

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 4,071 of 3rd April, 2014

B. 09/14

BILL

FOR

AN ACT to amend the Insolvency Act 2011.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Act may be cited as the Insolvency (Amendment) Act 2014 and comes into operation on the same date as the principal Act.

Amendment of the Insolvency Act 2011.

2.(1) The Insolvency Act 2011 is amended in accordance with the provisions of this section.

(2) After section 1, insert the following section—

“Application of Act to collateral arrangements and collateral securities etc.

1A.(1) Subject to subsection (2), this Act applies in relation to arrangements and transactions to which the prescribed collateral arrangements and securities laws and subsidiary legislation apply.

(2) Where any provision of this Act conflicts with a provision of the prescribed collateral arrangements and securities laws and subsidiary legislation, the prescribed law or subsidiary legislation prevails.

- (3) The Rules may prescribe laws concerning collateral arrangements and collateral securities for the purposes of this section.”.
- (3) In section 2(1)–
- (a) insert the following definition after the definition of “Commission”–
- ““Companies Act” means the Companies Act, 2014;
- (b) in paragraphs (a) and (b)(i) of the definition of “company”, insert after “formed and registered under”, the words “the former Companies Act or”;
- (c) insert the following definition after the definition of “floating charge”–
- “former Companies Act” means the Companies Act, 1930-07, as amended;”
- (d) in the definition of “insolvency practitioner”, delete “section (1)” and substitute “section 476(1)”,
- (e) delete the definition of “Insolvency Practitioners Code”;
- (f) insert the following definition after the definition of “moratorium period”–
- ““officer”, in relation to a body corporate, includes a director, manager or secretary;”;
- (g) delete the definition of “prescribed form”
- (h) in paragraph (b) of the definition of “receiver appointed out of court”, delete “are implied” and substitute “is implied”;
- (i) delete the definition of “related person”;
- (j) in the definition of “special resolution”, delete “section 163(2)” and substitute “section 191(2)”;

- (k) insert the following definition after the definition of “special resolution”–

““specified form” means a form published as a specified form in such manner as may be prescribed in the Rules;”;

- (l) insert the following definition after the definition of “statement of affairs”–

““statement of assets and liabilities” means a statement of assets and liabilities of an individual complying with section 399;”;

- (m) in the definition of “unregistered company”, delete paragraph (a) and substitute–

“(a) a body corporate that is not a company formed or registered under the former Companies Act or the Companies Act; or”; and

- (n) in the definition of “voluntary liquidator”, insert after “Part VI”, the words “of the former Companies Act or Part X”.

(4) In section 8(2)(b), delete “or rule of law, is of a type that is”.

(5) In section 13(7), delete “Sections 72 and 306(3)” and substitute “Sections 95 and 374(3)”.

(6) In section 18(4), delete “subsection (2)(a)” and substitute “subsection (3)(a)”.

(7) In section 21(4), delete the second occurrence of “commits an offence”.

(8) In section 28(2), delete “chairman” and substitute “interim supervisor”.

(9) In section 30(5), insert after “in effect”, the words “subject to the terms of the arrangement,”.

(10) In section 40(3), delete “chairman’s” and substitute “interim supervisor’s”.

(11) Repeal section 47 and substitute the following section–

“Limitations on scope.

An administration order may not be made, and an administrator may not be appointed under section 48, in respect of an Authorised person that is, or at any time has been, licensed or authorised to carry on deposit-taking business under the Financial Services (Banking) Act.”.

(12) In section 48(2), delete “it is created” and substitute “if it is created”.

(13) In section 50(1), delete “approved form” and substitute “specified form”.

(14) In section 75(7), delete “subsection 6” and substitute “subsection (6)”;

(15) In section 91–

(a) in subsection (1), delete the semi-colon at the end of the subsection and substitute a full stop; and

(b) in subsection (7), delete the comma after the word “apply”.

(16) In section 99(1)–

(a) in paragraph (c), delete “related company” and substitute “connected company”; and

(b) in paragraph (d), delete “section 518(2)” and substitute “section 485”.

(17) In section 103(3), delete “section 123” and substitute “section 106”.

(18) In section 135(4), delete “company” and substitute “debtor”.

(19) In section 136, delete subsection (3).

(20) In section 150–

- (a) in subsection (1)(j), delete “a creditors’ arrangement” and substitute “an arrangement”; and
 - (b) in subsection (2), delete “a creditors’ arrangement” and substitute “an arrangement”.
- (21) In section 170(3), delete “creditors meeting” and substitute “creditors’ meeting”.
- (22) In section 184(1), delete “form prescribed by the Rules” and substitute “specified form”.
- (23) In section 188(1), delete “and (3)”.
- (24) In section 200, delete the designation of subsection (1).
- (25) In section 229–
- (a) insert the following subsection after subsection (1)–
 - “(1A) Without limiting subsection (1)(f)–
 - (a) the “public” includes the public within and outside Gibraltar; and
 - (b) the preservation of the reputation of Gibraltar is a matter of public interest.”;
 - (b) in subsection (4), delete “Part X” and substitute “Part XII”; and
 - (c) in subsection (5), delete “subsection (1)(c) and substitute “subsection (1).
- (26) In section 230, insert after “set out in”, the words “this Part or”.
- (27) In section 243(2), delete “subsection” and substitute “section”.
- (28) In section 263, delete “section 160” and substitute “section 146 or section 160”.
- (29) Insert the following sections after section 263–

“Malpractice in anticipation, and after commencement, of liquidation.

263A.(1) Where a liquidator of a company is appointed under section 146 or section 160, any person, being a past or present officer of the company, is deemed to have committed an offence if, within the 12 months immediately preceding the commencement of the liquidation, the person has—

- (a) concealed any of the company’s assets to the value of £50 or more or concealed any debt due to or from the company;
- (b) fraudulently removed any of the company’s assets to the value of £50 or more;
- (c) concealed, destroyed, mutilated, altered or falsified any book or paper affecting or relating to the company’s assets or affairs, including any security;
- (d) made any false entry in any register, book or document belonging to the company or affecting or relating to its assets or affairs;
- (e) fraudulently parted with, altered or made any omission in any document affecting or relating to the company’s assets or affairs; or
- (f) pawned, pledged or disposed of any assets of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company’s business).

(2) A person specified in subsection (1)—

- (a) is deemed to have committed an offence if, within the 12 months immediately preceding the commencement of the liquidation, the person has been privy to the doing by others of any of the things mentioned in paragraphs (c), (d) or (e) of subsection (1); and

- (b) commits an offence if, at any time after the commencement of the liquidation, the person does any of the things mentioned in paragraphs (a) to (f) of subsection (1), or is privy to the doing by others of any of the things mentioned in paragraphs (c) to (e) of that subsection.
- (3) It is a defence–
- (a) to a charge under–
 - (i) paragraph (a) or (f) of subsection (1), or
 - (ii) subsection (2) in respect of the things mentioned in either of those two paragraphs,if the person charged proves that he had no intent to defraud;
 - (b) to a charge under–
 - (i) paragraph (c) or (d) of subsection (1);, or
 - (ii) subsection (2) in respect of the things mentioned in either of those two paragraphs,if the person charged proves that he had no intent to conceal the state of affairs of the company or to defeat the law.
- (4) Where a person pawns, pledges or disposes of any assets in circumstances which amount to an offence under subsection (1)(f), every person who takes in pawn or pledge, or otherwise receives, the assets knowing them to be pawned, pledged or disposed of in such circumstances, commits an offence.
- (5) A person who commits an offence under this section is liable–
- (a) on summary conviction to imprisonment for 12 months or a fine at level 5 on the standard scale, or both;

- (b) on conviction on indictment to imprisonment for 5 years or a fine of twice the statutory maximum, or both.

Misconduct in course of liquidation.

263B.(1) Where a company is in liquidation, any person, being a past or present officer of the company, commits an offence if the person—

- (a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the company's assets, and how and to whom and for what consideration and when the company disposed of any of its assets (except such assets as have been disposed of in the ordinary way of the company's business);
- (b) does not deliver up to the liquidator, or as the liquidator directs, all assets of the company in his custody or under his control, and which he is required by law to deliver up;
- (c) does not deliver up to the liquidator, or as the liquidator directs, all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up;
- (d) knowing or believing that a false debt has been proved by any person in the liquidation, fails to inform the liquidator as soon as practicable; or
- (e) after the commencement of the liquidation, prevents the production of any book or paper affecting or relating to the company's assets or affairs.

(2) A person specified in subsection (1)—

- (a) commits an offence if, after the commencement of the liquidation, he attempts to account for any part of the company's assets by fictitious losses or expenses; and
- (b) is deemed to have committed an offence if, within the 12 months immediately preceding the commencement

of the liquidation, he has attempted to account for any part of the company's assets by fictitious losses or expenses at any meeting of the company's creditors.

- (3) It is a defence to a charge under—
- (a) paragraph (a), (b) or (c) of subsection (1), if the person charged proves that he had no intent to defraud; or
 - (b) paragraph (e) of subsection (1), if the person charged proves that he had no intent to conceal the state of affairs of the company or to defeat the law.
- (4) A person who commits an offence under this section is liable—
- (a) on summary conviction to imprisonment for 12 months or a fine at level 5 on the standard scale, or both;
 - (b) on conviction on indictment to imprisonment for 5 years or a fine of twice the statutory maximum, or both.

Falsification of company's books by member.

263C.(1) Where a company is in liquidation, a member of the company commits an offence if he—

- (a) destroys, mutilates, alters or falsifies any books, papers or securities; or
 - (b) makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company, with intent to defraud or deceive any person.
- (2) A person who commits an offence under this section is liable—
- (a) on summary conviction to imprisonment for 12 months or a fine at level 5 on the standard scale, or both;

- (b) on conviction on indictment to imprisonment for 5 years or a fine of twice the statutory maximum, or both.

Material omissions from statement relating to company's affairs.

263D.(1) Where a company is in liquidation, any person, being a past or present officer of the company—

- (a) commits an offence if he makes any material omission in any statement relating to the company's affairs; and
 - (b) is deemed to have committed that offence if, prior to the liquidation, he has made any material omission in any such statement.
- (2) It is a defence to a charge under this section if the person charged proves that he had no intent to defraud.
- (3) A person who commits an offence under this section is liable—
- (a) on summary conviction to imprisonment for 12 months or a fine at level 5 on the standard scale, or both;
 - (b) on conviction on indictment to imprisonment for 5 years or a fine of twice the statutory maximum, or both.

False representations to creditors.

263E.(1) Where a company is in liquidation, any person, being a past or present officer of the company—

- (a) commits an offence if he makes any false representation or commits any other fraud for the purpose of obtaining the consent of the company's creditors or any of them to an agreement with reference to the company's affairs or to the liquidation; and
- (b) is deemed to have committed that offence if, prior to the liquidation, he has made any false representation, or committed any other fraud, for that purpose.

- (2) A person who commits an offence under this section is liable—
 - (a) on summary conviction to imprisonment for 12 months or a fine at level 5 on the standard scale, or both;
 - (b) on conviction on indictment to imprisonment for 5 years or a fine of twice the statutory maximum, or both.

- (30) In section 270—
 - (a) in paragraph (d)(i), insert after “comply with”, the words “the former Companies Act or”; and
 - (b) in paragraph (f), insert after “Part VI”, the words “of the former Companies Act or Part X”.

- (31) In section 298(5), delete “subsection (5)” and substitute “subsection (4)”.

- (32) In section 309(2)(c), delete the comma after the word “revoked”.

- (33) In section 309(2)(a)(ii), delete “, by the debtor”.

- (34) In section 337(5), delete “section 322” and substitute “section 334(1)(a)”.

- (35) In section 403(2), delete “subsection 402” and substitute “section 402”.

- (36) In section 444(2), delete the comma after the words “Court may”.

- (37) In section 459(4), delete “f a member” and substitute “If a member”.

- (38) Repeal section 475 and substitute the following section—

“Commission responsible for licensing and supervision of insolvency practitioners.

475. The Commission is responsible for the licensing of insolvency practitioners and for supervising and enforcing their compliance with this Act and the Insolvency Practitioners Regulations.”.

(39) In section 476(1)(b), insert after “of a company”, “, including a liquidator of a company in voluntary liquidation under the Companies Act”.

(40) In section 477–

- (a) in subsections (1) and (3), delete “Minister” and substitute “Commission”;
- (b) in subsection (2), delete “form prescribed” and substitute “approved form”; and
- (c) in subsection (3)–
 - (i) delete “him” and substitute “it”, and
 - (ii) delete “he” and substitute “it”.

(41) In section 478–

- (a) delete “Minister” in each place that it occurs in the section and substitute “Commission”;
- (b) in subsection (1), delete “he” and substitute “it”; and
- (c) in subsections (2), delete “his” and substitute “its”.

(42) In section 480(2):, delete “him” and substitute “it”.

(43) In section 481–

- (a) in subsection (1) delete “Minister” in each place that it occurs in the subsection and substitute “Commission”;
- (b) in subsection (2)–
 - (i) delete “The Minister may” and substitute “The Commission may”,
 - (ii) in paragraph (b), delete “this Part, the Insolvency Practitioners Regulations or the Insolvency Practitioners Code” and substitute “this Part or the Insolvency Practitioners Regulations,

- (iii) in paragraph (c), delete “the Minister or”,
 - (iv) in paragraph (f), delete “he” at the beginning of the paragraph,
 - (c) in subsection (3), delete “Minister” and substitute “Commission”;
 - (d) in subsection (5), delete “Minister” and substitute “Commission”;
 - (e) in subsection (6)–
 - (i) delete “Minister” in each place that it occurs in the subsection and substitute “Commission”, and
 - (ii) in paragraph (a), delete “he” and substitute “it”, and
 - (f) in subsection (7),
 - (i) delete “Minister” and substitute “Commission”, and
 - (ii) delete “he” and substitute “it”.
- (44) In section 482–
- (a) in subsection (1), delete “Minister” and substitute “Commission”; and
 - (b) in subsection (2)–
 - (i) delete “Minister” and substitute “Commission”, and
 - (ii) delete “him” and substitute “it”.
- (45) In section 483, delete the words before paragraph (a) and substitute the following–
- “Where a licensee has contravened, or is in contravention of, this Act or the Insolvency Practitioners Regulations, the Commission may issue one or more of the following directives–”.

(46) Repeal section 484 and substitute the following section–

“Filing of returns and other documents.

484. A licensee shall file with the Commission such returns and other documents as may be specified in the Insolvency Practitioners Regulations.”.

(47) In section 486, delete paragraphs (d) and (e) and substitute the following paragraphs–

- “(d) the criteria that will be used in assessing applications for a licence, including the criteria for determining whether or not an individual is to be regarded as being resident in Gibraltar;
- (d) the minimum security, including insurance cover, to be maintained by a licensee;
- (e) the records to be kept by a licensee, and the length of time such records shall be kept;
- (f) documents to be filed with, and returns to be made to, the Commission by licensees;
- (g) policies, systems and controls, including internal controls, to be maintained by licensees;
- (h) the procedures to be followed by and the conduct expected of a licensee when acting as an insolvency practitioner; and
- (i) such other matters required or permitted by this Part to be specified in the Regulations.

(48) Repeal section 487.

(49) In section 488–

- (a) delete subsection (1) and substitute the following subsections–

“(1) The Commission may, with the consent of the Minister approve forms for the purposes of this Part or the Insolvency Practitioners Regulations’.

(1A) The approved forms shall be published in such manner as is specified by the Minister.”; and

(b) in subsection (2), delete “Minister” and substitute “Commission”.

(50) Insert the following section after section 488–

“Guidance.

488A.(1) The Commission may, with the consent of the Minister, issue Guidance with respect to–

(a) compliance by licensees with this Act and the Insolvency Practitioners Regulations;

(b) such matters as it considers relevant to its functions under this Part.

(2) The Guidance may make different provision in relation to different persons, circumstances or cases.

(3) Failure to follow the Guidance does not, of itself, render a licensee liable to proceedings of any kind, but such a failure may be taken into account by the Commission in determining whether there has been a contravention of this Act or the Insolvency Practitioners Regulations.”.

(51) In section 491–

(a) delete the section heading and substitute “**Specified forms.**”;

(b) in subsection (1), delete “the form of which is prescribed by the Rules, that form” and substitute “that is published as a specified form, the specified form”; and

(c) in subsection (2), delete “prescribed form” and substitute “specified form”.

(52) In section 496–

- (a) delete the section heading and substitute “**Insolvent Partnerships Regulations**”;
- (b) delete subsection (1) and substitute the following–

“(1) The Minister may make Regulations providing for–

- (a) the liquidation of partnerships as unregistered companies;
- (b) the administration of insolvent partnerships; and
- (c) insolvent partnerships to enter into voluntary arrangements.”; and
- (d) in subsection (2), delete “Rules made under subsection (1) may contain” and substitute “Regulations made under subsection (1) may specify which provisions of the Act apply to insolvent partnerships and the modifications applicable to insolvent partnerships and may contain”.

(53) In section 497–

- (a) delete the section heading and substitute “**Insolvent Estates Regulations**”; and
- (b) delete “Rules” in each place that it occurs in subsections (1) and (2) and substitute “Regulations”.

(54) Delete “officer holder” in each place that it occurs in sections 248(1), 456(1)(c), 456(5) and 462(1) of the Act and substitute “office holder”.

(55) Delete “prescribed form” in each place that it occurs in sections 61(c), 68(7), 75(5)(b), 92(7), 103(5), 121(7), 132(3)(b), 227(10), 235(1), 236(1), 272(2), 273(4), 278(1), 416(8) and 485(1)(b) and substitute “specified form”.

EXPLANATORY MEMORANDUM

This Bill provides for amendments consequent upon the enactment of the Companies Act 2014. The Bill also (1) provides for the licensing, regulation and supervision of insolvency practitioners; (2) ensures that separate legislation and regulations concerning collateral arrangements and securities prevail in the case of any conflict with the Insolvency Act 2011; (3) places responsibility for distributing the report on the outcome of a creditors' meeting on the interim supervisor; and (4) ensures that, when considering the appointment of a liquidator on the public interest ground, the Court includes the interests of the public outside Gibraltar. The Bill also makes a few changes of terminology, e.g. "prescribed form" to "specified form".

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