MONOGRAPH ON THE INSOLVENCY ACT, 1992

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A. INTRODUCTION

The genesis of the Insolvency Act, 1992 traces to a study commissioned by the United States Agency for International Development (USAID) and the Ministry of Justice, Gambia in April, 1990.

A Report entitled "Assessment of the Legal and Regulatory Environment Affecting the Gambian Financial Sector" highlighted some active shortcomings in the legal regime for the enforcement of debt repayments. The Report thus recommended the enactment of a bankruptcy law which "would clearly delineate creditors priorities in the event of bankruptcy". [P.8, Para 9]

The Report also recommended the development of "a meaningful framework to assist in the analysis of the role the legal system can play in supporting and facilitating the modernisation, expansion and deepening of the financial sector in The Gambia". [p.9, para 1]

One other concern raised in the Report was the absence of a machinery to provide supporting measures to minimize lender and borrower risk [p.10, para 6(ii)]

B. HISTORICAL SETTING OF THE LAW OF INSOLVENCY IN THE GAMBIA

The law relating to insolvency in The Gambia, prior to the enactment by Parliament of the Insolvency Act, 1992, was governed by two sets of laws, namely, the Companies Act, 1955; and the Insolvency Act, 1967. The Companies Act, 1955 regulated company insolvency and the Insolvency Act, 1967 regulated personal insolvency. All matters relating to trading companies and associates were dealt with by the Companies Act 1955, the Insolvency Act, 1967 on the other hand, dealt specifically with matters regarding insolvent debtors. The Companies Act, 1955 regulated insolvency through the mechanism of a winding up action.

The Insolvency Act, 1967 was beset with a lot of inadequacies and was not in tune with modern developments relating to insolvency.

For instance, the Act sought to impose imprisonment as a punishment for acts of insolvency. The amount of indebtedness which operated as a condition for personal insolvency was indeed low (one thousand five hundred dalasis). Besides, in order to satisfy the conditions of insolvency, one had to follow an unduly long court process. In effect the machinery in place was not cost-effective and could only be described as unrealistic.

Apart from the deficiencies apparent in the Act of 1967, there was no provision in the law which catered for the proper investigation of persons to assess their indebtedness. So also was the absence of a proper machinery aimed at discovering assets of debtors which could be easily concealed. Furthermore, there was no machinery in place to distinguish the dishonest borrower from the honest but reckless one. Nor was there any form of protection for the honest entrepreneur who ran into financial difficulties. There was no law to shelter him and give him an opportunity to purge his fault and make a fresh start.

In order to ensure a thriving market in which confidence reigns, it is important to have a strong legal infrastructure which will provide a strong base for creditors and ensure a fair scheme for the protection of honest borrowers. The Act of 1967 indeed failed to provide such legal infrastructure that would bring about borrower/lender confidence and protect both in their legitimate business transactions. Hence the need for an enhanced insolvency legislation.

With respect to companies and associates, the rules on which liquidations were based in The Gambia were, in fact, pre-1948 English Company Law rules. To say the least, they needed long overdue revision and fundamental updating. But more fundamentally, there was no sound reason for The Gambia to maintain two separate regimes of insolvency.

Field research showed clearly that there was indeed, a lack of strong infrastructure legal support base for creditors and the absence of a fair scheme for the protection of honest debtors. Identified by the field research also was a clear need for long-term financing which was presently denied because of the absence of a properly functioning regulatory framework. The situation thus spoke to a powerful case for the reform of the wholly inadequate laws of debtor and creditor.

Therefore the enactment of the Insolvency Act, 1992 was an attempt to remedy the shortcomings and failings in the legal and regulatory regime of insolvency. The Act thus introduced new ideas designed to strengthen the harnessing of credit as a means of promoting economic and financial growth.

C. UNDERSTANDING INSOLVENCY

It may conduce to clarify if the opportunity was seized to explain certain basic and fundamental terms which one meets often in insolvency legislation and texts.

(a) **Distinction between insolvency and bankruptcy:** The distinction between insolvency and bankruptcy is essentially historical. Insolvency has been described as eliciting a factual condition; that is, an existing condition in a business which reflects an inability to pay debts. Bankruptcy, on the other hand, has been described as eliciting a legal status; that is, an existing situation in which a person is adjudged a bankrupt by the court. An element of dishonesty is usually attributed to bankruptcy, yet not all bankruptcies are the result of dishonesty. Indeed a person may be made a bankrupt simply because of his persistent refusal to pay a single debt which he could well have afforded to settle. Some bankruptcies are due merely to recklessness or an unwise investment. Since not all bankruptcies are the result of dishonesty, the term "insolvency" was preferred to "bankruptcy", hence the choice of Insolvency Act, 1992, rather than the Bankruptcy Act, 1992.

When a business fails to generate sufficient cash flow to service its debts, it is said to suffer liquidity problems. It could also be insolvent. A business is said to be insolvent when it is unable to meet its financial commitments or current obligations. This occurs when, upon a careful balance of its capital and liabilities it is incapable of satisfying or settling the claims that might be made by its creditors.

It is essential that the parties to a debtor-creditor relationship should have an understanding of the law which governs their relationship. This helps to avoid unnecessary inconvenience, hardship or even material loss. Thus where the debtor's financial position is not already precarious beyond recall, the parties could work out an amicable solution to avoid the debtor being adjudged a bankrupt. This could consist of voluntary

arrangements between the debtor and his creditor or creditors. Such voluntary arrangements will have the binding force of law.

(b) **Who is a debtor?** The law relating to insolvency requires that an individual by or against whom a bankruptcy petition may be presented must be a debtor. The word "debtor" is closely associated with the terms "debt" and "creditor". A debt arises when a person (debtor) is liable to settle an obligation to another person (creditor). For example, where A borrows money from B, A is said to be indebted to B who becomes the creditor. The amount lent is the debt. Legally, a petition may be presented in respect of a debtor by one or more of his creditors only if certain circumstances exist. The basic requirement is that the debtor's indebtedness must, in terms of liquidated sums payable, amount to at least five thousand dalasis. In addition there must be evidence that the debtor has given notice to suspend, or is about to suspend, the payment of his debts; or that the Sheriff has taken possession of any of the debtor's property; or that any of the debtor's creditors has received a judgment or order from the court to proceed against the debtor's property (see section 29 of the Insolvency Act, 1992).

(c) **Who is a creditor?** In simple terms, a creditor is a person who is owed an obligation by a debtor. The obligation is usually in the nature of a credit facility extended to the debtor by the creditor. Thus a person who legally qualifies as a creditor is the one who would benefit in the event of a petition being presented and an order made against a debtor. However, regard must be had to what has been stated in (b) regarding the requirements that must exist before a petition could be presented against a debtor.

(d) **Who is a secured creditor?** A person is said to be a secured creditor if he holds a security for a debt that is due to him from the debtor. The security could be a mortgage, charge or lien. A mortgage can only be created in respect of an immovable property, such as land (see section 3 of the Mortgages Act, 1992). The commonest form of charge is a floating charge which is given only by companies. Essentially, a floating charge is a species of equitable charge which "floats" over a class of assets and then crystallises to become a specific charge. A lien in legal terms is a right a person has to retain possession of goods of another person until a debt is paid.

The secured creditor may have no real idea of the true value of the security he holds. He may, however, place his own estimation in respect of the value of the security he holds. It is important that a secured creditor should not make an undervaluation of his security vis-a-vis the credit offered to the person who has given the security. A gross under-valuation will only work to the advantage of the other creditors generally (if any). The trustee could earn his "profit" by acquiring the security from the secured creditor for the price the latter had placed upon it, and then sell it at its true value.

An "unsecured debtor" has no security whatsoever and in the event of a debtor's insolvency he could experience delays before he receives any payment at all.

(e) **Debtor's petition:** A debtor may seek protection under the law by presenting a petition in respect of himself. Under such circumstances he gives up his property in return for freedom from the burden of debts he has accumulated. This gives him the prospect to make a fresh start. This form of petition has the advantage of removing the debtor and his property from potential separate actions that may be brought against him by his unsecured creditors. By adopting this mode of insolvency, the debtor is in fact ensuring that his creditors will be dealt with equitably. It should be noted, however, that by petitioning against himself, the debtor opens himself to being adjudged a bankrupt. The course is not unwise for an honest but unfortunate debtor if his desire is to be rehabilitated back to the market of credit and commerce.

A debtor's petition will not assist the dishonest and undeserving debtor, especially if his motive is to elude his creditors and seek an opportunity to revert to his dishonest practices. **N.B.**: As regards "creditor's petition", see the discussion in (b) above.

(f) **After-acquired property:** The term "after-acquired property" is defined in section 46(2) of the Insolvency Act, 1992 to mean both movable and immovable property. This includes income which becomes "vested in the debtor during the period between the making of the protection order and the discharge of the debtor or earlier termination of the insolvency proceedings". Thus any property which an insolvent debtor acquires after a protection order has been made vests in the trustee.

The debtor is under a legal duty to notify the trustee of any after-acquired property. The property that vests in the trustee becomes part of the debtor's estate.

(g) **Transaction at undervalue:** Under section 4(4) of the Insolvency Act, 1992, a company enters into a transaction with a person at an undervalue if the company makes a gift to that person. The same would be the case if the company enters into a transaction with that person on terms that will deprive the company from receiving a benefit. A third situation is where the company enters into a transaction with that person for a benefit the value of which, in money or money's worth, is less than the value of the benefit provided by the company. The effect of this is that the court will not make an administration order if the company entered into the transaction in good faith and for the purpose of carrying on its business. Relevant to this point is that the company must, at the time it entered into the transaction, have had reasonable grounds for believing that it would benefit the company. Although the term "transaction" is not defined in the Act, it is supposed that the term will include a gift, or any agreement or arrangement, whether on a commercial basis or not.

(h) **Preferences:** The circumstances under which a company gives preferences are stipulated in section 4(8) of the Insolvency Act, 1992. Essentially, a preference confers on a creditor a material advantage over and above other creditors should a debtor become insolvent. Therefore, for a person to receive a preference he must stand to the debtor as a creditor, surety or guarantor of the debtor's debts and other liabilities.

(i) **Provable Debts and Proof of Debts:** A provable debt is an obligation which can be assessed in monetary terms. It is, in essence, an obligation which the creditor could have enforced against the debtor as at the date the protection order was made. It consists also of an existing or future obligation which the creditor can enforce against the debtor after the date of the making of the protection order (see section 35 of the Act.)

A proof of debt, on the other hand, is a statement that a creditor lodges with the trustee. A proof of debt may be considered in two parts: the first part may comprise particulars of the values and due dates of provable debts; the nature and value of securities held by a creditor; the values and due dates of obligations outstanding in the debtor's favour against the creditor as well as the nature and value of securities held by the debtor in that respect; and the total values of the above debts, obligations and securities. The second part may merely deal with the details of the transactions from which the debts and obligations arose.

It is the duty of the trustee to examine closely every claim lodged with him. Indeed every _bona fide_ creditor should be alert to detect claims alleged to be due to persons who in fact are "accomplices" of the insolvent debtor. This could come about as a plan designed primarily to rescue the debtor's assets.

D. THE NEW IDEAS INTRODUCED IN THE LAW

The Insolvency Act, 1992 ("the Act") has been enacted primarily to remove the numerous defects and inadequacies of the law, and create a machinery, for dealing with company insolvency and individual insolvency in one statute. The Act gives hope to the honest but unfortunate debtor to exonerate himself, with the prospect of making a fresh clean start. It also affords the creditor adequate hope for the realisation of his credit.

Towards this end, the Act focuses its attention on four major areas:

(a) it provides rules for the public administration of insolvency;
(b) it consolidates and amends enactments relating to the insolvency of individuals;
(c) it provides rules for the protection of companies and individuals from insolvency;
(d) it makes provision for the licensing of insolvency practitioners.

The Act is divided into four parts. The first part deals with the introductory general provisions; the second part deals with administration orders with respect to insolvent companies; the third part, which is divided into various chapters, deals with the insolvency of individuals; and the

fourth part deals with the licensing of insolvency practitioners. For purposes of easy comprehension, it is proposed to deal with these subjects in the order in which they appear in the Act.

(1) ADMINISTRATION ORDERS WITH RESPECT TO INSOLVENT COMPANIES: An administration order is an order of the court appointing a person to manage the affairs, business and property of an insolvent company. The person appointed for this purpose is called **the administrator** and he is appointed under section 8 of the Act.

(a) **When may an administration order be made?** Two factors come into play in the making of an administration order in relation to a company (section 3). First, the court must be satisfied that the company is or is likely to become unable to pay its debts. The satisfaction of the court is a question of evidence. That is, whether the court is satisfied or not will depend on the facts presented to it by those who apply for the administration order. Secondly, the court should be of the view that the making of the administration order is likely to achieve a positive purpose. This could be a single purpose or a combination of purposes. The purposes are -

(i) to ensure the survival of the company or any of its undertakings as a going concern;
(ii) to give approval to a voluntary arrangement between the company and its creditors;
(iii) to give sanction to a compromise or arrangement as reached between the company and other persons as provided in the Companies Act (Cap. 95:01);
(iv) to give advantage to the company to realise its assets.

However, the court shall not make an administration order, if it is satisfied on the evidence presented to it that a receiver has been appointed for the company.

(b) **Who may make an application for an administration order?** By virtue of section 4(1) of the Act, the persons eligible to apply for an administration order in respect of a company are the company itself or its directors or a creditor or creditors of the company. The application may be made by the parties either together or separately. The form by which the application is made is by petition to the court.

(c) **The effect of an administration order**: Once the court makes an administration order, it shall dismiss any petition that may be pending for the winding up of the company (section 6). If there is, at the time the order is made, a receiver of the company, such receiver shall vacate his office. Where there is a receiver of part of the company's property, the administrator may ask him to vacate his office. While an administration order is in force the following shall not be done:

(i) the passing of a resolution or making of an order for the winding up of the company;

(ii) the appointment of a receiver for the company;

(iii) enforcing a security in respect of the company's property, or re-possessing goods that are in the company's possession under a hire-purchase agreement. However, the administrator may give his consent to any of these acts, or a person may apply to the court to do so; and

(iv) commencing or continuing execution, legal process or any other proceedings or levying distress against the company or its property. Like (iii) above, the administrator may give his consent or the person could make an application to the court.

It should be noted that where a receiver vacates his office, his remuneration, expenses and any indemnity to which he is entitled are to be paid out of the company's property.

(d) **Powers and Duties of Administrator:** The Act provides wide powers for the administrator to exercise (sections 9 and 10). Once a person is appointed administrator, he may do anything that may be necessary for the management of the affairs, business and property of the company. He shall also have powers of a liquidator. These powers are specified in Schedules I, II, and III of the Act. In addition he may remove a director of the company from office and appoint another person in his place. He could call a meeting of the members or creditors of the company. In carrying out his functions he may apply to the court for directions on any particular matter. No company or officers of the company shall exercise a power given to them by the Companies Act (Cap. 95:01) or by the memorandum or articles of association so as to interfere with the administrator's exercise of his powers. If they wish to do so they must obtain the consent of the administrator. In effect the administrator acts as the agent of the company.

The administrator also has wide powers to dispose of property. The proceeds of any property disposed of is to be used to settle any debt that is secured by a security or payable under a hire-purchase agreement.

The administrator may at any time apply to the court to terminate or vary an administration order if the purposes of the order have been satisfied or are incapable of achievement, or if the company's creditors require him to do so (section 12).

(e) **Removal of Administrator from Office:** A person ceases to hold the office of administrator by any of the following means (section 13) -

(i) removal by an order of the court;

(ii) resignation or death;

(iii) upon ceasing to qualify as an insolvency practitioner;

(iv) upon the administration order being discharged.

Thus when an administrator ceases to hold office he is released from liability at the following times (section 14) -

(i) in the event of death, the time at which the court receives notice to that effect; and

(ii) in any other case, such time as the court may determine.

(f) **Ascertaining the Company's Affairs and Making Proposals:** The administrator is required under section 15 to publish a notice of every administration order and send the order to the company. He must also make a copy of the order available to the Registrar of Companies within fourteen days of the making of the order. He is also obliged to send a notice to all the company's creditors, unless the court directs otherwise. An administrator who fails to comply with these requirements is liable to a fine.

Upon receipt of an administration order, the administrator is required to conduct an investigation into the affairs of the company (section 16). He does this by requiring certain persons to submit statements relating to the company's assets, debts and liabilities, the names and addresses of the company's creditors and the securities held by them and the dates of such securities. He could, of course, require to be furnished with further information. The persons required to submit statements are generally those who have or have had any dealing or connection with the company, its directors, employees, etc.

The reasoning behind the administrator's investigation is to enable him to make a statement of proposals to the Registrar of Companies and the company's creditors (section 17). The proposals relate to how the administrator intends to achieve the purpose or purposes specified in the administration order. The statement of proposals must be made within two months after the making of the order. The administrator then summons a meeting of the creditors to seek approval of his proposals (section 18). The creditors may approve the proposals as presented to them or with modifications. However, the administrator must give his consent before any modification is made. Once a meeting with the creditors is concluded the administrator submits a report to the court and

gives notice of the conclusions to the Registrar of Companies. Section 19 of the Act prescribes similar procedures in respect of revised statements of proposals. Upon the successful implementation of an administration order, the order comes to an end.

(2) THE INSOLVENCY OF INDIVIDUALS

(a) **The Official Trustee (Sections 21 - 27):** The Act creates the office of the **Official Trustee**. This office is responsible for all matters relating to insolvent individuals. The powers and duties of the Official Trustee are variously outlined in the Act (See sections 63 - 69 in particular). A check is placed on the exercise of his powers in the sense that a person who is not satisfied with an act done by the Official Trustee may appeal to the court. Similarly, the Official Trustee may apply to the Court to force a person to comply with a requirement that he (the Official Trustee) has made. The Act goes further to create an **Insolvent Estates Fund.** Any money received by the Official Trustee is credited to this Fund. Within this fund is created the **Fees Account.** This is an account to which money received by the Official Trustee by way of fees and other charges is credited.

The Act requires the Official Trustee to keep a register known as the **Insolvency Register.** The purpose of this Register is to require the Official Trustee to record all information in respect of a debtor against whom a protection order has been made. Provision is also made for the Official Trustee to make entries in the Register in respect of a deceased debtor against whom an administration order has been made. The Insolvency Register is open for the inspection of members of the general public. In addition, the Official Trustee is required to publish in the *Gazette* every information he records in the Register within fourteen days after it becomes available to him. The Act also provides for the immunity of the Official Trustee, although nothing done under the Act by a Public Servant will affect the institution of criminal or disciplinary proceedings against such Servant. After the end of December of each year, the Official Trustee prepares a report which is laid before the House of Representatives.

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(b) Insolvency Proceedings

(i) *Petitions*: The form adopted for initiating insolvency proceedings against a debtor is the presentation of a petition to the Official Trustee (section 28). Upon receiving a petition, the Official Trustee makes an interim order known as a **protection order**. This enables him to conserve the assets of the debtor for the protection of the creditors until the court considers the affairs of the debtor. Every petition shall be against a single debtor, unless where debts are owed by debtors jointly. In the latter case a petition may be presented against them in their joint names.

The Official Trustee may apply to the court to restrain a person from instituting or continuing any civil proceedings against the debtor. However, this does not include civil proceedings by a secured creditor against a debtor in order to realise his security. A petition against a debtor may, with the consent of the Official Trustee, be withdrawn or amended at any time before a protection order is made.

(ii) *Protection Orders*: While a protection order is in force, the debtor's existing and after-acquired property vest in the Official Trustee. By virtue of section 57 of the Act the property relates to movable and immovable property vested in the debtor before the order was made. All property that is in the possession of the debtor within a period of six months before the order was made is presumed to vest in the debtor. As a result once such property vests in the Official Trustee it is not subject to any form of legal proceedings. This, however, does not prevent a secured creditor from initiating legal proceedings to enforce his security.

Again, while a protection order is in force against a debtor, he shall be subject to the duties and disabilities contained in sections 45 - 49 of the Act. These relate essentially to the debtor's duty to comply with directions given by the Official Trustee in respect of the debtor's affairs; the debtor's duty to give notice of his after-acquired property; the debtor's duty to disclose his bankrupt status; the issuing of warrants of arrest against the debtor should he impede insolvency proceedings against him; and the intercepting of postal article belonging to the debtor. No civil

proceedings shall be instituted or continued against a debtor while a protection order is in force, unless the court grants permission to that effect (section 32).

Section 33 of the Act requires a debtor to disclose his own statement of affairs. These relate to all the properties he has or hopes to have, a list of his creditors and the sums he owes them including the dates the debts are due and securities held by him, the reasons for his insolvency and any other transactions entered into during such period as the Official Trustee may specify. The debtor must inform the Official Trustee of any proposals he wishes to make to his creditors and provide a statement to that effect.

Upon satisfying himself of the correctness of every proof of debts lodged with him, the Official Trustee convenes the first meeting of the creditors within thirty days after the publication of the protection order (section 36). The Official Trustee then puts to the meeting such questions as he considers necessary and request the creditors to either approve or reject any proposals that may have been made by the debtor.

(iii) *Judicial consideration*: This is a process whereby the Official Trustee applies to the Court for it to give a decision regarding the debtor's insolvency. The Official Trustee provides the court with information (section 38) that will assist the court in arriving at a decision. The court may then make any of the following orders -

(a) an insolvency order;
(b) an order confirming agreed proposals with the creditors;
(c) an order rescinding the protection order made by the Official Trustee.

(iv) *Bankruptcy*: When the court makes an insolvency order and it appears to it that grounds for bankruptcy exist or are likely to exist, it may direct the debtor to undergo an examination. This examination will relate to the conduct of the debtor and it is held in public. The court will adjudge the debtor a bankrupt if any one of the grounds of bankruptcy is established. Section 43 of the Act stipulates the grounds of bankruptcy as follows -

(a) that for a continuous period of twelve months within the three years before the protection order was made, the debtor continued to carry on business even though he knew he was insolvent;

(b) that the debtor was careless or grossly negligent with his business, or engaged in gambling or unnecessary expenditure, contributing to his insolvency;

(c) that the debtor contracted a provable debt with the intention of not paying it back or without having a good reason of ever being able to pay it back;

(d) that the debtor is unable to give a satisfactory explanation regarding his missing assets;

(e) that the debtor has constantly failed, without adequate excuse, to carry out his duties in the insolvency proceedings;

(f) that the debtor is a former bankrupt;

(g) that within the past three years the debtor has been convicted of an offence involving dishonesty. The dishonesty must have related to property and the debtor must have been sentenced to imprisonment for three months or more;

(h) that within the past three years the debtor has been convicted of an offence relating to business.

Once the court makes an order of bankruptcy against a debtor, it gives the date when the bankrupt may be discharged. The date will be not earlier than two years after the making of the order.

Furthermore, under Section 44 of the Act, a bankrupt cannot carry on, or in any way be concerned in the management of, any trade or business, or operate an account with a bank or any financial institution, or obtain credit exceeding D5000.00, or enter into a hire-purchase agreement. However, the Official Trustee may give his consent to enable the debtor to do any or all of these activities. Once a bankrupt, the debtor must keep a record of his income and expenditures as well as other financial dealings as directed by the Official Trustee. And for a period of every four months he must provide the Official Trustee with an income and expenditure account.

(v) *When may an insolvent debtor be discharged?*: A debtor who is not a bankrupt shall be discharged from his insolvency on any of the following dates, whichever is the earliest -

(a) two years after the date the insolvency order was made;

(b) the date on which his debts are fully paid;

(c) the date specified in a proposal entered into with his creditors.

The date of discharge from an insolvency order and from bankruptcy of a debtor who is bankrupt is the date fixed by the court when it adjudged the debtor a bankrupt.

However, under section 51 it is possible for a bankrupt or other debtor to be discharged earlier than the date fixed for his discharge. This is where the bankrupt or other debtor gives notice to the Official Trustee proposing to make payments to his creditors. If it appears to the Official Trustee that the proposal is made in good faith, then he could proceed to call a meeting of the creditors. The latter will study the proposals and confirm or reject them. If they confirm the proposals the Official Trustee submits a report to the court for the final decision.

The appointed date of discharge of a bankrupt may be altered under section 52 on account of his conduct since he was adjudged a bankrupt, or if new facts are revealed relating to his conduct or affairs before he was adjudged a bankrupt. When a bankrupt or other debtor is discharged, the Official Trustee issues him with a **certificate of discharge** (section 53). This in effect releases the discharged bankrupt or other debtor from all provable debts and relieves him from any duties and liabilities under the Act (section 54). The issuing of a certificate of discharge brings to an end all insolvency proceedings against the discharged bankrupt or other debtor (sections 55 and 56).

(vi) *What assets of the debtor pass to the Official Trustee?* The debtor's property that is liable to be vested in the Official Trustee has been dealt with in conjunction with the discussion on protection orders (see (ii) above). Although the debtor's after-acquired property is also liable to vest in the Official Trustee, the following are exempted -

(a) any property that is necessary for the reasonable maintenance of the debtor, his spouse (i.e. wife or husband) and children;

(b) any money that may be paid to the debtor as compensation for injury suffered; this should relate to his reduced earning ability;

(c) any money that is paid or payable to the debtor in the form of a loan;

(d) any movable property bought by the debtor for which he has not made full payment;

(e) any property the debtor earns by investing the benefits he receives in (b), (c) or (d) above.

A situation may arise where for a period before a protection order is made, a debtor invests his property for the dominant purpose of favouring a single or certain of his creditor or creditors. If he did this six months before the making of the protection order against him and at a time when he was insolvent, the creditor or creditors will be liable to restore any benefit received from the debtor's investment (section 59). The same rule applies in the event of an insolvency order being made against the debtor during the relevant period (which is 21 days before a petition was presented for a protection order). The rule, however, does not apply to a payment or transfer of property the debtor makes -

(a) to a bank which the latter uses to defray cheques drawn by the debtor;

(b) to settle a debt he has incurred during the relevant period;

(c) to a secured creditor; or

(d) to enforce a guarantee or indemnity against a third party, or a mortgage, charge or lien on that party's property.

(vii) *Classification of debts*: The classification of debts is particularly important in relation to the distribution of dividends to creditors. What this means is that debts are ranked into various categories and when it comes to making payments to the creditors those among them who rank first will receive their payments before all others. Under section 67, debts are ranked into four classes as follows -

(a) **CLASS A** - This is a debt or part of a debt in respect of which a debtor owes payment not exceeding D5000.00 to his employee. The employee must not be a near relative and he must have been employed for the whole or any part of the four months before the protection order was made against the debtor.

Under this class also falls rates, taxes or similar payments the debtor owes the Government or local government authority. Such payments must have become due within the year before the making of the protection order.

(b) **CLASS B** - This is a debt which does not fall into any of the other three classes - class A, class C, or class D.

(c) **CLASS C** - This is a debt or part of a debt which the debtor owes a near relative. (A near relative is the debtor's spouse (husband or wife), parents and children as well as his brothers, sisters, uncles, aunts, nephews and nieces, whether of the full or half blood). This debt must not fall within class D and it must have been owed within the year before the making of the protection order.

(d) **CLASS D** - This is a debt or part of a debt which is in excess of any benefit the Official Trustee may have received from a person to whom the debtor has disposed of his property. Under section 60 of the Act if the debtor transfers his property other than at its full value or for the settlement of a debt, the person to whom the transfer is made is required to restore the property to the Official Trustee.

Also any excess interest (i.e. a portion of a debt) which represents interest at a rate exceeding seven per centum per annum will fall under this class.

Thus, when it comes to the payment of dividends (which are payments the Official Trustee makes to the proving creditors) to the debtor's creditors (section 74), the Official Trustee shall first pay debts in class A and then class B up to class D in that order. Debts which fall in the same class rank equally.

It should be noted, however, that the payment of dividends to the debtor's creditors will only be carried out after the Official Trustee has settled his own fees out of the debtor's account (section 72) and restored to the debtor -

(a) property used personally by him in his employment; and

(b) furniture, clothing and other household goods used by him or his dependents (i.e. members of his family) (section 73).

If any balance of money or other property remains in the hands of the Official Trustee after the payment of all of the debtor's liabilities, such balance is paid to the debtor.

(viii) *Arrangements between debtor and creditor:* An insolvent debtor may enter into negotiations with his creditors as regards the form and manner in which he will settle his liabilities to them. This in essence constitutes an arrangement. However, under section 77 of the Act an arrangement is only valid if it is made at a time when insolvency proceedings are not pending against the debtor and that the amount involved is not less than D5000.00.

Towards this end, there is a register called the **Arrangements Register** (section 78) in which the Official Trustee records details of each arrangement. Within fourteen days after an arrangement has become binding on the debtor, two copies of the agreement embodying the arrangement must be lodged with the Official Trustee for him to enter the same in the Register. Although the Act (section 79) does not state who should lodge the agreement relating to the arrangement, it is in the interest of the insolvent debtor to undertake this responsibility. Failure to keep to the time frame of fourteen days may lead to the arrangement being rescinded. In that case if an application is made by the Official Trustee to the Court, the latter may declare the arrangement as invalid from the period it was entered into.

Furthermore, a person who is interested in an arrangement may apply to the court for that arrangement to be set aside on any of the following grounds (section 80) -

(a) that a default has occurred in carrying the arrangement into effect;

(b) that it would not be practical or would be unjust to carry out the arrangement; or

(c) that the consent of the creditors to the arrangement was obtained by unlawful means.

(ix) *Minors*: The provisions of the Act apply to a minor who is a debtor to the same extent as it applies to an adult (section 82). A minor is a person who is not of full age and capacity and generally under the Gambian law a person is not of full age if he is below 21 years. Where a debtor is an infant or of unsound mind, the court may appoint a person to act as his guardian in insolvency proceedings. The Official Trustee or any other person interested in the matter could apply to the court for such appointment to be made.

(x) *Trustee Debtor*: There may arise a situation where a debtor against whom an insolvency order has been made is a trustee of some property. If the debtor has any beneficial interest in the property which has become vested in the Official Trustee under the Act, then the latter acts as trustee in place of the debtor. This is only up to the period when the debtor's beneficial interest in the property has been recovered. However, the duty is placed on the Official Trustee to appoint another person to act as trustee in his [the Official Trustee's] place. Or if there are two or more other trustees of the property, then the Official Trustee should give up acting as trustee (section 84).

(xi) *Participation Order*: This is an order which the Official Trustee may make upon an application by one or more creditors of the debtor to enable a creditor or creditors to take part in insolvency proceedings against a debtor in respect of new debts (s.85). However, before the order is made, there must have been impending insolvency proceedings which are still in progress. The creditor's application shall not be entertained, unless the debt the debtor owed him since the protection order was made amounts to at least D1000.00 and such debt has not been paid for a period of 14 days since it was demanded. The demand for the payment must be written, otherwise it will not have any effect.

(xii) *Administration of estates of deceased insolvents*: When an insolvent debtor dies without settling his debts in accordance with the provisions of the Act, his personal representative or creditor may apply to the Official Trustee for an administration order. The personal representative includes the person who would normally succeed the deceased under customary law if the deceased was subject to that law. The estate of the deceased vests in the Official Trustee. Within a period of three months after the making of the administration order, a creditor of the deceased may lodge with the Official Trustee a proof of debts in accordance with section 88. The deceased's representative is placed in the position of the deceased insolvent and must comply with the directions given by the Official Trustee.

Where a debtor dies while insolvency proceedings are pending against him, the proceedings will come to an end if the death occurs before a protection order is made or while it has effect (section 93). On the other hand, the proceedings will continue if the death occurs after the making of an insolvency order.

(C) **Insolvency Practitioners**: In order to ensure the success of an insolvency regime, it is important to provide for insolvency practitioners and set out their qualifications. Their conduct as insolvency practitioners must be regulated by law or a code of conduct administered by professionals versed in that line of practice.

Part IV of the Act devotes attention to insolvency practitioners. In relation to a company, a person acts as an insolvency practitioner when he becomes its liquidator, provisional liquidator, administrator or receiver, or if he supervises an arrangement it approves. In respect of individuals who have become insolvent, an insolvency practitioner could act as the debtor's trustee in bankruptcy or interim receiver of his property or as permanent or interim trustee in the sequestration of his property. (Sequestration is a process by which the personal property as well as the rents and profits of a person's immovable property (such as land) are taken away from him as a means of ensuring his compliance with an order.)

An insolvency practitioner could also act as trustee in respect of a deed of arrangement that has been made for the benefit of the creditors

of an insolvent debtor. He could also supervise an arrangement he proposes which is approved under the Act.

The disqualifications of an insolvency practitioner are outlined in section 96. These essentially relate to failure to obtain the proper authorisation, the absence of security for the proper performance of his functions, adjudication as a bankrupt or the subjection of his estate to a sequestration order or unsoundness of mind.

The powers of the Minister to declare and recognise a professional body for the purposes of insolvency practice is dealt with in section 97 of the Act. However, under that section the institutions regulating the affairs of legal practitioners and accountants in The Gambia have been recognised as professional bodies for purposes of insolvency practice. It should be noted that only individuals can practice as insolvency practitioners. This in effect means that a firm or company cannot qualify as insolvency practitioners.

The competent authorities to grant authorisation to a person to practice as an insolvency practitioner are the General Legal Council, the Accountant's Council, a professional body recognised by the Minister for purposes of insolvency practice and the Minister himself. These authorities have power not only to grant authorisation but also to refuse or withdraw an authorisation. A person who is refused an authorisation or has his authorisation withdrawn, may

(a) within 14 days of receiving notice of the refusal or withdrawal of the authorisation, make a written representation to the competent authority concerned;

(b) within 28 days of receiving notice of the refusal or withdrawal of the authorisation, apply to the court.

A decision of the court shall bind the competent authority.

E. THE PHILOSOPHY BEHIND THE NEW IDEAS IN THE INSOLVENCY ACT

As the economy grows so does the credit and security market. As businesses grow and thrive so do we witness the dwindling and fall of small businesses. There are numerous reasons which explain why businesses fail. Invariably many businesses start without an adequate and secure capital, and seeking finance from the bank has its drawbacks as interest payments have to be made irrespective of whether the business makes profit or not. Making imprudent business judgments could also lead to early liquidation. The management shortcomings of a business such as an unbalanced managerial team with a lack of management depth, a docile board, a rigid one man rule and a weak financial support base are other factors in business failings. So are accountancy failings relative to cash flow forecasts, absence of budgetary scrutiny and control, costing systems and over ambitious or unrealistic valuation of properties. Coupled with these shortcomings every business must contend with recession and inflation.

Therefore in a business community with various business difficulties, it is important to have a system of law that regulates credit and security as well as provides remedies for the enforcement of debts. A creditor who lends money not only expects to be repaid, but requires a security for the money lent and in the event of the insolvency of his debtor to enforce the security.

Towards this end, the Act provides for an administrative machinery by which the affairs of insolvent companies and insolvent individuals could be managed. The appointment of an administrator in respect of a company is aimed at saving the company (where possible) from liquidation and safeguarding the security of its creditors. Thus a company could present a petition in respect of itself with a view to obtaining an administration order. This maintains a moratorium over the affairs of the company. The same result is achieved when the creditors, whether separately or collectively, present a petition in respect of a company.

The Act in effect provides effective alternatives to the winding up of a company that is insolvent or near-insolvent, especially where there are reasonable prospects of reviving the company as a going concern. The administrator (who should usually be a person qualified to practice as an insolvency practitioner) could effectively utilise his wide powers to ensure a viable economic condition for the company while at the same time securing the interests of the creditors. Although the administrator is given

wide powers, the Act makes provisions relating to his liability and accountability.

Furthermore, the administrative machinery in place defines the relationship between a debtor and his creditor thereby reducing borrower/lender risks. In the event of an insolvency the parties concerned would know the options open to them and the procedures related thereto. This ensures a smooth and fluid co-existence of interest in matters of credit and encourages financial institutions to lend money to business enterprises.

The administrative machinery in place with respect to insolvent individuals is the office of the Official Trustee. His responsibilities would generally pertain to partnerships, sole proprietorships and individuals in other capacities which become insolvent. The object of the Act in this respect is not to exact punishment on individual entrepreneurs. Rather it is to protect the debtor's creditors and also give him sanctuary against further inconvenience, hardship or material loss. The Act also introduces a fair and equitable system whereby a dishonest insolvent is distinguished from the honest but reckless insolvent. This reinforces the modern rule that not every individual who has become insolvent deserves condemnation. The aim of the law therefore is to give the honest but reckless individual who has become insolvent prospects to make amends and begin a new chapter in his business. Hence the provision for a discharge order.

It is important that an individual should not unduly lose his property and personal possessions simply on account of his insolvency. He is entitled to have every property belonging to him which has become vested in the Official Trustee to be diligently and properly administered. The aim therefore is to manage his properties until his debts are fully satisfied and not to deprive him of his livelihood and that of his dependents. Hence the elaborate provisions relating to the administration of the debtor's property. In addition, a Chapter on the administration of deceased insolvents' estates ensures that the interests of creditors are not defeated merely because of the death of the insolvent debtor. Whoever assumes responsibility for the estate of the deceased also takes over his indebted position.

To ensure the success of the insolvency regime created in the Act, it is important that the people involved in its administration are upright and can command the confidence and respect of the courts, debtors, creditors and the general public. That explains the rationale for the law on insolvency practitioners. The Act clearly sets out the qualifications and disqualifications of insolvency practitioners and the penalties attached to insolvency practitioners without the requisite qualifications. This, it is hoped, will inject confidence into the credit and security market and reduce the level of complaints thereby preventing the insolvency regime from falling into disrepute.

F. COMMENTARY ON INSOLVENCY PRACTITIONERS

(1) *The Need for ethical guides*: The Act does not provide any ethical guidelines for the conduct of an insolvency practitioner. Rather, it lays down in broad terms the subjects that would disqualify a person from practising as an insolvency practitioner.

This may be described as deliberate. The Act gives the Minister the power to recognise professional bodies for purposes of insolvency practice. The legal and accountancy bodies are already recognised in the Act. Generally, the detailed guidelines for insolvency practitioners are dealt with in a non-statutory form. Professional bodies regulate their own affairs and conduct which requires a certain standard of behaviour from their members.

While no code of conduct in a documentary form is laid down for legal practitioners, the Legal Practitioner's Act (Cap. 7:01) does seek to regulate their conduct and provide for disciplinary proceedings for misconduct. The Accountants Act, 1991, on the other hand, is a step ahead in this respect. It provides in its First Schedule the subjects which constitute professional misconduct.

However, the statutory provisions have their limitations and are generally concerned with what is lawful or unlawful practice rather than the propriety or impropriety of the performance of certain acts.

The success of an insolvency regime requires considerations which extend beyond what is lawful or unlawful. It is of considerable

importance that an insolvency practitioner must demonstrate professional independence and avoid a conflict of interest in his practice. What this means is that an insolvency practitioner must be free from personal or professional relationships and indeed financial commitments which might interfere or impair his objective assessment or judgment. Anything that **might even appear** to interfere or impair his objectivity should disqualify him from acting as an insolvency practitioner.

In addition, an insolvency practitioner should be vigilant about any potential conflicts of interest in his practice. Thus where there is an obvious conflict of interest, the practitioner should not accept an appointment in that regard. Where in his judgment he **might** appear to have a conflict of interest he should make an honest disclosure of this to the parties concerned. It will be up to the parties concerned to take a decision.

A pre-existing professional relationship should make it inappropriate for an insolvency practitioner to act as liquidator or receiver of a company. For example, if A for the past three years had obtained income from work given to him by company B, then if company B is to go into liquidation it would be inappropriate for A to take up appointment to liquidate company B. The close business relationship which existed between A and company B would make it particularly inappropriate for A to accept appointment as liquidator of company B. The circumstances surrounding their relationship makes it difficult for A to be seen to be capable of acting impartially. The conflict here is between A's personal interests and his duty.

(2) *Independence and Conflicting Personal Interests*: An insolvency practitioner, in accepting an appointment, must not only consider whether he has or has had a personal or professional relationship with the company; he must also consider whether he or persons with whom he has a relationship or is connected hold or have held appointments that are not compatible with the acceptance of the insolvency appointment. Thus an insolvent practitioner must be independent and be seen to be independent of persons he may have to investigate. It is in the interest of those in the credit and security market and the general public for that matter that independence should not be compromised.

Where the conduct of an insolvency practitioner or his firm may have to be examined, prudence dictates that he should not accept appointment. His guiding professional and ethical rules should always be objectivity and independence.

The effect of non-compliance with these "ethical" rules is that any creditor or other person who has an interest in a company for which the insolvent practitioner is appointed may take his complaint to the court.

G. APPENDIX OF USEFUL REFERENCES

1. John Farrar, "Essential Business Law - Company Insolvency", Sweet & Maxwell

2. Alison Clarke, "Current Issues in Insolvency Law", Stevens & Sons, 1991

3. J. Argenti, "Corporate Collapse" and J.H. Farrar, "Corporate Insolvency and the Law" [1976] J.B.L. 214

4. Ian F. Fletcher, "The Law of Insolvency", Sweet & Maxwell, 1990. Legal practitioners will find this book particularly useful as it treats the law relating to insolvency through the illustration of decided cases.