

CAYMAN ISLANDS



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**A BILL FOR A LAW TO REPEAL AND REPLACE PART V OF THE
COMPANIES LAW (2007 REVISION) IN ORDER TO REFORM THE
LAW RELATING TO THE WINDING UP OF COMPANIES; AND FOR
INCIDENTAL AND CONNECTED PURPOSES**

MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to give effect to the recommendations relating to corporate insolvency set out in the 2006 report of the Law Reform Commission entitled “Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies Law.”.

In 2002 the Financial Services Secretariat asked Mr. Andrew J. Jones QC and G. James Cleaver to prepare a report upon the insolvency law and practice in response to the points made by KPMG in its review entitled “*Review of Financial Regulation in the Caribbean Overseas Territories and Bermuda*”. It was decided to deal with the matter in two stages. Messrs Jones and Cleaver submitted a report dated 29 May 2002 dealing solely with cross-border insolvency issues and the extent to which Cayman Islands law and practice is consistent with the model law of the United Nations Commission on International Trade Law (UNCITRAL). It was recognised that in order to conduct an in-depth review of the insolvency law and practice as a whole, a larger and more broadly based committee should be established. The subject thereafter was divided into a series of topics which were considered by seven separate groups whose reports were all submitted to Andrew Jones who acted as the overall chairman. A substantial amount of detailed work has been done by this private sector committee over the past four years.

The Law Reform Commission decided that it would assume responsibility for reviewing this important area of the law and therefore asked the private sector committee to submit its report and recommendations, which was done in September 2005. The report of the Commission is therefore based to a substantial extent upon the research and recommendations of a broadly based private sector committee comprising insolvency practitioners and lawyers involved with capital markets and asset finance business.

The recommendations of the Commission (based on the submissions of the private sector committee) may be summarised as follows-

- (a) the existing law relating to corporate insolvency is unduly complex and out of date and should be repealed and replaced;
- (b) the practice of attempting to apply foreign insolvency rules to the Islands does not work satisfactorily and there should be established an Insolvency Rules Committee which would be charged with the responsibility of enacting insolvency rules which specifically meet the needs of the Cayman Islands financial services industry;
- (d) there is currently a considerable degree of cross-border co-operation in respect of insolvency matters, but the basis upon

which this co-operation is afforded depends largely upon judicial practice and it is therefore recommended that the law relating to international co-operation in respect of insolvency matters be codified and included in a new Part XVI of the principal Law.

Clause 1 provides the short title of the Bill and the commencement of provisions of the Bill.

Clause 2 inserts new definitions in section 2 of the Companies Law (2007 Revision) (“the principal Law”).

Clause 3 repeals and replaces Part V of the principal Law.

The main provisions under Part V are as follows-

1. **Section 89** inserts a definition section. The definition of “company” applies to Part V only because it will become possible for local branches of foreign companies to be liquidated under this legislation by virtue of section 91 (d).

Also **section 89** defines a new term “shadow director” which, in relation to a company, is any person in accordance with whose directions or instructions the directors of the company are accustomed to act, but the person is not deemed to be a shadow director by reason only that the directors act on advice given by him in a professional capacity. This is the same definition as the definition contained in section 741 of the English Companies Act, 1985.

2. **Section 90 (1)** seeks to clarify the Law by providing that a company’s articles can provide for the automatic liquidation of the company. It is not clear whether section 133 (1) of the principal Law permits companies to be put into liquidation automatically at the expiry of a fixed term or upon the occurrence of an event.

3. **Section 91** specifies the kinds of companies which may be wound up by the Court. The section provides that the Court will have jurisdiction to make winding up orders in respect of -

- (a) an existing company;
- (b) a company incorporated and registered under the Companies Law;
- (c) a body incorporated under any other law; and
- (d) a foreign company which -
 - (i) has property located in the Islands;
 - (ii) is carrying on business in the Islands;
 - (iii) is the general partner of a limited partnership; or

(iv) is registered under Part IX.

An 'existing company' is one incorporated under the Jamaican law prior to 1961 and "recorded" as carrying on business in the Cayman Islands as defined in section 2 (1) of the principal Law.

A body incorporated under any other law includes a body under the Churches Incorporation Law (1998 Revision), the Building Societies Law (2001 Revision) or the Strata Titles Law (1996 Revision).

The jurisdiction of the Court is extended by section 91 to enable it to make winding up orders in respect of the Cayman branches of foreign companies and foreign incorporated general partners of limited partnerships registered under the laws of the Cayman Islands

4. **Section 92** widens the circumstances in which a company may be wound up by the Court. Section 92 (c) provides that a company may be wound up by the Court if the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up.

This is a basis upon which a company may be put into voluntary liquidation automatically. It is also intended to be a ground upon which a contributory (or conceivably a creditor) should be able to present a petition. For example, if the directors of a company which has gone into liquidation automatically are failing to wind up its affairs, a contributory should be entitled to present a petition on this ground.

5. **Section 93** provides the definition of "inability to pay debts" and reproduces section 95 of the principal Law.

6. **Section 94** deals with applications for winding up. At present contingent and prospective creditors cannot present a petition. This section extends the right to present a petition.

Subsection (2) provides that where it is expressly provided for in the articles of association of a company the directors of a company incorporated after the commencement of this Law have the authority to present a winding up petition on its behalf without the sanction of a resolution passed at a general meeting.

The rating agencies normally require that special purpose vehicles have at least one independent director. Historically, this requirement has not applied to Caymanian companies because their directors had no power to present a winding

up petition. The ability to exclude this power in the articles will prevent Caymanian companies being put at a competitive disadvantage in the capital markets business. In order to avoid any adverse effect upon existing transactions, this amendment will only apply to companies incorporated after the commencement of the new law.

Subsection (3) clarifies the circumstances in which shareholders can present petitions. Its effect is to impose a constraint upon "vulture funds" and those who buy shares with the intention of realising value by liquidating the company.

Under the regulatory laws the Monetary Authority has power to present petitions against licensed entities. Section 94 (4) enables the Authority to present a petition against an unlicensed entity in order to prevent it from carrying on a regulated business unlawfully.

7. **Section 95** deals with the power of the Court upon the hearing of a winding up petition. Subsection (1) expands and clarifies the existing section 100 of the principal Law by adopting language substantially the same as section 125 (1) of the 1986 English Insolvency Act ("the 1986 Act").

Subsections (3) to (6) are equivalent to sections 459 to 461 of the English Companies Act 1985.

8. **Section 97** deals with the avoidance of attachments and stay of proceedings when a winding up order is made or when a provisional liquidator is appointed.

Subsection (1) widens section 101 of the existing law by adding the words "including criminal proceedings". It provides that when a winding up order is made or a provisional liquidator is appointed no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose.

9. **Section 98** provides that when a winding up order is made the liquidator shall publish a notice of the winding up in the Official Gazette and the newspapers in which the winding up petition was advertised.

10. **Section 99** provides that when a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void. It is intended that the Insolvency Rules Committee should make rules relating to validation summonses.

11. **Section 100** specifies when a winding up by the court is considered to have begun.

12. **Section 101** deals with a company's statement of affairs. Where the Court has made a winding up order or appointed a provisional liquidator, the liquidator may require certain persons to prepare and submit to him a statement in the prescribed form as to the affairs of the company. Such persons would be persons who are or have been directors or officers of the company; persons who are or have been professional service providers to the company and persons who are or have been employees of the company, during the period of one year immediately preceding the date of the appointment of the liquidator or the date of the commencement of the winding up.

This section is based upon section 131 of the 1986 Act. Where the company has no employees the Law would require the company's professional service providers to make or concur in a statement of affairs.

The expression "professional service providers" is defined in section 89(1) to mean those who contract to provide general managerial or administrative services to a company on an annual or continuing basis. It is intended to catch, e.g. mutual fund administrators and investment managers, but not lawyers and auditors.

13. **Section 102** deals with investigations by a liquidator where a winding up order is made by the Court. There is no 'duty' to investigate in all cases because there will be no Government official (equivalent to the Official Receiver in England) charged with the responsibility to investigate at the public expense. Subsection (3) is intended to re-confirm that liquidators may be directed by the Court to conduct or assist in criminal prosecutions at the expense of creditors.

14. **Section 103** deals with the duty of certain persons to co-operate with the official liquidator and with the private examination of persons. A person who must co-operate with the liquidator is a person who -

- (a) has made or concurred with the statement of affairs;
- (b) is or has been a director or officer of the company;
- (c) is or was a professional service provider to the company;
- (d) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property; and
- (e) not being a person falling within paragraphs (a) to (c), is or has been concerned or has taken part in the promotion, formation or management of the company,

referred to in this section as the "relevant person".

The section includes those persons who are responsible for the formation of companies. In a normal situation this would be a law firm, trust company or company manager.

15. **Section 104** deals with the appointment and powers of a provisional liquidator. It provides that, subject to the provisions of this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

16. **Section 105** deals with the appointment of an official liquidator. When making a winding up order the Court shall appoint one or more qualified insolvency practitioners and may, in addition, appoint one or more foreign practitioners as liquidator or liquidators of the company. Section 89 provides that a qualified insolvency practitioner means a person holding the qualifications specified in the regulations made by the Insolvency Rules Committee under section 155 or such other qualifications as the Court considers appropriate for the conduct of the winding up of a company.

17. **Sections 106** and **107** deal with the appointment of joint liquidators and the removal of official liquidators respectively.

18. **Section 108** provides that an official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company.

19. **Section 109** provides for the remuneration of official liquidators. The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims. It is also provided that there shall be paid to the official liquidator such remuneration, by way of percentage or otherwise, that the Court may direct acting in accordance with rules made under section 155; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the Court directs.

20. **Section 110** specifies the functions and powers of official liquidators. The functions of the official liquidator are to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it and to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up. The powers of the official liquidators are set out in the Third Schedule. Some of the powers in the Third Schedule can only be exercised with the sanction of the Court or the liquidation committee. The powers of the official liquidators include-

- (a) power to bring or defend any action or other legal proceeding in the name and on behalf of the company;
- (b) power to carry on the business of the company so far as may be necessary for its beneficial winding up;
- (c) power to pay any class of creditors in full;
- (d) the power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels;
- (e) the power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal; and
- (f) the power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors.

21. **Section 111** provides for the stay of a winding up by the Court and **section 112** deals with the settlement of list of contributories by the liquidator.

22. **Section 113** empowers the Court to make calls at any time after making a winding up order. Such calls may be made on all or any of the contributories on the list of the contributories to the extent of their liability or to satisfy the expenses of winding up.

23. **Section 114** provides for the inspection of documents by creditors and contributories at any time after the making of winding up order by the Court. The Court, after making a winding up order, may make an order relating to the inspection of documents or to the preparation of reports.

24. **Section 115** provides that the Court shall, as to all matters relating to the winding up, have regard to wishes of the creditors or contributories and for that purpose it may direct reports to be prepared by the official liquidator and meetings of creditors or contributories to be summoned. The manner in which meetings are summoned and conducted will be addressed in the Rules. The Rules will also deal with such matters as notice, proxies, quorum, majorities required to pass resolutions etc.

25. **Sections 116 to 130** deal with the voluntary winding up of companies. **Section 116** sets out the circumstances in which a company may be wound up voluntarily. The section provides that a company incorporated and registered under this Law or an existing company may be wound up voluntarily -

- (a) when the period, if any, fixed for the duration of the company by its memorandum or articles of association expires;
- (b) if the event, if any, occurs, on the occurrence of which the memorandum or articles of association provide that the company is to be wound up;
- (c) if the company resolves by special resolution that it be wound up voluntarily; or
- (d) if the company resolves by ordinary resolution that it be wound up voluntarily because it is unable to pay its debts as they fall due.

26. **Section 117** sets out the circumstances in which a voluntary winding up is deemed to commence.

27. **Section 118** deals with the effect of a voluntary winding up order on business and the status of a company. Subsection (1) provides that the company shall from the commencement of its winding up cease to carry on its business except so far as it may be beneficial for its winding up.

28. **Section 119** provides for the appointment of a voluntary liquidator and **section 120** provides that any person, including a director or officer of a company may be appointed voluntary liquidator. A company may by this provision act as a voluntary liquidator.

29. **Sections 121** and **122** deal with the removal and resignation of voluntary liquidators respectively.

30. **Section 123** provides that certain notices relating, inter alia, to the filing of liquidators consent, must be filed within 28 days of the commencement of a voluntary winding up.

31. **Section 124** provides that where a company is being wound up voluntarily its liquidator shall apply to the Court for an order that the liquidation continue under the supervision of the Court unless, within 28 days of the commencement of the liquidation, the directors have signed a declaration of solvency in the prescribed form in accordance with the section.

A declaration of solvency means a voluntary declaration or affidavit in the prescribed form to the effect that a full enquiry into the company's affairs has been made and that to the best of the directors' knowledge and belief the company will be able to pay its debts in full together with interest at the prescribed rate, within such period, not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration.

Section 124 is intended to ratify current practice as recommended by a sub-committee of the private sector committee. The effect is that all insolvent liquidations are conducted under court supervision, there being no distinction between supervised liquidations and compulsory liquidations, except the method by which the proceeding is commenced. An important practical effect is that qualified insolvency practitioners will take over voluntary liquidations unless the directors are willing to sign off on declarations of solvency.

32. **Section 125** provides that any transfer of shares, not being a transfer with the sanction of the liquidator, and any alteration in the status of the company's members made after the commencement of a voluntary winding up is void.

33. **Section 126** provides that in the event of a voluntary winding up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and at the end of each succeeding year and such meeting shall held within 3 months of each anniversary of the commencement of the liquidation.

34. **Section 127** provides that as soon as the company's affairs are fully wound up, the liquidator shall make a report and an account of the winding up showing how it has been conducted and how the company's property has been disposed off and thereupon shall call a general meeting of the company for the purpose of laying before it the account and giving an explanation for it.

35. **Section 128** deals with the effects of winding up on the share capital of a company limited by guarantee; **section 129** provides that a voluntary liquidator may apply to the court to determine any question arising in the voluntary winding up of a company and **section 130** deals with the expenses incurred in the winding up of a company.

36. **Sections 131 to 133** deal with the winding up subject to the supervision of the Court. **Section 131** provides that when a resolution has been passed by a company to wind up voluntarily, the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124, on the grounds that -

- (a) the company is or is likely to become insolvent; or
- (b) the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.

37. **Sections 134 to 137** deal with offences of fraud etc. These sections follow the general scheme of the 1986 Insolvency Act except that the burden of proving an intent to defraud rests upon the prosecution.

38. **Section 134** deals with fraud etc. in the anticipation of a winding up. Section 134 is limited to those insiders who have exercised managerial functions such as a past or present officer or professional adviser.

39. **Section 135** deals with transactions by officers or professional service providers to defraud creditors; **section 136** deals with misconduct in the course of winding up; and section 137 provides that where a company is being wound up, whether by the Court or voluntarily, any person, who is or was a director, an officer a manager or a professional service provider of the company, commits an offence if he makes any material omission in any statement relating to the company's affairs, with intent to defraud the company's creditors or contributories.

40. **Sections 138 to 150** are general provisions. **Section 138** deals with getting in the company's property and **section 139** deals with provable debts.

41. **Section 140** deals with the distribution of a company's property. Section 140 reproduces section 112 of the existing law with a slight modification of subsection (2). There is an argument that the language of the current Law permits bilateral set off agreements but not multi-lateral set off agreements. In order to clarify the point the expression "any persons" is replaced with the expression "any person or persons". Subsections (3), (4) and (5) reproduce Rule 4.90 of the English Insolvency Rules.

42. **Section 141** deals with preferential debts. The priority of debts described in the Second Schedule relate to insolvent companies.

Subsection (2) of section 141 is intended to make clear that preferred creditors rank after the application of contractual set-off and netting rights.

43. **Section 142** deals with secured creditors. Subsection (1) provides that notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce his security without the leave of the Court and without reference to the liquidator.

This section seeks to codify the practical effect of the current law. It must be supported by rules which should follow rules 4.95 to 4.99 of the English Insolvency Rules.

44. **Section 143** deals with preferential charges on distrained goods and reproduces section 162 (5) of the current law.

45. **Section 144** deals with the effect of execution and attachment.

46. **Section 145** deals with voidable preference. This section repeals and replaces section 168 of the current Law and it seeks to confirm the Islands' reputation as "creditor friendly jurisdiction" for the purposes of capital markets and asset finance transactions. The critical question in determining whether a payment by a debtor to a creditor constitutes a voidable preference will continue to be whether the debtor made the payment with the dominant intention of preferring the creditor.

47. **Section 146** deals with the avoidance of dispositions made at undervalue. Thus the section provides that every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator. "Under value" in relation to a disposition of a company's property means -

- (a) the provision of no consideration for the disposition; or
- (b) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

48. **Section 147** deals with fraudulent trading and is based on section 213 of the 1986 Act

49. **Section 148** provides that if a request is made by or with the concurrence of the liquidator (including a provisional liquidator) for the giving, after the effective date, of any of the supplies mentioned in the subsection (2), the supplier-

- (a) may make it a condition of the giving of the supply that the liquidator personally guarantees the payment of any charges in respect of the supply; but
- (b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid.

The supplies referred to are a supply of electricity, a supply of water and a supply of telecommunication services.

The effect of this section is to put the utility companies in the same position as other creditors. In the case of an insolvent company, the utility companies must

prove for pre-liquidation debts. Post liquidation supplies will be payable in full as an expense of the liquidation for which the liquidator will be personally liable in the ordinary way.

50. **Section 149** deals with interest on debts. This section is based upon section 189 of the 1986 Act. It has the effect of changing the existing common law position which is that the creditor of a solvent company who has a contractual right of interest may claim interest at the contractual rate. Such interest is payable only out of the surplus which would otherwise go to the shareholders. An ordinary trade creditor who cannot establish a contractual right to interest, has no claim in the liquidation. The effect of this section is to give such creditor the right to receive interest at the prescribed rate.

51. **Section 150** deals with the currency of the liquidation. The section provides that in the case of a solvent liquidation, a company's creditors are entitled to receive payment of their debts in the currency of the obligation.

In the case of an insolvent liquidation, a company's liabilities shall be translated in to the functional currency of the company at the exchange rates ruling -

- (a) on the date of the commencement of the voluntary liquidation; or
- (b) on the day upon which the winding up order is made.

The functional currency of a company is the currency of the primary economic environment in which it operated as at the commencement of the liquidation.

In order to give effect to the *pari passu* rule, it is necessary to translate a company's liabilities into a common currency. This section gives effect to the established practice of the Grand Court which is to direct that a company's liabilities be translated into its functional currency, which is a question of fact to be determined in accordance with standards published by the Financial Accounting Standards Board (FAS 52). 50. **Sections 151 to 153** deal with the dissolution of a company following winding up voluntarily and by the Court.

52. **Section 151** provides that upon the expiration of three months from the registration of the return made under section 128 the company is deemed to be dissolved. This period may, upon application of the liquidator or by any other interested person, may be changed by order of the Court.

53. **Section 152** provides that when the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of that order or such other date as the Court thinks fit, and the company shall be dissolved accordingly.

54. **Section 153** deals with unclaimed dividends and undistributed assets. It provides for the holding, upon trust, of such assets or dividends by the liquidator or former liquidator for the benefit of the contributories or creditors for a period of one year after the dissolution of the company. At the end of one year after the dissolution of the company, the former liquidator shall transfer any funds or other assets held on trust by him to the Financial Secretary who shall manage them in accordance with Part VIII of the Public Management and Finance Law (2005 Revision).

54. **Section 154** establishes the Insolvency Rules Committee which will comprise-

- (a) the Chief Justice or other judge nominated by the Chief Justice in his place who shall be chairman;
- (b) the Attorney-General or his nominee;
- (c) the legal practitioner members of the Grand Court Rules Committee;
- (d) a qualified insolvency practitioner appointed by the Chief Justice upon the recommendation of the Cayman Islands Society of Professional Accountants; and
- (e) a person appointed by the Chief Justice who, in his opinion, demonstrates a wide knowledge of law, finance, financial regulation or insolvency practice.

55. **Section 155** sets out the powers of the Insolvency Rules Committee which includes the power to make rules for the purposes of Parts IV, V and XVI of the Law and the power to set fees to be paid in connection with applications and winding up proceedings.

Clause 4 repeals section 200 of the principal Law which deals with the winding up of a limited duration company. Liquidation provisions relating to the liquidation of exempted limited duration companies are included in the new Part V.

Clause 5 amends section 232 by deleting the definition of “regulatory laws”.

Clause 6 inserts a new Part XVI which deals with international co-operation in cross-border bankruptcy proceedings.

Section 253 of the new Part XVI gives the Grand Court power to make ancillary orders upon the application of a trustee, liquidator or other official appointed in respect of foreign companies which are the subject of a bankruptcy or liquidation proceeding.

Section 254 provides that in determining whether to make an ancillary order under section 253, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with -

- (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
- (b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
- (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
- (d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;
- (e) the recognition and enforcement of security interests created by the debtor;
- (f) the non-enforcement of foreign taxes, fines and penalties; and
- (g) comity.

Section 255 deals with the publication of foreign bankruptcy proceedings. It is not uncommon for a company incorporated under Part II or registered under Part IX of the Companies Law to become the subject of a foreign bankruptcy proceeding. The fact that a company registered under the Companies Law is the subject of a foreign bankruptcy proceeding should be a matter of public record. It is therefore provided in section 255 that such companies should make a filing with the Registrar of Companies.

The powers set out under Part XVI are based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are familiar.

Clause 7 amends the principal Law by repealing the Second Schedule thereof and by substituting two new Schedules.

The new Second Schedule sets out categories of preferred debts and the Third Schedule specifies the powers of liquidators.

Clause 8 contains savings and transitional provisions.

ARRANGEMENT OF CLAUSES

1. Short title and commencement
2. Amendment of section 2 of the Companies Law (2007 Revision)-
definitions
3. Repeal of Part V and substitution- winding up of companies and
associations
4. Repeal of section 200- winding up of an exempted limited duration
company
5. Amendment of section 232- definitions in this Part
6. Insertion of Part XVI- international co-operation
7. Repeal of the Second Schedule and insertion of new Schedules
8. Savings and transitional provisions

CAYMAN ISLANDS

A BILL FOR A LAW TO REPEAL AND REPLACE PART V OF THE COMPANIES LAW (2007 REVISION) IN ORDER TO REFORM THE LAW RELATING TO THE WINDING UP OF COMPANIES; AND FOR INCIDENTAL AND CONNECTED PURPOSES

ENACTED by the Legislature of the Cayman Islands.

1. (1) This Law may be cited as the Companies (Amendment) Law, 2007.

Short title and commencement

(2) Sections 154 and 155 of Part V as set out in section 5 shall come into force on the date of publication of this Law and the other provisions of this Law shall come into force on such date as may be appointed by order made by the Governor in Cabinet; and different dates may be appointed for different provisions and in relation to different matters.

2. (1) The Companies Law (2007 Revision), in this Law referred to as "the principal Law", is amended in section 2 by inserting the following definitions in their appropriate alphabetical order—

Amendment of section 2 of the Companies Law (2007 Revision)- definitions

“ "Insolvency Rules Committee" means the committee established in accordance with section 154;

"regulated business" means a business which is required to be licensed under one or other of the regulatory laws; and

"regulatory laws" means any one or more of the following-

- (a) Banks and Trust Company Law (2007 Revision);
- (b) Building Societies Law (2001 Revision);
- (c) Companies Management Law (2003 Revision);
- (d) Cooperative Societies Law (2001 Revision);
- (e) Insurance Law (2007 Revision);
- (f) Money Services Law (2003 Revision);
- (g) Mutual Funds Law (2003 Revision); and
- (h) Securities Investment Business Law (2004 Revision),

and any other laws that may be prescribed by the Governor by regulations made under section 46 of the Monetary Authority Law (2004 Revision).”.

Repeal of Part V and substitution- winding up of companies and associations

3. The principal Law is amended by repealing Part V and by substituting the following Part –

“Part V – Winding up of Companies and Associations

Preliminary

Definitions

89. (1) In this Part unless the context otherwise requires-

"company" includes a foreign company in respect of which the Court has made a winding up order;

"contributory" means -

- (a) every person liable by virtue of section 49 to contribute to the assets of a company in the event that it is wound up under this Law; and
- (b) every holder of fully paid up shares of a company;

"controller" means a person appointed by the Authority pursuant to the regulatory laws to take control of a company;

"document" includes any device by means of which information is recorded or stored;

"limited partnership" means an ordinary limited partnership registered in accordance with section 49 of the Partnership Law (2002 Revision) or an exempted

limited partnership registered in accordance with Section 9 of the Exempted Limited Partnership Law (2003 Revision);

"foreign company" means any body corporate incorporated outside the Islands;

"foreign practitioner" means a person who is qualified under the law of a foreign country to perform functions equivalent to those performed by official liquidators under this Law or by trustees in bankruptcy under the Bankruptcy Law (1997 Revision);

"official liquidator" means the liquidator of a company which is being wound up by order of the Court or under the supervision of the Court and includes a provisional liquidator;

"prescribed" means prescribed by the Insolvency Rules Committee;

"professional service provider" means a person who contracts to provide general managerial or administrative services to a company on an annual or continuing basis;

"qualified insolvency practitioner" means a person holding the qualifications specified in the regulations made by the Insolvency Rules Committee under section 155 or such other qualifications as the Court considers appropriate for the conduct of the winding up of a company;

"Rules" mean rules prescribed by the Insolvency Rules Committee;

"shadow director" means, in relation to a company, any person in accordance with whose directions or instructions the directors of the company are accustomed to act, but the person is not deemed to be a shadow director by reason only that the directors act on advice given by him in a professional capacity; and

"winding up order" includes an order that a voluntary

winding up continue under the supervision of the court and references to a company being wound up by the Court includes a company which is being wound up under the supervision of the Court.

Alternative modes of winding up

90. A company may be wound up –

- (a) compulsorily by order of the Court;
- (b) voluntarily -
 - (i) by virtue of a special resolution;
 - (ii) because the period (if any) fixed for the duration of the company by its articles of association has expired; or
 - (iii) because the event (if any) has occurred, on the occurrence of which its articles of association provide that the company shall be wound up; or
- (c) under the supervision of the Court.

Jurisdiction of the Court

91. The Court has jurisdiction to make winding up orders in respect of -

- (a) an existing company;
- (b) a company incorporated and registered under this Law;
- (c) a body incorporated under any other law; and
- (d) a foreign company which -
 - (i) has property located in the Islands;
 - (ii) is carrying on business in the Islands;
 - (iii) is the general partner of a limited partnership; or
 - (iv) is registered under Part IX.

Winding up by the Court

Circumstances in which a company may be wound up by the Court

92. A company may be wound up by the Court if -

- (a) the company has passed a special resolution requiring the company to be wound up by the Court;
- (b) the company does not commence its business within a year from its

incorporation, or suspends its business for a whole year;

- (c) the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;
- (d) the company is unable to pay its debts; or
- (e) the Court is of opinion that it is just and equitable that the company should be wound up.

Definition of inability to pay debts

93. A company shall be deemed to be unable to pay its debts if-

- (a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;
- (b) execution of other process issued on a judgement, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or
- (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

Application for winding up

94. (1) An application to the Court for the winding up of a company shall be by petition presented either by-

- (a) the company;
- (b) by any creditor or creditors (including

any contingent or prospective creditor or creditors);

- (c) any contributory or contributories; or
- (d) subject to subsection (4), by the Authority pursuant to the regulatory laws.

(2) Where expressly provided for in the articles of association of a company the directors of a company incorporated after the commencement of this Law have the authority to present a winding up petition on its behalf without the sanction of a resolution passed at a general meeting.

(3) A contributory is not entitled to present a winding up petition unless either-

- (a) the shares in respect of which he is a contributory, or some of them, are partly paid; or
- (b) the shares in respect of which he is a contributory, or some of them, either were-
 - (i) originally allotted to him, or have been held by him, and registered in his name for a period of at least six months immediately preceding the presentation of the winding up petition; or
 - (ii) have devolved on him through the death of a former holder.

(4) A winding up petition may be presented by the Authority in respect of any company which is carrying on a regulated business in the Islands upon the grounds that it is not duly licensed or registered to do so under the regulatory laws or for any other reason as provided under the regulatory laws or any other law.

Powers of the Court

95. (1) Upon hearing the winding up petition the Court may-

- (a) dismiss the petition;
- (b) adjourn the hearing conditionally or unconditionally;
- (c) make a provisional order; or

(d) any other order that it thinks fit,

but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.

(2) The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.

(3) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely -

- (a) an order regulating the conduct of the company's affairs in the future;
- (b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;
- (c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or
- (d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly.

(4) Where an alternative order under subsection (3) requires the company not to make any, or any specified, alteration in the memorandum or articles of association, the company does not have power, without the leave of the Court, to make any such alteration in breach of that requirement.

(5) Any alteration in a company's memorandum

or articles of association made by virtue of an alternative order under subsection (3) is of the same effect as if duly made by resolution of the company, and the provisions of this Law shall apply to the memorandum or articles of association as so altered accordingly.

(6) A copy of an alternative order made under subsection (3) altering, or giving leave to alter, a company's memorandum or articles of association shall be filed by the company with the Registrar within 14 days of the making of the order.

Power to stay or
restrain
proceedings

96. At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may -

- (a) where any action or proceeding against the company, including a criminal proceeding, is pending in a summary court, the Court or the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and
- (b) where any action or proceeding is pending against the company in a foreign court, apply to the Court for an injunction to restrain further proceedings therein,

and the court to which application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

Avoidance of
attachments and
stay of proceedings

97. (1) When a winding up order is made or a provisional liquidator is appointed no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose.

(2) When a winding up order has been made, any attachment, distress or execution put in force against the estate or effects of the company after the commencement

of the winding up is void.

Notice of winding up order

98. When a winding up order is made, the liquidator shall -

- (a) file a copy of the winding up order with the Registrar; and
- (b) publish notice of the winding up in the Official Gazette and any newspaper in which the winding up petition was advertised.

Avoidance of property dispositions etc

99. When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.

Commencement of winding up by Court

100. (1) If, before the presentation of a petition for the winding up of a company by the Court-

- (a) a resolution has been passed by the company for voluntary winding up; or
- (b) the period, if any, fixed for the duration of the company by the articles of association has expired; or
- (c) the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred,

the winding up of the company is deemed to have commenced at the time of passing of the resolution or the expiry of the relevant period or the occurrence of the relevant event.

(2) In any other circumstance not specified in subsection (1), the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up.

Company's statement of affairs

101. (1) Where the Court has made a winding up order or appointed a provisional liquidator, the liquidator may require some or all of the persons mentioned in subsection (3) to prepare and submit to him a statement

in the prescribed form as to the affairs of the company.

(2) The statement shall be verified by an affidavit sworn by the persons required to submit it and shall show-

- (a) particulars of the company's assets and liabilities, including contingent and prospective liabilities;
- (b) the names and addresses of any persons having possession of the company's assets;
- (c) the assets of the company held by those persons;
- (d) the names and addresses of the company's creditors;
- (e) the securities held by those creditors;
- (f) the dates when the securities were respectively given; and
- (g) such further or other information that the liquidator may require.

(3) The persons referred to in subsection (1) are-

- (a) persons who are or have been directors or officers of the company;
- (b) persons who are or have been professional service providers to the company; and
- (c) persons who are or have been employees of the company, during the period of one year immediately preceding the relevant date.

(4) Where any persons are required under this section to submit a statement of affairs to the liquidator, they shall do so, subject to subsection (5), before the end of the period of 21 days beginning with the day after that on which the prescribed notice of the requirement is given to them by the liquidator.

(5) The liquidator may release a person from an obligation imposed on him under subsection (1) or, when giving the notice mentioned in subsection (4) or subsequently, the liquidator may extend the time for compliance; and if the liquidator refuses to extend the

time for compliance, the Court may do so.

(6) In this section "the relevant date" means-

- (a) in a case where a provisional liquidator is appointed, the date of his appointment; and
- (b) in any other case, the commencement of the winding up.

(7) A person who, without reasonable excuse, fails to comply with any obligation imposed under this section is liable on conviction to a fine of \$10,000.

Investigation by liquidator

102. (1) Where a winding up order is made by the Court, the liquidator shall be empowered to investigate -

- (a) if the company has failed, the causes of the failure; and
- (b) generally, the promotion, business, dealings and affairs of the company,

and to make such report, if any, to the Court as he thinks fit.

(2) Subject to obtaining the directions of the Court, the liquidator shall have power to -

- (a) assist the Authority and the Royal Cayman Islands Police Force to investigate the conduct of persons referred to in section 101 (3); and
- (b) institute and conduct a criminal prosecution of persons referred to in section 101 (3).

(3) Subject to obtaining the prior approval of the company's creditors, if it is insolvent, or its contributories, if it is solvent, the directions given under subsection (2) may include a direction that the whole or part of the costs of investigation and prosecution be paid out of the assets of the company.

Duty to co-operate and the private examination of relevant persons

103. (1) This section applies to any person who, whether resident in the Islands or elsewhere-

- (a) has made or concurred with the

- statement of affairs;
- (b) is or has been a director or officer of the company;
- (c) is or was a professional service provider to the company;
- (d) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property;
- (e) not being a person falling within paragraphs (a) to (c), is or has been concerned or has taken part in the promotion, or management of the company,

and such person is referred to in this section as the "relevant person".

(2) It is the duty of every relevant person to co-operate with the official liquidator.

(3) While a company is being wound up, the official liquidator may at any time before its dissolution apply to the Court for an order -

- (a) for the examination of any relevant person; or
- (b) that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company.

(4) Unless the Court otherwise orders, the official liquidator shall make an application under subsection (3) if he is requested in accordance with the rules to do so by one-half, in value, of the company's creditors or contributories.

(5) On an application made under subsection (3) (a), the Court may order that a relevant person -

- (a) swear an affidavit in answer to written interrogatories;
- (b) attend for oral examination by the official liquidator at a specified time and place, or
- (c) do both things specified in paragraphs

(a) and (b).

(6) The Court may direct that any creditor or contributory of the company be permitted by the official liquidator to participate in an oral examination.

(7) The Court shall have jurisdiction-

- (a) to make an order under this section against a relevant person resident outside the Islands; and
- (b) to issue a letter of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person resident outside the jurisdiction.

Official Liquidators

Appointment and powers of provisional liquidator

104. (1) Subject to the provisions of this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company on the grounds that -

- (a) there is a prima-facie case for making a winding up order; and
- (b) the appointment of a provisional liquidator is necessary in order to-
 - (i) prevent the dissipation or misuse of the company's assets; or
 - (ii) prevent the oppression of minority shareholders; or
 - (iii) prevent mismanagement or misconduct on the part of the company's directors.

(3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company ex-parte on the grounds that -

- (a) the company is or is likely to become unable to pay its debts within the meaning of section 93; and
- (b) the company intends to present a compromise or arrangement to its creditors.

(4) A provisional liquidator shall carry out only such functions as the Court may confer on him and his powers may be limited by the order appointing him.

(5) The remuneration of the provisional liquidator shall be fixed by the Court from time to time on his application and the Court shall in fixing such remuneration act in accordance with rules made under section 155.

Appointment of
official liquidator

105. (1) For the purpose of conducting the proceedings in winding up a company and assisting the Court therein, there may be appointed one or more than one person to be called an official liquidator or official liquidators; and the Court may appoint to such office such person as it thinks fit, and if more persons than one are appointed to such office, the Court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any or more of such persons.

(2) The Court may also determine whether any and what security is to be given by an official liquidator on his appointment; and if no official liquidator is appointed, or during any vacancy in such office, all the property of the company shall be in the custody of the Court.

(3) The liquidator shall within 28 days of the date upon which the winding up order is made summon-

- (a) a meeting of the company's creditors if the order was made on the grounds that the company is insolvent; or
- (b) a meeting of the company's contributories if the order was made on grounds other than insolvency,

for the purposes of resolving any other matters which the liquidator puts before the meeting.

(4) The Court may make an order dispensing with the need to summon a meeting under this section or extending the time within which it shall be summoned.

Appointment of joint liquidators

106. When two or more persons are appointed to the office of liquidator, either provisionally or as official liquidators, they shall be authorised to act jointly and severally, unless their powers are expressly limited by order of the Court.

Removal of official liquidators

107. An official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company.

Qualifications of official liquidators

108. (1) A foreign practitioner may be appointed to act jointly with a qualified insolvency practitioner.

(2) Official liquidators are officers of the Court.

Remuneration of official liquidators

109. (1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

(2) There shall be paid to the official liquidator such remuneration, by way of percentage or otherwise, that the Court may direct acting in accordance with rules made under section 155; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the Court directs.

Function and powers of official liquidators

110. (1) It is the function of an official liquidator-

- (a) to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and
- (b) to report to the company's creditors and contributories upon the affairs of the

company and the manner in which it has been wound up.

- (2) The official liquidator may-
- (a) with the sanction of the Court, exercise any of the powers specified in Part I of the Third Schedule; and
 - (b) with or without that sanction, exercise any of the general powers specified in Part II of the Third Schedule.

(3) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and subject to subsection (5), any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of such powers (hereinafter referred to as a "the sanction application")

- (4) In the case of-
- (a) a solvent company, a sanction application may only be made by a contributory and the creditors shall have no right to be heard;
 - (b) an insolvent company, a sanction application may only be made by a creditor and the contributories shall have no right to be heard; and
 - (c) a company whose solvency is doubtful, a sanction application may be made by both contributories and creditors and both contributories and creditors shall have a right to be heard.

(5) For the purposes of this section, a person shall be treated as a related to a company if-

- (a) he has acted for the company as a professional service provider;
- (b) he is or was a shareholder or director of the company or of any other company in the same group as the company;
- (c) he has a direct or indirect beneficial interest in the shares of the company; or
- (d) he is a creditor or debtor of the company.

General Powers of the Court

Power to stay winding up

111. (1) The Court may at any time after an order for winding up, on the application either of the liquidator or any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in the winding up ought to be stayed, make an order staying the proceedings either all together or for a limited time, on such terms and conditions as the Court thinks fit.

(2) The Court may at any time after the liquidation has commenced under section 116 (c), but before the final meeting has been held as provided for in section 127, on the application of the liquidator accompanied by-

- (a) a special resolution stating that the company will not be wound up and setting out the reasons for such decision;
- (b) proof of a recall notice published in the official Gazette; and
- (c) such other documents as the Court may consider necessary,

make an order to recall the liquidation, place the company into active status and place the company back into good standing as it was prior to the commencement of liquidation under section 116 (c), on such terms and conditions as the Court thinks fit.

(3) A company shall, within 7 days of the making of an order under this section, forward a copy of the order to the Registrar who shall enter it in the records relating to the company.

Settlement of list of contributories

112. (1) The liquidator shall settle a list of contributories, if any, for which purpose he shall have power to adjust the rights of contributories amongst themselves.

(2) In the case of a solvent liquidation of a company which has issued redeemable shares at prices based upon its net asset value from time to time, the liquidator shall have power to settle and, if necessary,

rectify the company's register of members, thereby adjusting the rights of members amongst themselves.

(3) A contributory who is dissatisfied with the liquidator's determination may appeal to the Court against such determination.

Power to make calls

113. (1) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the company's assets, make calls on all or any of the contributories for the time being settled on the list of the contributories-

- (a) to the extent of their liability, for the payment of any money which the Court considers necessary to satisfy the company's debts and liabilities and the expenses of winding up; and
- (b) to the adjustment of the rights of the contributories among themselves,

and make an order for payment of any call so made.

(2) In making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay it.

Inspection of documents by creditors etc

114. (1) At any time after making a winding up order the Court may make such orders as it thinks fit for-

- (a) the inspection of the company's documents by creditors and contributories; and
- (b) the preparation of reports by the official liquidator and the provision of such reports to the company's creditors and contributories.

(2) A contributory shall be entitled to make an application under this section notwithstanding that the company is or may be insolvent and the Court shall not refuse to make an order upon the application of a contributory merely by reason of the fact that the company is or may be insolvent.

Meetings to ascertain wishes of creditors or contributories

115. (1) The Court shall, as to all matters relating to the winding up, have regard to wishes of the creditors or contributories and for that purpose it may direct reports to be prepared by the official liquidator and meetings of creditors or contributories to be summoned.

(2) If it considers it necessary to do so, the Court may direct that separate meetings be held of different classes of creditors or contributories.

(3) Subject to Rules made under section 155, meetings may be requisitioned by creditors, if the company is insolvent, or by contributories if the company is solvent.

(4) The votes of creditors and contributories shall be counted by reference to-

- (a) the value of their debts, in the case of creditors;
- (b) the number of votes, in the case of contributories whose shares carry voting rights under the articles of association of the company; and
- (c) the par value of all the shares held, in the case of contributories whose shares do not carry votes under the articles of association of the company and, where there are no par value shares, the net asset value of the company shown.

Voluntary Winding up

Circumstances in which a company may be wound up voluntarily

116. A company incorporated and registered under this Law or an existing company may be wound up voluntarily-

- (a) when the period, if any, fixed for the duration of the company by its memorandum or articles of association expires;
- (b) if the event, if any, occurs, on the occurrence of which the memorandum or articles of association provide that the

- company is to be wound up;
- (c) if the company resolves by special resolution that it be wound up voluntarily; or
- (d) if the company resolves by ordinary resolution that it be wound up voluntarily because it is unable to pay its debts as they fall due.

Commencement of winding up

117. (1) A voluntary winding up is deemed to commence-

- (a) at the time of the passing of the resolution for winding up; or
- (b) on the expiry of the period or the occurrence of the event specified in the company's memorandum or articles of association,

notwithstanding that a supervision order is subsequently made by the Court.

(2) Subject to any contrary provision in its memorandum or articles of association, the voluntary winding up of an exempted limited duration company is taken to have commenced upon the expiry of a period of ninety days starting on –

- (a) the death, insanity, bankruptcy, dissolution, withdrawal, retirement or resignation of a member of the company;
- (b) the redemption, repurchase or cancellation of all the shares of a member of the company; or
- (c) the occurrence of any event which, under the memorandum or articles of association of the company, terminates the membership of a member of the company,

unless there remain at least two members of the company and the company is continued in existence by the unanimous resolution of the remaining members pursuant to amended memorandum and articles of association adopted during that period of ninety days.

Effect on business
and status of the
company

118. (1) In the case of a voluntary winding up, the company shall from the commencement of its winding up cease to carry on its business except so far as it may be beneficial for its winding up.

(2) Notwithstanding anything to the contrary contained in the company's articles of association, its corporate state and powers shall continue until the company is dissolved.

Appointment of
voluntary
liquidator

119. (1) One or more liquidators shall be appointed for the purpose of winding up the company's affairs and distributing its assets.

(2) When the winding up has commenced in accordance with the company's memorandum or articles of association upon the termination of a fixed period or the occurrence of an event -

- (a) the persons designated as liquidators in the memorandum or articles of association shall become such liquidators automatically from the commencement of the winding up; or
- (b) if no such person is designated in the memorandum or articles of association or the person designated is unable or unwilling to act, the directors shall convene a general meeting of the company for the purpose of appointing a liquidator.

(3) Except in the case of a person designated as liquidator in the company's memorandum or articles of association, the appointment of a voluntary liquidator shall take effect upon the filing of his consent to act with the Registrar.

(4) If a vacancy occurs by death, resignation or otherwise in the office of voluntary liquidator appointed by the company-

- (a) the company in a general meeting may fill the vacancy; or

(b) the Court may fill the vacancy on the application of any contributory or creditor.

(5) On the appointment of a voluntary liquidator all the powers of the directors cease, except so far as the company in a general meeting or the liquidator sanctions their continuance.

(6) When two or more persons are appointed as voluntary liquidators jointly, they shall be authorised to act jointly and severally unless their powers are expressly limited by the resolution or articles of association pursuant to which they are appointed.

Qualifications of
voluntary
liquidators

120. Any person, including a director or officer of the company, may be appointed as its voluntary liquidator.

Removal of
voluntary
liquidators

121. (1) A voluntary liquidator may be removed from office by an ordinary resolution passed by a general meeting of the company convened especially for that purpose.

(2) A general meeting of the company for the purpose of considering a resolution to remove its voluntary liquidator may be convened by any shareholder or shareholders holding not less than one fifth of the company's issued share capital.

(3) Whether or not a general meeting has been convened in accordance with subsection (2), any contributory may apply to the Court for an order that a voluntary liquidator be removed from office on the grounds that he is not a fit and proper person to hold office.

Resignation of
voluntary
liquidator

122. (1) Where 2 or more persons are appointed as joint voluntary liquidators, they may resign by filing a notice of resignation with the Registrar, so long as at least one of them continues in office.

(2) Except as provided in subsection (1), a voluntary liquidator wishing to resign shall-

- (a) prepare a report and accounts; and
- (b) convene a general meeting of the company for the purpose of accepting his resignation and releasing him from the performance of any further duties, and shall cease to hold office with effect from the date upon which the resolution is passed.

(3) In the event that the company fails to pass a resolution accepting his resignation, the voluntary liquidator may apply to the Court for an order that he be released from the performance of any further duties.

Notice of voluntary winding up

123. (1) Within 28 days of the commencement of a voluntary winding up, the liquidator or, in the absence of any liquidator, the directors shall-

- (a) file notice of the winding up with the Registrar;
- (b) file the liquidator's consent to act with the Registrar;
- (c) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought);
- (d) in the case of a company carrying on a regulated business, serve notice of the winding up upon the Monetary Authority; and
- (e) publish notice of the winding up in the Gazette.

(2) A director or liquidator who fails to comply with this section commits an offence and is liable to a fine of \$10,000.

Application for supervision order

124. (1) Where a company is being wound up voluntarily its liquidator shall apply to the Court for an order that the liquidation continue under the supervision of the Court unless, within 28 days of the commencement of the liquidation, the directors have signed a declaration of solvency in the prescribed form in accordance with subsection (2).

(2) A declaration of solvency means a voluntary

declaration or affidavit in the prescribed form to the effect that a full enquiry into the company's affairs has been made and that to the best of the directors' knowledge and belief the company will be able to pay its debts in full together with interest at the prescribed rate, within such period, not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration.

(3) A person who knowingly makes a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full, together with interest at the prescribed rate, within the period specified commits an offence and is liable on summary conviction to a fine of \$10,000 or to imprisonment for a term of 2 years, or both.

Avoidance of share transfers

125. Any transfer of shares, not being a transfer with the sanction of the liquidator, and any alteration in the status of the company's members made after the commencement of a voluntary winding up is void.

General meeting at year's end

126. (1) In the event of a voluntary winding up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and at the end of each succeeding year and such meetings shall be held within 3 months of each anniversary of the commencement of the liquidation.

(2) At each meeting the liquidator shall lay before the meeting a report and account of his acts and dealings and the conduct of the winding up during the preceding year.

(3) A liquidator who fails to comply with this section commits an offence and is liable on conviction to a fine of \$10,000.

Final meeting prior to dissolution

127. (1) As soon as the company's affairs are fully wound up, the liquidator shall make a report and an account of the winding up showing how it has been conducted and how the company's property has been

disposed off and thereupon shall call a general meeting of the company for the purpose of laying before it the account and giving an explanation for it.

(2) At least 21 days before the meeting the liquidator shall send a notice specifying the time, place and object of the meeting to each contributory in any manner authorised by the company's articles of association and published in the Official Gazette.

(3) The liquidator shall, no later than 7 days after the meeting, make a return to the Registrar in the prescribed form specifying –

- (a) the date upon which the meeting was held; and
- (b) if a quorum was present, particulars of the resolutions (if any) passed at the meeting.

(4) A liquidator who fails to call a general meeting of the company as required by subsection (1) or fails to make a return as required by subsection (3) commits an offence and is liable on conviction to a fine of \$10,000.

Effect of winding up on share capital of company limited by guarantee

128. Where a company limited by guarantee and having a capital divided into shares is being wound up voluntarily, any share capital that may not have been called upon shall be deemed to be an asset of the company, and to be a speciality debt due from each member to the company to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidator.

Reference of questions to Court

129. (1) The voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court.

(2) The Court, if satisfied that the determination

of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application on such terms and conditions as it thinks fit, or make such other order on the application as it thinks just.

(3) The voluntary liquidator shall, within 7 days of the making of an order under this section, forward a copy of the order to the Registrar who shall enter it in his records relating to the company.

Expenses of
voluntary winding
up

130. (1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

(2) The rate and amount of the liquidator's remuneration shall be fixed and payment authorised by resolution of the company.

(3) Each report and account laid before the company in general meetings by its liquidator shall contain all such information, including the rate at which the liquidator's remuneration is calculated and particulars of the work done, as may be necessary to enable the members to determine what expenses have been properly incurred and what remuneration is properly payable to the liquidator.

(4) If the company fails to approve the liquidator's remuneration and expenses or the liquidator is dissatisfied with the decision of the company, he may apply to the Court which shall fix the rate and amount of his remuneration and expenses.

Winding up subject to the supervision of the Court

Application for
supervision order

131. When a resolution has been passed by a company to wind up voluntarily, the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124,

on the grounds that-

- (a) the company is or is likely to become insolvent; or
- (b) the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.

Appointment of official liquidator

132. (1) When making a supervision order the Court -

- (a) shall appoint one or more qualified insolvency practitioners; and
- (b) may, in addition, appoint one or more foreign practitioners,

as liquidator or liquidators of the company and the provisions of section 105 shall apply as if the Court had made a winding up order.

(2) Unless a voluntary liquidator is appointed as an official liquidator, he shall prepare a final report and accounts within 28 days from the date of the supervision order.

Effect of supervision order

133. A supervision order shall take effect for all purposes as if it was an order that the company be wound up by the Court except that -

- (a) the liquidation commenced in accordance with section 117; and
- (b) the prior actions of the voluntary liquidator shall be valid and binding upon the company and its official liquidator.

Offences of fraud, etc.

Fraud, etc. in anticipation of winding up

134. (1) Where a company is ordered to be wound up by the Court, or passes a resolution for voluntary winding up, any person, who is or was an officer, professional service provider, voluntary liquidator or controller of the company and who, within the 12 months immediately preceding the commencement of the winding up, has -

- (a) concealed any part of the company's property to the value of \$10,000 or more or concealed any debt due to or from the company;
- (b) removed any part of the company's property to the value of \$10,000 or more;
- (c) concealed, destroyed, mutilated or falsified any documents affecting or relating to the company's property or affairs;
- (d) made any false entry in any documents affecting or relating to the company's property or affairs;
- (e) parted with, altered or made any omission in any document affecting or relating to the company's property or affairs; or
- (f) pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company's business),

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine and to imprisonment for a term of 5 years, or to both.

(2) For purposes of this section, "officer" includes a shadow director.

Transactions in
fraud of creditors

135. (1) Where a company is ordered to be wound up by the Court or passes a resolution for voluntary winding up, any officer or professional service provider of the company who-

- (a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the company's property; or
- (b) has concealed or removed any part of the company's property,

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine and to imprisonment for a term of 5 years, or both.

Misconduct in
course of winding
up

136. (1) Where a company is being wound up, whether by the Court or voluntarily, any person, who is or was a director, officer or professional service provider of the company and who -

- (a) does not to the best of his knowledge and belief fully and truly discover to the liquidator –
 - (i) all the company's property (except such part as has been disposed of in the ordinary way of the company's business);
 - (ii) the date on which and manner in which the company's property or any part thereof property was disposed of, if it was disposed of;
 - (iii) the persons to whom any property was transferred, if it was disposed of; or
 - (iv) the consideration paid for any property which was disposed of;
- (b) does not deliver up to the liquidator or does not deliver up in accordance with the directions of the liquidator any of company's property which is in his custody or under his control, and which he is required by law to deliver up;
- (c) does not deliver up to the liquidator or does not deliver up, in accordance with the directions of the liquidator, all documents in his custody or under his control which belong to the company and which he is required by law to deliver up;
- (d) knows or believes that a false debt has been proved by any person in the winding up and fails to inform the liquidator of such knowledge or belief as soon as practicable;

- (e) prevents the production of any document affecting or relating to the company's property or affairs; or
- (f) destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company,

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine or to imprisonment for a term of 5 years, or both.

(2) For purposes of this section, "officer" includes a shadow director.

Material omissions
from statement
relating to
company's affairs

137. (1) Where a company is being wound up, whether by the Court or voluntarily, any person, who is or was a director, an officer a manager or a professional service provider of the company, commits an offence if he makes any material omission in any statement relating to the company's affairs, with intent to defraud the company's creditors or contributories.

(2) A person guilty of an offence under this section is liable on conviction to a fine or to imprisonment for a term of 5 years, or both.

(3) For purposes of this section, "officer" includes a shadow director.

General provisions

Getting in the
company's
property

138. (1) Where any person has in his possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator.

(2) Where the official liquidator seizes or disposes of any property which he reasonably believed belonged to the company, he shall not be personally

liable for any loss or damage caused to its true owner except in so far as such losses or damage is caused by his own negligence.

Provable debts

139. (1) All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.

(2) Foreign taxes, fines and penalties shall be admissible to proof against the company only if and to the extent that a judgement in respect of the same would be enforceable against the company pursuant to the Foreign Judgements Reciprocal Enforcement Law (1996 Revision) or any laws permitting the enforcement of foreign taxes, fines and penalties.

Distribution of the company's property

140. (1) Subject to subsection (2), the property of the company shall be applied in satisfaction of its liabilities *pari passu* and subject thereto shall be distributed amongst the members according to their rights and interests in the company.

(2) The collection in and application of the property of the company referred to in subsection (1) is without prejudice to and after taking into account and giving effect to the rights of preferred and secured creditors and to any agreement between the company and any creditors that the claims of such creditors shall be subordinated or otherwise deferred to the claims of any other creditors and to any contractual rights of set-off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multi lateral set off or netting arrangements between the company and any person or persons) and subject to any agreement between the company and any person or persons to waive or limit the same.

(3) In the absence of any contractual right of set-off or non set-off, an account shall be taken of what is due from each party to the other in respect of their mutual dealings, and the sums due from one party shall be set-off against the sums due from the other.

(4) Sums due from the company to another party shall not be included in the account taken under subsection (3) if that other party had notice at the time they became due that a petition for the winding up of the company was pending.

(5) Only the balance, if any, of the account taken under subsection (3) shall be provable in the liquidation or, as the case may be, payable to the liquidator as part of the assets.

Preferential debts

141. (1) In the case of an insolvent company, the debts described in the Second Schedule shall be paid in priority to all other debts.

(2) The preferential debts shall -

- (a) rank equally amongst themselves and be paid in full unless the assets available, after having exercised any rights of set off or netting of claims, are insufficient to meet them in which case they shall abate in equal proportions; and
- (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures secured by, or holders of any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

Secured creditors

142. (1) Notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce his security without the leave of the Court and without

reference to the liquidator.

(2) Where the liquidator sells assets on behalf of a secured creditor, he is entitled to deduct from the proceeds of sale a sum by way of remuneration equivalent to that which is or would be payable pursuant to section 109.

Preferential charge
on goods distrained

143. In the event of a landlord or other person entitled to receive rent distraining or having distrained on any goods or effects of the company within 3 months preceding the date of the winding up order, the debts to which priority is given by section 141 shall be first charge on the goods or effects so distrained on or the proceeds of sale thereof.

Effect of execution
or attachment

144. (1) Where a creditor has issued execution against the goods or land of a company or has attached any debt due to it, and the company is subsequently wound up, he is not entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the commencement of the winding up.

(2) Notwithstanding subsection (1)-

- (a) where a creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which he had notice is substituted for the purpose of subsection (1) for the date of commencement of the winding up;
- (b) a person who purchases in good faith under a sale by the bailiff any goods of a company on which execution has been levied in all cases acquires a good title to them against the liquidator; and
- (c) the rights conferred by subsection (1) on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

- (3) For the purposes of this Law -
 - (a) an execution against goods is completed by seizure and sale;
 - (b) an execution against securities is completed upon making a charging order absolute;
 - (c) an attachment of a debt is completed by receipt of the debt; and
 - (d) an execution against land is completed by the registration of a charging order.

Voidable preference

145. (1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within 6 months immediately preceding the commencement of a liquidation.

(2) A payment made as aforesaid to a related party of the company shall be deemed to have been made with a view to giving such creditor a preference.

(3) For the purposes of this section a creditor shall be treated as a "related party" if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions.

Avoidance of dispositions made at an undervalue

146. (1) In this section and section 147-
- (a) "disposition" has the meaning ascribed in Part VI of the Trusts Law (2001 Revision);
 - (b) "intent to defraud" means an intention to wilfully defeat an obligation owed to a creditor;
 - (c) "obligation" means an obligation or liability (which includes a contingent liability) which existed on or prior to the

date of the relevant disposition;

- (d) "transferee" means the person to whom a relevant disposition is made and shall include any successor in title; and
- (e) "undervalue" in relation to a disposition of a company's property means -
 - (i) the provision of no consideration for the disposition; or
 - (ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

(2) Every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator.

(3) The burden of establishing an intent to defraud for the purposes of this section shall be upon the official liquidator.

(4) No action or proceedings shall be commenced by an official liquidator under this section more than 6 years after the date of the relevant disposition.

(5) In the event that any disposition is set aside under this section, then if the Court is satisfied that the transferee has not acted in bad faith -

- (a) the transferee shall have a first and paramount charge over the property, the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings; and
- (b) the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith).

Fraudulent trading 147. (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section.

(2) The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned in subsection (1) are liable to make such contributions, if any, to the company's assets as the Court thinks proper.

Supply of utilities 148. (1) If a request is made by or with the concurrence of the liquidator (including a provisional liquidator) for the giving, after the effective date, of any of the supplies mentioned in the subsection (2), the supplier-

- (a) may make it a condition of the giving of the supply that the liquidator personally guarantees the payment of any charges in respect of the supply; but
- (b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid.

(2) The supplies referred to in subsection (1) are-

- (a) a supply of electricity;
- (b) a supply of water; and
- (c) a supply of telecommunication services.

(3) The "effective date" for the purposes of this section is -

- (a) the date on which the provisional liquidator was appointed; or
- (b) the date on which the winding up order was made.

Interest on debts 149. (1) Subject to subsection (5), in a winding up

interest is payable in accordance with this section on any debt proved in the winding up, including so much of any such debt as represents interest on the remainder of the debt.

(2) Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the period during which they have been outstanding since the company went into liquidation.

(3) All interest under this section ranks equally, whether or not the debts on which it is payable ranked equally.

(4) The rate of interest payable under this section in respect of any debt is the greater of -

- (a) the rate applicable to the currency of the liquidation prescribed from time to time by the Judgment Debts (Rates of Interest) Rules made pursuant to section 34 of the Judicature Law (2007 Revision); and
- (b) the rate applicable to that debt apart from the winding up.

(5) No interest shall be payable if the liquidation is concluded in less than 6 months or the accrued amount is less than \$500.

Currency of the
liquidation

150. (1) In the case of a solvent liquidation, a company's creditors are entitled to receive payment of their debts in the currency of the obligation.

(2) In the case of an insolvent liquidation, a company's liabilities shall be translated into the functional currency of the company at the exchange rates ruling-

- (a) on the date of the commencement of the voluntary liquidation; or
- (b) on the day upon which the winding up order is made.

(3) For the purposes of this section the functional currency of a company is the currency of the primary economic environment in which it operated as at the commencement of the liquidation.

Dissolution of a Company

Dissolution following voluntary winding up

151. (1) The Registrar shall within 3 days of receiving a liquidator's return under section 127 (3), register such return.

(2) Upon the expiration of three months from the registration of the return the company is deemed to be dissolved.

(3) Notwithstanding subsection (2), the Court may, on the application of the liquidator or any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect to such date as the Court thinks fit.

(4) An application under this section shall not be made after the company is deemed to have been dissolved.

(5) An order of the Court made under this section shall be registered with the Registrar within 7 days of the date upon which it was made.

Dissolution following winding up by the Court

152. (1) When the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of that order or such other date as the Court thinks fit, and the company shall be dissolved accordingly.

(2) The effect of an order for dissolution in respect of a segregated portfolio is that its creditors' claims against the company shall be extinguished, notwithstanding that the company has not been liquidated and dissolved.

(3) The official liquidator shall file the order for

dissolution with the Registrar.

(4) An official liquidator who fails to file the order for dissolution with the Registrar within 14 days from the date upon which it was perfected, commits an offence and is liable on summary conviction to a penalty of \$10 for every day during which he is so in default.

Unclaimed
dividends and
undistributed assets

153. (1) Any unclaimed dividends or undistributed assets in the possession or control of the liquidator or former liquidator of a company shall be held by him as trustee upon trust for the benefit of the contributories or creditors to whom such funds are owed.

(2) At the end of one year after the dissolution of the company, the former liquidator shall transfer any funds or other assets held on trust by him to the Financial Secretary who shall manage them in accordance with Part VIII of the Public Management and Finance Law (2005 Revision).

Insolvency rules and regulations

Insolvency Rules
Committee

154. (1) There shall be established an Insolvency Rules Committee comprising-

- (a) the Chief Justice or other judge nominated by the Chief Justice in his place who shall be chairman;
- (b) the Attorney-General or his nominee;
- (c) the legal practitioner members of the Grand Court Rules Committee;
- (d) a qualified insolvency practitioner appointed by the Chief Justice upon the recommendation of the Cayman Islands Society of Professional Accountants; and
- (e) a person appointed by the Chief Justice who, in his opinion, demonstrates a wide knowledge of law, finance, financial regulation or insolvency practice.

(2) The quorum of the Insolvency Rules Committee shall be the chairman and three other

members of the Committee; and the chairman shall have a casting vote.

Powers of the
Insolvency Rules
Committee

155. (1) The Insolvency Rules Committee shall have power-

- (a) to make rules and prescribe forms for the purpose of giving effect to Parts IV, V and XVI;
- (b) to prescribe court fees to be paid in connection with -
 - (i) applications under Part IV;
 - (ii) winding up proceedings under Part V; and
 - (iii) applications under Part XVI; and
- (c) to make rules for the purpose of specifying -
 - (i) the qualifications which must be held by a person appointed to the office of official liquidator;
 - (ii) persons who are disqualified from holding office as official liquidator either generally or in relation to a particular company which is not in liquidation before the court;
 - (iii) the nature and scope of professional indemnity insurance, if any, required to be held by persons appointed to the office of official liquidators; and
 - (iv) the nature and scope of security bonds, if any, required to be posted by persons appointed to the office of official liquidator.

(2) The Insolvency Rules Committee, after consultation with the Authority and with any organisation representing insolvency practitioners in the Islands, shall make rules prescribing the rates of fees which may be charged by an official liquidator.”.

Repeal of section 200-
winding up of an
exempted limited
duration company

4. The principal Law is amended by repealing section 200.

5. The principal Law is amended in section 232 by repealing the definition of “regulatory laws”.

Amendment of section 232- definitions in this Part

6. The principal Law is amended by inserting after Part XV the following Part-

Insertion of Part XVI- international co-operation

“PART XVI – INTERNATIONAL CO-OPERATION

Definitions

252. In this Part -

"debtor" means a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established;

"foreign bankruptcy proceeding" includes proceedings for the purpose of reorganising or rehabilitating an insolvent debtor; and

"foreign representative" means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.

Ancillary orders

253. (1) Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of -

- (a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
- (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- (c) staying the enforcement of any judgment against a debtor;
- (d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
- (e) ordering the turnover to a foreign representative of any property belonging to a debtor.

(2) An ancillary order may only be made under

subsection (1)(d) against-

- (a) the debtor itself; or
- (b) a person who was or is a relevant person as defined in section 103 (1).

Criteria upon which the Court's discretion shall be exercised

254. (1) In determining whether to make an ancillary order under section 253, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with-

- (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
- (b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
- (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
- (d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;
- (e) the recognition and enforcement of security interests created by the debtor;
- (f) the non-enforcement of foreign taxes, fines and penalties; and
- (g) comity.

(2) In the case of a debtor which is registered under Part IX, the Court shall not make an ancillary order under section 253 without also considering whether it should make a winding up order under Part V in respect of its local branch.

Publication of foreign bankruptcy proceedings

255. (1) Where a company incorporated under Part II or registered under Part IX is made the subject of a foreign bankruptcy proceeding, notice of this fact shall be filed with the Registrar and published in the Official Gazette.

(2) The notice shall contain the prescribed particulars and shall be filed by the company's liquidator or, if no liquidator has been appointed under this Law, by

its directors within 14 days of the date upon which the foreign bankruptcy proceeding commenced.

(3) A liquidator or a director who fails to comply with this section commits an offence and is liable on summary conviction to a fine of \$10,000.”.

7. The principal Law is amended by repealing the Second Schedule and by substituting the following Schedules-

Repeal of the Second Schedule and insertion of new Schedules

“Second Schedule

Categories of Preferred Debts

Category 1: Debts due to employees

1. Any sum due by the company to an employee, whether employed in the Islands or elsewhere, in respect of-

- (a) salaries;
- (b) wages; and
- (c) gratuities,

accrued due during the four months immediately preceding the commencement of the liquidation.

2. Any sum due and payable by the company on behalf of an employee in respect of medical health insurance premiums or pension fund contributions.

3. Where a contract of employment has been terminated as a consequence of the company going into liquidation, any sum due by the company to any former employee in respect of:

- (a) severance pay; and
- (b) earned vacation leave.

4. Any sum payable to a workman in respect of compensation pursuant to the Workman's Compensation Law (1996 Revision).

5. An employee may claim in the liquidation as an ordinary creditor in respect of any other sum due to him pursuant to or by virtue of the breach of his contract of employment or any tortious claim against the company.

6. The words and expressions used in paragraphs 1 and 2 have the meanings ascribed to them by the Labour Law (2007 Revision).

Category 2: Debts due to bank depositors

1. Any sum due to eligible depositors who have deposits with a company which-

- (a) is incorporated in the Islands; and
- (b) held an "A" licence issued under the Banks and Trust Companies Law (2007 Revision),

and which does not exceed the deposit limit.

2. The following depositors are not eligible depositors-

- (a) a person who holds or is considered to hold a deposit a deposit after the presentation of the petition for the winding up of the bank or the commencement of the voluntary winding up of the bank (except in the case of the death of the owner of the deposit); and
- (b) the following persons making deposits as-
 - (i) a person licensed under section 6 (1) of the Banks and Trust Companies Law (2007) Revision;
 - (ii) a person authorised, licensed or recognised as a bank or deposit holder in a country or territory outside the Islands;
 - (iii) a person who, in the opinion of the Court, has any responsibility for, or may have profited, or may profit, directly or indirectly, from the winding up;
 - (iv) a person who was, at the date of presentation of the petition for the winding up of the bank or the commencement of the voluntary winding up of the bank, a director, controller or manager of the bank or who, in the opinion of the court exercised such functions;
 - (v) a person who is the legal or beneficial owner of five per cent or more of the shares of all classes issued by the bank; or
 - (vi) a company or corporation, whether or not incorporated in the Islands, which is, at the date of the presentation of the petition for the winding up of the bank or the commencement of the voluntary winding up of the bank, a parent, subsidiary or fellow subsidiary of the bank, or which is in common ownership with the bank.

3. The deposit limit is \$20,000 dollars in respect of each eligible depositor or its equivalent in any foreign currency for which purpose the

applicable exchange rate shall be that determined by the Court in accordance with section 150.

4. For the purpose of calculating the amount of eligible deposits-
 - (a) separate deposits in the same legal or beneficial ownership shall be aggregated and treated as one deposit;
 - (b) the ownership of a deposit in joint names shall be deemed to be divided equally between the joint depositors;
 - (c) the ownership of a deposit in the name of a partnership shall be deemed to be divided equally among the partners;
 - (d) a deposit which is a client account, and which is designated as such, shall be treated as a separate deposit, made by the client of the depositor, of amounts corresponding to the amount to which such client is entitled; and
 - (e) the amount of each eligible deposit shall be reduced by the amount of any liability of the depositor to the bank in respect of which a right of set-off existed at the date of the presentation of the petition for the winding up of the bank, or the commencement of the voluntary winding up of the bank.

Category 3: Taxes due to the Government

1. Sums due in respect of duty and penalties payable under the Customs Law (2007 Revision).
2. Sums due in respect of fees payable under this Law.
3. Sums due in respect of duty and penalties payable under the Stamp Duty Law (2005 Revision).
4. Sums due in respect of licence fees payable under the regulatory laws.
5. Sums due in respect of taxes payable under the Tourist Accommodation (Taxation) Law (2003 Revision).

Third Schedule
Powers of Liquidators

Part I

Powers exercisable with sanction

1. Power to bring or defend any action or other legal proceeding in the name and on behalf of the company.
2. Power to carry on the business of the company so far as may be necessary for its beneficial winding up.
3. Power to dispose of any property of the company to a person who is or was related to the company.
4. Power to pay any class of creditors in full.
5. Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.
6. Power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.
7. Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.
8. The power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.
9. The power to raise or borrow money and grant securities therefor over the property of the company.

10. The power to engage staff (whether or not as employees of the company) to assist him in the performance of his functions.

11. The power to engage attorneys and other professionally qualified persons to assist him in the performance of his functions.

Part II

Powers exercisable without sanction

1. The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as he considers necessary.

2. The power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal.

3. The power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors.

4. The power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with the respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.

5. The power to promote a scheme of arrangement pursuant to section 86.

6. The power to convene meetings of creditors and contributories.

7. The power to do all other things incidental to the exercise of his powers.”.

8. (1) All proceedings in respect of offences committed or alleged to have been committed against any enactment repealed by this Law may be commenced or continued as if this new Law had not come into force.

Savings and transitional provisions

(2) Every proceeding commenced under a repealed enactment may be continued and completed-

- (a) if the proceeding has been wholly or partly heard, as if the enactments repealed by this Law were still in force; and
- (b) in other cases, as if the proceeding had been commenced under the new Law.

(3) Where, apart from this section, anything done under or for the purposes of the former Law would cease to have effect by virtue of the repeal of any enactment of the former Law it shall have effect as if it had been done under and for the purposes of the corresponding provisions of the new Law.

(4) In this section-

“the former Law” means the principal Law in force immediately before the date of commencement of this Law; and

“the new Law” means the principal Law as amended by this Law.

Passed by the Legislative Assembly the day of , 2007

Speaker

Clerk of the Legislative Assembly