which the order is in force as may be specified in the Order.



- (3) In accordance with section 33 6, the court shall not make a Debt Repayment Order the effect of which would be to reduce the income of bankrupt debtor below his or her protected income.
- (4) A Debt Repayment Order shall, in respect of any payment of income to which it is to apply, either
  - (a) require the bankrupt debtor to pay the Bankruptcy Trustee an amount equal to so much of that payment as is claimed by the Order; or
  - (b) require the person making the payment to pay so much of it as is so claimed to the Bankruptcy Trustee, instead of to the bankrupt debtor.
- (5) Sums received by the Bankruptcy Trustee under a Debt Repayment Order form part of the Bankruptcy Estate.
- (6) A Debt Repayment Order must specify the period during which it is to have effect, and that period may not end after the discharge of the bankrupt debtor.
- (7) Subject to subsection (3) (5), a Debt Repayment Order may be varied on the application of the Bankruptcy Trustee or the bankrupt debtor.

#### **126. Debt Repayment Agreement**

- (1) In this section “Debt Repayment Agreement” means a written agreement between a bankrupt debtor and the Bankruptcy Trustee which provides—
  - (a) that the bankrupt debtor is to pay to the Bankruptcy Trustee an amount equal to a specified part or proportion of the bankrupt debtor's income for a specified period, or
  - (b) that a third person is to pay to the Bankruptcy Trustee a specified proportion of money due to the bankrupt debtor by way of income for a specified period.
- (2) A provision of Debt Repayment Agreement of a kind specified in subsection (1)(a) or (b) may be enforced as if it were a provision of a Debt Repayment Order.
- (3) Sums received by the Bankruptcy Trustee under a Debt Repayment Agreement form part of the Bankruptcy Estate.
- (4) A Debt Repayment Agreement must specify the period during which it is to have effect; and that period may not end after the discharge of the bankrupt debtor.
- (5) In accordance with section 33 9, the terms of a Debt Repayment Arrangement shall not have the effect of reducing the income of bankrupt debtor below his or her protected income.
- (6) A Debt Repayment Agreement may (subject to subsection (4)(b)) be varied—
  - (a) by written agreement between the parties, or
  - (b) by the court on an application made by the bankrupt debtor or the Bankruptcy Trustee.
- (7) The court—
  - (a) may not vary a Debt Repayment Agreement so as to include provisions of a kind which would have the effect of reducing the income of bankrupt debtor below what is necessary for meeting the reasonable domestic needs of the bankrupt debtor and his or her dependents, and

- (b) shall grant an application to vary a Debt Repayment Agreement if and to the extent that the court thinks variation necessary to avoid the effect of reducing the income of bankrupt debtor below what is necessary for meeting the reasonable domestic needs of the bankrupt debtor and his or her dependents.

## ***Chapter 8: Effect of Bankruptcy on Certain Transactions***

### **127. Voidable Preferences, Voidable Encumbrances, and Alienations of Property with Intent to Hinder, Delay, or**

#### **Defeat a Creditor**

- (1) A transaction by a debtor may be set aside by the court as a voidable preference in accordance with sections
  - (a) 391 402 Voidable preference,
  - (b) 394 405 Procedure for setting aside a voidable preference, voidable encumbrance or alienation with intent,
  - (c) 395 406 Court orders on setting aside a voidable preference, voidable encumbrance or alienation with intent; and
  - (d) 396 407 Restrictions on setting aside a voidable preference, voidable encumbrance or alienation with intent.
- (2) A transaction by a debtor may be set aside by the court as a voidable encumbrance in accordance with sections
  - (a) 403 Voidable encumbrance,
  - (b) 405 Procedure for setting aside a voidable preference, voidable encumbrance or alienation with intent,
  - (c) 406 Court orders on setting aside a voidable preference, voidable encumbrance or alienation with intent; and
  - (d) 407 Restrictions on setting aside a voidable preference, voidable encumbrance or alienation with intent.
- (3) A transaction by a debtor may be set aside by the court as an alienation of property with intent to hinder, delay or defeat a creditor in accordance with sections
  - (a) 403 Alienation of property with intent to hinder, delay or defeat a creditor,
  - (b) 405 Procedure for setting aside a voidable preference, voidable encumbrance or alienation with intent,
  - (c) 406 Court orders on setting aside a voidable preference, voidable encumbrance or alienation with intent; and

- (d) 407 Restrictions on setting aside a voidable preference, voidable encumbrance or alienation with intent.

**128. Transactions at an Undervalue**

- (1) The Bankruptcy Trustee may recover an excess from a recipient of value under a transaction at an undervalue in accordance with section 397 408 Transaction at an undervalue.

**129. Protection of good faith transactions without notice**

- (1) This section is subject to the provisions of this Act with respect to the effect of Bankruptcy on an execution or attachment (section 133 74), and with respect to the provisions on preferences and undervalued transactions (sections 127 and 128 408 and 409).
- (2) A transaction between the bankrupt debtor and any other person under which, after commencement of the Bankruptcy, the bankrupt debtor acquires property, or property passes to the bankrupt debtor shall be valid against the Bankruptcy Trustee where –
- (a) the other person deals with the bankrupt debtor in good faith and for value; and
  - (b) the transaction is completed without an intervention by the Bankruptcy Trustee.
- (3) Where the other person is the bankrupt debtor's bank, a transaction dealing with the bankrupt debtor for value includes –
- (a) the receipt by the bank of any money, security, or negotiable instrument from the bankrupt debtor or by the bankrupt debtor's order or direction;
  - (b) a payment by the bank to the bankrupt debtor or by the debtor's order or direction; and
  - (c) the delivery by the bank of a security or negotiable instrument to the bankrupt debtor or by the bankrupt debtor's order or direction.
- (4) A payment of money or delivery of property by a legal personal representative to, or direction of, the bankrupt debtor is a transaction for value.

**130. Validity of certain payments to bankrupt debtor and assignee**

- (1) This section applies where a person makes a payment of money or delivery of property to a person in respect of whom a Bankruptcy Order is subsequently made, or to a person claiming by assignment from him or her.
- (2) The payment of money or delivery of property constitutes a good discharge to the person paying the money or delivering the property, where the payment or delivery is made before the actual date on which the Bankruptcy Order
- (a) is made and without notice of the presentation of a bankruptcy petition or application; and
  - (b) is either pursuant to the ordinary course of business or is otherwise made in good faith.

### 131. General assignments of book debts

- (1) The following applies where a person engaged in any business makes a general assignment to another of his or her existing or future book debts, or any class of them, and subsequently a Bankruptcy Order is made in respect of the person.
- (2) The assignment of book debts by the bankrupt debtor is void against the Bankruptcy Trustee as regards any book debts which have not been paid at the commencement of the Bankruptcy, unless the assignment has been registered **[under the APPLICABLE LEGISLATION RE REGISTRATION OF ASSIGNMENTS OF BOOK DEBTS].**
- (3) For the purposes of this section, “assignment” includes assignment by way of security and other charges on book debts.
- (4) For the purposes of this section, a “general assignment” does not include
  - (a) any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts; or
  - (b) any assignment of book debts included in a transfer of a business made in good faith and for value, or any assignment of assets for the benefit of creditors generally.

### 132. Extortionate Credit Transactions

- (1) This section applies where a Bankruptcy Order has been made against a debtor who is or has been a party to a transaction for, or involving, the provision to him or her of credit.
- (2) The court may, on the application of the Bankruptcy Trustee, make an order with respect to the transaction if the transaction is or was extortionate and was not entered into more than **[2] years** before the commencement of the Bankruptcy.
- (3) For the purposes of this section a transaction is extortionate if, having regard to the risk accepted by the person providing the credit—
  - (a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit, or
  - (b) it otherwise grossly contravened ordinary principles of fair dealing;and it shall be presumed, unless the contrary is proved, that a transaction with respect to which an application is made under this section is or, as the case may be, was extortionate.
- (4) An order under this section with respect to any transaction may contain such one or more of the following as the court thinks, fit, that is to say—
  - (a) provision setting aside the whole or part of any obligation created by the transaction;

- (b) provision otherwise varying the terms of the transaction or varying the terms on which any security for the purposes of the transaction is held;
  - (c) provision requiring any person who is or was party to the transaction to pay to the Bankruptcy Trustee any sums paid to that person, by virtue of the transaction, by the bankrupt debtor;
  - (d) provision requiring any person to surrender to the Bankruptcy Trustee any property held by him as security for the purposes of the transaction;
  - (e) provision directing accounts to be taken between any persons.
- (5) Any sums or property required to be paid or surrendered to the Bankruptcy Trustee in accordance with an order under this section shall be comprised in the Bankruptcy Estate.
- (6) The powers conferred by this section are exercisable in relation to any transaction concurrently with any powers exercisable under this Act in relation to that transaction as a transaction at an undervalue.

**133. No benefit of execution or other process unless completed before Bankruptcy**

- (1) Subject to subsection (2), a creditor is not entitled to the benefit of any execution or other legal process or distress against a bankrupt debtor or property of the bankrupt debtor unless the execution or other legal process or distress was completed **at least 180 days** before the commencement of the Bankruptcy, except with the permission of the court on such terms and conditions as the court thinks fit.
- (2) For the purposes of subsection (1) –
- (a) an execution against movable or immovable property is completed by seizure, or the entry into possession of a receiver or a person charged with execution, and a completed sale; and
  - (b) an attachment of a debt is completed by satisfaction of the debt.
- (3) A person who acquires property of the bankrupt debtor in good faith –
- (a) from a Fiscal charged with an execution process; or
  - (b) on which distress has been levied,
- acquires good title as against the Bankruptcy Trustee and the bankrupt debtor.
- (4) Nothing in this section shall affect or limit the application of sections [•] (*Voidable preference*) to [•] (*Misfeasance*).

**134. Duties of Fiscal in Bankruptcy**

- (1) This section applies to an execution process against property of a bankrupt debtor that was levied but not completed within the meaning of section ~~133~~ 137 (*No benefit of execution or other process unless completed before Bankruptcy*) **at least 180 days** before commencement of the Bankruptcy.
- (2) Subject to subsection (3) and unless the court orders otherwise on the application of the execution creditor, a Fiscal shall, as soon as practicable after the Bankruptcy commences –

- (a) deliver to the Bankruptcy Trustee any property of the bankrupt debtor that is in or comes into the Fiscal's possession or custody or under the Fiscal's control as a result of the execution process;  
and
  - (b) cause the Bankruptcy Trustee to be paid –
    - (i) any proceeds of realisation of property of the bankrupt debtor under the execution process;
    - (ii) any money of the bankrupt debtor received or seized under the execution process;  
and
    - (iii) any money paid to avoid seizure or sale of property of the bankrupt debtor under the execution process,  
where such proceeds or money –
      - (iv) are in or come into the Fiscal's possession or custody or under the Fiscal's control; or
      - (v) are paid into court (and have not already been paid out).
- (3) The Fiscal may retain or cause to be retained –
- (c) from property delivered under subsection (1)(a), property of a value that the Fiscal may reasonably determine to represent the costs of the execution process or attachment (as the case may be) incurred by the Fiscal; or
  - (d) from proceeds or money paid under subsection (1)(b), the costs of the execution process or attachment (as the case may be) incurred by the Fiscal.

## ***Chapter 9: Distribution of Property***

### **135. Distributions in Bankruptcy**

- (1) Whenever the Bankruptcy Trustee has sufficient funds in hands for the purpose of paying claims in accordance with sections ~~110~~ 444 Priority of Debts in Bankruptcy and Schedule Preferential Claims in Liquidation, subject to the retention of such sums as may be necessary for the expenses of the Bankruptcy, the Bankruptcy Trustee shall make a distribution in accordance with section ~~402~~ 443 Distributions.

## ***Chapter 10: End of Bankruptcy***

### 136. Duration of Bankruptcy

- (1) The Bankruptcy continues in effect until an Order of Discharge has been made under section ~~137~~ 144 Discharge, which shall be made as soon as practicable after the expiry of for a period of 3 years<sup>20</sup> from the date of the Bankruptcy Order.
- (2) However, the Bankruptcy can continue for a period longer than **that specified in subsection (1)**, but no longer than 7 years, if the total value of the Bankruptcy Estate exceeds an amount of 10 million rupees.
- (3) A Bankruptcy can continue for a period longer than the periods specified in subsections (1) or (2) above where the [Court] ~~suspends discharge extends the Order~~ under sections ~~140 or 142~~ 143–146 below.
- (4) When the [court] ~~extends an Order~~ ~~suspends discharge~~ under subsection (3), the court must specify an alternative date for discharge, which must be no later than [xx] days/months after the expiry of
  - (a) Where subsection (1) applies, the period of 3 years; or
  - (b) Where subsection (2) applies, the period of 7 years, from the date of the Bankruptcy Order.

### 137. Discharge

- (1) Where the value of the Bankruptcy Estate does not exceed 10 million rupees, in advance of the expiry of a period of **3 years** from the date of the Bankruptcy Order, the Bankruptcy Trustee shall
  - (a) issue a Certificate of Discharge to the bankrupt debtor; and
  - (b) make an application to court for an order confirming the discharge of the bankrupt debtor.
- (2) If the Bankruptcy Trustee has not yet made an application under subsection (1) within a period of [30] days after the expiry of a period of 3 years from the date of the Bankruptcy Order, the bankrupt debtor may bring an application to court for an order confirming the discharge of the bankrupt debtor.
- (3) On receiving an application under subsection (1) or (2), the court shall, within 90 days, make an order of discharge, unless an application to contest discharge has been made under section ~~139~~ 123 below.
- (4) The court order made under subsection (3) shall provide that the bankrupt debtor is discharged from the Bankruptcy Order on the expiry of a period of **3 years** from the date of the Bankruptcy Order.
- (5) On discharge from the Bankruptcy Order, the bankrupt debtor's included debts are cancelled, and the bankrupt debtor is not liable to pay any part of the debts, including any penalties, interest, and other sums which may have become payable in relation to those debts.
- (6) The discharge of debts under this section does not release the bankrupt debtor from any debt or liability specified as an excluded debt under section ~~34~~ 8.
- (7) A discharge under this section does not release from any liability any person who, at the date of the discharge, was
  - (a) A business partner of the discharged debtor;
  - (b) A co-trustee with the discharged debtor;

<sup>20</sup> The procedure for discharge outlined in this section reflects the guidance of the Law Commission. However, a peer reviewer suggested that it would be preferable for discharge to occur without the need for an application to court, and that the waiting period should be reduced to 1 year.

- (c) Jointly bound or contracted with the discharged debtor; or
- (d) a guarantor or in the nature of a guarantor of the discharged debtor.

**138. Discharge: High Value Bankruptcies**

- (1) Where the value of the Bankruptcy Estate exceeds 10 million rupees, in advance of the expiry of a period of **7 years** from the date of the Bankruptcy Order, the Bankruptcy Trustee shall
  - (a) issue a Certificate of Discharge to the bankrupt debtor; and
  - (b) make an application to court for an order confirming the discharge of the bankrupt debtor
- (2) If the Bankruptcy Trustee has not yet made an application under subsection (1) within a period of [30] days after the expiry of a period of 3 years from the date of the Bankruptcy Order, the bankrupt debtor may bring an application to court for an order confirming the discharge of the bankrupt debtor.
- (3) On receiving an application under subsection (1) or (2), the court shall, within 90 days, make an order of discharge, unless an application to contest discharge has been made under section 139 423 below.
- (4) The court order made under subsection (3) shall provide that the bankrupt debtor is discharged from the Bankruptcy Order on the expiry of a period **of 7 years** from the date of the Bankruptcy Order.
- (5) On discharge from the Bankruptcy Order, the bankrupt debtor's included debts are cancelled, and the bankrupt debtor is not liable to pay any part of the debts, including any penalties, interest, and other sums which may have become payable in relation to those debts.
- (6) The discharge of debts under this section does not release the bankrupt debtor from any debt or liability specified as an excluded debt under section 8.
- (7) A discharge under this section does not release from any liability any person who, at the date of the discharge, was
  - (a) A business partner of the discharged debtor;
  - (b) A co-trustee with the discharged debtor;
  - (c) Jointly bound or contracted with the discharged debtor; or
  - (d) a guarantor or in the nature of a guarantor of the discharged debtor.

**139. Application to Contest Discharge**

- (1) The trustee or a creditor may apply to the court to contest the bankrupt debtor's **discharge**.
- (2) **An application to the court to contest the bankrupt debtor's discharge must be made at least [xx] days before the date at which discharge would otherwise occur** but for this application.
- (3) The applicant must provide notice to the bankrupt debtor of an application to contest discharge, including the grounds on which the application is based.
- (4) Where the applicant is the Bankruptcy Trustee, the applicant must provide the creditors with notice of the application.
- (5) Where the applicant is a creditor, the applicant must provide the Bankruptcy Trustee with notice of the application.



- (6) An application to the court to contest discharge must be based on the grounds of a failure by the bankrupt debtor to comply with the personal insolvency duties of the bankrupt debtor as specified in sections 35, 111, 112, and 113 ~~41, 91, 92, and 93~~ of this Act.
- (7) On receiving an application to oppose the bankrupt debtor's discharge, the court shall fix a date for a hearing of this application, **to take place within [xx] days** of the receipt of the application.
- (8) The court shall provide notice to the bankrupt debtor and creditors of the hearing of the application to contest discharge [in the usual manner].

#### **140. Interim Suspension of Discharge**

- (1) On receiving an application to contest the bankrupt debtor's discharge, the court, if satisfied that there are reasonable grounds for concluding that an order suspending discharge would be made after a substantive hearing, may make an interim order provisionally suspending the bankrupt debtor's discharge until a hearing may take place.
- (2) When making an interim order under subsection (1), the court may order the Bankrupt Trustee to investigate the extent to which the bankrupt debtor has complied with the personal insolvency duties specified in sections 35, 111, 112, and 113 ~~41, 91, 92, and 93~~ of this Act.
- (3) Where an application to contest the bankrupt debtor's discharge has been presented by a trustee or creditor outside of the time period specified in subsection ~~139(2) 423(2)~~, a court may permit a late application to be submitted where the court is satisfied that
  - (a) the delay in submitting the application has been caused by exceptional circumstances beyond the control of the applicant; and/or
  - (b) facts have been established that were not known to the applicant during the time period specified in subsection ~~139(2) 423(2)~~ above.
- (4) Where the court is convinced that further investigation of the bankrupt debtor's affairs by the Bankruptcy Trustee is required prior to a hearing of the application to contest discharge, the court may issue a further interim order
  - (a) provisionally suspending the bankrupt debtor's discharge and
  - (b) postponing the hearing for a period reasonably necessary for such investigation to take place.
- (5) When determining whether to make an interim order under subsections (1) and (4), or to permit a late application under subsection (3), the court shall have due regard to any unfairness to the bankrupt debtor which might result from the extension of the bankruptcy period.

#### **141. Application to Contest Discharge: Bankruptcy Report**

- (1) The Bankruptcy Trustee must prepare a bankruptcy report and file it in the court when an application to contest discharge has been made under section ~~139 423~~.
- (2) The Bankruptcy Trustee must report as to-
  - (a) The affairs of the bankrupt debtor,

- (b) The manner in which the bankrupt debtor has performed the duties imposed on debtors under this Act and/or obeyed orders of the court,
  - (c) The Trustee's view as to whether a ground exists for denial of discharge,(d)
  - (d) Any other matter relating to the bankruptcy which the Trustee has reason to consider would assist the court in making a decision as to the bankrupt debtor's discharge.
- (3) The Bankruptcy Trustee must provide the debtor and the creditors with a copy of the bankruptcy report **at least [xx] days in advance of the hearing** of the application to contest discharge.
- (4) If a creditor contests discharge on grounds other than those specified in the bankruptcy report, the creditor must give notice, to the Bankruptcy Trustee and the bankrupt debtor, **not less than [xx] days in advance of the hearing** of the application to contest discharge, of the grounds on which discharge is contested.

#### **142. Court Determination of Application to Contest Discharge**

- (1) On the hearing of an application to contest discharge, the court may, having regard to the circumstances of the case,
- (a) Immediately and unconditionally discharge the bankrupt debtor; or
  - (b) ~~Discharge the bankrupt debtor on conditions; or~~
  - (c) Discharge the bankrupt debtor but suspend the order for a fixed period.;
  - (d) ~~Discharge the bankrupt debtor, with or without conditions, at a specified future date.~~
- (2)** Where the court suspends a discharge order, ~~or provides that the bankrupt debtor will be discharged at a specified future date,~~ the effect of the order must be that the bankrupt debtor shall be **discharged no later than [x] days/months years from the date of the Bankruptcy Order after the expiry of**
- (a) Where subsection (1) applies, the period of 3 years; or
  - (b) Where subsection (2) applies, the period of 7 years, from the date of the Bankruptcy Order.
- ~~(3) Where~~
- ~~(a) at any time after the expiration of one year after the date of any order made under this section,~~
  - ~~(b) the bankrupt debtor satisfies the court that there is no reasonable likelihood of her or his being in a position to comply with conditions set in the order, and~~
  - ~~(c) The bankrupt debtor satisfies the court that her or his inability to comply with the relevant conditions is due to circumstances for which the bankrupt debtor should not reasonably be held responsible,~~
- ~~the court may discharge the bankrupt debtor immediately and unconditionally.~~

#### **143. Revocation of Discharge**

- (1) The court may, on the application of the Bankruptcy Trustee or a creditor, and after notice to the bankrupt debtor and a hearing, revoke a discharge granted under section **137 or 142** ~~122 or 126~~ above.

- (2) An application to revoke a discharge under this section may only be made at a time before 1 year after the discharge.
- (3) The court may only revoke a discharge under this section if the court is satisfied that-
  - (a) The discharge was obtained through the fraud of the bankrupt debtor; and the applicant did not know of such fraud until after such discharge; **or**
  - (b) The bankrupt debtor fraudulently failed to report income and/or property to the Bankruptcy Trustee, where such income and/or property were not exempt from distribution to creditors under the rules of sections **31, 32, 33, and 114** ~~6, 7, and 94~~ of this Act. ~~;~~ **or**
  - (c) ~~The bankrupt debtor knowingly and wilfully failed to comply with a condition of discharge imposed by the court under section 126.~~
- (4) The revocation of a discharge does not prejudice or affect the rights or remedies that any person other than the bankrupt debtor would have had if the discharge had not been revoked.
- (5) Property that has been acquired by the bankrupt debtor after discharge and that is vested in the bankrupt debtor at the date of the revocation-
  - (a) Vests in the Bankruptcy Trustee subject to any encumbrances; and
  - (b) Must be applied by the Bankruptcy Trustee to pay debts that the bankrupt debtor has incurred since the date of discharge.

#### **144. Annulment of Bankruptcy Order**

- (1) The court may annul a Bankruptcy Order if it at any time appears to the court
  - (a) That, on any grounds existing at the time the order was made, the order ought not to have been made; or
  - (b) That the provable debts and the expenses of the Bankruptcy have all, since the making of the Bankruptcy Order, either been paid or secured to the satisfaction of the court.
- (2) The court may annul a Bankruptcy Order whether or not the bankrupt debtor has been discharged from the Bankruptcy.
- (3) Where the court annuls a Bankruptcy order
  - (a) any sale or other disposition of property, payments made or other thing duly done, under any provision in this Part, by or under the authority of the Official Receiver, Bankruptcy Trustee, or the court, shall be valid, but
  - (b) if any of the Bankruptcy Estate is then vested, under any such provision, in such a Bankruptcy Trustee, it shall vest in such person as the court may appoint, or, in default of any such appointment, revert to the bankrupt debtor on such terms (if any) as the court may direct.

**145. Application for Debt Restructuring Arrangement during Bankruptcy**

- (1) A bankrupt debtor may apply to court for an order staying the administration of the Bankruptcy for a limited period of 90 days, for the purpose of preparing a proposal for a Debt Restructuring Arrangement under Part 4.
- (2) Where a court has made an order under subsection (1), the debtor must prepare a proposal for a Debt Restructuring Arrangement under the procedure specified in Part 4.
- (3) Where a proposal for a Debt Restructuring Arrangement in respect of a bankrupt debtor has been approved by creditors under section 51 28 and confirmed by the court under section 53 30,
  - (a) The Debt Restructuring Arrangement shall take effect in accordance with its terms and the provisions of Part 4; and
  - (b) the court order providing for the confirmation of the Debt Restructuring Arrangement shall also provide for the annulment of the Bankruptcy Order in accordance with section 144 118.
- (4) Where a court has annulled a Bankruptcy Order under subsection (3), the annulment shall have the effects specified in subsection 118(3) above.

**Chapter 11: The Official Receiver**

**146. References to Bankruptcy Trustee to include references to the Official Receiver**

- (1) All provisions in this or any other Act, referring to the Bankruptcy Trustee or trustee in bankruptcy shall, unless the context otherwise requires, or the Act otherwise provides, include the Official Receiver when acting as Bankruptcy Trustee.

**147. Powers of Official Receiver as regards the Debtor's Conduct in Bankruptcy**

- (1) The Official Receiver shall investigate the conduct of the bankrupt debtor and report to the court, stating whether there is reason to believe that the bankrupt debtor has committed any act
  - (a) Which constitutes an offence under this Act or any enactment repealed by this Act; or
  - (b) Which would justify the court in refusing or suspending the bankrupt debtor's discharge, or making the debtor's discharge subject to conditions.
- (2) Subsection (1) shall not apply to a case in which the Official Receiver considers that an investigation under that subsection is unnecessary.
- (3) The Official Receiver shall make such other reports concerning the conduct of the bankrupt debtor as the court may direct.
- (4) A report by the Official Receiver under this section shall in any proceedings be prima facie evidence of the facts stated in it.

- (5) The Official Receiver shall act in accordance with the provisions of section 95 74 regarding the Official Receiver's power to apply to court for a public examination of the bankrupt debtor.
- (6) The Official Receiver shall take such part as he or she may deem fit in the public examination of the bankrupt debtor under section 95 74.
- (7) The Official Receiver shall give such assistance as the **Attorney General** may direct in relation to the prosecution of any offence under this Act.

**148. General Duties of the Official Receiver as to the Bankruptcy**

- (1) The Official Receiver shall act as Bankruptcy Trustee in the circumstances specified in section 96 75.
- (2) The Official Receiver shall act as Interim Receiver in the circumstances specified in section 90 69.
- (3) The Official Receiver shall advertise, and provide notice of, all such matters as it may be necessary to advertise, or provide notice of, under this Act.

## ***Chapter 12: Partnerships in Bankruptcy***

**149. Bankruptcy Applications and Bankruptcy Petitions in cases of Partnerships**

- (1) Any creditor whose debt is sufficient to entitle the creditor to present a bankruptcy petition against all the partners of a firm may present a bankruptcy petition under section 84 63 against any one or more partners of the firm without including the others.
- (2) **Where all debtors are eligible for a Bankruptcy Order under section 81**, two or more debtors who are partners in a business partnership may file a joint bankruptcy application under section 80 59 above.
- (3) When a Bankruptcy Order is made under section 83 62 in respect of a joint bankruptcy application, the Order applies both separately and jointly to the debtors.

**150. Power to dismiss petition against some respondents only**

- (1) Where there are more respondents than one to a bankruptcy petition, the court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them.

**151. Property of partners to be vested in same trustee**

- (1) Where a Bankruptcy Order has been made under section 89 68 in relation to a bankruptcy petition against one member of a partnership,
  - (a) any other bankruptcy petition or application against or by a member of the same partnership shall be filed with the first-mentioned petition;
  - (b) unless the court directs otherwise, the same Bankruptcy Trustee shall be appointed as may have been appointed in respect of the Bankruptcy Estate of the first-mentioned member of the partnership; and
  - (c) the court may give such directions for consolidating the proceedings as it sees fit.
- (2) Where a Bankruptcy Order has been made under section 83 62 in relation to a bankruptcy application made by one member of a partnership,

- (a) any other bankruptcy petition or application against or by a member of the same partnership shall be filed with the first-mentioned application;
- (b) unless the court directs otherwise, the same Bankruptcy Trustee shall be appointed as may have been appointed in respect of the Bankruptcy Estate of the first-mentioned member of the partnership; and
- (c) the court may give such directions for consolidating the proceedings as it sees fit.

**152. Actions by Bankruptcy Trustee and bankrupt debtor's partners**

- (1) Where a Bankruptcy Order has been made in respect of a member of a partnership, the court may authorise the Bankruptcy Trustee to commence and prosecute any action in the names of the Bankruptcy Trustee and of the bankrupt debtor's partner.
- (2) Where the court has authorised the Bankruptcy Trustee to commence and prosecute an action under subsection (1), any release by such bankrupt debtor's partner of the debt or demand to which the action relates shall be void.
- (3) Where a Bankruptcy Trustee makes an application to court for authority to commence and prosecute an action under subsection (1), the Bankruptcy Trustee must provide notice of the application to the bankrupt debtor's partner.
- (4) Where a Bankruptcy Trustee makes an application to court for authority to commence and prosecute an action under subsection (1), the bankrupt debtor's partner may contest the application on showing good cause.
- (5) Where a bankrupt debtor's partner contests the application under subsection (4),
  - (a) the court may, if it thinks fit, direct that he or she shall receive his or her proper share of the proceeds of the action, and
  - (b) if he or she does not claim any benefit therefrom, he or she shall be indemnified against costs in respect thereof as the court directs.

**153. Actions on joint contracts**

- (1) Where a bankrupt debtor is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt.

**154. Proceedings in partnership name**

- (1) Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm.
- (2) In the circumstances applicable in subsection (1) the court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner and verified on oath or otherwise, as the court may direct.

## Part VIII – Personal Insolvency Register

### 155. Authority to Maintain Personal Insolvency Register

- (1) The Authority shall establish and maintain a Personal Insolvency Register.
- (2) The Personal Insolvency Register shall be in electronic form and such other form (if any) as the Authority decides.

### 156. Purpose of Personal Insolvency Register

- (1) The Personal Insolvency Register has the purpose of **maintaining records and** information about debtors in respect of whom a Personal Insolvency Order is in effect.
- (2) The Personal Insolvency Register has the further purposes of
  - (a) facilitating the compliance, audit, and other supporting and administrative functions of the Official Receiver, Authority, courts, personal insolvency officials, or any other person under this Act;
  - (b) facilitating the enforcement functions and the exercise of the powers of the Official Receiver, Authority, the courts, personal insolvency officials, or any other person under this Act; and
  - (c) providing statistical information and information for research purposes in relation to Personal Insolvency Procedures.

### 157. Information to be Recorded in Personal Insolvency Register

- (1) The Personal Insolvency Register must contain the following information in respect of a debtor who is subject to a personal insolvency procedure:
  - (a) the debtor's full name;
  - (b) any other name (including any alias or trading name) used by the debtor and known to the Official Receiver or the Authority;
  - (c) the debtor's address;
  - (d) the fact of the existence of a Personal Insolvency Order in respect of the debtor;
  - (e) the type of Personal Insolvency Order made in respect of the debtor;
  - (f) the date on which a Personal Insolvency Order was made in respect of the debtor;
  - (g) the scheduled date for discharge of the Personal Insolvency Order;
  - (h) the court which made a Personal Insolvency Order in respect of the debtor;
  - (i) the case number, if any, associated with the Personal Insolvency Order;

- (j) the name, address, and contact details of any authorised intermediary, personal insolvency agent, personal insolvency administrator, and/or Bankruptcy Trustee who is acting in the debtor's case;
- (k) the address and contact details of the office of the Official Receiver dealing with the debtor's case;
- (l) any other information required to be entered in the Personal Insolvency Register under this Act; and
- (m) any other information as may be prescribed by secondary legislation.

#### **158. Removal of Information from Personal Insolvency Register**

- (1) On the discharge of the debtor from a personal insolvency procedure, the Authority shall remove all information relating to the debtor from the Personal Insolvency Register.
- (2) On the removal of information relating to the debtor from the Personal Insolvency Register, the Authority shall retain all relevant records relating to the debtor's case on file for a period of [x] years.
- (3) On the revocation of discharge under sections 78 or 143 56 or 127, the Authority shall
  - (a) Republish in the Personal Insolvency Register the information relating to a debtor's case specified in section 157 32; and
  - (b) Record in the Personal Insolvency Register the making of a revocation order, and the date on which such revocation order was made.
- (4) Where a Personal Insolvency Order has been made in respect of a debtor on two or more occasions, the Authority shall
  - (a) Maintain information relating to the debtor on the Personal Insolvency Register for a period of [x] years after the debtor's discharge from a second or subsequent Personal Insolvency Procedure; and
  - (b) Ensure that the Personal Insolvency Register contains all of the information required by this Act about the debtor and each insolvency event.

#### **159. Access to Personal Insolvency Register**

- (1) A person may only search the Personal Insolvency Register in accordance with this Act, secondary legislation made under this Act, or rules made by the Authority under this Act.
- (2) Members of the public may inspect the Personal Insolvency Register at all reasonable times.
- (3) The Authority may charge a fee to members of the public for inspection of the Personal Insolvency Register.
- (4) The Personal Insolvency Register may be searched by any person, or by any party acting with the consent of that person, for the purpose of searching for information about that person.
- (5) The Personal Insolvency Register may be searched by any person



- (a) For the purpose of ascertaining whether a Personal Insolvency Order is in effect in respect of another person, where such ascertainment is necessary in the course of a person's business for evaluating or ascertaining the creditworthiness or credit standing of another person **or in connection with the investigation of title to property of any nature;**
  - (b) For the purpose of ascertaining whether a Personal Insolvency Order has been made in respect of a debtor on two or more occasions;
  - (c) For any purpose related to the debtor's participation in a Personal Insolvency Procedure;
  - (d) For the purpose of facilitating the compliance, audit, and other supporting and administrative functions of the Official Receiver, Authority, courts, personal insolvency officials, or any other person under this Act;
  - (e) For the purpose of facilitating the enforcement functions and the exercise of the powers of the Official Receiver, Authority, courts, or any other person under this Act;
  - (f) For the purpose of providing statistical information and information for research purposes in relation to Personal Insolvency Procedures.
- (6) The Personal Insolvency Register may be searched only by reference to the following criteria:
- (a) The name of the debtor;
  - (b) The case number, if any, associated with the Personal Insolvency Order;
  - (c) The name of a court;
  - (d) The date of the Personal Insolvency Order;
  - (e) Any combination of the criteria in paragraphs (a) to (e); or
  - (f) Any other criteria as may be prescribed by secondary legislation.

#### **160. Authority and Official Receiver not Liable for Act or Omission**

The Official Receiver and the Authority cannot be sued for any act or omission in relation to the maintenance of a public register under this subpart done or omitted to be done in good faith and with reasonable care.

#### **161. Personal Insolvency Register and Credit Information Bureau**

[Provisions to coordinate publication of data in Personal Insolvency Register and Credit Information Bureau.]

## Part IX – Personal Insolvency Offences

### **Chapter 1: Offences – General Provisions**

#### **162. Defence of Absence of Intent**

- (1) A person is not guilty of an offence under this Part if ~~he or she~~ proves **unless it is proven** that, at the time of the conduct constituting the offence, he or she had ~~no~~ intent

- (a) to defraud,
- (b) To deceive,
- (c) To conceal the state of his or her affairs; or
- (d) to defeat the law.

**163. Penalties for Offences under this Part**

- (1) A person who, without fraudulent intent, commits an offence under this Part is liable on conviction to imprisonment for a term not exceeding **x years** or to a fine not exceed **xxx rupees** or both.
- (2) A person who, with fraudulent intent, commits an offence under this Part is liable on conviction to imprisonment for a term not exceeding **x years** or to a fine not exceed **xxx rupees** or both.

**164. Criminal Liability after Discharge**

- (1) Without prejudice to his or her liability in respect of a subsequent personal insolvency, a debtor is not guilty of an offence under this Part in respect of anything done after his or her discharge from a personal insolvency procedure.
- (2) Notwithstanding subsection (1), nothing in this Part prevents the institution of a proceedings against a discharged debtor for an offence committed before his or her discharge from a personal insolvency procedure.
- (3) Chapter 3 applies whether or not the Bankruptcy Order is annulled, but proceedings for an offence under Chapter 3 shall not be instituted after the annulment.

## **Chapter 2: Personal Insolvency Offences**

**165. Personal Insolvency Procedure Applications: False Information**

- (1) A person on whose behalf an application or proposal to which this section applies is made is guilty of an offence if **the person** ~~he or she~~, in respect of that application or proposal,
  - (a) ~~(a)~~ knowingly or recklessly provides information which is false or misleading in a material respect; or
  - (b) ~~(b)~~ knowingly or recklessly makes a material omission in any statement made under this Act in relation to ~~his or her~~ **the person's** financial affairs.
- (2) This section applies to an application or proposal—
  - (a) under section ~~37~~ **43** for a Debt Protection Moratorium Order;
  - (b) under section ~~49~~ **26** for a Debt Restructuring Arrangement;
  - (c) under section ~~66~~ **44** for a Debt Rehabilitation Order; or
  - (d) under section ~~80~~ **59** for a Bankruptcy Order.

**166. Personal Insolvency Procedures: Non-Compliance with Duties of Debtors**

- (1) ~~An insolvent individual~~ **A person who is party, as a debtor,** ~~who is party~~ to a Debt Protection Moratorium Order is guilty of an offence if **the debtor** ~~he or she~~—
- (a) intentionally fails to comply with an obligation under sections 35 Duties of Debtors under Personal Insolvency Procedures and 41 Obligations of **Debtors Insolvent Individuals** during Debt Protection Moratorium, or
  - (b) provides information to the court or the Official Receiver in connection with such an obligation, knowing the information to be false or misleading in a material respect.
- (2) A person who is party, as a debtor, to a Debt Restructuring Arrangement under Part 4 is guilty of an offence if **the debtor** ~~he or she~~—
- (a) intentionally fails to comply with an obligation under sections 35 Duties of Debtors under Personal Insolvency Procedures and 55 Duties of Debtor under Debt Restructuring Arrangement, or
  - (b) provides information to the court, personal insolvency agent, personal insolvency administrator, or the Official Receiver in connection with such an obligation, knowing the information to be false or misleading in a material respect.
- (3) A person who is party, as a debtor, to a Debt Rehabilitation Order under Part 5 is guilty of an offence if **the debtor** ~~he or she~~—
- (a) intentionally fails to comply with an obligation under sections 35 Duties of Debtors under Personal Insolvency Procedures and 70 Effect of Debt Rehabilitation Order, or
  - (b) provides information to the court or the Official Receiver in connection with such an obligation, knowing the information to be false or misleading in a material respect.

**167. Personal Insolvency Procedures: Documents and Records**

- (1) A person to whom this section applies is guilty of an offence where **the person** ~~he or she~~ commits an act referred to in subsection (2) for the purpose of—
- (a) obtaining a Debt Protection Moratorium Order;
  - (b) avoiding an obligation under sections 35 Duties of Debtors under Personal Insolvency Procedures and 41 Obligations of **Debtors Insolvent Individuals** during Debt Protection Moratorium;
  - (c) obtaining an order confirming the coming into effect of a Debt Restructuring Arrangement;
  - (d) avoiding an obligation under sections 35 Duties of Debtors under Personal Insolvency Procedures and 55 Duties of Debtor under Debt Restructuring Arrangement;
  - (e) avoiding the termination of a Debt Restructuring Arrangement;
  - (f) obtaining a Debt Rehabilitation Order;
  - (g) avoiding an obligation under 35 Duties of Debtors under Personal Insolvency Procedures and 70 Effect of Debt Rehabilitation Order;

- (h) avoiding the termination or conversion of a Debt Rehabilitation Order; or
  - (i) avoiding any other obligation under this Act.
- (2) A person commits an act referred to in this subsection where **the person** ~~he or she~~—
- (a) fails to provide, at the request of the court or Official Receiver, all of the financial records of which he or she has possession or control,
  - (b) prevents the production to the court or Official Receiver of a financial record,
  - (c) fraudulently parted with, altered or made any omission in, or been concerned in or taken part in fraudulently parting with, destroying, altering or making any omission in, any financial record.
- (3) This section applies to a person
- (a) Who has made an application or proposal under sections 37, 49, or 66; or
  - (b) In respect of whom a Debt Protection Moratorium Order, Debt Rehabilitation Order, or order confirming a Debt Restructuring Arrangement has been made.
- (4) In this section “financial record”, in relation to a person to whom this section applies, means a book, document or record relating to that person’s financial affairs.

**168. Personal Insolvency Procedures: Disposal of Property**

- (1) A **debtor** ~~person~~ to whom this section applies is guilty of an offence where **the debtor** ~~he or she~~ commits an act referred to in subsection (2) for the purpose of—
- (a) obtaining a Debt Protection Moratorium Order;
  - (b) avoiding an obligation under sections **35 and 41** ~~11 and 17~~;
  - (c) obtaining a Debt Restructuring Arrangement;
  - (d) avoiding an obligation under sections **35 and 55** ~~11 and 32~~;
  - (e) avoiding the termination of a Debt Restructuring Arrangement;
  - (f) obtaining a Debt Rehabilitation Order;
  - (g) avoiding an obligation under sections **35 and 70** ~~11 and 51~~;
  - (h) avoiding the termination or conversion of a Debt Rehabilitation Order; or
  - (i) avoiding any other obligation under this Act.
- (2) Subject to subsection (3), a **debtor** ~~person~~ commits an act referred to in this subsection where **the debtor**, **other than in the normal course of business carried on by the debtor or in the normal family affairs of the debtor** ~~he or she~~—
- (a) makes or causes to be made a gift of any of **the debtor’s** ~~his or her~~ property to another person,
  - (b) otherwise makes or causes to be made any transfer of any of **the debtor’s** ~~his or her~~ property, on terms that provide for **the debtor** ~~him or her~~ to receive no consideration, to another person, or
  - (c) enters into a transaction with another person involving the transfer of any of **the debtor’s** ~~his or her~~ property to that other person or to a third person (whether or not the third person is a party to the transaction), where the value of the property concerned, in money or money’s worth, is

significantly greater than the value, in money or money's worth, of the consideration provided by the other person.

- (3) Subsection (2) does not apply to property of a value of less than [\\$xxx].
- (4) This section applies to a **debtor** person
  - (a) Who has made an application or proposal under sections 13, 26, or 44; or
  - (b) In respect of whom a Debt Protection Moratorium Order, Debt Rehabilitation Order, or order confirming the coming into effect of a Debt Restructuring Arrangement, has been made.

#### **169. Personal Insolvency Procedures: Credit and Business**

- (1) A **debtor** ~~relevant individual~~ is guilty of an offence if he or she, either alone or with any other person, obtains credit in **an amount of more than [\\$xxxx]** without informing the person from whom the credit is obtained of—
  - (a) ~~The debtor's his or her name~~, as specified in the Debt Protection Moratorium Order, Debt Restructuring Arrangement, or Debt Rehabilitation Order concerned, and
  - (b) the fact that ~~the debtor he or she~~ is subject to a Debt Protection Moratorium Order, Debt Restructuring Arrangement, or Debt Rehabilitation Order.
- (2) In this section, ~~"relevant individual"~~ **"debtor"** means a **debtor** ~~person~~ in respect of whom—
  - (a) a Debt Protection Moratorium Order has been made, for so long as the Debt Protection Moratorium Order remains in effect;
  - (b) an order has been made confirming the coming into effect of a Debt Restructuring Arrangement; for so long as the Debt Restructuring Arrangement remains in effect; or
  - (c) a Debt Rehabilitation Order has been made, for so long as the Debt Rehabilitation Order remains in effect.
- (3) The reference in subsection (1) to a **debtor** ~~relevant person~~ obtaining credit includes the following cases—
  - (a) where goods are **hired** ~~bailed~~ to him or her under a hire-purchase agreement, or agreed to be sold to him or her under a conditional sale agreement, and
  - (b) where he or she is paid in advance (in money or otherwise) for the supply of goods or services.

### **Chapter 3: Bankruptcy Offences**

#### **170. Bankruptcy Offences: Non-disclosure and False Representations**

- (1) The bankrupt debtor is guilty of an offence if
  - (a) ~~he or she~~ the **bankrupt debtor** does not, to the best of his or her knowledge and belief, disclose all the property comprised in ~~his or her estate~~ **the Bankruptcy Estate** to the Official Receiver or the Bankruptcy Trustee, or

- (b) ~~he or she~~ **the bankrupt debtor** does not inform the Official Receiver or the Bankruptcy Trustee of any disposal of any property which but for the disposal would be so comprised, stating how, when, to whom and for what consideration the property was disposed of.
- (2) Subsection (1)(b) does not apply to any disposal in the normal course of business carried on by the bankrupt debtor or to any payment of the ordinary expenses of the bankrupt debtor or his or her family.
- (3) The bankrupt debtor is guilty of an offence if he or she makes a false representation for, or is guilty of any other fraud for, the purpose of obtaining the consent of creditors to any agreement with reference to the bankrupt debtor's property or financial affairs.

#### 171. Bankruptcy Offences: Property

- (1) The bankrupt debtor is guilty of an offence if
- (a) ~~He or she~~ **the bankrupt debtor** does not deliver up possession to the Official Receiver or Bankruptcy Trustee, or as the Official Receiver or Trustee may direct, of such part of his or her property as is in his or her possession or under his or her control and possession of which he or she is required by law so to deliver up; **or**
- (b) ~~He or she~~ **the bankrupt debtor** conceals any debt due to or from him or her or conceals any property the value of which is not less than [xxx] and possession of which ~~he or she~~ **the bankrupt debtor** is required to deliver up to the Official Receiver or Bankruptcy Trustee.
- (2) The bankrupt debtor is guilty of an offence if he or she disposes of any property, **other than in the normal course of business carried on by the bankrupt debtor or in the normal family affairs of the bankrupt debtor**, the value of which was not less than [\$xxx] and possession of which ~~he or she~~ **the bankrupt debtor** has or would have been required to deliver up to the Official Receiver or the Bankruptcy Trustee. (4)
- (3) The bankrupt is guilty of an offence if he or she,
- (a) with the intent to hinder, delay or defeat creditors, and
- (b) **other than in the normal course of business carried on by the bankrupt debtor or in the normal family affairs of the bankrupt debtor**, makes or causes to be made, or has in the period of **12 months** ~~5 years~~ ending with the commencement of the Bankruptcy made or caused to be made, any gift or transfer of, or any charge on, his or her property.

#### 172. Bankruptcy Offences: Documents

- (1) The bankrupt debtor is guilty of an offence if he or she does not deliver up possession to the Official Receiver or the Bankruptcy Trustee, ~~or as the Official Receiver or Bankruptcy Trustee may direct, of all~~ books, papers and other records of which ~~he or she~~ **the bankrupt debtor** has possession or control and which relate
- (a) **to provable debts, or property forming part of the Bankruptcy Estate; and**
- (b) **To the period since the commencement of the Bankruptcy, and the period of 12 months ending with the commencement of the Bankruptcy.** ~~his or her estate or his or her affairs.~~
- (2) The bankrupt debtor is guilty of an offence if—

- (a) he or she prevents the production of any financial record relating directly to provable debts, or property forming part of the Bankruptcy Estate, and to the period since the commencement of the Bankruptcy or the period of 12 months ending with the commencement of the Bankruptcy;
  - (b) fraudulently parted with, altered or made any omission in, or been concerned in or taken part in fraudulently parting with, destroying, altering or making any omission in any financial record relating directly to provable debts, or property forming part of the Bankruptcy Estate, and to the period since the commencement of the Bankruptcy or the period of 12 months ending with the commencement of the Bankruptcy;
  - (c) he or she attempts to account for any part of his or her property by fictitious losses or expenses; or
  - (d) in the 12 months before the making of the bankruptcy application or the presentation of the bankruptcy petition, he or she did anything which would have been an offence under paragraph (a), (b), or (c) ~~(b), (c), or (d)~~ above if the Bankruptcy Order had been made before he or she did it.
- (3) The bankrupt debtor is guilty of an offence if
- (a) ~~(a)~~ he or she disposes of, or alters or makes any omission in, or causes or permits the disposal, altering or making of any omission in, any book, document or record relating directly
    - (i) to provable debts, or property forming part of the Bankruptcy Estate to his or her property or financial affairs, and
    - (ii) To the period since the commencement of the Bankruptcy or the period of 12 months ending with the commencement of the Bankruptcy;
  - (b) in the 12 months ~~two years~~ before the making of the bankruptcy application or the presentation of the bankruptcy petition, he or she did anything which would have been an offence under paragraph (a) if the Bankruptcy Order had been made before he or she did it.
- (4) In this section "financial record", in relation to a person to whom this section applies, means a book, document or record relating directly to provable debts, or property forming part of the Bankruptcy Estate, and to either the period since the commencement of the Bankruptcy, or the period of 12 months ending with the commencement of the Bankruptcy. ~~relating to that person's financial affairs~~

### **173. Bankruptcy Offences: Credit and Borrowing**

- (1) The bankrupt debtor is guilty of an offence if—
- (a) either alone or jointly with any other person, the bankrupt debtor obtains credit to the extent of [\$xxx] or more without informing the creditor that a Bankruptcy Order is in effect in respect of the bankrupt debtor; or
  - (b) the bankrupt debtor engages (whether directly or indirectly) in any business under a name other than that specified in the Bankruptcy Order without disclosing to all persons with whom he or she enters into any business transaction the name specified in the Bankruptcy Order.

- (2) The bankrupt debtor is guilty of an offence if, after the commencement of Bankruptcy or within **12 months** before the making of a bankruptcy application or the presentation of a bankruptcy petition-
- (a) The bankrupt debtor obtains property on credit and has not paid for the property; and
  - (b) The bankrupt debtor obtains the property on credit-
    - (i) by a false representation or other fraud;
    - (ii) by a false statement of financial position or other false statement of the bankrupt debtor's affairs; or
    - (iii) under the false pretence of carrying on business and dealing in the normal course of business.
- (3) ~~The bankrupt debtor is guilty of an offence if, after the commencement of Bankruptcy or within **12 months** before the making of a bankruptcy application or the presentation of a bankruptcy petition, the bankrupt debtor pawned, pledged or disposed of any property of the that the bankrupt debtor has obtained on credit and has not been paid for, unless the pawning, pledging or disposal was in the normal course of the debtor's business.~~
- (4) The reference to the bankrupt debtor obtaining credit includes the following cases
- (a) Where goods are bailed **hired** to him or her under a hire-purchase agreement, or agreed to be sold to him or her under a conditional sale agreement, and
  - (b) Where he or she is paid in advance (whether in money or otherwise) for the supply of goods or services.

#### **174. Bankruptcy Offences: False Claims**

- (1) The bankrupt debtor is guilty of an offence if, knowing or believing that a false debt has been proved by any person under the Bankruptcy, he or she fails for a period of **one month** to inform the Bankruptcy Trustee. **[Instead of a period of one month, an alternative would be to include the formula "as soon as practicable". This may be depend on what is considered a reasonable time frame for expecting a debtor to become aware and notify the Bankruptcy Trustee of a relevant matter, and the balance between a certain deadline and a more flexible approach.]**

#### **175. Bankruptcy Offences: Leaving Sri Lanka**

- (1) The bankrupt debtor is guilty of an offence if ~~he or she~~ **the bankrupt debtor,**
- (a) **while having the intent specified in section 162 Intent, and**
  - (b) **other than in the normal course of business carried on by the bankrupt debtor or in the normal family affairs of the bankrupt debtor,**
- leaves, or attempts or prepares to leave, Sri Lanka with any property **the value of which is not less [xxx]** and possession of which ~~he or she~~ **the bankrupt debtor** is required to deliver up to the Official Receiver or the Bankruptcy Trustee.
- (2) ~~The bankrupt debtor is guilty of an offence if he or she, in the **6 months** before the making of the bankruptcy application or the presentation of the bankruptcy petition, he or she did anything which would have been an offence under subsection (1) if the Bankruptcy Order had been made immediately before he or she did it.~~



**176. Bankruptcy: Non-Compliance with Duties of Debtors**

- (1) A bankrupt debtor is guilty of an offence if he or she—
- (a) intentionally and without reasonable excuse fails to comply with an obligation under sections 35, 111, 112, and 113 ~~11, 91, 92, and 93~~;
  - (b) provides information to the court, Bankruptcy Trustee, or the Official Receiver in connection with an obligation under sections 35, 111, 112, and 113 ~~11, 91, 92, and 93~~, knowing the information to be false or misleading in a material respect; or
  - (c) intentionally and without reasonable excuse refuses to answer fully and truthfully all proper questions put to the bankrupt debtor at any examination held under this Act.

**177. Bankruptcy: Failure to Keep Proper Records with Intent to Conceal**

- (1) A bankrupt debtor is guilty of an offence if he or she, with intent to conceal the true state of his or her financial affairs, has within the period of 12 months ~~two years~~ prior to the making of a bankruptcy application or presentation of a bankruptcy petition, failed to keep and preserve a proper record of ~~the bankrupt debtor's~~ ~~his or her~~ transactions.

Parts X and XI: Rescue of Companies

Part X – Administration

*Role of Administrator*

**178. Role of administrator**

The administrator of a company in administration –

- (a) has control of the company's affairs, business and property;
- (b) may administer the company's affairs, business and property;
- (c) is required to investigate the company's affairs;
- (d) has the following objective – **intended to provide a clearer statement of the key role of the administrator, essentially focused on rescue where possible**
  - (i) ~~having regard to the interests of creditors, shareholders and employees,~~ to administer the company's affairs, business and property in a way that maximises the chances of the company, or as much as possible of its business, continuing in existence; and
  - (ii) if it is not possible for the company or its business to continue in existence, to administer the company's affairs, business and property in a way that results in a better return for the creditors and shareholders than would result from an immediate liquidation of the company;

- (e) may, subject to the applicable provisions of this Act, terminate or dispose of all or part of the company's business, and dispose of all or part of the company's property; and
- (f) may perform or exercise any function or power that the company or any of its directors or other officers could perform or exercise if the company were not in administration.

### *Process of Administration*

#### **179. When administration commences**

The administration of a company commences on the day on which, and at the time at which, an administrator other than a replacement administrator is appointed under this Part (*Administration*).

#### **180. Administration routes**

- (1) Following commencement of an administration, and subject to subsection (4) and to the other applicable provisions of this Act, the administrator is to –
  - (a) convene –
    - (i) an initial meeting; and
    - (ii) subsequently, an outcome meeting; or
  - (b) in relation to a proposed deed of company arrangement –
    - (i) convene a combined initial and outcome meeting;
    - (ii) apply to the court for a deed review hearing; and
    - (iii) after hearing such views of creditors as are expressed on this matter at the combined initial and outcome meeting –
      - (a) proceed to the deed review hearing; or
      - (b) convene an outcome meeting.
- (2) In this section –
  - “expedited route” means the course of action described in subsection (1)(b); and
  - “standard route” means the course of action described in subsection (1)(a).
- (3) In the standard route –
  - (a) the objectives of an initial meeting include the provision of an opportunity for creditors to decide subject to the applicable provisions of this Act –
    - (i) whether or not to replace the administrator; and
    - (ii) whether or not an administration creditors' committee should be appointed and, if so, who should be appointed as members of that committee.
  - (b) the objectives of an outcome meeting include the making of a resolution by creditors, subject to the applicable provisions of this Act, on whether –
    - (i) a proposed deed of company arrangement should be approved;
    - (ii) unless the company is already in liquidation, a liquidator should be appointed; or
    - (iii) the administration should end **otherwise**.
- (4) In the expedited route –

- (a) the objectives of a combined initial and outcome meeting include –
    - (i) the objectives of an initial meeting referred to in subsection (3)(a); and
    - (ii) the making of a resolution by creditors, subject to the applicable provisions of this Act, on whether or not a proposed deed of company arrangement should be approved; and
  - (b) the objective of a deed review hearing is a determination by the court, subject to the applicable provisions of this Act, on whether or not a deed of company arrangement approved by creditors should be made binding.
- (5) Forthwith after commencement of the administration and subject to subsection (6), the administrator shall –
- (a) decide to pursue the standard route; or
  - (b) decide to pursue the expedited route.
- (6) The administrator may not decide to pursue the expedited route unless –
- (a) a directors' statement has been provided to the administrator under section [•] (*Directors' statement in administration*); and
  - (b) the administrator is satisfied that –
    - (i) there is sufficient support from creditors for approval of a proposed deed of company arrangement at the combined initial and outcome meeting; and **envisaged that this support would be evidenced by lock-up/support agreements from sufficient creditors**
    - (ii) if the proposed deed of company arrangement referred to in paragraph (b) were to take effect, it would comply with the requirements in section [•] (*Requirements for a deed*).
- (7) In this Part (*Administration*) –
- “combined initial and outcome meeting” means a meeting of creditors, of the kind described in section [•] (*Combined initial and outcome meeting*);
- “convening period” means the period of 20 working days after commencement of the administration, and includes any period for which it is extended under subsection (3) or subsection (4) of section [•] (*Outcome meeting*);
- “deed review hearing” means a court hearing of the kind described in section [•] (*Deed review hearing*);
- “initial meeting” means a meeting of creditors, of the kind described in section [•] (*Initial meeting*);
- “outcome meeting” means a meeting of creditors, of the kind described in section [•] (*Outcome meeting*).

### *Appointment of Administrator*

#### **181. Who may be appointed and act as administrator**

- (1) A person may not be appointed or act as administrator of a company ~~unless~~ **only** if the person –

- (a) is qualified under section [•] (~~Registration~~) (*Individuals who are qualified to serve as key office holders*) to serve as an ~~Insolvency Practitioner~~ *a key office holder* with respect to the administration;
  - (b) is **not disqualified** under section [•] (*Qualifications of administrators*) from being appointed or acting as an administrator;
  - (c) has certified in writing that the person –
    - (i) is qualified under section [•] (~~Registration~~) (*Individuals who are qualified to serve as key office holders*) to serve as an ~~Insolvency Practitioner~~ *a key office holder* with respect to the administration; and
    - (ii) is **not disqualified** under section [•] (*Qualifications of administrators*) from being appointed or acting as an administrator; and
  - (d) has consented in writing to the appointment and has not withdrawn the consent at the time of appointment.
- (2) A person who, with the person's consent, is appointed or acts as administrator of a company knowing that any of the requirements of paragraphs (a), (b) and (c) of subsection (1) has not been met, shall be guilty of an offence. [Provision for offence – approach TBD]

#### **182. Qualifications of administrators**

- (1) [Except in such circumstances as may be prescribed,] the following persons and their related parties are disqualified from being appointed or acting as an administrator of a company – **the carve-out for prescribed circumstances is intended to allow for appointments in systemically significant cases where it would not otherwise be practicable to identify a suitable IP who would be meet the qualification requirements, but it may not be considered necessary**
- (a) a person who is or who has within the period of two years immediately preceding the date of commencement of the administration been a creditor of the company, except as a liquidator of the company;
  - (b) a person who is or who has within the period of two years immediately preceding the date of commencement of the administration been a director or other officer or an auditor or employee of the company or of a related company;
  - (c) a person who has or who has had within the period of two years preceding the date of commencement of the administration –
    - (i) a direct interest in a share issued by the company or by a related company; or
    - (ii) an indirect interest in [five *per centum*] or more of any class of shares issued by the company or by a related company; or
  - (d) a person who is or has been a receiver of property of the company within the period of three years immediately preceding the date of commencement of the administration.

- (2) A person who is appointed or acts as an administrator when disqualified under subsection (1) shall be guilty of an offence. [Provision for offence – approach TBD]

**183. Who may appoint an administrator**

- (1) Subject to subsection (2), an administrator may be appointed by –
- (a) the company, where section [\*] (*Appointment of administrator by the company*) so provides;
  - (b) the board of the company, where section [\*] (*Appointment of administrator by the board of the company*) so provides;
  - (c) a liquidator or a provisional liquidator, where section [\*] (*Appointment of administrator by a liquidator or provisional liquidator*) so provides;
  - (d) a secured creditor or a receiver, where section [\*] (*Appointment of administrator by a secured creditor*) so provides; or
  - (e) the court, where section [\*] (*Appointment of administrator by the court*) so provides.
- (2) If the company is already in administration, an administrator may not be appointed except –
- (a) by the creditors, as a replacement administrator for an administrator that the creditors have removed, under section [\*](2)(a) (*Removal of administrator from office by creditors*);
  - (b) by the appointer of the first administrator, under section [\*](4) (*Vacancy in office of administrator or deed administrator*);
  - (c) by the court; or
  - (d) pursuant to a process specified by the court under section [\*](5)(a)(ii) (*Vacancy in office of administrator or deed administrator*).

**184. Appointment of two or more administrators**

- (1) Two or more persons may be appointed as administrators in any case where this Part (*Administration*) provides for the appointment of an administrator.
- (2) Where two or more persons are appointed as administrators –
- (a) an administrator's functions and powers may be performed or exercised by any one of them, or by any two or more of them together, except so far as the resolution, instrument or order appointing them provides otherwise;
  - (b) [any personal liability of the persons as administrators shall be joint and several;] and
  - (c) a reference in this Act to an administrator refers to whichever one or more of the administrators as the case requires.

**185. Appointment of administrator by the company**

- (1) Subject to section [\*](2) [\*] (*Restriction on appointment of administrator by the company or board*), the company may, by resolution, appoint an administrator where the company has, by resolution, decided that

–

- (a) in the opinion of the shareholders voting for the resolution, the company is or is likely to become insolvent; and
- (b) an administrator of the company should be appointed. **Intended to reduce the restrictiveness of conditions for appointment as compared with the current CA 2007, s 401, with a view to facilitating the restructuring of viable enterprises led by independent professionals**

(2) An appointment under subsection (1) shall be in writing.

#### 186. Appointment of administrator by the board of the company

(1) Subject to section [•](2) (*Restriction on appointment of administrator by the company or board*), the board of the company may, by resolution, appoint an administrator where the board of the company has, by resolution, decided that –

- (a) in the opinion of the directors voting for the resolution, the company is or is likely to become insolvent; and
- (b) an administrator of the company should be appointed. **Intended to reduce the restrictiveness of conditions for appointment as compared with the current CA 2007, s 401, with a view to facilitating the restructuring of viable enterprises led by independent professionals**

(2) An appointment under subsection (1) shall be in writing.

(3) **Where the articles of the company vest the management of the company in the board of the company, in the case of conflict between the views of shareholders and those of the board on the matter referred to in subsection (1)(b) or as to who should be appointed as administrator, the views of the board shall prevail.**

#### 187. Restriction on appointment of administrator by the company or board

(1) An administrator may not be appointed under section [•](1) (*Appointment of administrator by the company*) or section [•](1) (*Appointment of administrator by the board of the company*) after a liquidation has commenced.

(2) Where an application under section [•](1) (*Appointment of administrator by the court*) or section [•](2)(c) (*Appointment of liquidator*) has been made and served on the company, and is pending, an administrator may not be appointed under section [•](1) (*Appointment of administrator by the company*) or section [•](1) (*Appointment of administrator by the board of the company*) except –

- (a) if the appointment is made within seven working days after the application is served on the company;
- (b) if the application was made by a creditor under section [•](1)(a) (*Appointment of administrator by the court*) or section [•](2)(c) (*Appointment of liquidator*), with the prior, written consent of that creditor;
- (c) with the permission of the court; or

- (d) as a replacement administrator to fill a vacancy in the office of administrator, where the previous administrator was appointed in accordance with –
  - (i) one of the preceding paragraphs of this subsection; or
  - (ii) this paragraph.
  
- (3) During a receivership of the whole, or substantially the whole, of the company's property and undertaking, an administrator may not be appointed under section [•](1) (*Appointment of administrator by the company*) or section [•](1) (*Appointment of administrator by the board of the company*) except –
  - (a) with the prior, written consent of the person by whom or in whose interests the receiver was appointed;
  - (b) with the permission of the court; or
  - (c) as a replacement administrator to fill a vacancy in the office of administrator, where the previous administrator was appointed in accordance with –
    - (i) one of the preceding paragraphs of this subsection; or
    - (ii) this paragraph.

**188. Appointment of administrator by a liquidator or provisional liquidator**

- (1) Subject to subsections (3) and (4), the liquidator or provisional liquidator of a company may appoint an administrator where the liquidator or provisional liquidator thinks that –
  - (a) the company is or is likely to become insolvent; and
  - (b) if an administrator is appointed, either –
    - (i) the survival of the company or the whole or part of its business is reasonably capable of being achieved; or
    - (ii) a better return for the creditors and shareholders may be achieved than would be likely either in the liquidation or if the liquidation of the company were to commence immediately (as the case may be).
  
- (2) An appointment under subsection (1) shall be in writing.
  
- (3) The liquidator, or a related party of the liquidator, may not be appointed as administrator unless either of the following is first obtained –
  - (a) the approval of the creditors by resolution; or
  - (b) the permission of the court.
  
- (4) The appointment of an administrator under subsection (1) suspends the liquidation or provisional liquidation (as the case may be), including the powers of the liquidator or provisional liquidator (as the case may be) to act on the company's behalf, but does not remove the liquidator or provisional liquidator (as the case may be) from office.

**189. Appointment of administrator by a secured creditor**

- (1) Subject to subsection (3), a secured creditor who holds an encumbrance over the whole, or substantially the whole, of a company's property and undertaking, or a receiver appointed by that person, may appoint an administrator where the encumbrance has become, and is still, enforceable.
- (2) An appointment under subsection (1) shall be in writing.
- (3) A secured creditor who appoints an administrator under subsection (1) shall give written notice of the appointment to the company as soon as practicable and in any event before the close of the next working day after appointment.
- (4) The secured creditor or receiver may not appoint an administrator if the company is already in liquidation.

**190. Appointment of administrator by the court**

- (1) Subject to subsection (2), the court may appoint an administrator on the application of one of the following –
  - (a) the company;
  - (b) one or more directors of the company;
  - (c) a contributory of the company;
  - (d) a creditor (including a contingent or prospective creditor) of the company;
  - (e) if the company is in liquidation, the liquidator;
  - (f) where a provisional liquidator has been appointed, the provisional liquidator;
  - (g) the Registrar; or
  - (h) the Authority.
- (2) The court may appoint an administrator where the court is satisfied that –
  - (a) the company is or is likely to become insolvent and, if an administrator is appointed, either –
    - (i) the survival of the company or the whole or part of its business is reasonably capable of being achieved; or
    - (ii) a better return for the creditors and shareholders may be achieved than would be likely if the liquidation of the company were to commence immediately; or
  - (b) it is just and equitable to do so.

**191. Commencement of administration to be recorded**

- (1) Where an administrator is appointed under section [•](1) (*Appointment of administrator by the company*), the company shall record in the resolution appointing the administrator the date on which, and the time at which, the resolution was passed.
- (2) Where an administrator is appointed under section [•](1) (*Appointment of administrator by the board of the company*), the board of the company shall record in the resolution appointing the administrator the date on which, and the time at which, the resolution was passed.
- (3) Where an administrator is appointed under section [•](1) (*Appointment of administrator by a liquidator or provisional liquidator*), the liquidator or provisional liquidator (as the case may be) shall record in the



instrument appointing the administrator the date on which, and the time at which, the instrument was made.

- (4) Where an administrator is appointed under section [•](1) (*Appointment of administrator by a secured creditor*), the secured creditor or receiver appointing the administrator shall record in the instrument appointing the administrator the date on which, and the time at which, the instrument was made.
- (5) Where an administrator is appointed under section [•](1) (*Appointment of administrator by the court*), the court shall record in the order appointing the liquidator the date on which, and the time at which, the order was made.

#### **192. Appointment of administrator may not be revoked**

The appointment of an administrator may not be revoked, except where the administrator is removed by –

- (a) the court; or
- (b) the creditors, under this Part (*Administration*).

#### **193. Notice of administrator's appointment and details**

- (1) An administrator appointed by a company, liquidator, provisional liquidator or a secured creditor (or receiver appointed by a secured creditor) shall –
  - (a) before the close of the next working day after appointment, give written notice of the appointment to the Registrar and Authority;
  - (b) as soon as practicable, and in any event before the close of the next working day after appointment, give written notice of the appointment to each person who holds an encumbrance over the whole, or substantially the whole, of the company's property and undertaking; and
  - (c) within two working days after appointment –
    - (i) give public notice of the administrator's appointment, including –
      - (a) the administrator's full name;
      - (b) the date of the appointment;
      - (c) the identity of the appointer of the administrator and, where the appointer was the court, the identity of the person on whose application the appointment was made; and
      - (d) the administrator's office address and contact number to which, during normal working hours, inquiries may be directed; and
    - (ii) send a copy of the public notice to the Registrar and Authority.
- (2) Where the appointment of an administrator is in addition to an administrator who already holds office or is in place of a person who has vacated office as administrator, each notice under subsection (1) shall state that fact.
- (3) In the event of any change in an administrator's office address or contact number, the administrator shall within two working days –

- (a) give public notice of the new address or contact number (as the case may be); and
  - (b) send a copy of the public notice to the Registrar and Authority.
- (4) A failure to comply with this section shall not affect the validity of a person's appointment as administrator.
- (5) An administrator who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

**194. Documents to refer to administration**

- (1) For so long as a company is in administration, the administrator shall ensure that –
- (a) every document issued or signed by or on behalf of the company or the administrator shall have the words “in administration” after the name of the company where it first appears; and
  - (b) if the company has one or more websites, each page of each website shall state prominently that the company is in administration.
- (2) A failure to comply with subsection (1) shall not affect the validity of –
- (a) a person's appointment as administrator; or
  - (b) any document.
- (3) Every person who fails to comply with subsection (1) shall be guilty of an offence. [Provision for offence – approach TBD]

**195. Documents in administration to refer to a change of name**

- (1) Where a company in administration has changed its name less than six months before commencement of the administration, the administrator shall ensure that –
- (a) every document issued or signed by or on behalf of the company or the administrator shall include its former name; and
  - (b) if the company has one or more websites, each page of each website shall include its former name.
- (2) A failure to comply with subsection (1) shall not affect the validity of –
- (a) a person's appointment as administrator; or
  - (b) any document.
- (3) Every person who fails to comply with subsection (1) shall be guilty of an offence. [Provision for offence – approach TBD]

## *Effects of Administration*

### **196. No enforcement of encumbrance during administration**

- (1) Subject to sections [•] (*Application in decision period for permission to enforce fixed security*) and [•] (*Power exercised before commencement of administration*), during the administration of a company, no person shall enforce –
- (a) an encumbrance over property of the company; or
  - (b) an encumbrance over property of a third party granted in respect of a debt, liability or other obligation of the company,
- except with –
- (c) the prior, written consent of the administrator; or
  - (d) the permission of the court on such terms and conditions as the court thinks fit.
- (2) The administrator may give consent under subsection (1)(a) where it is satisfied that the enforcement of the encumbrance is ~~in-~~ **does not harm** the interests of the creditors of the company as a whole.
- (3) The administrator is not liable in damages for declining to give consent under subsection (1)(a).
- (4) The court may give permission under subsection (1)(b) where it is satisfied that substantial injustice would otherwise result.

### **197. No recovery of property during administration**

- (1) Subject to sections [•] (*Application in decision period for permission to enforce fixed security*) and [•] (*Power exercised before commencement of administration*), during the administration of a company, the owner or lessor of property that is used or occupied by, or is in the possession of, the company, including under a hire-purchase agreement, shall not take possession of the property or otherwise recover it, except with –
- (a) the prior, written consent of the administrator; or
  - (b) the permission of the court on such terms and conditions as the court thinks fit.
- (2) The administrator may give consent under subsection (1)(a) where it is satisfied that the taking possession or other recovery of the property is ~~in-~~ **does not harm** the interests of the creditors as a whole.
- (3) The administrator is not liable in damages for declining to give consent under subsection (1)(a).
- (4) The court may give permission under subsection (1)(b) where it is satisfied that substantial injustice would otherwise result.

### **198. No commencement or continuation of proceedings during administration**

- (1) During the administration of a company, no formal proceeding against the company or any of its property shall be commenced or continued, except with –
- (a) the prior, written consent of the administrator; or
  - (b) the permission of the court on such terms and conditions as the court thinks fit.

- (2) For the purposes of subsection (1), “formal proceeding” includes –
  - (a) any legal proceeding; and
  - (b) any mediation or arbitral process or other formal adversarial process.
- (3) The administrator may give consent under subsection (1)(a) where it is satisfied that the commencement or continuation of the proceeding ~~is in~~ **does not harm** the interests of the creditors as a whole.
- (4) The administrator is not liable in damages for declining to give consent under subsection (1)(a).
- (5) The court may give permission under subsection (1)(b) where it is satisfied that substantial injustice would otherwise result.

#### **199. No execution or other process during administration**

Subject to sections [•] (*Application in decision period for permission to enforce fixed security*) and [•] (*Power exercised before commencement of administration*), during the administration of a company, no execution or other legal process, or the levying of distress, against the company or any of its property shall be commenced or continued, except with the permission of the court on such terms and conditions as the court thinks fit.

#### **200. No benefit of execution or other process unless completed before administration**

- (1) Subject to subsection (2), a creditor is not entitled to the benefit of any execution or other legal process or distress against a company in administration or any of its property unless the execution or other legal process or distress was completed before the commencement of the administration, except with the permission of the court on such terms and conditions as the court thinks fit.
- (2) For the purposes of subsection (1) –
  - (a) an execution against movable or immovable property is completed by seizure, or the entry into possession of a receiver or a person charged with execution, and a completed sale; and
  - (b) an attachment of a debt is completed by satisfaction of the debt.
- (3) A person who acquires property of the company in good faith –
  - (a) from a Fiscal charged with an execution process; or
  - (b) on which distress has been levied,acquires good title as against the company and administrator.
- (4) Nothing in this section shall affect or limit the application of sections [•] (*Voidable preference*) to [•] (*Misfeasance*).

#### **201. Duties of Fiscal in administration**

- (1) This section applies to an execution process against property of a company in administration that was levied but not completed within the meaning of section [•](2) (*No benefit of execution or other process unless completed before administration*) before commencement of the administration.

- (2) Subject to subsection (3) and unless the court orders otherwise on the application of the execution creditor, a Fiscal shall, as soon as practicable after the administration commences –
- (a) deliver to the administrator any property of the company that is in or comes into the Fiscal's possession or custody or under the Fiscal's control as a result of the execution process; and
  - (b) cause the administrator to be paid –
    - (i) any proceeds of realisation of property of the company under the execution process;
    - (ii) any money of the company received or seized under the execution process; and
    - (iii) any money paid to avoid seizure or sale of property of the company under the execution process,where such proceeds or money –
    - (iv) are in or come into the Fiscal's possession or custody or under the Fiscal's control; or
    - (v) are paid into court (and have not already been paid out).
- (3) The Fiscal may retain or cause to be retained –
- (a) from property delivered under subsection (1)(a), property of a value that the Fiscal may reasonably determine to represent the costs of the execution process incurred by the Fiscal; or
  - (b) from proceeds or money paid under subsection (1)(b), the costs of the execution process incurred by the Fiscal.

**202. Power exercised before commencement of administration**

- (1) Where, before the commencement of an administration, and by way of enforcement of –
- (a) an encumbrance over property; or
  - (b) a right of the owner or lessor of property, including under a hire-purchase agreement, to take possession of the property or otherwise recover it,
- a receiver or other person –
- (c) entered into possession or custody or assumed control of; or
  - (d) exercised any other power in relation to,
- property of the company or of a third party, nothing in sections [•] (*No enforcement of encumbrance during administration*), [•] (*No recovery of property during administration*), [•] (*No execution or other process during administration*) and [•] (*Effect of administration on dealing with property*) shall prevent the receiver or other person from performing or exercising a function or power in relation to the property.
- (2) Section [•](1) (*Effect of administration on dealing with property*) shall not apply to an agreement, transaction or dealing that affects the property referred to in subsection (1) and is entered into in the performance or exercise of a function or power of the receiver or other person referred to in subsection (1).

**203. Application in decision period for permission to enforce fixed security**

- (1) In this section, “decision period”, with respect to a grantee of a fixed security over property of a company in administration, means the period that –

- (a) begins –
    - (i) if notice of the appointment of the administrator is required to be given to the grantee under section [•] (*Notice of administrator's appointment and details*), on the day on which that notice is received; or
    - (ii) in any other case, on the date of commencement of the administration; and
  - (b) ends at the close of the tenth working day after of commencement of the administration.
- (2) A grantee of a fixed security over property of a company in administration may, within the decision period, apply to the court for an order granting the grantee permission to enforce the fixed security.
- (3) A grantee who makes an application to the court under subsection (2) shall, on the day on which the application is [filed with the court], give written notice of the application to the administrator.
- (4) Within five working days after receiving a notice under subsection (3), the administrator shall file in the office of the court –
- (a) a notice informing the court of whether the administrator supports or opposes the application;
  - (b) a report on the property, debts and other liabilities of the company, so far as these are known to the administrator, stating any respects in which, to the knowledge of the administrator, the report in paragraph (b) may be incomplete; and
  - (c) a statement of reasons supporting or opposing the application (as the case may be).
- (5) After receiving the documents referred to in subsection (4), the court shall conduct a hearing and –
- (a) proceed to make a determination on the application; or
  - (b) where the court considers that it is essential to receive further information from either the grantee or the administrator in order to determine the application –
    - (i) adjourn the hearing for that purpose; and
    - (ii) subsequently make a determination on the application.
- (6) In making a determination under subsection (5), the court may make an order granting permission to the grantee to enforce the grantee's fixed security where the court is satisfied that –
- (a) furthering the achievement of the objective referred to in paragraph (d) of section [•] (*Role of administrator*) will not be materially adversely affected if the application is granted; and
  - (b) in all the circumstances of the case, prejudice will be caused to the grantee if the application is not granted, that outweighs the prejudice that will be caused to other persons with an interest in the company from the granting of the application.
- (7) The court may make an order under subsection (6) on such terms and conditions as it thinks fit, including –
- (a) that a receiver or other person involved in the enforcement shall not perform or exercise specified functions or powers except as permitted by further order of the court;
  - (b) limiting enforcement to specified property;
  - (c) directing that enforcement by a sale shall be conducted in a manner laid down by the court or subject to further permission of or directions from the court.

- (8) A grantee granted permission under subsection (6) shall, from time to time at intervals not exceeding three months, report to the administrator, in such manner and in such level of detail as may be prescribed, on the enforcement of the fixed security.
- (9) In the case of perishable property, the court may on an application under subsection (2) make an order granting permission to the grantee to enforce the fixed security so far as it is a fixed security over perishable property and to hold any proceeds recovered by the grantee on trust for the administrator pending the conduct of a hearing under subsection (5) and the making of an order under subsection (6).

**204. *Lis pendens* in administration**

For the purposes of any enactment relating to the effect of a *lis pendens* on purchasers or mortgagees **grantees**, an application under section [•](2)(c) (*Appointment of liquidator*) made during the administration of the company and served on the company shall be taken **deemed** to be pending and shall constitute a *lis pendens*.

**205. No enforcement of certain guarantees in administration**

- (1) ~~During the administration of a company, a guarantee of a debt, liability or other obligation of the company shall not be enforced against –~~
- ~~(a) a director of the company who is a natural person; or~~
  - ~~(b) a close family member of that person;~~
- ~~except with the permission of the court on such terms and conditions, subject to sections [•] (Effect of debt protection moratorium order), [•] (Effect of court confirmation of debt restructuring arrangement), [•] (Effect of debt rehabilitation order) and [•] (Stay of proceedings and remedies), as the court thinks fit.~~

**206. No consent or permission required for giving notice**

Nothing in this Part (*Administration*) shall require the consent of the administrator, or the permission of the court, for the giving of notice to the company under –

- (a) an agreement relating to property that is used or occupied by, or is in the possession of, the company; or
- (b) a [security agreement].

**207. Effect of administration on directors and other agents of the company**

- (1) The appointment of an administrator does not remove the directors of the company from office.
- (2) Subject to subsections (3) and (4), a director of a company that is in administration may not perform or exercise, or purport to perform or exercise, a function or power as an officer of the company except –
- (a) to appeal against an order made under section [•] (*Appointment of administrator by the court*), appointing an administrator, in such manner, within such period, and with such requirements for notice of intention to appeal as may be prescribed, but the director shall not have any resort to the property of the company in connection with any such appeal (subject to any order the court may make at the conclusion of the appeal);
  - (b) with the prior, written consent of the administrator; or
  - (c) as expressly permitted by this Part (*Administration*).

- (3) The administrator may give consent under subsection (2)(b) where it is satisfied that the performance or exercise of the function or power by the director is in the interests of the creditors as a whole.
- (4) The administrator is not liable in damages for declining to give consent under subsection (2)(b).
- (5) The appointment of an administrator revokes the authority of any agent of the company appointed by or on behalf of the board of the company.

**208. Requirement to provide information to administrator**

- (1) Where an administrator is appointed, every director and other officer of the company shall –
  - (a) as soon as practicable and in any event within five working days after the appointment make available to the administrator all books, records and documents relating to the affairs, business, property and financial circumstances of the company in the person's possession or custody or under the person's control;
  - (b) if required to do so by the administrator, verify by affidavit within a reasonable period that the books, records and documents are complete and correct;
  - (c) if the company has a common seal, promptly make the common seal available for use by the administrator; and
  - (d) give the administrator such assistance as the administrator may reasonably request.
- (2) On the application of the administrator, the court may make an order requiring a director or other officer of the company to comply with subsection (1).
- (3) A verification under subsection (1)(b) may be qualified in relation to specific matters dealt with in the books, records and documents where the person giving the verification does not –
  - (a) consider the books, records and documents to be complete and correct; or
  - (b) have the knowledge necessary to give a verification.

**209. Effect of administration on employees**

The appointment of an administrator does not automatically terminate a contract of employment to which the company is a party.

**210. Effect of administration on dealing with property**

- (1) Subject to section [\*] (*Power exercised before commencement of administration*), an agreement, transaction or dealing by a company in administration, or by a person on behalf of the company, that affects property of the company is void unless the agreement, transaction or dealing was entered into –
  - (a) by the administrator, on the company's behalf;
  - (b) with the prior, written consent of the administrator; or
  - (c) under an order of the court.
- (2) The administrator may give consent under subsection (1)(b) where it is satisfied that the agreement, transaction or dealing is in the interests of the creditors as a whole.
- (3) The administrator is not liable in damages for declining to give consent under subsection (1)(b).



- (4) The court may by order give effect to an agreement, transaction or dealing that is void under subsection (1).
- (5) Subsection (1) shall not apply to a payment, made by a [bank], that is –
- (a) out of an account kept by the company with the [bank];
  - (b) in good faith and in the ordinary course of the [bank's] banking business; and
  - (c) on or before the earlier of –
    - (i) the day on which the [bank] was notified in writing by the administrator that the administration had commenced; and
    - (ii) the day on which the [bank] had reason to believe that the company was in administration.
- (6) A director or other officer of the company who –
- (a) purports, on the company's behalf, to enter into an agreement, transaction or dealing that is void under subsection (1); or
  - (b) is in any other way knowingly concerned in, or a party to, an agreement, transaction or dealing that is void under subsection (1),
- shall be guilty of an offence. [Provision for offence – approach TBD]
- (7) The court may order a director or other officer who is convicted of an offence under subsection (6) to compensate any person, including the company, that has suffered loss as a result of the act or omission constituting the offence.
- (8) If any question arises as to whether, on the date on which an administrator was appointed, an agreement, transaction or dealing that affects property of the company was entered into before or after the time at which the administrator was appointed, that agreement, transaction or dealing shall be presumed, unless the contrary is proved, to have been entered into after that time.
- (9) Notwithstanding any other enactment, no person may, as against the administrator, claim a lien over a book, record or document of the company.

#### **211. Effect of administration on transfer of shares**

- (1) Subject to this section –
- (a) a share in a company in administration shall not be transferred; and
  - (b) the status of a shareholder of a company in administration, as to its liabilities, may not be altered.
- (2) The administrator may consent to the transfer of a share in the company in administration where the administrator is satisfied that the transfer is in the interests of the creditors as a whole.
- (3) The administrator is not liable in damages for declining to give consent under subsection (2).
- (4) The court may, where it is satisfied that substantial injustice would otherwise result, make an order –
- (a) for the transfer of a share of a company in administration; or
  - (b) altering the status of a shareholder of a company in administration, as to its liabilities.

- (5) Nothing in this section shall affect or limit the application of section 46 of the Companies Act.

**212. Essential services in administration**

- (1) In this section—, **a going-concern business is likely to depend on the continued supply of certain services, but the current provisions do not appear to facilitate the continued supply of such services to a company in administration; this section seeks to do so**

“essential good or service” means—

- (a) electricity;
- (b) relevant information technology;
- (c) telecommunications services; and
- (d) water;

“insolvency-related term” is a provision of an agreement for the supply of an essential good or service to a company under which –

- (a) the agreement or the supply would terminate, or any other thing would take place, because the administration of the company commences; or
- (b) the supplier would be entitled to terminate the agreement or the supply, or to do any other thing, because the administration of the company commences;

“relevant information technology” means—

- (a) computer hardware and software;
- (b) data storage and processing, including in relation to cloud services;
- (c) information, advice and technical assistance in relation to the use of information technology;
- (d) point-of-sale terminals; and
- (e) website hosting; and

“telecommunications services” means the conveyance from one device to another by a line, radio frequency, satellite transmission or other medium of a sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of a person using the device.

- (2) Notwithstanding any other enactment, a supplier of an essential good or service shall not –
- (a) refuse to supply the good or service to an administrator, or to a company in administration, by reason of the company’s default in paying charges due for the good or service in relation to a period before the commencement of the administration;
  - (b) make it a condition of the supply of the good or service to an administrator, or to a company in administration, that payment be made of outstanding charges due for the good or service in relation to a period before the commencement of the administration; or
  - (c) rely on an insolvency-related term of the agreement for the supply of the good or service, except with the prior, written consent of the administrator.

- (3) The administrator may give consent under subsection (2)(c) where it is satisfied that the reliance on the insolvency-related term is in the interests of the creditors as a whole.
- (4) The administrator is not liable in damages for declining to give consent under subsection (2)(c).
- (5) For the purposes of the [•] Schedule (*Preferential Claims in Liquidation*), the charges incurred by an administrator for the supply of an essential good or service are an expense of the administration.

## *Administration Routes*

*Provisions applicable to the standard and expedited routes*

### **213. Provisions applicable to the standard and expedited routes**

- (1) If the administrator has decided under section [•](5) (*Administration routes*) to pursue the standard route, sections [•] (*Initial meeting*) to [•] (*Business at outcome meeting*) shall apply.
- (2) If the administrator has decided under section [•](5) (*Administration routes*) to pursue the expedited route, sections [•] (*Combined initial and outcome meeting*) and [•] (*Deed review hearing*) shall apply.

*Standard route*

### **214. Initial meeting**

- (1) This section applies in the circumstances referred to in section [•](1) (*Provisions applicable to the standard and expedited routes*).
- (2) The administrator shall hold an initial meeting within ten working days after commencement of the administration.
- (3) The following business shall be conducted at the initial meeting –
  - (a) consideration by creditors of the documents tabled at the meeting;
  - (b) a resolution of creditors on whether or not to replace the administrator under section [•](1)(a) (*Removal of administrator from office by creditors*); and
  - (c) if the administrator is seeking to establish an administration creditors' committee, one or more resolutions of creditors on –
    - (i) whether or not to establish such a committee under section [•] (*Creditors' committee in administration*); and
    - (ii) if such a committee is to be established, who are to be appointed as members of that committee.
- (4) The administrator shall table at the initial meeting –
  - (a) a statement to the effect that the conduct and performance of Insolvency Practitioners is monitored by the Authority and providing contact details of the Authority;
  - (b) the written certification specified in paragraph (c) of section [•](1) (*Who may be appointed and act as administrator*);

- (c) the written consent specified in paragraph (d) of section [•](1) (*Who may be appointed and act as administrator*);
  - (d) an interests statement, signed by the administrator, that complies with section [•] (*Interests statement*);
  - (e) if the administrator seeks the payment of any unpaid pre-administration costs, a statement of pre-administration costs, signed by the administrator, that complies with section [•] (*Statement of pre-administration costs*);
  - (f) **the basis (or bases) and (as applicable) the hourly and percentage rate (or rates) and fixed level (or levels) of the administrator's proposed remuneration;** and
  - (g) where a directors' statement has been provided to the administrator under section [•] (*Directors' statement in administration*), that statement.
- (5) At least seven working days before the meeting is required under subsection (2) to be held, the administrator shall convene the initial meeting by –
- (a) giving written notice of the initial meeting to as many of the company's creditors as is reasonably practicable; and
  - (b) giving public notice of the meeting.
- (6) A notice under subsection (5)(a) shall –
- (a) state that an administrator has been appointed;
  - (b) state the following –
    - (i) the administrator's full name;
    - (ii) the date of the appointment;
    - (iii) the identity of the appointer of the administrator and, where the appointer was the court, the identity of the person on whose application the appointment was made; and
    - (iv) the administrator's office address and contact number to which, during normal working hours, inquiries may be directed;
  - (c) specify –
    - (i) the documents to be tabled at the meeting; and
    - (ii) the business to be conducted at the meeting;
  - (d) if the administrator is seeking to establish an administration creditors' committee –
    - (i) summarise the matters referred to in section [•] (*Creditors' committee in administration*); and
    - (ii) invite nominations for membership of such a committee.
- (7) The [•] Schedule (*Procedures for Meetings of Creditors and Contributories*) shall apply to an initial meeting.
- (8) Within two working days after the holding of the initial meeting, the administrator shall send –

- (a) a copy of the statement referred to in subsection (4)(a);
- (b) a copy of the interests statement referred to in subsection (4)(d); and
- (c) a copy of the notice referred to in subsection (5)(a),

to the Registrar and Authority.

- (9) An administrator who fails to comply with any of subsections (2), (4), (5), (6) and (8) shall be guilty of an offence. [Provision for offence – approach TBD]

#### **215. Outcome meeting**

- (1) This section applies in the circumstances referred to in –
  - (a) section [•](1) (*Provisions applicable to the standard and expedited routes*); and
  - (b) section [•](3) (*Deed review hearing*).
- (2) The administrator shall, within the convening period, convene an outcome meeting.
- (3) On the application of the administrator, the court may extend the convening period, but shall not do so if the application has been made after the convening period has expired.
- (4) The creditors may by resolution extend the convening period, but shall not do so after the convening period has expired.
- (5) The convening period may be extended under subsection (3) or subsection (4) where it has already been extended under one or both of those subsections.
- (6) At least seven working days before the meeting is required under subsection (8) to be held, the administrator shall convene the outcome meeting by –
  - (a) giving written notice of the outcome meeting to as many of the company's creditors as is reasonably practicable; and
  - (b) giving public notice of the meeting.
- (7) The administrator shall enclose the following documents with a notice under subsection (6)(a) –
  - (a) the directors' statement provided to the administrator under section [•] (*Directors' statement in administration*), if not tabled at the initial meeting;
  - (b) a report by the administrator about –
    - (i) the affairs, business, property and financial circumstances of the company;
    - (ii) **all agreements, transactions and dealings, entered into after commencement of the administration, affecting property of the company;** and
    - (iii) any other matter material to the creditors' decisions to be considered at the meeting;
  - (c) a statement setting out the administrator's opinion, with reasons for that opinion, about **as to** –
    - (i) whether it would be in the creditors' interests for the company to make a deed of company arrangement;
    - (ii) whether it would be in the creditors' interests for a liquidator to be appointed; or

- (iii) whether it would be in the creditors' interests for the administration to end otherwise;  
and
- (d) where a deed of company arrangement is proposed, a statement by the administrator –
  - (i) setting out the terms of the proposed deed;
  - (ii) explaining the effect of approval of the proposed deed, and in particular its commercial impact; and
  - (iii) containing such other information as may be prescribed.
- (8) The administrator shall hold the outcome meeting within five working days after the end of the convening period.
- (9) An outcome meeting may be adjourned to a day that is not more than 30 working days after the first day on which the meeting was held, unless the court on the application of the administrator orders that the meeting be adjourned to a date later than this.
- (10) An administrator who fails to comply with any of subsections (2), (6), (7) and (8) shall be guilty of an offence. [Provision for offence – approach TBD]

#### **216. Business at outcome meeting**

- (1) This section applies in the circumstances referred to in –
  - (a) section [•](1) (*Provisions applicable to the standard and expedited routes*); and
  - (b) section [•](3) (*Deed review hearing*).
- (2) At an outcome meeting, the creditors may –
  - (a) by resolution, approve a proposed deed of company arrangement specified in the resolution, even if its terms are different from those set out in the administrator's statement referred to in section [•](7)(d) (*Outcome meeting*);
  - (b) unless the company is already in liquidation, by resolution appoint a liquidator; or
  - (c) by resolution, end the administration otherwise.
- (3) The [•] Schedule (*Procedures for Meetings of Creditors and Contributories*) shall apply to an outcome meeting.
- (4) The administrator and the directors of the company shall, before the meeting votes on any resolution, inform the meeting of any voting arrangement of which the administrator or a director (as the case may be) is aware that requires any creditor to vote in a particular way on any resolution that will or may be voted on by the meeting.
- (5) A deed of company arrangement approved by the creditors under subsection (2)(a) [takes effect as if made by the company, on the day on which, and at the time at which, the resolution approving the deed is passed].
- (6) Subject to subsection (7), the directors of the company shall attend the outcome meeting, including any occasion to which the meeting is adjourned, but cannot be required to answer questions at the meeting.

- (7) A director need not attend the outcome meeting where –
- (a) the director has a valid reason for not attending; or
  - (b) the administrator has, or the creditors by resolution have, excused the director from attending.
- (8) A director of the company attending the outcome meeting shall leave for all or part of the remainder of the meeting if the creditors, by resolution, decide that the director should do so.
- (9) The administrator shall record in the resolution of creditors made under subsection (2) the date on which, and the time at which, the resolution was passed.
- (10) Within five working days after the outcome meeting, the administrator shall –
- (a) give written notice of the outcome of the resolution of creditors made under subsection (2) to as many of the company's creditors as is reasonably practicable;
  - (b) give public notice of that outcome; and
  - (c) send a copy of the notice referred to in paragraph (a) to the Registrar and Authority.

*Expedited route*

**217. Combined initial and outcome meeting**

- (1) This section applies in the circumstances referred to in section [•](2) (*Provisions applicable to the standard and expedited routes*).
- (2) The administrator shall hold a combined initial and outcome meeting within ten working days after commencement of the administration.
- (3) The following business shall be conducted at the combined initial and outcome meeting –
- (a) the business referred to in section [•](3) (*Initial meeting*); and
  - (b) a resolution of creditors on approval of a proposed deed of company arrangement specified in the resolution.
- (4) The administrator shall table at the combined initial and outcome meeting the documents referred to in paragraphs (a), (b), (c), (d) and ~~(e)~~, (e) and (f) of section [•](4) (*Initial meeting*).
- (5) At least seven working days before the meeting is required under subsection (2) to be held, the administrator shall convene the combined initial and outcome meeting by –
- (a) giving written notice of the combined initial and outcome meeting to as many of the company's creditors as is reasonably practicable; and
  - (b) giving public notice of the meeting.
- (6) A notice under subsection (5)(a) shall –
- (a) state that an administrator has been appointed;
  - (b) state the following: –

- (i) the administrator's full name;
  - (ii) the date of the appointment;
  - (iii) the identity of the appointer of the administrator and, where the appointer was the court, the identity of the person on whose application the appointment was made; and
  - (iv) the administrator's office address and contact number to which, during normal working hours, inquiries may be directed;
- (c) specify –
- (i) the documents to be tabled at the meeting; and
  - (ii) the business to be conducted at the meeting;
- (d) if the administrator is seeking to establish an administration creditors' committee –
- (i) summarise the matters referred to in section [•] (*Creditors' committee in administration*); and
  - (ii) invite nominations for membership of an administration creditors' committee.
- (7) The administrator shall enclose the following documents with a notice under subsection (5)(a) –
- (a) the directors' statement provided to the administrator under section [•] (*Directors' statement in administration*);
  - (b) a report by the administrator about –
    - (i) the affairs, business, property and financial circumstances of the company;
    - (ii) all agreements, transactions and dealings, entered into after commencement of the administration, affecting property of the company; and
    - (iii) any other matter material to the creditors' decisions to be considered at the meeting;
  - (c) a statement setting out the administrator's opinion, with reasons for that opinion, that it would be in the creditors' interests for the company to make a deed of company arrangement;
  - (d) a statement by the administrator –
    - (i) setting out the terms of the proposed deed of company arrangement;
    - (ii) explaining the effect of approval of the proposed deed, and in particular its commercial impact; and
    - (iii) containing such other information as may be prescribed; and
  - (e) a statement containing such information about the expedited procedure as may be prescribed.
- (8) The [•] Schedule (*Procedures for Meetings of Creditors and Contributories*) shall apply to a combined initial and outcome meeting.
- (9) Subject to subsection (10), the directors of the company shall attend the combined initial and outcome meeting, including any occasion to which the meeting is adjourned, but cannot be required to answer questions at the meeting.
- (10) A director need not attend the combined initial and outcome meeting where –



- (a) the director has a valid reason for not attending; or
- (b) the administrator has, or the creditors by resolution have, excused the director from attending.

(11) A director of the company attending the combined initial and outcome meeting shall leave for all or part of the remainder of the meeting if the creditors, by resolution, decide that the director should do so.

(12) An administrator who fails to comply with any of subsections (2), (4), (5), (6) and (7) shall be guilty of an offence. [Provision for offence – approach TBD]

#### **218. Deed review hearing**

- (1) This section applies in the circumstances referred to in section [•](2) (*Provisions applicable to the standard and expedited routes*).
- (2) After hearing such views of creditors as are expressed on this matter at the combined initial and outcome meeting, the administrator shall –
  - (a) if the requisite majority of creditors ~~creditors, by the requisite majorities, approves~~ **approve** a proposed deed of company arrangement by resolution, even if its terms are different from those set out in the administrator's statement referred to in section [•](7)(d) (*Combined initial and outcome meeting*) –
    - (i) promptly apply to the court for a deed review hearing **[envisaged to be, essentially, the default option in the expedited route]**; or
    - (ii) notwithstanding the approval, if the administrator considers that the proposed deed is fundamentally inconsistent with furthering the achievement of the administrator's objective referred to in paragraph (d) of section [•] (*Role of administrator*) –
      - (a) with immediate effect pursue the standard route in lieu of the expedited route; and
      - (b) convene an outcome meeting. **[intended to provide for a switch to the standard route in the event that one or more creditors raise compelling objections to a pre-agreed deed of company arrangement]**; or
  - (b) if the requisite majority of creditors ~~creditors, by the requisite majorities, does~~ **do** not approve a proposed deed of company arrangement by resolution – **[not envisaged to be a common scenario]**
    - (i) with immediate effect pursue the standard route in lieu of the expedited route; and
    - (ii) convene an outcome meeting.
- (3) If the administrator is required to convene an outcome meeting under paragraph (a) or (b) of subsection (2), sections [•] (*Outcome meeting*) and [•] (*Business at outcome meeting*) shall apply.
- (4) After an application has been made under subsection (2)(a)(i), and until the application has been disposed of by the court, the administration shall continue.
- (5) There shall be [enclosed with] an application under subsection (2)(a)(i) [copies of] –

- (a) the interests statement with respect to the administrator tabled at the combined initial and outcome meeting;
  - (b) if the proposed deed administrator is not the administrator, the interests statement with respect to the deed administrator tabled at the combined initial and outcome meeting or other meeting of creditors;
  - (c) if the administrator seeks the payment of any unpaid pre-administration costs, the statement of pre-administration costs tabled at the combined initial and outcome meeting; and
  - (d) the documents enclosed with the notice of the combined initial and outcome meeting under section [•](7) (*Combined initial and outcome meeting*);
  - (e) the minutes of the combined initial and outcome meeting; and
  - (f) such other information as may be prescribed.
- (6) At a deed review hearing –
- (a) where the court is satisfied that the proposed deed of company arrangement would, if it were to take effect, comply with the requirements in section [•] (*Requirements for a deed*), the court shall order that the proposed deed be binding;
  - (b) where the court is not satisfied that the proposed deed of company arrangement would, if it were to take effect, comply with the requirements in section [•] (*Requirements for a deed*), the court shall make such order as it thinks fit, **appropriate account being taken of the views of the creditors representing the requisite majorities.**
- (7) In making an order under subsection (6), the court may, if it thinks fit –
- (a) impose any term or condition;
  - (b) make any other ancillary order.
- (8) Within five working days after the making of an order under subsection (6), the administrator shall –
- (a) give written notice of the order to as many of the company's creditors as is reasonably practicable;
  - (b) give public notice of the order; and
  - (c) send a copy of the notice referred to in paragraph (a) to the Registrar and Authority.
- (9) A copy of every order made under subsection (6) shall, within five working days after the making of the order, be sent by the court to the Registrar and Authority.
- (10) Where a deed of company arrangement is binding by virtue of an order made under subsection (6), the deed shall be [deemed to have been made by the company] –
- (a) on the day on which, and at the time at which, ~~it was approved by a resolution of creditors at the combined initial and outcome meeting~~ **the order is made**; or
  - (b) on such other day, and at such other time, as the court may order.

Matters applying to both routes

**219. Creditors' committee in administration**

- (1) At any time during an administration and if an administration creditors' committee has not already been established, an administrator may, if the administrator thinks fit and subject to subsection (2), seek the establishment of such a committee. **Framed as a decision for the administrator rather than the creditors**
- (2) The establishment of an administration creditors' committee **and appointments to such a committee** ~~requires a resolution~~ **require one or more resolutions** of creditors adopted at –
  - (a) an initial meeting;
  - (b) a combined initial and outcome meeting; or
  - (c) another meeting of creditors, the notice of which shall –
    - (i) summarise the matters referred to in this section; and
    - (ii) invite nominations for membership of the administration creditors' committee.
- (3) **The [•] Schedule (Procedures for Meetings of Creditors and Contributories) shall apply to a meeting referred to in subsection (2)(c).**
- (4) If established, an administration creditors' committee –
  - (a) shall have the following functions –
    - (i) to consult with the administrator about matters relating to the administration; and
    - (ii) to consider reports from the administrator sent under subsection (4); and
  - (b) may not give directions to the administrator.
- (5) If an administration creditors' committee is established, the administrator shall send reports to the committee containing such information, in such manner, and within such periods as may be prescribed.
- (6) A person is not eligible to be a member of an administration creditors' committee unless the administrator is satisfied that the person is –
  - (a) a creditor;
  - (b) the agent of a creditor under a general power of attorney; or
  - (c) authorised in writing by a creditor to be a member.
- (7) With respect to an administration creditors' committee, the following matters shall be subject to such requirements, restrictions and limitations as may be prescribed –
  - (a) membership **and termination of membership** of the committee;
  - (b) notice of the establishment of the committee **and of matters relating to the committee**;
  - (c) the procedure for convening meetings of the committee;
  - (d) protection of acts or omissions done by members of the committee;
  - (e) reimbursement of expenses of members of the committee; and
  - (f) transactions by members of the committee and their related parties.
- (8) The consequences of defects in the qualifications, nomination or election of members of an administration creditors' committee shall be as may be prescribed.

- (9) Where, by reason of vacancies in an administration creditors' committee that has been established, the committee is unable to act, the administrator shall as soon as practicable give written notice of that fact to each known creditor.

**220. Meetings in administration of ~~shareholders~~, creditors and committees**

- (1) An administrator shall at all times until the end of the administration –
- (a) ~~convene such meetings of shareholders as the administrator sees fit;~~
  - (b) convene such meetings of creditors as the administrator sees fit; and
  - (c) convene such meetings of an administration creditors' committee (if any) –
    - (i) as the administrator sees fit;
    - (ii) as that committee may reasonably request, within five working days after receiving the committee's request.
- (2) The [•] Schedule (*Procedures for Meetings of Creditors and Contributors*) shall apply to the meetings referred to in subsection (1)(a)(b).
- (3) The requirements for notice and ~~the conduct of~~ business of meetings convened under subsection (1)(b)(c) shall be as may be prescribed.

**221. Directors' statement in administration**

- (1) Subject to subsection (3), within five working days after the administration of a company commences the directors of the company shall provide to the administrator a full statement about the affairs, business, property and financial circumstances of the company, showing as at the latest practicable date before the making of the declaration –
- (a) the particulars of its property, including any inventory of stock and the total amount expected to be realised therefrom;
  - (b) the debts and other liabilities of the company;
  - (c) the name and address of each of its creditors;
  - (d) the encumbrance or encumbrances (if any) held by each creditor; and
  - (e) the date on which each encumbrance was created.
- (2) The statement in subsection (1) shall be supported by affidavit by one or more of the persons who are, as at the commencement of the administration, directors of the company, or by such of the following persons as the administrator may reasonably request –
- (a) a person other than a director who is or has been an officer of the company;
  - (b) a person who has taken part in the formation, promotion or management of the company at any time within the period of 12 months immediately preceding the date of commencement of the administration; or

- (c) a person who is or has been within that period a director or other officer of or in the employment of a body corporate that is, or within that period was, a director or other officer of the company to which the statement relates.
- (3) The administrator or the court may extend the time limit for the provision of a statement under subsection (1).
- (4) If a director fails to comply with subsection (1) or subsection (2), that director shall be guilty of an offence.
- [Provision for offence – approach TBD]

## **222. When administration ends**

- (1) An administration ends on the day on which, and at the time at which –
- (a) an outcome meeting is not convened within the convening period, unless an application has been made under –
    - (i) subsection [•](3) (*Outcome meeting*); or
    - (ii) subsection [•](2)(a)(i) (*Deed review hearing*);
  - (b) an application has been made under subsection [•](3) (*Outcome meeting*), the convening period has expired after the application was made and the application is refused;
  - (c) an outcome meeting is convened but is not held within the period referred to in section [•](8) (*Outcome meeting*);
  - (d) the creditors by resolution at an outcome meeting approve a proposed deed of company arrangement under section [•](2)(a) (*Business at outcome meeting*);
  - (e) the creditors by resolution at an outcome meeting appoint a liquidator under section [•](2)(b) (*Business at outcome meeting*) or a liquidator is otherwise appointed;
  - (f) the creditors by resolution at an outcome meeting end the administration under section [•](2)(c) (*Business at outcome meeting*);
  - (g) a deed of company arrangement is [deemed] under section [•](10) (*Deed review hearing*) [to have been made by the company]; or
  - (h) the court ends the administration, under section [•] (*Court's general power in administration and deed administration*) or in the exercise of any other power the court may exercise.
- (2) Where an administration ends under any of paragraphs (a), (b), (c), (e) and ~~(g)~~(h) of subsection (1), the company's status immediately prior to the administration, of being in liquidation or not being in liquidation, is restored.

### ***Deeds of Company Arrangement and Deed Administrators***

*Deeds of company arrangement*

**223. Content of a deed**

- (1) The terms of a deed of company arrangement, including those required to be included in a statement by the administrator under section [•](7)(d)(i) (*Outcome meeting*) or section [•](7)(d)(i) (*Combined initial and outcome meeting*), shall specify –
  - (a) the identity of the deed administrator.
  - (b) the conditions (if any) for the deed to come into operation;
  - (c) the functions, powers and duties of the deed administrator;
  - (d) the functions and powers of the directors;
  - (e) if and to what extent the company will be released from its debts and other liabilities;
  - (f) all amendments to the terms of the company's debts and other liabilities;
  - (g) reporting to creditors by the deed administrator; and
  - (h) the circumstances in which the deed terminates.
- (2) A deed of company arrangement shall be deemed to include such provisions as may be prescribed, except such prescribed provisions as the deed expressly excludes.

**224. Release of third parties under a deed**

- (1) On an application to the court by the administrator, the court may order that a deed of company arrangement, if approved, shall release from liability one or more persons, including related companies and directors of the company, that are sufficiently connected with the deed.
- (2) In deciding whether or not a person is sufficiently connected with the deed of company arrangement for the purposes of subsection (1), the court shall have regard to –
  - (a) whether or not the proposed release is an integral part of the deed;
  - (b) whether or not the person is contributing under the deed; and
  - (c) whether or not, in the absence of a release, the person would have an indemnity claim against the company if called on.

**225. Requirements for a deed**

- (1) Subject to subsection (3), under a deed of company arrangement each creditor is to receive treatment at least as favourable as that which it would have received had the liquidation of the company commenced immediately before the taking effect of the deed.
- (2) Subject to subsections (3) and (4), a deed of company arrangement may not –
  - (a) ~~interfere with the right of a grantee of an encumbrance to enforce the encumbrance;~~ provide for a preferential claim to be paid otherwise than in priority to –
    - (i) a preferential claim ranking behind that preferential claim; or
    - (ii) a claim that is not a preferential claim; ~~or~~

- (b) provide for satisfaction of a materially smaller proportion of the amount of one claim than of the amount of another equally ranked claim; or
  - (c) contain any provision that transfers shares in the company, varies a right attaching to shares in the company or varies the liabilities of or dilutes shareholders of the company.
- (3) ~~Subsections~~ Subsection (1) and paragraphs (a) and (b) of subsection (2) shall not apply to –
- (a) treatment, under the deed of company arrangement, to which the relevant creditor consents;
  - (b) a proposal for a compromise under Part [\*] (*Compromises*).
- (4) Subsection (2)(c) shall not apply to any transfer, variation or dilution that [the shareholders have, or relevant class of shareholders of the company has, by special resolution approved at a meeting convened for the purpose].
- (5) Compliance with the requirements in subsection (1) and subsection (2)(~~e~~)(b) is to be assessed on the basis of –
- (a) reasonable assumptions; and [intended to address situations where the two positions to be compared are not straightforwardly comparable (e.g. in the event that part or all of a creditor's recovery is in the form of equity)]
  - (b) a determination of claims as at the relevant date.
- (6) In determining –
- (a) for the purposes of subsection (1), the treatment that a creditor would have received had the liquidation of the company commenced immediately before the taking effect of the deed; and
  - (b) for the purposes of subsection (2)(~~e~~)(b), whether claims are equally ranked,
- account is to be taken of an agreement under which a creditor has agreed to accept a lower priority in respect of a debt than that which it would otherwise have.
- (7) A deed of company arrangement may not –
- (a) be unfairly prejudicial to, or unfairly discriminatory against, one or more creditors;
  - (b) be contrary to the interests of the creditors as a whole.

**226. Who is bound by a deed** **Extent to which deed is binding**

- (1) A deed of company arrangement is binding on the company, each director and shareholder of the company, the deed administrator and each person who was entitled to vote on the resolution of creditors approving the deed.
- (2) This section does not prevent a grantee of an encumbrance from enforcing the encumbrance except so far as –
  - (a) the deed provides for that the grantee ~~te~~ will not enforce the encumbrance and the grantee voted in favour of the resolution approving the deed; or
  - (b) the court orders otherwise under subsection (4).
- (3) This section does not prevent an owner or lessor of property, including under a hire-purchase agreement, from taking possession of the property or otherwise recovering it except so far as –

- (a) the deed provides for ~~that~~ the owner or lessor (as the case may be) ~~to~~ will not take possession of the property or otherwise recover it and the owner or lessor (as the case may be) voted in favour of the resolution approving the deed; or
  - (b) the court orders otherwise under subsection (4).
- (4) Subject to subsection (5), on an application by an administrator or deed administrator, whichever holds office, the court may order that as from the day on which **and time at which** a deed of company arrangement is made by the company and for such time as may be specified in the order (which may be for a fixed period or until the occurrence of a specified event) –
- (a) a grantee of an encumbrance shall not enforce the encumbrance;
  - (b) an owner or lessor of property, including under a hire-purchase agreement, shall not take possession of the property or otherwise recover it.
- (5) The court may make an order under subsection (4) where it is satisfied that –
- (a) furthering the purposes of the deed will not be materially adversely affected if the application is granted; and
  - (b) in all the circumstances of the case, prejudice will be caused to those with an interest in the company other than the grantee, owner or lessor (as the case may be) if the application is not granted, that outweighs the prejudice that will be caused to the grantee, owner or lessor (as the case may be) from the granting of the application.
- (6) An order under subsection (4) may be made subject to such terms and conditions as the court thinks fit.

#### *Deed administrators*

#### **227. Deed administrator**

- (1) Where the administrator is not the same person as the deed administrator –
- (a) the administrator shall, forthwith after the deed of company arrangement is made, do all that is necessary to put the deed administrator in control of the affairs, business and property of the company that are subject to the deed; and
  - (b) the deed administrator shall, as soon as practicable after taking control of such affairs, business and property, discharge any balance due to the administrator in respect of –
    - (i) costs, charges and expenses properly incurred by and the remuneration of the administrator under this Act; and
    - (ii) personal liability indemnified under paragraphs (a) and (b) of section [•](1)  
*(Administrator's indemnity)*.
- (2) The administrator shall have a lien on the property of the company subject to the deed of company arrangement, in respect of any sums comprising the balance referred to in subsection (1)(b).
- (3) A lien under subsection (2) has the same priority over an encumbrance as the priority accorded to a lien under section [•](3) *(Administrator's indemnity)*.



**228. Who may be appointed and act as deed administrator**

- (1) A person may not be appointed or act as deed administrator of a company unless – **[not designed to require the deed administrator to be an IP, unless required by regulations made under paragraph (b) (though the provisions on voidable transactions and transactions at an undervalue are not designed to be capable of being invoked by a deed administrator who is not an IP)]**
- (a) the person has consented in writing to the appointment and has not withdrawn the consent at the time of appointment;
  - (b) the person is not prohibited under section 213 of the Companies Act, or by an order made under section 214 of the Companies Act, from being appointed or acting as an office holder;**
  - (c) the person complies with such other requirements as may be prescribed; and
  - (d) with respect to the person –
    - (i) the written consent specified in paragraph (a);
    - (ii) an interests statement, signed by the person, that complies with section [\*] (*Interests statement*); and
    - (iii) such other documents as may be prescribed,have been tabled at an initial meeting, outcome meeting, combined initial and outcome meeting or other meeting of creditors.
- (2) A person who, with the person's consent, is appointed or acts as deed administrator of a company knowing that any of the requirements of paragraphs ~~(b) and (c)~~ **(b), (c) and (d)** of subsection (1) has not been met, shall be guilty of an offence. [Provision for offence – approach TBD]

**229. Appointment of two or more deed administrators**

- (1) Two or more persons may be appointed as deed administrators in any case where this Part (*Administration*) provides for the appointment of a deed administrator.
- (2) Where two or more persons are appointed as deed administrators –
- (a) a deed administrator's functions and powers may be performed or exercised by any one of them, or by any two or more of them together, except so far as the deed of company arrangement provides otherwise;
  - (b) [any personal liability of the persons as deed administrators shall be joint and several;]** and
  - (c) a reference in this Act to a deed administrator refers to whichever one or more of the deed administrators as the case requires.

**230. When deed administration commences and deed administrator appointed**

- (1) The deed administration of a company commences on the day on which, and at the time at which, the appointment of a deed administrator takes effect under subsection (2).
- (2) The appointment of the deed administrator specified in a deed of company arrangement that is –
- (a) approved by the creditors under subsection [\*](2)(a) (*Business at outcome meeting*); or

(b) binding by virtue of an order made under subsection [•](6) (*Deed review hearing*),  
takes effect on the day on which, and at the time at which, the deed of company arrangement is made.

**231. Security for appointment of deed administrator**

A deed of company arrangement may require the deed administrator to provide security for the deed administrator's appointment.

**232. Appointment of deed administrator may not be revoked**

Without prejudice to section [•] (*Removal and replacement of deed administrator*), the appointment of a deed administrator may not be revoked, except where the deed administrator is removed by the court.

*Validity, variation and termination of deeds of company arrangement*

**233. Court may rule on validity of a deed**

- (1) On the application of a person referred to in subsection (2), the court may –
- (a) in the case of a deed of company arrangement that is in force, make an order declaring the deed void; or
  - (b) in the case of a proposed deed of company arrangement, make such order as it thinks fit, including granting permission for the proposed deed to take effect subject to certain conditions, where the court is satisfied that –
    - (c) in the case of a deed –
      - (i) there was a material irregularity in obtaining approval of the deed of company arrangement;
      - (ii) the deed does not comply with the requirements in section [•] (*Requirements for a deed*);
      - (iii) there has been a material contravention of the deed by a person bound by it; or
      - (iv) the deed should be declared void for some other reason; or
    - (d) in the case of a proposed deed, would not, if it were to take effect, comply with the requirements in section [•] (*Requirements for a deed*).
- (2) Any of the following persons may make an application to the court under subsection (1) –
- (a) the administrator;
  - (b) the deed administrator or a person to be appointed as deed administrator;
  - (c) a creditor;
  - (d) any other person with an interest in the company; or
  - (e) the Authority.
- (3) An application for an order under subsection (1)(a) shall be made within such period as may be prescribed.
- (4) In making an order under subsection (1)(a) declaring a deed of company arrangement void, the court shall specify in the order the consequences of the declaration.

**234. Variation and termination of a deed**

A deed of company arrangement may specify the terms and conditions on which it may be varied and terminated.

## *Powers of Administrator*

### **235. Powers of administrator**

- (1) An administrator may do all such things as may be necessary or desirable for the administration of the affairs, business and property of the company.
- (2) An administrator shall have and may exercise the powers specified in the [•] Schedule (*Powers of Administrators*).
- (3) In the performance or exercise of a power or function the administrator is the company's agent, and a person dealing with the administrator in good faith and for value is not required to inquire whether the administrator is acting within the administrator's powers.

### **236. Request by administrator for cooperation**

- (1) An administrator may by written notice –
  - (a) subject to section [•] (*Documents required by office holder*), ~~require~~ request a director or shareholder of the company or any other person to deliver to the administrator such books, records or documents of the company in that person's possession or custody or under that person's control relating to the administration as the administrator may determine; and
  - (b) ~~require~~ request –
    - (i) a person who has taken part in the formation, promotion or management of the company;
    - (ii) a past or present shareholder of the company;
    - (iii) a past or present director or other officer of the company;
    - (iv) a past or present receiver of property of the company;
    - (v) a person who is or has been an employee of the company;
    - (vi) a person who is acting or has at any time acted as a lawyer for the company (~~but subject to legal advice privilege or litigation privilege~~);
    - (vii) an accountant or auditor of the company; or
    - (viii) another person having knowledge of the affairs of the company,to do any of the things specified in subsection (2), if and to the extent reasonable.
- (2) The things referred to in subsection (1) are to –
  - (a) attend on the administrator at such time and place as the administrator may request;
  - (b) provide the administrator with such information about the affairs, business, property or financial circumstances of the company as the administrator may request;
  - (c) be examined on oath by the administrator on any matter relating to the affairs, business, property or financial circumstances of the company, under such evidentiary and other procedural rules as may be prescribed;

- (d) assist the administrator in the administration to the best of the person's ability.
- (3) The administrator shall pay to a person referred to in subsection (1)(b), not being an employee of the company, the reasonable travel and other expenses that are incurred in complying with a request made under subsection (2)(1)(b).
- (4) No suit, prosecution or any other legal or other proceeding (including a disciplinary proceeding by any professional body or authority having jurisdiction in respect of professional conduct) shall lie against any person in respect of disclosure in good faith of information to the administrator under this section.
- (5) On the application of the administrator, the court may order a person who has failed to comply with a request made under this section to –
- (a) comply with the request; or
  - (b) attend before the court and be examined on oath, under such evidentiary and other procedural rules as may be prescribed,
- where the court is satisfied that such compliance or examination (as the case may be) –
- (c) is necessary to further the achievement of the objective referred to in paragraph (d) of section [•] (*Role of administrator*); and
  - (d) would not be unreasonably oppressive to the person.

#### **237. Administrator's notice that receivership shall end**

- (1) An administrator may require a receivership to end by giving written notice, in such form as may be prescribed, to the receiver.
- (2) The receivership ends at the close of the next working day after the giving of notice under subsection (1).
- (3) As soon as practicable after receiving a notice under subsection (1) and in any event by the end of the receivership, the receiver shall cease to deal with the property in receivership.
- (4) After a receiver receives a notice under subsection (1) –
- (a) the receiver is not required to take any further steps under section [•](2) (*General duties of receivers*);
  - (b) section [•](4)(b) (*Order of priority where floating charge fixed security receiver appointed*) or section [•](4)(b) (*Order of priority where fixed security floating charge receiver appointed*) (as the case may be) ceases to apply, but any distributions already made thereunder shall not be disturbed on that ground;
  - (c) for the purposes of the [•] Schedule (*Preferential Claims in Liquidation*), the costs, charges and expenses properly incurred by and the remuneration of the receiver under this Act, and the receiver's indemnity under section [•] (*Receiver's indemnity*), shall be treated as an expense of the liquidation administration.

#### **238. Calls on shares by administrator**

An administrator has the same powers as the directors of the company would have had, if the company were not in administration, to make calls on contributories in respect of uncalled capital and other liabilities and to charge interest on and demand payment of calls.

**239. Execution of documents by administrator**

- (1) An administrator may execute in the name and on behalf of the company all documents necessary or incidental to the exercise of the administrator's powers.
- (2) A document signed on behalf of a company by an administrator shall be deemed to have been properly entered into on behalf of the company for the purposes of section 19 of the Companies Act.
- (3) Notwithstanding anything to the contrary in any other law or the articles of a company, an administrator may execute documents in the name and on behalf of the company by affixing the company's common seal to the documents and attesting the affixing of the common seal.
- (4) A document executed in the manner described in subsection (3) shall be deemed to have been properly entered into by the company for the purposes of section 19 of the Companies Act.

**240. Power of administrator to deal with property subject to an encumbrance**

- (1) An administrator may dispose of or otherwise exercise the administrator's powers in relation to any property of the company that is subject to –
  - (a) a floating charge; or
  - (b) a fixed security ranking behind a floating charge under section 431(2) of the Companies Act, as if the property were not subject to that encumbrance.
- (2) Where property is disposed of under subsection (1), the grantee of the encumbrance has the same priority in respect of any property of the company directly or indirectly representing the property disposed of as the grantee had in respect of the property subject to the encumbrance.
- (3) The administrator may apply to the court for an order permitting the disposal (with or without other property) of –
  - (a) any property of the company subject to an encumbrance to which subsection (1) does not apply;
  - or
  - (b) any goods in the possession of the company under a hire-purchase agreement.
- (4) On an application under subsection (3), the court may by order authorise the administrator to (as the case may be) –
  - (a) dispose of the property as if it were not subject to the encumbrance; or
  - (b) dispose of the goods as if all rights of the owner or lessor under the hire-purchase agreement were vested in the company,where the court is satisfied that –
  - (c) the disposal would be likely to further the achievement of the objective referred to in paragraph (d) of section [•] (*Role of administrator*); and
  - (d) in all the circumstances of the case, prejudice will be caused to those with an interest in the company other than the grantee of the encumbrance or the owner or lessor under the hire-purchase agreement (as the case may be) if the application is not granted, that outweighs the

prejudice that will be caused to the grantee or owner (as the case may be) from the granting of the application. **Compared with the current CA 2007, s 417(3), intended to be clearer as to when a court should be prepared to grant an application**

- (5) Without prejudice to subsection (7), it shall be a condition of an order under subsection (4) that in respect of –
- (a) the net proceeds of the disposal; and
  - (b) where those proceeds are less than such amount as may be determined by the court to be the net proceeds that it would be reasonable to realise on an arm's-length sale of the property or goods in the administration, such money as may be required to make good the deficiency, the grantee or owner (as the case may be) shall have the same priority as the grantee or owner had in respect of the property or goods.
- (6) Where a condition imposed under subsection (5) relates to a disposal of property subject to two or more encumbrances, the condition shall preserve the respective priorities of the grantees.
- (7) In making an order under subsection (4), the court may, if it thinks fit –
- (a) impose any term or condition;
  - (b) make any other ancillary order.
- (8) A copy of every order made under subsection (4) shall, within five working days after the making of the order, be sent by the court to the Registrar and Authority.

### *Duties of Administrator*

#### *Duty to investigate*

#### **241. Duty of administrator to investigate company's affairs**

As soon as practicable after the administration of a company commences, an administrator shall –

- (a) investigate the company's affairs;
- (b) consider whether the company may have been a party to a voidable transaction or a transaction at an undervalue, and determine in respect of possible voidable transactions and transactions at an undervalue whether or not it would be in the creditors' interests –
  - (i) to carry out investigations in relation to them; and
  - (ii) to apply to the court under section [•] (*Procedure for setting aside a voidable preference, voidable encumbrance or alienation with intent*) and to seek recovery under section [•] (*Transaction at an undervalue*); and
- (c) form an opinion about ~~as to~~ whether it would be in the creditors' interests for –
  - (i) the company to make a deed of company arrangement;
  - (ii) a liquidator to be appointed; or
  - (iii) the administration to end otherwise.

*Duties to report*

**242. Duty of administrator to report misfeasance**

- (1) Where an administrator believes, or has reasonable grounds to believe, that an involved party has misapplied or retained or become liable or accountable for money or other property of the company, or been guilty of negligence, default or breach of duty or trust in relation to the company, the administrator shall as soon as practicable report the matter to the Registrar and Authority.
- (2) In any case where an administrator makes a report under subsection (1), the administrator shall give to the Registrar and Authority such assistance as the Registrar or Authority (as the case may be) may reasonably request by way of –
  - (a) provision of information;
  - (b) access to documents; and
  - (c) facilities for inspecting and copying documents.
- (3) An administrator who fails to comply with subsection (1) or subsection (2) shall be guilty of an offence.

[Provision for offence – approach TBD]

**243. Duty of administrator to report offence committed** [draws on (but differs from) the current CA 2007, ss 382 and 460]

- (1) Where an administrator believes, or has reasonable grounds to believe, that the company or any involved party has committed an offence under –
  - (a) this Act;
  - (b) the Companies Act; **or**
  - (c) [the Securities and Exchange Commission of Sri Lanka Act, No. 19 of 2021]<sup>21</sup>, ~~36 of 1987~~; **or**
  - (d) ~~[TBC]~~,the administrator shall as soon as practicable report the matter to the Registrar and Authority.
- (2) The Registrar and Authority shall refer a matter reported under subsection (1) to the appropriate law enforcement authority.
- (3) In any case where an administrator makes a report on a matter under subsection (1) that is reported to a law enforcement authority under subsection (2), the administrator shall give to the authority such assistance as the authority may require by way of –
  - (a) provision of information;
  - (b) access to documents; and
  - (c) facilities for inspecting and copying documents.

**(4) Nothing in this section shall –**

<sup>21</sup> Law Commission to consider whether this paragraph should be removed, as the number of companies registered by the SEC is understood to be relatively small.

- (a) impose any duty on an administrator to investigate whether any offence of the kind referred to in that subsection (1) has been committed; or
  - (b) affect or limit any duty imposed on an administrator under any other enactment.
- (5) An administrator who fails to comply with subsection (1) or subsection (3) shall be guilty of an offence.
- [Provision for offence – approach TBD]

#### **244. Duty of administrator to prepare accounts**

- (1) An administrator or a person who was an administrator at the end of the administration (as the case may be) shall prepare an account for each of the following periods –
- (a) the period of six months (or shorter, as the administrator may determine) immediately after the appointment of the administrator;
  - (b) each subsequent period of six months during which the administrator holds office; and
  - (c) the period between the last period of the kind referred to in subsection (1)(b) and the day on which the administrator vacates office.
- (2) Within 20 working days after the end of the period in question referred to in subsection (1), the person shall –
- (a) in such manner as may be prescribed, send to each known creditor and shareholder the account referred to in subsection (1); and
  - (b) send a copy of the account to the Registrar and Authority.
- (3) The account referred to in subsection (1) shall be in such form as may be prescribed and shall –
- (a) show, for each period, the administrator's receipts and payments; and
  - (b) show, for each period except the first, the aggregate of the administrator's receipts and payments since the day on which the administrator was appointed; and
  - (c) except in the case of the account referred to in subsection (1)(c), contain an updated interests statement, signed by the administrator, that complies with section [\*] (*Interests statement*).
- (4) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]
- (5) This section shall, if prescribed, apply to deed administrators with the necessary modifications.

#### **245. Duty of administrator to send final report**

- (1) This section applies to a person who was an administrator at the end of an administration.
- (2) As soon as practicable after performing all of the person's other duties in relation to the administration, and in any event within 20 working days after the end of the administration, the person shall send to the Registrar and Authority a final report containing such information as may be prescribed, in such manner as may be prescribed.



- (3) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]
- (4) This section shall, if prescribed, apply to deed administrators with the necessary modifications.

*Miscellaneous duties*

**246. Duty of administrator in relation to money**

- (1) Subject to subsections (2) and (3), and to any order that the court may make, an administrator shall forthwith pay all money received by the administrator into an account or accounts established for the purpose at one or more banks.
- (2) An administrator shall not pay any money received into a personal bank account of the administrator.
- (3) An administrator may invest money received in the course of the administration in financial products, to such extent (if any) and subject to such terms and conditions as may be prescribed.
- (4) An administrator who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

**247. Duty of administrator and deed administrator in relation to accounting records**

- (1) An administrator shall make accounting records that correctly record and explain, in relation to the period of the administration, all receipts, payments, and other transactions relating to the property and undertaking of the company.
- (2) On an application to the court by an interested person, the court may order that the applicant may inspect the accounting records referred to in subsection (1) on such terms and conditions as the court thinks fit.
- (3) A deed administrator shall make accounting records that correctly record and explain, in relation to the period of the deed administration, all receipts, payments, and other transactions relating to the property and undertaking of the company.
- (4) On an application to the court by an interested person, the court may order that the applicant may inspect the accounting records referred to in subsection (3) on such terms and conditions as the court thinks fit.
- (5) The accounting records referred to in subsections (1) and (3) shall be retained by the administrator or deed administrator (as the case may be) for at least six years after the administration or deed administration (as the case may be) ends.
- (6) An administrator or deed administrator who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

*Remuneration of Administrator and Deed Administrator*

**248. Remuneration of administrator and deed administrator**

- (1) Subject to subsection (3) and to section [•](1)(a) (*Order regarding remuneration or appointment of administrator or deed administrator*), an administrator shall be entitled to receive remuneration at such rate

~~or rates on one or more bases and at one or more hourly and percentage rates and fixed levels as may be determined—~~

- (a) **as may be agreed** by the creditors, in such manner as may be prescribed; or
  - (b) **as may be determined** by the court, in the absence of a determination by the creditors.
- (2) Subject to subsection (3) and to section [•](1)(a) (*Order regarding remuneration or appointment of administrator or deed administrator*), a deed administrator shall be entitled to receive remuneration ~~at such rate or rates on one or more bases and at one or more hourly and percentage rates and fixed levels as may be determined—~~
- (a) **as may be agreed** by the creditors, in such manner as may be prescribed; or
  - (b) **as may be determined** by the court, in the absence of a determination by the creditors.
- (3) An administrator or deed administrator (as the case may be) shall, in addition to remuneration, be entitled to the reasonable costs of storage of such records as are required under section [•](5) (*Duty of administrator and deed administrator in relation to accounting records*) to be retained.

### *Liability of Administrator and Deed Administrator*

#### **249. Liability of administrator under pre-existing employment contracts**

- (1) An administrator is not personally liable for payment in relation to a contract of employment entered into before the administrator's appointment, unless –
- (a) the administrator expressly adopts the contract in writing; or
  - (b) subsection (2) applies.
- (2) An administrator is personally liable for payment in relation to a contract of employment entered into before the administrator's appointment, of –
- (a) wages or salary;
  - (b) [provident fund dues; and
  - (c) employees trust fund dues], **aligned with reference in the [•] Schedule (*Preferential Claims in Liquidation*); TBC whether to align with personal insolvency section]**
- that accrue from the date of appointment of the administrator up to –
- (d) the earliest of –
    - (i) the end of the administration;
    - (ii) the date on which the administrator ceases to be an administrator; and
    - (iii) the date of termination of the contract,if the administrator gives notice of termination of the contract, in accordance with the law applicable to termination of employment, within ten working days after the appointment; or
  - (e) the earlier of –
    - (i) the end of the administration; and

- (ii) the date on which the administrator ceases to be an administrator,  
if the administrator does not give notice of termination of the contract, in accordance with the law applicable to termination of employment, within ten working days after the appointment.
- (3) The court may, on the application of an administrator, made before the end of the period of ten working days referred to in paragraphs (d) and (e) of subsection (2), extend that period on such terms and conditions as the court thinks fit.

**250. Liability of administrator on other agreements and for rent**

- (1) An administrator is personally liable on an agreement entered into by the administrator in the performance and exercise of any of the administrator's functions and powers.
- (2) Subsection (1) has effect notwithstanding any agreement to the contrary, but without prejudice to the administrator's rights against the company or any other person.
- (3) Subject to subsections (4) and (5), an administrator is personally liable for rent and any other payments becoming due under an agreement subsisting at the date of the administrator's appointment relating to the use, occupation or possession of property by the company.
- (4) The liability of an administrator under subsection (3) is limited to that portion of the rent or other payments that is attributable to the period commencing ten working days after the appointment of the administrator, and ending on the earliest of –
  - (a) the end of the administration;
  - (b) the day on which the administrator ceases to be an administrator; and
  - (c) the day on which the company ceases to use, occupy or possess the property.
- (5) On the application of the administrator, the court may –
  - (a) limit the liability of the administrator to a greater extent than that specified in subsection (4); or
  - (b) exempt the administrator from liability under subsection (3) altogether.
- (6) Nothing in subsection (3) or subsection (4) shall –
  - (a) be taken as giving rise to an adoption by an administrator of an agreement referred to in subsection (3); or
  - (b) render an administrator personally liable in respect of the non-performance of any other obligation under such an agreement. **[Intended to make it clear that there would be no liability in damages and no obligation of specific performance (or similar)]**

**251. Relief from liability in the event of a defect**

- (1) The court may relieve a person who has acted as an administrator or deed administrator from personal liability incurred in the course of the administration, where the court is satisfied that –
  - (a) the liability was incurred solely by reason of a defect in the order or resolution appointing the administrator or deed administrator (as the case may be); and

- (b) the administrator or deed administrator (as the case may be) acted honestly and reasonably and should in the circumstances be exempted from liability.
- (2) The court may exercise its powers under subsection (1) subject to such terms and conditions as it thinks fit.

**252. Administrator's indemnity**

- (1) An administrator has an indemnity out of the company's property, in respect of –
- (a) the administrator's personal liability under sections [•] (*Liability of administrator under pre-existing employment contracts*) and [•] (*Liability of administrator on other agreements and for rent*); and
  - (b) personal liability otherwise properly incurred by the administrator in the performance and exercise of the administrator's functions, powers and duties;
  - (c) the remuneration of the administrator under section [•](1) (*Remuneration of administrator and deed administrator*).
- (2) In a liquidation of the company, an administrator's indemnity under subsection (1) has the priority accorded to the costs, charges and expenses properly incurred by and the remuneration of the administrator under subparagraphs (b) and (c) of paragraph 1 of the [•] Schedule (*Preferential Claims in Liquidation*) with respect to the corresponding elements of those subparagraphs.
- (3) An administrator shall have a lien on the company's property to secure the indemnity under subsection (1).
- (4) A lien under subsection (3) has priority over an encumbrance to the extent that the indemnity under subsection (1) has priority over debts, liabilities and other obligations secured by the encumbrance.

***Administration and Deed Administration – Miscellaneous***

**253. Setting aside of act by administrator**

- (1) A payment made, transaction entered into, or any other thing done, in good faith by or with the consent of the administrator of a company in administration, shall not be set aside in a liquidation of the company.
- (2) Sections [•] (*Voidable transactions*) to [•] (*Transactions at an undervalue*) shall not apply to a transaction by a company in administration if the transaction is –
- (a) carried out by or with the authority of the administrator or deed administrator; or
  - (b) authorised or permitted by the deed of company arrangement and carried out by the deed administrator.

**254. Vacancy in office of administrator or deed administrator**

- (1) The office of administrator or deed administrator shall become vacant if the person holding that office –
- (a) resigns office under subsection (2) or subsection (3);
  - (b) dies;
  - (c) is removed from office by the court;

- (d) in the case of an Insolvency Practitioner, has its registration as an Insolvency Practitioner suspended or cancelled;
  - (e) **in the case of an administrator, sends a final report under section [\*] (*Duty of administrator to send final report*);**
  - (f) in the case of an administrator, is removed from office by the creditors under section [\*] (*Removal of administrator from office by creditors*);
  - (g) **in the case of a deed administrator, performs the final duty of the deed administrator under the deed of company arrangement;**
  - (h) in the case of a deed administrator, is removed from office by the creditors or company under the terms of the deed of company arrangement; or
  - (i) is for some other reason not acting.
- (2) An administrator may resign office by giving five working days' written notice in such manner as may be prescribed, of the administrator's intention to resign, to –
- (a) the administrator's appointer and, where the appointer was the court, the person on whose application the appointment was made; and
  - (b) the creditors.
- (3) A deed administrator may resign office by giving five working days' written notice in such manner as may be prescribed, of the deed administrator's intention to resign, to –
- (a) the company; and
  - (b) the creditors.
- (4) The appointer of an administrator may appoint a replacement administrator to fill a vacancy in the office of administrator, subject to –
- (a) any order of the court; and
  - (b) the requirements under this Part (*Administration*) applicable to the appointment of an administrator.
- (5) On the application of a person referred to in subsection (6), the court may make an order –
- (a) where for any reason the office of administrator is vacant –
    - (i) appointing a suitable replacement administrator; or
    - (ii) specifying a process for the appointment of a suitable replacement administrator;
  - (b) **where a deed of company arrangement is in force, and** if it thinks fit –
    - (i) either –
      - (a) appointing a suitable replacement deed administrator; or

- (b) specifying a process for the appointment of a suitable replacement deed administrator; and
  - (ii) removing the ~~a~~ deed administrator upon appointment of the replacement deed administrator;
  - (c) ~~where a deed of company arrangement is in force but for any reason the office of deed administrator is vacant –~~
    - (i) ~~appointing a suitable replacement deed administrator; or~~
    - (ii) ~~specifying a process for the appointment of a suitable replacement deed administrator.~~
- (6) Any of the following persons may make an application to the court under subsection (5) –
- (a) a creditor;
  - (b) any other person with an interest in the company;
  - (c) the Registrar; or
  - (d) the Authority.
- (7) Where a vacancy occurs in the office of administrator or deed administrator **other than under paragraph (e) or (g) of subsection (1)**, written notice of the vacancy shall as soon as practicable be given to the Registrar and Authority by the person vacating office or, if that person is unable to act, by the person's legal representative.
- (8) A person vacating the office of administrator or deed administrator **other than under paragraph (e) or (g) of subsection (1)** shall, where practicable, provide such information and give such assistance to the person's successor as the successor may reasonably request.
- (9) On the application of a person appointed to fill a vacancy in the office of administrator or deed administrator, the court may make any order that it considers necessary to facilitate the performance and exercise of the functions, powers and duties of the administrator or deed administrator (as the case may be).
- (10) Every person who fails to comply with this section shall be guilty of an offence. ~~[Provision for offence – approach TBD]~~

#### **255. Removal of administrator from office by creditors**

- (1) Subject to subsection (2) and to the applicable provisions of this Act, an administrator may be removed from office by a resolution of creditors adopted at –
- (a) an initial meeting or a combined initial and outcome meeting; or
  - (b) a meeting of creditors convened under section [\*] (*Replacement administrator*).
- (2) An administrator may not be removed by a resolution of creditors unless –
- (a) the creditors, by resolution, appoint as replacement administrator another person, where the appointment of that other person –
    - (i) takes effect upon the removal; and

- (ii) is not in contravention of section [•] (*Who may be appointed and act as administrator*);  
and
- (b) that other person has tabled at a meeting of the kind referred to in paragraph (a) or (b) of subsection (1) –
  - (i) the written certification specified in paragraph (c) of section [•](1) (*Who may be appointed and act as administrator*);
  - (ii) the written consent specified in paragraph (d) of section [•](1) (*Who may be appointed and act as administrator*); and
  - (iii) an interests statement, signed by the person, that complies with section [•] (*Interests statement*).

#### **256. Replacement administrator**

- (1) A replacement administrator, unless appointed by the creditors under section [•](2)(a) (*Removal of administrator from office by creditors*) or by the court, shall within ten working days after the appointment hold a meeting of creditors at which the creditors may –
  - (a) vote to remove the replacement administrator; and
  - (b) appoint another person in the place of the replacement administrator.
- (2) At least seven working days before the meeting referred to in subsection (1), the replacement administrator shall –
  - (a) convene the meeting by –
    - (i) giving written notice of the meeting to as many of the company's creditors as is reasonably practicable; and
    - (ii) giving public notice of the meeting; and
  - (b) send a copy of the notice referred to in subsection (2)(a)(i) to the Registrar and Authority.
- (3) The replacement administrator shall table at the meeting referred to in subsection (1) an interests statement, signed by the replacement administrator, that complies with section [•] (*Interests statement*).
- (4) The [•] Schedule (*Procedures for Meetings of Creditors and Contributories*) shall apply to a meeting referred to in subsection (1).
- (5) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

#### **257. Removal and replacement of deed administrator**

- (1) A deed administrator may be removed from office by the creditors or company under the terms of the deed of company arrangement, where they so provide.
- (2) A replacement deed administrator may be appointed under the terms of the deed of company arrangement, where they so provide.

**258. Order for liquidation or provisional liquidation to resume**

An administrator who is appointed under section [•](1) (*Appointment of administrator by a liquidator or provisional liquidator*) to a company in liquidation or provisional liquidation may apply to the court for an order for the liquidation or provisional liquidation (as the case may be) to resume.

**259. Release of administrator or deed administrator**

- (1) Where a person ceases to be an administrator or deed administrator, the person shall be released where –
  - (a) if –
    - (i) notice has been given to each known creditor, in such manner and enclosing such documents as may be prescribed, of the release sought and explaining how they may object to it; and
    - (ii) the creditors do not object in such manner and within such period as may be prescribed; or
  - (b) after such procedure as may be prescribed has been followed, with the permission of the court.
- (2) A release under subsection (1) shall discharge the person from all liability, except liability under section [•] (*Misfeasance*), in respect of any act or omission by the person in the administration or deed administration (as the case may be) of the company.
- (3) Where a person has obtained a release under subsection (1), the person shall give written notice of the release to the Authority within ten working days.

**260. Documents to refer to deed administration**

- (1) For so long as a company is in deed administration, the deed administrator shall ensure that –
  - (a) every document issued or signed by or on behalf of the company shall have the words “subject to deed of company arrangement” after the name of the company where it first appears; and
  - (b) if the company has one or more websites, each page of each website shall state prominently that a deed of company arrangement is in force.
- (2) On an application by the company or the deed administrator, the court may exempt the deed administrator from the requirements in subsection (1) where it considers that furthering the purposes of the deed will be materially adversely affected if the application is not granted.
- (3) A failure to comply with subsection (1) shall not affect the validity of –
  - (a) a person’s appointment as deed administrator; or
  - (b) any document.
- (4) Every person who fails to comply with subsection (1) shall be guilty of an offence. [Provision for offence – approach TBD]

**261. When deed administration ends**

A deed administration ends on the day on which, and at the time at which, the deed of company arrangement terminates.



## *Powers of the Court in Administration and Deed Administration*

### **262. Application for directions by an administrator or deed administrator**

- (1) On the application of an administrator or deed administrator or the Authority, the court may –
  - (a) give directions in relation to any matter arising in connection with the performance or exercise of any of the functions, powers and duties of the administrator or deed administrator (as the case may be);
  - (b) revoke or vary any such directions.
- (2) The powers conferred under subsection (1) –
  - (a) are in addition to any other powers the court may exercise; and
  - (b) may be exercised whether or not the administrator or deed administrator (as the case may be) has ceased to act as such when the application is made.
- (3) It is a defence to a claim against an administrator or deed administrator, in relation to any act or omission by the administrator or deed administrator (as the case may be), that the administrator or deed administrator (as the case may be) acted in compliance with a direction given under subsection (1).

### **263. Order regarding remuneration or appointment of administrator or deed administrator**

- (1) On the application of a person referred to in subsection (2), the court may –
  - (a) in respect of any period or activity for which the remuneration of an administrator or deed administrator has not been determined under subsection (1) or (2) (as the case may be) of section [•] (*Remuneration of administrator and deed administrator*), fix such remuneration at a level that is reasonable in the circumstances;
  - (b) declare whether or not an administrator or deed administrator was validly appointed.
- (2) Any of the following persons may make an application to the court under subsection (1) –
  - (a) the administrator or a person to be appointed as administrator;
  - (b) the deed administrator or a person to be appointed as deed administrator;
  - (c) a liquidator or provisional liquidator;
  - (d) a receiver;
  - (e) a creditor;
  - (f) any other person with an interest in the company;
  - (g) with respect to subsection (1)(c), the Registrar; or
  - (h) the Authority.
- (3) The powers conferred under subsection (1) may be exercised whether or not the administrator or deed administrator has ceased to act as administrator or deed administrator (as the case may be) when the application is made.

**264. Court's general power in administration and deed administration**

- (1) On the application of a person referred to in subsection (2), the court may make any order that it considers necessary about how this Part (*Administration*) is to operate in relation to a particular company.
- (2) Any of the following persons may make an application to the court under subsection (1) –
  - (a) the administrator or a person to be appointed as administrator;
  - (b) the deed administrator or a person to be appointed as deed administrator;
  - (c) a liquidator or provisional liquidator;
  - (d) a receiver;
  - (e) a creditor;
  - (f) with the permission of the court, any other person with an interest in the company;
  - (g) the Registrar;
  - (h) the Authority; or
  - (i) with the permission of the court, any other interested person.
- (3) In an order under subsection (1), the court may end an administration where it is satisfied that the administration should end because –
  - (a) the provisions of this Part (*Administration*) are being abused; or
  - (b) for some other reason, it is just and equitable that the administration end.
- (4) A copy of every order made under subsection (3) shall, within five working days after the making of the order, be sent by the court to the Registrar and Authority.
- (5) In making an order under subsection (1), the court may, if it thinks fit –
  - (a) impose any term or condition;
  - (b) make any other ancillary order.

**265. Order to enforce administrator's or deed administrator's duties**

- (1) In this section, "failure to comply", with respect to an administrator or deed administrator, means a failure by the administrator or deed administrator (as the case may be) to comply with a duty arising –
  - (a) under this or any other Act or rule of law or Rules of Court; or
  - (b) under any order or direction of the court, except an order to comply made under this section,and "comply" shall have the corresponding meaning.
- (2) On the application of a person referred to in subsection (3), and where the court is satisfied that there is or has been a failure to comply, the court may –
  - (a) without prejudice to any other right or remedy that may be available in relation to a breach of duty, order the administrator or deed administrator (as the case may be) to comply with the applicable duty so far as may be specified in the order; or
  - (b) relieve the administrator or deed administrator (as the case may be) of the duty to comply with the applicable duty, wholly or in part.
- (3) Any of the following persons may make an application to the court under subsection (2) –

- (a) a receiver;
  - (b) a creditor;
  - (c) any other person with an interest in the company;
  - (d) a liquidator or provisional liquidator;
  - (e) the Registrar; or
  - (f) the Authority.
- (4) No application may be made under subsection (2) unless notice of the failure to comply has been served on the administrator or deed administrator (as the case may be) at least ten working days before the application and, as at the date of the application, there is a continuing failure to comply.
- (5) A copy of every order made under subsection (2)(a) shall, within five working days after the making of the order, be sent by the court to the Authority.

**266. Removal of administrator or deed administrator from office by court**

- (1) On the application of a person referred to in subsection [•](3) (*Order to enforce administrator's or deed administrator's duties*), and where the court is satisfied that –
- (a) an administrator or deed administrator has failed to comply with an order made under subsection [•](2)(a) (*Order to enforce administrator's or deed administrator's duties*);
  - (b) an administrator has become disqualified under section [•] (*Who may be appointed and act as administrator*) to be appointed or act as administrator; or
  - (c) a deed administrator has become disqualified under section [•] (*Who may be appointed and act as deed administrator*) to be appointed or act as deed administrator,
- the court may –
- (d) make an order removing the administrator or deed administrator (as the case may be) from office; and
  - (e) if it thinks fit, make any other ancillary order.
- (2) A copy of every order made under subsection (1) shall, within five working days after the making of the order, be sent by the court to the Registrar and Authority.

**267. Orders protecting business or property**

The court may, in making an order that removes or has the effect of removing an administrator or deed administrator from office, make such orders as it thinks fit –

- (a) for preserving the business or property of the company; and
- (b) for that purpose, requiring the person removed from office –
  - (i) to deliver to such person as may be specified in the order such documents in the possession or custody or under the control of the administrator or deed administrator (as the case may be) as may be specified in the order; and
  - (ii) to take such other action as the court thinks fit.

**268. Protection of interests of creditors and shareholders**

- (1) At any time during an administration or deed administration, but subject to subsection (3), a creditor or shareholder of a company or the Authority may apply to the court for an order under this section on the ground that –
- (a) the company's affairs, business or property are being or have been administered by the administrator or deed administrator in a manner that is unfairly prejudicial to, or unfairly discriminatory against, one or more of the creditors and shareholders; or
  - (b) any actual or proposed act or omission of the administrator or deed administrator is or would be unfairly prejudicial to, or unfairly discriminatory against, one or more of the creditors and shareholders.
- (2) On an application under this section, the court may, where it considers it just and equitable to do so and subject to subsection (3), make such order as it thinks fit, including an order –
- (a) regulating the future administration by the administrator or deed administrator of the company's affairs, business and property; or
  - (b) requiring the administrator or deed administrator to refrain from either doing or continuing an act complained of by the applicant or to do an act that the applicant complains that the administrator or deed administrator (as the case may be) has omitted to do.
- (3) Any complaint as to the terms of – **seeks to reduce the probability of illegitimately going around the review/challenge procedures designed specifically for compromises and deeds of company arrangement**
- (a) a deed of company arrangement (actual or proposed); or
  - (b) a compromise (actual or proposed) under Part [\*] (*Compromises*),
- shall not be made under this section, but may be made under other provisions of this Act where permitted by those provisions.

**269. Order to protect creditors in administration**

While a company is in administration –

- (a) on the application of the Registrar or the Authority, the court may make any order that it considers necessary to protect the interests of the creditors;
- (b) on the application of a creditor, the court may make any order that it considers necessary to protect the interests of that creditor and other creditors.

## Part XI – Compromises

**270. Interpretation**

In this Part (*Compromises*)[, unless the context otherwise requires] –

- (1) "compromise" means a compromise between a company and its creditors, or any class of them, including a compromise –
- (a) cancelling all or part of any debts or other liabilities of the company;

- (b) varying the rights of creditors or the terms of any debts or other liabilities of the company; or
  - (c) relating to an alteration of a company's articles that affects the likelihood of the company's ability to pay its debts; and
- (2) "proponent" means a person referred to in section [•] (*Compromise proposal*) who proposes a compromise in accordance with this Part (*Compromises*).

#### **271. Compromise proposal**

- (1) Any of the following persons may propose a compromise under this Part (*Compromises*), if that person has reason to believe that a company is or is likely to become insolvent –
- (a) the board of the company, by resolution;
  - (b) a receiver who is appointed in respect of the whole, or substantially the whole, of the property and undertaking of the company;
  - (c) an administrator of the company;
  - (d) a liquidator of the company; or
  - (e) with the permission of the court, a creditor of the company, a receiver appointed by a creditor of the company, or a shareholder of the company.
- (2) Where the court grants permission to a creditor, receiver or shareholder under subsection (1)(e), the court may make an order directing the company to send to the creditor, receiver or shareholder, within such period as may be specified in the order, a list of the names and addresses of the company's creditors, setting out the amount or estimated amount of the company's debt or liability to each creditor ~~or~~ and such other information as may be specified in the order, to enable the creditor, receiver or shareholder to propose a compromise.
- (3) A compromise shall be proposed to each class of creditors in a separate meeting convened by the proponent.
- (4) For the purposes of subsection (3) –
- (a) the proponent shall constitute creditor classes in such a way that creditors whose interests are so dissimilar that they cannot sensibly consult together with a view to acting in their common interest are in different classes; and
  - (b) if the members of a class of creditors do not have a genuine economic interest in the company, a meeting of that class does not need to be convened.
- (5) On the application of the proponent or the company, and at any time before a meeting is convened under subsection (3), the court may give directions in relation to any of the matters referred to in subsection (4).
- (6) On the application of the proponent or the company, and at any time before a compromise is approved by creditors, or a class of creditors, under section [•] (*Effect of compromise*), the court may give directions in relation to any matter that would or might be relevant if an application were to be made under section [•](2) (*Powers of court in relation to compromises*).

- (7) Without prejudice to subsection (5), subsection (6) shall not apply to the matters referred to in subsection (4).
- (8) In view of the importance to the company's position of the subject matter of subsections (5) and (6), a determination on an application under either of those subsections shall be made as expeditiously as possible.

**272. Notice of proposed compromise**

- (1) The proponent shall compile a list of creditors known to the proponent who would be entitled to attend each meeting that is to be convened under section [•](3) (*Compromise proposal*), setting out the amount or estimated amount of the company's debt or liability to each creditor.
- (2) The proponent shall, in such manner as may be prescribed, give –
- (a) each known creditor of the company;
  - (b) the company;
  - (c) any receiver;
  - (d) any administrator;
  - (e) any liquidator; and
  - (f) the Registrar,

written notice, in accordance with the [•] Schedule (*Procedures for Meetings of Creditors and Contributors*), of the intention to hold a meeting of the creditors or any class of creditors, or meetings of classes of creditors, for the purpose of voting on the resolution, at least 20 working days before the meeting or meetings (as the case may be).

- (3) The proponent shall enclose the following documents with a notice under subsection (2) –
- (a) a statement by the proponent –
    - (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 inquiries may be directed during normal working hours;
    - (iii) setting out the terms of the proposed compromise and the reasons for it;
    - (iv) explaining the effect of approval of the proposed compromise, and in particular its commercial impact;
    - (v) stating any material interests of a director or other officer of the company in the proposed compromise (whether as director or other officer or otherwise) and the effect on those interests of the proposed compromise insofar as it differs from the effect on the like interests of other persons;
    - (vi) explaining that the proposed compromise will be binding on all creditors or on all creditors of that class, if approved in accordance with section [•] (*Effect of compromise*);

- (vii) containing details of the company's alternatives if the proposed compromise is not approved;
  - (viii) containing details of any procedure proposed as part of the proposed compromise for varying the compromise following its approval; and
  - (ix) containing such other information as may be prescribed; ~~and~~
- (b) where a meeting of a class of creditors is not to be convened, on the ground that the members of that class do not have a genuine economic interest in the company, as referred to in section [•](4)(b) (*Compromise proposal*), a statement by the proponent –
- (i) describing the relative ranking of the company's debts or other liabilities to the members of that class of creditors, with respect to the company's debts or other liabilities to the members of each other class of creditors; and
  - (ii) stating that the members of that class do not have a genuine economic interest in the company and that, accordingly, a meeting of that class is not to be convened; and
- (c) a copy of the list or lists of creditors referred to in subsection (1).

### **273. Effect of compromise**

- (1) A compromise is approved by the creditors or a class of creditors where at a meeting of the creditors or that class of creditors convened and held in accordance with the [•] Schedule (*Procedures for Meetings of Creditors and Contributories*), the compromise is approved by a resolution adopted in accordance with that Schedule.
- (2) A compromise approved by the creditors or a class of creditors of a company, and by either the company, the liquidator (if the company is in liquidation), or an administrator (if the company is in administration), in accordance with this Part is binding on –
- (a) the company; and
  - (b) all creditors or all creditors of that class (as the case may be).
- (3) On an application to the court by a person referred to in section [•](1) (*Compromise proposal*), the court may order that a compromise, if approved, shall release from liability one or more persons, including related companies and directors of the company, that are sufficiently connected with the compromise.
- (4) In deciding whether or not a person is sufficiently connected with the compromise for the purposes of subsection (3), the court shall have regard to –
- (a) whether or not the proposed release is an integral part of the compromise;
  - (b) whether or not the person is contributing under the compromise; and
  - (c) whether or not, in the absence of a release, the person would have an indemnity claim against the company if called on.

- (5) Where a resolution proposing a compromise is put to the vote of more than one class of creditors, it shall be presumed, unless the contrary is expressly stated in the resolution, that the approval of the compromise is conditional on the approval of the compromise by every other class voting on the resolution.
- (6) The proponent shall, in such manner and within such period as may be prescribed, give written notice of the numerical results of the voting to –
- (a) each known creditor;
  - (b) the company;
  - (c) any receiver;
  - (d) any administrator;
  - (e) any liquidator; and
  - (f) the Registrar.
- (7) An approved compromise becomes effective upon the giving of notice to the Registrar in accordance with subsection (6).

#### **274. Variation of compromise**

- (1) A compromise approved under section [•] (*Effect of compromise*) may be varied –
- (a) in accordance with any procedure for variation incorporated in the compromise as approved; or
  - (b) by the approval of a variation of the compromise in accordance with the requirements provided for in this Part which, for that purpose, shall apply with such modifications as may be necessary, as if any proposed variation were a proposed compromise.
- (2) This Part shall apply to any compromise that is varied in accordance with this section.

#### **275. Powers of court in relation to compromises**

- (1) On the application of the proponent or the company, the court may –
- (a) give directions in relation to a procedural requirement under this Part (*Compromises*), or waive or vary any such requirement, where the court is satisfied that it would be just to do so; or
  - (b) where the court is satisfied that there is sufficient support from the creditors for approval of a compromise that has been proposed, order that during such time as may be specified in the order, beginning not earlier than the day on which notice was given of the proposed compromise and ending not later than 20 working days after the day on which notice is given of the result of the voting on it –
    - (i) proceedings in relation to a debt owing by the company be stayed or restrained; and
    - (ii) a creditor refrain from taking any other measure to enforce satisfaction of a debt owing by the company, including enforcing an encumbrance or taking possession of or otherwise recovering property,

except with the permission of the court. [intended to diverge from the current CA 2007, s 252(2), provided a compromise has been proposed for which there is sufficient creditor support, with a view to giving the company breathing room]



- (2) Where the court is satisfied, on the application of a creditor of a company who was entitled to vote on a compromise, that —
- (a) insufficient notice of the meeting or of the matters required to be included in a statement under section [•](3)(a) (*Notice of proposed compromise*), or of the list or lists required under section [•](3)(b) (*Notice of proposed compromise*), was given to that creditor;
  - (b) there was some other material irregularity in obtaining approval of the compromise; or
  - (c) in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to, or unfairly discriminatory against, that creditor or the class of creditors to which that creditor belongs,
- the court may order that such creditor is not bound by the compromise, or make such other order as it thinks fit.
- (3) An application under subsection (2) shall be made within such period as may be prescribed.

**276. Costs of compromise**

- (1) Unless the court orders otherwise, the costs incurred in organising and conducting a meeting of creditors for the purpose of voting on a proposed compromise —
- (a) shall be met by the company;
  - (b) if incurred by a liquidator, shall be deemed to be an expense of the liquidation;
  - (c) if incurred by an administrator, shall be deemed to be an expense of the administration; or
  - (d) if incurred by any other person, shall be deemed to be a debt owing to that person from the company and, in a liquidation, are payable in the order of priority specified in the [•] Schedule (*Preferential Claims in Liquidation*).

## PART XI-1 MSME COMPANY DEBT RESTRUCTURING ARRANGEMENTS

### 276A. MSME Company Debt Restructuring Arrangements

- (1) This part establishes an MSME Company Debt Restructuring Arrangement procedure, under which a small company-debtor, with the assistance of an insolvency intermediary, can negotiate a flexible repayment arrangement with its creditors, in satisfaction of the company's outstanding liabilities.
- (2) The MSME Company Debt Restructuring Arrangement procedure aims to enable companies to achieve economic rehabilitation, avoiding liquidation and the unnecessary expense and complexity of administration.
- (3) The MSME Company Debt Restructuring Arrangement procedure aims to enable the rehabilitation and rescue of MSME companies through the restructuring of debts via negotiation between companies and creditors.

### 276B. MSME Company Debt Restructuring Arrangements: General Conditions

- (1) For the purposes of this Part, "MSME debtor" means a company which has total secured and unsecured debts that amount to no more than [50 million rupees] [at the time of the submission of a proposal to the Official Receiver under section 276G].
- (2) Subject to the provisions of this Act, a MSME debtor who satisfies the eligibility criteria specified in section 276C may make a proposal to creditors for an MSME Company Debt Restructuring Arrangement in respect of the payment, satisfaction, or restructuring of the MSME debtor's debts.
- (3) A proposal for an MSME Company Debt Restructuring Arrangement may be made and submitted by a MSME debtor, or on behalf of a MSME debtor by a *personal insolvency agent*, in accordance with the provisions of this Part and any secondary legislation.
- (4) A *personal insolvency agent* may also act, after the coming into effect of an MSME Company Debt Restructuring Arrangement, as a *personal insolvency administrator*.
- (5) In accordance with section 3, secondary legislation may prescribe rules regulating the performance of the functions of *personal insolvency agents* and *personal insolvency administrators* under this Part.
- (6) Two or more proposals for an MSME Company Debt Restructuring Arrangement may be dealt with as one proposal where
  - (a) the *personal insolvency agent* considers that they could reasonably be dealt with together because of the financial relationship of the MSME debtors involved; and
  - (b) the terms of each of the proposals specify details of how the Arrangements should be administered together, including
    - (i) the treatment of joint and individual assets and the treatment of joint and individual debts;
    - (ii) whether the approval of each of the Arrangements is to be contingent on the approval of another Arrangement;
    - (iii) the effect of the failure or early termination of one Arrangement on any other Arrangement; and
    - (iv) how any joint payments, made by two or more MSME debtors, should be apportioned between the creditors.

### 276C. MSME Company Debt Restructuring Arrangements: Eligibility Criteria

- (1) A MSME debtor will be eligible to enter into an MSME Company Debt Restructuring Arrangement when it meets all of the following criteria:

- (a) The MSME debtor is unable, or is likely to be unable to pay some or all of his or her debts to pay its debts as they become due in the normal course of business **see section 389**; and
- (b) The MSME debtor is not currently in liquidation proceedings.

**276D. MSME Company Debt Restructuring Arrangements: Mandatory Provisions**

- (1) An MSME Company Debt Restructuring Arrangement must authorise a person, firm, or body to act as a personal insolvency administrator in relation to the arrangement.
- (2) An MSME Company Debt Restructuring Arrangement may authorise or require the personal insolvency administrator to
  - (a) Carry on the MSME debtor's business, or trade on the MSME debtor's behalf or in the debtor's name;
  - (b) Realise the assets of the MSME debtor; or
  - (c) Collect, administer or dispose of any funds of the MSME debtor.
- (3) An MSME Company Debt Restructuring Arrangement shall provide for the payment, before any other debts are paid, of
  - (a) The fees and expenses of the personal insolvency agent and personal insolvency administrator, that are properly incurred in respect of the Arrangement; and
  - (b) Those debts specified as having priority under **the Third Schedule to this Act** unless the holder of a particular priority debt claim agrees to a different treatment of such claim.
- (4) An MSME Company Debt Restructuring Arrangement shall provide that the circumstances of the MSME debtor be reviewed by the personal insolvency administrator at regular intervals, not exceeding intervals of 12 months.

**276E. MSME Company Debt Restructuring Arrangements: Secured Creditors and Property Rights**

- (1) An MSME Company Debt Restructuring Arrangement may include terms providing for the payment, satisfaction, or restructuring of both unsecured and secured debts **and the rights of counterparties to hire-purchase agreements**.
- (2) Subject to the rules on creditors' approval of a MSME debtor's proposal under **section 276**, an MSME Company Debt Restructuring Arrangement may provide for the treatment of any asset that is the object of security **or of a hire-purchase agreement**, which may include:
  - (a) the sale or disposition of the asset;
  - (b) the surrender of the asset to the MSME debtor; or
  - (c) the retention by the secured creditor **or hire-purchase agreement counterparty** of the asset.
- (3) Subject to the rules on creditors' approval of a MSME debtor's proposal under **section 276**, an MSME Company Debt Restructuring Arrangement may include terms
  - (a) modifying the rights of a secured creditor **or hire-purchase agreement counterparty**; and/or
  - (b) providing that a secured creditor **or hire-purchase agreement counterparty** will not seize or realise its security while the arrangement is in force.
- (4) Subject to the rules on creditors' approval of a MSME debtor's proposal under **section 276**, an MSME Company Debt Restructuring Arrangement may include terms providing for the reduction of the principal sum due in respect of a secured debt **or hire-purchase agreement**, only where the Arrangement specifies that the amount of the reduced principal sum is not less than the value of the security.
- (5) Subject to the rules on creditors' approval of a MSME debtor's proposal under **section 276**, an MSME Company Debt Restructuring Arrangement may provide for
  - (a) the curing, within a reasonable time, of any default; and
  - (b) maintenance of payments while the Arrangement is in effecton any secured debt on which the last payment is due after the completion of the Arrangement.
- (6) Subject to the rules on creditors' approval of a MSME debtor's proposal under **section 276**, an MSME Company Debt Restructuring Arrangement may provide for the
  - (a) Curing, within a reasonable time, of any default; and
  - (b) maintenance of rent payments while the Arrangement is in effectarising under an occupancy agreement into which the MSME debtor has entered with a relevant creditor.

Note: consider whether "occupancy agreement" is the appropriate terminology to use to refer to agreements for the rental of business premises (storefronts etc.)

**276F. MSME Company Debt Restructuring Arrangements: Appointment of Personal Insolvency Agent**

- (1) Where a MSME debtor wishes to make a proposal for an MSME Company Debt Restructuring Arrangement, it must appoint a person, firm, or body, to act as a personal insolvency agent.
- (2) If the MSME debtor and the personal insolvency agent so agree, the person, firm, or body appointed to act as a personal insolvency agent may also act as a personal insolvency administrator in respect of the proposed MSE Company Debt Restructuring Arrangement.
- (3) On being appointed under subsection (2), the personal insolvency agent shall
  - (a) Confirm in writing to the MSME debtor that the personal insolvency agent has consented to act in the role of personal insolvency agent in respect of the MSME debtor's MSME Company Debt Restructuring Arrangement proposal;
  - (b) If it consents to act as personal insolvency administrator on the coming into effect of the MSME Company Debt Restructuring Arrangement, confirm this consent in writing to the MSME debtor; and
  - (c) Notify the Official Receiver of its appointment to act as a personal insolvency agent, and, where relevant, a personal insolvency administrator.
- (4) A personal insolvency agent who agrees to assist a MSME debtor in preparing an MSME Company Debt Restructuring Arrangement shall
  - (a) Make such reasonable enquiries into the MSME debtor's property and financial affairs so as to be able to assess with reasonable accuracy the MSME debtor's financial situation; and
  - (b) Prepare an MSME Company Debt Restructuring Arrangement in the manner specified by this Part, and in the form which may be prescribed in secondary legislation.
- (5) For the purpose of enabling the personal insolvency agent to assist in the preparation of a proposal for an MSME Company Debt Restructuring Arrangement, the MSME debtor shall submit to the personal insolvency agent a statement disclosing fully, to the best of the knowledge of the MSME's directors, all of the MSME debtor's financial affairs, in accordance with [section 36](#) above.
- (6) Secondary legislation, or rules, standards, or guidance set by the Authority under section 9, may prescribe details regarding the functions of personal insolvency agents in assisting a MSME debtor in the preparation and submission of a proposal for an MMSE Company Debt Rehabilitation Order.

**276G. MSME Company Debt Restructuring Arrangements: Preparation of MSME Debtor Proposal**

- (1) A MSME debtor who meets the criteria in [section 276C](#) may prepare, with the assistance of a personal insolvency agent, a proposal for an MSME Company Debt Restructuring Arrangement.
- (2) Details regarding the form of a proposal for an MSME Company Debt Restructuring Arrangement may be prescribed in secondary legislation.
- (3) The proposal for an MSME Company Debt Restructuring Arrangement must
  - (a) Be signed by an authorized representative of the MSME debtor;
  - (b) Have endorsed on it the name of
    - (i) the person, firm, or body who is acting as a personal insolvency agent; and
    - (ii) the person, firm, or body who is willing to act as a personal insolvency administrator on the coming into effect of the MSME Company Debt Restructuring Arrangement.
- (4) The proposal for an MSME Company Debt Restructuring Arrangement must include a statement of the personal insolvency agent confirming that it is of the opinion that
  - (a) The MSME debtor satisfies the eligibility requirements of [section 276C](#);

- (b) To the best of the personal insolvency agent's knowledge, the information contained in the MSME debtor's statement of financial affairs is complete and accurate;
  - (c) The proposal has a reasonable prospect of being approved and implemented; and
  - (d) The proposal offers a reasonable means of facilitating the economic rehabilitation of the MSME debtor while allowing fair contributions to creditors from the MSME debtor's available resources.
- (5) The proposal for an MSME Company Debt Restructuring Arrangement must include, in addition to any requirements prescribed by secondary legislation, a statement of the MSME debtor's financial affairs.
- (6) The statement of the MSME debtor's financial affairs, as required by subsection (5), must set out the information prescribed in **section 34** above.
- (7) The proposal for an MSME Company Debt Restructuring Arrangement must include a statement of the MSME debtor's consent to
- (a) the Official Receiver making such enquiries as it considers necessary to determine whether the MSME debtor meets the eligibility criteria specified in **section 278C**;
  - (b) the postponement of the consideration of the MSME Company Debt Restructuring Arrangement proposal by the Official Receiver until the Official Receiver has received satisfactory answers to such enquiries, and
  - (c) the disclosure by the Official Receiver of company data of the MSME debtor to creditors and other third parties to the extent necessary for the making and consideration of an MSME Company Debt Rehabilitation Arrangement; and
  - (d) the disclosure to the Official Receiver, by creditors, government agencies, or any other relevant third parties, of company data of the MSME debtor, to the extent necessary for the making and consideration of an MSME Company Debt Rehabilitation Arrangement.
- (8) On the preparation by the MSME debtor, with the assistance of the personal insolvency agent, of a proposal that satisfies the requirements of this section, the personal insolvency agent shall submit the proposal to the Official Receiver.

#### **276H. MSME Company Debt Restructuring Arrangement Negotiation Meeting**

- (1) After submitting the proposal to the Official Receiver under **subsection 276C**, the personal insolvency agent must seek a decision from the MSME debtor's creditors as to whether they approve the proposal for an MSME Company Debt Restructuring Arrangement.
- (2) The decision by the MSME debtor's creditors to approve or reject the proposal shall be made by an MSME Company Debt Restructuring Arrangement negotiation meeting.
- (3) The personal insolvency agent shall consider the convenience of creditors and the MSME debtor in fixing the date and venue for the negotiation meeting, which may take place in-person or via digital communication means.
- (4) The personal insolvency agent must send to every known creditor,
- (a) Notice of the negotiation meeting;
  - (b) A copy of the proposal for an MSME Company Debt Restructuring Arrangement;
  - (c) A creditor's claim form;
  - (d) A postal vote form and electronic mail vote template;
  - (e) A statement asking each creditor to decide whether it approves or rejects the proposed MSME Company Debt Restructuring Arrangement;
  - (f) A statement of the date on which the negotiation meeting will be held, that date **being at least [xx] working days** after the sending of the statement; and
  - (g) A statement to the effect that a creditor who does not attend the negotiation meeting, or does not cast a postal vote or electronic mail vote, shall be deemed to have accepted the proposal for an MSME Company Debt Restructuring Arrangement.
- (5) A creditor who has submitted a creditor's claim form, in a manner satisfying any requirements which may be prescribed by secondary legislation, may vote on the proposal by

- (a) sending a postal vote that reaches the personal insolvency agent before or at the negotiation meeting; or
  - (b) sending an electronic mail vote that reaches the personal insolvency agent before or at the negotiation meeting.
- (6) If the personal insolvency agent receives a postal vote, or other communication of assent or dissent as prescribed, before or at the meeting, this vote or communication has effect as if the creditor had been present and voted at the meeting.

#### **276I. Creditor Approval of MSME Company Debt Restructuring Arrangement**

- (1) The personal insolvency agent shall facilitate and chair the MSME Company Debt Restructuring Arrangement negotiation meeting.
- (2) Subject to the provisions of this Part and any such rules as may be prescribed by secondary legislation, First Schedule (Procedures for Meetings of Creditors and Contributories) shall apply to the following matters regarding the holding of a meeting referred to in this section:
- Proxies
  - Chairperson
  - Quorum
  - Adjourned meetings
- (3) At the negotiation meeting, the creditors may
- (a) Conduct such examination of officers of the MSME debtor as is reasonable to clarify the MSME debtor's financial circumstances;
  - (b) Adjourn the meeting [for a maximum period of **x days**] to allow further investigation of the MSME debtor's affairs, by passing a resolution of a majority of creditors in value;
  - (c) Accept the proposal, by passing a resolution, in accordance with subsection (3) or (4), that sets out the final terms of the MSME Company Debt Restructuring Arrangement;
  - (d) With the consent of the MSME debtor, modify or amend the proposal, by passing a resolution, in accordance with subsection (3) or (4), that sets out the final terms of the MSME Company Debt Restructuring Arrangement;
  - (e) Appoint the personal insolvency agent as personal insolvency administrator of the MSME Company Debt Restructuring Arrangement, or appoint another person, firm, or body who is willing to act as personal insolvency administrator;
  - (f) With the consent of the MSME debtor, include such terms in the MSME Company Debt Restructuring Arrangement with respect to the supervision of the affairs of the debtor as they may deem advisable.
- (4) Subject to subsections (5) and (6), a proposal is approved where the claims of those creditors voting in favour of the proposal **represent [a majority in value of 75% of the claims of all creditors]** entitled to vote.
- (5) Where the proposal includes terms modifying or limiting the rights of secured creditors, in a manner specified in section 276E or otherwise, the proposal is approved where the claims of those secured creditors voting in favour of the proposal represent more than **[75 per cent of the value of the claims of secured creditors]** entitled to vote.
- (6) Where the proposal includes terms modifying or limiting the rights of creditors under hire purchase agreements, finance leases, or any similar agreement, in a manner specified in section 276E or otherwise, the proposal is approved where the claims of such creditors voting in favour of the proposal represent more than **[75 per cent of the value of the claims of such creditors]** entitled to vote.

[This new subsection has been informed by discussion with our peer reviewers and is an effort to balance the rights of creditors under vendor-finance transactions with the need to prevent the unnecessary seizure of essential assets of the MSME debtor. The position is effectively to treat vendor-lenders in the same manner as secured creditors – they can agree to have their rights modified by super majority. We are open to suggestions as to appropriate wording to describe these creditors and transactions under Sri Lankan law]

- (7) Where the proposal does not include terms modifying or limiting the rights of a secured creditor or hire-purchase agreement counterparty, such secured creditor or hire-purchase agreement counterparty may not vote on the proposal.
- (8) A creditor who does not
- (a) attend the negotiation meeting;
  - (b) cast a postal vote; or
  - (c) cast an electronic mail vote,
- shall be deemed to have voted in favour of the proposal for an MSME Company Debt Restructuring Arrangement.
- (9) Where no creditor votes, the proposed Debt Restructuring Arrangement shall be deemed to have been approved under this section.
- (10) For the avoidance of doubt, a creditor who does not
- (e) Submit a creditor's claim form under section 50;
  - (f) Attend the negotiation meeting under this section;
  - (g) Cast a postal vote under this section; or
  - (h) Cast an electronic mail vote under this section,

shall not be entitled to bring an application to object to a court order confirming the coming into effect of the Arrangement under section 56.

[This is a new subsection, which is based on the experience of the recent Irish Supreme Court case of *O'Flynn v O'Driscoll* [2023] IESC 32, in which a failure of the Irish legislation to define which creditors could object to the coming into effect of an arrangement allowed a creditor who opposed the whole insolvency process to refuse to engage in efforts to negotiate and approve a proposal, before subsequently objecting to the arrangement once other creditors had voted to approve it. I have reviewed our draft, and I think that our section 56 is probably sufficiently clear to prevent this type of strategy from working for a creditor under our framework. I thought it might be useful to add this subsection, however, to make this position clear. I also think a clear subsection has the effect of forewarning creditors that they must act on their rights and engage with the process. It is not sufficient for a creditor to sit on its rights and subsequently try to overturn the whole process once the MSME debtor and other creditors have agreed a proposal.]

- (11) Where the creditors at a negotiation meeting do not accept the proposal,
- (a) The personal insolvency agent shall endorse the proposal "not accepted by creditors" and return it to the Official Receiver; and
  - (b) The MSME Company Debt Restructuring Arrangement procedure shall terminate.

#### **276J. Submission of Approved MSME Company Debt Restructuring Arrangement to Official Receiver**

- (1) After the proposal for an MSME Company Debt Restructuring Arrangement has been accepted by the creditors, the personal insolvency agent must, as soon as practicable, submit to the Official Receiver
- (a) a notice of the result of the creditor vote at the MSME Company Debt Restructuring Arrangement negotiation meeting; and

- (b) the final terms of the MSME Company Debt Restructuring Arrangement.
- (2) On receiving the documents set out in subsection (1), the Official Receiver must confirm that the terms of the MSME Company Debt Restructuring Arrangement satisfy the provisions of this Part.
- (3) On confirming that the terms of the MSME Company Debt Restructuring Arrangement satisfy the provisions of this Part, the Official Receiver must issue a certificate recommending an MSME Company Debt Restructuring Arrangement.
- (4) On issuing a certificate recommending an MSME Company Debt Restructuring Arrangement, the Official Receiver must
  - (a) present this certificate, together with notice of the result of the creditor vote at the negotiation meeting and the final terms of the MSME Company Debt Restructuring Arrangement, to the appropriate [court]; and
  - (b) notify the MSME debtor, the personal insolvency agent, and all creditors listed in the Arrangement, of the issuance of the certificate.
- (5) The Official Receiver may only refuse to issue a certificate recommending an MSME Company Debt Restructuring Arrangement if;
  - (a) The Arrangement does not satisfy the provisions of this Part; or
  - (b) The Official Receiver becomes aware of a material inaccuracy in the MSME debtor's statement of financial affairs or accompanying documents;
  - (c) The Official Receiver becomes aware of a material change in the MSME debtor's circumstances that was not foreshadowed in the MSME debtor's statement of financial affairs or accompanying documents;
  - (d) The Official Receiver is of the opinion that the terms of the MSME Company Debt Restructuring Arrangement are not reasonable or are not fair to the MSME debtor and the creditors.
- (6) If the Official Receiver refuses to issue a certificate recommending an MSME Company Debt Restructuring Arrangement, the Official Receiver must
  - (a) Provide reasons for this refusal to the MSME debtor, personal insolvency agent, and creditors of this refusal; and
  - (b) notify the appropriate court of its recommendation that the court not confirm the coming into effect of the MSME Company Debt Restructuring Arrangement.

#### **276K. Court Confirmation of MSME Company Debt Restructuring Arrangement**

- (1) Where the [appropriate court] receives a recommendation from the Official Receiver with respect to an MSME Company Debt Restructuring Arrangement under **section 276J**, the court shall consider the recommendation, together with any accompanying documentation.
- (2) When considering a recommendation under this section, the [Court] shall be entitled to treat a certificate issued by the Official Receiver under **section 276J** as evidence of the matters certified therein.
- (3) The court must, when considering a recommendation under this section, hear any objection to the recommendation that is made by a creditor, the MSME debtor, or the personal insolvency agent.
- (4) The court, where an objection has been made under subsection (3), or where it requires further information or evidence for the purpose of its arriving at a decision, may hold a hearing, which hearing shall be on notice to the Official Receiver, the personal insolvency agent, the MSME debtor, and the creditors.
- (5) Having considered the recommendation, the [Court] must make an Order confirming the coming into effect of the MSME Company Debt Restructuring Arrangement if it considers that
  - (a) the MSME Company Debt Restructuring Arrangement satisfies the criteria in this Part,
  - (b) the making of the MSME Company Debt Restructuring Arrangement has complied with the procedural requirements of this Part; and
  - (c) the court has no reason to believe that the terms of the MSME Company Debt Restructuring Arrangement are not reasonable or are not fair to the MSME debtor and the creditors.



- (6) On confirming the coming into effect of the MSME Company Debt Restructuring Arrangement, the [Court] shall direct the Official Receiver to record in the [Debt Restructuring Arrangement Register], in addition to such other details as may be prescribed by secondary legislation,
- (a) details of the MSME debtor and its officers,
  - (b) the date of issue of the Order, and
  - (c) a statement of the rights of creditors to object to the MSME Company Debt Restructuring Arrangement under **section 276N**.
- (7) On the making an order confirming the MSME Company Debt Restructuring Arrangement, the [Court] shall direct the Official Receiver to
- (a) Inform the MSME debtor, personal insolvency agent, and personal insolvency administrator of the issue of order and the coming into effect of the MSME Company Debt Restructuring Arrangement;
  - (b) Inform each creditor of the MSME debtor of the issue of the order and the coming into effect of the MSME Company Debt Restructuring Arrangement; and
  - (c) Inform each creditor of the rights of creditors to object to the MSME Company Debt Restructuring Arrangement under **section 276M**.

#### **276L. Effect of Court Confirmation of MSME Company Debt Restructuring Arrangement**

- (1) An MSME Company Debt Restructuring Arrangement that is approved by the court is binding on all the creditors who are affected by the terms of the Arrangement.
- (2) The court order confirming the coming into effect of the MSME Company Debt Restructuring Arrangement is conclusive as to the validity of the Arrangement.
- (3) Following the court order confirming the coming into effect of the MSME Company Debt Restructuring Arrangement, the Arrangement remains in effect according to its terms until
- (a) It is completed in accordance with its terms and **section 276H**; or
  - (b) It is terminated under **section 276O**.
- (4) While an MSME Company Debt Restructuring Arrangement is in effect, a creditor who holds a debt affected by the terms of the Arrangement-
- (a) Shall not take any actions to recover or enforce the debt, and
  - (b) In particular, shall not take any actions to
    - (i) Contact a MSME debtor regarding payment of an included debt, otherwise than at the request of the MSME debtor or the personal insolvency administrator, or in accordance with the terms of the Arrangement,
    - (ii) Initiate or continue any legal proceedings against the MSME debtor in relation to an included debt,
    - (i) Collect, secure, recover, or demand payment of an affected debt,
    - (ii) Subject to subsection (6), execute or enforce a judgment or order of a court or tribunal against the MSME debtor,
    - (iii) Obtain a warrant,
    - (iv) Terminate, on the grounds of the MSME debtor's default or insolvency, any agreement for the provision of essential services, as defined in **Section 3**,
    - (v) obtain possession of a **premises** which the MSME debtor is occupying under an occupancy agreement into which the MSME debtor has entered with the relevant creditor, otherwise than under the terms of the Arrangement;
    - (vi) If the Arrangement so provides, take any of the actions in this subsection against another person who is jointly liable with the MSME debtor to whom the MSME Company Debt Restructuring Arrangement relates;
    - (vii) If the Arrangement so provides, take any of the actions in this subsection against another person who has guaranteed the debts of the MSME debtor to whom the MSME Company Debt Restructuring Arrangement relates;
  - (viii) Instruct an agent to take any of the actions mentioned in [paragraphs (i)-(ix) above]
- (5) While an MSME Company Debt Restructuring Arrangement is in effect, a [court] may permit a creditor to take a step listed in subsection (4), where the [court] considers that
- (a) Exceptional circumstances mean that it is reasonable to allow the creditor to take the step, and
  - (b) The step will not
    - (i) Cause undue detriment to the MSME debtor to whom the Arrangement relates,
    - (ii) Unfairly prejudice any other creditor; or

- (iii) Significantly undermine the objectives of the Arrangement.
- (6) Nothing in this section affects a creditor's entitlement to the benefit of any execution or other legal process or distress against a MSME debtor or property of the MSME debtor where the execution or other legal process or distress was completed at least 180 days before the court order confirming the coming into effect of the MSME Company Debt Restructuring Arrangement, where
- (a) an execution against movable or immovable property is completed by seizure, or the entry into possession of a receiver or a person charged with execution, and a completed sale; and
  - (b) an attachment of a debt is completed by satisfaction of the debt.
- (7) While the MSME Company Debt Restructuring Arrangement is in effect, a supplier of an essential good or service shall not –
- (a) refuse to supply the good or service to a MSME debtor, by reason of the MSME debtor's default in paying charges due for the good or service in relation to a period before the coming into effect of the Arrangement;
  - (b) make it a condition of the supply of the good or service to a MSME debtor, that payment be made of outstanding charges due for the good or service in relation to a period before the coming into effect of the Arrangement; or
  - (c) rely on an insolvency-related term of the agreement for the supply of the good or service, except with the prior, written consent of the personal insolvency administrator.
- (e)
- (8) The personal insolvency administrator may give consent under subsection (9)(c) where it is satisfied that the reliance on the insolvency-related term is necessary to put the MSME Company Debt Restructuring Arrangement into effect and to serve the objectives of the Debt Restructuring Arrangement as specified in section 43 Personal and Small Business Debt Restructuring Arrangements.
- (9) The personal insolvency administrator is not liable in damages for declining to give consent under subsection (9)(c).
- (10) A Debt Restructuring Arrangement does not prevent the commencement or continuation of any criminal proceedings against an office of a MSME debtor.
- (11) Any action taken contrary to this section shall be null and void.
- (12) Where a person has acquired an interest in property or any other right under a transaction with a creditor which arose from an action taken by a creditor or creditor's agent which was contrary to this section, the nullity of that action shall not prejudice the rights of that person, where that person dealt with the creditor in good faith and for value.
- (13) Where a MSME Company Debt Restructuring Arrangement does not include terms modifying or limiting the rights of a secured creditor or a counterparty to a hire-purchase agreement, nothing in this section shall affect the right of a secured creditor or counterparty to a hire-purchase agreement to enforce its rights over the property subject to the security or hire-purchase agreement.
- (14) Where a MSME Company Debt Restructuring Arrangement includes terms modifying or limiting the rights of a secured creditor or a counterparty to a hire-purchase agreement, in a manner specified in section 276E or otherwise, a secured creditor or counterparty to a hire-purchase agreement may only enforce its rights over the property subject to the security or hire-purchase agreement in accordance with the terms of the Arrangement.
- (15) In relation to a MSME Company Debt Restructuring Arrangement, "insolvency-related term" is a provision of an agreement for the supply of an essential good or service to a MSME debtor under which -
- a. the agreement or the supply would terminate, or any other thing would take place, because the MSME Company Debt Restructuring Arrangement procedure commences; or
  - b. the supplier would be entitled to terminate the agreement or the supply, or to do any other thing, because a MSME Company Debt Restructuring Arrangement procedure commences.

Note: consider whether "occupancy agreement" is the appropriate terminology to use to refer to agreements for the rental of business premises (storefronts etc.)

#### 276M. Challenge to MSME Company Debt Restructuring Arrangement

- (1) A creditor who is bound by an MSME Company Debt Restructuring Arrangement may apply to [the court] to object to a court order confirming the coming into effect of the Arrangement.
- (2) A creditor's application to object to an MSME Company Debt Restructuring Arrangement under subsection (1) above must be based on one or more of the following grounds, namely that-
  - (a) the company is not a MSME debtor, or the company, if a MSME debtor, does not meet the eligibility criteria in section 276C;
  - (b) the MSME Company Debt Restructuring Arrangement does not comply with the mandatory provisions specified in section 276D;
  - (c) the making and confirmation of the MSME Company Debt Restructuring Arrangement has not complied with the procedural requirements of this Part;
  - (d) the MSME debtor has made any false representation or omission in making its statement of financial affairs, or on supplying any accompanying information; or
  - (e) the MSME Company Debt Restructuring Arrangement causes unfair prejudice to the interests of the creditor.
- (3) A creditor's application to [court] to object to an MSME Company Debt Restructuring Arrangement must be made within the period of [28] days beginning with the day on which the MSME Company Debt Restructuring Arrangement comes into effect.
- (4) A creditor must provide notice to the MSME debtor, and the personal insolvency administrator, of an application to object to an MSME Company Debt Restructuring Arrangement, including the grounds on which the application is based.
- (5) Where on an application under this section the [court] is satisfied as to any of the grounds specified in subsection (2) above, the [court] may do either or both of the following, namely-
  - (a) Where to do so would not unfairly prejudice any other creditor, make an order directing that the MSME Company Debt Restructuring Arrangement shall not apply to the creditor who made the application to court,
  - (b) Direct the personal insolvency administrator to seek a decision from creditors as to whether they approve a revised proposal; or
  - (c) Make an order cancelling the MSME Company Debt Restructuring Arrangement in respect of any other included debt and/or creditor.
- (6) Where a [court] has made an order under subsection (5) above, the [court] may require the MSME debtor to pay any interest, fees or charges that accrued in respect of an affected debt during the period in which the MSME Company Debt Restructuring Arrangement was in effect.
- (7) Where a court has made an order under subsection (5)(c) above with the effect of cancelling the Debt Restructuring Arrangement in respect of all included debts and all creditors, the court shall also make an order establishing a temporary moratorium on creditor remedies, which shall endure for a period of [21] days [and shall have the same effect as a Debt Protection Moratorium under section 39]. This new subsection responds to a comment from Peer Reviewer 2 to the effect that a temporary debt protection moratorium may be necessary when a Restructuring Arrangement is cancelled, in order to avoid a race to enforce against the MSME debtor.
- (8) In any case where a [court] makes an order under subsections (5) and/or (6), the [court] must notify the MSME debtor and the personal insolvency administrator, the Official Receiver, and any creditors to whom the order under subsection (5) applies.

- (9) Where a [court] notifies the Official Receiver under subsection (7), the Official Receiver must, within a period of [x] days,
- (a) Cause an entry to be made in the [Debt Restructuring Arrangement Register], and
  - (b) Send a notification of the court order made under subsection (5), and any requirements made under subsection (6), to any affected creditor.

**276N. Variation of MSME Company Debt Restructuring Arrangement**

- (1) Where a court has made an order confirming the coming into effect of the MSME Company Debt Restructuring Arrangement, the Arrangement may be varied in accordance with its terms and subject to this section.
- (2) A personal insolvency administrator, whether on its own initiative or the request of a MSME debtor or creditor, shall propose a variation of an MSME Company Debt Restructuring Arrangement where
- (a) It appears to the personal insolvency administrator that there has been a material change in the MSME debtor's circumstances, and
  - (b) The personal insolvency administrator is satisfied that there is a reasonable prospect that a variation that addresses such circumstances would be approved by the MSME debtor's creditors.
- (3) Where the conditions in subsection (2) apply, the personal insolvency administrator shall, as soon as is reasonably practicable,
- (a) Require the MSME debtor to complete an updated statement of the MSME debtor's financial affairs;
  - (b) Assist the MSME debtor in preparing a proposal for a variation of the MSME Company Debt Restructuring Arrangement;
  - (c) Seek the consent of the MSME debtor to the proposal and to the seeking of creditor approval of the proposal; and
  - (d) Write to each affected creditor to ask them to indicate whether the proposal should be accepted.
- (4) When writing to each affected creditor under subsection (3) in respect of a proposal to vary an MSME Company Debt Restructuring Arrangement, the personal insolvency administrator must
- (a) Provide the creditor with a copy of
    - (i) the proposal; and
    - (ii) the updated statement of the MSME debtor's financial affairs
  - (b) Provide the creditor with a statement to the effect that
    - (i) The MSME debtor satisfies the eligibility requirements of **section 276C**;
    - (ii) To the best of the personal insolvency agent's knowledge, the information contained in the MSME debtor's updated statement of financial affairs is complete and accurate;
    - (iii) the proposal is a reasonable means of addressing the relevant change in the MSME debtor's circumstances; and
    - (iv) The proposal has a reasonable prospect of being approved and implemented.
  - (c) Ask the creditor to provide a written response, via physical or electronic mail, setting out whether or not the proposal should be accepted; and
  - (d) Inform the creditor of the deemed notice provision in subsection **63** and the need to provide this response to the personal insolvency practitioner in advance of the applicable deadline.
- (5) A proposal to vary an MSME Company Debt Restructuring Arrangement is accepted if
- (a) The MSME debtor provides consent in writing to the variation of the Arrangement;
  - (b) The personal insolvency administrator writes to affected creditors of a MSME debtor under this section;
  - (c) Replies accepting the proposal are provided, before the deadline stated in subsection (4), by creditors whose claims represent a majority in value of 75% of the claims of all creditors bound by the Arrangement; and
  - (d) Where the variation includes terms modifying or limiting the rights of secured creditors and hire-purchase agreement counterparties, replies accepting the proposal as varied are provided, before the deadline stated in subsections (4), by any such creditor whose rights are so modified or limited in the variation.
- (6) For the purposes of subsection (5), a creditor who does not provide a response to the personal insolvency administrator before the applicable deadline under subsection (4), shall be deemed to have stated that the proposal to vary the MSME Company Debt Restructuring Arrangement should be accepted.
- (7) When a proposal to vary an MSME Company Debt Restructuring Arrangement has been accepted, the personal insolvency administrator shall, as soon as is reasonably practicable, submit to the Official Receiver

- (a) a notice of the creditor responses approving the variation to the MSME Company Debt Restructuring Arrangement; and
  - (b) the final terms of the varied Debt Restructuring Arrangement.
- (8) On receiving the documents set out in subsection (7), the Official Receiver must issue a certificate recommending the confirmation of the varied Debt Restructuring Arrangement.
- (9) On issuing a certificate recommending the confirmation of a varied Debt Restructuring Arrangement, the Official Receiver must
- (a) present this certificate, together with notice of the creditor approval of the proposal to vary the MSME Company Debt Restructuring Arrangement, and the final terms of the varied Arrangement, to the appropriate [court]; and
  - (b) notify the MSME debtor, the personal insolvency administrator, and all creditors listed in the Arrangement, of the issuance of the certificate.
- (10) Where the [appropriate court] receives a recommendation from the Official Receiver with respect to a variation of an MSME Company Debt Restructuring Arrangement under subsection (9), the court shall consider the recommendation, and make an order confirming the coming into effect of the varied Arrangement.
- (11) Where the court makes an order confirming the coming into effect of the varied Arrangement under subsection (10), the provisions of this Part apply to the varied Arrangement as if the varied Arrangement were an Arrangement confirmed under **section 276K** Court Confirmation of MSME Company Debt Restructuring Arrangement.

#### **276O. Termination of MSME Company Debt Restructuring Arrangement**

- (1) The MSME debtor, acting with the personal insolvency administrator, and creditors may at any time terminate an MSME Company Debt Restructuring Arrangement through the acceptance by a majority of 75 per cent in value of creditors of a proposal by the MSME debtor to terminate the Arrangement.
- (2) Any of the following persons may apply to the court for an order terminating an MSME Company Debt Restructuring Arrangement:
  - (a) The MSME debtor;
  - (b) A creditor;
  - (c) The personal insolvency administrator; or
  - (d) The Official Receiver.
- (3) An application by a MSME debtor or creditor for an order terminating an MSME Company Debt Restructuring Arrangement may include an application for a bankruptcy order against the MSME debtor.
- (4) An application under subsection (a) must be based on one of the following grounds:
  - (a) A material inaccuracy or omission has been found in the statement of the MSME debtor's financial affairs, which causes a material detriment to a creditor;
  - (b) the making and confirmation of the MSME Company Debt Restructuring Arrangement has not complied with the procedural requirements of this Part;
  - (c) The company, **at the time of the submission of a proposal to the Official Receiver under section 276G**, was not a MSME debtor;
  - (d) The MSME debtor, **at the time of the submission of a proposal to the Official Receiver under section 276G**, did not satisfy the eligibility criteria under **section 276C**;
  - (e) The MSME debtor did not comply with the duties and obligations imposed on it under the MSME Company Debt Restructuring Arrangement;
  - (f) The MSME debtor is in arrears in respect of payments under the MSME Company Debt Restructuring Arrangement of an amount corresponding to a period of not less than three months;
  - (g) The MSME debtor has failed to carry out any action reasonably necessary to put the MSME Company Debt Restructuring Arrangement into effect; or
  - (h) The MSME debtor has unreasonably refused to consent to a variation of the MSME Company Debt Restructuring Arrangement.
- (5) On hearing an application under subsection (2), the court may

- (a) Dismiss the application;
  - (b) Terminate the MSME Company Debt Restructuring Arrangement; or
  - (c) Order that the personal insolvency administrator prepare a proposal for a variation of the MSME Company Debt Restructuring Arrangement under **section 276N**.
- (6) Where a [court] has made an order under subsection (5) above, the [court] may require the MSME debtor to pay any interest, fees or charges that accrued in respect of an included debt during the period in which the MSME Company Debt Restructuring Arrangement was in effect.
- (7) In any case where a [court] makes an order under subsections (5) and/or (6), the [court] must notify the MSME debtor and the personal insolvency administrator, the Official Receiver, and any creditors to whom the order under subsection (5) applies.
- (8) Where a [court] notifies the Official Receiver under subsection (7), the Official Receiver must, **within a period of [x] days**, cause an entry to be made in the Personal Insolvency Register recording the fact of the termination.

#### **276P. Completion of MSME Company Debt Restructuring Arrangement**

- (1) An MSME Company Debt Restructuring Arrangement is completed when all of the obligations that it created have been discharged, unless the Arrangement has been terminated earlier under **section 276O**.
- (2) When an Arrangement is completed under subsection (1), the personal insolvency administrator must, **within [x] business days** of the completion,
- (a) provide the MSME debtor with a certificate of completion; and
  - (b) give notice to the Official Receiver of the certificate of completion.
- (3) The certificate of completion is prima facie evidence of the facts stated in it.
- (4) When an MSME Company Debt Restructuring Arrangement is completed under subsection (1), except as provided below, the debts affected by the Arrangement are cancelled, and the MSME debtor is not liable to pay any part of the debts, including any penalties, interest, and other sums which may have become payable in relation to those debts.
- (5) The completion of an MSME Company Debt Restructuring Arrangement does not, except to the extent provided in the terms of the Arrangement,
- (a) Release anyone else from a debt that it owes jointly with the MSME debtor; or
  - (b) Release a guarantor from the guarantee that the guarantor gave for the MSME debtor's debt.
- (6) The completion of an MSME Company Debt Restructuring Arrangement **does not, except to the extent provided in the terms of the Arrangement, release the MSME debtor from liability under any hire-purchase agreement or secured debt**.
- (7) When the Official Receiver receives the certificate of completion specified in subsection (2) above, the Official Receiver shall
- (a) Record the successful completion of the MSME Company Debt Restructuring Arrangement in the Personal Insolvency Register, and
  - (b) Within **[x] months of such receipt**, remove from the Debt Restructuring Arrangement Register all information recorded in it in respect of the completed Arrangement.
- (8) For the avoidance of doubt, when a MSME Company Debt Restructuring Arrangement is completed under subsection (1), the MSME Company Debt Restructuring Arrangement is no longer in effect, and the moratorium on creditor remedies under section 276L(4) ceases to apply.

#### **276Q. Duties of Personal Insolvency Administrator under MSME Company Debt Restructuring Arrangement**

- (1) The duties of the personal insolvency administrator under an MSME Company Debt Restructuring Arrangement include
  - (a) Generally giving effect to the Arrangement;
  - (b) Dealing with the MSME debtor's property in the manner specified in the Arrangement;
  - (c) Giving information about the administration of the Arrangement to the MSME debtor when the MSME debtor makes a reasonable request for the information;
  - (d) Giving information about the administration of the Arrangement to a creditor who
    - (i) is a party to the Arrangement;
    - (ii) makes a reasonable request for the information; and
  - (e) Giving information about the administration of the Arrangement to the Official Receiver.
- (2) The personal insolvency administrator shall not be reimbursed for expenses incurred in administering the Arrangement unless those expenses are of a kind specified in the relevant proposal for an MSME Company Debt Restructuring Arrangement.
- (3) The personal insolvency administrator shall maintain a separate bank account for receiving all monies paid by MSME debtors under MSME Company Debt Restructuring Arrangements, and shall not pay any money out of the account otherwise than
  - (a) For purposes related to the administration of MSME Company Debt Restructuring Arrangements;
  - (b) In accordance with this Act; or
  - (c) In accordance with a direction of the Court.
- (4) The personal insolvency administrator shall transmit monies paid by MSME debtors under MSME Company Debt Restructuring Arrangements to creditors in the agreed proportion on a timely basis.
- (5) The personal insolvency administrator shall maintain complete and accurate records of the account of monies received from the MSME debtor and the monies disbursed to creditors under an MSME Company Debt Settlement Arrangement.
- (6) The personal insolvency administrator shall maintain regular contact with the MSME debtor and conduct a review of the MSME Company Debt Restructuring Arrangement
  - (a) At least once in every period of 12 months; and
  - (b) At such other times as may be required by the circumstances of the operation of the Arrangement.
- (7) Where the circumstances of the MSME debtor have changed in a material respect, the personal insolvency administrator, in consultation with the MSME debtor, shall give due consideration as to whether the procedure for varying the MSME Company Debt Settlement Arrangement under **section 276N** should be commenced.

#### **276R. Personal Insolvency Agents**

- (1) A personal insolvency agent, when performing the functions of a personal insolvency agent under this Part,
  - (a) Does not act as agent of the MSME debtor;
  - (b) Does not act as agent of any creditor or creditors;
  - (c) Shall engage in the personal insolvency agent's professional capacity with the MSME debtor and creditors to seek, if possible, to achieve a solution which is satisfactory to both the MSME debtor and to creditors; and
  - (d) Shall exercise professional independent judgment, having regard to the rules and duties specified in this Act and any rules, standards, and guidance made by the Authority under section 9.

This new subsection responds to a query from Peer Reviewer 2 as to the legal status of the personal insolvency agent and of the personal insolvency administrator. The Peer Reviewer had asked whether the agent/administrator holds the status of agent of the MSME debtor, and whether the agent/administrator is an officer of the court. The position under the laws of countries such as England/Wales and Ireland is that an insolvency practitioner under an arrangement procedure is not an agent of the

debtor, but rather must act independently in exercising professional judgment in following the rules and furthering the aims of the relevant legislation. The wording I have included here reflects this position. It is based on wording drawn from judicial statements in cases of *Re a Debtor (No. 222 of 1990)*, *ex parte Bank of Ireland and others (No. 2) [1993] BCLC 233 (England and Wales)* and *Re Meeley (A Debtor) [2019] 1 IR 235* and *Re Darren Reilly [2017] IEHC 558 (Ireland)*.

(2) A person may serve as a personal insolvency agent under this Part only if the person

- (a) Is qualified under section 11A to serve as a key office holder with respect to the proposed MSME Company Debt Restructuring Arrangement
- (b) Has certified in writing that the person is qualified under section 11A to serve as a key office holder with respect to the proposed MSME Company Debt Restructuring Arrangement; and
- (c) Has consented in writing to the appointment as a personal insolvency agent and has not withdrawn consent at the time of appointment.

(3) A person who, with the person's consent, is appointed or acts as a personal insolvency agent knowing that any of the requirements of paragraphs (a) and (b) of subsection (2) has not been met, shall be guilty of an offence. [Provision for offence – approach TBD]

#### 276S. Personal Insolvency Administrators

- (1) A personal insolvency administrator, when performing the functions of a personal insolvency administrator under this Part,
  - (a) Does not act as agent of the MSME debtor;
  - (b) Does not act as agent of any creditor or creditors;
  - (c) Shall engage in the personal insolvency administrator's professional capacity with the MSME debtor and creditors to put the MSME Company Debt Restructuring Arrangement into effect; and
  - (d) Shall exercise professional independent judgment, having regard to the rules and duties specified in this Act and any rules, standards, and guidance made by the Authority under section 9.

[This new subsection responds to a query from Peer Reviewer 2 as to the legal status of the personal insolvency agent and of the personal insolvency administrator. The Peer Reviewer had asked whether the agent/administrator holds the status of agent of the debtor, and whether the agent/administrator is an officer of the court. The position under the laws of countries such as England/Wales and Ireland is that an insolvency practitioner under an arrangement procedure is not an agent of the debtor, but rather must act independently in exercising professional judgment in following the rules and furthering the aims of the relevant legislation. The wording I have included here reflects this position. It is based on wording drawn from judicial statements in cases of *Re a Debtor (No. 222 of 1990)*, *ex parte Bank of Ireland and others (No. 2) [1993] BCLC 233 (England and Wales)* and *Re Meeley (A Debtor) [2019] 1 IR 235* and *Re Darren Reilly [2017] IEHC 558 (Ireland)*.]

(2) A person may serve as a personal insolvency administrator under this Part only if the person



- (a) Is qualified under section 11A to serve as a key office holder with respect to the MSME Company Debt Restructuring Arrangement
  - (b) Has certified in writing that the person is qualified under section 11A to serve as a key office holder with respect to the MSME Company Debt Restructuring Arrangement; and
  - (c) Has consented in writing to the appointment as a personal insolvency administrator and has not withdrawn consent at the time of appointment.
- (3) A person who, with the person's consent, is appointed or acts as a personal insolvency administrator knowing that any of the requirements of paragraphs (a) and (b) of subsection (2) has not been met, shall be guilty of an offence. [Provision for offence – approach TBD]

**276T. MSME Company Debt Restructuring Arrangements: Court Directions**

- (1) The Official Receiver, or a personal insolvency administrator, may make an application to the court for directions or an order in relation to any matter arising in connection with an MSME Company Debt Restructuring Arrangement.
- (2) On an application under subsection (1), the court may
  - (a) Give the Official Receiver or personal insolvency administrator directions as the court deems appropriate;
  - (b) Treat the application as an application for Termination of the MSME Company Debt Restructuring Arrangement under **section 276C** or
  - (c) Order the personal insolvency administrator to commence the procedure for the variation of the MSME Company Debt Restructuring Arrangement under **section 276E**.

## Part XII – Liquidation

### *Role of Liquidator*

#### **277. Role of liquidator**

Subject to section [\*] (*Liquidator not required to act in certain cases*), a liquidator of a company in liquidation has the following objective –

- (a) to exercise control over the property of the company;
- (b) to protect the property of the company;
- (c) to realise property of the company; and
- (d) to distribute –
  - (i) the proceeds of realisation of property of the company; and
  - (ii) where applicable, property of the company,

subject to the applicable provisions of this Act.

### *Process of Liquidation*

#### **278. When liquidation commences**

The liquidation of a company commences on the day on which, and at the time at which, a liquidator other than a replacement liquidator is appointed under this Part (*Liquidation*).

#### **279. Appointment of liquidator**

- (1) A company is put into liquidation by the appointment as liquidator of –
  - (a) a named person; or
  - (b) the Official Receiver.
- (2) A liquidator may be appointed by –
  - (a) the company, by special resolution;
  - (b) the board of the company, by resolution, on the occurrence of an event specified in the articles of the company;
  - (c) the court on the application of –
    - (i) the company;
    - (ii) one or more directors of the company;
    - (iii) a contributory of the company;
    - (iv) a creditor (including a contingent or prospective creditor) of the company;
    - (v) if the company is in administration, the administrator;
    - (vi) a receiver;
    - (vii) the Registrar; or
    - (viii) the Authority; or
  - (d) a resolution of creditors passed at an outcome meeting under section [\*](2)(b) (*Business at outcome meeting*).

- (3) The Official Receiver may not be appointed as liquidator except –
- (a) under subsection (2)(a), where the special resolution is passed by reason of the Official Receiver exercising voting rights attaching to shares in the company of –
    - (i) a person in respect of whom a Bankruptcy Order has been made; or
    - (ii) another body corporate of which the Official Receiver is liquidator; or
  - (b) by the court.
- (4) The court may appoint a liquidator under subsection (2)(c) where the court is satisfied that –
- (a) **taking into account section [\*] (Evidence of inability to pay debts)**, the company is insolvent; or
  - (b) it is just and equitable that the company be put into liquidation.
- (5) The court shall not entertain an application under subsection (2)(c) made by a contingent or prospective creditor unless –
- (a) such security for costs has been provided as the court thinks fit; and
  - (b) the court is satisfied that a *prima facie* case for liquidation has been established.
- (6) An appointment under paragraph (a) or (b) of subsection (2) shall be in writing.
- (7) Where the court puts a company into liquidation under a power other than that contained in subsection (2)(c), including under section 97(2)(d) of the Companies Act, and unless the court orders otherwise, the appointment of the liquidator shall for all purposes be treated as having been made under subsection (2)(c) on an application by the company under paragraph (i) of that subsection.

**280. Restriction on appointment of liquidator by the company or board**

Where an application under section [\*](2)(c) (*Appointment of liquidator*) has been made and served on the company, and is pending, a liquidator may not be appointed under paragraph (a) or (b) of section [\*](2) (*Appointment of liquidator*) except –

- (a) if the appointment is made within seven working days after the application is served on the company;
- (b) if the application was made by a creditor under section [\*](2)(c) (*Appointment of liquidator*), with the prior, written consent of that creditor;
- (c) with the permission of the court; or
- (d) as a replacement liquidator to fill a vacancy in the office of liquidator, where the previous liquidator was appointed in accordance with –
  - (i) one of the preceding paragraphs of this subsection; or
  - (ii) this paragraph.

**281. Commencement of liquidation to be recorded**

- (1) Where a liquidator is appointed under section [\*](2)(a) (*Appointment of liquidator*), the company shall record in the special resolution appointing the liquidator the date on which, and the time at which, the special resolution was passed.

- (2) Where a liquidator is appointed under section [•](2)(b) (*Appointment of liquidator*), the board of the company shall record in the resolution appointing the liquidator the date on which, and the time at which, the resolution was passed.
- (3) Where a liquidator is appointed under section [•](2)(c) (*Appointment of liquidator*), the court shall record in the order appointing the liquidator the date on which, and the time at which, the order was made.

**282. Appointment of liquidator at outcome meeting**

- (1) In the case of the appointment by the creditors by resolution at an outcome meeting of a liquidator under section [•](2)(b) (*Business at outcome meeting*), the Official Receiver shall be the liquidator where –
  - (a) the resolution does not specify a person for appointment; or
  - (b) the appointment of the person specified for appointment in the resolution would be in contravention of section [•] (*Who may be appointed and act as liquidator*).
- (2) Where the creditors by resolution at an outcome meeting appoint a liquidator under section [•](2)(b) (*Business at outcome meeting*), the person who was the administrator at the end of the administration shall –
  - (a) confirm at the meeting whether or not subsection (1) applies; and
  - (b) if subsection (1) applies, forthwith give notice of that fact to the Official Receiver, in such manner as may be prescribed.

**283. Declaration of solvency**

- (1) Subject to subsection (4)(a), this section applies to a company where –
  - (a) a liquidator is appointed under paragraph (a) or (b) of section [•](2) (*Appointment of liquidator*); and
  - (b) before that appointment, a written declaration that meets the condition in subsection (2) is –
    - (i) made by –
      - (a) all of the directors of the company; or
      - (b) in the case of a company having more than two directors, a majority of the directors of the company; and
    - (ii) filed with the Registrar and Authority.
- (2) The condition referred to in subsection (1)(b) is that the declaration –
  - (a) states that –
    - (i) the directors making the declaration have made a full inquiry into the affairs of the company; and

- (ii) having done so, those directors have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after commencement of a liquidation of the company;
- (b) includes a full statement about the affairs, business, property and financial circumstances of the company –
  - (i) showing as at the latest practicable date before the making of the declaration –
    - (a) the particulars of its property, including any inventory of stock and the total amount expected to be realised therefrom;
    - (b) the debts and other liabilities of the company;
    - (c) the name and address of each of its creditors;
    - (d) the encumbrance or encumbrances (if any) held by each creditor;
    - (e) the date on which each encumbrance was created; and
    - (f) the estimated costs, charges and expenses of the liquidation and the estimated remuneration of the liquidator;
  - (ii) supported by affidavit by one or more of the persons who are, as at the date of the statement, directors of the company;
- (c) is made at a meeting of the directors of the company; and
- (d) is made within the 20 working days immediately preceding the date of appointment of the liquidator.
- (3) A director making a declaration under subsection (1)(b)(i) without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration shall be guilty of an offence. [Provision for offence – approach TBD]
- (4) Where a liquidator believes, or has reasonable grounds to believe, that the company will not be able to pay its debts in full within the period specified in a declaration made and filed under subsection (1)(b) –
  - (a) this section ceases to apply to the company, but without affecting or limiting subsection (3); and
  - (b) the liquidator shall as soon as practicable give written notice to the Registrar and Authority that this section no longer applies to the company.
- (5) A liquidator who fails to comply with subsection (4)(b) shall be guilty of an offence. [Provision for offence – approach TBD]
- (6) The application of this section, by virtue of subsection (1), has effects under the following sections: [•], [•], [•], [•], [•], [•], [•], [•], [•], [•], [•] and [•].

#### **284. Evidence of inability to pay debts**

For the purposes of an application under section [•](2)(c) (*Appointment of liquidator*), evidence of failure for three weeks from the date of service of a statutory demand to comply with the demand is not admissible as evidence that the company is insolvent (and the presumption in section [•](2)(4) (*Inability to pay debts*) shall not, **by reason of such failure**, apply) unless the application is made within 30 working days after the last date for compliance with the demand.

**285. Appointment of provisional liquidator**

- (1) Where an application is made under section [•](2)(c) (*Appointment of liquidator*), the court may appoint the Official Receiver as provisional liquidator, where the court –
  - (a) considers that it is likely that an order for the appointment of a liquidator will be made when the application is heard; and
  - (b) is satisfied on cogent evidence that property of the company is or affairs of the company are in serious jeopardy pending determination of the application.
- (2) In an order under subsection (1), the court shall record the date on which, and the time at which, the order is made.
- (3) The provisional liquidation of a company commences on the day on which, and at the time at which, the appointment of a provisional liquidator takes effect under subsection (4).
- (4) The appointment of a provisional liquidator takes effect on the day on which, and at the time at which, an order under subsection (1) is made.
- (5) A provisional liquidator shall, as soon as practicable and in any event within five working days after being appointed, give notice of the appointment to such persons and in such manner as may be prescribed.
- (6) The appointment of a provisional liquidator –
  - (a) may be terminated by the court on the application of –
    - (i) the provisional liquidator; or
    - (ii) a person specified in section [•](2)(c) (*Appointment of liquidator*);
  - (b) shall terminate upon –
    - (i) the making of an order for the appointment of a liquidator; or
    - (ii) the refusal by the court of an application, under section [•](2)(c) (*Appointment of liquidator*).
- (7) In making an order under subsection (6) the court may, if it thinks fit, make any other ancillary order.
- (8) Within five working days after the appointment of a provisional liquidator terminates, the provisional liquidator shall give notice of the termination to such persons and in such manner as may be prescribed.
- (9) Where the appointment of a provisional liquidator terminates under subsection (6)(b)(i), the provisional liquidator shall forthwith do all that is necessary to put the liquidator in control of the affairs, business and property of the company.
- (10) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

**286. Directors' statement in liquidation**

- (1) In such circumstances as may be prescribed, this section does not apply. [Intended to allow the section to be disapplied specifically in solvent liquidations or more generally.]
- (2) Subject to subsection (3)(4), within five working days after the liquidation of a company commences the directors of the company shall provide to the liquidator a full statement about the affairs, business, property

and financial circumstances of the company, showing as at the latest practicable date before the making of the declaration –

- (a) the particulars of its property, including any inventory of stock and the total amount expected to be realised therefrom;
  - (b) the debts and other liabilities of the company;
  - (c) the name and address of each of its creditors;
  - (d) the encumbrance or encumbrances (if any) held by each creditor; and
  - (e) the date on which each encumbrance was created.
- (3) The statement in subsection (1)(2) shall be supported by affidavit by one or more of the persons who are, as at the commencement of the liquidation, directors of the company, or by such of the following persons as the liquidator may reasonably request –
- (a) a person other than a director who is or has been an officer of the company;
  - (b) a person who has taken part in the formation, promotion or management of the company at any time within the period of 12 months immediately preceding the date of commencement of the liquidation; or
  - (c) a person who is or has been within that period a director or other officer of or in the employment of a body corporate that is, or within that period was, a director or other officer of the company to which the statement relates.
- (4) The liquidator or the court may extend the time limit for the provision of a statement under subsection (1)(2).
- (5) If a director fails to comply with subsection (1)(2) or subsection (2)(3), that director shall be guilty of an offence. [Provision for offence – approach TBD]

#### **287. Liquidator to convene meeting of creditors**

- (1) A liquidator shall hold a meeting of creditors –
- (a) where section [•] (*Declaration of solvency*) does not apply to the company, within ten working days after the liquidation commences; or
  - (b) where section [•] (*Declaration of solvency*) ceases to apply to the company, within ten working days of that cessation.
- (2) The following business shall be conducted at the meeting –
- (a) consideration by creditors of the documents tabled at the meeting;
  - (b) a resolution of creditors on whether or not the liquidator should be replaced; and
  - (c) if the liquidator is seeking to establish a liquidation creditors' committee, one or more resolutions of creditors on –
    - (i) whether or not to establish such a committee under section [•] (*Creditors' committee in liquidation*); and

- (ii) if such a committee is to be established, who are to be appointed as members of that committee.
- (3) The liquidator shall table at the meeting –
- (a) a statement to the effect that the conduct and performance of Insolvency Practitioners is monitored by the Authority and providing contact details of the Authority;
  - (b) the written certification specified in paragraph (c) of section [•](1) (*Who may be appointed and act as liquidator*);
  - (c) the written consent specified in paragraph (d) of section [•](1) (*Who may be appointed and act as liquidator*); and
  - (d) an interests statement, signed by the liquidator, that complies with section [•] (*Interests statement*); and
  - (e) the basis (or bases) and (as applicable) the hourly and percentage rate (or rates) and fixed level (or levels) of the liquidator's proposed remuneration.
- (4) At least seven working days before the meeting is required under subsection (2) to be held, the liquidator shall convene the meeting by –
- (a) giving written notice of the meeting to as many of the company's creditors as is reasonably practicable; and
  - (b) giving public notice of the meeting.
- (5) A notice under subsection (5)(a) shall –
- (a) state that a liquidator has been appointed;
  - (b) state the following –
    - (i) the liquidator's full name;
    - (ii) the date of the appointment;
    - (iii) the identity of the appointer of the liquidator and, where the appointer was the court, the identity of the person on whose application the appointment was made; and
    - (iv) the liquidator's office address and contact number to which, during normal working hours, inquiries may be directed;
  - (c) specify –
    - (i) the documents to be tabled at the meeting; and
    - (ii) the business to be conducted at the meeting; and
  - (d) summarise the matters referred to in section [•] (*Creditors' committee in liquidation*) and, if the liquidator is seeking to establish a liquidation creditors' committee, invite nominations for membership of such a committee.



- (6) The [•] Schedule (*Procedures for Meetings of Creditors and Contributors*) shall apply to a meeting referred to in subsection (2).
- (7) Within two working days after the holding of the meeting, the liquidator shall send –
- (a) a copy of the statement referred to in subsection (4)(a);
  - (b) a copy of the interests statement referred to in subsection (4)(d); and
  - (c) a copy of the notice referred to in subsection (5)(a),
- to the Registrar and Authority.
- (8) A liquidator who fails to comply with any of subsections (2), (4), (5), (6) and (8) shall be guilty of an offence.
- [Provision for offence – approach TBD]

#### **288. Replacement liquidator**

- (1) Where a resolution that a liquidator should be replaced is passed under section [•](2)(b) (*Liquidator to convene meeting of creditors*), the liquidator shall forthwith make an application to the court for the appointment of a replacement liquidator.
- (2) On an application under this section, the court may make an order –
- (a) either –
    - (i) appointing a suitable replacement liquidator; or
    - (ii) specifying a process for the appointment of a suitable replacement liquidator; and
  - (b) removing the liquidator upon appointment of the replacement liquidator.
- (3) A replacement liquidator shall, within five working days after appointment, send to each known creditor an interests statement, signed by the liquidator, that complies with section [•] (*Interests statement*).

#### **289. Creditors' committee in liquidation**

- (1) This section does not apply to a company for so long as section [•] (*Declaration of solvency*) applies to the company.
- (2) At any time during a liquidation and if a liquidation creditors' committee has not already been established, a liquidator –
- (a) shall seek the establishment of a liquidation creditors' committee, if so requested by a creditor in such manner as may be prescribed;
  - (b) may seek the establishment of a liquidation creditors' committee, on the liquidator's own motion.
- (3) The establishment of a liquidation creditors' committee ~~and appointments to such a committee requires a resolution~~ **require one or more resolutions** of creditors adopted at a meeting of creditors –
- (a) which, in the case of a request made under subsection (2)(a), the liquidator shall hold within seven working days after the liquidator receives the request; and
  - (b) the notice of which shall –
    - (i) summarise the matters referred to in this section; and

- (ii) invite nominations for membership of the liquidation creditors' committee.
- (4) The [ ] Schedule (*Procedures for Meetings of Creditors and Contributories*) shall apply to a meeting referred to in subsection (3).
- (5) If established, a liquidation creditors' committee –
- (a) shall have the following functions –
    - (i) to consult with the liquidator about matters relating to the liquidation; and
    - (ii) to consider reports from the liquidator sent under subsection (6); and
  - (b) may not give directions to the liquidator.
- (6) If a liquidation creditors' committee is established, the liquidator shall send reports to the committee containing such information, in such manner, and within such periods as may be prescribed.
- (7) A person is not eligible to be a member of a liquidation creditors' committee unless the liquidator is satisfied that the person is –
- (a) a creditor;
  - (b) the agent of a creditor under a general power of attorney; or
  - (c) authorised in writing by a creditor to be a member.
- (8) With respect to a liquidation creditors' committee, the following matters shall be subject to such requirements, restrictions and limitations as may be prescribed –
- (a) membership **and termination of membership** of the committee;
  - (b) notice of the establishment of the committee **and of matters relating to the committee**;
  - (c) the procedure for convening meetings of the committee;
  - (d) protection of acts or omissions done by members of the committee;
  - (e) reimbursement of expenses of members of the committee; and
  - (f) transactions by members of the committee and their related parties.
- (9) The consequences of defects in the qualifications, nomination or election of members of a liquidation creditors' committee shall be as may be prescribed.
- (10) Where, by reason of vacancies in a liquidation creditors' committee, the committee is unable to act, the liquidator shall as soon as practicable give written notice of that fact to each known creditor.

#### **290. Contributories' committee in liquidation**

- (1) At any time during a liquidation and if a liquidation contributories' committee has not already been established, a liquidator –
- (a) shall seek the establishment of a liquidation contributories' committee, if so requested by a contributory in such manner as may be prescribed;
  - (b) may seek the establishment of a liquidation contributories' committee, on the liquidator's own motion.

- (2) The establishment of a liquidation contributories' committee **and appointments to such a committee** requires a resolution **require one or more resolutions** of contributories adopted at a meeting of contributories –
- (a) which, in the case of a request made under subsection (1)(a), the liquidator shall hold within seven working days after the liquidator receives the request; and
  - (b) the notice of which shall –
    - (i) summarise the matters referred to in this section; and
    - (ii) invite nominations for membership of the liquidation contributories' committee.
- (3) The [•] Schedule (*Procedures for Meetings of Creditors and Contributories*) shall apply to a meeting referred to in subsection (2).
- (4) If established, a liquidation contributories' committee –
- (a) shall have the following functions –
    - (i) to consult with the liquidator about matters relating to the liquidation; and
    - (ii) to consider reports from the liquidator sent under subsection (5); and
  - (b) may not give directions to the liquidator.
- (5) If a liquidation contributories' committee is established, the liquidator shall send reports to the committee containing such information, in such manner, and within such periods as may be prescribed.
- (6) A person is not eligible to be a member of a liquidation contributories' committee unless the liquidator is satisfied that the person is –
- (a) a contributory;
  - (b) the agent of a contributory under a general power of attorney; or
  - (c) authorised in writing by a contributory to be a member.
- (7) With respect to a liquidation contributories' committee, the following matters shall be subject to such requirements, restrictions and limitations as may be prescribed –
- (a) membership **and termination of membership** of the committee;
  - (b) notice of the establishment of the committee **and of matters relating to the committee**;
  - (c) the procedure for convening meetings of the committee;
  - (d) protection of acts or omissions done by members of the committee;
  - (e) reimbursement of expenses of members of the committee; and
  - (f) transactions by members of the committee and their related parties.
- (8) The consequences of defects in the qualifications, nomination or election of members of a liquidation contributories' committee shall be as may be prescribed.
- (9) Where, by reason of vacancies in a liquidation contributories' committee, the committee is unable to act, the liquidator shall as soon as practicable give written notice of that fact to each known contributory.

**291. Meetings in liquidation of shareholders, creditors, contributories and committees**

- (1) A liquidator shall at all times until the end of the liquidation –
- (a) where section [\*] (*Declaration of solvency*) applies to the company, convene such meetings of shareholders as are requested by: –
    - (i) not less than five shareholders; or
    - (ii) a shareholder or shareholders representing not less than ten per centum of the total voting rights of all shareholders, ~~one or more shareholders holding shares on which has been paid up at least 10 per centum of the total amount paid up on all shares issued by the company,~~within five working days after receiving the request from the shareholder or shareholders;]
  - (b) where section [\*] (*Declaration of solvency*) does not apply to the company, convene such meetings of creditors as the liquidator sees fit;
  - (c) convene such meetings of shareholders as the liquidator sees fit;
  - (d) convene such meetings of contributories as the liquidator sees fit;
  - (e) convene such meetings of a liquidation creditors' committee (if any) –
    - (i) as the liquidator sees fit;
    - (ii) as that committee may reasonably request, within five working days after receiving the committee's request; and
  - (f) convene such meetings of a liquidation contributories' committee (if any) –
    - (i) as the liquidator sees fit;
    - (ii) as that committee may reasonably request, within five working days after receiving the committee's request.
- (2) The [\*] Schedule (*Procedures for Meetings of Creditors and Contributories*) shall apply to the meetings referred to in paragraphs (b) and (d) of subsection (1).
- (3) The requirements for notice and **the conduct of** business of meetings convened under paragraphs (e) and (f) of subsection (1) shall be as may be prescribed.
- (4) A liquidator shall have regard to the views set out in a resolution passed at a meeting convened under this section.
- (5) [The sole shareholder or sole contributory of a company may present to the liquidator a view on any matter that could have been decided at a meeting of shareholders or contributories (as the case may be), and that view shall for all purposes be treated as if it were set out in a resolution passed at a meeting of shareholders or contributories (as the case may be).]

**292. End of liquidation**

A liquidation ends on the day at which, and at the time at which –

- (a) all of the property of the company as at the commencement of the liquidation has been realised, distributed or disclaimed, and the proceeds of realisation of property have been distributed to the extent practicable; or
- (b) the court ends the liquidation, under section [•] (*Court's general power in liquidation and provisional liquidation*) or in the exercise of any other power the court may exercise.

### *Appointment of Liquidator or Provisional Liquidator*

~~Matters applying to both liquidation and provisional liquidation~~

#### **293. Who may be appointed and act as liquidator**

- (1) Other than the Official Receiver, a person may ~~not be~~ appointed or act as liquidator of a company ~~unless~~ **only if** the person –
  - (a) is qualified under section [•] (~~Registration~~) (**Individuals who are qualified to serve as key office holders**) to serve as an ~~Insolvency Practitioner~~ **a key office holder** with respect to the liquidation;
  - (b) is **not disqualified** under section [•] (*Qualifications of liquidators*) from being appointed or acting as a liquidator;
  - (c) has certified in writing that the person –
    - (i) is qualified under section [•] (~~Registration~~) (**Individuals who are qualified to serve as key office holders**) to serve as an ~~Insolvency Practitioner~~ **a key office holder** with respect to the liquidation; and
    - (ii) is **not disqualified** under section [•] (*Qualifications of liquidators*) from being appointed or acting as a liquidator; and
  - (d) has consented in writing to the appointment and has not withdrawn the consent at the time of appointment.
- (2) A person other than the Official Receiver who, with the person's consent, is appointed or acts as liquidator of a company knowing that any of the requirements of paragraphs (a), (b) and (c) of subsection (1) has not been met, shall be guilty of an offence. [Provision for offence – approach TBD]

#### **294. Qualifications of liquidators**

- (1) Other than the Official Receiver, the following persons and their related parties are disqualified from being appointed or acting as a liquidator of a company –
  - (a) a person who is or who has within the period of two years immediately preceding the date of commencement of the liquidation been a creditor of the company, except as an administrator of the company;
  - (b) a person who is or who has within the period of two years immediately preceding the date of commencement of the liquidation been a director or other officer or an auditor or employee of the company or of a related company;

- (c) a person who has or who has had within the period of two years immediately preceding the date of commencement of the liquidation –
  - (i) a direct interest in a share issued by the company or by a related company; or
  - (ii) an indirect interest in [five *per centum*] or more of any class of shares issued by the company or by a related company; or
- (d) a person who is or has been a receiver of property of the company within the period of three years immediately preceding the date of commencement of the liquidation.

- (2) A person who is appointed or acts as a liquidator when disqualified under subsection (1) shall be guilty of an offence. [Provision for offence – approach TBD]

**295. Appointment of two or more liquidators or provisional liquidators**

- (1) Two or more persons may be appointed as liquidators ~~or provisional liquidators~~ in any case where this Part (*Liquidation*) provides for the appointment of a liquidator ~~or provisional liquidator~~.
- (2) Where two or more persons are appointed as liquidators ~~or provisional liquidators~~ –
  - (a) a liquidator's ~~or provisional liquidator's~~ functions and powers may be performed or exercised by any one of them, or by any two or more of them together, except so far as the resolution or order appointing them provides otherwise;
  - (b) [any personal liability of the persons as liquidators shall be joint and several;] and
  - (c) a reference in this Act to a liquidator ~~or provisional liquidator~~ refers to whichever one or more of the liquidators ~~or provisional liquidators~~ as the case requires.

*Matters applying to liquidation only*

**296. Notice of liquidator's appointment and details**

- (1) A liquidator shall –
  - (a) before the close of the next working day after appointment, give written notice of the appointment to the Registrar and Authority;
  - (b) within two working days after appointment –
    - (i) give public notice of the liquidator's appointment, including –
      - (a) the liquidator's full name;
      - (b) the date of the appointment;
      - (c) the identity of the appointer of the liquidator and, where the appointer was the court, the identity of the person on whose application the appointment was made;
      - (d) the liquidator's office address and contact number to which, during normal working hours, inquiries may be directed; and

- (e) a statement to the effect that requests may be made in the prescribed manner for the establishment of committees of creditors and contributories to consult with and consider reports from the liquidator; and
  - (ii) send a copy of the public notice –
    - (a) to each known creditor and contributory; and
    - (b) to the Registrar and Authority; and
  - (c) within 20 working days after appointment –
    - (i) prepare a report about the affairs, business, property and financial circumstances of the company;
    - (ii) in such manner as may be prescribed, send to each known creditor and contributory the report referred to in paragraph (i); and
    - (iii) send a copy of the report to the Registrar and Authority.
- (2) Where the appointment of a liquidator is in addition to a liquidator who already holds office or is in place of a person who has vacated office as liquidator, each notice under subsection (1) shall state that fact.
- (3) In the event of any change in a liquidator's office address or contact number, the liquidator shall within two working days –
- (a) give public notice of the new address or contact number (as the case may be); and
  - (b) send a copy of the public notice to the Registrar and Authority.
- (4) A failure to comply with this section shall not affect the validity of a person's appointment as liquidator.
- (5) A liquidator who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

#### **297. Documents to refer to liquidation**

- (1) For so long as a company is in liquidation, the liquidator shall ensure that –
- (a) every document issued or signed by or on behalf of the company or the liquidator shall have the words "in liquidation" after the name of the company where it first appears; and
  - (b) if the company has one or more websites, each page of each website shall state prominently that the company is in liquidation.
- (2) A failure to comply with subsection (1) shall not affect the validity of –
- (a) a person's appointment as liquidator; or
  - (b) any document.
- (3) Every person who fails to comply with subsection (1) shall be guilty of an offence. [Provision for offence – approach TBD]

## *Effects of Liquidation*

### **298. No enforcement of encumbrance during liquidation**

- (1) This section does not apply to a company for so long as section [\*] (*Declaration of solvency*) applies to the company.
- (2) Subject to section [\*] (*Power exercised before commencement of liquidation*), during the liquidation of a company, no person shall enforce an encumbrance over property of the company, except with –
  - (a) the prior, written consent of the liquidator; or
  - (b) the permission of the court on such terms and conditions as the court thinks fit.
- (3) The liquidator is not liable in damages for declining to give consent under subsection (1)(2)(a).

### **299. No commencement or continuation of proceedings during liquidation**

- (1) During the liquidation of a company, no formal proceeding against the company or any of its property shall be commenced or continued, except with –
  - (a) the prior, written consent of the liquidator; or
  - (b) the permission of the court on such terms and conditions as the court thinks fit.
- (2) For the purposes of subsection (1), “formal proceeding” includes –
  - (a) any legal proceeding; and
  - (b) any mediation or arbitral process or other formal adversarial process.
- (3) The liquidator is not liable in damages for declining to give consent under subsection (1)(a).

### **300. No execution or other process during liquidation**

- (1) This section does not apply to a company for so long as section [\*] (*Declaration of solvency*) applies to the company.
- (2) Subject to section [\*] (*Power exercised before commencement of liquidation*), during the liquidation of a company, no execution or other legal process, or the levying of distress, against the company or any of its property shall be commenced or continued, except with –
  - (a) the prior, written consent of the liquidator; or
  - (b) the permission of the court on such terms and conditions as the court thinks fit.
- (3) The liquidator is not liable in damages for declining to give consent under subsection (2)(a).

### **301. No benefit of execution or other process unless completed before liquidation**

- (1) Subject to subsection (2), a creditor is not entitled to the benefit of any execution or other legal process or distress against a company in liquidation or any of its property unless the execution or other legal process or distress was completed before the commencement of the liquidation, except with the permission of the court on such terms and conditions as the court thinks fit.
- (2) For the purposes of subsection (1) –



- (a) an execution against movable or immovable property is completed by seizure, or the entry into possession of a receiver or a person charged with execution, and a completed sale; and
  - (b) an attachment of a debt is completed by satisfaction of the debt.
- (3) A person who acquires property of the company in good faith –
- (a) from a Fiscal charged with an execution process; or
  - (b) on which distress has been levied,
- acquires good title as against the company and liquidator.
- (4) Nothing in this section shall affect or limit the application of sections [\*] (*Voidable preference*) to [\*] (*Misfeasance*).

### **302. Duties of Fiscal in liquidation**

- (1) This section applies to an execution process against property of a company in liquidation that was levied but not completed within the meaning of section [(2)] (*No benefit of execution or other process unless completed before liquidation*) before commencement of the liquidation.
- (2) Subject to subsection (3) and unless the court orders otherwise on the application of the execution creditor, a Fiscal shall, as soon as practicable after the liquidation commences –
- (a) deliver to the liquidator any property of the company that is in or comes into the Fiscal's possession or custody or under the Fiscal's control as a result of the execution process; and
  - (b) cause the liquidator to be paid –
    - (i) any proceeds of realisation of property of the company under the execution process;
    - (ii) any money of the company received or seized under the execution process; and
    - (iii) any money paid to avoid seizure or sale of property of the company under the execution process,where such proceeds or money –
    - (iv) are in or come into the Fiscal's possession or custody or under the Fiscal's control; or
    - (v) are paid into court (and have not already been paid out).
- (3) The Fiscal may retain or cause to be retained –
- (a) from property delivered under subsection (1)(a), property of a value that the Fiscal may reasonably determine to represent the costs of the execution process or attachment (as the case may be) incurred by the Fiscal; or
  - (b) from proceeds or money paid under subsection (1)(b), the costs of the execution process or attachment (as the case may be) incurred by the Fiscal.

### **303. Power exercised before commencement of liquidation**

- (1) Where, before the commencement of a liquidation, and by way of enforcement of –
- (a) an encumbrance over property; or

- (b) a right of the owner or lessor of property, including under a hire-purchase agreement, to take possession of the property or otherwise recover it,

a receiver or other person –

- (c) entered into possession or custody or assumed control of; or
- (d) exercised any other power in relation to,

property of the company, nothing in sections [•] (*No enforcement of encumbrance during liquidation*), [•] (*No execution or other process during liquidation*) and [•] (*Effect of liquidation on dealing with property*) shall prevent the receiver or other person from performing or exercising a function or power in relation to the property.

- (2) Section [•](1) (*Effect of liquidation on dealing with property*) shall not apply to an agreement, transaction or dealing that affects the property referred to in subsection (1) and is entered into in the performance or exercise of a function or power of the receiver or other person referred to in subsection (1).

#### **304. Effect of liquidation on directors and other agents of the company**

- (1) The appointment of a liquidator does not remove the directors of the company from office.
- (2) A director of a company that is in liquidation may not perform or exercise, or purport to perform or exercise, a function or power as an officer of the company except –
  - (a) to appeal against an order of the court under section [•](2)(c) (*Appointment of liquidator*), in such manner, within such period, and with such requirements for notice of intention to appeal as may be prescribed, but the director shall not have any resort to the property of the company in connection with any such appeal (subject to any order the court may make at the conclusion of the appeal); or
  - (b) as expressly permitted by this Part (*Liquidation*).
- (3) The appointment of a liquidator revokes the authority of any agent of the company appointed by or on behalf of the board of the company.

#### **305. Requirement to provide information to liquidator**

- (1) Where a liquidator is appointed, every director and other officer of the company shall –
  - (a) as soon as practicable and in any event within five working days after the appointment make available to the liquidator all books, records and documents relating to the affairs, business, property and financial circumstances of the company in the person's possession or custody or under the person's control;
  - (b) if required to do so by the liquidator, verify by affidavit within a reasonable period that the books, records and documents are complete and correct;
  - (c) if the company has a common seal, promptly make the common seal available for use by the liquidator; and
  - (d) give the liquidator such assistance as the liquidator may reasonably request.

- (2) On the application of the liquidator, the court may make an order requiring a director or other officer of the company to comply with subsection (1).
- (3) A verification under subsection (1)(b) may be qualified in relation to specific matters dealt with in the books, records and documents where the person giving the verification does not –
  - (a) consider the books, records and documents to be complete and correct; or
  - (b) have the knowledge necessary to give a verification.

**306. Effect of liquidation on dealing with property**

- (1) Subject to section [\*] (*Power exercised before commencement of liquidation*), an agreement, transaction or dealing by a company in liquidation, or by a person on behalf of the company, that affects property of the company is void unless the agreement, transaction or dealing was entered into –
  - (a) by the liquidator, on the company's behalf;
  - (b) with the prior, written consent of the liquidator;
  - (c) in accordance with section [\*](1) (*Powers of receiver on liquidation*); or
  - (d) under an order of the court.
- (2) The liquidator is not liable in damages for declining to give consent under subsection (1)(b).
- (3) The court may by order give effect to an agreement, transaction or dealing that is void under subsection (1).
- (4) Subsection (1) shall not apply to a payment, made by a [bank], that is –
  - (a) out of an account kept by the company with the [bank];
  - (b) in good faith and in the ordinary course of the [bank's] banking business; and
  - (c) on or before the earlier of –
    - (i) the day on which the [bank] was notified in writing by the liquidator that the liquidation had commenced; and
    - (ii) the day on which the [bank] had reason to believe that the company was in liquidation.
- (5) A director or other officer of the company who –
  - (a) purports, on the company's behalf, to enter into an agreement, transaction or dealing that is void under subsection (1); or
  - (b) is in any other way knowingly concerned in, or a party to, an agreement, transaction or dealing that is void under subsection (1),shall be guilty of an offence. [Provision for offence – approach TBD]
- (6) The court may order a director or other officer who is convicted of an offence under subsection (5) to compensate any person, including the company, that has suffered loss as a result of the act or omission constituting the offence.
- (7) If any question arises as to whether, on the date on which a liquidator was appointed, an agreement, transaction or dealing that affects property of the company was entered into before or after the time at

which the liquidator was appointed, that agreement, transaction or dealing shall be presumed, unless the contrary is proved, to have been entered into after that time.

- (8) Notwithstanding any other enactment, no person may, as against the liquidator, claim a lien over a book, record or document of the company.

### **307. Effect of liquidation on transfer of shares**

- (1) Subject to this section –
- (a) a share in a company in liquidation shall not be transferred; and
  - (b) the status of a shareholder of a company in liquidation, as to its liabilities, may not be altered.
- (2) Where –
- (a) section [\*] (*Declaration of solvency*) does not apply to the company; and
  - (b) the liquidator is satisfied that the transfer of a share in the company in liquidation is in the interests of the creditors as a whole,
- the liquidator may consent to the transfer.
- (3) The liquidator is not liable in damages for declining to give consent under subsection (2).
- (4) The court may, where it is satisfied that substantial injustice would otherwise result, make an order –
- (a) for the transfer of a share of a company in liquidation; or
  - (b) altering the status of a shareholder of a company in liquidation, as to its liabilities.
- (5) Nothing in this section shall affect or limit the application of section 46 of the Companies Act.

### **308. Essential services in liquidation**

- ~~(1) In this section –~~

~~“essential good or service” means –~~

- ~~(a) electricity;~~
- ~~(b) relevant information technology;~~
- ~~(c) telecommunications services; and~~
- ~~(d) water;~~

~~“relevant information technology” means –~~

- ~~(e) computer hardware and software;~~
- ~~(f) data storage and processing, including in relation to cloud services;~~
- ~~(g) information, advice and technical assistance in connection with the use of information technology;~~
- ~~(h) point-of-sale terminals; and~~
- ~~(i) website hosting; and~~

~~“telecommunications services” means the conveyance from one device to another by a line, radio frequency, satellite transmission or other medium of a sign, signal, impulse, writing, image, sound,~~

instruction, information or intelligence of any nature, whether or not for the information of a person using the device.

- (2) Notwithstanding any other enactment, a supplier of an essential good or service shall not –
- (a) refuse to supply the good or service to a liquidator, or to a company in liquidation, by reason of the company's default in paying charges due for the good or service in relation to a period before the commencement of the liquidation; or
  - (b) make it a condition of the supply of the good or service to a liquidator, or to a company in liquidation, that payment be made of outstanding charges due for the good or service in relation to a period before the commencement of the liquidation.
- (3) The charges incurred by a liquidator for the supply of an essential good or service are an expense of the liquidation for the purposes of the [•] Schedule (*Preferential Claims in Liquidation*).

### **309. Applicability of this Sub-Part (*Effects of Liquidation*) in provisional liquidation**

Where a provisional liquidator is appointed by an order made under section [•] (*Appointment of provisional liquidator*), and unless the order provides otherwise, the following sections (and no other sections) of this Sub-Part shall apply to the provisional liquidator and the provisional liquidation, as if references to a liquidator were to the provisional liquidator and references to a liquidation (except the reference in section [•](2) (*Essential services in liquidation*)) were to the provisional liquidation –

- (a) section [•] (*No enforcement of encumbrance during liquidation*);
- (b) section [•] (*No commencement or continuation of proceedings during liquidation*);
- (c) section [•] (*No execution or other process during liquidation*);
- (d) section [•] (*Power exercised before commencement of liquidation*);
- (e) section [•] (*Effect of liquidation on directors and other agents of the company*), as if the words “an order of the court under section [•](2)(c) (*Appointment of liquidator*)” read “an order of the court under section [•](1) (*Appointment of provisional liquidator*)”;
- (f) section [•] (*Effect of liquidation on dealing with property*);
- (g) section [•] (*Effect of liquidation on transfer of shares*); and
- (h) section [•] (*Essential services in liquidation*).

## *Powers of Liquidator*

### *Powers in general*

#### **310. Powers of liquidator**

- (1) A liquidator may do all such things as may be necessary or desirable for the matters referred to in section [•] (*Role of liquidator*).
- (2) A liquidator shall have the powers specified in the [•] Schedule (*Powers of Liquidators*)
- (3) Subject to any requirement for –
- (a) approval of –

- (i) creditors;
  - (ii) shareholders;
  - (iii) contributories;
  - (iv) a liquidation creditors' committee; or
  - (v) a liquidation contributories' committee; or
- (b) permission of the court,
- as may be prescribed, a liquidator may exercise the powers referred to in subsection (2).

- (4) In the performance or exercise of a power or function the liquidator is the company's agent, and a person dealing with the liquidator in good faith and for value is not required to inquire whether the liquidator is acting within the liquidator's powers.

### **311. Request by liquidator for cooperation**

- (1) ~~[This section~~ **Subsection (2)(b)** does not apply to a company for so long as section [•] (*Declaration of solvency*) applies to the company.]<sup>22</sup>
- (2) A liquidator may by written notice –
- (a) subject to section [•] (*Documents required by office holder*), ~~require~~ **request** a director or shareholder of the company or any other person to deliver to the liquidator such books, records or documents of the company in that person's possession or custody or under that person's control relating to the liquidation as the liquidator may determine; and
  - (b) ~~require~~ **request** –
    - (i) a person who has taken part in the formation, promotion or management of the company;
    - (ii) a past or present shareholder of the company;
    - (iii) a past or present director or other officer of the company;
    - (iv) a past or present receiver of property of the company;
    - (v) a person who is or has been an employee of the company;
    - (vi) a person who is acting or has at any time acted as a lawyer for the company (**but subject to legal advice privilege or litigation privilege**);
    - (vii) an accountant or auditor of the company; or
    - (viii) another person having knowledge of the affairs of the company,to do any of the things specified in subsection (3), if and to the extent reasonable.
- (3) The things referred to in subsection (2) are to –
- (a) attend on the liquidator at such time and place as the liquidator may request;
  - (b) provide the liquidator with such information about the affairs, business, property or financial circumstances of the company as the liquidator may request;

<sup>22</sup> Law Commission to confirm that subsection (1) can be retained, limited to subsection (2)(b) as now drafted.

- (c) be examined on oath by the liquidator on any matter relating to the affairs, business, property or financial circumstances of the company, under such evidentiary and other procedural rules as may be prescribed;
  - (d) assist the liquidator in the liquidation to the best of the person's ability.
- (4) The liquidator shall pay to a person referred to in subsection (2)(b), not being an employee of the company, reasonable travel and other expenses that are incurred in complying with a request made under subsection ~~(3)~~(2)(b).
- (5) No suit, prosecution or any other legal or other proceeding (including a disciplinary proceeding by any professional body or authority having jurisdiction in respect of professional conduct) shall lie against any person in respect of disclosure in good faith of information to the liquidator under this section.
- (6) On the application of the liquidator, the court may order a person who has failed to comply with a request made under this section to –
- (a) comply with the request; or
  - (b) attend before the court and be examined on oath, under such evidentiary and other procedural rules as may be prescribed,
- where the court is satisfied that such compliance or examination (as the case may be) –
- (c) is necessary to further the achievement of the objective referred to in section [\*] (*Role of liquidator*); and
  - (d) would not be unreasonably oppressive to the person.

**312. Liquidator's notice that receivership shall end**

- (1) A liquidator may require a receivership to end by giving written notice, in such form as may be prescribed, to the receiver.
- (2) The receivership ends at the close of the next working day after the giving of notice under subsection (1).
- (3) As soon as practicable after receiving a notice under subsection (1) and in any event by the end of the receivership, the receiver shall cease to deal with the property in receivership.
- (4) After a receiver receives a notice under subsection (1) –
  - (a) the receiver is not required to take any further steps under section [\*](2) (*General duties of receivers*);
  - (b) section [\*](4)(b) (*Order of priority where floating charge-fixed security receiver appointed*) or section [\*](4)(b) (*Order of priority where fixed security-floating charge receiver appointed*) (as the case may be) ceases to apply, but any distributions already made thereunder shall not be disturbed on that ground; and
  - (c) for the purposes of the [\*] Schedule (*Preferential Claims in Liquidation*), the costs, charges and expenses properly incurred by and the remuneration of the receiver under this Act, and the receiver's indemnity under section [\*] (*Receiver's indemnity*), shall be treated as an expense of the liquidation.

**313. Execution of documents by liquidator**

- (1) A liquidator may execute in the name and on behalf of the company all documents necessary or incidental to the exercise of the powers of the liquidator (as the case may be).
- (2) A document signed on behalf of a company by a liquidator shall be deemed to have been properly entered into on behalf of the company for the purposes of section 19 of the Companies Act.
- (3) Notwithstanding anything to the contrary in any other law or the articles of a company, where the resolution or order appointing a liquidator empowers the liquidator to execute documents and to use the company's common seal for that purpose, a liquidator may execute documents in the name and on behalf of the company by affixing the company's common seal to the documents and attesting the affixing of the common seal.
- (4) A document executed in the manner described in subsection (3) shall be deemed to have been properly entered into by the company for the purposes of section 19 of the Companies Act.

**314. Power of liquidator to deal with property subject to an encumbrance**

- (1) A liquidator may perform or exercise a function or power in relation to property that is subject to an encumbrance where –
  - (a) the encumbrance is a fixed security and the property is surrendered under paragraph 1(b) of the [•] Schedule (*Secured Creditors' Options*) or taken to be surrendered under paragraph 4(a) of that Schedule;
  - (b) the encumbrance is a fixed security and paragraph (a) does not apply but the grantee of the encumbrance has confirmed to the liquidator that it does not intend to enforce the encumbrance;
  - (c) the encumbrance is a floating charge;
  - (d) the encumbrance is a fixed security ranking behind a floating charge under section 431(2) of the Companies Act; or
  - (e) the encumbrance is a lien.
- (2) Where property is disposed of under subsection (1), the grantee of the encumbrance has the same priority in respect of any property of the company directly or indirectly representing the property disposed of as the grantee had in respect of the property subject to the encumbrance.

*Disclaimer of onerous property*

**315. Disclaimer of onerous property** [overall, intended as a simplification of the current CA 2007, s 377 (including some substantive changes)]

- (1) In this section, "onerous property" means –
  - (a) an unprofitable contract; or
  - (b) property that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act.



- (2) Subject to subsection (3), a Bankruptcy Trustee (in a bankruptcy) or a liquidator (in a liquidation) may disclaim onerous property. **intended to remove the time limit for a disclaimer, and the requirement for leave of the court, provided for in the current CA 2007, s 377(1)**
- (3) A Bankruptcy Trustee or liquidator may not disclaim onerous property where the onerous property **presents an imminent and serious risk to public health**.
- (4) A contract may be disclaimed under subsection (2) even if the Bankruptcy Trustee or liquidator has tried to assign it or has exercised rights in relation to it or to any property to which it relates.
- (5) Property may be disclaimed under subsection (2) even if the Bankruptcy Trustee or liquidator has taken possession of it, tried to sell it, or otherwise exercised rights of ownership in relation to it.
- (6) A disclaimer under subsection (2) –
- (a) brings to an end as from the time of the disclaimer the rights, interests and liabilities of the debtor in relation to the property disclaimed; but
  - (b) does not, except so far as necessary to release the debtor from a liability, affect or limit the rights or liabilities of any other person.
- (7) A Bankruptcy Trustee or liquidator who disclaims onerous property shall, as soon as practicable and in any event within five working days after the disclaimer, give written notice of the disclaimer, containing such information and in such manner as may be prescribed, to each person whose rights are, to the knowledge of the Bankruptcy Trustee or liquidator (as the case may be), affected by the disclaimer.
- (8) A person suffering loss as a result of a disclaimer under subsection (2) may –
- (a) claim as a creditor for the amount of the loss, taking account of the effect of an order made under subsection (8)(b); and
  - (b) apply to the court for an order that the disclaimed property be delivered to or vested in that person.
- (9) The court may make an order under this section where it is satisfied that it is just that the property be delivered to or vested in the applicant.
- (10) In making an order under this section, the court may, if it thinks fit –
- (a) impose any term or condition;
  - (b) make any other ancillary order.

### **316. Requirement to elect whether or not to disclaim**

Where a person whose rights would be affected by a disclaimer of onerous property gives the Bankruptcy Trustee (in a bankruptcy) or the liquidator (in a liquidation) written notice requiring the ~~Official Receiver~~ **Bankruptcy Trustee** or the liquidator to elect, before the close of such date as is specified in the notice, not being a date that is less than 20 working days after the day on which the notice is received by the ~~Official Receiver~~ **Bankruptcy Trustee** or liquidator, whether or not to disclaim the onerous property, the ~~Official Receiver~~ **Bankruptcy Trustee** or liquidator may not disclaim the onerous property unless the ~~Official Receiver~~ **Bankruptcy Trustee** or liquidator does so before the close of that date.

### 317. Applicability of this Sub-Part (*Powers of Liquidator*) in provisional liquidation

Where a provisional liquidator is appointed by an order made under section [\*] (*Appointment of provisional liquidator*), the extent to which this Sub-Part applies to the provisional liquidator and the provisional liquidation, as if references to a liquidator were to the provisional liquidator and references to a liquidation were to the provisional liquidation and with the necessary modifications to section [\*](6)(c) (*Request by liquidator for cooperation*), shall be as may be specified in the order.

## *Duties of Liquidator*

### *General*

#### 318. Liquidator not required to act in certain cases

- (1) This section applies notwithstanding any other provisions of this Part (*Liquidation*).
- (2) Except where paragraph (a), (b) or (d) of section [\*](1) (*Power of liquidator to deal with property subject to an encumbrance*) applies, a liquidator is not required to perform or exercise any function or power in relation to property that is subject to a fixed security.
- (3) Where all of the following apply –

- (i) a liquidator is appointed by an order made under section [\*](2)(c) (*Appointment of liquidator*);
- (ii) the Official Receiver is not the liquidator; and
- (iii) the company is an assetless company,

the liquidator is not required to perform any duty or exercise any power in connection with the liquidation if to do so would, or would be likely to, involve incurring any expense.

#### 319. Duty of liquidator to investigate company's affairs

- (1) As soon as practicable after the liquidation of a company commences, the liquidator shall –
  - (a) investigate the company's affairs;
  - (b) where a declaration has been made and filed under section [\*](1)(b) (*Declaration of solvency*), consider whether or not the company will be able to pay its debts in full within the period specified in the declaration;
  - (c) subject to subsection (2), consider whether the company may have been a party to a voidable transaction or a transaction at an undervalue, and determine in respect of possible voidable transactions and transactions at an undervalue whether or not it would be in the creditors' interests –
    - (i) to carry out investigations in relation to them; and
    - (ii) to apply to the court under section [\*] (*Procedure for setting aside a voidable preference, voidable encumbrance or alienation with intent*) and to seek recovery under section [\*] (*Transaction at an undervalue*).
- (2) ~~Subsection (1)(b) does not apply to a company for~~ For so long as section [\*] (*Declaration of solvency*) applies to the a company, subsection (1)(c) does not apply to the company unless the court orders otherwise on the application of a contributory.

*Contributories*

**320. Settlement of a list of contributories**

- (1) Subject to subsection (2), as soon as practicable after commencement of a liquidation, the liquidator shall settle a list of contributories.
- (2) Where the liquidator considers that it will not be necessary to make calls on contributories, the liquidator need not settle a list of contributories.
- (3) In settling a list of contributories, the liquidator shall follow such procedure as may be prescribed.
- (4) A list of contributories shall comply with such requirements as may be prescribed.

**321. Variation of a list of contributories**

- (1) A liquidator may vary a list of contributories.
- (2) In varying a list of contributories, the liquidator shall follow such procedure as may be prescribed.

**322. Adjustment of the rights of contributories**

- (1) As soon as practicable after settling a list of contributories, a liquidator shall, so far as necessary for the contributories' liabilities to be rateable, adjust the rights of contributories among themselves.
- (2) In adjusting the rights of contributories among themselves, the liquidator shall follow such procedure as may be prescribed.

**323. Liability of former shareholders**

- (1) In this section, "former shareholder", with respect to a company, means a person who was a shareholder at any time within the period of 12 months immediately preceding the date of commencement of its liquidation.
- (2) Subject to subsections (3) and (4), where a shareholder fails to pay any amount owing in respect of a share, that amount shall be payable by, and may be recovered by a liquidator from, any former shareholder.
- (3) A former shareholder shall not be liable under subsection (2) where, at all times that the former shareholder was a shareholder during the period referred to in subsection (1), the company was able to pay its debts as they become due in the normal course of business.
- (4) Where the liability attached to a share has increased after the time at which it was held by a former shareholder, the liability of the former shareholder under subsection (2) in respect of that share shall not exceed the amount of any liability attached to the share after the time at which it was held by the former shareholder.

**324. Enforcement of liability of contributories**

- (1) A liquidator may –
  - (a) where a shareholder is liable to a call in respect of uncalled capital, make a call on that shareholder in respect of that uncalled capital; and

- (b) where a contributory is otherwise liable to the company, make a call on that contributory in respect of that liability.
- (2) Where the liquidator makes a call under subsection (1), it shall give notice of the call to the contributory.
- (3) A notice under subsection (2) shall comply with such requirements as may be prescribed.
- (4) Interest shall be payable on calls at such rate or rates as may be prescribed.
- (5) On the application of the liquidator, the court may order payment of –
  - (a) an individual call made under subsection (1); or
  - (b) multiple calls made under subsection (1),together with interest, if any, payable under subsection (4).

*Application of property of the company*

**325. Preferential claims**

- (1) A liquidator shall apply the proceeds of realisation of property of the company in or towards satisfaction of the claims, determined as at the relevant date, set out in the [•] Schedule (*Preferential Claims in Liquidation*), to the extent and in the order of priority specified in that Schedule.
- (2) Without prejudice to paragraph 8 of the [•] Schedule (*Preferential Claims in Liquidation*), “property of the company” in subsection (1) shall not include property subject to an encumbrance unless one of paragraphs (a), (b), (c), (d) and (e) of section [•](1) (*Power of liquidator to deal with property subject to an encumbrance*) applies.
- (3) After paying claims in accordance with subsection (1), the liquidator shall apply the proceeds of realisation of property of the company in or towards satisfaction of general claims, determined as at the relevant date, **paying all general claims at the same time.**
- (4) The claims referred to in subsection (3) rank equally among themselves and shall be satisfied in full unless the proceeds of realisation of property of the company are insufficient to satisfy them, in which case the proceeds shall abate rateably among all such claims.
- (5) After paying claims in accordance with subsection (3), interest as from the relevant date calculated in such manner as may be prescribed shall be paid on the claims referred to in paragraphs (1) and (3).
- (6) The claims referred to in subsection (5) rank equally among themselves with respect to the interest referred to in that subsection, and such interest shall be paid in full unless the proceeds of realisation of property of the company are insufficient to pay it, in which case the proceeds shall abate rateably among all of the claims referred to in that subsection with respect to that interest.
- (7) After paying claims in accordance with subsection (5), the liquidator –
  - (a) subject to paragraph (b), shall apply the surplus proceeds of realisation of the property of the company in accordance with paragraph (8);
  - (b) [may distribute surplus unrealised property of the company in accordance with paragraph (8) (instead of realising that property and applying the proceeds under paragraph (a)) where –
    - (i) the articles of the company permit its distribution; or

- (ii) both of the following are first obtained –
  - (a) a decision of the shareholders, by special resolution, that the property should be distributed; and
  - (b) permission of the court, on the application of the liquidator, for the distribution of the property].
- (8) Any application of surplus proceeds or distribution of surplus property under subsection (7) is to be –
  - (a) in the order of priority provided for in the articles of the company; or
  - (b) in the absence of such provision, to the shareholders rateably.
- (9) Where, before the commencement of a liquidation, a creditor has agreed to accept a lower priority in respect of a debt than that which it would otherwise have under this section, nothing in this section shall prevent the agreement from having effect according to its terms.

*Duties to report*

**326. Duty of liquidator to report misfeasance**

- (1) Where a liquidator believes, or has reasonable grounds to believe, that an involved party has misapplied or retained or become liable or accountable for money or other property of the company, or been guilty of negligence, default or breach of duty or trust in relation to the company, the administrator-liquidator shall as soon as practicable report the matter to the Registrar and Authority.
- (2) In any case where a liquidator makes a report under subsection (1), the liquidator shall give to the Registrar and Authority such assistance as the Registrar or Authority (as the case may be) may reasonably request by way of –
  - (a) provision of information;
  - (b) access to documents; and
  - (c) facilities for inspecting and copying documents.
- (3) A liquidator who fails to comply with subsection (1) or subsection (2) shall be guilty of an offence. [Provision for offence – approach TBD]

**327. Duty of liquidator to report offence committed [draws on (but differs from) the current CA 2007, ss 382 and 460]**

- (1) Where a liquidator believes, or has reasonable grounds to believe, that the company or any involved party has committed an offence under –
  - (a) this Act;
  - (b) the Companies Act; or
  - (c) [the Securities and Exchange Commission of Sri Lanka Act, No. 36 of 1987]19 of 2021<sup>23</sup>; or
  - (d) [TBC];

<sup>23</sup> Law Commission to consider whether this paragraph should be removed, as the number of companies registered by the SEC is understood to be relatively small.

the liquidator shall as soon as practicable report the matter to the Registrar and Authority.

- (2) The Registrar and Authority shall refer a matter reported under subsection (1) to the appropriate law enforcement authority.
- (3) In any case where a liquidator makes a report on a matter under subsection (1) that is reported to a law enforcement authority under subsection (2), the liquidator shall give to the authority such assistance as the authority may require by way of –
  - (a) provision of information;
  - (b) access to documents; and
  - (c) facilities for inspecting and copying documents.
- (4) Nothing in this section shall affect or limit any duty imposed on a liquidator under any other enactment.
- (5) A liquidator who fails to comply with subsection (1) or subsection (3) shall be guilty of an offence. [Provision for offence – approach TBD]

### **328. Duty of liquidator to prepare accounts**

- (1) A liquidator or a person who was a liquidator at the end of the liquidation (as the case may be) shall prepare an account for each of the following periods –
  - (a) the period of six months (or shorter, as the liquidator may determine) immediately after the appointment of the liquidator;
  - (b) each subsequent period of six months during which the liquidator holds office; and
  - (c) the period between the last period of the kind referred to in subsection (1)(b) and the day on which the liquidator vacates office.
- (2) Within 20 working days after the end of the period in question referred to in subsection (1), the person shall –
  - (a) in such manner as may be prescribed, send to each known creditor and contributory the account referred to in subsection (1); and
  - (b) send a copy of the account to the Registrar and Authority.
- (3) The account referred to in subsection (1) shall be in such form as may be prescribed and shall –
  - (a) show, for each period, the liquidator's receipts and payments;
  - (b) show, for each period except the first, the aggregate of the liquidator's receipts and payments since the day on which the liquidator was appointed; and
  - (c) where the Official Receiver is not the liquidator and except in the case of the account referred to in subsection (1)(c), contain an updated interests statement, signed by the liquidator, that complies with section [•] (*Interests statement*).
- (4) Where a special manager has been appointed under section [•](1) (*Appointment of a special manager*), the person shall include the special manager's account or accounts in the corresponding account or accounts referred to in subsection (1).

- (5) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

**329. Duty of liquidator to send final report and associated documents**

- (1) This section applies to a person who was a liquidator at the end of a liquidation.
- (2) As soon as practicable after performing all of the person's other duties in relation to the liquidation, and in any event within 20 working days after the end of the liquidation, the person shall –
- (a) prepare –
    - (i) a final report containing such information as may be prescribed; and
    - (ii) a statement that –
      - (a) all of the property of the company as at the commencement of the liquidation has been realised, distributed or disclaimed;
      - (b) the proceeds of realisation have been distributed to the extent practicable;
      - and
      - (c) the company is to be dissolved;
  - (b) in such manner as may be prescribed, send to each known creditor and contributory the documents referred to in paragraph (a); and
  - (c) send a copy of the documents to the Registrar and Authority.
- (3) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

*Dissolution*

**330. Dissolution**

- (1) Subject to subsection (2), a company shall be dissolved at the expiry of three months after compliance with subsection [•](2)(c) (*Duty of liquidator to send final report and associated documents*).
- (2) On the application of an interested person, the court may direct that the date of dissolution of the company shall be deferred for such time as the court thinks fit.
- (3) In making an order under subsection (2) the court may, if it thinks fit, make any other ancillary order.
- (4) A copy of every order made under subsection (2) shall, within five working days after the making of the order, be sent by the court to the Registrar and Authority.

*Miscellaneous duties*

**331. Duty of liquidator in relation to money**

- (1) Subject to subsections (2) and (3), and to any order that the court may make, a liquidator shall forthwith pay all money received by the liquidator into an account or accounts established for the purpose at one or more banks.
- (2) A liquidator shall not pay any money received into a personal bank account of the liquidator.

- (3) A liquidator may invest money received in the course of the liquidation in financial products, to such extent (if any) and subject to such terms and conditions as may be prescribed.
- (4) A liquidator who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

### 332. Duty of liquidator in relation to accounting records

- (1) A liquidator shall make accounting records that correctly record and explain, in relation to the period of the liquidation, all receipts, payments, and other transactions relating to the property and undertaking of the company.
- (2) On an application to the court by an interested person, the court may order that the applicant may inspect the accounting records referred to in subsection (1) on such terms and conditions as the court thinks fit.
- (3) The accounting records referred to in subsection (1) shall be retained by the liquidator for at least six years after the liquidation ends.
- (4) A liquidator who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

#### *Duties in provisional liquidation*

### 333. Applicability of this Sub-Part (*Duties of Liquidator*) in provisional liquidation

Where a provisional liquidator is appointed by an order made under section [\*] (*Appointment of provisional liquidator*), the extent to which this Sub-Part applies to the provisional liquidator and the provisional liquidation, as if references to a liquidator were to the provisional liquidator and references to a liquidation were to the provisional liquidation, shall be as may be specified in the order.

## *Remuneration of Liquidator*

### 334. Remuneration of liquidator other than the Official Receiver

- (1) Subject to subsection (2) and to section [\*](1)(b) (*Court supervision of liquidators and provisional liquidators*), a liquidator other than the Official Receiver shall be entitled to receive remuneration ~~at such rate or rates~~ **on one or more bases and at one or more hourly and percentage rates and fixed levels as may be determined** –
  - (a) [where section [\*] (*Declaration of solvency*) applies to the company, **as may be agreed** by the shareholders, in such manner as may be prescribed;]
  - (b) where section [\*] (*Declaration of solvency*) does not apply to the company, **as may be agreed** by the creditors, in such manner as may be prescribed; or
  - (c) **as may be determined** by the court, in the absence of **agreement** ~~a determination~~ by the shareholders or creditors under the preceding paragraphs of this subsection.
- (2) The remuneration referred to in subsection (1) shall not exceed such limit or limits as may be prescribed.



- (3) A liquidator other than the Official Receiver shall, in addition to remuneration, be entitled to the reasonable costs of storage of such records as are required under section [•](3) (*Duty of liquidator in relation to accounting records*) to be retained.

### *Liability of Liquidator, Provisional Liquidator and Special Manager*

#### **335. Relief from liability in the event of a defect**

- (1) The court may relieve a person who has acted as a liquidator, provisional liquidator or special manager from personal liability incurred in the course of the liquidation or provisional liquidation (as the case may be), where the court is satisfied that –
- (a) the liability was incurred solely by reason of a defect in the resolution or order appointing the liquidator, provisional liquidator or special manager (as the case may be); and
  - (b) the liquidator, provisional liquidator or special manager (as the case may be) acted honestly and reasonably and should in the circumstances be exempted from liability.
- (2) The court may exercise its powers under subsection (1) subject to such terms and conditions as it thinks fit.

### *Liquidation – Miscellaneous*

#### **336. Provision of information and assistance by administrator or receiver to liquidator**

- (1) Where the creditors by resolution at an outcome meeting appoint a liquidator under section [•](2)(b) (*Business at outcome meeting*) or a liquidator of a company in administration is otherwise appointed, and subject to section [•] (*Documents required by office holder*), the person who was the administrator at the end of the administration (if that person is not the liquidator who has been appointed) shall –
- (a) forthwith do all that is necessary to put the liquidator in control of the affairs, business and property of the company;
  - (b) as soon as practicable –
    - (i) provide the liquidator with a copy of all accounting records made by the administrator under section [•] (*Duty of administrator and deed administrator in relation to accounting records*); and
    - (ii) deliver to the liquidator any other documents in the possession or custody or under the control of the administrator relating to the administration.
- (2) Subject to sections [•] (*Power exercised before commencement of liquidation*) and [•] (*Documents required by office holder*), where the liquidation of a company in receivership commences, the receiver shall –
- (a) forthwith do all that is necessary to put the liquidator in control of the affairs, business and property of the company;
  - (b) as soon as practicable –

- (i) provide the liquidator with a copy of all accounting records made by the receiver under section [•] (*Duty of receiver in relation to accounting records*); and
- (ii) deliver to the liquidator any other documents in the possession or custody or under the control of the receiver relating to the receivership.

**337. Vacancy in office of liquidator**

- (1) The office of liquidator shall become vacant if the person holding that office –
  - (a) resigns office under subsection (2);
  - (b) dies;
  - (c) is removed from office by the court;
  - (d) has its registration as an Insolvency Practitioner suspended or cancelled;
  - (e) *sends a final report under section [•] (*Duty of liquidator to send final report and associated documents*); or*
  - (f) is for some other reason not acting.
- (2) A liquidator may resign office by giving five working days' written notice in such manner as may be prescribed, of the liquidator's intention to resign, to –
  - (a) the liquidator's appointer and, where the appointer was the court, the person on whose application the appointment was made; and
  - (b) the creditors.
- (3) The appointer of a liquidator may appoint a replacement liquidator to fill a vacancy in the office of liquidator, subject to –
  - (a) any order of the court; and
  - (b) the requirements under this Part (*Liquidation*) applicable to the appointment of a liquidator.
- (4) On the application of a person referred to in subsection (5), the court may make an order where for any reason the office of liquidator is vacant –
  - (a) appointing a suitable replacement liquidator; or
  - (b) specifying a process for the appointment of a suitable replacement liquidator.
- (5) Any of the following persons may make an application to the court under subsection ~~(5)~~(4) –
  - (a) a creditor;
  - (b) a contributory;
  - (c) any other person with an interest in the company;
  - (d) the Registrar; or
  - (e) the Authority.

- (6) Where a vacancy occurs in the office of liquidator **other than under subsection (1)(e)**, written notice of the vacancy shall as soon as practicable be given to the Registrar and Authority by the person vacating office or, if that person is unable to act, by the person's legal representative.
- (7) A person vacating the office of liquidator **other than under subsection (1)(e)** shall, where practicable, provide such information and give such assistance to the person's successor as the successor may reasonably request.
- (8) On the application of a person appointed to fill a vacancy in the office of liquidator, the court may make any order that it considers necessary to facilitate the performance and exercise of the liquidator's functions, powers and duties.
- (9) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

### **338. Release of liquidator or provisional liquidator**

- (1) Where a person ceases to be a liquidator or provisional liquidator, the person shall be released where –
  - (a) in a case where section [\*] (*Declaration of solvency*) applies to the company –
    - (i) notice has been given to each shareholder, in such manner and enclosing such documents as may be prescribed, of the release sought and explaining how they may object to it; and
    - (ii) the shareholders do not object in such manner and within such period as may be prescribed; or
  - (b) in a case where section [\*] (*Declaration of solvency*) does not apply to the company –
    - (i) notice has been given to each known creditor, in such manner and enclosing such documents as may be prescribed, of the release sought and explaining how they may object to it; and
    - (ii) the creditors do not object in such manner and within such period as may be prescribed; or
  - (c) after such procedure as may be prescribed has been followed, the court grants permission.
- (2) A release under subsection (1) shall discharge the person from all liability, except liability under section [\*] (*Misfeasance*), in respect of any act or omission by the person in the liquidation or provisional liquidation (as the case may be) of the company.
- (3) Where a person has obtained a release under subsection (1), the person shall give written notice of the release to the Authority within ten working days.

### **339. Appointment of a special manager**

- (1) On the application of a liquidator or provisional liquidator, the court shall make an order appointing a special manager, where the court is satisfied that the condition in subsection (2) is met.

- (2) The condition referred to in subsection (1) is that the nature of the affairs, business or property of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager.
- (3) In deciding whether or not the condition in subsection (2) is met, the court shall have regard to whether or not the applicant can exercise a reasonable level of personal control over the entirety of the affairs, business or property of the company. **Intended to allow for the appointment of a special manager where for example, the assets of the company are too extensive or specialised for the liquidator or provisional liquidator to act without formal support**
- (4) In making an order under subsection (1) the court may, if it thinks fit, make any other ancillary order.
- (5) A special manager appointed by an order made under subsection (1) –
- (a) shall act during such time as may be specified in the order, which may be –
    - (i) for a fixed period;
    - (ii) until the occurrence of a specified event; or
    - (iii) until the court makes a further order;
  - (b) have such powers and duties as may be specified in the order;
  - (c) prepare such accounts as may be prescribed;
  - (d) send the accounts referred to in paragraph (c) to such persons, in such manner, and within such periods as may be prescribed; and
  - (e) be entitled to receive such remuneration as ~~is~~ **may be** determined by the court.
- (6) A special manager appointed by an order made under subsection (1) shall be an officer of the court.
- (7) The appointment of a special manager shall not take effect until the person to be appointed has given the applicant security, for the appointment, that complies with such requirements as may be prescribed.
- (8) A special manager shall, as soon as practicable and in any event within five working days after being appointed, give notice of the appointment to such persons and in such manner as may be prescribed.
- (9) The appointment of a special manager may be terminated by the court on the application of –
- (a) the special manager;
  - (b) a provisional liquidator; or
  - (c) a liquidator.
- (10) A liquidator or provisional liquidator, whichever holds office, shall apply to the court for an order terminating the appointment of a special manager where –
- (a) section [•] (*Declaration of solvency*) applies to the company and the shareholders decide, by special resolution, that the appointment should be terminated; or
  - (b) section [•] (*Declaration of solvency*) does not apply to the company and the creditors decide, by resolution, that the appointment should be terminated.

(11) On an application under subsection (9), the court may –

- (a) may make an order terminating the appointment of the special manager; and
- (b) in making such an order, may, if it thinks fit, make any other ancillary order.

(12) Within five working days after the appointment of a special manager terminates, the special manager shall give notice of the termination to such persons and in such manner as may be prescribed.

(13) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

#### **340. Stamp duty exemption**

During the liquidation of a company –

- (a) [every deed relating solely to immovable property, or to any estate, right or interest in, any movable or immovable property, that forms part of the property of the company both before and after execution of the deed; and
- (b) every power of attorney, proxy paper, writ, order, certificate, affidavit, bond or other written instrument relating solely to –
  - (i) the property of the company; or
  - (ii) any legal process or other legal proceeding that is part of the liquidation,]

shall be exempt from stamp duty.

### *Powers of the Court in Liquidation and Provisional Liquidation*

#### **341. Application for directions by a liquidator or provisional liquidator**

(1) On the application of a liquidator or provisional liquidator or the Authority, the court may –

- (a) give directions in relation to any matter arising in connection with the performance or exercise of any of the functions, powers and duties of the liquidator or provisional liquidator (as the case may be);
- (b) revoke or vary any such directions.

(2) The powers conferred under subsection (1) –

- (a) are in addition to any other powers the court may exercise; and
- (b) may be exercised whether or not the liquidator or provisional liquidator (as the case may be) has ceased to act as such when the application is made.

(3) It is a defence to a claim against a liquidator or provisional liquidator, in relation to any act or omission by the liquidator or provisional liquidator (as the case may be), that the liquidator or provisional liquidator (as the case may be) acted in compliance with a direction given under subsection (1).

#### **342. Court supervision of liquidators and provisional liquidators**

(1) On the application of a person referred to in subsection (2), the court may –

- (a) confirm, reverse or modify an act or decision of a liquidator or provisional liquidator;

- (b) in respect of any period or activity for which the remuneration of a liquidator other than the Official Receiver has not been determined under section [\*](1) (*Remuneration of liquidator other than the Official Receiver*), fix such remuneration at a level that is reasonable in the circumstances;
  - (c) declare whether or not a liquidator was validly appointed.
- (2) Any of the following persons may make an application to the court under subsection (1) –
- (a) the liquidator or a person to be appointed as liquidator;
  - (b) a provisional liquidator;
  - (c) an administrator or deed administrator;
  - (d) a receiver;
  - (e) a creditor;
  - (f) a contributory;
  - (g) any other person with an interest in the company;
  - (h) with respect to subsection (1)(c), the Registrar; or
  - (i) the Authority.
- (3) The powers conferred under subsection (1) may be exercised whether or not the liquidator has ceased to act as liquidator when the application is made.

**343. Court's general power in liquidation and provisional liquidation**

- (1) On the application of a person referred to in subsection (2), the court may make any order that it considers necessary about how this Part (*Liquidation*) is to operate in relation to a particular company.
- (2) Any of the following persons may make an application to the court under subsection (1) –
- (a) the liquidator or a person to be appointed as liquidator;
  - (b) a provisional liquidator;
  - (c) a special manager;
  - (d) an administrator or deed administrator;
  - (e) a receiver;
  - (f) a creditor;
  - (g) a contributory;
  - (h) any other person with an interest in the company;
  - (i) the Registrar;
  - (j) the Authority; or
  - (k) with the permission of the court, any other interested person.
- (3) In an order under subsection (1), the court may end a liquidation where it is satisfied that the liquidation should end because –
- (a) the provisions of this Part (*Liquidation*) are being abused;

- (b) in the case of a liquidation that has been suspended under section [•](4) (*Appointment of administrator by a liquidator or provisional liquidator*) owing to the appointment of an administrator, the administration has ended or will end (with or without a deed of company arrangement having been made) and the company is not insolvent or likely to become insolvent;  
or
  - (c) for some other reason, it is just and equitable that the liquidation end.
- (4) A copy of every order made under subsection (3) shall, within five working days after the making of the order, be sent by the court to the Registrar and Authority.
- (5) In making an order under subsection (1), the court may, if it thinks fit –
- (a) impose any term or condition;
  - (b) make any other ancillary order.

**344. Order to enforce liquidator's or provisional liquidator's duties**

- (1) In this section, "failure to comply", with respect to a liquidator or provisional liquidator, means a failure by the liquidator or provisional liquidator (as the case may be) to comply with a duty arising –
- (a) under this or any other Act or rule of law or Rules of Court; or
  - (b) under any order or direction of the court, except an order to comply made under this section,
- and "comply" shall have the corresponding meaning.
- (2) On the application of a person referred to in subsection (3), and where the court is satisfied that there is or has been a failure to comply, the court may –
- (a) without prejudice to any other right or remedy that may be available in relation to a breach of duty, order the liquidator or provisional liquidator (as the case may be) to comply with the applicable duty so far as may be specified in the order; or
  - (b) relieve the liquidator or provisional liquidator (as the case may be) of the duty to comply with the applicable duty, wholly or in part.
- (3) Any of the following persons may make an application to the court under subsection (2) –
- (a) a receiver;
  - (b) a creditor;
  - (c) a contributory;
  - (d) any other person with an interest in the company;
  - (e) an administrator or deed administrator;
  - (f) the Registrar; or
  - (g) the Authority.
- (4) No application may be made under subsection (2) unless notice of the failure to comply has been served on the liquidator or provisional liquidator (as the case may be) at least ten working days before the application and, as at the date of the application, there is a continuing failure to comply.

- (5) A copy of every order made under subsection (2)(a) shall, within five working days after the making of the order, be sent by the court to the Authority.

**345. Removal of liquidator or provisional liquidator from office by court**

- (1) On the application of a person referred to in subsection [•](3) (*Order to enforce liquidator's or provisional liquidator's duties*), and where the court is satisfied that –
- (a) a liquidator or provisional liquidator has failed to comply with an order made under subsection [•](2)(a) (*Order to enforce liquidator's or provisional liquidator's duties*); or
  - (b) a liquidator has become disqualified under section [•] (*Who may be appointed and act as liquidator*) to be appointed or act as liquidator,
- the court –
- (c) may make an order removing the liquidator or provisional liquidator (as the case may be) from office; and
  - (d) in making such an order, may, if it thinks fit, make any other ancillary order.
- (2) A copy of every order made under subsection (1) shall, within five working days after the making of the order, be sent by the court to the Registrar and Authority.

**346. Power to stay or restrain application or proceeding**

- (1) At any time after the making of an application under section [•](2)(c) (*Appointment of liquidator*) and pending determination of the application, the company or any creditor or contributory may, where an application or proceeding against the company or any of its property is pending in a court, apply to that court to stay or restrain the application or proceeding.
- (2) On an application under subsection (1), the court may stay or restrain the application or proceeding on such terms and conditions as it thinks fit.

**347. Order to protect creditors in liquidation or provisional liquidation**

While a company is in liquidation or in provisional liquidation –

- (a) on the application of the Registrar or the Authority, the court may make any order that it considers necessary to protect the interests of the creditors;
- (b) on the application of a creditor, the court may make any order that it considers necessary to protect the interests of that creditor and other creditors.

## Part XIII – Receivership

### *Interpretation*

**348. Interpretation**

In this Part (*Receivership*) [and the Sixth Schedule], unless the context otherwise requires], “grantor” means a company in respect of the property of which a receiver is or may be appointed.



## Appointment of Receiver

### 349. Instrument may confer power to appoint receiver

An instrument that creates a floating charge in respect of the whole, or substantially the whole, of the property and undertaking of a company may confer on the grantee the power to appoint a receiver of the property and undertaking of the company.

### 350. When receivership commences

The receivership of a company commences on the day on which, and at the time at which, a receiver other than a replacement receiver is appointed under this Part (*Receivership*).

### 351. Who may be appointed and act as receiver

- (1) A person may not be appointed or act as receiver of property of a company unless ~~only~~ if the person –
- (a) is qualified under section [•] (~~Registration~~) (*Individuals who are qualified to serve as key office holders*) to serve as an ~~Insolvency Practitioner~~ *a key office holder* with respect to the receivership;
  - (b) is **not disqualified** under section [•] (*Qualifications of receivers*) from being appointed or acting as a receiver;
  - (c) has certified in writing that the person –
    - (i) is qualified under section [•] (~~Registration~~) (*Individuals who are qualified to serve as key office holders*) to serve as an ~~Insolvency Practitioner~~ *a key office holder* with respect to the receivership; and
    - (ii) is **not disqualified** under section [•] (*Qualifications of receivers*) from being appointed or acting as a receiver; and
  - (d) has consented in writing to the appointment and has not withdrawn the consent at the time of appointment.
- (2) A person who, with the person's consent, is appointed or acts as receiver of property of a company knowing that any of the requirements of paragraphs (a), (b) and (c) of subsection (1) has not been met, shall be guilty of an offence. [Provision for offence – approach TBD]

### 352. Qualifications of receivers

- (1) The following persons and their related parties are disqualified from being appointed or acting as a receiver of property of a company –
- (a) a creditor of the company;
  - (b) a person who is or who has within the period of two years immediately preceding the date of commencement of the receivership, been –
    - (i) a director or other officer or an auditor or employee of the company or of a related company; or
    - (ii) a director or other officer or employee of the mortgagee ~~a grantee~~ of the property in receivership;

- (c) a person who has or who has had within the period of two years preceding the date of commencement of the receivership –
    - (i) a direct interest in a share issued by the company or by a related company; or
    - (ii) an indirect interest in [five *per centum*] or more of any class of shares issued by the company or by a related company; or
  - (d) where a receiver is to be appointed under an instrument under section [•](1) (*Appointment of receiver under an instrument*), a person who is not permitted under the instrument to be appointed or act as receiver.
- (2) A person who is appointed or acts as a receiver when disqualified under subsection (1) shall be guilty of an offence. [Provision for offence – approach TBD]

### **353. Appointment of receiver under an instrument**

- (1) Where an instrument confers on the grantee the power to appoint a receiver of property of a company, the grantee may appoint a receiver by an instrument in writing signed by or on behalf of the grantee.
- (2) A receiver appointed under an instrument shall be the agent of the grantor, unless the instrument expressly provides otherwise.
- (3) A receiver may be appointed under subsection (1) –
  - (a) notwithstanding anything to the contrary in any other law; and
  - (b) whether or not the property in receivership includes immovable property.
- (4) Unless the instrument expressly provides otherwise, a power conferred by an instrument to appoint a receiver includes the power to appoint –
  - (a) two or more receivers;
  - (b) a receiver additional to a receiver who already holds office;
  - (c) a receiver to succeed a receiver whose office has become vacant.
- (5) Where two or more persons are appointed as receivers under an instrument –
  - (a) a receiver's functions and powers may be performed or exercised by any one of them, or by any two or more of them together, except so far as the instrument provides otherwise;
  - (b) [any personal liability of the persons as receivers shall be joint and several;] and
  - (c) a reference in this Act to a receiver refers to whichever one or more of the receivers as the case requires.
- (6) For the avoidance of doubt –
  - (a) [the appointment of a receiver under this section is not a hypothecary action]; and
  - (b) [nothing in section 46 of the Mortgage Act (Cap. 89) shall affect or shall apply in relation to the appointment of a receiver under this section].

**354. Court may appoint a receiver**

- (1) Without prejudice to any other power the court may exercise under any other enactment, the court may appoint a receiver of any property that is subject to a fixed security or floating charge granted by a company, on the application of the grantee of the fixed security or floating charge (as the case may be), where the court is satisfied that –
- (a) [the company has failed to pay a debt owing to the grantee or has otherwise failed to meet any obligation to the grantee;
  - (b) the company proposes to sell or otherwise dispose of the secured property in contravention of the terms of any instrument creating the fixed security or floating charge (as the case may be); or
  - (c) it is necessary to do so to ensure the preservation of the secured property for the benefit of the grantee].<sup>24</sup>
- (2) A receiver appointed by an order made under subsection (1) shall be an officer of the court.
- (3) A receiver may be appointed under subsection (1) –
- (a) notwithstanding anything to the contrary in any other law; and
  - (b) whether or not the property in receivership includes immovable property.
- (4) For the avoidance of doubt –
- (a) [the appointment of a receiver under this section is not a hypothecary action]; and
  - (b) [nothing in section 46 of the Mortgage Act (Cap. 89) shall affect or shall apply in relation to the appointment of a receiver under this section].

**355. Notice of receiver's appointment and details**

- (1) A receiver shall as soon as practicable and in any event within five working days after being appointed –
- (a) give written notice of the receiver's appointment to the grantor;
  - (b) give public notice of the receiver's appointment, including –
    - (i) the receiver's full name;
    - (ii) the date of the appointment;
    - (iii) the identity of the appointer of the receiver and, where the appointer was the court, the identity of the person on whose application the appointment was made;
    - (iv) the receiver's office address; and
    - (v) a brief description of the property in receivership; and
  - (c) send a copy of the public notice to the Registrar and Authority.
- (2) Where the appointment of a receiver is in addition to a receiver who already holds office or is in place of a person who has vacated office as receiver, each notice under subsection (1) shall state that fact.
- (3) In the event of any change in a receiver's office address, the receiver shall within five working days –
- (a) give public notice of the new address; and
  - (b) send a copy of the public notice to the Registrar and Authority.

<sup>24</sup> Law Commission to consider whether the grounds in this subsection are sufficiently wide.

- (4) A failure to comply with this section shall not affect the validity of a person's appointment as receiver.
- (5) A receiver who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

### 356. Documents to refer to appointment of receiver

- (1) For so long as a receiver holds office, the receiver shall ensure that –
  - (a) every document issued or signed by or on behalf of the grantor or the receiver and on which the name of the grantor appears shall state, where the name first appears, that a receiver has been appointed; and
  - (b) if the company has one or more websites, each page of each website shall state prominently that a receiver has been appointed.
- (2) For so long as a receiver holds office in respect of a specific asset, the receiver –
  - (a) shall ensure that every document issued or signed by or on behalf of the grantor or the receiver that relates to the asset and on which the name of the grantor appears shall state clearly that a receiver has been appointed; and
  - (b) shall require the company to ensure that if the company has one or more websites, each page of each website shall state prominently that a receiver has been appointed in respect of an asset of the company.
- (3) A failure to comply with subsection (1) or subsection (2) shall not affect the validity of –
  - (a) a person's appointment as receiver; or
  - (b) any document.
- (4) Every person who –
  - (a) fails to comply with subsection (1) or subsection (2); or
  - (b) is knowingly concerned in or takes part in a failure to comply with subsection (1) or subsection (2),shall be guilty of an offence. [Provision for offence – approach TBD]

## *Powers of Receiver*

### 357. Powers of receiver

- (1) A receiver shall have the powers and authorities expressly or impliedly conferred by the instrument or the order of the court by or under which the appointment was made.
- (2) Subject to the instrument or the order of the court by or under which the appointment was made, a receiver shall have and may exercise the powers specified in the [•] Schedule (*Powers of Receiver*). [intended to remove the provision regarding supply of essential services in the current CA 2007 s 470; if continued supply is required, it is suggested that administration should be pursued]

- (3) Subject to the instrument or the order of the court by or under which the appointment was made, a receiver may exercise the receiver's powers and authorities to the exclusion of the powers of the company's directors or those of the grantor.

**358. Execution of documents by receiver**

- (1) A receiver may execute in the name and on behalf of the company all documents necessary or incidental to the exercise of the receiver's powers.
- (2) A document signed on behalf of a company by a receiver shall be deemed to have been properly entered into on behalf of the company for the purposes of section 19 of the Companies Act.
- (3) Notwithstanding anything to the contrary in any other law or the articles of a company, where the instrument or the order of the court by or under which a receiver is appointed empowers the receiver to execute documents and to use the company's common seal for that purpose, a receiver may execute documents in the name and on behalf of the company by affixing the company's common seal to the documents and attesting the affixing of the common seal.
- (4) A document executed in the manner described in subsection (3) shall be deemed to have been properly entered into by the company for the purposes of section 19 of the Companies Act.

**359. Precedence among receivers** [slightly amended version of CA 2007, s 444]

- (1) Where there are two or more floating charges subsisting over all or any part of the property of the company, a receiver may be appointed under this Part (*Receivership*) by virtue of each such charge.
- (2) A receiver appointed by or on the application of the grantee of a floating charge, where that charge has priority over any other floating charge by virtue of which a receiver has been appointed, has the powers conferred on a receiver by this Act to the exclusion of the other receiver.
- (3) Where two or more floating charges rank equally with one another, and two or more receivers have been appointed by virtue of such charges, the receivers so appointed are deemed to have been appointed as joint receivers.
- (4) Receivers deemed to have been appointed as joint receivers shall act jointly unless any of the instruments of appointment provides otherwise.
- (5) Subject to subsection (6), the powers of a receiver appointed by or on the application of the grantee of a floating charge are suspended by, and as from the time of the appointment of a receiver by or on the application of the grantee of a floating charge having priority over that charge, so far as necessary to enable the receiver second mentioned to exercise the powers of that receiver conferred by this Act, and any powers so suspended shall take effect again when the floating charge having priority ceases to attach to the property then subject to the charge, or when the appointment of a receiver under the floating charge having priority ceases in respect of that property, whichever occurs first.
- (6) The suspension of the powers of a receiver under subsection (5) does not have the effect of requiring the receiver to release any part of the property of the company from the receiver's possession, custody or control, unless and until the receiver receives from the superseding receiver a valid indemnity (subject to

the limit of the value of such part of the property as is subject to the charge by virtue of which the receiver was appointed) in respect of any personal liability the receiver may have incurred in the performance and exercise of the receiver's functions, powers and duties.

- (7) The suspension of the powers of a receiver under subsection (5) shall not cause the floating charge by virtue of which the receiver was appointed to cease to attach to the property in respect of which that receiver was appointed.
- (8) Nothing in this section shall prevent the same receiver being appointed by virtue of two or more floating charges.

**360. Requirement to provide information to receiver**

- (1) Where a receiver is appointed in respect of property of a company, every director and other officer of the company shall –
  - (a) as soon as practicable and in any event within five working days after the appointment make available to the receiver all books, records and documents relating to the property in receivership in the person's possession or custody or under the person's control;
  - (b) if required to do so by the receiver, verify by affidavit within a reasonable period that the books, records and documents are complete and correct;
  - (c) if the company has a common seal, promptly make the common seal available for use by the receiver; and
  - (d) give the receiver such assistance as the receiver may reasonably request.
- (2) On the application of a receiver, the court may make an order requiring a director or other officer of the company to comply with subsection (1).
- (3) A verification under subsection (1)(b) may be qualified in relation to specific matters dealt with in the books, records and documents where the person giving the verification does not –
  - (a) consider the books, records and documents to be complete and correct; or
  - (b) have the knowledge necessary to give a verification.

**361. Consent of mortgagee-grantee to sale of property**

- (1) Where the consent of a mortgagee-grantee is required for the sale of property in receivership and a receiver is unable to obtain that consent, the receiver may apply to the court for an order authorising the sale of the property, either by itself or together with other property.
- (2) On an application under subsection (1), the court may make such order as it thinks fit authorising the sale of the property by the receiver, where the court is satisfied that –
  - (a) the receiver has made reasonable efforts to obtain the mortgagee's-grantee's consent; and
  - (b) the sale –
    - (i) is in the interests of –
      - (a) the grantor; and
      - (b) the grantor's creditors; and

- (ii) will not materially adversely affect the interests of the mortgagee grantee.
- (3) In making an order under subsection (2), the court may, if it thinks fit –
  - (a) impose any term or condition;
  - (b) make any other ancillary order.

### **362. Powers of receiver on liquidation**

- (1) Subject to subsection (2) and unless the court orders otherwise, a receiver may be appointed and act as receiver, and exercise all of the powers of a receiver, in respect of property of a company that is in liquidation.
- (2) A receiver who holds office in respect of property referred to in subsection (1) may not act as the agent of the grantor except –
  - (a) with the prior, written consent of the liquidator; or
  - (b) with the permission of the court.
- (3) A receiver who by reason of subsection (2) is not able to act as the agent of the grantor is not solely by reason of that fact the agent of a person by whom or in whose interests the receiver was appointed.
- (4) The liquidator is not liable in damages for declining to give consent under subsection (2)(a).
- (5) A debt or liability incurred by a grantor through an act or omission of a receiver who is acting as the agent of the grantor in accordance with subsection (2) is not a cost, charge or expense of the liquidation.

## *Duties of Receiver*

### **363. General duties of receivers**

- (1) The receiver shall exercise the receiver's powers in good faith.
- (2) The receiver shall exercise the receiver's powers in a manner that the receiver believes on reasonable grounds to be in the interests of the person in whose interests the receiver was appointed.
- (3) Without prejudice to subsections (1) and (2), the receiver shall exercise the receiver's powers having reasonable regard to the interests of –
  - (a) the grantor;
  - (b) creditors of the grantor; and
  - (c) any other persons claiming, through the grantor, interests in the property in receivership.
- (4) A receiver appointed under an instrument under section [\*](1) (*Appointment of receiver under an instrument*) shall not be bound to act in accordance with the directions of the person in whose interests the receiver was appointed, and any failure to act in accordance with such directions shall not be regarded as a breach of the duty referred to in subsection (2).
- (5) Nothing in this section shall affect or limit the application of section [\*] (*Duty of receiver selling property*).

**364. Duty of receiver selling property**

A receiver who exercises a power of sale of property in receivership owes a duty to the persons referred to in section [•](3) (*General duties of receivers*) to obtain the best price reasonably obtainable as at the time of sale.

**365. No defence or indemnity**

Notwithstanding anything to the contrary in any other law or anything in an instrument under which a receiver is appointed –

- (a) it shall not be a defence to proceedings against a receiver for a breach of the duty imposed by section [•] (*Duty of receiver selling property*) that the receiver was acting as the grantor's agent or under a power of attorney from the grantor;
- (b) the receiver shall not be entitled to compensation or indemnity from the property in receivership or the grantor in respect of any liability incurred by the receiver arising from a breach of the duty imposed by section [•] (*Duty of receiver selling property*).

**366. Order of priority where fixed security receiver appointed**

- (1) This section applies to a receiver who was appointed by virtue of a fixed security.
- (2) In this section, "applicable fixed security" means the security by virtue of which the receiver was appointed.
- (3) Subject to sections [•] (*Administrator's notice that receivership shall end*) and [•] (*Liquidator's notice that receivership shall end*) and to the rights of the persons referred to in subsection (4), a receiver to whom this section applies shall apply the proceeds of realisation of the property in receivership in or towards satisfaction of the debt, determined as at the relevant date, secured by the applicable fixed security.
- (4) The following persons shall be entitled to distributions of the proceeds of realisation of the property in receivership in priority to the grantee of the applicable fixed security, and in the order of priority in which they are listed –
  - (a) first, if the company is in liquidation, the liquidator, for any costs reasonably incurred by the liquidator in preserving and realising the property in receivership;
  - (b) second, the receiver, for the costs, charges and expenses properly incurred by and the remuneration of the receiver under this Act; and
  - (c) third, the grantee of any fixed security over any part of the property that ranks prior to –
    - (i) the applicable fixed security; and
    - (ii) any floating charge,for any debt owing to that grantee, determined as at the relevant date; and
  - (d) where the applicable fixed security ranks below a floating charge over any part of the property under section 431(2) of the Companies Act, and without affecting or limiting paragraphs (a), (b) and (c) of this subsection –



- (i) fourth, the persons having preferential claims, in or towards satisfaction of their claims, determined as at the relevant date, set out in paragraphs 1, 2 and 7 of the [•] Schedule (*Preferential Claims in Liquidation*), to the extent and in the order of priority specified in that Schedule, except such costs, charges and expenses as are referred to in paragraphs (a) and (b) of this subsection;
  - (ii) fifth, the grantee of the floating charge, for any debt owing to that grantee, determined as at the relevant date; and
  - (iii) sixth, the grantee of any fixed security over any part of the property that ranks prior to the applicable fixed security but below the floating charge under section 431(2) of the Companies Act, for any debt owing to that grantee, determined as at the relevant date.
- (5) After the debt secured by the applicable fixed security has been satisfied in full, any further distribution of the proceeds of realisation of the property in receivership shall be made to the company or, if the company is in liquidation, to the liquidator.

**367. Order of priority where floating charge receiver appointed**

- (1) This section applies to a receiver who was appointed by virtue of a floating charge.
- (2) In this section, “applicable floating charge” means the charge by virtue of which the receiver was appointed.
- (3) Subject to sections [•] (*Administrator’s notice that receivership shall end*) and [•] (*Liquidator’s notice that receivership shall end*) and to the rights of the persons referred to in subsection (4), a receiver to whom this section applies shall apply the proceeds of realisation of the property in receivership in or towards satisfaction of the debt, determined as at the relevant date, secured by the applicable floating charge.
- (4) The following persons shall be entitled to distributions of the proceeds of realisation of the property in receivership in priority to the grantee of the applicable floating charge, and in the order of priority in which they are listed –
  - (a) first, if the company is in liquidation, the liquidator, for any costs reasonably incurred by the liquidator in preserving and realising the property in receivership;
  - (b) second, the receiver, for the costs, charges and expenses properly incurred by and the remuneration of the receiver under this Act;
  - (c) third, the grantee of any fixed security over any part of the property that ranks prior to the applicable floating charge, for any debt owing to that grantee, determined as at the relevant date;
  - (d) fourth, the persons having preferential claims, in or towards satisfaction of their claims, determined as at the relevant date, set out in paragraphs 1, 2 and 7 of the [•] Schedule (*Preferential Claims in Liquidation*), to the extent and in the order of priority specified in that Schedule, except such costs, charges and expenses as are referred to in paragraphs (a) and (b) of this subsection; and

- (e) fifth, the grantee of any floating charge over any part of the property that ranks prior to the applicable floating charge, for any debt owing to that grantee, determined as at the relevant date; and
  - (f) sixth, the grantee of any fixed security over any part of the property that ranks prior to the applicable floating charge but below the floating charge referred to in paragraph (e) under section 431(2) of the Companies Act, for any debt owing to that grantee, determined as at the relevant date.
- (5) After the debt secured by the applicable floating charge has been satisfied in full, any further distribution of the proceeds of realisation of the property in receivership shall be made to the company or, if the company is in liquidation, to the liquidator.

### **368. Duty of receiver in relation to money**

The receiver shall keep money relating to the property in receivership separate from other money received in the course of the receivership but not relating to the property in receivership, and from any other money held by or under the control of the receiver.

### **369. Duty of receiver in relation to accounting records**

- (1) A receiver shall at all times keep accounting records that correctly record and explain, in relation to the period of the receivership, all receipts, payments, and other transactions relating to the property in receivership.
- (2) On an application to the court by an interested person, the court may order that the applicant may inspect the accounting records referred to in subsection (1) on such terms and conditions as the court thinks fit.
- (3) The accounting records referred to in subsection (1) shall be retained by the receiver for at least five years after the receivership ends.
- (4) A receiver who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

## *Remuneration of Receiver*

### **370. Remuneration of receiver**

- (1) Subject to subsection (2) and to section [\*](1)(a) (*Order regarding remuneration or appointment of receiver*), the receiver shall be entitled to receive remuneration ~~at such rate or rates on one or more bases and at one or more hourly and percentage rates and fixed levels as may be determined—~~
  - (a) **as may be agreed** by the grantee, where the receiver is appointed under an instrument under section [\*](1) (*Appointment of receiver under an instrument*); or
  - (b) **as may be determined** by the court, where the receiver is appointed by the court under section [\*](1) (*Court may appoint a receiver*).
- (2) The remuneration referred to in subsection (1) shall not exceed such limit or limits as may be prescribed.
- (3) The receiver shall, in addition to remuneration, be entitled to the reasonable costs of storage of such records as are required under section [\*](3) (*Duty of receiver in relation to accounting records*) to be retained.

## *Reporting by Receiver*

### **371. First report by receiver**

- (1) A receiver or a person who was a receiver at the end of the receivership (as the case may be) shall, within two months after the person's appointment as receiver, prepare a report on the state of affairs with respect to the property in receivership, including –
  - (a) particulars of the property comprising the property in receivership;
  - (b) particulars of the debts and other liabilities to be satisfied from the property in receivership;
  - (c) the names and addresses of the creditors with an interest in the property in receivership;
  - (d) particulars of any encumbrance over the property in receivership held by any creditor, including the date on which it was created;
  - (e) particulars of any default by the grantor in making relevant information available; and
  - (f) such other information as may be prescribed.
- (2) The report referred to in subsection (1) shall also include details of –
  - (a) the events leading up to the appointment of the receiver, so far as the person is aware of them;
  - (b) property disposed of and any proposals for the disposal of property in receivership;
  - (c) amounts owing, as at the date of appointment, to any person in whose interests the receiver was appointed;
  - (d) amounts owing, as at the date of appointment, to creditors of the grantor having preferential claims; and
  - (e) amounts likely to be available for payment to creditors other than those referred to in paragraph (c) and paragraph (d).
- (3) A receiver may omit from a report required to be prepared under subsection (1) details of any proposals for disposal of property in receivership if the receiver considers that their inclusion would materially adversely affect the performance of the receiver's functions.
- (4) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

### **372. Further reports by receiver**

- (1) A receiver or a person who was a receiver at the end of the receivership (as the case may be) shall within 20 working days after –
  - (a) the end of each period of six months after the receiver was appointed; and
  - (b) the day on which the receivership ends,prepare a further report summarising the state of affairs with respect to the property in receivership as at those dates, and the conduct of the receivership, including all amounts received and paid, during the period to which the report relates.
- (2) The report referred to in subsection (1) shall include details of –

- (a) property disposed of since the date of any previous report and any proposals for the disposal of property in receivership;
  - (b) amounts owing, as at the date of the report, to any person in whose interests the receiver was appointed;
  - (c) amounts owing, as at the date of the report, to creditors of the grantor having preferential claims;
  - (d) amounts likely to be available, as at the date of the report, for payment to creditors other than those referred to in paragraph (b) and paragraph (c); and
  - (e) such other information as may be prescribed.
- (3) A receiver may omit from a report required to be prepared under subsection (1)(a) details of any proposals for disposal of property in receivership if the receiver considers that their inclusion would materially adversely affect the performance of the receiver's functions.
- (4) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

### **373. Extension of time for preparing reports**

A period of time within which a person is required to prepare a report under section [•](1) (*First report by receiver*) or section [•](1) (*Further reports by receiver*) may be extended, on the application of that person, by –

- (a) the court, where the person was appointed a receiver by the court under section [•](1) (*Court may appoint a receiver*); or
- (b) the Registrar, where the person was appointed a receiver [by or] under an instrument under section [•](1) (*Appointment of receiver under an instrument*).

### **374. Persons entitled to inspect and receive reports**

- (1) Where a report has been prepared by under section [•](1) (*First report by receiver*) or section [•](1) (*Further reports by receiver*), the person who prepared it shall within five working days –
- (a) send it to the grantor;
  - (b) cause it to be available for inspection by the grantor and the persons referred to in subsection (4); and
  - (c) cause notice to be given to the grantor and the persons referred to in subsection (4) that a report has been prepared and that –
    - (i) the report is available to be inspected; and
    - (ii) copies of the report will be sent on request on payment of the reasonable costs of the making and sending of such copies.
- (2) Where the person who prepared a report under section [•](1) (*First report by receiver*) or section [•](1) (*Further reports by receiver*) was appointed as a receiver by the court, the person shall file it in the office of the court.

- (3) A person referred to in subsection (4) is entitled to inspect a report prepared under section [•](1) (*First report by receiver*) or section [•](1) (*Further reports by receiver*) during normal working hours at the office of the person who prepared it.
- (4) Within ten working days after receiving a request for a copy of any report prepared under section [•](1) (*First report by receiver*) or section [•](1) (*Further reports by receiver*) from –
- (a) a director of the grantor;
  - (b) a creditor of the grantor; or
  - (c) any other person with an interest in the property in receivership,
- and on payment of the reasonable costs of making and sending the copy, the person who prepared the report shall send a copy of the report to the person who requested it.
- (5) Within ten working days after preparing a report under section [•](1) (*First report by receiver*) or section [•](1) (*Further reports by receiver*), the person who prepared it shall send a copy to the Registrar and Authority.
- (6) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

**375. Duty of receiver to report offence committed** [draws on (but differs from) the current CA 2007, ss 382 and 460]

- (1) Where a receiver believes, or has reasonable grounds to believe, that the company or any involved party has committed an offence under –
- (a) this Act;
  - (b) the Companies Act; or
  - (c) [the Securities and Exchange Commission of Sri Lanka Act, No. 36 of 1987] 19 of 2021<sup>25</sup>; or
  - (d) [TBC],
- the receiver shall as soon as practicable report the matter to the Registrar and Authority.
- (2) The Registrar and Authority shall refer a matter reported under subsection (1) to the appropriate law enforcement authority.
- (3) In any case where a receiver makes a report on a matter under subsection (1) that is reported to a law enforcement authority under subsection (2), the receiver shall give to the authority such assistance as the authority may require by way of –
- (a) provision of information;
  - (b) access to documents; and
  - (c) facilities for inspecting and copying documents.
- (4) Nothing in ~~subsection (1)~~ this section shall –
- (a) impose any duty on a receiver to investigate whether any offence of the a kind referred to in that subsection (1) has been committed; or

<sup>25</sup> Law Commission to consider whether paragraph to be removed, as the number of companies registered by the SEC is understood to be relatively small.

- (b) affect or limit any duty imposed on a receiver under any other enactment.
- (5) A receiver who fails to comply with subsection (1) or subsection (3) shall be guilty of an offence. [Provision for offence – approach TBD]

### *Liability of Receiver*

#### **376. Liability of receiver under pre-existing employment contracts**

- (1) A receiver is not personally liable for payment in relation to a contract of employment entered into before the receiver's appointment, unless –
- (a) the receiver expressly adopts the contract in writing; or
  - (b) subsection (3) applies.
- (2) The adoption of a contract under subsection (1)(a) may exclude or limit the personal liability of a receiver, other than a receiver appointed by the court under section [\*](1) (*Court may appoint a receiver*).
- (3) A receiver is personally liable for payment in relation to a contract of employment entered into before the receiver's appointment, of –
- (a) wages or salary;
  - (b) [provident fund dues; and
  - (c) employees trust fund dues], **aligned with reference in the [\*] Schedule (*Preferential Claims in Liquidation*); TBC whether to align with personal insolvency section]**
  - (d) that accrue from the date of appointment of the receiver up to –
- (e) the earlier of –
    - (i) the end of the receivership;
    - (ii) the date on which the receiver ceases to be a receiver; and
    - (iii) the date of termination of the contract,if the receiver gives notice of termination of the contract, in accordance with the law applicable to termination of employment, within ten working days after the appointment; or
  - (f) the earlier of –
    - (i) the end of the receivership; and
    - (ii) the date on which the receiver ceases to be a receiver,if the receiver does not give notice of termination of the contract, in accordance with the law applicable to termination of employment, within ten working days after the appointment.
- (4) The court may, on the application of the receiver, made before the end of the period of ten working days referred to in paragraphs (d) and (e) of subsection (3), extend that period on such terms and conditions as the court thinks fit.

**377. Liability of receiver on other agreements and for rent**

- (1) A receiver is personally liable on an agreement entered into by the receiver in the performance and exercise of any of the receiver's functions and powers.
- (2) Subsection (1) has effect notwithstanding any agreement to the contrary, but without prejudice to the receiver's rights against the company or any other person.
- (3) Subject to subsections (4) and (5), a receiver is personally liable for rent and any other payments becoming due under an agreement subsisting at the date of the receiver's appointment relating to the use, occupation or possession by the grantor of property in receivership.
- (4) The liability of a receiver under subsection (3) is limited to that portion of the rent or other payments that is attributable to the period commencing ten working days after the appointment of the receiver, and ending on the earliest of –
  - (a) the end of the receivership;
  - (b) the day on which the receiver ceases to be a receiver; and
  - (c) the day on which the grantor ceases to use, occupy or possess the property.
- (5) On the application of the receiver, the court may –
  - (a) limit the liability of the receiver to a greater extent than that specified in subsection (4); or
  - (b) exempt the receiver from liability under subsection (3) altogether.
- (6) Nothing in subsection (3) or subsection (4) shall –
  - (a) be taken as giving rise to an adoption by a receiver of an agreement referred to in subsection (3); or
  - (b) render a receiver personally liable in respect of the non-performance of any other obligation under such an agreement. **[Intended to make it clear that there would be no liability in damages and no obligation of specific performance (or similar)]**

**378. Relief from liability in the event of a defect**

- (1) The court may relieve a person who has acted as a receiver from personal liability incurred in the course of the receivership, where the court is satisfied that –
  - (a) the liability was incurred solely by reason of a defect in the instrument or the order of the court by or under which the receiver was appointed; and
  - (b) the receiver acted honestly and reasonably and should in the circumstances be exempted from liability.
- (2) The court may exercise its powers under subsection (1) subject to such terms and conditions as it thinks fit.
- (3) A person in whose interests a receiver was appointed shall be liable, subject to such terms and conditions as the court thinks fit, to the extent to which the receiver is relieved from liability under subsection (1).

### 379. Receiver's indemnity

- (1) A receiver is entitled to an indemnity out of the property in receivership, in respect of the receiver's personal liability under sections [•] (*Liability of receiver under pre-existing employment contracts*) and [•] (*Liability of receiver on other agreements and for rent*).
- (2) A receiver's indemnity under subsection (1) has the priority accorded to the costs, charges and expenses properly incurred by and the remuneration of the receiver under section [•](4)(b) (*Order of priority where floating charge fixed security receiver appointed*) or section [•](4)(b) (*Order of priority where fixed security floating charge receiver appointed*) (as the case may be).
- (3) Nothing in this section shall –
  - (a) limit any other right of indemnity to which a receiver may be entitled;
  - (b) limit the liability of a receiver on an agreement entered into without authority; or
  - (c) confer on a receiver a right to an indemnity in respect of liability on an agreement entered into without authority.

### *Vacancy in Office and End of Receivership*

### 380. Vacancy in office of receiver

- (1) The office of receiver shall become vacant if the person holding that office –
  - (a) resigns office under subsection (2);
  - (b) dies;
  - (c) is removed from office by the court; or
  - (d) has its registration as an Insolvency Practitioner suspended or cancelled;
  - (e) sends a copy of a report required to be prepared under section [•](1)(b) (*Further reports by receiver*) to the Registrar and Authority under section [•] (*Persons entitled to inspect and receive reports*); or
  - (f) is for some other reason not acting.
- (2) A receiver appointed under an instrument under section [•](1) (*Appointment of receiver under an instrument*) may resign office, by giving five working days' written notice of the receiver's intention to resign to the person by whom the receiver was appointed, in such manner as may be prescribed.
- (3) A receiver appointed by the court under section [•](1) (*Court may appoint a receiver*) shall not resign office except with the permission of the court.
- (4) Where a vacancy occurs in the office of receiver other than under subsection (1)(e) –
  - (a) written notice of the vacancy shall as soon as practicable be given to the Registrar and Authority by the person vacating office or, if that person is unable to act, by the person's legal representative; and
  - (b) within 20 working days after the vacancy occurring, either –



- (i) if the person vacating office was appointed under an instrument under section [•](1) (*Appointment of receiver under an instrument*), the appointer may appoint a replacement receiver under that subsection; or
  - (ii) if the person vacating office was appointed by the court under section [•](1) (*Court may appoint a receiver*), the applicant may apply to the court for the appointment of a replacement receiver under that subsection.
- (5) The receivership shall end where a vacancy occurs in the office of receiver other than under subsection (1)(e) and –
- (a) within 20 working days after the vacancy occurring, neither an appointment nor an application under subsection (4)(b) has been made; or
  - (b) an application has been made under paragraph (ii) of subsection (4)(b) and the application is refused.
- (6) A person vacating the office of receiver other than under section (1)(e) shall, where practicable, provide such information and give such assistance to the person's successor as the successor may reasonably request.
- (7) On the application of a person appointed to fill a vacancy in the office of receiver, the court may make any order that it considers necessary to facilitate the performance and exercise of the receiver's functions, powers and duties.
- (8) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

### **381. End of receivership**

A receivership ends –

- (a) when a receiver is satisfied that –
  - (i) the debt secured by the fixed security or floating charge by virtue of which the receiver was appointed has been satisfied in full; or
  - (ii) if earlier –
    - (a) all of the property in respect of which the receiver was appointed, or so much as can in the receiver's opinion be realised or disclaimed without needlessly protracting the receivership, has been realised; and
    - (b) all of the proceeds of realisation have been distributed;
- (b) after notice is given to a receiver by an administrator or liquidator, requiring the receivership to end, under section [•] (*Administrator's notice that receivership shall end*) or section [•] (*Liquidator's notice that receivership shall end*); or
- (c) under section [•](5) (*Vacancy in office of receiver*).

**382. Duty of receiver to notify end of receivership**

- (1) This section applies to a person who was a receiver at the end of a receivership.
- (2) Within two working days after the end of the receivership, the person shall –
  - (a) give written notice of the end of the receivership to the company or, if the company is in liquidation, the liquidator;
  - (b) where the person was appointed as a receiver by the court, file the notice in the office of the court; and
  - (c) send a copy of the notice to the Registrar and Authority.
- (3) Every person who fails to comply with this section shall be guilty of an offence. [Provision for offence – approach TBD]

*Powers of the Court in a Receivership*

**383. Application for directions by a receiver**

- (1) On the application of the receiver or the Authority, the court may –
  - (a) give directions in relation to any matter arising in connection with the performance or exercise of any of the functions, powers and duties of the receiver;
  - (b) revoke or vary any such directions.
- (2) The powers conferred under subsection (1) –
  - (a) are in addition to any other powers the court may exercise; and
  - (b) may be exercised whether or not the receiver has ceased to act as receiver when the application is made.
- (3) It is a defence to a claim against a receiver, in relation to any act or omission by the receiver, that the receiver acted in compliance with a direction given under subsection (1).

**384. Order regarding remuneration or appointment of receiver**

- (1) On the application of a person referred to in subsection (2), the court may –
  - (a) in respect of any period or activity for which the remuneration of a receiver has not been determined under section [•](1) (*Remuneration of receiver*), fix such remuneration at a level that is reasonable in the circumstances;
  - (b) declare whether or not a receiver was validly appointed in respect of any property or validly entered into possession or custody or assumed control of any property.
- (2) Any of the following persons may make an application to the court under subsection (1) –
  - (a) the receiver or a person to be appointed as receiver;
  - (b) a liquidator or provisional liquidator;
  - (c) an administrator or deed administrator;
  - (d) the grantor;

- (e) a creditor of the grantor;
  - (f) any other person with an interest in the property in receivership;
  - (g) with respect to subsection (1)(c), the Registrar; or
  - (h) the Authority.
- (3) The powers conferred under subsection (1) may be exercised whether or not the receiver has ceased to act as receiver when the application is made.

**385. Court may restrict or limit receivership**

- (1) The court may, subject to subsection (2), on the application of the grantor or a liquidator of the grantor –
- (a) order that a receiver shall cease to act as from a specified date and time, and prohibit the appointment of any other receiver in respect of the property in receivership; or
  - (b) order that a receiver shall, as from a specified date and time, act only in respect of specified property forming part of the property in receivership.
- (2) An order under subsection (1) may be made where the court is satisfied that –
- (a) the purpose of the receivership has been satisfied so far as possible; or
  - (b) circumstances no longer justify its continuation.
- (3) Unless the court orders otherwise, a copy of an application under this section shall be served on the receiver at least five working days before the hearing of the application, and the receiver may appear and be heard at the hearing.
- (4) In making an order under subsection (1), the court may, if it thinks fit –
- (a) impose any term or condition;
  - (b) make any other ancillary order.
- (5) An order made under subsection (1) shall not affect an encumbrance over the property in receivership.

**386. Order to enforce receiver's duties**

- (1) In this section, "failure to comply", with respect to a receiver, means a failure by the receiver to comply with a duty arising –
- (a) under the instrument or the order of the court by or under which the receiver was appointed; or
  - (b) under this or any other Act or rule of law or Rules of Court; or
  - (c) under any order or direction of the court, except an order to comply made under this section, and "comply" shall have the corresponding meaning.
- (2) On the application of a person referred to in subsection (3), and where the court is satisfied that there is or has been a failure to comply, the court may –
- (a) without prejudice to any other right or remedy that may be available in relation to a breach of duty, order the receiver to comply with the applicable duty so far as may be specified in the order; or
  - (b) relieve the receiver of the duty to comply with the applicable duty, wholly or in part.
- (3) Any of the following persons may make an application to the court under subsection (2) –

- (a) a receiver, in relation to a failure to comply by another receiver of property of the grantor;  
**intended to remove the provision in the current CA 2007, s 468 for a receiver to apply for an order with respect to itself, which would presumably be with a view to relieving the receiver of the duty to comply (wholly or in part); it is thought that the applicable circumstances should be addressed by seeking directions under the section "Application for directions by a receiver"**
  - (b) the grantor;
  - (c) a creditor of the grantor;
  - (d) any other person with an interest in the property in receivership;
  - (e) a liquidator or provisional liquidator of the grantor;
  - (f) **an administrator or deed administrator of the grantor;**
  - (g) the Registrar; or
  - (h) the Authority.
- (4) No application may be made under subsection (2) unless notice of the failure to comply has been served on the receiver at least ten working days before the application and, as at the date of the application, there is a continuing failure to comply.
- (5) A copy of every order made under subsection (2)(a) shall, within five working days after the making of the order, be sent by the court to the Authority.

#### 387. Removal of receiver from office by court

- (1) On the application of a person referred to in subsection [•](3) (*Order to enforce receiver's duties*), and where the court is satisfied that a receiver –
- (a) has failed to comply with an order made under subsection [•](2)(a) (*Order to enforce receiver's duties*); or
  - (b) has become disqualified under section [•] (*Who may be appointed and act as receiver*) to be appointed or act as receiver,
- the court –
- (c) may make an order removing the receiver from office; and
  - (d) in making such an order, may, if it thinks fit, make any other ancillary order. **intended to remove the provision in the current CA 2007, s 468(4)(b) under which it appears that a court may order that a person may serve as receiver where not qualified to do so**
- (2) A copy of every order made under subsection (1) shall, within five working days after the making of the order, be sent by the court to the Registrar and Authority.

#### 388. Orders protecting property in receivership

The court may, in making an order that removes or has the effect of removing a receiver from office, make such orders as it thinks fit –

- (a) for preserving the property in receivership; and
- (b) for that purpose, requiring the person removed from office –

- (i) to deliver to such person as may be specified in the order any documents in the possession or custody or under the control of the receiver as may be specified in the order; and
- (ii) to take such other action as the court thinks fit.

## Part XIV – Insolvency

### *Inability to pay debts*

#### **389. Inability to pay debts**

- (1) ~~An individual is insolvent where he or she is unable to pay his or her debts as they become due. A company is insolvent where it is unable to pay its debts as they become due in the normal course of business.~~
- (2) ~~A company is insolvent where it is unable to pay its debts as they become due in the normal course of business.~~
- (3) ~~Insolvency within the meaning of subsection (1) or subsection (2) may be proved by any evidence.~~
- (4) For the purposes of this Act, a company shall be presumed, unless the contrary is proved, to be ~~unable to pay its debts as they become due in the normal course of business~~ insolvent within the meaning of subsection (2) where –
  - (a) a creditor by assignment or otherwise, to whom the company is indebted in a sum then due exceeding such amount as may be prescribed, has served on the company a statutory demand requiring the company to pay the sum so due or secure or compound for it, and the company has for three weeks from the date of service failed without reasonable cause to comply with the demand by paying the sum or securing or compounding for it to the reasonable satisfaction of the creditor; **[among other things, intended to provide that (1) the demand can be served by any lawful means and not only by the creditor in person, and (2) a company is not deemed insolvent where it has failed to pay but with a reasonable excuse (e.g. if there is a genuine dispute between the company and the creditor as to whether the amount demanded is actually owing)]**
  - (b) execution or other process levied on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part **[substitution of "levied" for "issued" intended to require that the process has actually been levied (e.g. that failure by an officer to gain entry to the company's premises does not in itself satisfy the test in this paragraph)]**.
- (5) ~~A statutory demand is a written demand, in such form as may be prescribed, requiring a company to pay a sum that is due.~~

#### **390. Court may set aside demand**

- (1) On the application of the company, the court may set aside a statutory demand where it is satisfied that –
  - (a) the sum is disputed on grounds that appear to be substantial;

- (b) the company appears to have a counterclaim, set-off or cross-demand, and the amount specified in the demand less the amount of that counterclaim, set-off or cross-demand appears not to exceed the prescribed amount; or
  - (c) the demand should be set aside for some other reason.
- (2) An application under subsection (1) shall be –
- (a) made within ten working days after service of the demand on the company; and
  - (b) in such form as may be prescribed.
- (3) An application under subsection (1) suspends the time for compliance with the demand.
- (4) Where the court refuses an application under subsection (1), the time for compliance with the demand shall run again from the date of the refusal.
- (5) In making an order under subsection (1), the court may, if it thinks fit –
- (a) impose any term or condition;
  - (b) make any other ancillary order.

*Voidable transactions* [intended to remove the provision for the "uncommercial transactions" ground in CA 2007, s 369, which it is thought may entail significant uncertainty]

### **391. Voidable preference**

- (1) A transaction by a debtor may be set aside by the court on the application of an **a relevant office holder** where it –
- (a) is entered into at a time when the debtor is insolvent;
  - (b) enables a person to receive more **in or** towards satisfaction of a debt by the debtor than that person would receive, or would be likely to receive, in a bankruptcy or liquidation of the debtor; and [intended to remove the "influenced by a desire" condition in CA 2007, s 367(3) and (4), in the interests of reducing complexity, balancing this with the restrictions provided for in the section "Restrictions on setting aside [etc]"]
  - (c) either –
    - (i) if entered into with a person other than a connected party of the debtor, was entered into within the standard review period; or [intended to shorten the period in the current CA 2007, ss 367(1)(a)(ii) and 373(2) from one year to six months, in the interests of certainty]
    - (ii) if entered into with a connected party of the debtor, was entered into within the connected-party review period.
- (2) For the purposes of subsection (1)(a), a transaction that is entered into within the standard review period is presumed, unless the contrary is proved, to be entered into at a time when the debtor is insolvent.

[intended to extend the period in the current CA 2007, ss 367(2) and 373(4) from one month to six months]

- (3) Where –
- (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship such as a running account between a debtor and a creditor, including a relationship to which other persons are parties; and
  - (b) in the course of the relationship, the level of the debtor's net indebtedness to the creditor is increased and decreased from time to time because of a series of transactions forming part of the relationship,
- then –
- (c) subsection (1) applies in relation to all of the transactions forming part of the relationship as if they together constituted a single transaction; and
  - (d) the transaction referred to in subsection (3)(a) may not be taken to be a voidable preference unless the effect of applying subsection (1) in accordance with subsection (3)(c) is that the single transaction referred to in subsection (3)(c) is taken to be a voidable preference.
- (4) A voidable preference is a transaction that may be set aside under subsection (1).

### **392. Voidable encumbrance**

- (1) Subject to subsections (3) and (5), an encumbrance, other than a lien, over any property or the undertaking of a debtor may be set aside by the court on the application of ~~an~~ a relevant office holder where –
- (a) immediately after the encumbrance was given, the debtor was insolvent; and
  - (b) either –
    - (i) if the encumbrance was given in favour of a person other than a connected party of the debtor, it was given within the standard review period; or **intended to shorten the period in the current CA 2007, ss 368(1) and 373(2) from one year to six months, in the interests of certainty**
    - (ii) if the encumbrance was given in favour of a connected party of the debtor, it was given within the connected-party review period.
- (2) For the purposes of subsection (1)(a), a debtor giving an encumbrance within the standard review period is presumed, unless the contrary is proved, to have been insolvent immediately after giving the encumbrance. **intended to extend the period in the current CA 2007, ss 368(2) and 373(4) from one month to six months**
- (3) Subject to subsection (4), an encumbrance may not be set aside under subsection (1) where –
- (a) the encumbrance secures –
    - (i) 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 grantee of the encumbrance to the debtor at the time of, or at any time after, the giving of the encumbrance; and

- (ii) any interest payable on an amount referred to in subparagraph (i); or
- (b) the encumbrance is in substitution for an encumbrance given by the debtor and either –
  - (i) if given in favour of a person other than a connected party of the debtor, was given before the standard review period; or **intended to shorten the period in the current CA 2007, ss 368(1)(c) and 373(2) from one year to six months**
  - (ii) if given in favour of a connected party of the debtor, was given before the connected-party review period.
- (4) Subsection (3)(b) shall not apply to the extent that –
  - (a) the amount secured by the substitute encumbrance exceeds the amount that was secured by the existing encumbrance; or
  - (b) the value of the property subject to the substitute encumbrance at the date of substitution exceeds the value of the property that was subject to the existing encumbrance at that date.
- (5) An encumbrance may not be set aside under subsection (1) where it secures the unpaid purchase price of property and any interest payable on that amount, whether or not the encumbrance is given over that property, if the instrument creating the encumbrance is executed –
  - (a) within 20 working days after the sale of the property; or
  - (b) in the case of the sale of an estate or interest in immovable property, within 20 working days after the final settlement of the sale.
- (6) For the purposes of subsections (3)(a) and (5), where a debtor has made a payment to a grantee of an encumbrance that meets the condition in subsection (1)(b), the payment shall be deemed to have been appropriated to the extent necessary towards –
  - (a) repayment of money actually advanced or paid by the grantee of the encumbrance to the debtor on or after the giving of the encumbrance;
  - (b) payment of the actual price or value of property sold or supplied by the grantee of the encumbrance to the debtor on or after the giving of the encumbrance;
  - (c) satisfaction of any other liability of the debtor to the grantee of the encumbrance in respect of any other valuable consideration given in good faith on or after the giving of the encumbrance, including interest payable on any amount referred to in paragraphs (a), (b) and (c).
- (7) A voidable encumbrance is an encumbrance that may be set aside under subsection (1).

**393. Alienation of property with intent to hinder, delay or defeat a creditor**

- (1) Subject to subsections (2) and (3), every conveyance or transfer of property by a debtor in the extended review period, with intent to hinder, delay or defeat a creditor in the exercise of any right of recourse of the creditor in respect of the property, may be set aside by the court on the application of ~~an~~ **a relevant** office holder.



- (2) A conveyance or transfer may not be set aside under subsection (1) where the property was conveyed or transferred to a person who acquired the property in good faith without knowledge of the intent referred to in subsection (1).
- (3) Nothing in subsection (1) shall affect or limit any right of or remedy available to a secured creditor.
- (4) An alienation with intent is a conveyance or transfer that may be set aside under subsection (1).

**394. Procedure for setting aside a voidable preference, voidable encumbrance or alienation with intent**

- (1) An application to the court for the setting aside of a voidable transaction shall, in addition to complying with all other applicable requirements under this Act, regulations made thereunder and Rules of Court applicable to court applications by an office holder, specify –
  - (a) the date of the transaction that is subject to challenge;
  - (b) the particulars of the transaction that is subject to challenge;
  - (c) the manner in which each of the applicable conditions for the setting aside is said to be satisfied;
  - (d) the order or orders that the relevant office holder seeks; and
  - (e) the calculations of all amounts and values that are relied upon in seeking the order or orders referred to in paragraph (d).
- (2) The relevant office holder shall, in such manner and within such period as may be prescribed, serve a copy of the application on –
  - (a) the person other than the debtor that was a party to the transaction; and
  - (b) any other person against whom the relevant office holder seeks the order or orders,in each case, together with such other information as may be prescribed.
- (3) The person or persons referred to in paragraphs (a) and (b) of subsection (2) may object, in such manner and within such period as may be prescribed, to the setting aside. **intended to remove the provision in the current CA 2007, s 370(3) under which it appears that there is an automatic setting aside in the absence of a court application made by a deadline, which it is thought may lead to unfair results**

**395. Court orders on setting aside a voidable preference, voidable encumbrance or alienation with intent**

- (1) On the setting aside of a voidable transaction, the court may make one or more of the following orders –
  - (a) an order that a person transfer to –
    - (i) the relevant office holder; or
    - (ii) if the liquidation of the debtor has commenced after the application to court was made, the liquidator,property or a property interest of the debtor that was transferred under the voidable transaction;
  - (b) an order that a person pay to –
    - (i) the relevant office holder; or
    - (ii) if the liquidation of the debtor has commenced after the application to court was made, the liquidator,an amount equal to some or all of the money that was paid under the voidable transaction;

- (c) an order that a person pay to –
- (i) the relevant office holder; or
  - (ii) if the liquidation of the debtor has commenced after the application to court was made, the liquidator,

an amount that, in the court's opinion, fairly represents some or all of the benefits that the person received as a result of the voidable transaction;
- (d) an order that a person transfer property or a property interest that, in the court's opinion, fairly represents either or both of the following (but without double-counting) –
- (i) some or all of the money that was paid under the voidable transaction; and
  - (ii) some or all of the proceeds of realisation of property or of a property interest of the debtor that was transferred under the voidable transaction;
- (e) an order releasing, in whole or in part, a debt that has been incurred or a guarantee or encumbrance that has been given;
- (f) an order requiring security to be given for the discharge of an order made under this subsection;
- (g) an order specifying the extent to which a person affected by the setting aside of a voidable transaction is entitled to be treated as a creditor in the bankruptcy, administration or liquidation;
- (h) an order declaring an agreement that constitutes, forms part of or relates to the voidable transaction, or specified provisions of such an agreement, either – **intended to remove the provision in the current CA 2007, s 371 para (f) for a court to vary an agreement, which seems unlikely to be necessary and may entail significant uncertainty**
- (i) to be void as from the time at which the agreement was made or such later time as may be specified in the order; or
  - (ii) to be unenforceable.

- (2) In making an order under subsection (1) the court may, if it thinks fit, make any other ancillary order. **intended to cover, for example, the carrying out of formalities associated with a property transfer**

**396. Restrictions on setting aside a voidable preference, voidable encumbrance or alienation with intent**

- (1) Subject to subsections (2), (3) and (4), the court may make an order under section [\*] (*Court orders on setting aside a voidable preference, voidable encumbrance or alienation with intent*) that affects property of, or imposes an obligation upon, any person whether or not the person is a party to the voidable transaction or a beneficiary under the voidable transaction.
- (2) Where a person is a party to a voidable transaction or a beneficiary under the voidable transaction, the court shall not make an order under section [\*] (*Court orders on setting aside a voidable preference, voidable encumbrance or alienation with intent*) against the person where the person proves that –
- (a) the person acted in good faith;

- (b) at the time of the voidable transaction, a reasonable person in the person's position would not have believed that the debtor was, or immediately after the voidable transaction would be, insolvent; and
- (c) either –
  - (i) the person gave substantial value under the voidable transaction; or
  - (ii) the person did not believe that the conditions for setting aside the voidable transaction (other than the condition in this paragraph (ii)) would be met, and it was reasonable for the person not to have such a belief.
- (3) Where a person is neither a party to a voidable transaction nor a beneficiary under the voidable transaction, the court shall not make an order that affects an interest of the person in property that the person has acquired –
  - (a) in good faith; and
  - (b) for valuable consideration.
- (4) Where a person referred to in subsection (3) is a connected party of the debtor, it shall be presumed, unless the contrary is proved, that the person acquired the property otherwise than in good faith.

*Transactions at an undervalue and misfeasance*

**397. Transaction at an undervalue**

- (1) In this section –
  - (a) “applicable transaction” means a transaction, with a recipient, to which the debtor was or is a party;
  - (b) “excess” means the amount (if any) by which the value that a recipient received from the debtor under an applicable transaction exceeds the value that the debtor received from the recipient under the applicable transaction; and
  - (c) “recipient” means a person who received value from the debtor.
- (2) An **A relevant** office holder may, **following such procedure as may be prescribed**, recover an excess from a recipient where –
  - (a) the debtor entered into the applicable transaction within the period of two years immediately preceding the date of commencement of the debtor's bankruptcy, administration or liquidation (as the case may be);
  - (b) either –
    - (i) the debtor was insolvent when it entered into the applicable transaction; or
    - (ii) the debtor became insolvent because it entered into the applicable transaction;
  - (c) considering the value of the debtor's property, the excess is a significant amount; and
  - (d) either or both of the conditions in subsection (3) is not met.
- (3) The conditions referred to in subsection (2)(d) are that –
  - (a) the applicable transaction was at arm's length; and

- (b) the debtor entered into the applicable transaction in good faith.
- (4) A transaction at an undervalue is a transaction under which an excess is liable to be recovered under this section.

### 398. Misfeasance

- (1) ~~Where the Authority~~ **Where, in the course of the administration, deed administration or liquidation of a company, the Authority** or the court considers that an involved party has misapplied or retained or become liable or accountable for money or other property of the company, or been guilty of negligence, default or breach of duty or trust in relation to the company, the court may on the application of ~~an~~ **a relevant** office holder, a creditor, a contributory, the Official Receiver, the Authority, or another interested person –
  - (a) inquire into the conduct of the involved party; and
  - (b) either –
    - (i) order that person to repay or restore the money or other property or any part of it with interest at a rate the court thinks just;
    - (ii) order that person to contribute such sum as the court thinks just to the property of the company by way of compensation;
    - (iii) where the application is made by a creditor, order that person to pay or transfer the money or other property or any part of it with interest at a rate the court thinks just to the creditor or creditors; or
    - (iv) make such other order as it thinks fit.
- (2) An order for payment of money under subsection (1) shall be deemed to be a final judgment for the purposes of section [\*] (*Bankruptcy notice and inability to pay*).
- (3) An application under subsection (1) in relation to a person who has acted as administrator, deed administrator, liquidator or provisional liquidator of the company may not be made, except with the permission of the court, after that person has been released under section [\*] (*Release of administrator or deed administrator*) or section [\*] (*Release of liquidator or provisional liquidator*).

### Definitions

### 399. Definitions

- (1) For the purposes of sections [\*] (*Voidable preference*) to [\*] (*Misfeasance*) –
  - (a) “connected-party review period” means the period of two years immediately preceding the date of commencement of the debtor’s bankruptcy, administration or liquidation (as the case may be);
  - (b) “connected party” means **[TBC]**,<sup>26</sup>
  - (c) “extended review period” means the period of five years immediately preceding the date of commencement of the debtor’s bankruptcy, administration or liquidation (as the case may be);

<sup>26</sup> It was discussed in a VC with the Law Commission that the Law Commission will consider and populate this definition, and that there may be guidance from the existing *Banking Act* and / or *SEC Act*.

- (d) “relevant office holder” means –
- (i) in a bankruptcy, the Bankruptcy Trustee;
  - (ii) in an administration, the administrator;
  - (iii) in a liquidation, the liquidator; and
  - (iv) where a deed of company arrangement is in force, and if an Insolvency Practitioner, the deed administrator; and
- (e) “standard review period” means the period of six months immediately preceding the date of commencement of the debtor’s bankruptcy, administration or liquidation (as the case may be).
- (2) For the purposes of sections [•] (*Voidable preference*) and [•] (*Transaction at an undervalue*), “transaction” means any of the following steps by the debtor –
- (a) conveying or transferring property of the debtor;
  - (b) giving an encumbrance over any property or the undertaking of the debtor;
  - (c) incurring an obligation;
  - (d) undergoing an execution or other legal process or the levying of distress;
  - (e) paying money; and
  - (f) anything done or omitted to be done for the purpose of one or more of paragraphs (a), (b), (c), (d) and (e).

*Proofs of debt and proving debts*

**400. Proofs of debt and proving debts**

- (1) In this section, “debt” means –
- (a) any debt to which the debtor is subject at the relevant date;
  - (b) any debt to which the debtor may become subject after the relevant date by reason of an obligation incurred before that date; and
  - (c) any interest provable in accordance with subsection (8).
- (2) A creditor wishing to vote or claim a distribution in respect of a debt, or for such other purposes as may be prescribed, shall submit a proof of debt unless –
- (a) this Act or any regulation made thereunder provides otherwise, or a court orders otherwise; or
  - (b) section [•] (*Declaration of solvency*) applies to the company, in which case the creditor is not required to submit a proof unless the liquidator requires one to be submitted.
- (3) A proof of debt –
- (a) is to be invited in such manner and at such times or on such occasions as may be prescribed;
  - (b) is, in such circumstances as may be prescribed, to be deemed to have been submitted;
  - (c) is to be submitted in such manner and within such period as may be prescribed; and
  - (d) shall comply with such other requirements, including as to its content, as may be prescribed.
- (4) Proofs of debt may be admitted or rejected, in whole or in part, in such manner, within such period and with such requirements for notice of admission or rejection as may be prescribed.

(5) A debt is proved when a decision is made to admit a proof of debt under subsection (4) with respect to it.

(6) Where –

(a) a proof of debt relates to debt –

- (i) that bears interest;
- (ii) to which a trade discount or other discount relates;
- (iii) that is incurred or payable in a foreign currency;
- (iv) that is payable at a future time;
- (v) that relates to rent or other payments of a periodical nature;

(b) a proof of debt relates to the debtor's liability to calls as a contributory of a company;

(c) a proof of debt is deemed under subsection (3)(b) to have been submitted;

(d) a proof of debt is subject to a contingency, or is for damages; or

(e) for some other reason the amount of a proof of debt is uncertain,

the amount of the proof of debt that may be admitted shall be determined in such manner as may be prescribed.

(7) In a liquidation –

(a) the grantee of a fixed security shall have the options referred to in paragraph 1 of the [•]

*Schedule (Secured Creditors' Options)* with respect to that security; and

(b) the exercise of those options shall be governed by the provisions of that Schedule.

(8) Interest up to but excluding the relevant date on debts referred to in paragraphs (a) and (b) of subsection (1) shall be provable, and shall be calculated in such manner as may be prescribed.

(9) Where an interested person is dissatisfied with a decision to admit or reject a proof of debt, in whole or in part, that person may appeal against the decision in such manner, within such period and with such requirements for notice of intention to appeal as may be prescribed.

(10) A proof of debt may be withdrawn or varied, subject to such conditions and in such manner as may be prescribed.

(11) A creditor shall be required to produce documents supporting a proof of debt, subject to such conditions and in such manner as may be prescribed.

(12) Inspection of proofs of debt shall be allowed, by such persons, in such manner and at such times and places as may be prescribed.

(13) Unless the court orders otherwise, a creditor shall bear the costs of proving its debt.

(14) Any person who –

(a) makes, or authorises the making of, a proof of debt that is false or misleading in a material particular, knowing it to be false or misleading; or

(b) omits, or authorises an omission from, a proof of debt any fact or matter, knowing that the omission makes the proof of debt false or misleading in a material particular,

shall be guilty of an offence. [Provision for offence – approach TBD]

*Set-off*

**400A. Set-off between a bankrupt debtor and another party**

(1) Subject to subsections (3), (4) and (5), where there have been mutual credits, mutual debts or other mutual dealings between a Bankrupt debtor and a person who seeks or, but for the operation of this section, would seek to have a claim admitted in a Bankruptcy, by way of proof of debt –

- (c) an account shall be taken of what is due from one party to the other in respect of those credits, debts or dealings;
- (d) an amount due from one party shall be set off against an amount due from the other party; and
- (e) only the balance of the account shall be admitted as a provable debt or be payable to the Bankruptcy Trustee as part of the Bankruptcy Estate.

(2) For the purposes of subsection (1), mutual credits, mutual debts and other mutual dealings do not include –

(a) any debt arising out of an obligation incurred at any time after commencement of the Bankruptcy or after which the person had notice of –

(i) ongoing proceedings on a Bankruptcy application relating to the bankrupt debtor under section 80 *Debtor Application for Bankruptcy Order*; or

(ii) a pending Bankruptcy petition relating to the bankrupt debtor under section 84 *Petition for Bankruptcy Order*.

(b) any debt acquired by the person, by assignment or otherwise, under an agreement entered into at any time after commencement of the Bankruptcy or after which the person had notice of –

(i) ongoing proceedings on a Bankruptcy application relating to the bankrupt debtor under section 80 *Debtor Application for Bankruptcy Order*; or

(ii) a pending Bankruptcy petition relating to the bankrupt debtor under section 84 *Petition for Bankruptcy Order*.

(4) For the purposes of this section, such rules on determining amounts as may be prescribed under section 400 (Proofs of debt and proving debts) apply.

(5) Where an amount due from the bankrupt debtor to the person referred to in subsection (1) includes both preferential claims and claims that are not preferential claims, the amount due from the person to the bankruptcy debtor shall under subsection (1)(b) be set off rateably against such claims.

**401. Set-off between a company and another party**

(1) Subject to subsections (3), (4) and (5), where there have been mutual credits, mutual debts or other mutual dealings between a company and a person who seeks or, but for the operation of this section, would seek to have a claim admitted in a liquidation, by way of proof of debt –

- (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 shall be set off against an amount due from the other party; and
  - (c) only the balance of the account shall be admitted as a provable debt or be payable to the company.
- (2) For the purposes of subsection (1), mutual credits, mutual debts and other mutual dealings do not include –
- (a) any debt arising out of an obligation incurred at any time after commencement of the liquidation or after which the person had notice of –
    - (i) the convening of a meeting of the company to consider a resolution for the appointment of a liquidator under section [\*](2)(a) (*Appointment of liquidator*);
    - (ii) the convening of a meeting of the board of the company to consider a resolution for the appointment of a liquidator under section [\*](2)(b) (*Appointment of liquidator*);
    - (iii) the making of an application under section [\*](2)(c) (*Appointment of liquidator*); or
    - (iv) a resolution of creditors for the appointment of a liquidator under section [\*](2)(b) (*Business at outcome meeting*); or
  - (b) any debt acquired by the person, by assignment or otherwise, under an agreement entered into at any time after commencement of the liquidation or after which the person had notice of –
    - (i) the convening of a meeting of the company to consider a resolution for the appointment of a liquidator under section [\*](2)(a) (*Appointment of liquidator*);
    - (ii) the convening of a meeting of the board of the company to consider a resolution for the appointment of a liquidator under section [\*](2)(b) (*Appointment of liquidator*);
    - (iii) the making of an application under section [\*](2)(c) (*Appointment of liquidator*); or
    - (iv) a resolution of creditors for the appointment of a liquidator under section [\*](2)(b) (*Business at outcome meeting*).
- (3) Subsection (1) shall not apply to an amount paid or payable by a contributory –
- (a) as the consideration or part of the consideration for the issue of a share; or
  - (b) in satisfaction of a call in respect of a liability of the contributory made by the board of the company or by the liquidator.
- (4) For the purposes of this section, such rules on determining amounts as may be prescribed under section [\*](6) (*Proofs of debt and proving debts*) apply.
- (5) Where an amount due from the company to the person referred to in subsection (1) includes both preferential claims and claims that are not preferential claims, the amount due from the person to the company shall under subsection (1)(b) be set off rateably against such claims.

*Distributions*



**402. Distributions**

- (1) In this section, “distributing office holder” means –
  - (a) in a bankruptcy, the Bankruptcy Trustee;
  - (b) in a liquidation, the liquidator; and
  - (c) in a receivership, the receiver.
  
- (2) Where a distributing office holder proposes to make a distribution, the distributing office holder –
  - (a) shall give –
    - (i) public notice; and
    - (ii) notice to individual creditors,of the proposed distribution in compliance with such requirements as may be prescribed;
  - (b) may, in such circumstances as may be prescribed, postpone or cancel a proposed distribution of which notice has been given;
  - (c) may make such provision as the distributing office holder sees fit for –
    - (i) proofs of debt that have not been submitted or whose amounts have not been determined; and
    - (ii) expenses likely to be associated with the admission, or determination of the amounts of, such proofs of debt.
  
- (3) Where a creditor’s proof of debt is submitted or increased after the making of a distribution –
  - (a) any distribution that has already been made shall not be disturbed on that ground;
  - (b) if and to the extent that the proceeds of realisation of property are sufficient, any further distributions shall be made such that the proportion of the creditor’s debt satisfied in those distributions is equal to the proportion previously satisfied of the debts of all other creditors with equally ranked claims.
  
- (4) A distributing office holder is not liable in damages for failing to make a distribution, but where a distributing office holder refuses to make a distribution and on an application to the court by an interested person, the court may order that the distributing office holder shall –
  - (a) make the distribution; and
  - (b) pay out of the distributing office holder’s own money –
    - (i) interest on the amount [or value] of the distribution at such rate as may be prescribed; and
    - (ii) the reasonable costs of the applicant incurred in making the application.

*Sending of documents to creditors and opting out*

**403. Sending of documents to creditors and opted-out creditors**

- (1) Where this Act or a regulation made thereunder requires an office holder to send a document to creditors, including creditors of a particular class, the requirement is complied with by the sending of the document to

all such creditors of whose address the office holder is aware other than opted-out creditors, except where – **intended to avoid the need, in general, for an office holder to provide information to a creditor (spending time and money doing so) where the creditor does not wish to receive information**

- (a) the Act or the regulation provides otherwise; or
  - (b) a court orders otherwise.
- (2) A creditor may at any time, and for any reason, elect to be an opted-out creditor by giving written notice, in such form as may be prescribed, to an office holder.
- (3) An opted-out creditor may at any time, and for any reason, elect to cease to be an opted-out creditor by giving written notice, in such form as may be prescribed, to an office holder.
- (4) An office holder shall, in the first written communication with a creditor, give notice, in such form as may be prescribed, that the creditor –
- (a) may elect to be an opted-out creditor; and
  - (b) may subsequently elect to cease to be an opted-out creditor.
- (5) An office holder shall treat a creditor as an opted-out creditor from the opt-out time to the earlier of –
- (a) the end of the liquidation, administration or receivership (as the case may be); and
  - (b) the opt-out withdrawal time.
- (6) In this section –
- (a) ~~“office holder” means a Bankruptcy Trustee, authorised intermediary, personal insolvency administrator, personal insolvency agent, administrator, deed administrator, liquidator, provisional liquidator or receiver;~~
  - (b) “opt-out time” is the earliest time, after the giving of notice by a creditor under subsection (2), at which it is reasonably practicable for the office holder to treat the creditor as an opted-out creditor;
  - (c) “opt-out withdrawal time” is the earliest time, after the giving of notice by a creditor under subsection (3), at which it is reasonably practicable for the office holder to cease to treat the creditor as an opted-out creditor; and
  - (d) “opted-out creditor”, with respect to an office holder, means a person who –
    - (i) is a creditor of the company;
    - (ii) has given a notice to the office holder under subsection (2); and
    - (iii) has not given a notice to the office holder under subsection (3).

## Part XV – Cross-Border Insolvency

### 404. Overseas companies

- (1) An application may be made to the court for the liquidation of an overseas company.
- (2) An application may be made under subsection (1) whether or not the overseas company –
  - (a) is a registered overseas company;
  - (b) has given notice under section 496 of the Companies Act that it has ceased to have a place of business in Sri Lanka; or
  - (c) has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of any other jurisdiction.
- (3) Part [\*] (*Liquidation*) applies to the liquidation of an overseas company, except that –
  - (a) references to a company shall be taken to include references to an overseas company; and
  - (b) section [\*] (*Dissolution*) shall not apply.

### 405. UNCITRAL Model Law on Cross-Border Insolvency

- (1) In this Part (*Cross-Border Insolvency*) –

“Model Law” means the Model Law on Cross-Border Insolvency adopted by UNCITRAL on 30 May 1997 and approved by the General Assembly of the United Nations on 15 December 1997;

“Sri Lanka insolvency law” shall have the meaning given to it in paragraph [\*] of Article [2] of the [\*] Schedule (*UNCITRAL Model Law on Cross-Border Insolvency*);

“UNCITRAL” means the United Nations Commission on International Trade Law.
- (2) **The Model Law, with certain modifications to adapt it for application in Sri Lanka, as set out in the [\*] Schedule (*UNCITRAL Model Law on Cross-Border Insolvency*) shall have the force of law in Sri Lanka.**
- (3) For the purposes of giving effect to this Part (*Cross-Border Insolvency*) and the [\*] Schedule (*UNCITRAL Model Law on Cross-Border Insolvency*), Sri Lanka insolvency law shall apply with such modifications as the context requires.
- (4) In ascertaining the meaning or effect any provision of the [\*] Schedule (*UNCITRAL Model Law on Cross-Border Insolvency*), reference may be made to any document that relates to the Model Law that is issued by, or that forms part of the record on the preparation of the Model Law of, UNCITRAL or its working group for the preparation of the Model Law, including the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

## Part XVI – General and Miscellaneous

### *General*

#### **406. Application of surplus proceeds**

- (1) In this section –
  - (a) “entitled person”, with respect to a distribution of proceeds of realisation of property, means a person entitled to those proceeds; and
  - (b) “established claim” means a claim established to the reasonable satisfaction of the Official Receiver.
- (2) Where a distribution of proceeds of realisation of property is made in a bankruptcy, liquidation or receivership and any such proceeds remain unclaimed –
  - (a) for more than 12 months from the date on which the distribution is made; or
  - (b) if earlier, at the time at which an order of discharge is made under section [\*] in respect of the bankruptcy, or the liquidation or receivership ends,the Bankruptcy Trustee, liquidator or receiver (as the case may be) shall surrender those proceeds to the Official Receiver.
- (3) A Bankruptcy Trustee, liquidator or receiver shall be entitled to a certificate issued by the Official Receiver in respect of a surrender under subsection (2), which shall be an effectual discharge to the Bankruptcy Trustee, liquidator or receiver (as the case may be).
- (4) The Official Receiver shall place all proceeds received under subsection (2) into an account of the Official Receiver called the “Insolvency Holding Account”, to be applied as soon as practicable in or towards satisfaction of any established claim of an entitled person.
- (5) At the expiry of 12 months from the date on which proceeds are received by the Official Receiver under subsection (2), the Official Receiver shall transfer the balance (after any application under subsection (4)) of such proceeds into an account of the Official Receiver called the “Insolvency Surplus Account”.
- (6) If and to the extent that any amount is standing to the credit of the Insolvency Surplus Account, such amount shall –
  - (a) where proceeds of realisation were transferred under subsection (5), be applied as soon as practicable in or towards satisfaction of any established claim of any entitled person;
  - (b) be available to meet the costs of administration of personal insolvency proceedings in which the debtor’s estate is insufficient to cover such costs.
- (7) Any amount standing to the credit of the Insolvency Surplus Account may, if prescribed, be invested in compliance with such requirements as may be prescribed, and the income received on any such investments shall be paid promptly into the Insolvency Surplus Account.

- (8) Where any sum is paid from the Insolvency Holding Account or Insolvency Surplus Account to an entitled person under subsection (4) or (6)(a), any other person who subsequently claims that sum shall not have any right of recourse to the Insolvency Holding Account or Insolvency Surplus Account in respect of that sum.
- (9) The Official Receiver shall send reports on the Insolvency Holding Account and Insolvency Surplus Account to such persons, with such information, in such manner, and at such times or on such occasions as may be prescribed.

**407. Creditor resolutions**

Where this Act refers to a resolution of creditors, the requirements for such a resolution shall be those in paragraph [7] (*Resolutions*) of the [•] Schedule (*Procedures for Meetings of Creditors and Contributories*).

**408. Contributory resolutions**

Where this Act refers to a resolution of contributories, the requirements for such a resolution shall be those in paragraph [7] (*Resolutions*) of the [•] Schedule (*Procedures for Meetings of Creditors and Contributories*).

**409. Protection in respect of seizure or disposal of property**

- (1) Where a person referred to in subsection (2) seizes or disposes of any property that is not property of the company, the person is not liable in respect of any loss or harm resulting from the seizure or disposal unless caused by the person's bad faith or negligence.
- (2) Subsection (1) applies to an administrator, deed administrator, liquidator, provisional liquidator or special manager of a company.
- (3) Nothing in subsection (1) shall affect or limit any right or remedy of any person to recover some or all of –
  - (a) the property; or
  - (b) any proceeds of realisation of the property.

**410. Validity of acts**

If there has been a genuine attempt to appoint a person as administrator, deed administrator, liquidator, provisional liquidator, special manager or receiver under a power that has become exercisable, the acts of that person as an administrator, deed administrator, liquidator, provisional liquidator, special manager or receiver (as the case may be) are valid notwithstanding any defect in the person's appointment or qualifications that is subsequently discovered.

**411. Extension of time period**

- (1) Where the exercise of a right is subject to a stay (however described) under any of sections [•], [•] and [•], any time period for the exercise of that right shall be extended by the duration of the stay.
- (2) Nothing in subsection (1) shall affect any restriction or limitation on the exercise of a right, or the termination of a right, under this Act.

**412. Documents required by **specified** office holder**

- (1) In this section –
  - (a) “requesting party” means –
    - (i) the Authority;
    - (ii) an administrator;

- (iii) a liquidator; or
- (iv) a provisional liquidator; and
- (b) “specified office holder” means –
  - (i) the Official Receiver;
  - (ii) a Bankruptcy Trustee;
  - (iii) a personal insolvency agent;
  - (iv) a personal insolvency administrator;
  - (v) an administrator;
  - (vi) a deed administrator;
  - (vii) a liquidator;
  - (viii) a provisional liquidator; or
  - (ix) a receiver.
- (2) An ~~A~~ specified office holder shall have the right not to deliver to a requesting party any book, record or document that is otherwise to be delivered to the ~~office holder~~ requesting party under this Act, where the specified office holder requires that book, record or document for the purpose of performing or exercising any of its functions, powers and duties.
- (3) Where ~~an~~ a specified office holder exercises the right under subsection (2), the requesting party may require the specified office holder to –
  - (a) make the book, record or document (as the case may be) available for inspection by the requesting party at any reasonable time; and
  - (b) provide the requesting party with a copy of the book, record or document (as the case may be) or the relevant part or parts of it.
- (4) The requesting party shall pay the reasonable expenses of ~~an~~ a specified office holder in complying with a requirement under subsection (3).

#### 413. Requests

Where this Act provides for the making of a request, but neither this Act nor any regulation made thereunder specifies the method by which the request is to be made, the request is to be made in writing.

### Offences

#### 414. Misfeasance of a director or other officer before administration or liquidation [draws on the current CA 2007, s 374; note that certain changes have been made beyond the addition of the new provisions highlighted]

- (1) When the administration or liquidation of a company commences, a person who is a past or present director or other officer of the company shall be guilty of an offence where, within the period of two years immediately preceding the date of commencement of the administration or liquidation or at any time thereafter, the person has –

- (a) concealed any part of the company's property to the value of [ten thousand] rupees or more or concealed any debt owing to or from the company;
  - (b) fraudulently removed any part of the company's property to the value of [ten thousand] rupees or more;
  - (c) fraudulently parted with, altered or made any omission in, or been concerned in or taken part in fraudulently parting with, destroying, altering or making any omission in, any book, record or document relating to the affairs, business, property or financial circumstances of the company;
  - (d) by any fraudulent representation or other fraud, obtained any property for or on behalf of the company on credit that the company has not subsequently paid for; **[new provision, intended to be along the lines of the current CA 2007, s 380(1)(h)/(i)]**
  - (e) been concerned in or taken part in the pawning, pledging or disposal of any property of the company that has been obtained on credit and has not been paid for, unless the pawning, pledging or disposal was in the normal course of the company's business;
  - (f) made or given or caused to be made or given any gift or transfer of or encumbrance over any property of the company or has caused or connived at the commencement or continuation of any execution or other legal process or the levying of distress against the company or any of its property, with the intent of defrauding creditors;
  - (g) concealed or removed any part of the company's property after, or less than two months before, the date of any unsatisfied judgment or order for the payment of money obtained against the company, with the intent of defrauding creditors;
  - (h) attempted to account for any part of the company's property by fictitious losses or expenses **[new provision, intended to be along the lines of CA 2007, s 380(1)(g)]**.
- (2) It is a good defence to a charge under paragraph (a) or (e) of subsection (1) to prove that the person had no intent to defraud.
- (3) A person who commits an offence under subsection (1) shall be liable on conviction to [a fine not exceeding [\*] rupees or to imprisonment for a term not exceeding [\*] years or to both such fine and imprisonment]. **[Provision for offence – approach TBD]**
- (4) Where a person is concerned in or takes part in the pawning, pledging or disposal of any property in circumstances that amount to an offence under subsection (1)(e), any person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in those circumstances shall be guilty of an offence and shall be liable on conviction to [a fine not exceeding [\*] rupees or to imprisonment for a term not exceeding [\*] years or to both such fine and imprisonment]. **[Provision for offence – approach TBD] [New provision]**

#### **415. Wrongful trading**

- (1) A director of a company who believes that the company is unable to pay its debts as they become due in the normal course of business, or within a reasonable time thereafter, shall, where a meeting has not

already been convened under this subsection, forthwith convene a meeting of the directors of the company to consider –

- (a) whether the company is unable to pay its debts as they become due in the normal course of business, or within a reasonable time thereafter; and
  - (b) whether the board of the company should –
    - (i) resolve that an administrator of the company be appointed under section [•] (*Appointment of administrator by the board of the company*);
    - (ii) make an application to the court under section [•](1)(b) (*Appointment of administrator by the court*) for the appointment of an administrator of the company; or
    - (iii) make an application to the court under section [•](2)(c) (*Appointment of liquidator*) for the appointment of a liquidator of the company.
- (2) Where a meeting is convened under subsection (1), the directors shall consider the matters set out in paragraphs (a) and (b) of subsection (1).
- (3) Where –
- (a) a director fails to comply with subsection (1);
  - (b) at the time of that failure, the company was unable to pay its debts as they became due in the normal course of business, or within a reasonable time thereafter; and
  - (c) a liquidation of the company commences within five years thereafter,
- the court may, on the application of the liquidator or a creditor, order that the director be liable for the whole or part (as the court thinks fit) of any loss suffered by creditors as a result of the company not being put into administration or liquidation at the time of the failure.
- (4) Where –
- (a) either –
    - (i) a meeting is convened under subsection (1) but the directors fail to hold it; or
    - (ii) at a meeting convened under subsection (1), the directors fail to take one of the steps set out in paragraphs (b)(i), (b)(ii) and (b)(iii) of subsection (1);
  - (b) at the time of that failure, there were no reasonable grounds to believe that the company was able to pay its debts as they became due in the normal course of business, or within a reasonable time thereafter; and
  - (c) a liquidation of the company commences within five years thereafter,
- the court may, on the application of the liquidator or a creditor, order that the directors of the company, other than those directors who attended the meeting and voted in favour of taking one of the steps set out in paragraphs (b)(i), (b)(ii) and (b)(iii) of subsection (1), be liable for the whole or part (as the court thinks fit) of any loss suffered by creditors as a result of the company not being put into administration or liquidation at the time of the failure.
- (5) In making an order under this section, the court may, if it thinks fit –



- (a) impose any term or condition;
  - (b) make any other ancillary order.
- (6) Nothing in this section shall –
- (a) affect or limit the application of section 187 of the Companies Act; or
  - (b) prevent the board of a company from convening a meeting of shareholders to consider a resolution of the company for –
    - (i) the appointment of an administrator under section [\*] (*Appointment of administrator by the company*);
    - (ii) an application to the court under section [\*](1)(b) (*Appointment of administrator by the court*) for the appointment of an administrator; or
    - (iii) an application to the court under section [\*](2)(c) (*Appointment of liquidator*) for the appointment of a liquidator.

(7) [This section shall not apply to a company which has total secured and unsecured debts that amount to no more than [50 million rupees] [at the time of the commencement of a liquidation].]

#### **416. Fraudulent trading**

- (1) Where any business of a company that has been put into liquidation or administration has been carried on with intent to defraud a creditor or another person or for any fraudulent purpose, every person who was knowingly concerned in or took part in the carrying on of the business in that manner shall be guilty of an offence and shall be liable on conviction to [a fine not exceeding [\*] rupees or to imprisonment for a term not exceeding [\*] years or to both such fine and imprisonment]. [Provision for offence – approach TBD]
- (2) Where any business of a company that has been put into liquidation or administration has been carried on with intent to defraud a creditor or another person or for any fraudulent purpose, the court may, on the application of the liquidator or administrator (as the case may be), order that every person who was knowingly concerned in or took part in the carrying on of the business in that manner –
  - (a) make such contribution to the property of the company; or
  - (b) be personally responsible for such debts and other liabilities of the company, as the court thinks fit.
- (3) In making an order under this section, the court may, if it thinks fit –
  - (a) impose any term or condition;
  - (b) make any other ancillary order.

#### **417. Offence relating to administration or liquidation [draws on the current CA 2007, s 380]**

- (1) Where a person who is a past or present director or other officer, or a contributory, of a company that is in administration or liquidation or the administration or liquidation of which (to the person's knowledge) subsequently commences –

- (a) in response to a request by the administrator, liquidator or provisional liquidator, does not to the best of the person's knowledge and belief fully and truly make known to the administrator, liquidator or provisional liquidator (as the case may be) all of the property, movable and immovable, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the normal course of the company's business;
- (b) does not deliver to the administrator, liquidator or provisional liquidator all such part of the movable and immovable property of the company as is in the person's possession or custody or under the person's control, and which the administrator, liquidator or provisional liquidator (as the case may be) may reasonably request the person to deliver;
- (c) does not deliver to the administrator, liquidator or provisional liquidator all books, records and documents of the company in the person's possession or custody or under the person's control and which the administrator, liquidator or provisional liquidator (as the case may be) may reasonably request the person to deliver;
- (d) prevents the production of any book, record or document to the administrator, liquidator or provisional liquidator relating to the company's affairs, business, property or financial circumstances;
- (e) makes, or is concerned in or takes part in the making of, any statement relating to the affairs, business, property or financial circumstances of the company that –
  - (i) is false or misleading in a material particular; or
  - (ii) omits to disclose any fact or matter, where such omission makes the statement false or misleading in a material particular;
- (f) knowing or believing that a false debt has been proved by any person, fails for a period of one month to inform the administrator, liquidator or provisional liquidator thereof;
- (g) is guilty of any fraudulent representation or other fraud for the purpose of obtaining the consent of any creditor to an agreement with respect to the company or to the administration or liquidation,

shall be guilty of an offence and shall on conviction, in the case of the offence referred to in paragraph (g) be liable to [a fine not exceeding [\*] rupees or to imprisonment for a term not exceeding [\*] years or to both such fine and imprisonment], and in the case of any other offence under this subsection be liable to [a fine not exceeding [\*] rupees or to imprisonment for a term not exceeding [\*] years or to both such fine and imprisonment]. [Provision for offence – approach TBD]

- (2) It is a good defence to a charge under any of paragraphs (a), (b), (c), (d), (e) and (f) of subsection (1) to prove that the person had no intent to conceal the state of affairs of the company or to [defeat the law].

**418. Conduct prohibited**

- (1) If a company is in liquidation or administration, or an application has been made under section [•](2)(c) (*Appointment of liquidator*) or section [•](1) (*Appointment of administrator by the court*), no person may leave Sri Lanka with the intention of –
- (a) avoiding payment of money owing to the company;
  - (b) avoiding examination in relation to the affairs of the company; or
  - (c) avoiding compliance with an order of the court or another requirement under this Act or any regulation made thereunder, in relation to the affairs of the company.
- (2) A person who fails to comply with subsection (1) shall be guilty of an offence. [Provision for offence – approach TBD]

**419. Liability where proper accounts not kept [draws on the current CA 2007, s 381]**

- (1) Where in the course of the administration or liquidation of a company it is shown that proper books of accounts were not kept by the company throughout the period of two years immediately preceding the date of commencement of the administration or liquidation, or the period between the incorporation of the company and the date of commencement of the administration or liquidation, whichever is the shorter, every director and other officer of the company who is in default shall, unless the director or other officer shows that –
- (a) the director or other officer acted honestly and reasonably; and
  - (b) in the circumstances in which the business of the company was carried on the default was inevitable,
- be guilty of an offence. [Provision for offence – approach TBD]
- (2) [For the purposes of this section, proper books of accounts shall be deemed not to have been kept in the case of any company if there have not been kept such books of accounts as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company, including books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealing in goods, statements or annual stock-takings (except in the case of goods sold by way of ordinary retail trade) of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified.]

**420. Phoenix company [this and the following sections are intended, subject to certain exceptions, to prevent the re-use of the name of a company that has entered liquidation while insolvent, with a view to reducing the risk of an unscrupulous person carrying on the same business having arranged for creditors to be disenfranchised]**

- (1) In this section and sections [•] (*Personal liability*) to [•] (*Exception regarding non-dormant company*) –

“director of a failed company” means a person who was a director of a failed company at any time within the period of 12 months immediately preceding the date of commencement of its liquidation;

“failed company” means a company that was put into liquidation where, with respect to the liquidation, section [\*] (*Declaration of solvency*) either did not apply or ceased to apply to the company;

“phoenix company”, with respect to a failed company, means a company that, at any time before or within five years after commencement of the liquidation of the failed company or within such other period as may be prescribed, is incorporated with or changes its name to a pre-liquidation name of the failed company or a similar name;

“pre-liquidation name” means any name (including any trading name) of a failed company in the period of 12 months immediately preceding the date of commencement of that company’s liquidation;

“similar name” means a name that is so similar to a pre-liquidation name of a failed company as to reasonably suggest an association with that company.

- (2) Except with the permission of the court, or unless one of the exceptions in section [\*] (*Exception for person named in successor company notice*), section [\*] (*Exception for temporary period*) or section [\*] (*Exception regarding non-dormant company*) applies, a director of a failed company shall not, for a period of five years after commencement of the liquidation of the failed company –
- (a) be a director of a phoenix company;
  - (b) be concerned in or take part in the formation, promotion or management of a phoenix company;
- or
- (c) be concerned in or take part in the carrying on of a business that has a pre-liquidation name of the failed company or a similar name.
- (3) A person who fails to comply with subsection (2) shall be guilty of an offence. [Provision for offence – approach TBD]

#### **421. Personal liability**

- (1) A person who fails to comply with paragraph (a) or paragraph (b) of section [\*](2) (*Phoenix company*) is personally liable for all of the relevant debts of the phoenix company.
- (2) A person (A) who is involved in the management of a phoenix company is personally liable for all of the relevant debts of the company where –
- (a) in the management of the company A acts or is willing to act on instructions given by another person (B); and
  - (b) at that time A knows that B is contravening paragraph (a) or paragraph (b) of section [\*](2) (*Phoenix company*) in relation to the company.
- (3) In this section, “relevant debt” –
- (a) in subsection (1) means the debts and other liabilities incurred by the phoenix company while the person liable was involved in the management of the company and the phoenix company was known by a pre-liquidation name of the failed company or a similar name; and

- (b) in subsection (2) means the debts and other liabilities incurred by the phoenix company while A was acting or was willing to act on the instructions of B and the phoenix company was known by a pre-liquidation name of the failed company or a similar name.
- (4) Any liability under subsection (1) or subsection (2) is joint and several.
- (5) For the purposes of this section, a person (C) who is involved in the management of a company has at any time acted on instructions given by a person (D) whom C knew at the time to be contravening subsection (2) is presumed, unless the contrary is proved, to have been willing at any later time to act on any instructions given by D.

**422. Exception for person named in successor company notice**

- (1) Section [•] (*Phoenix company*) shall not apply to a person named in a successor company notice.
- (2) A successor company is a company that acquires the whole, or substantially the whole, of the business of a failed company under arrangements made by an administrator, liquidator or receiver or made under a deed of company arrangement.
- (3) A successor notice is a written notice by a successor company that –
  - (a) is given by the successor company to each known creditor of the failed company;
  - (b) is given to those creditors within one month after the arrangements for the acquisition of the business referred to in subsection (2) are made;
  - (c) specifies –
    - (i) the name and registered number of the failed company;
    - (ii) the circumstances in which the business has been acquired by the successor business;
    - (iii) the name that the successor company has assumed, or proposes to assume, for the purpose of carrying on that business;
    - (iv) any change of name that the successor company has made, or proposes to make, for the purpose of carrying on that business; and
  - (d) states, in respect of a person named in the notice –
    - (i) the person's full name;
    - (ii) the duration of the person's directorship of the failed company;
    - (iii) the extent of the person's involvement in the management of the failed company.

**423. Exception for temporary period**

- (1) A person does not contravene a prohibition in section [•] (*Phoenix company*), for the temporary period referred to in subsection (2), if that person applies to the court within five working days after commencement of the liquidation of the failed company for an order exempting that person from the prohibition concerned.
- (2) The temporary period referred to in subsection (1) is the period beginning on the date of the commencement of the liquidation of the failed company and ending on –

- (a) the day on which the court makes an order of exemption; or
- (b) if earlier, the close of [30] working days after commencement of the liquidation.

**424. Exception regarding non-dormant company**

- (1) The prohibitions in paragraphs (a) and (b) of section [•](2) (*Phoenix company*) shall not apply in respect of a phoenix company that has been known by a name or names that are the same as the failed company's pre-liquidation name or are similar names where –
  - (a) it has been known by that name or those names for at least the period of 12 months immediately preceding the date of commencement of the liquidation; and
  - (b) it has not been dormant at any time during those 12 months.
- (2) For the purposes of subsection (1), a company has not been dormant at any time during the 12-month period if transactions that are required by section 148(1) of the Companies Act to be recorded in its accounting records have occurred throughout that period.

**425. False or misleading statement**

Any person who supplies any information required by or for the purposes of this Act, where –

- (a) the information is false or misleading in a material particular; and
- (b) the person either –
  - (i) knows that the information is false or misleading in a material particular; or
  - (ii) omits to disclose any fact or matter, knowing that the omission makes the information false or misleading in a material particular,

shall be guilty of an offence and shall be liable on conviction to [a fine not exceeding [•] rupees or to imprisonment for a term not exceeding [•] years or to both such fine and imprisonment]. [Provision for offence – approach TBD]

**426. Procedure and interim relief**

- (1) The provisions of section 520 of the Companies Act shall apply as if references to the Companies Act were to this Act.
- (2) Without prejudice to section [•](3) (*Costs*) [court may make an order for security for costs], the provisions of section 521 of the Companies Act shall apply as if references to the Companies Act were to this Act.

**427. Costs**

- (1) ~~In this section, "costs" means [TBC].<sup>27</sup>~~
- (2) When a court makes a determination on an application or **proceeding reference**, it may, subject to such rules as may be prescribed, make an order for the payment of costs, including as to –
  - (a) payment by a party of another party's costs;
  - (b) the amount of costs to be paid; and
  - (c) the period of time within which payment is to be made.

<sup>27</sup> In a VC with the Law Commission it was provisionally agreed to delete this definition, subject to any further research by the Law Commission on relevant definitions in the Civil Procedure or other sources.

- (3) A court may, in connection with any legal proceeding and subject to such rules as may be prescribed, make an order for security for costs.

**428. Enforcement of court orders**

- (1) Any order of the court under this Act may be enforced in the same manner in which a decree of the court made in any suit pending in that court may be enforced.
- (2) Where any order of the court under this Act is sought to be enforced by any other court –
- (a) a certified copy of the order shall be sufficient evidence of the order; and
  - (b) upon production of such a certified copy, the other court shall take the requisite steps in the matter to enforce the order, in the same manner as if it had been made by that other court.

**429. General provisions as to offences**

- (1) Where –
- (a) a person fails to comply with an order of the court under this Act; and
  - (b) this Act does not otherwise provide that such a failure to comply with an order of the court under this Act is an offence,

~~a~~ the person who fails to comply with such an order shall be guilty of an offence under this subsection and shall be liable on conviction to [a fine not exceeding [•] rupees or to imprisonment for a term not exceeding [•] years or to both such fine and imprisonment]. [Provision for offence – approach TBD]

- (2) [Where –
- (a) a person fails to comply with a provision of this Act;
  - (b) the person is not, by reason of the failure, guilty of an offence under subsection (1); and
  - (c) this Act does not otherwise provide that such a failure is an offence,

~~A person who in any other manner fails to comply with a provision of this Act~~ the person shall be guilty of an offence under this subsection.] [Provision for offence – approach TBD]

*Delegated Powers to Legislate*

**430. Secondary Legislation**

[Secondary legislation may provide for –

- (a) All monetary amounts in this Act;
- (b) The form, content, translation, authentication and sending of, and the amendment to and withdrawal of, notices, reports and other documents (including copies of notices and reports for the Authority), including the time at which notices are deemed to have been received, and including as regards electronic communications;

- (c) The disclosure, publication, rectification and inspection of documents (including public files and registers), rights to injunctions restraining publication of documents, and rights to copies of documents;
- (d) Creditor and contributory decision-making;
- (e) The scope of fees, costs, charges and expenses that may be claimed by insolvency office holders, and court involvement with respect to this;
- (f) Court filings, court hearings (including as to whether or not ex parte) and court orders (including the annulment of orders), the service of documents, the costs of applications, the notification of applications to court and of court orders, and court fees;
- (g) The examination of persons (including applications for exculpation in respect of information disclosed) and other evidentiary matters;
- (h) The assessment and recovery of, and security for, costs;
- (i) Notification of matters to relevant persons and bodies, including the Inland Revenue Department;
- (j) **The structure and operations of the Authority;**
- (k) **[Procedural matters relating to the Model Law (as defined in Part XV)]; and**
- (l) **Any other matters that, under this Act, are to be or may be prescribed in secondary legislation.]**

***[Provision to be made for secondary legislation, to the extent necessary, regarding:***

- ~~— ***Matters indicated as to be prescribed***~~
- ~~— ***All monetary amounts in this Act***~~
- ~~— ***The form, content, authentication and sending of, and the amendment to and withdrawal of, notices, reports and other documents (including copies of notices and reports for the Authority), including the time at which notices are deemed to have been received, and including as regards electronic communications***~~
- ~~— ***The disclosure, publication, rectification and inspection of documents (including public files and registers), rights to injunctions restraining publication of documents, and rights to copies of documents***~~
- ~~— ***Creditor and contributory decision-making***~~
- ~~— ***The scope of fees, costs, charges and expenses that may be claimed by insolvency office holders, and court involvement with respect to this***~~
- ~~— ***Court filings, court hearings (including as to whether or not ex parte) and court orders (including the annulment of orders), the service of documents, the costs of applications, the notification of applications to court and of court orders, and court fees***~~
- ~~— ***The examination of persons (including applications for exculpation in respect of information disclosed) and other evidentiary matters***~~
- ~~— ***The assessment and recovery of, and security for, costs***~~
- ~~— ***Notification of matters to relevant persons and bodies, including the Inland Revenue Department***~~



~~— Procedural matters related to the Model Law]~~

[TBC whether to include a catch-all provision]

## *Procedure and Jurisdiction*

431. [TBC]

(1) [TBC]

## Part XVII – Final

### *Amendments*

#### **432. Section 46 of the Companies Act**

Section 46 of the Companies Act is amended by deleting “in the course of being wound up” and inserting “in administration or in liquidation”.

#### **433. Section 71 of the Companies Act**

Section 71 of the Companies Act is amended in subsection (2)(d), by deleting “Part IX” and inserting “Part [•] (*Compromises*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”.

#### **434. Section 88 of the Companies Act**

Section 88 of the Companies Act is amended in subsection (1), by deleting “section 269” and inserting “section [•] (*Liability of former shareholders*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”.

#### **435. Section 92 of the Companies Act**

Section 92 of the Companies Act is amended by substituting for paragraph (e) –

“(e) resolve that a liquidator of the company be appointed under section [•](2)(a) (*Appointment of liquidator*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X];”

#### **436. Section 97 of the Companies Act**

Section 97 of the Companies Act is amended in subsection (2)(d), by deleting “wound up by the court” and inserting “put into liquidation”.

#### **437. Section 213 of the Companies Act**

**[Matters other than those relating to financial distress are outside the scope of the World Bank exercise. These suggested amendments address matters of company law that (in the context of individual cases) may or may not relate to financial distress, and so should be carefully reviewed]**

Section 213 of the Companies Act is amended –

- (a) in subsection (1)(a), by adding immediately after “under this Act”, “or under the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”;
- (b) in subsection (1)(b), by deleting “involving dishonest or fraudulent acts” and inserting “of dishonesty or fraud”;
- (c) by deleting subsection (1)(c);
- (d) in subsection (1), by adding “(e) is the subject of a court order made under section [•] (*Wrongful trading*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”;

- (e) in subsection (1), by adding, immediately after “the management of a company,”, “or ~~serve as an Insolvency Practitioner~~ **be appointed or act as an office holder** within the meaning of section [\*] (*Definitions and interpretation*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”; and
- (f) by adding “(1A) Where a person is subject to a Bankruptcy Order under the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X], subsection (1) shall apply to the person as if “during the period of five years after the conviction or adjudication” read “during the period until discharge of the person under Part [\*] (*Bankruptcy*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”.”.

#### **438. Section 214 of the Companies Act**

**[Matters other than those relating to financial distress are outside the scope of the World Bank exercise. These suggested amendments address matters of company law that (in the context of individual cases) may or may not relate to financial distress, and so should be carefully reviewed]**

Section 214 of the Companies Act is amended –

- (a) in subsection (1)(c), by deleting “an offence of involving dishonest or fraudulent acts” and inserting “an offence of dishonesty or fraud”;
- (b) in subsection (1)(d), by deleting “became insolvent” and inserting “met the insolvency proceeding condition or was dissolved without meeting that condition (in either case whether while the person was a director or subsequently)”;
- (c) in subsection (1), by adding immediately after “the management of a company,”, “or ~~serve as an Insolvency Practitioner~~ **be appointed or act as an office holder** within the meaning of section [\*] (~~Registration~~) (*Definitions and interpretation*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”;
- (d) by adding “(1A) In deciding whether a person is unfit to be a director of a company for the purposes of paragraph (d) of subsection (1), the court shall have regard in particular to the following matters –
  - (i) any misfeasance or breach of any duty or trust by the person in relation to a company;
  - (ii) any ~~material~~ contravention by the person of any other **legal or regulatory** requirement that applied by reason of being a director of a company;
  - (iii) the extent (if any) to which the person was responsible for the cause or causes of any ~~material~~ contravention by a company of any **legal or regulatory** requirement applicable to the company;
  - (iv) the extent (if any) to which the person was responsible for the cause or causes of a company meeting the insolvency proceeding condition;
  - (v) the number and frequency of **any** instances of the person’s conduct falling within paragraphs ~~(a), (b), (c) and (d)~~ **(i), (ii), (iii) and (iv)**; and

- (vi) the nature and extent~~extent~~ of any loss or harm caused by the person's conduct in relation to a company.”;
- (e) in subsection (3), by adding immediately after “the Registrar”, “or the Official Receiver”;
- (f) in subsection (5), by adding immediately after “to the Registrar”, “and the Authority within the meaning of section [•] (*Definitions and interpretation*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”;
- (g) by adding “(8) For the purposes of this section, a company meets the insolvency proceeding condition if –
  - (i) the liquidation of the company commences and, with respect to that liquidation, section [•] (*Declaration of solvency*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X] either does not apply or ceases to apply to the company;
  - (ii) the administration of the company commences; or
  - (iii) a receiver is appointed [under the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]] in respect of the whole, or substantially the whole, of the property and undertaking of the company.”; and
- (h) by adding “(9) For the purposes of this section, an overseas company meets the insolvency proceeding condition if the company enters into an insolvency proceeding of any description (including an interim proceeding) in any jurisdiction.”

#### **439. Section 220 of the Companies Act**

Section 220 of the Companies Act is amended in subsection (1) –

- (a) [by deleting “director of a company” and inserting “director of a public company”]; and
- (b) by deleting “form” and inserting “from”.

#### **440. Section 228 of the Companies Act**

Section 228 of the Companies Act is amended by deleting paragraph (e).

#### **441. Section 246 of the Companies Act**

Section 246 of the Companies Act is amended in subsection (5), by deleting “or the company is wound up” and inserting “or the liquidation of the company commences”.

#### **442. Part X of the Companies Act**

**[Matters other than those relating to financial distress are outside the scope of the World Bank exercise. These suggested amendments address matters of company law that (in the context of individual cases) may or may not relate to financial distress, and so should be carefully reviewed]**

- (1) Section 256 of the Companies Act is amended in subsection (1)(b), by deleting “Part XIII” and inserting “Part [•] (*Administration*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”.
- (2) The following section is added immediately after section 258 of the Companies Act –

**“258A. No approval where company insolvent.** The court shall not approve an arrangement or amalgamation or compromise under section 256 if the company in question is insolvent within the meaning of section [•](2) (*Inability to pay debts*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]), taking into account **subsections (3) and (4) of that section** ~~the presumption in that section.~~”

**443. Section 394 of the Companies Act**

Section 394 of the Companies Act is amended –

- (a) in subsection (4) –
  - (i) by deleting “in the winding up” and inserting “in relation to the liquidation”;
  - (ii) by deleting “fully wound up” and inserting “the liquidation has ended under section [•] (*End of liquidation*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”; and
  - (iii) by adding, immediately after “subsection (3)”, “and shall give written notice to the Authority within the meaning of section [•] (*Definitions and interpretation*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X] that this subsection applies”;
- (b) in subsection (5), by deleting “form” and inserting “from”; and
- (c) in subsection (5)(b), by deleting “affect the power of the court to wind up” and inserting “affect or limit the application of Part [•] (*Liquidation*) or section [•] (*Overseas companies*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X] to”.

**444. Section 431 of the Companies Act**

Section 431 of the Companies Act is amended –

- (a) in subsection (5)(b), by deleting “section 440” and inserting “section [•] (Notice of receiver’s appointment and details) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”; and
- (b) in subsection (6) –
  - (i) by deleting “fixed charge” and inserting “fixed security”;
  - (ii) [by deleting “section 427” and inserting “section 428”]; and
  - (iii) by deleting “repsect” and inserting “respect”.

**445. Section 433 of the Companies Act**

Section 433 of the Companies Act is amended –

- (a) in subsection (1)(b), by deleting “winding up” and inserting “liquidation”;
- (b) in subsection (5)(b) –
  - (i) by deleting “is accordance” and inserting “in accordance”; and
  - (ii) by deleting “section 440” and inserting “section [•] (Notice of receiver’s appointment and details) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”; and
- (c) in subsection (6), by deleting “Part XV” and inserting “Part [•] (*Receivership*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X]”.

**446. Section 529 of the Companies Act**

Section 529 of the Companies Act is amended in subsection (1), by adding –

- (1) in paragraph (b) of the definition of “director”, immediately after “197,”, “214(1)(b) and (d) (except the final reference in that paragraph), 214(1A)(b), 214(3),”; and
- (2) in paragraph (c) of the definition of “director”, immediately after “197,”, “214(1)(b) and (d) (except the final reference in that paragraph), 214(1A)(b), 214(3),”.

**446A. First Schedule to the Companies Act**

The First Schedule to the Companies Act is amended in paragraph 34, by deleting “The shareholders may resolve to wind up the company voluntarily by special resolution” and inserting “The shareholders may resolve by special resolution that a liquidator of the company be appointed”.

**446B. Sixth Schedule to the Companies Act**

The Sixth Schedule to the Companies Act is amended, by deleting –

- (a) “Section 401 (Power of board to appoint administrator)”; and
- (b) “Section 415 (Vacancy in office of administrator)”.

**447. Third Schedule to the Mediation Boards Act**

The Third Schedule to the Mediation Boards Act, No. 72 of 1988 is amended by substituting for paragraph 9 –

“9. Actions under any of Parts [\*] (*Debt Protection Moratorium Order*), [\*] (*Personal and Small Business Debt Restructuring Arrangements*), [\*] (*Debt Rehabilitation Orders*) and [\*] (*Bankruptcy*) of the [Rescue, Rehabilitation and Insolvency] Act, No. [X] of 202[X].”

**448. [TBC]**

- (1) [TBC]

*Repeals*

**449. Repeals**

The following provisions of the Companies Act are repealed –

- (a) sections 219 and 227;
- (b) Part IX (*Compromises with Creditors*);
- (c) Part XII (*Winding Up*) (except sections 393, 394 and 395);
- (d) Part XIII (*Administrators*);
- (e) Part XV (*Receivers and Managers*);
- (f) section 497;
- (g) [definitions – TBC]; and
- (h) the Seventh Schedule, the Eighth Schedule, the Ninth Schedule, the Tenth Schedule, the Twelfth Schedule and the Thirteenth Schedule.

*Transitional Provisions and Savings*

**450. [TBC]**

- (1) [TBC]<sup>28</sup>

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<sup>28</sup> Law Commission to consider transitional provisions, with input from Legal Draftsman’s Office. Consideration to be given to an approach of deeming (for a period of time) categories of individuals to be registered (allowing for individuals’ deemed registrations to be subsequently cancelled or suspended in accordance with the provisions of the Act).

- (2) [The provisions of this Act are subject to *[the relevant provisions]* of the *[legislation implementing the Cape Town Convention and the Aircraft Protocol].*]

DRAFT

**First Schedule**  
*Procedures for Meetings of Creditors and Contributories*

**1. Definition**

In this Schedule, “participant” means –

- (a) in the case of a meeting of creditors, a creditor; and
- (b) in the case of a meeting of contributories, a contributory.

**2. Method of holding meeting**

A meeting may be held –

- (a) by assembling persons together in a physical place;
- (b) by means of audio, or audio and visual, communication by which, except where a participant chooses not to be heard, participants can simultaneously hear each other; or
- (c) by a combination of the method in paragraph (a) and the method in paragraph (b).

**3. Notice**

(1) Written notice of –

- (a) the date, time and place of each meeting to be held under paragraph [2](a) (*Method of holding meeting*);
- (b) the date, time and joining details of each meeting to be held under paragraph [2](b) (*Method of holding meeting*); or
- (c) the date, time, place and, where appropriate, joining details of each meeting to be held under paragraph [2](c) (*Method of holding meeting*),

shall be sent to each participant entitled to attend the meeting.

(2) Unless this Act or any regulation made thereunder provides otherwise, or a court orders otherwise, a notice under subparagraph (1) shall be sent at least five working days before the meeting is to be held.

(3) An irregularity in, or a failure to receive notice of, a meeting does not invalidate anything done by a meeting where –

- (a) the irregularity or failure is not material;
- (b) all of the participants entitled to attend the meeting do so without protest as to the irregularity or failure; or
- (c) all of the participants entitled to attend the meeting give their written consent to waiver of the irregularity or failure.

(4) Where public notice is to be given of a meeting, it shall comply with such requirements as may be prescribed.

**4. Proxies**

(1) A participant entitled to attend and vote at a meeting may do so either in person or by proxy.

- (2) A proxy for a participant entitled to attend a meeting is entitled to attend and be heard at the meeting as if the proxy were that participant.
- (3) A proxy shall be appointed by written notice, signed by the participant entitled to attend, which shall state whether the appointment is for a particular meeting or for a specified term not exceeding 12 months.
- (4) A proxy shall not be effective in relation to a meeting unless a copy of the notice of appointment of the proxy is given to the person convening the meeting before the start of the meeting.

**5. Chairperson**

- (1) Subject to this paragraph, the person convening the meeting shall act as chairperson of the meeting.
- (2) Where the person referred to in subparagraph (1) is not present, the participants entitled to attend the meeting and present in person or by proxy shall choose one of their number to act as chairperson of the meeting.

**6. Quorum**

- (1) A quorum for a meeting is present where –
  - (a) three participants who are entitled to attend or their proxies are present; or
  - (b) where the number of participants entitled to attend does not exceed three, all of the participants who are entitled to attend or their proxies are present.
- (2) Where a quorum is not present within 30 minutes after the time appointed for the meeting, the meeting shall be adjourned to the same day in the following week and at the same time and place as were appointed for the meeting, or to such other date, time and place as the chairperson may determine and where, at the adjourned meeting, a quorum is not present within 30 minutes after the time appointed for the meeting, the participants entitled to attend who are present or their proxies are a quorum.

**7. Resolutions**

- (1) At any meeting of creditors or contributories other than a meeting held for the purposes of Part [•] (*Administration*), ~~or Part [•] (*Compromises*)~~, or **Part V Individual Debt Restructuring Arrangements**, a resolution is adopted where both –
  - (a) those participants voting in favour of the resolution represent a majority in number of all of the participants voting on the resolution; and
  - (b) the claims of those participants voting in favour of the resolution represent a majority in value of the claims of all of the participants voting on the resolution.
- (2) At any meeting of creditors held for the purposes of Part [•] (*Administration*), a resolution is adopted where both –
  - (a) those creditors voting in favour of the resolution represent a majority in number of all of the creditors voting on the resolution; and



- (b) the claims of those creditors voting in favour of the resolution represent at least 75 *per centum* in value of the claims of all of the creditors voting on the resolution.
- (3) At any meeting of creditors held for the purposes of Part [•] (*Compromises*), a resolution is adopted where both –
  - (a) those creditors voting in favour of the resolution represent a majority in number of all of the creditors, or of all of the creditors in the class of creditors, voting on the resolution; and
  - (b) the claims of those creditors voting in favour of the resolution represent at least 75 *per centum* in value of the claims of all of the creditors, or of all of the creditors in the class of creditors, voting on the resolution.
- (4) The vote on a resolution of any participant not entitled to vote on the resolution shall be excluded from the calculations in subparagraphs (1), (2) and (3).

#### **8. Minutes**

- (1) The chairperson shall ensure that minutes are kept of proceedings at a meeting.
- (2) Minutes of a meeting that are signed as correct by the chairperson are prima facie evidence of the proceedings at that meeting.
- (3) Minutes of a meeting shall be delivered to and retained by such persons and in compliance with such requirements as may be prescribed.
- (4) On an application to the court by an interested person, the court may order that the applicant may inspect the minutes of a meeting on such terms and conditions as the court thinks fit.

#### **9. Adjourned meetings**

- (1) Without prejudice to paragraph [6](2) (*Quorum*), adjournments of meetings shall be subject to such restrictions and limitations as may be prescribed.
- (2) Where a resolution is passed at an adjourned meeting, the resolution –
  - (a) shall for all purposes be treated as having been passed on the date on which it was in fact passed; and
  - (b) shall not be deemed to have been passed on any earlier date.
- (3) Paragraph [3](1) (*Notice*) shall apply to an adjourned meeting unless the meeting is adjourned for less than six working days.

#### **10. Miscellaneous**

- (1) A person entitled to vote at a meeting may, if prescribed, do so by postal vote, by following such procedure as may be prescribed.
- (2) For the purposes of subparagraph (1), “postal vote” includes a vote by such electronic means as may be prescribed.

- (3) Where a participant does not attend a meeting, this shall not prejudice an entitlement of the participant to attend any subsequent meeting.
- (4) Subject to the requirements of this Act, a meeting may regulate its own procedure.

DRAFT

## Second Schedule *Powers of Administrators*

### 1. Powers of Administrators

- (1) [Every administrator appointed under Part [\*] (*Administration*) shall have the power to –
- (a) take possession of, collect and get in property of the company;
  - (b) sell or otherwise dispose of property of the company by public auction, private auction or private contract;
  - (c) demand and recover, by action or otherwise, income of property of the company;
  - (d) issue receipts for income recovered;
  - (e) insure, and maintain insurance in respect of, the business and property of the company;
  - (f) repair and maintain property of the company;
  - (g) inspect any books, records or documents relating to the affairs, business, property and financial circumstances of the company and that are in the possession or custody or under the control of the company;
  - (h) exercise a right to inspect books, records or documents relating to the affairs, business, property and financial circumstances of the company and that are in the possession or custody or under the control of a person other than the company;
  - (i) raise or borrow money from any person, whether or not a creditor or shareholder, whether with or without granting security for such money over property of the company;
  - (j) appoint a lawyer or accountant or other professionally qualified person to assist the administrator with the performance and exercise of the administrator's functions, powers and duties;
  - (k) begin or defend, and continue or discontinue, any legal process or other legal proceeding, and levy distress, in the name and on behalf of the company;
  - (l) refer to mediation or arbitration, or to any ombudsman, any question affecting the company;  
**[includes references to mediation and any ombudsman]**
  - (m) use the company's common seal if it has one;
  - (n) do all acts, and execute any contract, deed or other document, in the name and on behalf of the company;
  - (o) draw, accept, endorse and hold any bill of exchange or promissory note in the name and on behalf of the company;
  - (p) appoint any agent to do any business which the administrator is unable to do on the administrator's own, or which can more conveniently be done by an agent;
  - (q) ~~to engage~~engage, dismiss, or seek permission of the appropriate authority for the dismissal of, employees;
  - (r) do all such things (including the carrying out of works) as may be necessary for the realisation of property of the company;

- (s) make any payment necessary or incidental to the performance and exercise of the administrator's functions, powers and duties;
- (t) carry on the business of the company;
- (u) establish subsidiaries of the company;
- (v) transfer to subsidiaries of the company the whole or any part of the business and property of the company;
- (w) grant, or accept a surrender of, a lease or tenancy of, or hiring of, any property of the company, and to take a lease or tenancy of or hire any property required or convenient for the business of the company;
- (x) propose or assent to any arrangement, amalgamation or compromise on behalf of the company, where permitted under the corresponding procedure;
- (y) where a person owes a debt or is otherwise under a liability to the company –
  - (i) vote, prove and rank the debt or other liability in the bankruptcy, insolvency or liquidation of that person, and receive distributions as a creditor of that person; and
  - (ii) vote, receive distributions, and otherwise participate as a creditor in a Debt Restructuring Arrangement of that person,where permitted under the corresponding procedure;
- (z) make an application to the court for the appointment of a liquidator of the company;
- (aa) change the registered office or address for service of the company; [provision regarding address for service added]
- (bb) acquire any property required or convenient for the business of the company; [provision added]
- (cc) grant an option over property of the company; [provision added]
- (dd) renew or enlarge property of the company; [provision added]
- (ee) permit any person to operate any account in the name and on behalf of the company; [provision added]
- (ff) file any tax return and pay any taxes due; [provision added]
- (gg) remove a director of the company; [provision added]
- (hh) consult with an administration creditors' committee about matters relating to the administration;
  - (ii) convene a meeting of creditors, of shareholders or of an administration creditors' committee, where permitted or required under section [\*] (*Meetings in administration of shareholders, creditors and committees*), or of others with an interest in the company for –
    - (i) the purpose of –
      - (a) informing them of progress in the administration;
      - (b) ascertaining their views on any matter arising in the administration;
    - (ii) another purpose connected with the administration;
- (jj) make calls on the contributories of the company in respect of uncalled capital and other liabilities; [provision added]

- (kk) do all other things necessary for or incidental to the exercise of the powers set out in this paragraph;
- (ll) do such other things as the court may approve for the economic and expeditious conduct of the administration.] **Intended to provide an additional assurance that an administrator can do any appropriate thing, at least if court approval is obtained**

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## Third Schedule

### *Preferential Claims in Liquidation*

#### 1. Preferential Claims in Liquidation

- (1) The liquidator shall first pay, in the order of priority in which they are listed –
- (a) the costs, charges and expenses properly incurred by a liquidator or provisional liquidator in the performance and exercise of the functions, powers and duties of the liquidator or provisional liquidator (as the case may be), the remuneration of a liquidator or provisional liquidator, and the remuneration of a special manager, except such funds as are referred to in paragraph (e);
  - (b) the costs, charges and expenses properly incurred by an administrator in the performance and exercise of the functions, powers and duties of the administrator, including approved pre-administration costs in relation to the company, and the remuneration of an administrator, except such funds as are referred to in paragraph (c);
  - (c) any creditor for any funding provided to the company on or after the commencement of administration or liquidation, including to finance ongoing operations of the company during administration or liquidation, such funding having been properly incurred by an administrator or liquidator as an expense of the administration or liquidation (as the case may be);
  - (d) the reasonable costs of a person who applied to the court for an order that the company be put into liquidation incurred in making the application, including the reasonable costs of a person appearing on the application whose costs are allowed by the court;
  - (e) the actual out-of-pocket expenses necessarily incurred by an administration creditors' committee, liquidation creditors' committee and liquidation contributories' committee;
  - (f) the remuneration of a deed administrator;
  - (g) the debt or liability secured by a lien that the holder of the lien is prohibited from claiming as against the liquidator by reason of section [•](8) (*Effect of liquidation on dealing with property*).
- (2) After paying the claims referred to in paragraph 1, the liquidator shall next pay the following claims –
- (a) all provident fund dues, employees trust fund dues and statutory gratuity payments payable to any employee;
  - (b) income tax charged or chargeable for one complete year prior to the commencement of the liquidation, that year to be selected by the Commissioner-General of Inland Revenue in accordance with the provisions of the Inland Revenue Act, No. 4024 of 20062017;
  - (c) [turnover tax] charged or chargeable for the complete year immediately preceding the date of commencement of the liquidation;
  - (d) value added tax charged or chargeable for four taxable periods prior to the commencement of the liquidation, such taxable periods to be selected by the Commissioner General of Inland Revenue in accordance with the provisions of the Value Added Tax Act, No. 14 of 2002;

- (e) all rates or taxes other than those referred to in the preceding subparagraphs of this paragraph 2 owing from the company as at the commencement of the liquidation that became due and payable within the period of twelve months prior to that date;
- (f) all dues to the Government as recurring payments for any services given or rendered periodically;
- (g) industrial court awards and other statutory dues payable to any employee;
- (h) subject to paragraph 4, all wages or salary of any employee whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services rendered to the company during the four months immediately preceding the date of commencement of the liquidation;
- (i) holiday pay becoming payable to an employee (or where the employee has died, to any other person in the employee's right), on the termination of the employment before or by reason of the commencement of the liquidation;
- (j) unless the company has, as at the commencement of the liquidation, rights capable of being transferred to and vested in the employee under a contract of the kind referred to in [section 24 of the Workmen's Compensation Ordinance],<sup>29</sup> amounts due in respect of any compensation or liability for compensation to an employee under that Ordinance that have accrued before the commencement of the liquidation;
- (k) [subject to paragraph [(5A)], amounts deducted by the company from the wages or salary of an employee, in respect of services rendered to the company during the four months immediately preceding the date of commencement of the liquidation, in order to satisfy obligations of the employee to third parties].

- (3) The claims listed in paragraph 2 rank equally among themselves and shall be satisfied in full unless the proceeds of realisation of property are insufficient to satisfy them, in which case they shall abate in equal proportions among all of those claims.
- (4) The sum to which priority is to be given under paragraph 2(h) shall not, in the case of any one employee, exceed twelve thousand rupees or such greater amount as may be prescribed.
- (5) Where any compensation under the [Workmen's Compensation Ordinance] is a fortnightly payment, the amount due in respect of that compensation shall, for the purposes of paragraph 2(j), be the amount of the lump sum for which those payments may be commuted under that [Ordinance].

(5A) The sum to which priority is to be given under paragraph 2(k) shall not, in the case of any one employee, exceed twelve thousand rupees, or such greater amount as may be prescribed, in each case reduced by the amount of the sum to which priority is to be given under paragraph 2(h).

- (6) Where a payment has been made –

- (a) to an employee of the company on account of wages or salary; or

<sup>29</sup> Law Commission to please review and confirm the appropriateness of all cross references to the Workmen's Compensation Ordinance in this section.

- (b) where an employee of the company has died, to any other person in the employee's right,

out of money advanced by some person for that purpose, the person by whom the money was advanced has in a liquidation the same right of priority in respect of the money so advanced as the employee or other person receiving the payment in the employee's right would have had if the payment had not been made.

- (7) After paying the claims referred to in paragraph 2, the liquidator shall next pay the amount of any costs referred to in paragraph (d) of section [\*] (*Costs of compromise*) of this Act.
- (8) So far as the proceeds of realisation of property of the company available for satisfaction of general claims are insufficient to satisfy the claims listed in each of paragraphs 1, 2 and 7, the claims listed in those paragraphs shall –
- (a) have priority over the claim of any person in respect of property that is subject to –
    - (i) a floating charge; or
    - (ii) a fixed security ranking behind a floating charge under section 431(2) of the Companies Act; and
  - (b) be satisfied accordingly out of that property.
- (9) For the purposes of this Schedule –
- (a) remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be treated as wages in respect of services rendered to the company during that period;
  - (b) the expression “holiday pay” in relation to a person includes all sums that by virtue of the person's contract of employment or any enactment (including any Order made or direction given under any written law) are payable to that person by the company on account of the remuneration that would, in the ordinary course, have become payable to the person in respect of a period of holiday, had the person's period of employment continued until the person became entitled to the holiday;
  - (c) the expression “rates or taxes” means any rate, charge, tax or assessment imposed or made by the Government or by any Provincial Council or local authority or any other authority established by or under any written law.



Fourth Schedule  
*Secured Creditors' Options*

1. Powers of Administrators

- (1) A secured creditor holding a fixed security over property of a company may –
  - (a) enforce the security, where the secured creditor is entitled to do so; or
  - (b) surrender the property subject to the security to the liquidator for the benefit of the creditors as a whole and claim as an unsecured creditor for the whole debt.
- (2) A secured creditor who exercises the option referred to in paragraph 1(a) shall account to the liquidator for any surplus remaining from the net amount realised, after –
  - (a) satisfaction of any debt owing to the grantee of any fixed security over any part of the property that ranks prior to the secured creditor's fixed security, determined as at the relevant date; and
  - (b) satisfaction of the full amount of the debt, determined as at the relevant date.
- (3) A liquidator may by written notice require a secured creditor within 20 working days after receiving the notice –
  - (a) to exercise the option referred to in paragraph 1(a) or the option referred to in paragraph 1(b); and
  - (b) if the creditor elects to exercise the option referred to in paragraph 1(b), to do so within that period.
- (4) A secured creditor on whom notice has been served under paragraph 3 who fails to comply with the notice –
  - (a) is to be taken as having surrendered the property subject to the security to the liquidator for the benefit of the creditors as a whole; and
  - (b) may claim as an unsecured creditor for the whole debt.

## Fifth Schedule *Powers of Liquidators*

### 1. Powers of Liquidators

- (1) [Every liquidator appointed under Part [•] (*Liquidation*) shall have the power to –
- (a) take possession of, collect and get in property of the company;
  - (b) sell or otherwise dispose of property of the company by public auction, private auction or private contract;
  - (c) demand and recover, by action or otherwise, income of property of the company;
  - (d) issue receipts for income recovered;
  - (e) insure, and maintain insurance in respect of, the business and property of the company;
  - (f) repair and maintain property of the company;
  - (g) inspect any books, records or documents relating to the affairs, business, property and financial circumstances of the company and that are in the possession or custody or under the control of the company;
  - (h) exercise a right to inspect books, records or documents relating to the affairs, business, property and financial circumstances of the company and that are in the possession or custody or under the control of a person other than the company;
  - (i) raise or borrow money from any person, whether or not a creditor or shareholder, whether with or without granting security for such money over property of the company;
  - (j) appoint a lawyer or accountant or other professionally qualified person to assist the liquidator with the performance and exercise of the liquidator's functions, powers and duties;
  - (k) begin or defend, and continue or discontinue, any legal process or other legal proceeding, and levy distress, in the name and on behalf of the company;
  - (l) refer to mediation or arbitration, or to any ombudsman, any question affecting the company;  
**[includes references to mediation and any ombudsman]**
  - (m) use the company's common seal if it has one;
  - (n) do all acts, and execute any contract, deed or other document, in the name and on behalf of the company;
  - (o) draw, accept, endorse and hold any bill of exchange or promissory note in the name and on behalf of the company;
  - (p) appoint any agent to do any business which the liquidator is unable to do on the liquidator's own, or which can more conveniently be done by an agent;
  - (q) ~~to engage~~engage, dismiss, or seek permission of the appropriate authority for the dismissal of, employees;
  - (r) do all such things (including the carrying out of works) as may be necessary for the realisation of property of the company;

- (s) make any payment necessary or incidental to the performance and exercise of the liquidator's functions, powers and duties;
- (t) carry on the business of the company so far as necessary for the liquidation;
- (u) establish subsidiaries of the company;
- (v) transfer to subsidiaries of the company the whole or any part of the business and property of the company;
- (w) grant, or accept a surrender of, a lease or tenancy of, or hiring of, any property of the company, and to take a lease or tenancy of or hire any property required or convenient for the business of the company;
- (x) propose or assent to any arrangement, amalgamation or compromise on behalf of the company, where permitted under the corresponding procedure;
- (y) where a person owes a debt or is otherwise under a liability to the company –
  - (i) vote, prove and rank the debt or other liability in the bankruptcy, insolvency or liquidation of that person, and receive distributions as a creditor of that person; and
  - (ii) vote, receive distributions, and otherwise participate as a creditor in a Debt Restructuring Arrangement of that person,where permitted under the corresponding procedure;
- (z) appoint an administrator of the company, *where permitted under Part [\*] (Administration)*;
- (aa) change the registered office or address for service of the company;
- (bb) acquire any property required or convenient for the business of the company;
- (cc) grant an option over property of the company;
- (dd) renew or enlarge property of the company;
- (ee) allow any person to operate any account in the name and on behalf of the company;
- (ff) file any tax return and pay any taxes due;
- (gg) remove a director of the company;
- (hh) consult with a liquidation creditors' committee about matters relating to the liquidation;
- (ii) consult with a liquidation contributories' committee about matters relating to the liquidation;
- (jj) convene a meeting of creditors, of shareholders, of contributories, of a liquidation creditors' committee, *or of a liquidation contributories' committee, where permitted or required under section [\*] (Meetings in liquidation of shareholders, creditors, contributories and committees)*, ~~or of others with an interest in the company for –~~
  - (i) the purpose of –
    - (a) informing them of progress in the liquidation;
    - (b) ascertaining their views on any matter arising in the liquidation;
  - (ii) another purpose connected with the liquidation;
- (kk) make a compromise or an arrangement with creditors or persons claiming to be creditors or who have or allege the existence of a claim against the company, whether present or future, whether

certain or contingent, and whether ascertained or sounding in damages, but such a compromise or arrangement shall not provide for a distribution other than in accordance with creditors' legal rights;

- (ll) make calls on the contributories of the company in respect of uncalled capital and other liabilities; **provision added**
- (mm) compromise calls, debts and other liabilities, whether present or future, whether certain or contingent, and whether ascertained or sounding in damages, subsisting or supposed to subsist between the company and any person, on such terms as may be agreed, take security for the discharge of any such call, debt or liability and give a complete discharge in respect thereof;
- (nn) do all other things necessary for or incidental to the exercise of the powers set out in this paragraph;
- (oo) do such other things as the court may approve for the economic and expeditious conduct of the liquidation.] **Intended to provide an additional assurance that a liquidator can do any appropriate thing, at least if court approval is obtained**

## Sixth Schedule *Powers of Receivers*

### 1. Powers of Receivers

- (1) [Every receiver appointed under Part [\*] (*Receivership*) shall, subject to any restriction or limitation on the receiver's powers under the instrument or the order of the court by or under which the appointment was made, have the power to –
- (a) take possession of, collect and get in the property in receivership;
  - (b) sell or otherwise dispose of the property in receivership by public auction, private auction or private contract;
  - (c) demand and recover, by action or otherwise, income of the property in receivership;
  - (d) issue receipts for income recovered;
  - (e) manage the property in receivership;
  - (f) insure, and maintain insurance in respect of, the property in receivership;
  - (g) repair and maintain the property in receivership;
  - (h) inspect at any reasonable time and place books, records or documents that relate to the property in receivership and that are in the possession or custody or under the control of the grantor;
  - (i) exercise on behalf of the grantor, a right to inspect books, records or documents that relate to the property in receivership and that are in the possession or custody or under the control of a person other than the grantor;
  - (j) make any payment necessary or incidental to the performance and exercise of the receiver's functions, powers and duties;
  - (k) do all other things necessary for or incidental to the exercise of the powers set out in this paragraph.]
- (2) [Without prejudice to paragraph 1, a receiver who is appointed in respect of the whole, or substantially the whole, of the property and undertaking of a company shall, subject to any restriction or limitation on the receiver's powers under the instrument or the order of the court by or under which the appointment was made, have the power to –
- (a) raise or borrow money from any person, whether or not a creditor or shareholder, whether with or without granting security for such money over the property of the company;
  - (b) appoint a lawyer or accountant or other professionally qualified person to assist the administrator with the performance and exercise of the administrator's functions, powers and duties;
  - (c) begin or defend, and continue or discontinue, any legal process or other legal proceeding, and levy distress, in the name and on behalf of the company;
  - (d) refer to mediation or arbitration, or to any ombudsman, any question affecting the company;
- adds references to mediation and any ombudsman**

- (e) use the company's common seal if it has one;
- (f) do all acts, and execute any contract, deed or other document, in the name and on behalf of the company;
- (g) draw, accept, endorse and hold any bill of exchange or promissory note in the name and on behalf of the company;
- (h) appoint any agent to do any business which the receiver is unable to do on the receiver's own, or which can more conveniently be done by an agent;
- (i) ~~to engage~~engage, dismiss, or seek permission of the appropriate authority for the dismissal of, employees;
- (j) do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the company;
- (k) insure, and maintain insurance in respect of, the business of the company;
- (l) carry on the business of the company;
- (m) establish subsidiaries of the company;
- (n) transfer to subsidiaries of the company the whole or any part of the business and property of the company;
- (o) grant, or accept a surrender of, a lease or tenancy of, or hiring of, any property of the company, and to take a lease or tenancy of or hire any property required or convenient for the business of the company;
- (p) propose or assent to any arrangement, amalgamation or compromise on behalf of the company, where permitted under the corresponding procedure;
- (q) where a person owes a debt or is otherwise under a liability to the company –
  - (i) vote, prove and rank the debt or other liability in the bankruptcy, insolvency or liquidation of that person, and receive distributions as a creditor of that person; and
  - (ii) vote, receive distributions, and otherwise participate as a creditor in a Debt Restructuring Arrangement of that person,where permitted under the corresponding procedure;
- (r) make an application to the court for the appointment of a liquidator of the company;
- (s) appoint an administrator of the company, where permitted under Part [•] (*Administration*);
- (t) change the registered office or address for service of the company; [provision regarding address for service added]
- (u) acquire any property required or convenient for the business of the company; [provision added]
- (v) grant an option over property of the company; [provision added]
- (w) renew or enlarge property of the company; [provision added]
- (x) allow any person to operate any account in the name and on behalf of the company; [provision added]
- (y) file any tax return and pay any taxes due; and [provision added]

- (z) do all other things necessary for or incidental to the exercise of the powers set out in this paragraph.]

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Seventh Schedule  
*UNCITRAL Model Law on Cross-Border Insolvency*

PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. This Law applies where:

- (a) Assistance is sought in this State 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 proceeding under [*identify laws of the enacting State relating to insolvency*]; or
- (c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] 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 participating in, a proceeding under [*identify laws of the enacting State relating to insolvency*].

2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

Article 2. Definitions

For the purposes of this Law:

- (a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
- (d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
- (e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. [*Competent court or authority*]



The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts, authority or authorities competent to perform those functions in the enacting State]*.

[Nothing in this Law affects the provisions in force in the State governing the authority of *[insert the title of the government-appointed person or body]*.]

Article 5. Authorization of *[insert the title of the person or body administering reorganization or liquidation under the law of the enacting State]* to act in a foreign State

A *[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding under *[identify laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law.

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a *[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]* to provide additional assistance to a foreign representative under other laws of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

## CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 11. Application by a foreign representative to commence a proceeding under *[identify laws of the enacting State relating to insolvency]*

A foreign representative is entitled to apply to commence a proceeding under *[identify laws of the enacting State relating to insolvency]* if the conditions for commencing such a proceeding are otherwise met.

Article 12. Participation of a foreign representative in a proceeding under *[identify laws of the enacting State relating to insolvency]*

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under *[identify laws of the enacting State relating to insolvency]*.

Article 13. Access of foreign creditors to a proceeding under *[identify laws of the enacting State relating to insolvency]*

1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under *[identify laws of the enacting State relating to insolvency]* as creditors in this State.

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims]*.

or

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]* or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than *[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims]*.

Article 14. Notification to foreign creditors of a proceeding under *[identify laws of the enacting State relating to insolvency]*

1. Whenever under *[identify laws of the enacting State relating to insolvency]* notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.
2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.
3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:
  - (a) Indicate a reasonable time period for filing claims and specify the place for their filing;
  - (b) Indicate whether secured creditors need to file their secured claims; and
  - (c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

### CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
  - (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 subparagraphs (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.
3. An 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.
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.
2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:
  - (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
  - (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
  - (c) The application meets the requirements of paragraph 2 of article 15; and
  - (d) The application has been submitted to the court referred to in article 4.
2. The foreign proceeding shall be recognized:
  - (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
  - (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

- (a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the 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 realization of all or part of the debtor's assets located in this State 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) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.

2. *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]*

3. Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition 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.

2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to *[refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article]*.

3. Paragraph 1 (a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

- (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
- (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
- (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
- (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* under the laws of this State.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

#### Article 22. Protection of creditors and other interested persons

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

#### Article 23. Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation]*.

2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

#### Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

### CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

#### Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]*.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

#### Article 26. Cooperation and direct communication between the *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* and foreign courts or foreign representatives

1. In matters referred to in article 1, a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

2. The *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

#### Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) Appointment of a person or body to act at the direction of the court;

(b) Communication of information by any means considered appropriate by the court;

(c) Coordination of the administration and supervision of the debtor's assets and affairs;

- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) Coordination of concurrent proceedings regarding the same debtor;
- (f) [*The enacting State may wish to list additional forms or examples of cooperation*].

#### CHAPTER V. CONCURRENT PROCEEDINGS

Article 28. Commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a proceeding under [*identify laws of the enacting State relating to insolvency*] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Article 29. Coordination of a proceeding under [*identify laws of the enacting State relating to insolvency*] and a foreign proceeding

Where a foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

- (a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
  - (i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
  - (ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
- (b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
  - (i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
  - (ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;
- (c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

- (a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [*identify laws of the enacting State relating to insolvency*], proof that the debtor is insolvent.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

## Eighth Schedule

### *Administration in Bankruptcy of Estate of Person Dying Insolvent* (Section 172)

#### 1. Administration in bankruptcy of estate of person dying insolvent

Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor, had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

#### 2. The order

Upon the prescribed notice being given to the personal representative of the deceased debtor, the court may, in the prescribed manner, upon proof of the petitioner's debt, unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shown, dismiss the petition with or without costs.

#### 3. Property to vest in official receiver

- (a) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the Official Receiver, as trustee thereof, and he shall forthwith proceed to realize and distribute it in accordance with the provisions of this Act:
- (b) Creditors shall have the same powers as to appointment of Bankruptcy Trustees and Creditors' Committees as they have in other cases where the estate of a debtor is being administered or dealt with in bankruptcy, and the provisions of this Act, relating to Bankruptcy Trustees and Creditor Committees, shall apply to Bankruptcy Trustees and Creditors' Committees appointed under the power so conferred.
- (c) If no Creditors' Committee is appointed, any act or thing or any direction or permission which might have been done or given by a Creditors' Committee may be done or given by the court.

#### 4. Application of Act

With the modifications hereinafter mentioned, all the provisions of Chapters 2, 3, 4, 5, 7, 8, and 9 of Part 6, subject to any modifications that may be made therein by general rules under subsection (10), apply to the case of an administration order under this Schedule in like manner as to a Bankruptcy Order under this Act, and section 68 shall apply as if for the reference to a Bankruptcy Order there were substituted a reference to an administration order under this section.

#### 5. Priority of claims

- (d) In the administration of the property of the deceased debtor under an order of administration, the Official Receiver or Bankruptcy Trustee shall have regard to any claim by the personal representative

of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him or her in and about the debtor's estate.

- (e) Claims of the type specified in paragraph (a) shall be deemed a preferential debt under the order and shall, notwithstanding anything to the contrary in the provisions of this Act relating to the priority of other debts, be payable in full, out of the debtor's estate, in priority to all other debts.

## **6. Surplus**

If, on the administration of a deceased debtor's estate, any surplus remains in the hands of the Official Receiver or Bankruptcy Trustee, after payment in full of all the debts due from the debtor, together with the costs of the administration and interest as provided by this Act in case of Bankruptcy, such surplus shall be paid over to the personal representative of the deceased debtor's estate, or dealt with in such other manner as may be prescribed.

## **7. Effect of notice to personal representative of the presentation of the petition**

- (a) Notice to the personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of bankruptcy petition.
- (b) After such notice no payment or transfer of property made by the personal representative shall operate as a discharge to him as between himself and the Official Receiver or Bankruptcy Trustee.
- (c) Save as aforesaid, nothing in this section shall invalidate any payment made or any act or thing done in good faith by the personal representative before the date of the order for administration.

## **8. Personal representative may present petition**

A petition for the administration of the estate of a deceased debtor under this **Schedule** may be presented by the personal representative of the debtor, and, where a petition is so presented by such a representative, this **Schedule** shall apply subject to such modifications as **may be prescribed by general rules** made under subsection (10).

## **9. "Creditor"**

Unless the context otherwise requires, "creditor", in this **Schedule**, means one or more creditors qualified to present a bankruptcy petition as in this Act provided.

## **10. Rules**

General rules for carrying into effect the provisions of this section may be made in the same manner and to the like effect and extent as in bankruptcy.