



**INSOL**  
INTERNATIONAL

# **FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW**

**Module 4D Guidance Text**

**Jamaica**

**2023 / 2024**



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Published: September 2023

## 1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN JAMAICA

Welcome to **Module 4D**, dealing with international insolvency law in **Jamaica**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of insolvency law in Jamaica;
- a relatively detailed overview of Jamaica's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Jamaica.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2024**. Please consult the Foundation Certificate in International Insolvency Law web pages for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2024 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

## 2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Jamaica:

- the background and historical development of insolvency law in Jamaica;
- the various pieces of primary and secondary legislation governing Jamaican insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in Jamaica;
- the rules relating to the recognition of foreign judgments in Jamaica.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Jamaican insolvency law; and
- be able to answer questions based on a set of facts relating to Jamaican insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

### 3. AN INTRODUCTION TO JAMAICA

#### 3.1 Geography

Jamaica is an island located in the Caribbean Sea. It is approximately 965 kilometres from the state of Florida in the United States of America. The island's area is 11,992 square kilometres. It has 345 named mountains, the highest and most prominent being the Blue Mountains which at its peak is 7,402 feet.

Large deposits of bauxite (used for production of aluminium) are found in the centre of the island. Deposits of limestone and gypsum can also be found around the island.

#### 3.2 History

In pre-Columbian times the island was inhabited by native Taino Indians.<sup>1</sup> On May 5, 1494 Christopher Columbus landed in Jamaica and claimed it for the King and Queen of Spain. The Spaniards proceeded to colonise the island, imposing the *encomienda* system<sup>2</sup> on the native Indians ultimately resulting in the extinction of the Tainos. The first Africans were brought to Jamaica in 1517 as part of the Transatlantic Slave Trade. In 1655 the British defeated the Spaniards and claimed the island for the King of England.<sup>3</sup>

Jamaica gained Independence from the United Kingdom in August 1962.

#### 3.3 Economy

The Jamaican economy during colonisation was largely focused on agriculture. In particular, the production of sugar cane was the singular focus of the economy.<sup>4</sup> Since independence the

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<sup>1</sup> CIA World Factbook, online at: <https://www.cia.gov/the-world-factbook/countries/jamaica/>.

<sup>2</sup> "The Road to freedom (Part I)", The Jamaica Gleaner, online at: <https://jamaica-gleaner.com/gleaner/20130719/news/news1.html>.

<sup>3</sup> CIA World Factbook, online at: <https://www.cia.gov/the-world-factbook/countries/jamaica/>.

<sup>4</sup> Coote, B "Sugar: The Case of Jamaica" (1988), Institute of Development Studies, Bulletin, Volume 19, Number 2.

island's economy has diversified to the present time whereby services comprise approximately 71.9% of the economy based on GDP and agriculture only 7%.<sup>5</sup>

Tourism and travel-related activities dominate the services sector in Jamaica and is the largest earner of foreign currency to the island. Remittances and the export of bauxite are the second and third largest contributors to foreign exchange.<sup>6</sup>

## **4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK**

### **4.1 Legal system**

Jamaica's legal system derives from the common law tradition.

Jamaican insolvency law was modernised and largely consolidated in 2014 with the passage of the Insolvency Act (hereinafter referred to as the JIA 2014). Prior to 2014, Jamaican insolvency law was found in various statutes, namely:

- the Bankruptcy Act 1880;
- the Companies Act 1965; and
- the 1949 UK Winding Up Rules of Court.

These laws adopted a creditor friendly perspective that emphasised the preservation of creditor value and the recovery of debt.<sup>7</sup>

The effort to modernise Jamaican insolvency law spanned more than a decade. The Jamaican Insolvency Act 2014 was modelled on the Canadian Bankruptcy and Insolvency Act ("CBIA") and in some instances lifts entire provisions from the CBIA. The decision to utilise the CBIA seems to have been determined after reflecting on the experience of Barbados (another Caribbean country) that modernised its insolvency law in 2001 using the CBIA as a model.<sup>8</sup>

The JIA adopts the modern policy of:

- facilitating the reorganisation of insolvent persons to avoid the value destructive consequences of a liquidation;
- establishing an orderly liquidation process if reorganisation is not possible.

<sup>5</sup> CIA World Factbook, online at: <https://www.cia.gov/the-world-factbook/countries/jamaica/>.

<sup>6</sup> Moody's Analytics, Jamaica - Economic Indicators, online at <https://www.economy.com/jamaica/indicators>.

<sup>7</sup> E N Greenaway, "The Legal and Regulatory Framework for the Practice of Insolvency in Jamaica: The Insolvency Act, 2015, & Rule 77 of the Rules of the Supreme Court of Jamaica, Civil Procedure Rules, 2002 (as amended)", page 2.

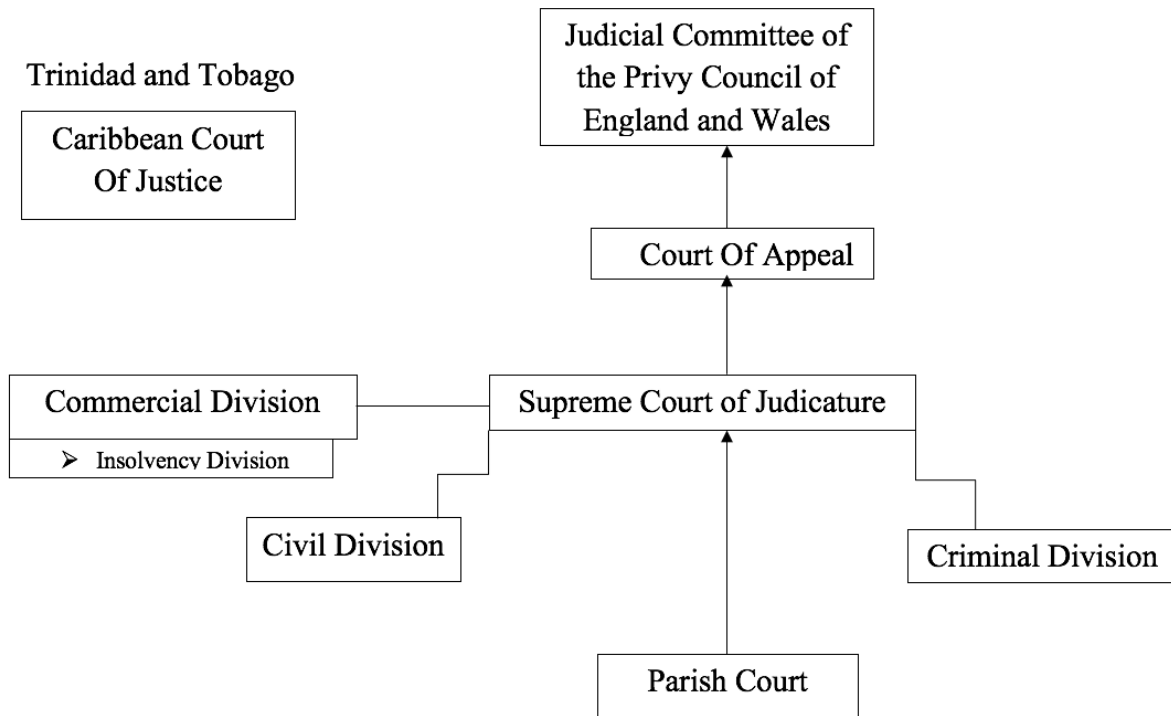
<sup>8</sup> *Ibid*, 2.

The JIA is still fairly new and it is still an open question as to whether it will satisfy the objectives of its framers.

#### 4.2 Institutional framework

The JIA does not create a distinct insolvency court. The JIA amended the Civil Procedures Rules 2002 to empower the Chief Justice of the Supreme Court of Judicature to designate any one or more Judges of the Supreme Court of Judicature (the “Supreme Court”) to constitute the Insolvency Division within the Commercial Division of the Supreme Court.<sup>9</sup> The Jamaican Court structure is as follows:

### Summary Of Structure Of The Jamican Court System



Prior to 2014 the average insolvency case took 18 months to resolve.<sup>10</sup> It is still an open question whether the JIA will improve the efficiency of resolution of insolvency proceedings.

A Judge sitting within the Insolvency Division has a broad general jurisdiction to decide any question on insolvency brought before it.<sup>11</sup> The Judge may, for example:

- appoint an interim receiver / receiver;

<sup>9</sup> Civil Procedure Rules, 2002, r 77.3.

<sup>10</sup> “Insolvency Law to Improve Business Environment”, The Jamaica Gleaner, online at: <https://jamaica-gleaner.com/gleaner/20131204/business/business4.html>.

<sup>11</sup> JIA, s 276(1).

- make an order to provide support to the interim receiver / receiver;
- review, rescind vary any order made under the JIA;
- amend any written process or proceeding under the JIA.

### 4.3 Enforcement of system

Jamaican law gives creditors (both unsecured and secured) the power to enforce their claim against a debtor through the courts. Typically, consensual financial debts (both unsecured and secured) will be evidenced by a promissory note granted by the debtor in favour of the creditor. Promissory notes that satisfy the requirements of The Bills of Exchange Act<sup>12</sup> allow for easier enforcement by way of a summary process without the need for a full-blown trial.

For non-consensual debts, for instance a claim on account of a tort liability, the creditor's claim will require a trial (if liability is disputed by the tortfeasor) or an assessment of damages if the tortfeasor accepts liability but disputes the quantum of damages.

#### 4.3.1 Enforcement of unsecured claims

The JIA defines an unsecured creditor as "any creditor that is not a secured creditor".<sup>13</sup> An unsecured creditor that is owed money by a debtor will typically commence enforcement by serving a pre-action demand letter on the debtor. The demand letter is invariably prepared and issued by a local attorney-at-law. The demand letter will identify: (i) the source of the indebtedness; (ii) the amount owed; (iii) the amount by which the debt increases due to interest (typically stating a daily amount); and (iv) specify a date by which the debt must be settled if the debtor is to avoid being subject to court action. If the debt is not settled by the date stated in the demand letter the creditor may commence a civil action against the debtor.

An unsecured creditor who wishes to commence civil proceedings to recover on a debt will commence their claim either in the Parish Court, if the claim is below JMD 1,000,000, or in the Supreme Court if the claim is above JMD 1,000,000.<sup>14</sup> An unsecured creditor whose case is well founded will be granted a judgment order against the debtor thereby converting the debt into a judgement debt and the creditor into a judgment creditor.

Once a debtor accesses the JIA, the enforcement rights of unsecured creditors are stayed. The stay is automatic and upon its commencement no unsecured creditor has any remedy against the debtor or their property.<sup>15</sup> An unsecured creditor affected by the stay may apply to the court to have the stay lifted if:<sup>16</sup>

<sup>12</sup> The Bills of Exchange Act 1893, s 83(1).

<sup>13</sup> JIA, s 2(1).

<sup>14</sup> "Jurisdictional Limits of the Parish Courts in Civil Matter", online at: <https://parishcourt.gov.jm/content/jurisdiction>.

<sup>15</sup> JIA, ss 4 and 5.

<sup>16</sup> *Idem*, s 7.



- the creditor can show that it is likely to be materially prejudiced by the continued operation of the stay; or
- that it is equitable on other grounds to make such a declaration.

Thus far in practice it has been difficult for a creditor to obtain a lifting of the stay.

#### **4.3.2 Enforcement of secured claims**

The JIA defines a secured creditor as a person:

- “(a) holding a -
  - (i) security interest as defined under the Security Interests in Personal Property Act;
  - (ii) mortgage;
  - (iii) pledge;
  - (iv) charge or lien,
 on or against the property of the debtor or any part thereof, as security for a debt due or accruing, due to him from the debtor; or
- (b) whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.”<sup>17</sup>

In practice secured creditors will be financial institutions (banks or securities dealers).<sup>18</sup> For business loans it is not uncommon for financial institutions to take security over all the assets (tangible and intangible) and undertaking of a corporate borrower.<sup>19</sup> In Jamaica that instrument is termed a debenture and creates fixed charges over fixed assets and floating charges over the company’s circulating assets. In theory, upon the default of the borrower (subject to any passage of time pursuant to a cure period in the terms of the debenture) the floating charge will automatically crystallise into a fixed charge.

Prior to the JIA, a lender with a debenture would upon crystallisation of the charges appoint a receiver that would displace the board of directors of the company and take over the management of the company. The debtor would typically seek to find creative ways, such as raising issues relating to the loan documents, to obtain an injunction from the court to prevent, or more likely delay, appointment of the receiver. The JIA has dramatically changed this process: now when a creditor that has a debenture wishes to enforce its security (by appointing a receiver), the creditor must first send a Notice of Enforcement of Security to the debtor and wait until the passage of 10 days before commencing enforcement action.<sup>20</sup>

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<sup>17</sup> *Idem*, s 2(1).

<sup>18</sup> These are essentially investment banks.

<sup>19</sup> Bank of Jamaica, Quarterly Credit Conditions Survey, online at: <https://boj.org.jm/boj-publications/survey-reports/>.

<sup>20</sup> JIA, s 72.

For creditors that have taken security over a specific asset, such as a motor vehicle: they may enforce their interest pursuant to the security agreement, for instance by taking possession of the property and exercising a power of sale under the security agreement. The right of the secured creditor to take possession and seize a specific asset is a self-help remedy that does not require a court order.

The JIA was primarily intended to regulate the rights of unsecured creditors whilst secured creditors would exercise their remedies under their security agreement. In practice, once a debtor has accessed the JIA the secured creditor (that has not already taken possession of its collateral) will find it significantly more difficult and time consuming to enforce their rights under the security agreement.<sup>21</sup> The secured creditor may seek to the lift the stay on the same grounds as an unsecured creditor as set out above.

### 4.3.3 *Insolvency regulator: The Supervisor of Insolvency*

The JIA established the Office of the Supervisor of Insolvency (the OSI).<sup>22</sup> The OSI is led by the Supervisor of Insolvency (the Supervisor). The Supervisor is a public officer and is responsible for *inter alia*:

- licensing and supervising insolvency practitioners (called trustees under the JIA);
- inspecting and investigating the administration of estates by trustees;
- intervening in court proceedings where it is expedient to do so;
- maintaining a public registry of bankruptcy filings;
- determining whether the automatic statutory stay should be extended.

#### Self-Assessment Exercise 1

##### Question 1

What impact does the JIA have on the standard enforcement mechanisms by creditors?

##### Question 2

How has Jamaican insolvency law evolved due to the passage of the JIA?

[For commentary and feedback on self-assessment exercise 1, please see APPENDIX A](#)

<sup>21</sup> *Development Bank of Jamaica Limited v Proactive Financial Services Limited* [2017] JMCC COMM 31.

<sup>22</sup> JIA, s 222.

## 5. SECURITY

### 5.1 Real property

Lenders may take security over a borrower's real property. Typically, the type of security will be in the form of a mortgage granted by the borrower to the lender. The creditor's interest in the real property may be registered on the certificate of title pursuant to the Registration of Titles Act in which case it is referred to as a legal mortgage. A lender may also take an equitable mortgage whereby the borrower deposits the certificate of title with the lender along with an executed instrument of mortgage. The equitable mortgage was more prevalent in the past due to the expense of registering the mortgage on the certificate of title. Certain tax reforms have reduced the cost of implementing a legal mortgage.

Neither type of mortgage effects an actual conveyance (that is a transfer) of the borrower's ownership in the real property. Instead, the mortgage creates an encumbrance on the debtor's ownership in the real property.

If the debtor defaults on its loan the creditor may choose either to exercise a power of sale or to foreclose on the real property thereby obtaining title to the property. If the lender has taken an equitable mortgage the lender will need to first register the instrument of mortgage on the title.

### 5.2 Personal property

A lender can also take security over a borrower's personal property. In 2013 Jamaica passed the Security Interest in Personal Property Act (the SIPP Act) which created an electronic registry for notifying the public and potential lenders that a person has granted security over their personal property.<sup>23</sup> The SIPP Act also sets out rules relating to the priority of security interests, primarily based on the date of effective registration.<sup>24</sup> Effective registration requires that the security interest must have "attached"<sup>25</sup> to the collateral (essentially that the security interest was granted pursuant to a security agreement) and has been "perfected"<sup>26</sup> by registration in the SIPP Act's electronic registry.

A security interest that has been perfected as at the date of insolvency proceedings will be effective against all other creditors. If the security interest is unperfected, that creditor will rank as an unsecured creditor.

Typical forms of personal property over which lenders may take security are:

- motor vehicles;
- publicly traded securities;

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<sup>23</sup> SIPP Act, Pt VII.

<sup>24</sup> *Idem*, Pt V.

<sup>25</sup> *Ibid*, s 5.

<sup>26</sup> *Ibid*, s 8.

- receivables;
- bank accounts.

If a borrower grants a debenture the lender must register their security interest on the SIPP Act's electronic registry as the debenture will cover circulating assets as well as intangible rights such as receivables.

### Self-Assessment Exercise 2

#### Question 1

Quick Loans Ltd (Quick Loans) makes small and medium size loans. Quick Loans operates its business from small premises that it occupies under a short term lease. Its largest assets are the loans receivable owing from its borrowers. It also has a loan platform which is licensed and proprietary to Quick Loans. Quick Loans has exhausted its internal sources of financing. It is now seeking a fresh source of debt capital to grow its business; however, Quick Loans is finding it difficult to obtain debt financing on an unsecured basis. Does Quick Loans have any assets over which a security interest could be granted?

[For commentary and feedback on self-assessment exercise 2, please see APPENDIX A](#)

## 6. INSOLVENCY SYSTEM

### 6.1 Policy goals

The JIA explicitly states its policy objectives as:

- “(a) the rehabilitation of debtors and the preservation of viable companies, having due regard to the protection of the rights of creditors and other stakeholders; and
- (b) fair allocation of the costs of insolvencies with the overriding interest of strengthening and protecting Jamaica’s economic and financial system and the availability and flow of credit within the economy.”<sup>27</sup>

This certainly makes clear that the intention of the legislature was to usher in a modern regime which would facilitate reorganisations whilst still recognising the rights of creditors. As to what this means in practise, the JIA has not yet truly been explored by the Jamaican courts as most distressed debtors have been able to restructure outside of insolvency proceedings (see the discussion below).

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<sup>27</sup> JIA, s 3.

## 6.2 General

The rules relating to insolvency proceedings are now found in the JIA. In regard to corporate entities, if they are solvent but wish to be liquidated, the Companies Act 2004 is the applicable legislation. The JIA is largely modelled based on the Canadian Bankruptcy and Insolvency Act (CBIA). There are, however, important differences, for instance certain responsibilities or powers that are assigned under the CBIA to the Canadian Courts are in the JIA assigned to the Supervisor of Insolvency (the Supervisor - see the discussion above).

It is still inconclusive the extent to which the JIA is to be considered either debtor-friendly or creditor-friendly in contrast to other jurisdictions. Even so, it is undeniable that the JIA is certainly more debtor-friendly than the fragmented regime that existed prior to its implementation.

## 6.3 Management of proceedings

Broadly the JIA contemplates debtors accessing the JIA either for reorganisation (the proposal provisions) or for liquidation (the bankruptcy process). Where reorganisation fails, the JIA contemplates the debtor automatically entering the bankruptcy process. Under the JIA a liquidation is effected either through an "assignment for the benefit of creditors" made by the Supervisor or a "receiving order" made by a Judge. Whether accessed through the proposal provisions or the bankruptcy process, the debtor is required to appoint a licensed insolvency practitioner (termed a "trustee" under the JIA).

In the situation where the JIA was accessed using the proposal provisions<sup>28</sup> for purposes of reorganisation, the debtor will remain in possession and control of their property and business. In the case of a corporate debtor that means the board of directors of the company will remain in control of the assets of the company. In the case where the debtor is a natural person, the debtor will themselves remain in control of their assets.

In the situation where the JIA was accessed for purposes of the bankruptcy process, a trustee is appointed in whom the bankrupt's estate will vest.<sup>29</sup>

In both processes the trustee plays a significant role. Indeed, in practice the trustee will be the key person that determines the speed, timing and potentially the outcome of the process.

In the context of a reorganisation under the proposal provisions the creditors (unsecured and secured) have very limited control over the process and must await the debtor's proposal. In the case of liquidation proceedings the creditors at the first meeting of creditors may confirm the appointment of the trustee or appoint another trustee.

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<sup>28</sup> *Idem*, Pt III.

<sup>29</sup> *Idem*, Pt V or Pt VI.

## 6.4 Bankruptcy

The JIA defines a “bankrupt” to mean either a person who has made an assignment for the benefit of its creditors; or a person against whom a receiving order has been made. A bankrupt is essentially an insolvent person that is not reorganising their affairs but is instead liquidating their assets to pay their creditors. Significantly, a person that is within the reorganisation modality (that is, the “proposal provisions”) is not termed a bankrupt as that term is reserved for persons within the liquidation process. In practice the liquidation process is referred to as a “formal” bankruptcy process versus the reorganisation process.

Purpose	Terminology in Practice	Methods of Accessing	Voluntary / Involuntary
Rescue or Rehabilitation	Proposal Provisions	Notice of Intention to File a Proposal	Voluntary and available only to Insolvent Person
		Proposal	Voluntary
Insolvent Liquidation	Bankruptcy Process	Application for Receiving Order	Involuntary made pursuant to a court application from a creditor
		Application for the Assignment for the benefit of creditors	Voluntary by the Insolvent Person or Involuntary if Proposal Provisions fail

### 6.4.1 Who may access the bankruptcy process

Recourse to the bankruptcy process is available to an insolvent person,<sup>30</sup> who is defined as:

- a resident or a person<sup>31</sup> carrying on business or with property in Jamaica;
- owes creditors at least JMD 300,000;
- satisfies one of the following conditions;
  - is unable to meet their obligations as they generally become due;
  - has ceased paying their current obligations in the ordinary course of business as they generally become due;

<sup>30</sup> *Idem*, s 2(1).

<sup>31</sup> *Idem*, s 2(1).

- the aggregate of whose property is not sufficient (on a fair value basis) if disposed at a fairly conducted legal process would not be sufficient to enable payment of all their obligations due and accruing due.

The JIA does not impose an obligation for a debtor to enter formal bankruptcy proceedings in any specified circumstances. It was, however, contemplated and expected that debtors would determine that it is in their best interest and the interest of all stakeholders to do so.<sup>32</sup> At this point in time the unfamiliarity of the regime as well as the significant pejorative connotations (culturally and legally) that are associated with “bankruptcy” may prevent persons from utilising the JIA’s bankruptcy process.

#### 6.4.2 *Methods to access bankruptcy*

A debtor may access the JIA either for liquidation (bankruptcy process) or reorganisation (the proposal provisions). The bankruptcy process may be commenced in the following circumstances:

- (a) an assignment for the benefit of creditors made to the Supervisor;
- (b) an application to the court for a receiving order;
- (c) a failure of the proposal provisions.

An assignment for the benefit of creditors may be voluntary or involuntary. Voluntary assignment would be in circumstances where the debtor elects to make an application to the Supervisor.<sup>33</sup> An involuntary application results from situations where a proposal fails and the debtor is **deemed** to make to make the application to the Supervisor.

An application to the court for a receiving order is a court application made by a creditor that is seeking to have the debtor’s assets liquidated and distributed to creditors.

It has thus far been rare for a debtor to make a voluntary application for an assignment for the benefit of creditors. The debtor will typically attempt an informal work-out (see below), failing which the debtor will attempt to use the JIA to reorganise under the proposal provisions.

It is also rare for a creditor to apply to court for a receiving order. At this point in time creditors will typically utilise the well-developed mechanisms to enforce their individual rights outside of insolvency proceedings, such as seeking a judgment order against the debtor.

For purposes of a reorganisation the debtor may access the proposal provisions by:

- filing a Notice of Intention to File a Proposal – in the case of an Insolvent Person; or

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<sup>32</sup> Greenaway, *supra* note 7 at p 25.

<sup>33</sup> JIA, s 58(1).

- filing a Proposal.

If an insolvent person is not able to successfully complete the procedures under the proposal provisions, the insolvent person is deemed to apply for an assignment for the benefit of creditors, effectively entering the bankruptcy process of the JIA.<sup>34</sup>

### 6.4.3 Definition of “insolvent person”

The JIA defines an insolvent person as follows:

“(a) a person who resides, carries on business or has property in Jamaica, whose liabilities to creditors provable as claims under this Act, amount to not less than three hundred thousand...; and

- (i) who for any reason is unable to meet his obligations as they generally become due; or
- (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- (iii) the aggregate of whose property is at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due.

(b) does not include a bankrupt.”<sup>35</sup>

There is no obligation for an “insolvent person” to seek protection under the JIA. Unlike the UK, the Jamaican Companies Act 2004 does not include wrongful trading provisions that would impose personal liability on the board of directors of a company if they continue to trade after they ought to have known that there was no reasonable prospect of avoiding insolvent liquidation. Rather, the Jamaican Companies Act 2004 imposes a liability for “fraudulent trading” which requires evidence that the director(s) intended to defraud creditors.<sup>36</sup> This higher threshold of “fraudulent trading” may be among the reasons that the board of directors of Jamaican companies that are in financial distress do not typically utilise the JIA because personal liability is only a very remote outcome.

An insolvent person may access the JIA either: (a) voluntarily; or (b) involuntarily.

One of the areas of departure from the Canadian Bankruptcy and Insolvency Act (CBIA) is the introduction of the concept of a “person facing imminent insolvency”. The JIA defines that as a person who:

“(a) resides, carries on business or has property in Jamaica, whose liabilities to creditors provable as claims under the Act, amount to not less than three hundred thousand dollars...; and

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<sup>32</sup> *Idem*, ss 40(1), 50(1), 51(2).

<sup>35</sup> *Idem*, s 2(1).

<sup>36</sup> The Jamaica Companies Act 2004, s 322



- (b) reasonably anticipates that for any reason within the period of twelve months, will be unable to meet his obligations as they generally become due.<sup>37</sup>

The contours of this concept have not yet been clearly defined; however, its objective is to provide companies that although not yet insolvent, are at a stage where they foresee financial difficulties. A person facing imminent insolvency may only access the JIA voluntarily under the proposal provisions to seek to reorganise.

#### **6.4.4 Voluntary bankruptcy**

In theory an insolvent person who wishes to be liquidated may voluntarily apply to the Supervisor for an assignment for the benefit of creditors. That, however, has not been common and the insolvent person is likely to attempt to reorganise using the proposal provisions. They would do so pursuant to making:

- (a) a Notice of Intention to File a Proposal (NOI); or
- (b) a Proposal.

#### **6.4.5 Involuntary bankruptcy**

Involuntary bankruptcy is either due to:

- (a) an application by a creditor for a receiving order to the court made by a creditor against the insolvent person; or
- (b) the failure of an insolvent person to re-organise under the proposal provisions whereby the JIA deems them to have made an application for the benefit of creditors, effectively putting them into the bankruptcy process.

#### **6.4.6 Automatic stay of proceedings**

A debtor that enters formal bankruptcy under the JIA will benefit from an automatic stay of proceedings on all enforcement actions for recovery of any indebtedness owing to creditors.<sup>38</sup> The scope and intended persistency of the automatic stay has thus far been the most contentious aspect to JIA.

A bankrupt will only benefit from an automatic stay on unsecured creditors. Secured creditors are not subject to an automatic stay on bankruptcy so that they may commence enforcement action pursuant to their security interest. The JIA does, however, grant a Court the discretion on an application by the insolvent person to stay actions by secured creditors. If granted, that Court

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<sup>37</sup> JIA, s 2(1).

<sup>38</sup> *Idem*, s 4.

order cannot stay a secured creditor for more than six months.<sup>39</sup> Although the provisions have not yet been judicially considered, it seems probable that a Court will only exercise this discretion in extraordinary circumstances.

All creditors (both unsecured and secured) have the right to apply to the court to have the stay lifted if:<sup>40</sup>

- the creditor can show that it is likely to be materially prejudiced by the continued operation of the stay; or
- that it is equitable on other grounds to make such a declaration.

#### **6.4.7 Status of debtor**

The commencement of bankruptcy results in the debtor being dispossessed of their property, which will vest in the trustee. The board of directors of the debtor will also be displaced by the trustee.

#### **6.4.8 Alternatives to formal bankruptcy**

##### *6.4.8.1 Informal workouts*

A debtor facing financial distress need not seek protection under the JIA. Instead, the debtor may informally work-out a consensual arrangement with its creditors. Historically, Informal workouts have been far more common than formal bankruptcies. A consensual arrangement can be implemented:

- (a) by way of contract (with the creditors that are party to the credit agreement);
- (b) by way of contract supported by a scheme of arrangement under the Companies Act 2004.<sup>41</sup>

In more simplified capital structures with only limited creditor groups, contractual arrangements are typical. These typically involve as a first step entering into a stand-still agreement whereby the creditors (typically only the financial creditors) that are most likely to enforce their rights agree to forbear from doing so. The underlying credit facility would then be modified potentially to extend the repayment period or to capitalise interest payments.

For more complex capital structures a scheme of arrangement would be used to supplement the contractual provisions. Schemes of arrangement are also used in debt-for-equity swaps. A scheme of arrangement may also be utilised where unanimous consent is required and the

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<sup>39</sup> *Idem*, s 6.

<sup>40</sup> *Idem*, s 7.

<sup>41</sup> The Jamaican Companies Act, 2004, ss 206 to 210. The Jamaican Scheme of Arrangement provisions are modelled on the provisions adopted in England and Wales.

debtor is unsure that it will be able to obtain unanimity but is certain that the scheme thresholds will be met (that is, in each class of creditors a majority in number of the creditors in the class and 75% in value).

#### 6.4.8.2 Summary administration

The JIA provides for a “summary administration” process for smaller estates where the realisable assets (after claims of secured creditors are deducted) falls below a pre-determined threshold of JMD 300,000.<sup>42</sup> The summary administration process relaxes some of the formalities that would be required for a formal bankruptcy, including:

- (a) dispensing with the requirement for a trustee to put up security;
- (b) publication of only one notice that informs creditors of the bankruptcy and the discharge of the bankrupt.

#### 6.4.9 Appointment of trustee or receiver

To act as either a trustee or a receiver requires that the person be licensed under the JIA.<sup>43</sup> The trustee is an officer of the Court and is bound by a Code of Ethics.<sup>44</sup> When a person is declared bankrupt either a trustee or the Government Trustee is appointed over the bankrupt’s asset.

Prior to their appointment a trustee is not bound to assume the duties of trustee but once an appointment is accepted the trustee must carry out the duties of a trustee until discharged or until another trustee is appointed in the place of that trustee.<sup>45</sup>

Subject to the rights of secured creditors, all the assets of the bankrupt will vest in the trustee resulting in an estate over which the trustee will act as administrator for the benefit of all creditors.<sup>46</sup>

The trustee is bound by the Code of Ethics (contained in the JIA Regulations) which requires the trustee *inter alia* to:

- (a) maintain a high standard of ethics;
- (b) perform their duties in a timely manner and carry out functions with competence;
- (c) act honestly and impartially.<sup>47</sup>

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<sup>42</sup> JIA, ss 219 to 221.

<sup>43</sup> *Idem*, s 71(1).

<sup>44</sup> *Idem*, s 235.

<sup>45</sup> *Idem*, s 248.

<sup>46</sup> *Idem*, s 85(1).

<sup>47</sup> The Insolvency Regulations 2015, reg 86(1).

It is expected that the trustee will seek to maximise the value of the realisable assets of the estate and to ensure the maximum distribution for creditors. The JIA does however place limits on the trustee's duties, including explicitly providing that the trustee is not required to operate the business of the bankrupt where:

- “(a) in the trustee’s opinion the realizable value of the property of the bankrupt is insufficient to protect the trustee fully against possible loss occasioned by so doing;
- (b) the creditors or inspectors<sup>48</sup>, on demand made by the trustee, neglect or refuse to secure the trustee against such possible loss.”<sup>49</sup>

Among the duties of a trustee in a bankruptcy are to:

- (a) notify all creditors of their appointment and, in the case of a corporate entity, to notify the Companies Office of Jamaica;<sup>50</sup>
- (b) take possession of all property, books and records of the bankrupt and to make an inventory;<sup>51</sup>
- (c) take conservatory measures to protect the estate;<sup>52</sup>
- (d) operate the bankrupt’s business until the first meeting;
- (e) sell the property of the bankrupt;<sup>53</sup>
- (f) temporarily insure and keep insured all insurable property of the bankrupt;<sup>54</sup>
- (g) deposit all monies received for an estate in a separate trust account for that estate;<sup>55</sup>
- (h) maintain and keep books and records of the administration for that estate;<sup>56</sup>
- (i) present reports to the Supervisor and / or creditors when required to do so;<sup>57</sup>
- (j) prepare and deliver a final report of the administration to the Supervisor;<sup>58</sup>

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<sup>48</sup> Inspectors are creditors appointed by the other creditors who may provide the Trustee with direction and authority to carry out actions on behalf of the estate.

<sup>49</sup> JIA, s 265.

<sup>50</sup> *Idem*, s 156.

<sup>51</sup> *Idem*, s 249(4).

<sup>52</sup> *Idem*, s 252.

<sup>53</sup> *Idem*, s 253.

<sup>54</sup> *Idem*, s 257.

<sup>55</sup> *Idem*, s 258.

<sup>56</sup> *Idem*, s 259.

<sup>57</sup> *Idem*, s 260.

<sup>58</sup> *Idem*, s 262.

- (k) with Court permission, make advances, incur obligations, borrow money and give security on the debtor's estate.<sup>59</sup>

Among the powers of the trustee over the estate of a bankrupt are to:

- (a) divest real property of the bankrupt;<sup>60</sup>
- (b) to initiate criminal proceedings for breaches of the JIA.<sup>61</sup>

A receiver can be appointed on an interim basis if a creditor is able to prove that it is necessary to protect the estate of the bankrupt.<sup>62</sup> The purpose of an interim receiver is to protect and preserve the debtor's property where proceedings have been (or are about to be) initiated which would result in:

- (a) the debtor's property vesting in a trustee; or
- (b) a receiver being appointed over the debtor's property, typically under a security agreement such as a debenture.

#### **6.4.10 Proof of claim**

The JIA assigns the duty of reviewing and determining claims by creditors, to the trustee. A bankrupt is required on the commencement of bankruptcy to provide the trustee with a statement of affairs. That will set out the names and address of all known creditors.<sup>63</sup> Still, the onus is on the creditors to prove that their claims are legitimate. The creditor must provide sufficient evidence to the trustee in this regard.

A creditor that does not provide a proof of claim may not vote at meetings and will not be able to claim a participation in any distribution.<sup>64</sup>

#### **6.4.11 Executory contracts**

The JIA does not include any specific provisions that set out the impact of bankruptcy on executory contracts. This is similar to the Canadian BIA which also does not specify any treatment for executory contracts. The Canadian Supreme Court recently provided a definitive opinion on the Canadian position relating to executory contracts.<sup>65</sup> It is not yet clear whether the Jamaican courts will follow suit.

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<sup>59</sup> *Idem*, s 264.

<sup>60</sup> *Idem*, s 253.

<sup>61</sup> *Idem*, s 254.

<sup>62</sup> *Idem*, s 67.

<sup>63</sup> *Idem*, s 127.

<sup>64</sup> *Idem*, s 167.

<sup>65</sup> *Chandos Construction Ltd v Deloitte Restructuring Inc* 2020 SCC 25. In that case the Canadian Supreme Court recognised the existence of the "anti-deprivation rule" that has the effect of rendering void a contractual term that on bankruptcy or insolvency would have the effect of removing from a bankrupt's estate property that would otherwise be available (but for the contractual provision) for realisation by the trustee in bankruptcy.

#### **6.4.12 Real property leases**

The JIA includes specific treatment for rights of the trustee relating to premises leased by the bankrupt.<sup>66</sup> The trustee may elect to:

- (a) hold the lease on the same terms and conditions as the bankrupt;
- (b) disclaim or assign the lease in the same manner as the bankrupt may under the lease agreement;
- (c) assign the lease pursuant to a Court order even if the lease was non-assignable.

#### **6.4.13 Copyright and patent rights**

The JIA contains specific provisions for patented articles and copyrighted works.<sup>67</sup> Essentially where the bankrupt's estate included patented articles or copyrighted works that were purchased by the bankrupt with any restrictions or limitations, the trustee, although not bound by those restrictions, must grant the manufacturer or vendor of the patented article a first right to purchase that property.

#### **6.4.14 Joint tenancy**

The commencement of bankruptcy operates to sever a joint tenancy.<sup>68</sup> That essentially means that the parties will revert to tenants-in-common, which gives the trustee the power to alienate the interest of the bankrupt party.

#### **6.4.15 Exempt property**

For individual bankrupts the JIA specifies certain property of the bankrupt that is not available for seizure or execution by creditors. These are:

- (a) the personal items and clothing of the bankrupt and the bankrupt's dependents necessary to satisfy their basic needs;
- (b) household furniture, appliances and food to satisfy the basic domestic needs in the permanent home of the bankrupt;
- (c) tools of trade of the bankrupt;
- (d) maintenance received by the bankrupt, pursuant to a Court order for the support of the bankrupt's dependents to satisfy their basic needs.

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<sup>66</sup> JIA, s 88.

<sup>67</sup> *Idem*, ss 106 to 108.

<sup>68</sup> *Idem*, s 98.

#### **6.4.16 Eligible financial contracts**

The JIA includes specific provisions relating to “Eligible Financial Contracts” (EFCs).<sup>69</sup> The JIA defines the types of contracts that are within the definition of an EFC. In brief they are largely derivative-type contracts including forward contracts, futures contracts, swaps, options but also includes margin loans and repurchase agreements.

The JIA provisions relating to EFCs are intended to protect and preserve the interest of the counterparty to the contract, so that the JIA provides that in the case of an EFC:<sup>70</sup>

- (a) the rights of a counterparty are not stayed;
- (b) the obligations between the debtor and a counterparty to the EFC may be netted or set-off;
- (c) the counterparty may deal with property that is pledged or provided as security to secure performance.

#### **6.4.17 Impeachable pre-bankruptcy transactions**

The JIA includes provisions that empower a trustee to make a claim for the recovery of assets improperly conveyed or transferred in pre-bankruptcy transactions. The key types of impeachable transactions are:

- (a) settlements;<sup>71</sup> and
- (b) preferences.<sup>72</sup>

To determine whether any of the aforementioned transactions is impeachable requires the trustee to first determine whether the transaction is within the look-back period created by the JIA. The look-back period in practice is called the “avoidance period”.

##### **6.4.17.1 The avoidance period**

The avoidance period is determined by reference to two dates,<sup>73</sup> namely:

- (a) the “initial bankruptcy event”; and
- (b) the date of the bankruptcy.

The initial bankruptcy event is any of the following:

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<sup>69</sup> *Idem*, s 2(1).

<sup>70</sup> *Idem*, s 53(7).

<sup>71</sup> *Idem*, s 2(1).

<sup>72</sup> *Idem*, s 117(1).

<sup>73</sup> *Idem*, s 113.

- (a) the date of filling a notice of intention to file a proposal or the filing of a proposal;
- (b) the date of application for an assignment for the benefit of creditors;
- (c) the date of the application for a receiving order.

The date of bankruptcy is the date on which any of the following occurs:

- (a) the granting of a receiving order;
- (b) a certificate of assignment for the benefit of creditors is granted;
- (c) an assignment for the benefit of creditors is deemed to occur.

#### 6.4.17.2 Settlements

A "settlement" is defined in the JIA as including "a contract, covenant, conveyance, transfer, gift and designation of beneficiary in an insurance contract, to the extent that the contract, covenant, conveyance, transfer, gift or designation is gratuitous or made for merely nominal consideration."<sup>74</sup>

A settlement made within the period beginning on the day one (1) year before the initial bankruptcy event is void as against the trustee. The trustee only needs to prove that the transaction is within the definition of a "settlement".

A settlement made within the period beginning on the day five (5) years before the initial bankruptcy event is void if:

- (a) the debtor was unable to pay debts without the aid of the property transferred; or
- (b) the legal interest in the property was not transferred.

#### 6.4.17.3 Preferences

A preference is essentially a transaction by an insolvent person which is intended to give a preference to one creditor over another creditor or creditors. A preference is voidable if made within six (6) months prior to the date of initial bankruptcy event. If the transaction occurs within the aforementioned period the JIA creates a presumption, absent evidence to the contrary, that the transaction was intended to provide a preference.

Eligible financial contracts are expressly excluded from the presumption of a preference.

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<sup>74</sup> *Idem*, s 2(1).



**6.4.17.4 Transactions After the initial bankruptcy event and the date of the bankruptcy**

All transactions between the initial bankruptcy event and the date of the bankruptcy are void; except the following if made in good faith and subject to provisions in relation to Preferences and Settlements and reviewable transactions<sup>75</sup>; namely:

- (a) payment by the bankrupt to any of the creditors of the bankrupt;
- (b) payment or delivery to the bankrupt;
- (c) conveyance or transfer by the bankrupt for adequate valuation consideration; or
- (d) a contract, dealing or transaction including any giving of security, by or with the bankrupt for adequate valuable consideration.

**6.4.18 Scheme of distribution**

The JIA sets out the priority of payment on a bankruptcy based on categories.<sup>76</sup>

Category	Description of Claim
1.	The costs of administering the estate, namely: <ul style="list-style-type: none"> <li>(i) the expenses and fees of a trustee or receiver; and</li> <li>(ii) the prescribed fees payable to the Supervisor.</li> </ul>
2.	A. Contributions of the debtor as an employer including: <ul style="list-style-type: none"> <li>(i) statutory deductions, contributions to pension funds;</li> <li>(ii) claims for wages and salaries of employees within the six months preceding the bankruptcy or appointment of receiver not exceeding JMD 500,000;</li> <li>(iii) redundancy payments.</li> </ul> B. All taxes (excluding penalties and interest) imposed under any law and having become due and payable within twelve months before the bankruptcy.
3.	Payment obligations owed to any secured creditors.
4.	All other claims including unsecured claims and the balance of any claim from any of the previous categories.

<sup>75</sup> *Idem*, s 119.

<sup>76</sup> *Idem*, s 202.

### 6.4.19 Discharge of bankrupt

#### 6.4.19.1 Individual bankrupt

An individual bankrupt may be discharged:

- (a) automatically;<sup>77</sup>
- (b) administratively;<sup>78</sup> or
- (c) by the Court.<sup>79</sup>

An individual bankrupt will be automatically discharged after 12 months from the commencement of bankruptcy if they are a first time bankrupt and there is no objection to the automatic discharge.

If there is an objection to an automatic discharge, the bankrupt’s discharge will be dealt with administratively between the trustee and the Supervisor.

A discharge by the Court will only be necessary if the bankrupt is not subject to automatic discharge and it cannot be resolved administratively.

#### 6.4.19.2 Corporate bankrupt

In the case of a corporate entity. The completion of the Bankruptcy Process results in the dissolution of the entity.

#### Self-Assessment Exercise 3

##### Question 1

Explain the two (2) main modalities under the JIA regime and the effect of each on the debtor’s control of their assets.

##### Question 2

Why is the trustee integral to the bankruptcy process under the JIA?

##### Question 3

How are pre-bankruptcy rights impacted by bankruptcy under the JIA?

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<sup>77</sup> *Idem*, s 139.

<sup>78</sup> *Idem*, s 142.

<sup>79</sup> *Idem*, s 144.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

## 6.5 Corporate liquidation

A corporate liquidation may either be solvent or insolvent. A solvent liquidation is conducted under the Jamaican Companies Act 2004, whilst an insolvent corporate liquidation would be conducted under the JIA.

### 6.5.1 Solvent corporate liquidation

A solvent company may be liquidated either:

- (a) voluntarily by the shareholders of the company;<sup>80</sup> or
- (b) by the Court pursuant to a winding up order.<sup>81</sup>

#### 6.5.1.1 Voluntary winding up

The members of a solvent company may resolve by special resolution (no less than 75% of the votes of shareholders in person or by proxy) to wind up the company. The company must also appoint a trustee. The board of directors are required to make a Declaration of Solvency which is in the form of a sworn statement that:

- (a) the directors have made a full inquiry into the affairs of the company; and
- (b) the directors have formed the opinion that the company will be able to pay its debts within the next 12 months from the commencement of the winding up.<sup>82</sup>

If the trustee forms the opinion that the company will not be able to pay its debts in accordance with the Declaration of Solvency, the trustee must apply to the Supervisor for an assignment for the benefit of creditors (effectively putting the company into insolvent liquidation).

When a company's assets are realised, the trustee must abide by the JIA's provisions relating to ranking of claims for payment on a distribution.<sup>83</sup>

A voluntary liquidation is deemed to commence on the date the member's pass the special resolution to wind up the company. From that date the company must cease to carry on business, except as required for a beneficial winding up.<sup>84</sup>

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<sup>80</sup> The Jamaican Companies Act 2004, s 272.

<sup>81</sup> *Idem*, s 234.

<sup>82</sup> *Idem*, s 277.

<sup>83</sup> *Idem*, s 311.

<sup>84</sup> *Idem*, s 275.

### 6.5.1.2 Court-ordered winding up

The Court may also wind up a company. Among the grounds for winding up are:

- (a) the shareholders have by special resolution resolved that the company be wound up by the Court;
- (b) the company has not commenced its business within a year of its incorporation or suspends its business for at least one year; or
- (c) the Court is of the opinion that it is just and equitable that the company be wound up.

The Court will appoint a licensed trustee to administer the winding up. The grant by the Court of a winding up order has the following effect:

- (a) no action or proceeding will proceed or commence against the company without the leave of the Court;<sup>85</sup>
- (b) it operates in favour of all creditors and shareholders as if a joint application had been made by creditors and shareholders;<sup>86</sup>
- (c) any disposition of the company's property is void without the leave of the Court.

In the event that the company's assets are insufficient to satisfy the liabilities, the Court may make an order for the trustee to apply to the Supervisor for an assignment for the benefit of creditors (effectively putting the company into insolvent liquidation).

### 6.5.2 Insolvent corporate liquidation

Insolvent corporate liquidation can arise by way of a voluntary assignment for the benefit of creditors or an involuntary receiving order being made by a creditor to the Court.

In an insolvent corporate liquidation, pre-bankruptcy rights and transactions are dealt with similarly to personal bankruptcy (as set out above). In the case of:

- (a) Executory contracts - see paragraph 6.4.11;
- (b) Real property leases - see paragraph 6.4.12;
- (c) Copyright and patent rights - see paragraph 6.4.13;
- (d) Joint tenancy - see paragraph 6.14.14;

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<sup>85</sup> *Idem*, s 229.

<sup>86</sup> *Idem*, s 230.

- (e) Eligible financial contracts – see paragraph 6.4.16;
- (f) Impeachable pre-bankruptcy transactions – see paragraph 6.4.17;
- (g) Scheme of distribution – see paragraph 6.4.18.

The provisions relating to exempt property (see paragraph 6.4.15) do not apply to corporate liquidations.

### 6.5.3 Dissolution

Whether in a solvent or insolvent liquidation, the completion of the liquidation process results in the dissolution of the corporate entity, effectively ending its corporate existence.

#### Self-Assessment Exercise 4

##### Question 1

What is the difference between a solvent winding-up and corporate liquidation?

##### Question 2

Joint Co Limited (JointCo) is a joint venture company. It was incorporated and is owned 50%-50% by two group of families. JointCo’s assets exceed its liabilities and it is able to pay its debts as they fall due. Unfortunately, the two families have a fundamental disagreement about the management of the business. JointCo is deadlocked. You have been asked to advise the main lender of JointCo who although has been paid their contractual interest, is concerned that the situation could deteriorate quickly if the deadlock is not resolved.

[For commentary and feedback on self-assessment exercise 4, please see APPENDIX A](#)

## 6.6 Receivership

The JIA codified the rules relating to receivership.<sup>87</sup> A receiver must now be a licensed trustee under the JIA.<sup>88</sup> A receiver may be appointed either privately or by way of a Court order. When appointed, a receiver will take possession and control of the debtor’s assets.

The JIA imposes obligations on all receivers including to:

<sup>87</sup> JIA, ss 71 to 90.

<sup>88</sup> *Idem*, s 71. Prior to the JIA there was no statutory requirement for a receiver to have any particular license, qualifications or credentials.

- (a) provide notice of their appointment within 14 days by publishing a notice in the prescribed form in a local daily newspaper;<sup>89</sup>
- (b) provide reports to the Supervisor;<sup>90</sup>
- (c) Deal with any property of the debtor in their possession or control in a commercially reasonable manner;<sup>91</sup>
- (d) Act honestly and in good faith;<sup>92</sup>
- (e) Adhere to the standards required by the Code of Ethics applicable to licensed trustees<sup>93</sup>;
- (f) Exercise their powers for the purposes of obtaining repayment of the debt<sup>94</sup>; and
- (g) Distribute proceeds from the property over which they are appointed in accordance with the priorities for distribution established by the JIA.<sup>95</sup>

### 6.6.1 Private receivers

A private receiver will almost invariably be appointed by a secured creditor that holds a debenture that provides for appointment of a receiver on default by the debtor. The private receiver's main duties are to the secured creditor that has appointed them. The private receiver still owes the duties common to all receivers under the JIA.

In *Morgan's Harbour Limited (In Receivership) v Lashmont Financial Services Limited, and others*<sup>96</sup> the Supreme Court of Judicature held that the appointer of a receiver (i.e. a secured creditor) has two main duties once a power of sale is exercised; namely to:

- (a) make decisions relating to its indebtedness for the sole purpose of obtaining repayment of its debt; and
- (b) to act in good faith.

These duties are more narrow than those imposed on a receiver.

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<sup>89</sup> *Idem*, s 74(a).

<sup>90</sup> *Idem*, s 73(2)(c).

<sup>91</sup> *Idem*, s 74(c).

<sup>92</sup> *Idem*, s 74(h).

<sup>93</sup> The Insolvency Regulations 2015, reg 86(1).

<sup>94</sup> *Morgan's Harbour Limited (In Receivership) v Lashmont Financial Services Limited, and others* [2018] JMCC Comm 9

<sup>95</sup> JIA, s 80.

<sup>96</sup> [2018] JMCC Comm 9.

### 6.6.2 Court-appointed receiver

A receiver may also be appointed by way of a Court order. This may either be on an interim basis or a permanent basis. An interim receiver would typically be appointed by a secured creditor to protect and preserve the assets of a debtor prior to it commencing enforcement action.

A permanent receiver would be appointed pursuant to a creditor's application for a receiving order against the debtor.

A receiver appointed by the Court must act in accordance with the directions of the Court.

### 6.6.3 Discharge of receiver

The JIA sets out the process for discharge of a receiver once it has completed its duties, including delivery to the Supervisor of:

- (a) a statement of receipts and disbursements;<sup>97</sup>
- (b) a report describing the administration of the property of the debtor over which it was appointed;<sup>98</sup>
- (c) a bill of costs in respect of their fees.<sup>99</sup>

## 6.7 Corporate rescue - the proposal provisions

There is no legal obligation on a debtor that is in (or that foresees that it will have) financial difficulties to pursue a corporate rescue. The JIA sets out the provisions relating to corporate rescue. In the JIA these are referred to as "proposals".

A proposal is defined as "an arrangement for a composition, extension of time or scheme of arrangement made between the debtor and creditor(s) either as a group or in classes."<sup>100</sup> There are no prescribed forms of proposal so that the terms, conditions and content of a proposal are flexible. The JIA does specify certain minimum requirements of a proposal, namely:

- (a) the proposal must not provide for the payment of equity claims unless all other claims are first paid in full;<sup>101</sup>
- (b) where the debtor is an employer, the proposal must provide for the priority of payment of certain employee claims;<sup>102</sup> and

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<sup>97</sup> JIA, s 80.

<sup>98</sup> *Idem*, s 73(2)(c).

<sup>99</sup> Insolvency Regulations 2015, reg 26.

<sup>100</sup> JIA, s 2(1).

<sup>101</sup> *Idem*, s 39(5).

<sup>102</sup> *Idem*, s 39(4).

(c) where the proposal is made conditional on creditors making a contribution to the debtor, creditors must have an option to not participate and those that elect not to participate must be given the option to receive a cash payment.<sup>103</sup>

A proposal may be combined with a scheme or arrangement under sections 203 to 207 of the Jamaican Companies Act 2004, if necessary.

The JIA's proposal provisions may be accessed either by filing:

- (a) a notice of intention to file a proposal (NOI); or
- (b) a proposal.

The filing of a NOI or a proposal brings into effect a stay of proceedings on all creditors who are prevented from commencing or continuing enforcement action to recover on debts from the debtor.<sup>104</sup> At the present time the understanding is that when an actual proposal is filed (which must initially be filed within 30 days) only the creditors named within the proposal (considered as "affected creditors") are stayed.

Within 14 days of filing a NOI an insolvent person must file a cash flow statement in the prescribed form with the Supervisor.<sup>105</sup> A failure to file the cash flow statement within the required time results in the debtor being deemed to apply for an assignment for the benefit of creditors (that is to say bankruptcy).

### **6.7.1 Who may access the JIA's proposal provisions**

A notice of intention to file a proposal may only be made by an insolvent person.<sup>106</sup>

A proposal<sup>107</sup> may be made by:

- (a) a person facing imminent insolvency;
- (b) an insolvent person;
- (c) a receiver, but only in relation to an insolvent person;
- (d) a liquidator of an insolvent person's property;
- (e) the trustee of the estate of a bankrupt;

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<sup>103</sup> *Idem*, s 37.

<sup>104</sup> *Idem*, s 4.

<sup>105</sup> *Idem*, s 13(1).

<sup>106</sup> *Idem*, s 11(2).

<sup>107</sup> *Idem*, s 11(1).



(f) a bankrupt.

A person that enters the JIA's proposal provisions will typically be an insolvent person. However, some of the rescue provisions in the JIA are also available to persons that are not yet insolvent. To accommodate those persons the JIA created a new concept of the "person facing imminent insolvency"; this is a person that:

- "(a) resides, carries on business or has property in Jamaica, whose liabilities to creditors provable as claims under the JIA, amount to not less than three hundred thousand dollars...; and
- (b) reasonably anticipates that for any reason within the period of twelve months, will be unable to meet his obligations as they generally become due."<sup>108</sup>

The provision recognises the importance of early intervention in rehabilitating a debtor that determines it is likely to face financial distress in the near future.<sup>109</sup> The provision has not yet been subjected to judicial consideration but departs from the Canadian BIA which does not have such a provision.

### **6.7.2 Methods of accessing the proposal provisions**

A debtor that is seeking to re-organise their liabilities can have recourse to the JIA if at the very least they are within the definition of a "person facing imminent insolvency". It appears that a person who is within this definition may only enter the rescue provisions by way of filing an actual proposal and not a NOI.

The rescue provisions are voluntary and may not be triggered by a creditor. However, a bankrupt that is within the liquidating modality of the JIA may convert to the rescue procedures if it makes a proposal that is accepted by its creditors and the Supervisor.<sup>110</sup>

### **6.7.3 Automatic stay of proceedings**

The filing of a NOI or a proposal triggers an automatic stay of proceedings. The NOI implements a stay on all creditors which prevents all creditors (with limited exception) from commencing, continuing or enforcing any action to recover debt against the debtor.<sup>111</sup> At this time the understanding is that only creditors named in the Proposal are stayed.

The NOI is the most common method by which a debtor accesses the proposal provisions. Upon filing of the NOI all creditors are stayed initially for 30 days. If the debtor does not file a cash flow statement within 14 days the debtor enters the bankruptcy process. If the debtor does not file a proposal within 30 days of the NOI the debtor or the trustee may apply for an extension of time

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<sup>108</sup> *Idem*, s 2(1).

<sup>109</sup> Greenaway, *supra* note 7, p 9.

<sup>110</sup> JIA, s 47.

<sup>111</sup> *Idem*, s 4.

to file a proposal in 45-day blocks up to an additional five (5) months.<sup>112</sup> The debtor essentially has a maximum of six (6) months after the NOI to file a proposal. In practice, upon filing a NOI the Supervisor has almost as a forgone conclusion given extensions up to the limit under the JIA with very little conditions placed on the grant of further extensions.

The stay created by the filing of the NOI is lifted:

- (a) on a creditor or a class of creditors if the debtor files a proposal which does not include that creditor or class of creditors,<sup>113</sup> or
- (b) pursuant to a Court order, made upon application by a creditor that is able to prove that the continuance of the stay is likely to be materially prejudicial, or it is equitable to do so.<sup>114</sup>

If the proposal fails, the automatic stay will in theory be lifted; however, as the debtor will enter the bankruptcy process a new automatic stay will be triggered.

#### **6.7.4 Status of debtor**

An insolvent person that files a NOI or a proposal will remain in control and possession of their property and business. Triggering the proposal provisions does not therefore create an estate that would vest in the trustee.

In the case of a corporate debtor the board of directors and the management will not be displaced by the trustee.

#### **6.7.5 Appointment of trustee**

A NOI or a proposal requires the debtor to select a trustee for purposes of the proposal. The trustee appointed by the debtor has very limited formal duties.

The proposal trustee's duties include:

- (a) giving notice to all creditors of their appointment within five (5) days of the filing of NOI,<sup>115</sup> and
- (b) providing an opinion as to whether the cash flow statement and the assumptions underpinning it, are reasonable.<sup>116</sup>

The proposal trustee may<sup>117</sup> (but is not required to) advise on and participate in the preparation of the proposal and any negotiations relating to the proposal.

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<sup>112</sup> *Idem*, s 14(6).

<sup>113</sup> *Idem*, s 5(1).

<sup>114</sup> *Idem*, s 7.

<sup>115</sup> *Idem*, s 12(1).

<sup>116</sup> *Idem*, s 13(1)(b).

<sup>117</sup> *Idem*, s 16.

The JIA seems to contemplate that among the responsibilities of the trustee, once a NOI or proposal has been filed, is to monitor the business and financial affairs of the debtor. The translation of these obligations into the JIA has however left a gap by omitting a provision that the trustee report to the creditors. Consequently, at the present time the trustee appointed for the purposes of a proposal has been of very limited assistance to creditors.

As the trustee appointed by the debtor has very limited formal duties, the experience has been that the board of directors and management are entirely in control of the business of a corporate debtor that is operating within the proposal provisions.

#### **6.7.6 Restrictions on the exercise of contractual rights**

The JIA provides that a counter-party to an agreement with a debtor may not terminate or alter the agreement by reason only that the debtor has either filed a NOI or a proposal, or is believed to be or will likely become insolvent.<sup>118</sup>

The JIA expands the restriction on termination if the default is in the period prior to the filing of a NOI or a proposal in respect of leases, licenses and public utilities.<sup>119</sup>

The JIA does not prohibit a supplier to the debtor from requiring immediate payment for goods or services, use of leased or licensed property after the filing of the NOI or Proposal.<sup>120</sup>

#### **6.7.7 Eligible financial contracts**

Eligible financial contracts are not subject to the stay of proceedings or restrictions on the contractual rights imposed by triggering the proposal provisions.<sup>121</sup>

#### **6.7.8 Sale of assets**

Once a debtor triggers the proposal provisions, the JIA prohibits the debtor from selling or disposing of assets outside of the ordinary course of business. The debtor must apply to the Court to sell any assets, or alternatively include the sale of the assets as part of the proposal which, if accepted by creditors, will be deemed to be approved by the Court.<sup>122</sup>

#### **6.7.9 Interim financing**

Creditors are not obligated to extend credit to a debtor that is within the proposal provisions under the JIA.<sup>123</sup>

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<sup>118</sup> *Idem*, s 53.

<sup>119</sup> *Idem*, s 53(2).

<sup>120</sup> *Idem*, s 53(3)(a).

<sup>121</sup> *Idem*, s 53(7).

<sup>122</sup> *Idem*, s 48.

<sup>123</sup> *Idem*, s 53(3)(b).

The JIA does, however, expressly grant the Court the power to order interim financing during the period that the insolvent person has filed a NOI or a proposal.<sup>124</sup> Interim financing may include merely authorising the borrowing of money but may also involve declaring that the property of the debtor is subject to a priority charge to secure a loan.

In determining whether to grant a priority charge the Court must consider<sup>125</sup> *inter alia*:

- “(a) the period during which the debtor is expected to be subject to the proposal provisions;
- (b) how the debtor’s business and financial affairs are to be managed during the proceeding;
- (c) whether the debtor’s management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor’s property;
- (f) whether any creditor would be naturally prejudiced as a result of the security or charge.”

#### **6.7.10 Impeachable pre-bankruptcy transactions**

The trustee named in the proposal is not under a duty or obligation to attempt to augment the assets of the debtor by challenging pre-bankruptcy transactions. In the context of the proposal provisions, challenges to pre-bankruptcy transactions would either be done by appointing an interim receiver (or the proposal trustee being appointed as an interim receiver); or by including within the proposal terms that the trustee must challenge the transactions as part of implementation of the proposal itself.

#### **6.7.11 Interim receiver**

After commencing the proposal provisions, a creditor may apply to Court to appoint an interim receiver over the debtor.<sup>126</sup> The benefit of an interim receiver is the potential for expanded powers, including to take possession of all or part of the debtor’s property and to exercise control over the debtor’s property or business, as well as to take such other actions as the Court may determine.

#### **6.7.12 Proof of claims**

The JIA requires that in connection with the proposal provisions the trustee will send a notice to creditors requiring that they file a proof of claim.<sup>127</sup> To participate in a creditor’s meeting and to vote and to receive a distribution under the proposal requires the creditor to file a proof of claim.

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<sup>124</sup> *Idem*, s 55.

<sup>125</sup> *Idem*, s 55(5).

<sup>126</sup> *Idem*, s 67.

<sup>127</sup> *Idem*, s 22(1).

### **6.7.13 Creditors' meeting**

The JIA requires that within 21 days of the filing of the proposal the trustee call a meeting of the creditors to consider and vote on the proposal.<sup>128</sup> The meeting is chaired by the trustee in accordance with the JIA. All matters to be considered, other than acceptance of the proposal, are to be decided by the creditors pursuant to an ordinary resolution.<sup>129</sup> An ordinary resolution means a resolution carried by a majority of votes (that is, greater than 50%). The votes of a creditor are determined by counting one vote for each dollar of every claim of that creditor.<sup>130</sup>

### **6.7.14 Acceptance of proposal**

A proposal is only accepted if a majority in number of the unsecured creditors in each class holding no less than two-thirds in value of the total debt represented by that class, vote in favour of the proposal.<sup>131</sup>

The present understanding of these provisions is that secured creditors do not determine the acceptance of the proposal and their votes only determine whether they will be bound by the proposal.<sup>132</sup> If the proposal is refused by a secured creditor or secured creditors then the secured creditors are no longer bound by the stay and are able to execute on their collateral. The failure of a proposal automatically puts the debtor into the bankruptcy process, except in the case of a "person facing imminent insolvency", in which case the unsecured creditors may vote by special resolution to permit the debtor to terminate the procedures under the proposal provisions.<sup>133</sup>

### **6.7.15 Court approval of proposal**

A proposal that has been accepted by the requisite majorities of unsecured creditors must obtain approval by the Court before it is implemented.

The JIA provides that a proposal is deemed to be approved by the Court if within 15 days of its acceptance by the requisite majority of unsecured creditors, neither a creditor nor the Supervisor delivers a notice to the debtor requiring the debtor to apply to the Court to have the proposal approved.<sup>134</sup>

The Court, in determining whether to approve a proposal, will consider<sup>135</sup> whether the proposal:

- (a) contravenes any of the provisions of the JIA;

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<sup>128</sup> *Idem*, s 19(1).

<sup>129</sup> *Idem*, s 24.

<sup>130</sup> *Idem*, s 2(1), "Ordinary Resolution".

<sup>131</sup> *Idem*, s 38.

<sup>132</sup> *Idem*, s 38(2)(c).

<sup>133</sup> *Idem*, s 40(3).

<sup>134</sup> *Idem*, s 39.

<sup>135</sup> *Idem*, s 42.

(b) is calculated to benefit the general body of creditors;

(c) terms are fair and reasonable to the creditors and not oppressive.

### **6.7.16 Implementation of the proposal**

The trustee appointed for purposes of the proposal will assist with managing the implementation of the proposal. Furthermore, the JIA requires that all distributions under the proposal must be made through the trustee.<sup>136</sup>

### **6.7.17 Equity claims**

In general the proposal provisions subordinate equity claims. Equity claims (which will include a return of capital, redemption of equity capital or dividend) cannot receive a distribution under a proposal until all other claims are paid in full.<sup>137</sup> Equity claims are also to be considered as one stand-alone class for the purposes of voting on the proposal.

#### **Self-Assessment Exercise 5**

##### **Question 1**

ABC Ltd, is a limited liability company incorporated in Jamaica. ABC Ltd has an unsecured term loan with XYZ Bank which matures in six (6) months. ABC Ltd does not have sufficient cash available to repay the loan. ABC Ltd wishes to get some breathing space to formulate a repayment plan acceptable to XYZ Bank. ABC Ltd has been advised that the JIA could be of assistance. Do you agree with this advice? If so, why and what additional information might you want to get from ABC Ltd?

##### **Question 2**

You are advising JAM Bank in regard to a secured loan it granted to Hotel Ltd, which is now in default. The loan is in the form of a debenture over all of the assets of Hotel Ltd. JAM Bank has lost confidence in the management of Hotel Ltd as funds intended for capital improvements to one of its properties have instead been diverted as bonus payments to management. JAM Bank has been told that if it tries to enforce its security, Hotel Ltd can access the JIA and prevent enforcement for up to six (6) months during which the management and shareholders of Hotel Ltd can dissipate the assets. What would you advise JAM Bank to do?

**For commentary and feedback on self-assessment exercise 5, please see APPENDIX A**

<sup>136</sup> *Idem*, s 45.

<sup>137</sup> *Idem*, s 39(5).

## 7. CROSS-BORDER INSOLVENCY LAW

### 7.1 General

The JIA provided expressly for the adoption of the UNCITRAL Model Law on Cross-border Insolvency through the adoption of regulations with or without modification. Accordingly, the Insolvency Regulations 2015 adopted a modified version of the UNCITRAL Model Law.

In many ways the modifications to the UNCITRAL Model Law mirror those adopted in Canada. To date there has been very little interpretation of the Jamaican provisions so that it is expected that heavy reliance will be placed on Canadian jurisprudence.

Canada's system is typically considered to be one with "modified universalism".<sup>138</sup> The Jamaican legislation is similarly intended to adopt a modified universalist approach in recognition of foreign insolvency proceedings.

### 7.2 Modified adoption of UNCITRAL Model Law

The Jamaican adoption of the UNCITRAL Model Law was by way of secondary legislation in the Insolvency Regulations 2015 (referred to as the JIA Regulations in this part of the Guidance Text).

The Jamaican adoption differs from the UNCITRAL Model Law in a number of ways, including:

- (a) The definition of "foreign non-main proceedings"<sup>139</sup> does not require the debtor to have an "establishment" in the foreign jurisdiction;
- (b) The foreign representative may commence proceedings under the JIA Regulations "as if" the foreign representative were a creditor or debtor under the JIA;<sup>140</sup>
- (c) The JIA Regulations grant a Court the power on an application by a foreign representative or interested person to apply any legal or equitable rules governing the recognition of foreign insolvency orders that are not inconsistent with the JIA Regulations;<sup>141</sup>

The Jamaican adoption expressly excluded some articles of the UNCITRAL Model Law, including but not limited to:

- (a) Article 3 – Conflicting Treaty Obligations;
- (b) Article 4 – Court or Other Authority competent to deal with recognition of foreign proceedings;

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<sup>138</sup> Ziegel, J "Chapter 11: Cross-Border Insolvencies" in *Canadian Bankruptcy & Insolvency Law: Bill C-55, Statute C.47 and Beyond*, 2007, LexisNexis Canada.

<sup>139</sup> JIA Regulations, reg 61(1).

<sup>140</sup> *Idem*, reg 66.

<sup>141</sup> *Idem*, reg 76(1).

- (c) Article 9 – foreign representative’s right of direct access to courts of forum state;
- (d) Article 22 – Protection of interests of creditors and other interested parties;
- (e) Article 23 – Avoidance of acts detrimental to the estate.

### 7.3 Key Terms and concepts

The JIA Regulation includes the following key terms and concepts:<sup>142</sup>

“Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;

“Foreign main proceeding” means a foreign proceeding taking place in the jurisdiction where the debtor has the centre of main interests;

“Foreign proceeding” means a judicial or an administrative proceeding including an interim proceeding in a jurisdiction outside Jamaica dealing with creditor’s collective interests generally under any law relating to bankruptcy or insolvency, in which a debtor’s property and affairs are subject to the control or supervision by a foreign court for the purpose of reorganization or liquidation;

“Foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding;

The centre of main interests (COMI) is not defined in the JIA Regulations. The JIA Regulations does however make the presumption that a debtor’s COMI is deemed to be its registered office for non-natural persons and the ordinary place of residence for natural persons.<sup>143</sup>

### 7.4 Recognition of foreign insolvency proceedings

Under the JIA Regulations the starting point for recognition of foreign insolvency proceedings in Jamaica will be an application to the Insolvency Division of the Supreme Court of Judicature. This application must be made by a “foreign representative”.

The foreign representative must include in their application:<sup>144</sup>

- (a) a certified copy of the instrument that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
- (b) a certified copy of the instrument authorising the foreign representative to act in that capacity or a certificate from the foreign court, affirming the foreign representative’s authority to act in that capacity; and

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<sup>142</sup> *Idem*, reg 61(1).

<sup>143</sup> *Idem*, reg 61(2).

<sup>144</sup> *Idem*, reg 62.



- (c) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

From the evidence submitted by the foreign representative the Court evaluates the evidence in a two-stage process, as follows:

- Stage one - the Court determines whether the proceeding is within the definition of a “foreign proceeding” and whether the foreign representative is appointed in that foreign proceeding. If the Court is satisfied after stage one, the Court is obligated to make an order granting recognition of the foreign proceeding.
- Stage two - the Court must determine whether the “foreign proceeding” is a “foreign main proceeding” or a “foreign non-main proceeding”.

The importance of this distinction is that if the Court determines that the recognition is sought in a foreign main proceeding, an automatic stay comes into effect on enforcement action against the debtor.<sup>145</sup> The foreign representative does not have to request this relief. The automatic stay also suspends the debtor’s power to transfer assets outside of the ordinary course of business.<sup>146</sup> If the Court determines that the foreign proceedings are “foreign non-main proceedings”, the foreign representative may apply for an automatic stay. Grant of relief is within the discretion of the Court in regard to foreign non-main proceedings.

## 7.5 Co-operation with foreign courts and foreign representative

The JIA Regulations obligates the Supreme Court of Judicature to co-operate to the “maximum extent possible” with the foreign representative and foreign Court involved in the foreign proceedings. The JIA Regulations includes a non-exhaustive list of the methods of co-operation.<sup>147</sup>

## 7.6 Local obligations of foreign representative

Once the Jamaican Court makes an order recognising a foreign proceeding, the foreign representative must without delay publish, in a daily newspaper in circulation in Jamaica, a notice setting out certain prescribed information.<sup>148</sup>

The foreign representative is also required to inform the Court<sup>149</sup> without delay of any:

- (a) substantial change in the status of the recognised foreign proceedings;
- (b) substantial change in the status of the foreign representative’s authority to act in that capacity; and

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<sup>145</sup> *Idem*, reg 63(1)(a).

<sup>146</sup> *Idem*, reg 63(1)(b).

<sup>147</sup> *Idem*, reg 67(3).

<sup>148</sup> *Idem*, reg 68(b).

<sup>149</sup> *Idem*, reg 68(a).

(c) other foreign proceeding in respect of the same debtor that becomes known to the foreign representative.

### 7.7 Public policy exemption

The JIA Regulations include a public policy exemption whereby the Court is not required to make any order that would be contrary to Jamaican public policy.<sup>150</sup>

### 7.8 Local cases relating to cross-border insolvency

The JIA Regulations are still new. There are not yet any decisions of note on interpreting the provisions relating to the recognition of foreign insolvency proceedings. It is however expected, that given the pedigree and substantial overlap with the Canadian provisions, that Canadian jurisprudence will be extremely persuasive with respect to these provisions.

#### Self-Assessment Exercise 6

##### Question 1

Describe the process a Jamaican Court will take in determining whether to recognise foreign insolvency proceedings.

##### Question 2

What determines whether a Jamaican Court will treat foreign insolvency proceedings as “foreign main proceedings” or “foreign non-main proceedings”? Why is this distinction important?

##### Question 3

Describe the various methods by which foreign insolvency proceedings can be recognised in Jamaica.

[For commentary and feedback on self-assessment exercise 6, please see APPENDIX A](#)

## 8. RECOGNITION OF FOREIGN JUDGMENTS

It should be noted that a foreign representative can also seek recognition of foreign proceedings either based on statute or common law principles.

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<sup>150</sup> *Idem*, reg 76(2).

In regards to statute, Jamaica has entered into reciprocal enforcement legislation<sup>151</sup> with certain other jurisdictions.<sup>152</sup> A judgment creditor in any of those jurisdictions has a right, pursuant to the reciprocal enforcement legislation, to secure registration of their judgment in the Supreme Court of Judicature of Jamaica and upon such registration such judgment would be enforced as if it were a judgment of the Jamaican Supreme Court.

In regards to jurisdictions with which Jamaica does not have a reciprocal enforcement legislation, the judgment creditor will need to rely upon common law principles to obtain enforcement in Jamaica.

At common law,<sup>153</sup> there are five recognised conditions for the enforcement of a foreign judgment in Jamaica; the judgement must:

- (a) be given by a court of competent jurisdiction;
- (b) be final and conclusive;
- (c) be enforceable by or under Jamaican law;
- (d) relate to a money debt and not immoveable property; and
- (e) be for a definite sum of money and should not contain a penalty.

Subject to satisfying these conditions a Jamaican court will recognise a foreign judgment unless a person seeking to prevent enforcement of the judgment can prove:

- (a) that the foreign judgment was obtained by fraud;
- (b) recognition or enforcement of the foreign judgment would be contrary to public policy; or
- (c) that the foreign judgment was obtained in a manner that contravenes the principles of natural justice.

## 9. INSOLVENCY LAW REFORM

The JIA includes a specific provision whereby the Act must be reviewed, from time to time, by a committee of both Houses of Parliament appointed for the purpose of reviewing the JIA.<sup>154</sup> Furthermore, the first review must be conducted no later than five years after the Act came into force. We are not aware that such a review has either begun or taken place.

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<sup>151</sup> The Judgments (Foreign) (Reciprocal Enforcement) Act 1936.

<sup>152</sup> The United Kingdom, Nigeria, Commonwealth of Australia and Australian States, Queensland in the Commonwealth of Australia, New South Wales in the Commonwealth of Australia, The Bahamas, Bermuda, Saint Lucia, Trinidad and Tobago, Saint Vincent, Leeward Islands, Guyana, Grenada, Barbados, Dominica, and British Honduras (Belize).

<sup>153</sup> *Sylvester Dennis v Lana Dennis* [2016] JMCA Civ 56 at para 36.

<sup>154</sup> JIA, s 308.

The reform of the Insolvency laws is not currently on the political agenda. At the present time the Parliamentary agenda has been focused implementing legislation that although already passed in both Houses of Parliament, but does not yet have the infrastructure or regulations in place to bring those provisions into force (those provisions include the Data Protection Act and a new National Identification Registry based on biometrics).

## **10. USEFUL INFORMATION**

The following website for the Office of the Supervisor of Insolvency may provide useful information on the insolvency system in Jamaica: <https://www.miic.gov.jm/content/office-supervisor-insolvency>.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

**Self-Assessment Exercise 1**

**Question 1**

What impact does the JIA have on the standard enforcement mechanisms by creditors?

**Question 2**

How has Jamaican insolvency law evolved due to the passage of the JIA?

**Commentary and feedback on Self-Assessment Exercise 1**

**Question 1**

The standard enforcement mechanisms whether for unsecured creditors or secured creditors will commence with a pre-action demand letter from an attorney-at-law to the debtor. The demand letter will provide the debtor with details of the indebtedness and demand repayment by a specified date. The standard enforcement process then diverges depending on whether the creditor is unsecured or secured.

**Unsecured Enforcement**

An unsecured creditor will need to commence Court action to enforce its rights against the debtor. The Court in which the claim is commenced depends on the amount of the debt. If the debt is above JMD1,000,000 the claim must be commenced in the Supreme Court of Judicature and if the debt is below that sum the claim is commenced in the Parish Court. If the debt meets the requirements for a promissory note under the Bill of Exchange Act, the creditor may seek summary enforcement. If the debt does not meet the requirements of a promissory note the claim will need to be tried requiring the Court to hear evidence.

**Secured Enforcement**

A secured creditor that has a claim over a specific tangible asset of a debtor (such as a motor vehicle), may seize and possess the asset in order to exercise their power of sale in order to repay their indebtedness. In the case of a secured creditor that is seeking to enforce a secured claim over substantially all of the assets of the debtor the JIA requires that the creditor must first send a Notice of Enforcement of Security to the debtor and wait until the passage of 10 days before commencing enforcement action.

**The JIA**

If the debtor accesses the JIA’s proposal provisions, all enforcement actions whether by unsecured or secured creditors (that have not already taken possession of collateral) are stayed.

The stay of proceedings may be lifted by a creditor (unsecured or secured) if the creditor can show that it is likely to be materially prejudiced by the continued operation of the stay or that it is equitable on other grounds to lift the stay. In practice once a debtor has accessed the JIA's automatic stay the Courts have been reluctant to lift the stay based on either ground.

### **Question 2**

The JIA has significantly modernised Jamaica's insolvency laws by creating a complete statutory framework that recognises the reorganisation of insolvency persons to avoid value destructive liquidation and only if reorganisation is not possible then to carry-out an orderly liquidation process. In achieving these policy objectives, the JIA was modelled on the Canadian Bankruptcy and Insolvency Act (CBIA). Canadian jurisprudence and judicial interpretations of provisions in the CBIA will be very persuasive in interpreting the JIA.

Among the administrative and practical changes ushered in by the JIA are establishing the Office of the Supervisor of Insolvency to regulate and act as an insolvency regulator. The JIA has also created an insolvency division within the commercial division of the Supreme Court of Judicature.

From a broad perspective the JIA has by creation of the proposal provisions (which if accessed imposes an automatic stay on enforcement procedures) created a mechanism that should provide debtors facing financial distress with breathing room to reorganise their financial situation. Many of the provisions have not yet been utilised or tested so that although the law has certainly changed it is still an open question as to whether the policy goals of the legislation will be satisfied.

### **Self-Assessment Exercise 2**

#### **Question 1**

Quick Loans Ltd (Quick Loans) makes small and medium size loans. Quick Loans operates its business from small premises that it occupies under a short-term lease. Its largest asset is the loans receivable owing from its borrowers. Quick Loans has exhausted its internal sources of financing. It is now seeking a fresh source of debt capital to grow its business however Quick Loans is finding it difficult to obtain debt financing on an unsecured basis. Does Quick Loans have any assets over which a security interest could be granted?

### **Commentary and Feedback on Self-Assessment Exercise 2**

#### **Question 1**

Yes, Quick Loans can grant security over its loan receivables. Receivables are a form of personal property that maybe the subject of a security interest granted pursuant to the Security Interest in Personal Property Act. In order for Quick Loans to grant a security over its receivables Quick

Loans must enter into a security agreement with the lender (this causes the security interest to attach) as well as file a notice of security interest in the electronic registry of security interest in personal property (this perfects a security interest that has attached).

Quick Loans could also grant a security interest over the bank account through which it collects its receivables as that too is considered an asset to which a security interest may attach and be perfected under the Security Interest in Personal Property Act.

### **Self-Assessment Exercise 3**

#### **Question 1**

Explain the two (2) main modalities under the JIA regime and the effect of each on the debtor's control of their assets.

#### **Question 2**

Why is the trustee integral to the bankruptcy process under the JIA?

#### **Question 3**

How are pre-bankruptcy rights impacted by bankruptcy under the JIA?

### **Commentary and Feedback on Self-Assessment Exercise 3**

#### **Question 1**

The two main modalities are: (a) reorganisation under the proposal provisions; or (b) liquidation under the bankruptcy process.

The proposal provisions are intended to give a debtor the opportunity to make an acceptable offer (called a proposal) to their creditors that will allow for the rehabilitation of the debtor. In contrast the bankruptcy process is intended to ensure the fair allocation of costs when a debtor cannot be rehabilitated.

Both modalities require the appointment of a licensed insolvency practitioner (called a trustee). Under the proposal provisions the trustee's primary role is assisting the debtor in the preparation of a proposal. The debtor's assets do not vest in the trustee and the debtor remains in control. In the case of the bankruptcy process the assets of the bankrupt will vest in the trustee displacing the right of the bankrupt to deal with their assets.

Both modalities require the appointment of a licensed insolvency practitioner (called a trustee). In the proposal provisions the trustee's primary role is assisting the debtor in the preparation of

a proposal. The debtor's assets do not vest in the trustee and the debtor remains in control. In the case of the bankruptcy process the assets of the bankrupt will vest in the trustee displacing the right of the bankrupt to deal with their assets.

### **Question 2**

The bankruptcy process results in the assets of the bankrupt vesting in the trustee and the bankrupt losing the right to deal with those assets. The trustee will therefore have significant control over the conduct of the affairs of the bankrupt estate.

The JIA contemplates that the trustee will seek to maximise the value of the realisable assets of the estate and to ensure the maximum distribution for creditors. In order to carry out its role the JIA grants the trustee significant powers and responsibilities including:

- (a) the power to initiate criminal proceedings in the name of the bankrupt;
- (b) the power to divest the real property of the bankrupt.

The trustee is also in control of the timing of when certain actions will occur such as the meeting of creditors, evaluation of proofs of claim, and whether or when to exercise other powers available to the trustee under the JIA.

### **Question 3**

Entering the bankruptcy process has a significant impact on certain of a bankrupt's pre-bankruptcy's assets. The bankrupt's assets will vest in the trustee subject to the rights of any secured creditor. Additionally commencing bankruptcy will have an effect on certain pre-bankruptcy assets including:

- (a) Joint tenancy - bankruptcy severs joint tenancy
- (b) Real property leases - the trustee in bankruptcy may: (i) assume the lease on the same terms as the bankrupt; (ii) disclaim or assign the lease on the same terms as the bankrupt; (iii) assign the lease pursuant to a court order even though the lease was non-assignable;
- (c) Copyrighted works and Patented articles - the trustee is required to give the creator of patented articles or copyrighted works a first right to purchase the asset.

The JIA does not include any specific provisions that set out the impact of bankruptcy on executory contracts. It appears that this is a matter that will be left up to the Courts to determine.



### Self-Assessment Exercise 4

**Question 1**

What is the difference between a solvent winding-up and corporate liquidation?

**Question 2**

Joint Co Limited (Joint Co) is a joint venture company. It was incorporated and is owned 50%-50% by two group of families. Joint Co's assets exceed its liabilities and it is able to pay its debts as they fall due. Unfortunately, the two families have a fundamental disagreement about the management of the business. Joint Co is deadlocked. You have been asked to advise the main lender of Joint Co who although has been paid their contractual interest, is concerned that the situation could deteriorate quickly if the deadlock is not resolved.

### Commentary and Feedback on Self-Assessment Exercise 4

**Question 1**

A corporate liquidation is a general term that refers to a company in the bankruptcy / liquidation process. A corporate liquidation may either be on a solvent basis or an insolvent basis. When the entity is solvent it is referred to as a solvent winding-up. When the entity is insolvent it is referred to as an insolvent liquidation or formal bankruptcy.

In a solvent winding-up the company's assets exceed its liabilities and it is able to pay its debts as they fall due. A solvent winding-up should therefore result in all creditors being paid in full. Indeed the Board of Directors are required to make a Declaration of Solvency that: (a) the directors have made a full inquiry into the affairs of the company; and (b) the directors have formed the opinion that the company will be able to pay its debts within the next 12 months from the commencement of the winding up.

In the case of an insolvent liquidation, the company by definition cannot pay its creditors in full. Typically, companies in that situation will not be liquidated immediately. Instead, there are attempts at out-of-court work-outs and / or an attempt at a corporate rescue using the proposal provisions. If those all fail only then is an insolvent company likely to be liquidated.

**Question 2**

JointCo is not in default of its repayment obligations to the lender. JointCo is also solvent. In those circumstances a concerned lender should first review its loan documentation to determine if it grants the lender any powers if the management is deadlocked. If the situation continues to deteriorate and the lender wishes to exert leverage on the families to resolve their issues, the lender could from a tactical perspective threaten to petition the court to wind-up JointCo. A petition to wind-up a solvent company is typically made by either the members or the board of

directors. However, a creditor can petition the court on the grounds that it is just and equitable to do so as the company is deadlocked.

Such a petition by JointCo's main lender would bring into direct focus for both families the urgency of resolving their issues or else risk the company being dissolved. That typically is sufficient to arrive at resolution which in practice, if JointCo is to continue, will see one family purchasing the interest of the other family and taking full control of JointCo.

### **Self-Assessment Exercise 5**

#### **Question 1**

ABC Ltd, is a limited liability company incorporated in Jamaica. ABC Ltd has an unsecured term loan with XYZ Bank which matures in six (6) months. ABC Ltd does not have sufficient cash available to repay the loan. ABC Ltd wishes to get some breathing space to formulate a repayment plan acceptable to XYZ Bank. ABC Ltd has been advised that the JIA could be of assistance. Do you agree with this advice? If so, why and what additional information might you want to get from ABC Ltd?

#### **Question 2**

You are advising JAM Bank in regard to a secured loan it granted to Hotel Ltd, which is now in default. The loan is secured by a debenture over all of the assets of Hotel Ltd. JAM Bank has lost confidence in the management of Hotel Ltd as funds intended for capital improvements to one of its properties have instead been diverted as bonus payments to management. JAM Bank has been told that if it tries to enforce its security, Hotel Ltd can access the JIA and prevent enforcement for up to six (6) months during which the management and shareholders of Hotel Ltd can dissipate the assets. What would you advise JAM Bank to do?

### **Commentary and Feedback on Self-Assessment Exercise 5**

#### **Question 1**

The JIA could provide ABC Ltd with breathing space however as XYZ Bank's debt has not yet matured, nor does it appear that ABC Ltd is in default of any of its other obligations, one would first need to confirm that ABC Ltd is "a person facing imminent insolvency". A "person facing imminent insolvency" requires that ABC Ltd be: (a) resident; (b) carry on business; or (c) have property in Jamaica. ABC Ltd's liabilities must also exceed JMD 300,000.

If ABC Ltd is within that definition it may access the JIA's proposal provisions in order to make a proposal to XYZ Bank. Filing a Proposal will create an automatic stay on enforcement proceedings by XYZ Bank. ABC Ltd, will also appoint a licensed insolvency practitioner (a trustee) that will assist with preparing the Proposal.

**Question 2**

JAM Bank should consider the appointment of an interim receiver. JAM Bank as a secured creditor may appoint an interim receiver to protect and preserve the debtor's property prior to commencing its enforcement of its debenture. This is advisable as prior to enforcement of the debenture JAM Bank must provide a Notice of Enforcement of Security to the Hotel Ltd and await 10 days prior to enforcement (typically by way of appointment of a private receiver). If the interim receiver is not appointed prior to the Notice of Enforcement of Security Hotel Ltd can file a Notice of Intention to File a Proposal ("NOI") which would effectively stay all enforcement actions by JAM Bank. Furthermore, pursuant to the NOI, Hotel Ltd will be able to appoint a trustee of its own choosing and whose very limited powers effectively mean that the existing management of Hotel Ltd will continue to remain in control until such time as the stay ends.

**Self-Assessment Exercise 6****Question 1**

Describe the process a Jamaican Court will take in determining whether to recognise foreign insolvency proceedings.

**Question 2**

What determines whether a Jamaican Court will treat foreign insolvency proceedings as "foreign main proceedings" or "foreign non-main proceedings"? Why is this distinction important?

**Question 3**

Describe the various methods by which foreign insolvency proceedings can be recognised in Jamaica.

**Commentary and Feedback on Self-Assessment Exercise 6****Question 1**

Jamaica has adopted a modified version of the UNCITRAL Model Law on Cross-border Insolvency. The first step a Court will adopt in determining whether to recognise foreign insolvency proceedings is to determine whether the foreign proceeding is within the definition of a "foreign proceeding"; that is defined as:

"a judicial or an administrative proceeding including an interim proceeding in a jurisdiction outside Jamaica dealing with a creditor's collective interests generally under any law relating to

bankruptcy or insolvency, in which a debtor's property and affairs are subject to the control or supervision by a foreign court for the purpose of reorganization or liquidation"

If that test is satisfied the Court will move onto the second step which is to determine whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding". A foreign main proceeding is defined as "*the jurisdiction where the debtor has the centre of main interests*". A foreign non-main proceeding is defined as a "*foreign proceeding that is other than a foreign main proceeding*".

### **Question 2**

"Foreign main proceedings" are defined as the jurisdiction where the debtor has its centre of main interests (COMI). The JIA Regulations creates presumptions with respect to COMI, in the case of a legal person the debtor's registered office is presumed to be the entity's COMI. In the case of a natural person the COMI is presumed to be the ordinary place of residence. These presumptions may be rebutted by proof to the contrary.

A "Foreign non-main proceeding" is defined as any foreign proceeding that is not a foreign main proceeding. There is therefore no requirement that the debtor have an establishment or have any property in the particular jurisdiction.

The importance of the distinction is if the foreign representative is seeking recognition of foreign main proceedings then the Jamaican Court will grant an automatic stay on enforcement action against the debtor. The foreign representative does not have to request this relief. In contrast if the foreign representative is seeking recognition of foreign non-main proceedings a stay on enforcement action must be requested and it is discretionary whether the Court will grant the request.

### **Question 3**

A foreign insolvency representative may seek enforcement using any of the following mechanisms:

- (a) Pursuant to the JIA Regulations that implements the UNCITRAL Model Law on Cross-Border Insolvency;
- (b) If a judgment has been granted in the foreign jurisdiction then depending on the jurisdiction from where the judgment arises either by: (i) statute pursuant to reciprocal enforcement legislation; or (ii) under common law pursuant to the rules relating to enforcement of judgments.

As the JIA Regulations are still fairly new, enforcement has typically been based either on the reciprocal enforcement legislation or pursuant to common law. As the reciprocal enforcement legislation is limited to a handful of jurisdictions the common law conditions for enforcement of a foreign judgment is the most widely used and the mechanism most familiar to the Jamaican Courts.

The conditions for enforcement of a foreign judgment at common law requires that the judgment:

- (a) be given by a court of competent jurisdiction;
- (b) be final and conclusive;
- (c) be enforceable by or under Jamaican law;
- (d) relate to a money debt and not real property; and
- (e) be for a definite sum of money and should not contain a penalty.



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