**Tim Prudhoe, 2022/2023**

**Short Paper (due 9.7.2023)**

***“Offer a comparative analysis of the balance between liquidation and restructuring goals and proceedings in two jurisdictions that are not your home jurisdiction (those two jurisdictions being Jamaica and Guyana)***

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**Introduction**

This paper offers analysis to the extent currently possible in respect of two jurisdictions having gained independence from the United Kingdom[[1]](#footnote-1) in the 1960s. Also dealt with is where further analysis is needed, subject to the availability of additional information with which to perform that.

Both jurisdictions are Caribbean Community (CARICOM) member states and start from a clear English law “footprint”.

Discussed below is the extent to which Jamaica’s current insolvency and restructuring regime closely follows the Canadian model: itself, based partly on the English model (as discussed further below). Guyana, remains more discernibly English, is in clear need of modernisation.[[2]](#footnote-2) Related to that, public access to judicial resources such as reports of decided cases at first instance (aka “trial court level) needs to be addressed as soon as possible.[[3]](#footnote-3) Achievement of balance (or lack thereof) in terms of actual deployment of legislative resources lacks the necessary current datasets. With Guyana experiencing since 2019 unprecedented economic growth as a result of largescale finds of offshore oil, resources exist by which to fund for the necessary rapid improvement in available statistical data and policy positions around corporate reconstruction. The need for improved transparent in respect of Guyana is especially relevant where World Bank information available from 2019 indicates that average recovery rates (that is, for creditors) as low as 18 cents on the dollar.[[4]](#footnote-4)

Solvent liquidations are commonplace and outside of insolvency issues. They therefore fall outside the scope of this paper.

**Applicable legal provisions**

1. ***Jamaica***

Regarding Jamaica, the Insolvency Act of 2014 consolidates the legislative provisions for both personal and corporate insolvency. The latter having previously been contained within the Companies Act of 2004, as amended. *Solvent* liquidation remains dealt with under the Companies Act. Following the Canadian model, the insolvent company and its assets are received by the bankrupt estate of the company, and which is under the control of a trustee in bankruptcy.

Scope for restructuring exists by way of what is referred to in the legislation “a proposal” and which give the protection of a stay (that is, “suspension”) in respect of any creditor enforcement efforts (ss. 2 and 5)

These provisions of the Insolvency Act together will be referred to in this paper as “the Jamaica Legislation”.

1. ***Guyana***

In the context of Guyana, the Companies Act (Ch. 89:01 at Part V) of 1991, as amended, provides both for voluntary and court-ordered winding-up and (ss.348-467). Within this, (s.369) there is provision of appointment of a *provisional* liquidator at any time after the presentation of a winding-up petition.[[5]](#footnote-5) “Presentation” in the context of a winding-up petition is not defined but appears to equate to issuance out of the Court Registry for hearing.[[6]](#footnote-6) As regards scope for restructuring, the same legislation (at Part II, Division K, “Arrangements for Reconstruction”) provides for this (ss.217-220).

Together, these provisions will be referred to in this paper as “the Guyana Legislation”.

**Discussion**

Although found elsewhere within the Insolvency Act, by s. 3 of that legislation Jamaica does set out the relevant legislative intent. That is stated as follows:

*“Objects of Act:*

*3. This Act seeks to create an environment which aids in –*

*(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 with the overriding interest of strengthening and protecting Jamaica’s economic and financial system and the availability and flow of credit within the economy.”*

The Jamaica Legislation follows closely the 1985 Canadian Bankruptcy and Insolvency Act (“the BIA”). That legislation similarly provides the debtor with the opportunity for a “fresh start”, by giving the insolvency business the chance to restructure by which to become financially viable.[[7]](#footnote-7)

The BIA has been described as remedial legislation serving the dual purposes of equitable distribution of the bankrupt’s assets amongst creditor and the financial rehabilitation of the bankrupt..[[8]](#footnote-8) The BIA is said to be less flexible (thereby giving rise to reduced scope for the exercise of judicial discretion) than the 1985 Companies Creditors Arrangements Act (“the CCAA”), other Canadian legislation dealing with restructuring. The CCAA was enacted to allow companies to restructure debt instead, simply, of liquidating assets. The original version of the BIA - in its then unamended form – had no restructuring provisions. Since amendments during the period 1992-2007, the BIA now offers a proposal route for creditors to agree acceptance of less-than-full repayment, an extension of time and / or a scheme of arrangement in terms of the alternation of the debt and equity structure.[[9]](#footnote-9)

That proposal part of the BIA is reflected at s.11 of the Jamaica Legislation and includes pre-insolvency (*“(a) a person facing imminent insolvency”*), insolvency but not adjudicated bankruptcy (*“(b) an insolvent person”*) and a bankrupt (s.11(1)(f)). A “person” is defined to include a company (s.2). That the Jamaica Legislation provides scope for reorganisation is discussed in Development Bank of Jamaica v Proactive Financial Services [2017] JMCC COMM 31: at [5]

*“[i]t has…introduced a new type of thinking to bankruptcy law in Jamaica, namely, rehabilitation and rescue. The idea is that the insolvent person, where possible, should emerge being able to ‘restart’ life after the previous debt has been satisfactorily dealt with under the insolvency regime”.*

The process of having a proposal by the debtor accepted is governed by s.17 of the Insolvency Act and understandably requires a proposal in writing. If already adjudged bankrupt, a statement of affairs is also required.[[10]](#footnote-10) A proposal can be made to the creditors as a whole, or to specific classes of creditors. It can include secured creditors.[[11]](#footnote-11) A meeting of creditors then takes place within 21 days of the proposal. 10 days ahead of that meeting a copy of the proposal and a summary of assets and liabilities is circulated to the creditors, together with of list of creditors and amounts owed. The summary financial information is subject to appraisal by the trustee and for which the trustee[[12]](#footnote-12) has powers of access to the debtor’s premises, book and records.[[13]](#footnote-13) Proofs of claim must have been filed for that creditor to be able to vote on the proposal.

The proposal is accepted by a majority in the *number* of creditors in attendance at the meeting and at least two-third of the proven claims in attendance at the meeting. Acceptance that way is deemed an approval by court. That is subject to an objecting creditor or Supervisor[[14]](#footnote-14) within 15 days (which triggers involvement of the court). In the experience of the writer, in the context of other jurisdiction a proof of claim need only have been submitted (not actually *determined*) in to be admitted for the purposes of voting.

Absent both from the Guyana Legislation and the Companies Act as a whole is any general statement of the intention of the either the insolvency or reorganisation provisions respectively. That reflects, in large part, the current absence in Guyana of freestanding insolvency legislation. In English equivalency terms, the Guyana Legislation at s217 offers a blend of the (solvent) company voluntary arrangement (“CVA”) and (insolvent) scheme of arrangement.

The CVA came into existence under the England and Wales Insolvency Act 1986 and does not require insolvency. A majority of three-quarters in value of approving creditors to bind minority creditors under a CVA is mirrored in the Guyana Legislation at s.217. Where there is a need to bind secured creditors (which a CVA does not), in the England and Wales context a scheme of arrangement (section 895 of the Companies Act 2006) would be used. [[15]](#footnote-15) Section 217 is to the equivalent effect. It requires a three-quarters in value of creditors or class of creditors if a scheme proposed in respect of only that class (s.217(2) *“…the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditor…as the case may be”.* Unlike the Jamaica position, it is not clear form the legislation whether voting status requires an actual proved claim (as distinct from a submitted proof of claim for subsequent consideration) Section 217 is not equivalent to the amendment introduced to the Companies Act 2006 (ss901A-901J) by the Corporate Insolvency and Governance Act 2020, by which a restructuring plan was created, and which applies to a wider range of English companies than the scheme of arrangement.

Discussion in the context of “just and equitable” winding-up on appeal from the Guyana Court of Appeal to the Caribbean Court of Justice in Nabi and others v Sheermohamed and others [2020] CCJ 15 (AJ( GY; (2020) 100 WIR 423 at [39]-[42] the judgment (Wit and Burgess JCCJ) discusses the extent to which the Guyana Companies Act is based (at least in part) on the Canadian Business Corporations Act[[16]](#footnote-16), which in turn has roots traceable as far back at the English Joint Stock Companies Act 1848.[[17]](#footnote-17) The benefits of that include, of course, an established body of case law.

Significant in the insolvency practitioner’s “armory” in the Guyana context is the ability to restructure in the context of a *provisional* liquidation (as set out above). In other jurisdictions following the English model, this has led to *de facto* restructuring within what is usually referred to as “light-touch” provisional liquidation. This generally involves a protocol by which the subject company’s management remains in operational / day-to-day control, supervised by the provision liquidator.[[18]](#footnote-18) During that time management pursue implementation of a compromise with its creditors. That flexibility is currently absent from the Jamaica process.

**Conclusion**

Where liquidation cannot be avoided, applicable data from Jamaica is at least better than the equivalent for Guyana. Certainly, neither shines in terms of creditor recovery in the context of insolvent liquidation.

In Jamaica, bankruptcy proceedings (as they are known there), take a year to resolve, costing 18% of the estate value with an average recovery rate of 65%. Compare that to Guyana: taking 3 years on average, costing 28.5% of the debtor’s estate, with the most likely outcome being that the company will be sold piecemeal. In Guyana the average recovery rate is as low as 18 cents on the dollar. Both datasets are from 2019, so pre-COVID[[19]](#footnote-19).

In respect of Guyana, significant oil finds since that time have led to predictions of very significant economic growth.[[20]](#footnote-20) So for at least Guyana there is the opportunity to legislate during a period of what is expected to be sustain economic prosperity. Interest in the geographic region encompassing both jurisdictions provide scope for cautious optimism that legislative attention will be given to necessary amendment.[[21]](#footnote-21)

In the Jamaica context, ongoing attempts to progress a voluntary insolvent liquidation in respect of the well-published fraud involving Stocks & Securities Limited[[22]](#footnote-22) are opposed in proceedings pursued by the Financial Services Commission that are next due for hearing in early November 2023[[23]](#footnote-23). The question is therefore raised whether available processes in respect of insolvent liquidation are even yet sufficiently embraced as a methodology.[[24]](#footnote-24) Scope for much further progress in a still-developing area of the law in two jurisdictions with overlapping legal legacies.

**Bibliography**

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* New York Time, 13.6.2023 “Oil prices are falling as fuel demand weakens”
* Sarra, Janis “Economic Rehabilitation: Understanding the Growth in Consumer Proposals under Canadian Insolvency Legislation” (2009) 24 BFLR at 1
* World Bank archive, “Doing Business”: <https://archive.doingbusiness.org/en/data/exploretopics/resolving-insolvency>

(resolving insolvency in Guyana takes 3 years on average; costing 28.5% of the debtor’s estate, with the most likely outcome being that the company will be sold piecemeal. The average recovery rate is 18 cents on the dollar.

Also <https://www.state.gov/reports/2022-investment-climate-statements/guyana/>

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<https://www.state.gov/reports/2020-investment-climate-statements/jamaica__trashed/>

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1. Jamaica gained independence on 6.8.1962, remaining a member of the Commonwealth. Formerly British Guiana, Guyana became independent on 26.5.1966 and became a republic on 23 February 1970, also remaining a member of the Commonwealth. Guyana is located on South America’s North Atlantic coast, bordering Venezuela, Suriname and Brazil. The only English-speaking country on the continent [↑](#footnote-ref-1)
2. Recent (and large) oil discovery in Guyana is well publicised. Increased oil production in Guyana, Brazil, Iran and Russia (the later exporting to China and India during sanctions elsewhere) is now capable of lowing oil prices: <https://www.nytimes.com/live/2023/06/13/business/cpi-inflation-fed?smid=nytcore-android-share#oil-prices-are-falling-as-fuel-demand-weakens> [↑](#footnote-ref-2)
3. The West Indian Law Reports and, to a lesser extent, the Law Reports of the Commonwealth report Guyana cases on appeal – both in the Guyana Court of Appeal and, on further appeal from that court, in the Caribbean Court of Justice. But does so only on a selective / infrequent basis [↑](#footnote-ref-3)
4. World Bank archive, “Doing Business”: <https://archive.doingbusiness.org/en/data/exploretopics/resolving-insolvency> [↑](#footnote-ref-4)
5. <https://www.mola.gov.gy/chapter-08901-companies-act> [↑](#footnote-ref-5)
6. Section 357 deals with powers (of the court) on the *hearing* of the winding-up petition; so, for the concept of a provisional liquidator to have meaning, it may be prior to then hearing of the petition itself: the inference being that the petition is presented (as opposed, actually to being heard) when issued – that is, for subsequent hearing - by the Court Registry. [↑](#footnote-ref-6)
7. “Economic Rehabilitation: Understanding the Growth in Consumer Proposals under Canadian Insolvency Legislation” (2009) 24 BFLR at 1 [↑](#footnote-ref-7)
8. Orphan Well Association v Grant Thornton 2019 SCC 5 at [67], on appeal from the Court of Appeal of the Province of Alberta:

   <https://www.canlii.org/en/ca/scc/doc/2019/2019scc5/2019scc5.html> [↑](#footnote-ref-8)
9. Since those amendments, the BIA resembles the CCAA much more closely; if enacted today, there would likely be only a single statute, instead of two. [↑](#footnote-ref-9)
10. Section 126(e) of the Insolvency Act sets out the requirements of a statement of affairs: (i) particulars of assets and liabilities, (ii) names and addresses of the creditors, (iii) details of securities held by the respective creditors; (iv) the dates when such securities granted, (iv) any other information reasonably required by the trustee. [↑](#footnote-ref-10)
11. Section 18(1)(b) *“(A proposal under this Part may be made to….(b) secured creditors in respect of any class of secured claim)”* [↑](#footnote-ref-11)
12. In this context, a Governor General appointee referred to as “the Government Trustee” (s.227 of the Insolvency Act). [↑](#footnote-ref-12)
13. Section 28 of the Insolvency Act. [↑](#footnote-ref-13)
14. That is, the Supervisor of Insolvency: s.222 of the Insolvency Act: *“222. For the purposes of the Act, there shall be a Supervisor of Insolvency, who shall be a public officer designated by the Minister as such”.* [↑](#footnote-ref-14)
15. Section 895(1)(a) *“….where a compromise or arrangement is proposed between a company and – its creditors or any class of them”* and s.899(3) *“A compromise or arrangement sanctioned by the court is binding on – (a) all creditors or the class of creditors…(as the case may be)…”* [↑](#footnote-ref-15)
16. Whether best described as a fascinating “mélange” or the road to madness, discerning sources of law in the Caribbean is an ever-lasting research project of-and-in-itself: the Caribbean Court of Justice, in interpreting the Guyana Companies Act in Nabi and others were looking at Galantis v. Alexiou [2019] UKPC 15, [2019] 3 LRC 545, [2019] 1 WLR 3636 – where s.280 of the Bahamas Companies Act 1992 which was based entirely on the Canada Business Companies Act. [↑](#footnote-ref-16)
17. Later consolidated in the English Companies Acts of 1862 and 1908. [↑](#footnote-ref-17)
18. This has been seen in at least The Bahamas (Companies Act, Ch.308; s.199(2)); British Virgin Islands: for example, in Re: Constellation Overseas Ltd BVIHC(COM) 2018/0206 of 5.2.2019; Cayman Islands (Companies Act, 2022 revision, section 104(4); Bermuda (Companies Act 1981, section 170 [↑](#footnote-ref-18)
19. As of 2019, from the World Bank: <https://archive.doingbusiness.org/en/data/exploretopics/resolving-insolvency> [↑](#footnote-ref-19)
20. Guyana’s economy grew by 19.9% in 2021 and was projected to grow by as much as 47.9% in 2022 (making it one of the fastest growing economies in the world): <https://www.state.gov/reports/2022-investment-climate-statements/guyana/> [↑](#footnote-ref-20)
21. See, for example, the research project ending July 2023 run by the British Institute of International and Comparative Law (funded under the 11th European Development Fund (European Commission), relating to Strengthening for CARICOM Integration and Cooperation Process. <https://www.biicl.org/projects/caricom-project-to-harmonize-company-and-insolvency-laws?cookiesset=1&ts=1688756327> [↑](#footnote-ref-21)
22. <https://jamaica-gleaner.com/article/news/20230208/prosecutors-cops-reviewing-ssl-fraud-evidence> [↑](#footnote-ref-22)
23. Financial Services Commission v Stocks and Shares Limited and others, Supreme Court of Jamaica, Commission Division, Claim SU 2023 / CD00034. [↑](#footnote-ref-23)
24. <https://www.fscjamaica.org/public-statement-by-the-financial-services-commission-onstocks-securities-limited/> [↑](#footnote-ref-24)