

***Insolvency Law:
The Barbados Experience, Lessons for
Jamaica's Insolvency Law Reform***

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Insolvency Law – The Barbados Experience

- The historical development of Jamaica's insolvency and bankruptcy law regime mirror the Barbados experience up to 2000
- informed by an English common Law system influenced by an unforgiving culture towards debt, debt repayment and forgiveness
- system thrived on a philosophy essentially treating business failure as fatal.

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Bankruptcy & Insolvency Act – 2001 (“BIA”):

- Apparently modeled on Canadian Bankruptcy & Insolvency Act of the day
- Quantum leap from early 20th century bankruptcy & insolvency regime to a more forgiving, balanced approach debtor/creditor relationship

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Object & Purpose of BIA to:

- revise the law relating to bankruptcy & insolvency
- make provision for corporate & individual insolvency
- provide for rehabilitation of the insolvent debtor
- create the Office of Supervisor of Insolvency

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Rehabilitation of Insolvent Debtor:

- paradigm shift in the philosophical underpinnings of the bankruptcy and insolvency law regimes of the day
- formal acknowledgement of global movement towards rescue and rehabilitation of insolvent debtor where appropriate several decades later

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Rehabilitation of Insolvent Debtor & Secured Creditor:

- Part III of the BIA, particularly section 10A –M - extensive provisions concerning the relationship between debtor and secured creditor
- This relationship is critical to issue and therefore a good indication of commitment to object and purpose

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The BIA attempts to regulate the enforcement of security of a secured creditor by providing the debtor an opportunity within a short window of time to make the first move on his secured creditor in the following ways

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(a) BIA Section 10B(1) :

Secured creditor must serve notice of intention to enforce security where creditor's interest covers all or substantially all of the inventory, accounts receivable or other property of the debtor used in relation to a business carried on by the debtor

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(b) a minimum of ten (10) days notice of secured creditor's intention to enforce security required;

and

(c) BIA section 10B(2) restricts secured creditor from exercising normal powers and rights of automatic and immediate removal of assets during the minimum ten (10) day notice period

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- (d) debtor consent required if enforcement of security is desired before the expiration of minimum ten (10) days notice period
- (e) section 10B (c) – secured creditor cannot obtain debtor's consent to enforcement of security prior to sending a notice of intention to enforce security

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These provisions provide a window of opportunity for the debtor to engage his secured creditor at the time of his financial distress

- (a) with the comfort of statutory protection of time, though limited; and
- (a) the prohibition on an alternative contractual arrangement which a secured creditor may likely contemplate as a condition of his entering into contractual relations with this debtor

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Rehabilitation of the Insolvent Debtor & The Proposal as a mechanism:

“...the purpose of every good bankruptcy law...[is for] Parliament to endeavour as far as possible, to protect the salvage and also to diminish the number of wrecks”

Joseph Chamberlain (1883) then President of the UK Board of trade re Bankruptcy Act 1883 (UK)

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Report of the Insolvency Law Review Committee 1981 (UK) (“Corke Report”)

“We believe that a concern for the livelihood and well-being of those dependent upon an enterprise, which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community, that it must not be overlooked.”

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Rehabilitation and rescue viewed as a multi-dimensional concept:

- Positive and protective
- Corrective and punitive
- Manifested by legislative and judicial policies

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Proposal defined by BIA section 2:

“...a proposal for a composition, for extension of time or for a scheme of arrangement..”

- Definition suggests that proposal may take a various forms
- Is consistent with the concept of rehabilitation and rescue in insolvency law

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BIA section 12 - Proposal can be made by:

- An insolvent person
- A receiver
- A liquidator
- A bankrupt
- A trustee of the estate of a bankrupt

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Proposal must be made to:

- general body of creditors
- may also be made to secured creditors in respect of any class of secured claim
- Overall effect is the opportunity to hold off all creditors including secured creditor for some time

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BIA section 41:

“... no creditor has nay remedy against the insolvent person or the insolvent person’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy...”

Note that similar provisions in Canadian bankruptcy and insolvency law interpreted to have the effect of staying both judicial and extra-judicial proceedings

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- BIA section 43 seeks to bring balance in that a creditor who is adversely affected by the Stay may seek relief through the court on the grounds that the Stay should not apply to him

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- Requires a declaration by the court exercising its discretion on the basis that:
 - (a) the creditor is materially prejudiced; or
 - (b) that it is equitable on other grounds to make a declaration; and
 - (c) Court has the discretion to make whatever qualifications it deems appropriate in granting the declaration

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The overall effect of the court declaration is to take power out of the hands of a creditor, such powers usually being secured and preserved by contract, and put into the hands of the independent and impartial authority of a court with the power to apply principles of equity in making a determination

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Bankruptcy provisions under the BIA section 38 also far reaching and modern:

- doctrine of ‘reputed ownership’ abolished to the extent that property held by the bankrupt in trust for another excluded from treatment as part of his estate
- All property owned by a bankrupt at the date of bankruptcy or that may be acquired by the bankrupt before his discharge now included in his estate

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- Section 39:
Reasonable standard of living allowed to individual bankrupt out of his income monitored by the Supervisor of Insolvency who has the jurisdiction to prevent obvious potential for abuse of the system

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- Sections 66-76:

Preserves the law's intent to prevent corruption and unfair practices by a debtor who may attempt to evade creditors in that certain transactions conducted 'on the eve' of bankruptcy are voided in appropriate cases, for example, certain related party conveyances, transfer and payments made within one year of bankruptcy.

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- Section 64:

Landmark improvement in that Crown claims are reduced to the level of unsecured credit thereby totally reverses the preferential status usually accorded the Crown in a wide range of matters

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Even with these significant enhancements to the law, largely favouring the insolvent debtor, the BIA is under-utilised.

An examination of the information contained in the following table supports this:

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Table of Bankruptcies and Insolvencies

Name of Co.	Incorp Date	Co. No.	Estate No.	Dated of Intention to Make Proposal	Date of Proposal	Court No.	No. of Creditors	Debtors given Estate Value \$
Grant Hotels Inc.	29/12/98	D18436	SOI 100/10/01	24/07/03	14/11/03	04 of 2003	327	41, 367,708.66
Captain Haddock & Co Limited	07/11/03	D22989	SOI 100/10/2	19/12/08		S.C 02 of 2008	3	5,029,816.59
Ideal Agencies Ltd.	11/01/00	A/D 17072	SOI 100/10/3	23/04/10	15/09/10	S.C. 0486 of 2010	71	2,713,448.00
Trimart Inc.	17/04/02	D21101	SOI 100/10/4	31/08/10	11/11/10	C.V. 1192 of 2010	538	22,613,716.00
AirOne Ventures Limited (Redjet)	22/01/08	D29852	SOI 100/10/5	05/06/12	pending	929 of 2012	1803	11,109,387.67

•Courtesy Office of Supervisor of Insolvency:
Bankruptcies in red (Assignment of Bankruptcy)
Insolvencies in black

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- Only four (4) companies have taken advantage of the Proposal mechanism and only one (1) bankruptcy request in a struggling economy more than ten years after the BIA.
- May be attributed to the following:
 - (1) Very limited public education on the BIA
 - (2) The impact of legal transplantation based on culture and socialisation of the Barbadian society

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- (3) Narrow definition and interpretation of insolvency and 'Insolvent person' allowing early intervention and wider scope for rehabilitation and rescue before it is too late
- (4) Absence of provisions for debtor-in-possession or interim financing for greater confidence and goodwill in the Proposal process and the increased likelihood of maintaining the value of entity and business during period of negotiation.

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Conclusion:

These factors may provide some useful guidelines for the Jamaica insolvency law reform process. While there is no need to reinvent the wheel and there is merit in embracing an existing tested legislative model, bankruptcy and insolvency systems are in fact social tools, are value-laden and must therefore be crafted to reflect the particular values of a society.

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THE END!