

# Barbados

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In December 2001 the government of Barbados passed the Bankruptcy and Insolvency Act to provide for corporate and individual bankruptcy and insolvency, and for the rehabilitation of insolvent debtors. The act came into effect on March 1 2002.

To date, no regulations or guidelines have been issued for the operation of the act. This lacuna creates a challenge for practitioners. For example, the act provides that a receiver appointed under the act must be a licensed trustee, but the requirements for the issuance of trustee licences under the act are not clear.

The act is modelled on the Canada Bankruptcy and Insolvency Act, and as such the interpretation of the Canadian legislation by the Canadian judiciary is useful to the Barbados courts when interpreting the act.

Under the act, a 'person' includes corporations and partnerships. An 'insolvent person' is defined as a person who is not a 'bankrupt' (also defined) and who:

- resides, carries on business or has property in Barbados;
- has liabilities to creditors that are provable as claims under the act of more than Bd\$4,000; and
- is unable to meet his or her obligations as they become due or has property which is insufficient in aggregate to enable payment of all obligations.

A 'bankrupt' is a person who has made an assignment of his or her property to a trustee for the benefit of his or her creditors, or a person against whom a receiving order has been made under the act.

The International Financial Services Act 2002 applies to eligible companies providing international financial services and qualified foreign banks and contains provisions relating to the insolvency of licensees under the act. The International Financial Services Act specifically states that the provisions of the Bankruptcy and Insolvency Act do not apply to licensees under the International Financial Services Act.

The Financial Institutions Act applies to 'financial institutions' (defined as including commercial banks, trust companies, finance companies, merchant banks and brokerage houses licensed under the act). The Financial Institutions Act contains provisions for the seizure of the management and control of such financial institutions when the realisable value of a financial institution's assets is less than the aggregate of its liabilities and capital accounts, or when a financial institution's financial condition suggests that it will shortly be in that circumstance. The Bankruptcy and Insolvency Act does not apply to financial institutions to which the Financial Institutions Act applies, or to insurance companies.

## **I. The legal framework and the effectiveness of court processes/legal remedies**

### ***1.1 Describe the nature and effectiveness of the following processes:***

#### ***(a) Debt recovery remedies where the creditor has no security***

Where the debtor is solvent, an unsecured creditor may enforce its security by obtaining a judgment in the magistrates court or High Court. Such a judgment must be registered to be enforceable and must be re-registered every five years to remain enforceable. A number of provisions facilitate the enforcement of a judgment for a debt or realisation of the debt, including:

- placing of a charging order over real property, which enables the creditor to sell the property to recover the debt;
- garnishing of wages in the case of an individual; and
- seizure and sale of other personal property.

Where the debtor is insolvent or bankrupt, the Bankruptcy and Insolvency Act applies and sets out the procedure for the unsecured creditor to recover its debt. The rights of the unsecured creditor are subject to the rights of the secured creditor and the act provides for the priority of payment from the proceeds realised from the property of a bankrupt debtor.

#### ***(b) The enforcement of security***

Where the debtor is solvent, the secured creditor may enforce the security in accordance with the terms of the security instrument. Where real property is used as security, the provisions of the Property Act will apply. The Property Act provides for the appointment of a receiver which will have the power to collect income on the mortgaged property or to sell the mortgaged property to realise the debt. The Property Act provides that on a sale of property to enforce security, the proceeds of sale are to be applied first to pay off any prior encumbrances (eg, arrears of land taxes and water rates), then to cover the enforcement expenses and finally to pay the principal and interest due under the security instrument. Any remaining proceeds are payable to the debtor or any subsequent secured creditor.

Secured creditors have duties to the debtor to act in good faith and to ensure that they advertise the property properly and obtain the best possible

price. However, they are not obliged to forgo a sale at under value if that is all they can get. The duty of good faith cannot be excluded by the contract with the debtor.

Where the debtor is an insolvent or bankrupt person, the Bankruptcy and Insolvency Act applies as discussed below. A secured creditor is called upon to prove its claim.

Where a corporation becomes bankrupt, no unsecured officer or director of the corporation is entitled to have his or her claim treated as priority in respect of wages, salary, commission or compensation for work done or services rendered to that corporation in any capacity.

Any provision of the Bankruptcy and Insolvency Act that imposes a duty or obligation on the company has effect as if it also imposed that duty or obligation on each person who was a director of the company at the date of presentation of the petition in bankruptcy.

#### ***(c) Corporate bankruptcy/liquidation processes***

The Bankruptcy and Insolvency Act offers a debtor three options: receivership, bankruptcy or reorganisation. The debt recovery method varies depending on which option is chosen.

An unsecured creditor may petition for a receiving order and the bankruptcy of a personal or corporate debtor. A trustee appointed under a receiving order is vested with the assets of the debtor and is responsible for realising on them and distributing the proceeds in the order provided by the act. After the claims of secured creditors, there are a limited number of preferred creditors (mainly employees and some government claims) which are paid in full, with the balance then distributed *pro rata* to the remaining creditors. The trustee is paid from the estate.

In bankruptcy, secured creditors are permitted to enforce their security, provided that the court does not postpone it.

Secured creditors which hold security over all or substantially all of a debtor's inventory, accounts receivable and other property acquired and used for the debtor's business are obliged to give 10 days' notice of their intention to enforce their security (a Section 10B notice), after which they can enforce their security in accordance with the terms of the security document, including appointing a receiver or receiver manager who can realise on the charged assets in accordance with the terms of the security.

Banks view the notice requirement as a cause for concern due to the risk of flight of assets in the

interim. However, a creditor can ask the court to appoint an interim receiver to protect its interests during the 10-day notice period.

The Companies Act provides for the appointment of a receiver or a receiver manager and for registrar or court-supervised liquidation. These processes are available only where the company is not insolvent within the meaning of the act.

#### **(d) Formal corporate rescue processes**

At any time before or after bankruptcy, a debtor may lodge a reorganisation proposal or a notice of intention to file a proposal with a licensed trustee, who has 30 days to review and file the proposal with the supervisor of insolvency. If it does not file the proposal in time, the debtor is deemed bankrupt. The trustee can obtain extensions of up to 45 days (to a total of five months) of the time in which to file the proposal.

**Unsecured creditors:** If the debtor chooses to make a reorganisation proposal, unsecured creditors are required to prove their claim and to vote for the debtor's proposal at a meeting held within 21 days of the filing of the proposal.

If a reorganisation proposal is rejected by either the creditors or the court, the debtor automatically goes into bankruptcy.

Creditors have the right to appoint inspectors to ensure that the appointed trustee executes the proposal plan properly. The trustee of the reorganisation proposal is required to be licensed and has reporting requirements in favour of the creditors. The creditors have the power to replace the trustee and have a certain degree of control over its activities.

**Secured creditors:** In the case of a reorganisation proposal, there is a stay of all proceedings once the debtor has filed a notice of intention to file a proposal. While the stay is in place, the secured creditor may not enforce its security unless it has taken possession of the secured assets first or filed a Section 10B notice more than 10 days before the notice of intention to file a proposal or the proposal itself is filed. The creditor can apply to the court for relief if the stay is causing real hardship.

The trustee can redeem the security by paying the creditor its assessed value or the amount of the debt due, or the trustee can require that the property comprising the security be sold. If the property is redeemed or sold, the creditor's claim is amended to take account of the amount that it was redeemed or sold for.

The secured creditors are divided into groups for voting purposes and there must be a commonality of interest between the secured creditors in a group. Once the proposal is made, a secured creditor to which it has not been made cannot vote, but it can enforce its security and the Section 10B no longer applies to it. If the proposal has been made to the class of creditors to which the secured creditor belongs, the secured creditor will be required to vote for or against the proposal at the creditors' meeting.

The proposal requires approval by a majority in number and two-thirds in value of the creditors. The proposal will not be accepted unless the unsecured creditors have voted for it; however, if the unsecured creditors in a particular class vote for the proposal and the secured creditors do not, it will not bind that class of the secured creditors. A secured creditor may vote as an unsecured creditor for the part of its claim that is not secured. The court must also approve the proposal.

If the proposal includes an assessed value of a security in respect of a claim, that creditor can vote only as a secured creditor in respect of an amount equal to the amount of the claim or the proposed assessed value of the security, whichever is less. The creditor will have to vote as an unsecured creditor in respect of the balance. The creditor can appeal the proposed assessed value.

If the secured creditors to which the proposal was made do not approve it, they can enforce their security and the Section 10B notice need not be filed at this stage. The creditor must have afforded the trustee the opportunity to inspect and redeem the security if it wants to and must have complied with its duties under the act.

If the secured creditors approve the proposal, the debtor is released from the obligation to pay off these creditors except under the terms of the proposal.

Even in the case of a secured creditor, the following are paid first:

- fees and expenses of the trustee;
- the supervisor of insolvency's 5 per cent levy; and
- wages.

#### **(e) Informal corporate rescue processes**

See section 3 below.

### **1.2 What are the formal processes to effect a liquidation of the company's assets?**

In cases where the company is not bankrupt, there

are provisions in the Companies Act for voluntary and involuntary liquidation of a company.

In the case of an insolvent company, a liquidation of assets may be ordered through the enforcement of a judgment and the seizure and sale of the company's assets to satisfy the judgment, or through the processes under the Bankruptcy and Insolvency Act.

### **1.3 What is the effect on debt collection and the enforcement of security of:**

#### **(a) An adjudication of corporate bankruptcy/liquidation?**

There is a stay of proceedings on bankruptcy with respect to unsecured creditors, which cannot take any action against the bankrupt until it is discharged. Secured creditors may enforce their security once they have issued a Section 10B notice.

#### **(b) The commencement of a formal corporate rescue process?**

There is a stay of proceedings until either a proposal is accepted or rejected by creditors or the proposal process is terminated by a court. Any agreement for which the creditors vote acts like a new contract with the debtor and has the effect of releasing the debtor from its previous obligations. Rejection of a proposal results in automatic bankruptcy.

#### **(c) The initiation of an informal corporate rescue process?**

This depends on what the parties agree. It will not have the force of law – at best, it might operate as a contract between the creditors or between the creditors and the debtor, in respect of which specific performance may or may not be granted by the court. A party might be able to obtain an injunction to stop a creditor which had agreed to abide by what the general body of creditors decided from acting in a manner contrary to that agreement.

### **1.4 Are insolvency procedures involving a corporation incorporated in your jurisdiction recognised if they are started in another jurisdiction? In particular, what would be the impact of US bankruptcy proceedings being commenced?**

The court has the power to make such orders as it considers appropriate to facilitate, approve or

implement the coordination of proceedings under the Bankruptcy and Insolvency Act with any foreign proceeding. Upon the application of a foreign representative or any other interested person, the court can also apply such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of the Bankruptcy and Insolvency Act.

### **1.5 In what circumstances would the directors or officers of a company in financial difficulties face potential personal liability for continuing to trade? In practice, are any such provisions actually enforced?**

The directors of a company may jointly and severally face potential personal liability in circumstances where a company that is bankrupt has paid a dividend, other than a stock dividend, or redeemed or purchased for cancellation any shares of the capital stock of the corporation within a period beginning one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy. The court may, upon the application of the trustee, enquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent.

This provision has not been enforced since the Bankruptcy and Insolvency Act came into effect.

### **2. What are the advantages and disadvantages of triggering a formal procedure?**

To date, the Bankruptcy and Insolvency Act is largely untested by the court. Therefore, anyone triggering a formal procedure under the act will not have the benefit of precedent to assess the advantages or disadvantages of any such procedure.

The fact that no regulations have yet been prescribed under the act must also be considered.

In Canada, triggering a formal procedure starts a process that includes the interim protection of the assets of the debtor and ensures the orderly realisation and distribution of the proceeds. If unsuccessful, the cost of the petition lies with the petitioner. In addition, if successful the petitioner gets no priority and will share in the estate with the other creditors.

### **3. What are the practical options for out-of-court restructuring?**

There may be significant business or social drivers

that result in key stakeholders coming to a consensus out of court. This requires consensus on the part of key secured and unsecured creditors, the debtor and, in certain instances, government agencies. Out-of-court restructuring typically involves the conversion of debt to equity or quasi-equity, the restructuring of credit facilities and some level of debt forgiveness – all to allow the company to go forward on a viable basis, protecting creditor access to markets or allowing the continuation of a vital service to the economy.

In practical terms, a great deal of effort is required to build consensus, lobby support and obtain funding or debt forgiveness from the key stakeholders. A successful out-of-court settlement is more likely when the number of key players is small and the risks to the economy and the creditors' business are great. Due to the relatively small size of the commercial sector and the parties' familiarity with each other, in certain cases out-of-court restructuring may be a practical option. With a larger bankruptcy, where there may be a number of creditors, a more formal procedure may be more efficient.

#### **4. What is the effect on the management of a company of:**

##### **4.1 An adjudication of corporate bankruptcy/liquidation?**

The trustee in bankruptcy takes control of all the debtor's assets. The trustee manages the company and its officers must submit to examination by the trustee.

##### **4.2 The commencement of a formal corporate rescue process?**

Under reorganisation, the debtor usually retains the right to deal with its property, subject to the provisions of its proposal. If it fails to comply with the terms of the proposal, the court may annul the proposal, in which case the debtor will automatically become bankrupt. The management of the company will be responsible for ensuring that the proposal is carried out under the supervision of the trustee and the creditor-appointed inspectors, and ultimately the supervisor of insolvency.

##### **4.3 The initiation of an informal corporate rescue process?**

This will depend on what management agrees with the creditors.

#### **5. Parties in interest/key players**

##### **5.1 Who is responsible for the 'case management control and administration of:**

###### **(a) A corporate bankruptcy/liquidation?**

The case management control and administration of a corporate bankruptcy or reorganisation proposal are overseen in the first instance by the trustee, which is subject to review by creditor-appointed inspectors and to ultimate control by the supervisor of insolvency.

###### **(b) A formal rescue?**

The debtor, subject to the trustee and any appointed inspectors.

###### **(c) An informal rescue?**

These functions will be carried out by whomever the parties agree.

##### **5.2 Who is responsible for preparing the restructuring plan in a formal or informal rescue?**

A reorganisation proposal is prepared by the debtor with the assistance of the trustee, by a receiver or liquidator, or by the reorganisation trustee itself.

In the case of an informal reorganisation, either the debtor will present a plan to its creditors or vice versa or all the parties will work out a solution together.

##### **6. What financial information is available to creditors in a corporate bankruptcy/liquidation, a formal rescue and an informal rescue?**

Under the Bankruptcy and Insolvency Act, where a notice of intention to file a reorganisation proposal or the proposal itself is filed, the debtor must file a cash-flow statement and the licensed trustee gives a report on its reasonableness to the creditors and the supervisor of insolvency. Generally speaking, the creditors will have access to the cash-flow statement.

The trustee in bankruptcy prepares reports for the creditors to enable them to consider the bankrupt's affairs. A complete list of creditors is always available.

## 7. Common questions

### 7.1 Funding and the priority given to new money

**(a) If an insolvent corporation requires urgent working capital funding, what difficulties are likely to be encountered in the provision of such funding?**

The Bankruptcy and Insolvency Act contains no provisions with respect to obtaining working capital funding.

**(b) Are lenders providing new money, or debtor-in-possession financing, given any statutory priority?**

No.

### 7.2 Ranking of creditors

**In what order are creditors paid in a corporate bankruptcy/liquidation?**

The table on the following page compares the division of assets.

### 7.3 Avoidance of antecedent transactions

**Are there any legal provisions that might operate to invalidate the creation of security, the disposal of an asset or the payment of a creditor by a company in financial difficulties?**

The Property Act provides that security created with the intent to defraud creditors is voidable at the instigation of the person prejudiced.

The following provisions under the Bankruptcy and Insolvency Act refer to a bankrupt and apply where a proposal has been made.

A settlement of property made in the year before the date of the initial bankruptcy event and ending on the date that the debtor became bankrupt is void against the trustee.

Any settlement of property made within the period beginning five years before the date of the initial bankruptcy event and ending on the date that the debtor became bankrupt is void against the trustee if the trustee can prove that the debtor was, at the time of making the settlement, unable to pay all of its debts without the aid of the property included in the settlement or that the interest of the debtor in the property did not pass on the execution.

Where a person engaged in any trade or

business makes an assignment of existing or future book debts and subsequently becomes bankrupt, the assignment of book debts is void against the trustee with respect to any book debts that have not been paid at the date of bankruptcy.

Transactions by any insolvent person with a view to giving a creditor a preference over the other creditors is deemed fraudulent and void as against the trustee in the bankruptcy where such transaction occurs in the three months before the date of the initial bankruptcy event. Preference is presumed in certain cases.

Preferential transactions occurring between the date of the initial bankruptcy event and the date of the bankruptcy are generally invalid.

### 7.4 'Cram-downs'

**What is the position of both unsecured and secured creditors that vote against, do not agree with, or do not consent to either a formal or an informal rescue plan?**

Where a reorganisation proposal has been approved by the requisite majority of the unsecured creditors, it will bind all the unsecured creditors, including those that voted against, did not agree with or did not consent to it.

If a reorganisation proposal that has been made to the class of secured creditors to which the creditor in question belongs obtains the requisite votes, it will bind all the secured creditors of that class, regardless of whether they agreed to it.

If the unsecured creditors vote for a proposal but the secured creditors do not, it will not bind the secured creditors.

A creditor has no rights or obligations under an informal plan if it voted against, did not agree with and did not consent to it.

### 7.5 Creditor protection

**What actions can creditors take if they are not satisfied with the conduct of either a formal rescue procedure or a corporate bankruptcy/liquidation?**

Under the Bankruptcy and Insolvency Act, creditors have the power to appoint inspectors to monitor the management of the debtor's estate. They can also remove and replace the trustee if they are not satisfied with his or her conduct.

Bankruptcy	Receivership (Companies Act) (floating charges only)	Reorganisation proposal
Suppliers/ farmers/ fishermen (claim restricted very severely)	Taxes and national insurance	Fees and expenses of the trustee
Secured creditors	Wages for the last four months	Supervisor of insolvency's 5 per cent levy
Funeral and testamentary expenses	Severance	Wages
Fees of person dealing with the estate under the court's direction where there has been a problem with the trustee	Costs and expenses of the liquidation	Secured creditors, to the extent their security can satisfy their claim
Trustee's fees	Landlord's right of distress	Unsecured creditors according to the proposal (and secured creditors to the extent that their security did not satisfy their claim)
Legal costs	Secured creditor	
Supervisor of insolvency's 5 per cent levy	Unsecured creditors	
Wages (up to Bd\$4,000 for the preceding six months, excluding severance, with the balance treated as an unsecured debt)	Shareholders	
Taxes		
Landlord's right of distress (costs of distress and three months' rent prior to bankruptcy. Total cannot exceed what the trustee recovers from the property on the premises and the balance is treated like an unsecured debt)		
Claims of persons under 30 years of age up to Bd\$750 (balance treated as though unsecured)		
Unsecured creditors		
Interest from the date of the bankruptcy at 5 per cent, according to the above priority		