GUIDE

APPLEBY

GUIDE TO COMPANIES IN MAURITIUS

CONTENTS

PREFACE

This is the sixth edition of the Guide, which we have produced for the information of our clients and professional colleagues. This edition takes account of changes brought about by the Companies Act 2001 and the Financial Services Act 2007.

This Guide is divided into five parts: 1) Mauritian Companies; 2) Foreign Companies in Mauritius; 3) Compromises with Creditors, Arrangements, Amalgamations and Minority Buy-out Rights; 4) Mergers and Takeovers; and 5) General Information.

Under the heading of General Information, we have dealt with matters such as banking facilities in Mauritius, accountants, registers and inspection, and other topics.

This Guide is concerned primarily with "global business companies" and "foreign companies"; little reference has, therefore, been made to those provisions of the Companies Act 2001 which regulate the carrying on of business by domestic companies in Mauritius.

All references in this Guide to "dollars" or "$" are to US dollars, and all references to "rupees" or "Rs" are to Mauritian rupees.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, please use the contact information provided at the end of this Guide.

Appleby
Mauritius
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1. INTRODUCTION

Mauritius' statute law on companies is contained in the Companies Act 2001 (the **Companies Act**), which was modelled after its counterpart from New Zealand. The Law Commission endorsed the view that: (i) the enabling function of the company law should be seen as a standard contract that reduced the costs of organising a business enterprise; and (ii) the regulatory function should protect against abuse of management power while providing protection for minority shareholders and creditors where the market failed. The goal was for the regulation of corporate activity to be commensurate with the real danger of abuse while not inhibiting legitimate business activity. The Law Commission determined that the most appropriate legislation would be primarily enabling in form, rather than regulating, except where the risk of abuse was clear, and from these principles the Companies Act was formed. The Companies Act has been regularly amended by the legislature to keep track of the changes in law having an incidence on Mauritius incorporated companies.

All references, however, to legislative provisions herein are to the Companies Act 2001, unless otherwise stated.

2. MAURITIAN COMPANIES

2.1 Classification

The Companies Act provides for several types and categories of companies (§21(2)):

Company Types	Company Categories
Companies limited by shares	Private Company, i.e. a company that does not have more than 25 shareholders
Companies limited by guarantee	Small Private Company, i.e. a company without a Category 1 Global Business Licence and the turnover of which is less than Rs30 million
Companies limited by shares and guarantee	Public Company, i.e. a company that is not a private company
Unlimited Companies	

It should be noted that the Companies Act provides the possibility for a foreign company to register in Mauritius. Companies may also be set up in Mauritius as Limited Life Companies.

The now repealed Financial Services Development Act 2001 (the **FSDA**) first introduced in Mauritius the concept of: (i) "qualified global business", defined as being any business or other activity carried out from Mauritius, by any entity, preferably corporate in nature, with persons ordinarily resident outside Mauritius and conducted in a currency other than the Mauritius Rupee; and (ii) "global business companies," being companies holding either a Category 1 (formerly Offshore Companies) or a Category 2 (formerly International Companies) Global Business Licence (a **GBL**) eligible to conduct qualified global business from Mauritius. The FSDA has now been repealed by the FSA, which has revamped the meaning of qualified global business, now referred to as "Global Business". Any resident corporation which proposes to conduct business outside Mauritius may apply to the Financial Services Commission (the **Commission**) for a Category 1 Global Business Licence or a Category 2 Global Business Licence. However, the Commission may, subject to such terms and conditions as it may determine, give its approval in writing for a corporation holding a Category 1 Global Business Licence to:

- conduct business in Mauritius;

- deal with a person resident in Mauritius or with a corporation holding a Category 2 Global Business Licence; or
- hold shares or other interests in a corporation resident in Mauritius.

Dormant companies are solely mentioned within the context of this Guide as they are exempted from having their accounts audited and from paying certain fees, although they must still file accounts and returns as required under the Companies Act. A dormant company is defined as having no significant accounting transactions (excluding payment of bank charges, licence fees and compliance costs, if any) over an extended period of time (§293), but a company may also declare itself dormant upon passing a special resolution (§294). The company must then file the resolution with the Registrar of Companies (the **Registrar**) at the Division of Companies within 14 days of the date of the resolution (§294(3)).

(a) **Category 1 Global Business Licence**

An application for a Category 1 Global Business Licence (a **GBL1**) may only be made through a management company in such form as may be approved by the Commission (§72(1) FSA).

Any entity holding a GBL1 is allowed to undertake from within Mauritius any business activity which is not illegal or against public policy and which would not cause prejudice to the good repute of Mauritius as a centre for financial services (§72(4) FSA). A further licence will need to be obtained by the company if it is to carry on financial or investment services.

In considering an application for or a renewal of a GBL1, the Commission shall have regard to whether the conduct of business will be or is being managed and controlled from Mauritius. In determining whether the conduct of business will be or is being managed and controlled from Mauritius, the Commission shall have regard to such matters as it may deem relevant in the circumstances and without limitation to the foregoing may have regard to whether the corporation (§71(4) FSA):

- shall have or has at least two directors, resident in Mauritius, of sufficient calibre to exercise independence of mind and judgment;
- shall maintain or maintains at all times its principal bank account in Mauritius;
- shall keep and maintain or keeps and maintains, at all times, its accounting records at its registered office in Mauritius;
- prepare or proposes to prepare its statutory financial statements and causes or proposes to have such financial statements to be audited in Mauritius; and
- provides for meetings of directors to include at least two directors from Mauritius.

Recently, the Commission has amended the Guide to Global Business Companies to provide for additional factors that the Commission will take into consideration in determining whether the corporation is managed and controlled from Mauritius. As such the Commission will also have regard to:

- whether the directors have the capacity and are/will be able to perform their duties in accordance with the law and regulatory requirements;
- GBC 1 entities which are authorised/licensed as a collective investment scheme, closed end fund or external pension scheme, is administered from Mauritius; and
- whether a corporation meets at least one of the following criteria:
    - the corporation has or shall have office premises in Mauritius;
    - the corporation employs or shall employ on a full time basis at administrative/technical level, at least one person who shall be resident in Mauritius;
    - the corporation's constitution contains a clause whereby all disputes arising out of the constitution shall be resolved by way of arbitration in Mauritius;

- the corporation holds or is expected to hold within the next 12 months, assets (excluding cash held in bank account or shares/interests in another corporation holding a Global Business Licence) which are worth at least USD100,000 in Mauritius;
- the corporation's shares are listed on a securities exchange licensed by the Commission;
- it has or is expected to have a yearly expenditure in Mauritius which can be reasonably expected from any similar corporation which is controlled and managed from Mauritius.

Applications to the Commission can only be submitted through a duly licensed management company and must be accompanied by the prescribed processing fees, a law practitioner's certificate certifying that the application complies with the laws of Mauritius and any other information which the Chief Executive of the Commission may request (§72 FSA).

In addition to companies, trusts, partnerships (including a limited partnership or a "société") and Foundations may apply for a GBL1. With regards to companies, both public and private companies in Mauritius, as well as foreign companies, may apply for a GBL1.

A company may apply for a GBL1 concurrently with the incorporation process. Once incorporated and the applicant has accepted any conditions as may be laid down by the Commission, the latter shall then issue the GBL1 after the payment of the prescribed licence fee, which is renewable every year.

A GBL1 may also be applied for upon the registration in Mauritius of a branch of a foreign company (or even by way of continuation where allowed by law in the country of origin). The branch of a foreign company may then have access to the various tax treaties available through Mauritius, provided that the Commissioner of Tax is adequately satisfied that effective control and management of the foreign company is in Mauritius. The opportunity for continuing a company originally registered in a foreign jurisdiction with a GBL1 allows the foreign company to benefit from relief on its existing holdings if that country has a double taxation treaty with Mauritius.

GBL1 holders qualify for protection under the various tax treaties to which Mauritius is a party, provided they fall within the definition of "resident" under the taxation laws of Mauritius. In order to satisfy this requirement, the company will need to have its central management and control in Mauritius.

A GBL1 company is generally required to file with the Commission its annual audited financial statements within six months after the close of its financial year, prepared in accordance with International Financial Reporting Standards and audited in accordance with the International Standards on Auditing, and such other standards as may be acceptable under the Financial Reporting Act 2004, by an audit firm approved by the Commission.

A GBL1 company must have a minimum of one company secretary, who must be a natural person ordinarily resident in Mauritius, although a corporation may act as secretary with the approval of the Registrar and subject to certain specified conditions.

(b) **Category 2 Global Business Licence**

An application for a Category 2 Global Business Licence (a **GBL2**) may only be made through a management company in such form as may be approved by the Commission (§72(1) FSA).

Any entity holding a GBL2 is allowed to undertake from within Mauritius any activity other than those activities listed in the Fourth Schedule of the FSA, which are:

- banking;

- financial services (see Schedule 1 of this Guide for a full list of "financial services");
- carrying out the business of holding or managing or otherwise dealing with a collective investment fund or scheme as a professional functionary;
- providing of registered office facilities, nominee services, directorship services, secretarial services or other services for corporations;
- providing trusteeship services by way of business.

A significant difference between a GBL1 and a GBL2 is that a GBL2 holder is exempted from the provisions of the Income Tax Act 1995 (the **Income Tax Act**) and is deemed to be 'non-resident' for tax purposes.

A GBL2 provides for greater flexibility and it is a suitable vehicle for holding and managing private assets. However it is not allowed to raise capital from the public or to conduct any financial services or to act as a fiduciary.

Under the FSA, only private companies may apply for a GBL2 (§71(3) FSA). Like an application for a GBL1, it must be accompanied by the incorporation documents and a law practitioner's certificate certifying that the application complies with the laws of Mauritius.

Once the company is incorporated and the applicant signifies his acceptance of the conditions laid down by the Commission, the latter shall issue the GBL2 after the payment of the prescribed fee, which is renewable every year.

There are no statutory requirements for a GBL2 company to have a secretary in Mauritius or otherwise. However, a corporation holding a GBL2 shall, at all times, have a registered agent in Mauritius who shall be a management company (§76 FSA).

2.2 Incorporation

An application for incorporation must be made through a licensed management company, and must be preceded with the reservation of a name with the Registrar. The application is then submitted to the Registrar, supplying the name of the proposed company, whether the company is to be limited or unlimited, whether the company is to be a private company, the proposed registered office, and the full name and address of each applicant, director and secretary of the company (§23).

Where the Registrar is satisfied that the application for incorporation of a company complies with the Companies Act and upon payment of the prescribed fees, the Registrar will (§24):

- enter the particulars of the company on the registers;
- assign a unique number to the company as its company number; and
- issue a certificate of incorporation in the prescribed form.

Global business companies may apply concurrently to the Commission to obtain either a GBL1 or GBL2.

The length of time for incorporation, registration and licensing of a new Mauritius entity is dependent upon whether it will be seeking a GBL1 or GBL2, the latter taking only two to three business days while the former up to seven to ten business days by the relevant regulatory bodies, once all the necessary documentation has been received and submitted. The incorporation process could take longer should either the Registrar or the Commission request additional documentation subsequent to the initial submission in the course of their consideration of the application.

2.3 Company Constitution

A certificate of incorporation is conclusive evidence that all the requirements of the Companies Act as to incorporation have been complied with and, on and from the date of incorporation stated in the certificate, the company is incorporated under the Companies Act (§25). A company incorporated

under the Companies Act shall be a body corporate with the name by which it is registered and continues in existence until it is removed from the register of companies (§26) (see 6.4 below).

To simplify the registration process and the operation of companies, the Companies Act dispensed with the requirement that a company should have a memorandum and articles of association. However, a company may choose to have a constitution, although there is no statutory requirement to have one as the Companies Act comprehensively sets out the rights, powers, duties and obligations of the company, the board, and each director and shareholder (§41).

(a) **Constitution**

Under a constitution, the company, the board, and each director and shareholder still have the same rights, powers, duties and obligations set out in the Companies Act, except to the extent that they are restricted, limited or modified by the company's constitution in accordance with the Companies Act (§40(1)). In effect, a company's constitution acts as a binding contract between (i) the company and each member or shareholder; and (ii) the members or shareholders themselves (§43). Where a company does not have a constitution, the rights, powers, duties, and obligations of the company, the Board, each director, and each shareholder of the company shall be those set out in the Companies Act (§41).

Where a company does not have a constitution, the shareholders or members of a company may choose to adopt a constitution post-incorporation at any time by way of special resolution (§44(1)). Where a company already has a constitution, the shareholders may by way of special resolution, alter or revoke the constitution of the company (§44(2)). Shareholders, under the Companies Act, already benefit from enforcement rights and the ability to obtain remedies for breach of any constitutional provision. Companies incorporated prior to the commencement of the Companies Act may also retain their memorandum of association and articles of association as its constitution, but such companies are prohibited from altering any of the existing provisions unless and until the two separate documents are replaced by a single consolidated document which will thereafter be referred to as the constitution (§44(3)). Within 14 days of the adoption of a constitution by a company, or the alteration or revocation of the constitution of a company, as the case may be, the Board shall cause a notice in a form approved by the Registrar to be delivered to the Registrar for registration (§44(5)).

(b) **Objects**

Under the Companies Act, a company is no longer required to state its objects, unless its constitution requires otherwise. However, if a company wishes to state its objects, then its business purpose will be restricted to those specific objects.

Subject to the Companies Act and to any other enactment, a company has full rights, powers, privileges and capacity to carry on or undertake any business or activity, do any act, or enter into any transaction from both within and outside Mauritius (§27(1)). The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company only if the provision restricts the capacity of the company or those rights, powers, and privileges (§27(3)). Where the constitution of a company sets out the objects of the company, there is likely to be a restriction in the constitution on carrying on any business or activity that is not within those objects, unless the constitution expressly provides otherwise. The Companies Act also provides that, notwithstanding any restrictions prescribed by the company's constitution on the business or activities in which the company may engage in, the capacity and powers of the company will not be affected by those restrictions and no act of the company and no contract or other obligation entered into by the company and no transfer of property to or by the company will be invalid by reason only that it was done in contravention of those restrictions (§28(2)).

In addition, a person is not affected by, or deemed to have notice or knowledge of the contents of a company's constitution (or any other document relating to a company) merely because the constitution (or document) is registered with the Registrar or is available for inspection at an office of the company (§30).

(c) **Names and Change of Name**

The Registrar will not register a company under a name or register a change of the name of a company unless the name is available (§31). Furthermore, the Registrar will not reserve a name that is identical to a name of an existing company, or statutory corporation or so nearly resembles that name as to be likely to mislead, unless the existing company or statutory corporation is in the course of being dissolved and signifies its consent for its name to be used by the Registrar (§35(1)). Unless the Minister has given a written consent, The Registrar will not register a company with a name that includes the word "Authority", "Corporation", "Government", "Mauritius", "National", "President", "Presidential", "Regional", "Republic", "State", or any other word that the Registrar considers, gives a suggestion, or is likely to give a suggestion, that it enjoys the patronage of the Government or of a statutory corporation, or of the Government of any other state, the word "Municipal" or "Chartered" or any other word which in the Registrar's opinion suggests, or is likely to suggest, connection with a local authority in Mauritius or elsewhere; the word "co-operative"'; the words "Chamber of Commerce"(§35(2)). In addition, the Registrar will not register a name that he considers offensive (§34(2)(d)).

As the name reservation fee is solely applicable upon a successful reservation, there is no additional financial deterrent from trying to register a new name that was not originally accepted by the Registrar.

For all companies, other than global business companies, where the liability of the shareholders of the company is limited, the company name must end with the word "Limited" or "Limitée" or, their respective abbreviations, "Ltd" or "Ltée" (§32).

A company may, subject to its constitution, change its name by passing a special resolution, which must accompany an application to change the name of a company (in the prescribed form) and be further accompanied by a notice reserving the name (§36(1)). Where the Registrar is satisfied that the above requirements are satisfied, the Registrar will record the new name of the company, record the change of name on its certificate of incorporation and require the company to cause a notice to that effect to be published in such manner as the Registrar may direct (§36(2)). A change of name of a company will take effect from the date of the certificate and will not affect the rights or obligations of the company or any legal proceedings by or against the company, and legal proceedings that might have been continued or commenced against the company under its former name may be continued or commenced against it under its new name (§36(3)).

A company must ensure that its name is clearly stated: in every written communication sent by, or on behalf of, the company; and on every document issued or signed by, or on behalf of, the company that creates a legal obligation of the company (§38(1)). It is important to note that where the name of a company is incorrectly stated in a document which evidences or creates a legal obligation of the company and the document is issued or signed by or on behalf of the company, every person who issued or signed the document may be liable to the same extent as the company (§38) unless:

> "(a) the person who issued or signed the document proves that the person in whose favour the obligation was incurred was aware at the time the document was issued or signed that the obligation was incurred by the company; or

(b) the court before which the document is produced is satisfied that it would not be just and equitable for the person who issued or signed the document to be so liable. (§38(2))"

(d) **Amendment of Constitution**

As stated above, the shareholders may alter or revoke the company's constitution at any time by way of special resolution (§44(2)). Companies incorporated prior to the commencement of the Companies Act may also retain their memorandum of association and articles of association as its constitution, but are prohibited from altering any of the existing provisions unless and until the two separate documents are replaced by a single consolidated document which will thereafter be referred to as the constitution (§44(3)). The board must file a notice of any adoptions, alterations or revocations with the Registrar within 14 days of the adoption, alteration or revocation taking place (§44(5)).

(e) **Fetter of Company's Power**

Following the principles enunciated in the UK case of *Russell v Northern Bank Development Corporation Ltd* [1992] 3 All ER 588 (HL) a company is barred from contractually agreeing to fetter its statutory powers, i.e. those powers reserved to the shareholders. Thus, for example, a contract made by a company that it will not exercise its statutory power to alter its articles is deemed to be unenforceable.

This bar against the company fettering its statutory powers is not specifically included in the Companies Act. It is also important to note that §27 provides that while a company has "full capacity to carry on or undertake any business or activity, do any act or enter into any transaction", these powers are expressed to be subject to this Act, and any other enactment, and the constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company only if the provision restricts the capacity of the company or those rights, powers and privileges. Accordingly, the constitution of a company may fetter the powers conferred to it by the Companies Act.

That being said, the Companies Act does provide that the company may not fetter its powers in certain instances. For example, and notwithstanding the constitution of a company, the following powers may only be exercised by the shareholders by special resolution (§105(1)):

- to alter, revoke or adopt a constitution of the company;
- to reduce the stated capital of the company;
- to approve a "major transaction";
- to approve an amalgamation of the company; and
- to put the company into liquidation.

Apart from a resolution to put the company into liquidation, which may not be rescinded in any circumstances, a resolution concerning any of the above may only be rescinded by a special resolution (§105(2) and (3)).

(f) **Continuance and Discontinuance**

(i) **Continuance**

The Companies Act allows for the registration and continuation of foreign companies as any type of company admitted under the Companies Act providing: the company is permitted by the laws of its "home" jurisdiction to transfer its incorporation; the company has complied with the requirements of that law in relation to the transfer of its incorporation; and, where that law does not require the shareholders (or a specified proportion of them) to consent to the transfer, the transfer has been consented to by not less than 75% of the shareholders and at least 21 days' notice prior to the meeting

specifying the company's intention to transfer was given to the shareholders (§297). However, a foreign company may not be registered as and continue as a company under the Act: where it is in the process of winding up or liquidation; where a receiver or manager has been appointed, whether by court order or not, in relation to the property of the company; or where there is a scheme or order in force in relation to the company whereby the rights of the creditors are suspended or restricted (§298).

In all circumstances, a foreign company may not be registered as a company in Mauritius unless it can satisfy a solvency test immediately after becoming registered.

An application for a foreign company to continue into Mauritius is made by filing the following documents with the Registrar (§296):

- a certified copy of the certificate of incorporation or other such document that evidences the incorporation of the company;
- a copy of the resolution authorising the continuation of the company in Mauritius;
- a certified copy of the documents containing its constitution;
- a statement of the charges on the company's assets;
- documentary evidence which satisfies the Registrar that the above requirements in relation to the laws of the "home" jurisdiction have been satisfied;
- the documents and information that are required to incorporate a company if it were being a newly incorporated company under the Companies Act;
- documentary evidence which satisfies the Registrar that the company is in good standing in the country of its incorporation and in the countries in which it has any significant activity; and
- such other document or information as may be required by the Registrar.

Upon receiving a properly completed application and on being satisfied that the requirements for registration under the Companies Act have been complied with, the Registrar will enter on the register of companies the particulars of the continuing company and issue a certificate of registration in the prescribed form (§299(1)). Once issued, the certificate of registration constitutes conclusive evidence that all the requirements of the Companies Act pertaining to registration have been complied with, and that the continuing company is now registered as from the date of registration specified in the certificate (§299(2)).

It is important to note that no new legal entity is created as a result of a continuing company becoming registered in Mauritius, and the identity of the body corporate constituted by the continuing company or its continuity as a legal entity will not be prejudiced or affected. The property, rights or obligations of the continuing company will not be affected nor will any proceedings by or against the continuing company (§300).

(ii) **Discontinuance**

Mauritian companies may also transfer their corporate entity to other jurisdictions, and thereby be removed from the register of companies for the purposes of becoming registered or incorporated under the law in force in, or in any part of, another country (§301).

A Mauritian company is prohibited from applying for discontinuation out of Mauritius where: it is in liquidation or an application has been made to the court to put the company into liquidation; a receiver or manager has been appointed, whether by a court or not, in relation to the property of the company; or the Mauritian company has entered into a compromise with creditors or a class of creditors (§305(1)). Furthermore,

a company cannot be removed from the register unless it can satisfy the solvency test immediately before its removal (§305(2)).

A company may only apply to be removed from the register of companies if the application has been approved by a special resolution of the shareholders (§303). The application by a discontinuing company for its removal from the register of companies must be made in a form approved by the Registrar and must be accompanied by (§302):

- documentary evidence which satisfies the Registrar that all of the above has been complied with;
- documentary evidence which satisfies the Registrar that the company has given public notice stating that it intends after the date specified in the notice (not being less than 28 days after the date of the notice) to apply for discontinuance for the purpose of becoming incorporated under the laws of another country (and specifying that country);
- written notice from the Commissioner of Income Tax and the Commissioner for Value Added Tax that there is no objection to the company being removed from the register;
- documentary evidence which satisfies the Registrar that the company is to be incorporated under the laws in force in another country; and
- such other document or information as may be required by the Registrar.

Upon the Registrar receiving an application satisfying all the requirements under the Companies Act, the Registrar will issue a notice removing the discontinuing company from the register. The discontinuing company will only be deemed to be removed from the register once that notice is registered under the Companies Act (§306).

The removal of a discontinued company from the register of companies does not result in the identity of the body corporate or its continuity as a legal person being prejudiced or affected. The property, rights, or obligations of that body corporate as well as any proceedings by or against it will not be affected. Likewise, proceedings that could have been commenced or continued by or against a discontinuing company before it was removed from the register may be commenced or continued by or against the body corporate that continues in existence after its removal from the register (§307).

2.4 Management and Administration

(a) Registered Office, Registered Agent and Management Company

Every company must have a registered office in Mauritius to which all communications and notices may be addressed and which shall constitute the address for service of legal proceedings on the company (§187(1)). Global business companies must also have the name of its management company or its registered agent, as the case may be, and the words “Registered Office” displayed permanently in a conspicuous place in legible romanised letters on the outside of its registered office (Fourteenth Schedule, Part I, paragraph 15).

GBL1 Companies must, at all times, be administered by a management company and (§71(5) FSA) and all GBL2 companies must have a registered agent in Mauritius, which must be a management company (§76(1) FSA). A registered agent is responsible for providing such services as the company may require in Mauritius including the filing of any return or document required under the FSA and the Companies Act; and the receiving and forwarding of any communications from, and to, the Commission or the Registrar (§76(2) FSA). A registered agent will be subject to such obligations in relation to appointment, change of registered address or registered agent, and such other matters for the purpose of the above, as may be prescribed (§76(3) FSA).

(b) **Constitution**

See paragraph 2.3(a) above.

(c) **Requirements for Officers or Representatives in Mauritius**

As stated above, a GBL1 company must have a minimum of one company secretary, who must be a natural person ordinarily resident in Mauritius (§163), although a corporation may act as secretary with the approval of the Registrar and subject to certain specified conditions (§164). It is worth noting that the Companies Act also provides that a secretary shall have certain duties, such as providing the Board with guidance as to its duties, responsibilities and powers (§166). There are no statutory requirements for a GBL2 company to have a secretary in Mauritius or otherwise.

(d) **Directors**

While the Companies Act decrees that the director(s) of a company (together the **Board**) are responsible for and shall have all the powers necessary for managing, directing or supervising of the business and affairs of the Company (§129(1)), there is no precise definition under Mauritian law as to who is a "director". The Companies Act defines the term as including "any person occupying the position of director by whatever name called" and this definition includes an alternate director but does not include a receiver (§128).

Subject to any limitations in the company's constitution, the business and affairs of a company are managed by or under the direction or supervision of its Board (§129). An important point to note is that despite the power of the Board to manage the affairs of a company, a company is restricted from entering into a "major transaction" unless it has been approved by a special resolution of the shareholders, or is contingent on a special resolution being passed (a major transaction being defined as one that will result in an increase or decrease of assets, liabilities, rights or interests equal to 75% or greater of the company's assets prior to such a transaction) (§130). However, investment companies holding a GBL1 may enter into major transactions without having to obtain the approval of the shareholders, and the shareholders of any private global business company may, by unanimous resolution, agree that the above requirements relating to major transactions do not apply (Fourteenth Schedule, Part I, paragraph 11).

The first directors of a company are those persons named in the application for registration or amalgamation proposal (§135(1)). All companies must have at least one director who is ordinarily resident in Mauritius (§132) and that director must be a natural person (§133(1)). These requirements are waived, however, for GBL2 companies, i.e. non-resident and corporate directors are permitted (Fourteenth Schedule, Part II, paragraph 1). A person must not be appointed as a director unless that person has consented in writing to be a director and certified that he is not disqualified from being appointed or holding office as a director of a company (§134).

The Board may, subject to the Companies Act and the company's constitution, delegate some of its powers to a committee of directors, a director or employee of the company, although the Board remains responsible for the exercise of the power by that delegate as if the Board had directly exercised the power itself (§131). However, it should be noted that the Companies Act provides for a list of powers of the director which cannot be delegated (Seventh Schedule).

Directors may be appointed by ordinary resolution of the shareholders, unless the company's constitution provides otherwise (§137). A director of a public company may be removed from office by an ordinary resolution passed at a meeting called for the purpose that includes the removal of that director (§138). A director of a private company may only be removed from office by special resolution of the shareholders passed at a meeting called for that purpose (§138(2)).

Under the Companies Act, where a company has only one shareholder (who is also the director of the company) for a continuous period of six months, the sole shareholder/director must file a notice with the Registrar nominating a person to be the secretary of the company in the event of the death of the sole shareholder and director (§140(3)). This provides a very useful succession mechanism for sole shareholder/directors.

It is worth noting that under the Companies Act, the acts of a person as a director will still be valid even though that individual's appointment was defective or the individual was not qualified for appointment as a director (§141).

Global business companies must keep a register of directors containing (Fourteenth Schedule, Part I, paragraph 3(1)):

- the names and addresses of the persons who are directors;
- the date on which each person whose name is entered on the register was appointed as a director; and
- the date on which each person named as a director ceased to be a director.

The Board must give notice to the Registrar in the approved form of any change in the directors or the secretary of a company, or of any change in the name or the residential address of a director or secretary (§142(1)). The notice must contain the following details (§142(2)):

- the date of the change;
- the full name and residential address of every person who is a director or secretary, or person nominated where the company has only one shareholder/director; and
- the form of consent and the certification that the new director or secretary is not disqualified from being appointed as director or secretary.

The notice must be delivered to the Registrar within 28 days of the change. Where the Board fails to comply with the above requirements, every director and any secretary will have committed an offence and will be liable to a fine (not exceeding 200,000 rupees) (§142(3)).

(i) **Director's Duties**

The duties of directors have been extensively codified in the Companies Act such that every director, in exercising his powers and discharging his duties, must, *inter alia* (§143(1)):

- exercise their powers in accordance with the Companies Act and within the limits and subject to the conditions and restrictions established by the company's constitution;
- obtain the authorisation of a meeting of shareholders before doing any act or entering into any transaction for which the authorisation or consent of a meeting of shareholders is required by the Companies Act or by the company's constitution;
- exercise their powers honestly in good faith and in the best interests of the company and for the respective purposes for which such powers are explicitly or impliedly conferred;
- exercise the degree of care, diligence and skill required that a reasonably prudent person would exercise in comparable circumstances; and
- not agree to the company incurring any obligation unless the director believes at that time, on reasonable grounds that the company shall be able to perform the obligation when it is required to do so;
- account to the company for any monetary gain, or the value of any other gain or advantage, obtained by them in connection with the exercise of their powers, or

by reason of their position as directors of the company, except remuneration, pensions provisions and compensation for loss of office in respect of their directorships of any company which are dealt with in accordance with §159 of the Companies Act;

- account to the company for any monetary gain, or the value of any other gain or advantage, obtained by them in connection with the exercise of their powers, or by reason of their position as directors of the company, except remuneration, pensions provisions and compensation for loss of office in respect of their directorships of any company which are dealt with in accordance with §159;
- not make use of or disclose any confidential information received by them on behalf of the company as directors otherwise than as permitted and in accordance with §153;
- not compete with the company or become a director or officer of a competing company, unless it is approved by the company under §146;
- where directors are interested in a transaction to which the company is a party, disclose such interest pursuant to sections 147 and 148;
- not use any assets of the company for any illegal purpose or purpose in breach of paragraphs (a) and (c), and not do, or knowingly allow to be done, anything by which the company's assets may be damaged or lost, otherwise than in the ordinary course of carrying or its business;
- transfer forthwith to the company all cash or assets acquired on its behalf, whether before or after its incorporation, or as the result of employing its cash or assets, and until such transfer is effected to hold such cash or assets on behalf of the company and to use it only for the purposes of the company;
- attend meetings of the directors of the company with reasonable regularity, unless prevented from so doing by illness or other reasonable excuse; and
- keep proper accounting records in accordance with sections 193 and 194 and make such records available for inspection in accordance with sections 225 and 226.

These duties are coupled with the overriding requirement that every officer (which includes director or secretary) must "exercise the powers and discharge the duties of his office honestly, in good faith and in the best interests of the company; and the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" (§160(1)).

The Companies Act provides that directors, when exercising their powers and performing their duties, are entitled to rely upon the reports, statements, financial data, other information prepared or supplied, and on professional or expert advice given by: an employee whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; a professional adviser or expert who the director believes is within the person's professional or expert competence; and another director, or committee of directors upon which the director did not serve in relation to matters within the director's or committee's designated authority (§145(1)). The above only applies, however, where the director acts in good faith; makes proper inquiry where the need for inquiry is indicated by the circumstances; and has no knowledge that such reliance is unwarranted (§145(2)).

A director will be in breach of his duties to the company if: the director competes with the company; becomes a director or officer of a competing company (§143(1)(h)); or uses information about the company that he came across as a result of his role in the company (§153(1)(d)), unless the company specifically approves such actions in

accordance with the Companies Act, e.g. a form of resolution which has been circulated to all the members and is signed by 75% of all members entitled to attend and vote at a meeting of shareholders.

In addition, a director who has information which would have been only obtainable through his directorship, must not disclose that information to any person, or make use of or act on that information, except (§153):

- for the purposes of the company;
- as required by law;
- in any circumstances authorised by the company's constitution;
- when approved by the company; or
- when authorised by the Board to a person whose interests the director represents or a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's powers or duties (subject to the director recording such particulars in the interests register where it has one).

The Board may authorise a director to disclose , make use of, or act on information "where it is satisfied that to do so is not likely to prejudice the company" (§153(3)). Further, any monetary gain made by a director from the use of information which the director could have only obtained through his position as a director, must be accounted for to the company (§153(4)).

The Companies Act also responds to the potential for conflict confronting directors in group company structures and joint venture scenarios. In doing so, the Companies Act has extended the duties of directors beyond the traditional principle that fiduciary duties are owed only to the company. The Companies Act (§143(2)-(4)) provides for the following:

- A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company, act in a manner which he believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
- A director of a company that is a subsidiary, other than a wholly-owned subsidiary, may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company and with the prior agreement of the shareholders (other than its holding company), act in a manner which he believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
- A director of a company incorporated to carry out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he believes is in the best interests of a shareholder or Shareholders, even though it may not be in the best interests of the company.

The Companies Act also provides that the above duties are owed to the company and not to the shareholders, debenture holders or creditors of the company (§143(5)(a)). In addition to a derivative action (see paragraph 2.4(d)(ii) below) or any other lawful remedy available to a shareholder, any member or debenture holder may apply to the court for: a declaration that an act of transaction, or proposed act, by any director constitutes a breach of any of their fiduciary duties under the Companies Act; and an

injunction to restrain any director from doing any proposed act in breach of their fiduciary duties (§143(5)(b)).

Directors also have a duty to call a Board meeting where they believe that the company is unable to pay its debts as they fall due, to consider whether the Board should appoint a liquidator or an administrator (§162).

(ii) **Director's Interests**

The Companies Act provides for a number of situations where a director may, either directly or indirectly, be materially interested in a transaction (§147(1)(a) to (e)). A director must disclose to the Board the fact that he may have a monetary or other interest in a transaction entered into by the company, as soon as the director becomes aware of that fact (and make an entry into the interests register, if the company has one) (§148(1)), unless the transaction is between the director and the company and is made in the ordinary course of business and on usual terms and conditions (§148(2)).

A failure by a director to comply with the above requirements will not affect the validity of a transaction entered into by the company or the director (§148(4)), though the transaction may subsequently be avoided by the company provided it does so within six months after the transaction is disclosed to shareholders, e.g. by the company's annual report or otherwise (§149(1)), unless the company received "fair value" under the transaction (§149(2)). It is a rebuttable presumption that the company received "fair value" if the transaction was entered into on usual terms and conditions and in the ordinary course of its business (§149(4)). The avoidance of such a transaction will not affect the title or interest of a third party in or to property which that person has acquired where the property was acquired from a person other than the company for valuable consideration, and without knowledge of the circumstances of the initial transaction (§150).

Subject to the company's constitution, a director who is interested in a transaction entered into, or to be entered into, by the company, may (§152):

- in the case of a public company, not vote on any matter relating to the transaction;
- in the case of a private company, vote on any matter relating to the transaction provided he discloses his interest in accordance with §148 of the Companies Act;
- attend a meeting of directors at which a matter relating to the transaction arises and be included among the directors present at the meeting for the purpose of a quorum;
- sign a document relating to the transaction on behalf of the company; and
- do any other thing in his capacity as a director in relation to the transaction,
- as if the director was not interested in the transaction.

The Companies Act provides for situations where a director must disclose matters relating to a share dealing by directors and, in certain situations, a director is restricted in dealing in shares of the company. For more specific advice, please refer to the contact details at the end of this Guide.

(iii) **Indemnities and Insurance**

A company is prohibited from indemnifying or directly or indirectly insuring for costs incurred by a director or employee of the company or a related company in defending or settling any claim or proceedings relating to any liability for any act or omission of the director or employee when acting in their capacity as director or employee and any such indemnity given in accordance with the Companies Act will be void (§161(1) and (2)).

This restriction does not apply where liability is to a person other than the company (or related company), unless the liability is criminal in nature or it is in respect of a breach of fiduciary duty (§161(5)). Subject to its constitution, a company may indemnify a director (or employee) of the company (or a related company) for any costs incurred by him or the company in respect of proceedings that relates to liability for any act or omission of a director (or employee) in his capacity as a director (or employee), provided judgment is given in the director (or employee's) favour (§161(3)).

(e) **Board Meetings**

The convening and conduct of a Board meeting will be dependent upon the company's constitution but, in the event that the company does not have a constitution, then the Eighth Schedule of the Companies Act will apply to the proceedings of the Board.

A director may convene a meeting by sending notice to every director who is in Mauritius, which must include the date, time and place of the meeting, and the matters to be discussed (Eighth Schedule, paragraph 2). The meeting can then either be held in person at the date, time and place stated in the notice, or by means of audio, or audio and visual, communication, provided that all the directors can simultaneously hear each other and a quorum is present (Eighth Schedule, paragraph 3). A quorum can be fixed by the Board, but failing that it is not so fixed will be a majority of the directors (Eighth Schedule, paragraph 4). No business may be transacted unless a quorum is present (Eighth Schedule, paragraph 4).

Every director in attendance has one vote and the chairperson does not have a casting vote in the event of a split decision. A resolution of the Board is only passed if it is agreed to by all directors present or if a majority of the votes cast on it are in favour of it. It is a rebuttable presumption that a director present at a meeting is in favour of a resolution of the Board (Eighth Schedule, paragraph 5), i.e. express dissent is required to show that a director is not in favour of a resolution of the Board. Written resolutions are also permitted by the Companies Act provided it is signed or assented to by all directors then entitled to receive notice of a Board meeting, and it is as valid and effective as if it had been passed at a meeting of the Board duly convened and held (Eighth Schedule, paragraph 7).

The Board must ensure that all minutes of the proceedings at meetings of the Board, including all written resolutions are kept.

(f) **Annual Meetings**

The convening and conduct of an annual meeting of shareholders will be dependent upon the company's constitution but, in the event that the company does not have a constitution, then the Fifth Schedule of the Companies Act will apply to the proceedings of the annual meeting.

Every company must hold an annual meeting once in each calendar year, not later than six months after the company's balance sheet date, and not later than 15 months after the previous annual meeting (§115(1)). A newly incorporated company must hold its first annual meeting within 18 months of its incorporation, i.e. there is no obligation for a company to hold that meeting within the first calendar year of its registration (§115(2)). It is not necessary for private companies to hold an annual meeting; everything may be done by a written resolution (see paragraph 2.4(f)(iii) below) (§117(5)).

Written notice of the time and place of the meeting must be given to every shareholder, director, secretary and auditor of the company not less than 14 days before the meeting. The notice must state the nature of the business to be transacted and the text of any special resolution to be submitted to the meeting (Fifth Schedule, paragraph 2). However, an accidental omission to give notice or failure to receive notice of a meeting to or by a shareholder will not invalidate the proceedings of that meeting (Fifth Schedule, paragraph 2(d)).

Whilst a quorum number of shareholders must be present to constitute the meeting, the meeting may be held by means of audio, or audio and visual, communication, providing that all shareholders participating in the meeting can simultaneously hear each other throughout the meeting (Fifth Schedule, paragraph 3). Where a quorum is not present, no business may be transacted at a meeting of shareholders (Fifth Schedule, paragraph 4).

At the annual meeting, such matters to be considered, insofar as they have not already been dealt with by the company, include: the consideration and approval of financial statements; the receiving of any auditor's reports; the consideration of any annual report; the appointment of any directors whose appointment on an annual or rotational basis is required by the constitution of the company; and the appointment of any auditor (§115(4)). Where the financial statements are not approved at the annual meeting, they must be presented at a further special meeting called by the Board (§115(5)).

A shareholder may give written notice to the Board of a matter which the shareholder proposes to raise for discussion or for a resolution at the next meeting of shareholders at which the shareholder is entitled to vote. Depending on the length of the notice, either the shareholder or the company will bear the expense of giving notice to all other shareholders entitled to receive notice. In addition, where the directors intend that shareholders may vote on the proposal by proxy or by postal vote, they must give the proposing shareholder the right to include a statement (of not more than 1000 words) in support of the proposal, together with the name and address of the proposing shareholder (Fifth Schedule, paragraph 9).

The Board must ensure that minutes are kept of all proceedings at the meetings of shareholders and those minutes which have been signed as correct by the chairperson of the meeting are *prima facie* evidence of the proceedings, notwithstanding anything in the constitution (Fifth Schedule, paragraph 8).

(i) **Voting**

The Companies Act provides that "a share in a company shall confer on the holder the right to one vote on a poll at a meeting of the company on any resolution" (§46(2)(a)), though "shares in a company may not confer voting rights" (§46(5)(d)).

Where a meeting of the shareholders is held, and unless a poll is demanded, the method of voting will be either by a show of hands or by voice (e.g. if the meeting is conducted by telephone) (Fifth Schedule, paragraph 5). A declaration by the chairperson of the meeting that a resolution is carried by the requisite majority will be conclusive evidence of that fact unless a poll is demanded. Where a sum due to a company in respect of a share has not been paid, then that share may not be voted on at a shareholder's meeting (Fifth Schedule, paragraph 12).

A poll may be demanded by the following either before or after the vote is taken on a resolution:

- not less than five shareholders having the right to vote at the meeting;
- a shareholder or shareholders representing not less than 10% of the total voting rights of all shareholders having the right to vote at the meeting;
- a shareholder or shareholders holding shares in the company that confer a right to vote at the meeting and on which the aggregate amount paid up is not less than 10% of the total amount paid up on all shares that confer that right; or
- the chairperson of the meeting.

Where a poll is taken, votes must be counted according to the votes attached to the shares of each shareholder present in person or by proxy and voting.

A shareholder may exercise the right to vote either by being present in person or by proxy. A proxy must be appointed by notice in writing signed by the shareholder stating whether the appointment is for a particular meeting or a specified term (Fifth Schedule, paragraph 6).

Shareholders may also exercise the right to vote at a meeting by casting a postal vote (Fifth Schedule, paragraph 7).

Where two or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on a matter must be accepted to the exclusion of the votes of the other joint holders, notwithstanding anything in the company's constitution (Fifth Schedule, paragraph 11).

(ii) **Convening of a Special General Meeting on Requisition**

A special meeting of shareholders entitled to vote on an issue may be called by a person who is authorised by the constitution to call a meeting or the Board, and must be called by the Board on the written request of shareholders holding shares carrying together not less than 5% of the voting rights entitled to be exercised on the issue (§116).

(iii) **Resolutions in Writing**

The Companies Act permits shareholder written resolutions in lieu of a meeting. Notice is not a prerequisite (§117(7)), though a shareholder resolution in writing must be signed by not less than 75% or such other percentage as the company's constitution may require, whichever is greater, of the shareholders who would be entitled to vote on that resolution at a meeting of shareholders and who together hold 75% (or more if required by the constitution) of the votes entitled to be cast on that resolution. Provided that these requirements are met, the written resolution is valid, as if it had been passed at a meeting of those shareholders (§117(1)).

(iv) **Representation of Corporations at Meetings**

A body corporate which is a shareholder may appoint a representative to attend a meeting of shareholders on its behalf and in the same manner as that in which it could appoint a proxy (Fifth Schedule, paragraph 10).

(g) **Auditors**

With the exception of GBL2 companies and small private companies, all companies in Mauritius are required to have an auditor. The Companies Act provides that auditors must have certain qualifications or be approved by the Minister of Finance (the **Minister**) (§198 and §199).

The first auditor of a company may be appointed before the first annual meeting by the directors and, if so appointed, the auditor holds office until the conclusion of that meeting (§201(1)). Where an auditor has not been appointed before the first annual meeting, the company shall appoint the first auditor at a meeting of the company (§201(2)). Auditors hold office from the conclusion of one annual meeting until the conclusion of the next annual meeting, though they may be automatically reappointed unless, for example, the company passes a resolution at the meeting appointing another person to replace him as auditor, or the auditor is not qualified for appointment, or where the auditor has given notice to the company that he does not wish to be re-appointed (§200). The Companies Act provides for a specific process for the replacement of the auditor by the company, or where an auditor seeks to resign or not be reappointed (§202 and §203, respectively).

An auditor must ensure that, in carrying out his duties, his judgment is not impaired by reason of any relationship with, or interest in, the company or any of its subsidiaries (§204). The Companies Act also provides that an auditor has duties towards a debenture holder's representative where the company makes a borrowing (§208).

The auditor must make a report to the shareholders on the financial statements which have been audited and to this end, the Board must ensure that the auditor has access at all times to the accounting records and other documents of the company (§206). The Board must also ensure that the auditor is permitted to attend a meeting of the shareholders, and that the auditor receives all notices and communications that a shareholder is entitled to receive relating to the meeting, and may be heard at a meeting of the shareholders which he attends on any part of the business of the meeting which concerns him as auditor (§207). The auditor's report must, amongst other things, include (§205):

- the work done by the auditor;
- the scope and limitations of the audit;
- the existence of any relationship (other than that of auditor) which the auditor has with, or any interests in the company or any of its subsidiaries which the auditor may have, other than dealings with the company in the ordinary course of business not involving indebtedness to the company or a related company in an amount exceeding 10,000 rupees;
- whether, in the auditor's opinion, as far as it appears from an examination, proper accounting records have been kept by the company;
- whether the auditor has obtained all information and explanations that the auditor has required;
- whether, in the auditor's opinion, the financial statements and any group financial statements give a true and fair view of the matters to which they relate, and where they do not, the respects in which they fail to do so, and whether the financial statements have been prepared in accordance with "International Accounting Standards"; and
- whether, in the auditor's opinion, the financial statements and any group financial statements comply with provision as regards to the contents and form of the financial statements or that of group financial statements, as the case may be, and where they do not, the respects in which they fail to do so.

(h) **Records and Financial Statements**

A company must keep at its registered office (§190) the following records:

- the constitution of the company;
- minutes of the meetings and resolutions of shareholders within the last seven years;
- an interests register;
- minutes of all meetings and resolution of directors and directors' committees within the last seven years;
- certificates given by directors under the Companies Act within the last seven years; the full names and addresses of the current directors;
- copies of all written communications to all shareholders or all holders of the same class of shares during the last seven years, including annual reports;
- copies of all financial statements and group financial statements required to be completed by §210 for the last seven completed accounting periods of the company;
- accounting records for the current accounting period and for the last seven completed accounting periods of the company;
- the share register; and
- the copies of instruments creating or evidencing charges required to be registered.

All companies must maintain company records and accounting records or financial statements (§210-214). GBL1 companies may prepare their financial statements in accordance with any

other internationally accepted accounting standards (Fourteenth Schedule, Part I, paragraph 5). GBL2 companies must prepare financial summaries and there is no obligation that same must be audited.

With the exception of GBL1 companies, who must file the company's financial statements and auditors' reports with the Commission, and small private companies, all Mauritian companies must, within 28 days after the financial statements and any group financial statements are required to be signed, register copies of those statements together with a copy of the auditor's report with the Registrar (§215). Global business companies are not required to prepare an annual report on the affairs of the company (Thirteenth Schedule, Part I). GBL2 Companies shall file the financial summary with the Commission once in every year.

(i) **Employment of Personnel**

Work permits are necessary for non-Mauritians to be employed. Work permits are issued for a minimum period of six months and a maximum of three years, with no ultimate restriction on renewals. The Employment Division, operating under the aegis of the Ministry of Labour, Industrial Relations and Employment, has a Work Permit Unit which is responsible for the issue of work permits. Expatriates are generally allowed to take up employment in fields in which there is a lack of Mauritian expertise. The employment of expatriates is governed by the Non-Citizens (Employment Restriction) Act 1973.

(j) **Investments**

As stated above and subject to the Companies Act, a company's constitution and GBL restrictions, a company has full rights, powers, privileges and capacity to carry on or undertake any business or activity, do any act, or enter into any transaction from both within and outside of Mauritius (§27(1)).

Global business companies who intend to hold or invest in property in Mauritius must, however, apply to the Commission for a certificate authorising the company to purchase, acquire or hold the property pursuant to the Non-Citizens (Property Restriction) Act 1975, (§53(6)). "Property" under the Non-Citizens (Property Restriction) Act 1975 means any freehold or leasehold immoveable property in Mauritius and includes the purchase or acquisition of any shares in a company which reckons among its assets any freehold or leasehold immoveable property in Mauritius or, if the company holds shares in a subsidiary, and the latter, in turn, reckons among its assets any freehold or leasehold immoveable property in Mauritius.

(k) **Registration of Charges**

Every company must file with the Registrar a statement of the particulars of any charge, or of making any issue of debentures charged on or affecting any property of the company.

Registration of mortgages, pledges, charges and liens is mandatory in law. Pursuant to the Registration of Duty Act 1804, any instrument of fixed or floating charge, pledge or any other document relating to a loan agreement, must be registered with the Registrar General/Conservator of Mortgages of Mauritius within 20 days of entry by the parties into the said instrument or document and the duty leviable is set out in the First Schedule – Part VII of the Registration of Duty Act 1804.

In relation to both Mauritian or foreign law governed pledges, §127 of the Companies Act provides that, within 28 days of entry by a Mauritian company into a "charge" (which includes, *inter alia*, a mortgage, fixed and floating charge, pledge of shares or debenture), a statement of the particulars of the charge(s) and a certified copy of the instrument of charge, in the form prescribed under the Companies Act, must be filed with the Registrar.

The effect of the above registration and filing is to confer priority over any other charge registered subsequently and over any unregistered charge. Registration will secure the priority

under Mauritius law of a valid security interest, but does not ensure that a Mauritius court would hold that the security interest is validly created.

(l) **Contracts**

Like a contract between private persons, the Companies Act provides that a contract made on behalf of a company may be made orally or in writing (§181). However, a contract must be made on behalf of a company in writing if it would be required to be made in writing if made between private persons. A contract made in or on behalf of a company in writing may be either signed under the common seal of the company or by any person acting under its express or implied authority. These requirements apply irrespective of whether or not: the contract was entered into in Mauritius; or the law governing the contract is the law of Mauritius (§181(3)).

Subject to its constitution, a company may appoint a person as its attorney either generally or in relation to a specified matter, as if the company was a natural person (§182).

The Companies Act also provides that a company may enter into contracts prior to its incorporation (a **pre-incorporation contract**) and that such contracts may be ratified once incorporated (§183). §184 of the Companies Act implies, subject to an express contrary intention being expressed in the pre-incorporation contract, a warranty that the company will be incorporated within a reasonable time after the making of the contract and that the company will ratify the contract once incorporated. The amount of damages recoverable in an action for breach of this warranty shall be the same as the amount of damages that would be recoverable in an action against the company for damages for breach of the unperformed obligations under the contract, had the contract been ratified post incorporation. A party to a pre-incorporation contract that has not been ratified may also apply to the court for an order directing the company to return property, whether real or personal, acquired under the contract to that party; or for any other relief in favour of that party relating to that property; or validating the contract whether in whole or in part. The court may, if it considers it just and equitable to do so, make any order or grant any relief it thinks fit and may do so whether or not an order has been made under section 184(2) (§185).

(m) **Electronic Records**

The records of a company must be kept in either English or French, and in a form that is written or "in a manner that allows the documents and information that comprise the records to be easily accessible and convertible into written form" (§191). Accordingly, documents may be kept electronically.

2.5 Taxation

As provided under the Income Tax Act, a GBL1 company is liable at the uniform tax rate of 15%. However, a GBL1 company is entitled to foreign tax credits and may opt to claim credit for actual tax suffered in another jurisdiction, resulting in an effective tax rate of 3% or nil, in certain circumstances. In addition, a GBL1 company that is centrally controlled and managed and is tax resident in Mauritius may, upon written approval from the Commissioner of Income Tax, benefit from tax relief from any of the double taxation treaties Mauritius has with other countries.

A GBL2 company is not resident for tax purposes and therefore cannot claim double taxation relief under the double taxation treaties in force in Mauritius.

Both GBL1s and GBL2s allow a company to freely repatriate profits, and there is no withholding tax in Mauritius on capital gains, dividends or interest, nor any stamp duty levied. The Commission and Registrar currently have very low annual licence and registration fees (see Table 1 below).

The Income Tax (Foreign Tax Credit) Regulations 1996 (the **Regulations**) allow for foreign tax credit on the foreign source of income of a Mauritian resident entity. The Regulations allow for the grossing up of the foreign source income, and provide in respect of foreign tax charged on dividend, credit for

the underlying tax charged in the foreign country on profits out of which the dividend is paid. A Mauritian resident entity will be entitled to foreign tax credits and may opt to claim credit for actual tax suffered in another jurisdiction, resulting in an effective tax rate or 3% or nil, in certain circumstances.

Table 1

Government Fees (as of September 2012)	**GBL1**	**GBL2**
Financial Services Commission		
Application Processing Fee	$500	$100
Annual Licence Fee	$1,750	$235
Registrar of Companies		
Application Processing Fee	Rs2,100 (≈$75)	$65
Annual Registration Fee	Rs6,000 (≈$220)	$65

2.6 Share Capital and Debentures

(a) Exchange Control

Theoretically speaking, exchange controls were suspended in 1994, but the rules still state that repatriation of foreign investment and the profits from it, are subject to proof of the origin of the money, and subject to payment of any outstanding Mauritian taxes.

(b) Stated Capital

While the Companies Act specifies the basic rights attached to a share, those rights may be varied by a company's constitution and such variation may allow for the issuance of different classes of shares, including fractional shares, and attach thereto any special, preferential or deferred rights, privileges or conditions (§46).

The Companies Act no longer requires companies to maintain an authorised share capital. Companies are now required to report their stated capital, which is the total of the nominal value of any par value shares and any premium paid in relation to those shares (§48). If the shares are issued with no par value, the stated capital is the total of any amount paid or due on the issue of and subsequent calls on the shares. The stated capital cannot be reduced unless a special resolution is passed and the solvency test has been satisfied (§62), although global business companies are exempted from the requirement to give public notice of any proposed reduction in stated capital (Thirteenth Schedule, Part I).

A company may by ordinary resolution divide or subdivide its shares into shares of a smaller amount if the proportion between the amount paid, and the amount unpaid (if any), on each reduced share remains the same as it was in the case of the share from which the reduced share is derived (§53(1)(a)). A company may also by ordinary resolution consolidate its shares into shares of a larger amount than its existing shares (§53(1)(b)). Notice of alteration of a company's share capital must be filed with the Registrar within 14 days of the date of the alteration (§53(3)).

Subject to the Companies Act and any agreement between a company and its creditors regarding the reduction of capital, a company may by special resolution reduce its stated capital to such amount as it thinks fit. All companies other than global business companies must give public notice not less than 30 days public notice before the resolution of such a reduction is

passed (§62(1)(2)). Notice of such a reduction must be given to the Registrar within 14 days specifying the amount of the reduction and the reduced amount of its stated capital (§62)(7).

(c) **Issue Price of Shares**

The Companies Act requires that a share created or issued after the commencement of the Companies Act must have no par value (§47(1)), with the noted exceptions of: pre-existing companies; global business companies; or upon the Registrar's satisfaction that the company is a wholly owned subsidiary registered outside Mauritius and that for purposes of reporting it is necessary to be formed with shares carrying a par value (§47). Global business companies may issue shares with or without a par value provided that all the ordinary shares or all the preference shares of the company consist of one kind or the other, which may be stated in more than one currency, with the exception of the Mauritian Rupee (Fourteenth Schedule, Part I, paragraph 1).

Before a company issues any shares, the Board must determine the amount of the consideration for which the shares are to be issued and the Board must ensure that such consideration is fair and reasonable to the company and to all existing shareholders (§56(1)). Consideration for such shares may take any form, including payment in cash, promissory notes, contracts for future services, real or personal property, or other securities of the company (§56(2)). Where a share in a company has par value, then the consideration for that share cannot be less than par value (§56(3)). With the exception of GBL2 companies, where a share is not paid for in cash, the Board must determine the "reasonable present cash value of the consideration" – ensuring that it is fair and reasonable to the company and all existing shareholders, and not less than the amount to be credited in respect of those shares – and issue a certificate describing the consideration in sufficient detail and signed by a director, stating (§57(3)):

- the present cash value of the consideration and the basis for assessing it;
- that the present cash value of the consideration is fair and reasonable to the company and to all existing shareholders; and
- that the present cash value of the consideration is not less than the amount to be credited in respect of the shares.

A copy of this certificate must be delivered to the Registrar within 14 days of its signature (§57(4)).

Subject to a company's constitution, a company may issue fractions of shares which will have corresponding fractional liabilities, limitations, preferences, privileges, qualifications, restrictions, rights and other attributes as those which relate to the whole share of the same class or series of shares (§54).

Where a company issues shares which rank equally with, or in priority to existing shares as to voting or distribution rights, subject to the company's constitution, those shares must first be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders (§55). This offer must be open for acceptance for a reasonable time, which shall not be less than 14 days.

(d) **Redemption or Purchase of Shares by a Company**

The principle of the preservation of capital of a company requires that certain tests be met if a company is to redeem or repurchase its shares, including determining that the company is and will be solvent after effecting the redemption or repurchase (§68(3) to (7)). Provided these requirements are met there are several mechanisms for the redemption or acquisition of a company's own shares (see §68 to §70, §78 to §80, and §108 to §111) including, approval by a unanimous resolution and, for private companies, unanimous approval of all the shareholders (§68(1)).

Shares may be redeemed at the option of the company (§78); at the option of the shareholder where the holder gives proper notice to the company requiring the company to redeem the share (§79); or, the shares may be redeemed on a specified date (§80). Aside from when shares are repurchased or acquired and held as treasury shares, shares that are acquired by a company pursuant to the above provisions, are deemed to be cancelled immediately on acquisition (§71).

(e) **Acquisition by a Company of its own Shares and Financial Assistance**

The Companies Act confers on a company, if so approved by the Board and subject to its constitution authorising the Board to do so, the power to purchase its own shares and to acquire and hold its own shares as treasury shares (see paragraph (f) below). A company cannot offer or agree to purchase or otherwise acquire its own shares unless the Board is satisfied of a number of requirements, including whether the acquisition is in the best interests of the company and the company is, and will be, solvent after effecting the acquisition (§69). In certain circumstances, a disclosure document must be sent out to each shareholder which sets out such information, including the nature and terms of the offer and if made to specified shareholders only, the names of those shareholders; the nature and extent of any relevant interest of any director of the company in respect of any shares that are the subject of the offer (§70)(3).

Pursuant to §75 of the Companies Act, a contract with a company for the acquisition by the company of its own shares will be specifically enforceable against the company except to the extent that the company would, after performance of the contract, fail to satisfy the solvency test (§75(1)).

Whilst the Companies Act states that a subsidiary does not have the power to purchase shares of its parent or holding company (§83), this provision does not apply to global business companies (Thirteenth Schedule, Part I).

There are certain restrictions on a company's ability to finance the acquisition of its own shares (§81). There is a statutory solvency test that, if met, will enable a company to provide what is termed "financial assistance" in connection with the acquisition of its own shares, provided also that the Board has previously resolved that giving the assistance is in the interests of the company, and the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance (§81). A company may provide assistance for up to 10% of the company's stated capital before an auditor's certificate going to the company's solvency is required by the Companies Act. For more information on financial assistance, please refer to the contact details at the end of this Guide.

(f) **Treasury Shares**

Where the company's constitution permits the company to hold its own shares, the Board resolves that the shares concerned shall not be cancelled on acquisition; and except in the case of a private company holding a Category 1 Global Business Licence or Category 2 Global Business Licence, as the case may be, the number of shares acquired, when aggregated with shares of the same class held by the company pursuant to §72 at the time of the acquisition, does not exceed 15% of the shares of that class previously issued (excluding shares previously deemed to be cancelled), a company may hold its shares as treasury shares (§72(1)).

When shares are held as treasury shares, any rights and obligations attaching to such shares are not to be exercised by or against the company, including any voting or distribution rights (§73). Provided that the company's constitution specifically allows treasury shares to be transferred, the Board may (re)issue the shares as if they were unissued shares of the company, i.e. at any time, to any person, and in any number as the Board thinks fit (§52(1)).

(g) **Bearer Shares**

All companies must maintain a share register. The entry of a name of a person on the share register as holder of a share shall be *prima facie* evidence that legal title to the share is vested in that person (§93(1)). Accordingly, bearer shares are not permitted in Mauritius.

(h) **Register of Members**

All companies must maintain a share register. The share register must record the shares issued by the company and state whether, under the company's constitution, or the terms of issue of the shares, there are any restrictions or limitations on their transfer (§91(1)). The principal share register must be kept in Mauritius (§92), however a company may keep copies of its share register at different locations if permitted by its constitution. It is the duty of the company secretary to ensure that all transfers are promptly recorded and the register is kept up-to-date (§94).

The share register must also state, with respect to each class of shares (§91(3)):

- the names (in alphabetical order) and the last known address of each person who is, or has within the last seven years, been a shareholder;
- the number of shares of that class held by each shareholder within the last seven years; and
- the date of: any issue of shares to; repurchase or redemption of shares from; or transfer of shares by or to, each shareholder within the last seven years and, in relation to the transfer, the name of the person to or from whom the shares were transferred.

For companies with more than 50 shareholders, the share register must, unless the share register is in such a form as to constitute in itself an index, have/keep an index of the names of shareholders, which must be amended within 14 days from the day on which any alteration to the shareholding of the company is made (§91(5)).

The provisions relating to public companies or subsidiaries or holding companies thereof are slightly more relaxed in that whilst the above requirements must be satisfied, they only apply to "substantial shareholders", i.e. shareholders who, by themselves or through their nominees, hold a direct or indirect interest in the company equivalent to 5% or more of the aggregate voting power exercisable at a meeting of the shareholders (§91(2)).

The entry of the name of a person in the share register as holder of a share shall be *prima facie* evidence that legal title to the share is vested in that person (§93(1)). However, where the name of a person is wrongly entered in, or omitted from, the share register of a company, the person aggrieved, or a shareholder, may apply to the court for rectification of the share register, compensation for any loss sustained or both rectification and compensation (§95(1)).

(i) **Prospectuses and Public Offers**

Pursuant to the Securities Act 2005 (the **Securities Act**), no person shall make an offer of securities to the public unless the entity is in existence, the offer is made in a prospectus that complies with the requirements of the Securities Act and the Commission has given a provisional registration to the prospectus (§68(1) Securities Act). A prospectus is not required, however, where no solicitation is made for the purchase of the securities, the offer of securities is a private placement, or where the vesting or transfer of securities is by operation of law or by order of a court, for example (see §70 Securities Act for a full list).

The Securities Act imposes a number of requirements on the contents of a prospectus: it must provide full, true and plain disclosure of all material facts concerning the securities to be offered and the person offering the securities, without omitting anything that would be required to allow investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer of the securities, as well as the rights and liabilities

attached to the securities (§71(1) Securities Act). The prospectus must also contain (§71(2) Securities Act):

- the date on which the prospectus is provisionally registered with the Commission;
- a statement signed by all the directors of the issuer to the effect that they accept responsibility for the contents of the prospectus and that, to the best of their knowledge and belief, and after making reasonable inquiries, the prospectus complies with the Securities Act and any other applicable Rules made by the Commission under the Securities Act (the **Commission Rules**);
- such other signatures as may be specified in the Commission Rules; and
- a statement to the effect that the Commission takes no responsibility for its contents.

There are strict requirements imposed by the Securities Act on a "statement by a person", which can be included in a prospectus. A "statement by a person" must not be included in a prospectus unless:

- the person who made the statement has consented to its inclusion in the form and context in which it appears in the prospectus;
- the prospectus states that the person who made the statement has given his consent;
- the consent is filed with the Commission; and
- the person who made the statement has not withdrawn his consent before the prospectus is lodged for provisional registration with the Commission.

Securities may not be issued to the public unless the prospectus is up to date at the time of issue (§73 Securities Act) and, for these purposes, a prospectus that is more than six months old, i.e. six months after the date of effective registration will not be up to date (§75 Securities Act).

A copy of the prospectus must be filed with the Commission and the Commission must issue an acknowledgement of filing before the prospectus may be published (§76 Securities Act). The Commission may grant a registration where all disclosure requirements are met, all requisite consents have been received and where the Commission is satisfied that the prospectus is in its final form and complies with the Securities Act and any applicable Commission Rules (§76(4) Securities Act). Any material change to the prospectus post registration must be filed with the Commission within ten days of the change and will also be subject to approval by the Commission (§78 Securities Act).

See also the Securities (Public Offer) Rules 2007, which provides further rules for the form and content of a prospectus as well as for the issuance of a simplified prospectus.

(j) Stock Exchange Listing of a Mauritian Company

The Stock Exchange of Mauritius Ltd (**SEM**) was incorporated in 1989 as a private limited company and is a member of the World Federation of Exchanges (**WFE**).

The SEM operates two markets: the Official Market and the Development & Enterprise Market (**DEM**). The Official Market started its operations in 1989 with five listed companies and a market capitalisation of nearly USD92 million, but currently there are 40 companies listed representing a market capitalisation of around USD5.5 billion, as at 28 September 2012. The DEM was launched in 2006 and there are presently 47 companies listed on this market with a market capitalisation of approximately USD1.4 billion, as at 28 September 2012.

The successful implementation of the Central Depository System (**CDS**) in January 1997 has brought about prompt, efficient clearing and settlement of trades and at the same time reduced some of the inherent risks in the process. With the support of the Bank of Mauritius which acts

as clearing bank, CDS ensures delivery versus payment on a T+3 rolling basis. The CDS also provides for a Guarantee Fund Mechanism to guarantee settlement failures of participants.

SEM's Automated Trading System was launched on 29 June 2001. It constitutes a state-of-the-art electronic trading system built on third generation technology.

SEM's most recent undertaking concerns the setting up of the DEM, which is a market designed for small and medium-sized enterprises and newly set-up companies. It is meant for companies wishing to avail themselves of the advantages and facilities provided by an organised and regulated market to raise capital to fund their future growth, improve liquidity in their shares, obtain an objective market valuation of their shares and enhance their overall corporate image.

(k) **Securities Clearance**

Apart from securities traded on an exchange and notwithstanding anything in a company's constitution, a company may not enter a transfer of securities in the share register or register of debenture holders unless a valid instrument of transfer in the form required by the Registration duty Act has been delivered to the company (§87), i.e. by deed (and in the form as stated in the Third Schedule of the Registration of Duty Act 1804). There are no permissions, as such, required to transfer securities in Mauritius.

(l) **Dividends and Distributions**

The Board may authorise a distribution by the company at any time, and of any amount, and to any shareholders it thinks fit, if it is that the company shall, upon the distribution being made, satisfy the solvency test (§61(2)).

(m) **Recognised Stock Exchanges**

Pursuant to the SEM Listing Rules, the following is the current list of recognised stock exchanges:

Abu Dhabi Securities Exchange
Amman Stock Exchange
Athens Exchange
Australian Securities Exchange
Bahamas International Securities Exchange
Beirut Stock Exchange
Bermuda Stock Exchange
BM&FBOVESPA S.A.
BME Spanish Exchanges
Bolsa de Comercio de Buenos Aires
Bolsa de Comercio de Santiago
Bolsa de Valores de Colombia
Bolsa de Valores de Lima
Bolsa Mexicana de Valores
Bombay Stock Exchange Ltd.
Bond Exchange of South Africa
Bourse de Casablanca
Bourse de Luxembourg
Bucharest Stock Exchange
Bursa Malaysia
Canadian Venture Exchange
Cayman Islands Stock Exchange
CBOE Holdings, Inc.
CME Group
Colombo Stock Exchange

Copenhagen Stock Exchange
Cyprus Stock Exchange
Deutsche Börse AG
The Egyptian Exchange
Frankfurt Stock Exchange
GreTai Securities Market
Helsinki Stock Exchange
HoChiMinh Stock Exchange
Hong Kong Exchanges and Clearing
Iceland Stock Exchange
Indonesia Stock Exchange
IntercontinentalExchange ICE
International Securities Exchange - ISE
Irish Stock Exchange
Istanbul Stock Exchange
Johannesburg Stock Exchange
Karachi Stock Exchange Ltd
Kazakhstan Stock Exchange
Korea Exchange
London Stock Exchange Group
Malta Stock Exchange
Mexico Stock Exchange
MICEX Stock Exchange
Montreal Exchange
Moscow Interbank Currency Exchange
Muscat Securities Market
Nairobi Stock Exchange Ltd
Namibian Stock Exchange
NASDAQ OMX
National Stock Exchange of India Limited
National Stock Exchange (US – Chicago)
New Zealand Stock Exchange
The Nigerian Stock Exchange
NYSE Euronext
Osaka Securities Exchange
Oslo Børs
Paris Bourse
Philippine Stock Exchange
Plus-listed market
RTS Exchange
Sao Paulo Stock Exchange
Saudi Stock Exchange (Tadawul)
Shanghai Stock Exchange
Shenzhen Stock Exchange
Singapore Exchange
SIX Swiss Exchange
Stock Exchange of Tehran
Stock Exchange of Thailand
Stockholm Stock Exchange
Taiwan Futures Exchange (TAIFEX)
Taiwan Stock Exchange (TWSE)
Tel-Aviv Stock Exchange
TMX Group Inc.

Tokyo Stock Exchange Group, Inc.
Toronto Stock Exchange
Warsaw Stock Exchange
Wiener Börse AG
Zhengzhou Commodity Exchange

(n) **Investigation, Shareholder Protection and Oppressive Conduct**

The Companies Act sets in place two key mechanisms whereby the rights of members can be protected: investigation and a series of members' remedies.

(i) **Investigation**

The Companies Act provides that investigations may be made into the affairs of a company (§229 to §234), a related corporation (§235) or into the membership of a company for the purpose of determining the true persons who are, or have been, financially interested in the success or failure, real or apparent, of a company, or who are able to control or materially influence the company's policy (§236).

The Minister may designate a company to be a 'declared company' and require an inspector, e.g. a qualified auditor, to investigate the affairs of the declared company (§230 and §231). The Minister may order as such where he is satisfied that:

- for the protection of the public, the shareholders or creditors of a company, it is desirable that the affairs of the company should be investigated;
- it is in the public interest that the affairs of the company should be investigated; or
- in the case of a foreign company, the appropriate authority of another country has requested that a designation be made in respect of the company.

The Registrar also has the power to appoint an inspector to investigate the affairs of a company on an application of the members of the company or where he considers that the appointment is necessary to safeguard the interests of shareholders or creditors, or is necessary in the public interest (§232(1)).

The Registrar may require an application made by the members to be accompanied by evidence in support and the grounds for requiring the investigation, and the Registrar may, before appointing an inspector, require the applicants to give security in such amount as he thinks fit for payment of the costs of the investigation (§232(2)). Where an inspector thinks it necessary for the purposes of the investigation of the affairs of a related corporation, he may, with the written consent of the Registrar, investigate the affairs of that corporation (§235).

An investigation into a company's affairs may also be resolved by an ordinary resolution (§234(1)).

The shareholders (in the proportions outlined above) may also apply to the Registrar for an investigation into the membership of a company for the purpose of determining the true persons who, are or have been, financially interested in the success or failure, real or apparent, of a company, or who are able to control or materially influence the company's policy (§236(1)). The Registrar will require an inspector to investigate the company as such where he is of the opinion that there are reasonable grounds to do so and the application is not vexatious or unreasonable. The powers of an inspector in these circumstances extend to the investigation of any circumstances which suggest the existence of an arrangement or understanding even though such arrangements may not be legally binding, providing the arrangement is observable in practice and is relevant to the investigation (§236(2)).

The Companies Act sets out the powers of the inspectors and the frequency and content of the inspector's reports (see §233 and §237 to §241).

(ii) **Members' Remedies**

Injunctions

Pursuant to §169 of the Companies Act, the company, a director, shareholder or an "entitled person" (i.e. a person upon whom the constitution confers any of the rights and powers of a shareholder) may apply to the court for an injunction to restrain the company (or a director) from engaging in conduct that would contravene the Companies Act or the company's constitution. The court may also make any interim order or grant any consequential relief as it thinks fit.

Derivative Actions

The court may, on the application of a shareholder or director, grant leave to that shareholder or director to (§170(1)):

- bring proceedings in the name and on behalf of the company or its subsidiary; or
- intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or its subsidiary (a **derivative action**).

The court will only grant leave to a shareholder or a director to bring a derivative action where it is satisfied that the company or related company "does not intend to bring, diligently continue or defend, or discontinue, the proceedings as the case may be; or it is in the best interests of the company or its subsidiary that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole" (§170(3)).

In determining whether to grant leave, the court will have regard to (§170(2)): the likelihood of the proceedings that may follow; the costs of the proceedings in relation to the relief likely to be obtained; any action already taken by the company or its subsidiary to obtain relief; and the interests of the company or its subsidiary in the proceedings being commenced, continued, defended or discontinued, as the case may be.

Notice of such an application must be served on the company or its subsidiary (§170(4)) and the company (or related company) also has a right to appear and be heard as to whether it itself intends to take any action in relation to the proceedings (§170(5)).

The costs of a derivative action will be met by the company, unless the court considers that it would be unjust or inequitable (§171) and, in which case, the costs will be met by the shareholder or director. Once proceedings are commenced by derivative action the court has the power to make any order it thinks fit in relation to the proceedings (§172) and proceedings cannot be settled, compromised or withdrawn without the court's approval (§173).

Personal Actions by Shareholders

The Companies Act also provides that any shareholder or former shareholder may bring a personal action against a director or a secretary for breach of certain statutory duties owed to the shareholder, providing the action is not to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company (§174).

Any shareholder of a company may bring an action against the company for breach of a duty owed by the company to him as a shareholder (§175).

Notwithstanding the above, a shareholder may also apply to the court for an order requiring the company (or its Board or a director) to take such action that is required to be taken by the company so as to comply with its constitution. The court will make such an order where it is just and equitable to do so and it may also grant any other consequential relief as it thinks fit (§176).

Where a shareholder brings proceedings against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject-matter of the proceedings, the court may appoint that shareholder to represent some or all of the shareholders having the same or substantially the same interest. Whilst the court has the power to make such order as it thinks fit, the Companies Act specifically provides that this includes an order:

- as to the control and conduct of the proceedings;
- as to the costs of the proceedings;
- directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented (§177).

(iii) **Oppressive Conduct**

Broadly, any shareholder or former shareholder of a company, or any other entitled person who considers that the affairs or acts of a company have been, are being, or are likely to be conducted in a manner that is oppressive, unfairly discriminatory, or unfairly prejudicial to the shareholder (in whatever capacity), may apply to the court for relief (§178). Interestingly, however, this relief is not available to a shareholder of a global business company (Thirteenth Schedule, Part I).

3. FOREIGN COMPANIES IN MAURITIUS

The Companies Act defines a foreign company as body corporate incorporated outside Mauritius. All foreign companies which have a place of business or that are carrying on business in Mauritius must be registered with the Registrar, including foreign companies establishing or using a share transfer office or a share registration office in Mauritius or administering, managing, or dealing with property in Mauritius as an agent, or personal representative, or trustee, whether through its employees or an agent or in any other manner (§274(a)).

3.1 "Carrying on Business" in Mauritius

A foreign company shall not be held to carry on business in Mauritius merely because in Mauritius it (§274(b)):

- is or becomes a party to a legal proceeding or settles a legal proceeding or a claim or dispute;
- holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
- maintains a bank account;
- effects a sale of property through an independent contractor;
- solicits or procures an order that becomes a binding contract only if the order is accepted outside Mauritius;
- creates evidence of a debt or creates a charge on property;
- secures or collects any of its debts or enforces its rights in relation to securities relating to those debts;
- conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or
- invests its funds or holds property.

3.2 Application Procedure

A foreign company may not carry on business in Mauritius unless it has registered its name with the Registrar. The name, or altered name, cannot be one that in the opinion of the Registrar is undesirable, or is a name (or kind of name) that the Minister has directed the Registrar not to accept for registration, unless otherwise allowed solely with the Minister's written consent. A foreign company may not use any name other than that which it has registered in Mauritius (§275) and see also paragraph 3.3 below.

A foreign company is required to (§283):

- conspicuously exhibit its name and the place where it is formed or incorporated outside its registered office and every place of business established by it in Mauritius (except in the case of a banking company);
- cause its name and the place where it is formed or incorporated to be stated on all its bill heads and letter paper and in all its notices, prospectuses and other official publications; and
- where the liability of its members is limited, unless the last word of its name is the word "Limited" or "Limitée" or the abbreviation "Ltd" or "Ltée", cause notice of that fact –
    - to be stated in legible characters in every prospectus issued by it and in all its bill heads, letter paper, notices, and other official publications in Mauritius; and
    - except in the case of a banking company, to be exhibited outside its registered office and every place of business established by it in Mauritius.

Within one month after establishing a place of business or carrying on business in Mauritius, a foreign company must file with the Registrar –

- a duly authenticated copy of the certificate of its incorporation or registration in its place of incorporation or origin or a document of similar effect;
- a duly authenticated copy of its constitution, charter, statute or memorandum and articles or other instrument constituting or defining its constitution;
- a list of its directors containing similar particulars with respect to directors as are, by this Act, required to be contained in the register of the directors, managers and secretaries of a company;
- where the list includes directors resident in Mauritius who are members of the local Board of directors of the company, a memorandum duly executed by or on behalf of the foreign company stating the powers of the local directors;
- a memorandum of appointment of power of attorney under the seal of the foreign company or executed on its behalf, in such manner is to be binding on the company, stating the names and addresses of two or more persons resident in Mauritius, not including a company, authorised to accept on its behalf service of process and any notices required to be served on the company;
- notice of the situation of its registered office in Mauritius and unless the office is open and accessible to the public during ordinary business hours on each day, other than Saturdays and public holidays, the days and hours during which it is open and accessible to the public; and
- a declaration made by the authorised agents of the company (§276(1)).

Foreign companies are required to have a registered office in Mauritius to which all communications and notices may be addressed. The registered office must be open and accessible to the public for not less than four hours on every day other than Saturdays, Sundays and public holidays (§277(1)).

Foreign companies are also required to appoint an authorised agent who will be required to do, and will be answerable for, all acts, matters and things as are required of and by the company under the Companies Act (§277(2)). A foreign company or its authorised agent may file with the Registrar a

written notice stating that the authorised agent has ceased or will cease to be the authorised agent on a date specified in the notice (§277(3)). Should the foreign company wish to continue carrying on or maintaining a place of business in Mauritius, it must appoint a new authorised agent within 21 days of the previous one ceasing to act (§277(4) and (5)). Within one month of appointing a new authorised agent, a foreign company must file a memorandum of such appointment with the Registrar, along with a copy of the deed, document or power of attorney appointing the same (§277(6)).

3.3 Registration and Requirements

Foreign companies are required to file with the Registrar, within one month, particulars of the following changes to (§278(1)):

- the constitution, charter, statutes, memorandum or articles or other instrument;
- the directors;
- the authorised agents or the address of the authorised agent;
- the situation of the registered office in Mauritius or of the days or hours during which the office is open and accessible to the public;
- the address of the registered office in its place of incorporation or origin;
- the name of the company; and
- the powers of any directors resident in Mauritius who are members of the local Board.

Foreign companies are also required to file a notice with the Registrar within one month of any increases in authorised share capital, which must include both the original amount as well as the increased amount (§278(2)). Where a foreign company does not have share capital but increases the number of its members beyond the number registered with the Registrar then, again, it must within one month file a notice of the increase with the Registrar (§278(3)).

Foreign companies must also file copies with the Registrar of any orders made by a court under any law in force in the country in which that foreign company is incorporated within one month of the order being issued (§278(4)).

Any foreign company with any share capital and shareholder(s) resident in Mauritius is required to keep a branch register for the purpose of registering shareholders resident in Mauritius, either at its Mauritius registered office or at some other place in Mauritius (§285(1)). However, a foreign company need not keep a branch register until after the expiry of two months from the receipt of a written application by a shareholder resident in Mauritius for registration of his shares (§285(2)). A branch register will be *prima facie* evidence of any matter directed or authorised to be inserted therein (§285(12)). Furthermore, a certificate under the seal of a foreign company or started by a director of the company specifying any shares held by any shareholder of that company and registered in the branch register shall be *prima facie* evidence of the title of the shareholder to the shares and the registration of the shares in the branch register (§285(13)). Foreign companies that are constitutionally prohibited from inviting the public to subscribe for shares are exempted from the requirement of having branch registers (§285(3)).

Within three months of its annual meeting of shareholders, a foreign company must file with the Registrar a copy of its balance sheet made up to the end of its last preceding accounting period. This must be in such form and containing such particulars and be accompanied by copies of such documents as the company is required to annex, attach or send with its balance sheet (by law as applicable from time to time in the place of the foreign company's incorporation or origin), along with a declaration certifying that they are true copies of the required documents (§281(1)).

It should be noted that regardless of whether or not a foreign company is required under the law of the place of its incorporation or origin to hold an annual meeting and prepare a balance sheet, it must still prepare and file with the Registrar a balance sheet within such period and in such form as the directors

would have been required to prepare or obtain if it were a public company (§281(3)). The balance sheet and any and all other financial statements must comply with internationally recognised accounting standards and, in particular, accurately show the assets employed in, liabilities arising out of, and its profit or loss arising out of its operations conducted in or from Mauritius (§281(4)).

3.4 Cessation of Business in Mauritius

Where a foreign company ceases to carry on or have a place of business in Mauritius, it must file a notice to that effect with the Registrar within seven days of the date of the cessation. The foreign company's obligations to lodge any document (other than those that ought to have been filed prior to the notice), shall cease as from the date on which that notice is filed. The Registrar shall remove the foreign company's name from the register upon three months after the filing of the notice (§286(1)).

Should a foreign company go into liquidation or be dissolved in its place of incorporation or origin, the authorised agent in Mauritius must file or cause to be filed with the Registrar a notice to that effect within one month after the commencement of the liquidation or the dissolution (§286(2)). Upon receipt of such notice from the authorised agent that the foreign company has been dissolved, the Registrar will then remove the foreign company's name from the register (§286(5)). Where a foreign liquidator is appointed, the authorised agent must also give notice of such appointment. The foreign liquidator will have the powers and functions of a local liquidator until the court appoints a liquidator for Mauritius (§286(2)).

4. COMPROMISES WITH CREDITORS AND AMALGAMATIONS

4.1 Compromises with Creditors

A compromise between a company and its creditors includes: the cancelling of all or part of a debt of the company; varying the rights of the company's creditors and the terms of a debt; or relates to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt (§253).

Accordingly, a person may propose a compromise where he has reason to believe that a company is, or is likely to be, unable to pay its debts (§254(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 will be met by the company, unless the company is in receivership or liquidation (§260).

(a) The Compromise Proposal

Subject to the above, the Board, a receiver, a liquidator or, with the leave of the court, any creditor or shareholder (the **proponents**) may propose a compromise where they have reason to believe that the company is, or is likely to be, unable to pay its debts (§254(2)). Where the court grants leave to a creditor or shareholder, the court may also make an order directing the company to furnish the proponent with such information so as to enable the proponent to propose an appropriate compromise (§254(3)).

The proponent must compile a list of creditors who would be affected by the proposed compromise, setting out the amount owing (or estimated to be owing) to each of them and the number of votes which each of them is entitled to cast on a resolution approving the compromise (§255(1)). The proponent must then give notice of its intention to hold a meeting of creditors for the purpose of voting on a resolution in relation to the proposal to each known creditor, the company, any receiver or liquidator, and deliver to the Registrar for registration the notice together with the proposed compromise (§255(2)). The Companies Act provides that the proposed compromise must contain a statement (§255(2)(b)):

- containing the name and address of the proponent and the capacity in which the proponent is acting;
- containing the contact details to which inquiries may be directed during normal business hours;
- setting out the terms of the compromise and the reasons for it;
- setting out the reasonably foreseeable consequences for creditors of the company of the compromise being approved;
- setting out any director's interests;
- explaining that the proposal and any amendment to it made at a meeting of creditors or any classes of creditors will be binding if approved in accordance with the Insolvency Act 2009;
- containing details of any procedure contained in the compromise for varying the terms of the compromise which may apply after its approval; and

in addition to the notice and the statement, a copy of the list of creditors must be delivered to the Registrar..

For the compromise proposal to be effective, it must be approved by creditors, or a class of creditors, of the company (or a class thereof) at a meeting conducted in accordance with The Insolvency Act 2009. A compromise approved by creditors will be binding on the company and on all the creditors; or where there is more than one class of creditors, on all creditors of that class to whom notice of the proposal was given (§256(2)). The proponent of the compromise must give written notice of the result of the voting to each known creditor, the company, any receiver or liquidator, and the Registrar (§256(4)).

A compromise may be varied, either through an inbuilt mechanism contained in the compromise itself or by treating the variation as if it were a (newly) proposed compromise (§257).

See also 4.4 below, where the compromise may amount to a "major transaction".

(b) **Powers of the Court**

The court may give directions or waive any procedural requirements in relation to compromises where the court is satisfied that it is just to do so (§258(1)).

For a certain period, starting from the date of the notice of the proposed compromise and ending 14 days after the date on which notice was given of the result of the voting on it, the court may also order that proceedings in relation to a debt owing by the company be stayed or that a creditor refrain from taking any other measure to enforce payment of a debt owing by the company (§258(1)(b)). The rights of a secured creditor during this period, however, remain unaffected, i.e. the secured creditor may take possession of, realise, or otherwise deal with property of the company over which that creditor has a charge (§258(2)).

A creditor who was entitled to vote on a compromise may apply to the court for an order stating that the creditor should not be bound by the compromise. Such an application must be made within 14 days of the date that the notice of the result of the voting was given to the creditor (§258(4)). The court may order that the creditor shall not be bound by the compromise, or make such order as it thinks fit, where (§258(3)):

- insufficient notice of the meeting was given to that creditor;
- there was some other material irregularity in obtaining approval of the compromise; or
- in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor, or to the class of creditors to which that creditor belongs.

The court also has certain powers to order that the compromise be effective and binding on the liquidator of a company (see §259).

4.2 Amalgamations

The Companies Act provides that two or more Mauritian companies may amalgamate and continue as one company, either as one of the amalgamating companies or as a new company (§244). Two or more companies may only amalgamate where: the company will satisfy the solvency test immediately after amalgamation; the directors of each amalgamating companies consider it to be in the best interests of the company, and the shareholders approve of the amalgamation by special resolution (§246).

(a) The Amalgamation Proposal

The terms of the amalgamation are contained in the "amalgamation proposal", which must set out, amongst other things (§245):

- the name of the amalgamated company where it is the same as the name of one of the amalgamating companies;
- the registered office of the amalgamated company;
- the names, usual residential addresses and the service addresses of the directors and secretaries of the amalgamated company;
- the address for service of the amalgamated company;
- the share structure of the amalgamated company specifying the number of shares of the company and any rights, privileges, limitations, and conditions attached to the shares;
- the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;
- where the shares of an amalgamating company are not to be converted into shares of the amalgamated company, the consideration that the holders of those shares are to receive instead of shares of the amalgamated company;
- any payment to be made to a director or shareholder of an amalgamating company, other than a payment described above;
- details of any arrangement necessary to complete the amalgamation;
- details of the subsequent management and operation of the amalgamated company; and
- a copy of the proposed constitution of the amalgamated company.

Where the shares of one of the amalgamating companies are held by, or on behalf of another of the amalgamating companies, the amalgamation proposal must also provide for the cancellation of those shares without payment or the provision of other consideration when the amalgamation becomes effective, and that the shares so held may not be converted into shares of the amalgamated company (§245(3)).

The amalgamation proposal may specify when the amalgamation is intended to become effective (§245(2)).

If the Board is satisfied that the amalgamation is in the best interests of the company and that the amalgamated company will be solvent immediately after the amalgamation, then the Board must sign a certificate stating the same and send a copy of the certificate to each shareholder, not less than 28 days before the amalgamation is proposed to take effect, together with (§246(3)):

- a copy of the amalgamation proposal;
- copies of the certificates given by the directors of each Board;

- a summary of the principal provisions of the constitution of the amalgamated company, if it has one;
- a statement that a copy of the constitution of the amalgamated company will be supplied to any shareholder who requests it;
- a statement setting out the rights of any dissenting shareholders;
- a statement of any material interests of the directors in the proposal whether in that capacity or otherwise;
- such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed amalgamation.

The Board must also, not less than 28 days before the amalgamation is proposed to take effect, send a copy of the amalgamation proposal to every secured creditor of the company and give public notice of the proposed amalgamation including a statement that:

- copies of the amalgamation proposal are available for inspection by any shareholder or creditor of an amalgamating company or any person whom an amalgamating company is under an obligation at the registered offices of the amalgamating companies and at such other places as may be specified during normal business hours; and
- a shareholder or creditor of an amalgamating company or any person to whom an amalgamating company is under an obligation is entitled to be supplied free of charge with a copy of the amalgamation proposal upon request to an amalgamating company.(§246(4)).

The amalgamation will be approved when the shareholders pass a special resolution and, where applicable, by a special resolution of any interest group (§246(5)).

(b) **Registration**

An amalgamation, however, is only effective when a certificate of amalgamation is issued by the Registrar. Accordingly, the following documents must be delivered to the Registrar for registration (§248):

- the approved amalgamation proposal together with the necessary certificates described above;
- a certificate signed by the Board of each amalgamating company stating that the amalgamation has been approved in accordance with the Companies Act and the constitution of the company (if it has one);
- where the amalgamated company is a new company or the proposal provides for a new name, a copy of the notice reserving the name of the amalgamated company;
- a certificate signed by the Board, or proposed Board, of the amalgamated company stating that no creditor will be prejudiced by the amalgamation, even where the proportion of the claims of creditors of the amalgamated company in relation to the assets of the amalgamated company is greater than the ratio prior to the amalgamation; and
- a document in the prescribed form and signed by each of the persons named in the amalgamation proposal as director or secretary, signifying their consent to act as such.

On receipt of these documents and where the amalgamated company is one of the amalgamating companies, the Registrar will issue a certificate of amalgamation, and where the amalgamated company is a new company, the Registrar will enter the particulars of the company on the Register and issue a certificate of amalgamation together with a certificate of

incorporation (§249(1)). The amalgamation will be effective from the date shown on the amalgamation certificate (§250(1)), or later if so specified in the amalgamation proposal (249(2)).

The amalgamated company will have all the property, rights, powers and privileges of each of the amalgamating companies, and the amalgamated company will continue to be liable for all the liabilities and obligations, together with any pending proceedings (at whatever stage) by or against any of the amalgamating companies (§250(4) and (5)). In addition, a conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by, or against, the amalgamated company.

The registers of the amalgamating companies are not, however, automatically transferred to the amalgamated company (§251(1)). In order for an amalgamated company to evidence the fact that the property of an amalgamating company has become the property of the amalgamated company, it will be necessary to present to the Registrar or, for example, the Conservator of Mortgages the certificate of amalgamation together with any instrument that (§251(2)):

- is executed or purported to be executed by the amalgamated company;
- relates to the property held immediately before the amalgamation by an amalgamating company; and
- states that the property referred to in the instrument has become the property of the amalgamated company by virtue of the Companies Act.

It is worth noting, however, that whilst the foregoing will be sufficient evidence that the property has become the property of the amalgamated company, evidence to the contrary may rebut this presumption.

Additionally and alternatively, where any security has been issued by a person or any rights or interests in property of any person have become, by virtue of an amalgamation (or any provision of the Companies Act), the property of an amalgamated company, that person may register the amalgamated company as the holder of that security or as the person entitled to such rights or interests, as the case may be, provided that the person has a signed certificate from the Board of the amalgamated company stating the same (§251(3)).

Any provisions of the amalgamation proposal that provide for the conversion of shares or rights of shareholders in the amalgamating companies will have effect according to the conditions in the amalgamation proposal (§250(7)).

(c) **Short Form Amalgamations**

Where the amalgamating companies are affiliates of one another, i.e. as holding company and subsidiary or as subsidiaries of the same holding company, there is a "short form amalgamation" procedure available (§247), which avoids the requirements of an amalgamation agreement and shareholder approval. In the former instance, the amalgamated company will be the company that owns (either directly or indirectly) the other amalgamating companies and, in the latter, the amalgamated company will be decided by the Boards of the amalgamating subsidiaries. In both cases, however, the amalgamation may take place if the amalgamation is approved by a resolution of the Board of each amalgamating company, which will constitute the amalgamation proposal and which must provide that (§247(1) or (2)):

- the shares of all but one of the amalgamating companies will be cancelled without payment or other consideration;
- the constitution of the amalgamated company (if it has one) will be the same as the constitution of the amalgamating company whose shares are not cancelled; and
- the Board is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test (and

the directors who vote in favour of the amalgamation must state that in their opinion together with the grounds for holding their opinion that these conditions are satisfied (§247(5))).

The Boards of each amalgamating company must also give written notice to every secured creditor not less than 28 days before the amalgamation is proposed to take effect (§247(3)).

(d) **Unfair Prejudice**

Where the court is satisfied that giving effect to an amalgamation proposal would unfairly prejudice a shareholder or creditor of an amalgamating company, or a person to whom an amalgamating company is under an obligation to, it may make any order it thinks fit in relation to the proposal (§252). An application to the court for such an order must be made before the date on which the amalgamation becomes effective:

- directing that effect shall not be given to the proposal
- modifying the proposal in such manner as may be specified in the order
- directing the company or its Board to reconsider the proposal or any part of it.

4.3 Approval of Arrangements, Amalgamations and Compromises by the Court

Notwithstanding anything in the Companies Act or the company's constitution, the court may, on the application of a company or any shareholder or creditor (provided that leave of the court has been granted in the latter two instances), order that an arrangement, e.g. a reorganisation of the share capital of the company, an amalgamation or a compromise will be binding on the company and on such other persons as the court may specify, and on such terms and conditions as the court thinks fit (§262(1)).

The court may, however, on its own volition or on an application by the company, any shareholder, creditor or other "interested" person, make one or more of the following orders (§262(3)):

- an order relating to the giving of notice of an application to the court for an order to approve an arrangement, amalgamation or compromise;
- an order directing the shareholders to hold a meeting to consider and/or approve the proposed arrangement, amalgamation or compromise;
- an order requiring a report to be compiled on the proposed arrangement, amalgamation or compromise, and who that report should be supplied to;
- an order as to the payment of the costs incurred in the preparation of any such report; or
- an order specifying the persons who would be entitled to appear and be heard on an application to approve the arrangement, amalgamation or compromise.

Any order made by the court will have effect on and from the date specified in the order (§262(4)), and the Board must, within 14 days of the order, ensure that a copy of it is filed with the Registrar for registration (§262(5)).

Subject to the above, the court may, for the purpose of giving effect to any arrangement, amalgamation or compromise approved, provide for, and prescribe terms and conditions relating to (§263(1)):

- the transfer or vesting of real or personal property, assets, rights, powers, interests, liabilities, contracts, and engagements;
- the issue of shares, securities, or policies of any kind;
- the continuation of legal proceedings;
- the liquidation of any company;

- the provisions to be made for persons who voted against the arrangement, amalgamation or compromise at any meeting or who have appeared before the court in opposition to the application to approve the arrangement, amalgamation or compromise; or
- such other matters that are necessary or desirable to give effect to the arrangement, amalgamation or compromise.

The court may approve such an amalgamation or compromise notwithstanding that an amalgamation or compromise may be effected by the methods described above. The Board must, within 14 days of the order, ensure that a copy of it is filed with the Registrar for registration (§263(2)).

4.4 Minority Buy-Out Rights

Where an arrangement or amalgamation will result in a company having an increase or decrease of assets, liabilities, rights or interests equal to 75% or greater of the company's assets prior to such a transaction, then the arrangement or amalgamation will constitute a "major transaction", and a special resolution of the shareholders will be required to approve the arrangement or amalgamation (where it is not already required by the procedures outlined above).

Where a "major transaction" has been passed, any shareholder who voted against the resolution may require a company to purchase his shares (§108). A shareholder who wishes the company to purchase his shares must give written notice of same to the company within 14 days of the resolution passing the major transaction (§109(1)). The Board may then arrange for the purchase of the shares, apply to the court for an order exempting it from purchasing the shares, or arrange for the resolution to be rescinded if it has not as yet been implemented (§109(2)), and it must give its decision in writing to the shareholder within 28 days of receipt of the shareholder's notice (§109(3)).

Where the Board resolves that the company should purchase the shares, it must state a fair and reasonable price for the shares to be acquired and provide written notice of the price to the shareholder (§110(1)). If the shareholder agrees to the price of the shares then no issues arise; the company will simply purchase the shares at the agreed price as soon as it is practicably possible. However, if the shareholder objects to the price of the shares, then the question of what is fair and reasonable will go to an arbitrator (in accordance with the *Code de Procédure Civile*), though the provisional price suggested by the Board must be paid in respect of each share (§110(4)) and the shareholder must transfer the shares to the company together with any relevant share certificate (§110(5)). Should the arbitrator decide a different price for the shares than the provisional amount paid, then any excess or deficiency may be recovered by the company or the shareholder, respectively (§110(6)). The Companies Act sets out strict timelines for the exercise of minority buy-out rights and also provides guidance as to how an arbitrator should determine the fair and reasonable shares of both a private and public company (§110). For more information on any aspects of a minority buy-out procedure, including the *Code de Procédure Civile*, please refer to the contact details at the end of this Guide.

Where the shares of a shareholder are to be purchased by a third party, then the above procedure will also apply (§111).

As stated above, a company does have an option apply to the court for an order exempting it from the obligation to purchase the shares of a shareholder exercising their minority buy-out rights. The company may do so on the following grounds (§112(1)):

- the purchase would be disproportionately damaging to the company;
- the company cannot reasonably be required to finance the purchase; or
- it would not be just and equitable to require the company to purchase the shares.

Upon such an application, the court may make any order that it thinks fit, including an order (§112(2)):

- setting aside the resolution of the shareholders;

- directing the company to take, or refrain from taking, any action specified in the order;
- requiring the company to pay compensation to the shareholders affected; or
- that the company be put into liquidation.

Where the company alleges that the purchase would be disproportionately damaging to the company or the company cannot reasonably be required to finance the purchase, then the court will not make one of the above orders, unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares (§112(3)). The court may also grant certain exemptions where the company is insolvent (§113).

5. MERGERS AND TAKEOVERS

Mauritian companies, private and public, have been involved in considerable merger and acquisition activity with companies listed on a number of international stock exchanges. These transactions have been both friendly and hostile. For example, Mauritian companies have been used as the acquirer, in a bid being made to acquire a listed company (set up in Mauritius or another jurisdiction), which is to be taken private by the owner of the acquirer.

5.1 Friendly Acquisition of a Mauritian Company

Friendly acquisitions are usually accomplished by an acquisition of the share capital of the target Mauritian company, pursuant to an offer of shares or cash made by an acquirer. Sometimes the transaction is structured as a direct acquisition of the shares from the existing shareholders of the Mauritian company or, more usually, the transaction is structured as an amalgamation of the target company into another Mauritius subsidiary company set up by the acquirer for the purpose.

As a result of this latter structure, the shares of the Mauritian company which is the target cease to exist in the amalgamation and are replaced by shares issued by the acquirer itself directly to the former shareholders of the Mauritian company. The amalgamated company becomes a wholly-owned subsidiary of the acquirer.

5.2 Hostile Acquisition of a Mauritian Company

In the context of a hostile acquisition, a number of alternatives have been used, for example:

- a straight offer of cash for the purchase of shares;
- an offer of shares of the acquirer by way of simple exchange;
- an offer of shares of the acquirer as part of an amalgamation; or
- a combined offer of shares and cash.

In the context of acquisitions, §94 of the Securities Act empowers the Minister to make regulations to provide for the making of takeovers and the rights and obligations of persons when a takeover is made. However, to date, no such regulations have been made.

In a transaction involving either an amalgamation or a takeover, a prospectus or a formalised document such as a proxy statement is usually not required under Mauritian law. However, it is highly likely that the rules of the stock exchange on which the shares of the target company are listed will have significant effect on the manner in which a company implements a merger, or deals with an offer. Subject to such rules, it is possible to structure defence mechanisms to takeovers.

5.3 Defence Mechanisms to a Hostile Bid

(a) Shareholders' Rights Issue Agreement

A shareholders' rights issue agreement, or as it is commonly referred to, a "poison pill", is a plan designed to deter a hostile takeover bid by diluting the percentage shareholding of the

acquiring company in the target Mauritian company. A poison pill may be found in a shareholders agreement or under the provisions of the company's constitution.

Typically the poison pill is triggered by a specified triggering event and grants shareholders, as a "bonus", the right to purchase additional shares in the target Mauritian company in proportion to their current shareholding, at a substantial discount to market price, if a hostile person acquires over a certain specified percentage (usually 20%) of the target Mauritian company's voting shares. The hostile person itself is not permitted to purchase shares at a discount. The effect of the poison pill is to dilute the percentage shareholding of the acquiring company in the target Mauritian company, while increasing the proportional interests of the other existing, friendly shareholders. The theory is that the hostile person will not acquire the requisite percentage shareholding to confer voting control of the target company while the plan is in force because of the massive dilution it would face, thus protecting the target Mauritian company from a hostile takeover.

The right of the directors to issue such "bonus" shares is always subject to their statutory duty to act in the best interests of the company. Acting in the best interests of the company does not necessarily mean that directors must obtain the very best price available for each individual share. Further, directors are entitled to have regard to any number of "proper" issues including "bonuses" to existing shareholders. Moreover, pre-existing contractual obligations to provide such bonuses will, more than likely, determine the issue in advance so that it must be "proper" for the directors to comply with their pre-existing contractual or constitutional obligations.

(b) **Poison Debt**

Another defensive mechanism is the poison debt which generally takes the form of a company issuing debt securities on terms and conditions designed to deter a hostile takeover.

Examples of terms and conditions which may prove a deterrent include:

- covenants that severely restrict the issuer's ability to sell assets;
- an increase in the interest rates of the debt in the event of a takeover, e.g. issue loan stock with low coupon or at a discount with zero coupon with a provision for repayment at par or at a premium on completion of the takeover;
- an acceleration of the maturity date upon the change of control of the target Mauritian company, i.e. repayment on completion of the takeover; and
- an issuance of debt/securities that are convertible into or carrying rights to subscribe for shares in the target Mauritian company.

(c) **Voting Poison Pill Plan**

The objective of a voting poison pill plan is to dilute the acquiring company's voting control. The most effective mechanisms are those that are in place prior to a potential hostile takeover bid. This will help to counter any accusations of mala fides on the part of the directors, which may render the plan invalid or expose the directors to liability for breaching their duties of impartiality. Also, given that these plans will require shareholder approval due to variation of share rights, it is easier to obtain the requisite consent when the spectre of a takeover does not loom. As an alternative, these plans may be created in response to a potential takeover and this will usually involve the potential target company issuing securities pursuant to a bonus issue (which possess special voting features), to its existing common shareholders. Many possible structures may be encountered. One form is where the target company issues shares, which do not have special voting privileges at the outset. Upon the occurrence of a specified triggering event, the shareholders, other than an acquiring company, receive super voting privileges. Another possible form is where the target company's shareholders are issued shares with voting rights that are enhanced with the length of time the securities are held on a continuous basis.

(d) **Shareholders' Meetings**

A defensive measure might include building special majorities and procedures for shareholder action, in particular removal of the Board.

Under Mauritian law, a special meeting of shareholders entitled to vote on an issue may be called by a person who is authorised by the constitution to call a meeting or the Board, and must be called by the Board on the written request of shareholders holding shares carrying together not less than 5% of the voting rights entitled to be exercised on the issue (§116). Depending on whether the company is a private or public company, and subject to the company's constitution, a director may be removed from office by resolution of the members of the company passed by at least 75% of the shareholders entitled to vote in the case of a private company and by a simple majority in the case of a public company (§138). In all events, subject to any supermajority provision, the shareholders may amend the constitution so as to provide for a staggered Board and any special majority necessary to remove them so as to delete such provision.

(e) **Concert Parties**

Generally there is nothing in Mauritius law to prevent shareholders from acting together for any lawful purpose including a takeover. Therefore, to counter such "concert parties" it is advisable to create a regime, in the constitution, which sets out the rules for making a bid. The rules of any stock exchange (if the target company is listed) may also require disclosure of concert parties.

The constitution can, for example, define the concept of persons acting in concert, and then transfer their voting rights pro rata to all the other shareholders in certain narrowly defined circumstances. A constitutional amendment to introduce concert party rules will require shareholder consent, and a relatively high level of approval to ensure shareholder buy-in and that the directors will not be criticised.

(f) **The Constitution**

Bearing in mind that the constitution of a target Mauritian company will always be susceptible to amendment provided the requisite majority for amendment is achieved, it may nevertheless be useful as a defensive mechanism to build into the constitution a list of matters requiring the approval of special majorities. However, restrictions which affect the liquidity of the shares may be undesirable or contrary to stock exchange regulations if the company is listed. Also, restrictive provisions in the constitution may unduly hamper the company during ordinary operations. Thus a balance would have to be struck. Typical restrictions would relate to the exercise of votes in certain circumstances, such as unwanted bids, or the disclosure of underlying beneficial interests, with votes in excess of a certain threshold, or in relation to ineligible beneficiaries, being transferred to other shareholders pro rata.

6. GENERAL INFORMATION

6.1 Banking Facilities

Currently, the two largest domestic banks in Mauritius are the Mauritius Commercial Bank and the State Bank of Mauritius, which is minority state-owned.

Presently there are 21 banks in operation which offer a wide variety of world class services as those provided by any other European international bank. Besides traditional banking facilities, these banks offer card based payment services such as credit and debit cards; and phone and internet banking facilities. Of these 21 banks, seven are locally incorporated, two are joint ventures with foreign ownership, seven are subsidiaries of foreign owned banks and five are branches of foreign banks.

For more details on the operational aspects, management and control, setting up a bank and obtaining a banking licence in Mauritius please refer to the contact details at the end of this Guide.

Banks in Mauritius are free to conduct business in all currencies.

6.2 Accountants

There are many accounting firms in Mauritius available to provide accounting and consultancy services to Mauritian entities. All of the leading international firms have local affiliates.

6.3 Registers and Inspection

Records of global business companies, such as the certificate of incorporation, the constitution, the share register, the contact details of the directors, or copies of such documents are not available for inspection by the public.

All companies in Mauritius must, however, keep the following records and make them available for inspection by a shareholder who serves the company with written notice of intention to inspect the records (§226):

- minutes of all meetings and resolutions of shareholders;
- copies of written communications to all shareholders or to all holders of a class of shares during the preceding seven years, including annual reports, financial statements, and group financial statements;
- certificates given by directors under the Companies Act; and
- the interests register of the company, where it has one.

These documents must be available for inspection at the place at which the company's records are kept between the hours of 9.00am and 5.00pm (§227).

6.4 Termination of Mauritian companies

(a) Methods of Termination

There are several ways of terminating the registration and existence of a Mauritian company, each of which involves the Registrar removing the company from the register. This includes where (§309(1)):

- the company is an amalgamating company, and has not become the amalgamated company;
- the Registrar is satisfied that the company has ceased to carry on business and there is no other reason for the company to continue in existence;
- the company has failed to pay its registration fees;
- the company has not filed its annual return as required under section 223(2);
- the company has been put into liquidation, and, for example, no liquidator is acting in respect of the company;
- the Registrar receives a request in the approved form from a shareholder authorised to make the request by a special resolution, or the Board or any other person (where the company's constitution so permits) that the company be removed from the register on specified grounds; or
- the liquidator delivers to the Registrar a notice that a final meeting of dissolution has taken place.

A request that a company be removed from the Registrar by either a shareholder or the Board may only be made if the company has ceased to carry on business, has discharged (in full) all

its liabilities to all its known creditors and has distributed any of its surplus assets in accordance with its constitution and the Companies Act or, the company has no surplus assets after paying its debts in full or in part and no creditor has applied to the court for an order putting the company into liquidation (§309(2)). Such an application must also be accompanied by a written notice from the Commissioner of Income Tax and the Commissioner for Value Added Tax stating that there is no objection to the company being removed from the registers (§309(4)).

The Registrar will not remove a company from the register, however, unless:

- the Registrar has given notice to the company, any person who is entitled to a charge registered against the company, and the public of his intention to remove the company from the register (§310);
- the Registrar is satisfied that no person has objected to the removal (§312); or
- where the Registrar has received an objection, the Registrar has discharged his duties pursuant to §313, i.e. he is satisfied that the objection has been withdrawn; the facts on which the objection was based are not, or are no longer, correct; or the objection is frivolous (§313(1)).

A person who gives notice objecting to the removal of a company may, in certain circumstances, apply to the court for an order not to remove the company from the register on any grounds set out in §312, e.g. the company is party to legal proceedings or the person is a creditor or has an undischarged claim against the company. On such an application and if so satisfied, the court may order that the company shall not be removed from the register.

It is worth noting that the removal of a company from the register does not affect the liability of any former director or shareholder of the company, or any other person in respect of any act or omission that took place before the company was removed from the register and that liability continues and may be enforced as if the company had not been removed from the register (§317).

In addition, the court may appoint a liquidator (under §108 of The Insolvency Act 2009) to a company removed from the register as if the company continued in existence (§318).

(b) **Property of Company Removed from the Register**

The Companies Act provides that any property which, immediately before the removal of a company from the register of companies, has not been distributed or disclaimed shall vest in the Consolidated Fund of Mauritius (§315(2)). "Property" includes all leasehold rights and all other rights vested in or held on behalf of, or on trust for the company prior to its removal (referred to as "foreign company"), excluding property held by the foreign company on trust for any other person (§315(1)).

On becoming aware of the vesting of such "property", the Registrar must inform the Curator of Vacant Estates and give public notice in two daily newspapers in wide circulation in Mauritius, of the vesting, setting out the name of the foreign company and particulars of the property (§315(3)), thereby allowing a person the opportunity to apply to the court for an order vesting all or part of the property in that person or for payment of compensation of an amount not greater than the value of the property (§315(4)).

The Companies Act also provides that the State may disclaim "onerous" property, e.g. an interest in property which is burdened with onerous covenants, or the property cannot be readily sold because the possessor is bound to the performance of an onerous act or the payment of a sum of money (§316).

(c) **Restoration to the Register**

Although a company may have been removed from the register, the Companies Act provides that the Registrar may, either on his own volition or on the application of a shareholder,

director, creditor or liquidator, restore a company to the register where he is satisfied that the company was still carrying on business, was a party to legal proceedings, or the company was in receivership or liquidation (or both) (§319(1) and (2)). Before the Registrar restores a company, however, he must give public notice in two daily newspapers setting out (§319(3)):

- the name of the company;
- the name and address of the applicant;
- the relevant section of the Companies Act and the grounds on which the application is made or the Registrar proposes to act; and
- the date by which an objection to the restoration must be filed (being not less than 28 days after the date of the notice).

The Registrar will not restore a company to the register if he receives an objection to the restoration within the period stated in the notice (§319(4)). Interestingly, the Companies Act is silent as to what may constitute a sufficient objection, however, it is likely that evidence going towards the company's business activity (or lack thereof), or evidence that the company is not a party to legal proceedings or in receivership or liquidation will likely be sufficient. Where the company is restored, both the Registrar and the court may give the company directions to ensure that the company complies with the provisions of the Companies Act or any regulations and for the purpose of putting the company in the same position as it would have been had the company not been removed from the register (§319(5) and (6)).

The court also has the power to restore a company to the register on an application by (§320(2)):

- a person who was a shareholder or director;
- a person who was a creditor;
- a person who was a party to legal proceedings against the company;
- a person who had an undischarged claim against the company;
- a person who was the liquidator or a receiver of the property of the company;
- the Registrar; or
- with leave of the court, any other person.

The court may restore a company to the register for all the reasons that the Registrar may restore a company to the register and also where it is just and equitable to do so, e.g. where the applicant believed that a right of action existed, or the applicant intended to pursue a right of action, on behalf of the company, such as a derivative action (§320(1)). Where the court makes an order restoring a company to the register, it may give such directions to ensure that the company complies with the provisions of the Companies Act or any regulations and for the purpose of putting the company in the same position as it would have been had the company not been removed from the register (§320(3) and (4)).

A company will be restored to the register of companies when a notice to that effect is signed by the Registrar and the company will be deemed to have continued in existence as if it had not been removed from the register (§321).

6.5 Winding Up and Liquidation

The winding-up or liquidation of a company may be enforced by the court (§102 to §136 of The Insolvency Act 2009) or may be commenced voluntarily (§137 to §153 of the Insolvency Act 2009). Voluntary windings-up may be made by the shareholders, where a company is solvent, or by its creditors, where the company is insolvent. An automatic winding-up of a company may be provided for in its constitution, creating a company of limited duration.

For more specific advice on companies in Mauritius, we invite you to contact one of the following:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found here.

SCHEDULE 1

Definition of “Financial Services” pursuant to the Second Schedule of the Financial Services Act:

Assets Management
Credit Finance
Custodian services (non-CIS)
Distribution of financial products
Factoring
Global headquarters administration
Global treasury activities
Leasing
Occupational Pension Scheme
Pension fund administrators
Pension Scheme Management
Retirement Benefits Scheme
Superannuation Funds
Registrar and Transfer Agent
Treasury management

and such other financial business activity as may be specified by the Commission

SCHEDULE 2

GLOBAL BUSINESS COMPANIES COMPARISON MATRIX

	GBL1	GBL2
Shares		
Minimum Capital Requirement	None	None
Minimum Number of Share Issued	1	1
Minimum Number of Members	1	1
Corporate members allowed	Yes	Yes
Nominee Shareholders allowed	Yes	Yes
Bearer Shares allowed	No	No
No Par Value Shares allowed	Yes	Yes
Directors & Officers		
Minimum Number of Directors	1[1]	1
Corporate Directors allowed	No	Yes
Resident Secretary required	Yes	Optional
Resident Agent required	No	Yes
Work & Resident permits (for expatriate staff)	Yes	No
Miscellaneous		
Incorporation timeframe	8-15 days	3 days
Allowed to carry out Financial Services Activities	Yes	No
Allowed to raise funds from public	Yes	No
Registered office in Mauritius required	Yes	Yes
Annual Meeting required	Yes	Yes
Annual Meeting in Mauritius required	No	No
Migration into and out of Mauritius allowed	Yes	Yes
Tax status	Income Tax at 15%[2]	Tax exempt
Exchange control	No	No
Free repatriation of profits	Yes	Yes
Records publicly accessible	No	No
Accounts		
Audited Accounts required	Yes	Optional
Filing of Audited Accounts to FSC required	Yes	No[3]
Accounts publicly accessible	No	No

[1] Minimum of two resident directors are required to qualify as resident for Mauritian tax purpose (Income Tax Act 1995)
[2] Able to avail itself of various tax credit provisions which will mitigate the final tax payable
[3] GBL2 Companies are required to prepare and file a financial summary to the FSC.