

# Trinidad and Tobago

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The principal statute governing the bankruptcy of individuals is the Bankruptcy Act (Chapter 9:70), which was enacted in 1916 and is modelled closely on the English Bankruptcy Act 1914. Many of the bankruptcy provisions apply to companies; however, the liquidation of companies is governed by Part VI of the Companies Act, Chapter 88:01, which is modelled on the equivalent winding-up provisions in the English Companies Act 1929.

The Bankruptcy and Insolvency Act (26/2007), which is modelled on the Canadian Bankruptcy and Insolvency Act, will provide a statutory mechanism for reconstruction or formal rescue. The act was passed in the House of Representatives on September 10 2007 and in the Senate on September 18 2007, and will come into effect on a date announced by proclamation of the president. Therefore, as at the date of writing, the law is based on the Bankruptcy Act (Chapter 9:70):

## **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 creditor has no security, the first recourse is self-help, such as set-off of debts, if available. Generally, an unsecured creditor must commence legal proceedings and obtain judgment. If this is not successful, creditors typically move to judgment. By obtaining a registered judgment, an unsecured creditor can benefit from:

- a charge on the judgment debtor's real estate and restrictions on future dealings;
- a writ of *fieri facias* directing the marshal of the High Court to levy execution on the judgment debtor's personal goods and chattels;
- a garnishee order requiring any debtor of the debtor to pay that debt to the judgment creditor;
- an order for the sale of the judgment debtor's real estate; and
- a charging order on the judgment debtor's real estate.

A creditor may at any time, either before or after judgment, present a petition in bankruptcy against an individual or for the winding-up of a company on the grounds of the debtor's inability to pay its debts.

Ancillary to formal debt recovery a creditor may, by '*fugae warrant*' or under the penal provisions of the Bankruptcy Act, prevent a debtor from fleeing the jurisdiction and, by way of a specialised injunction known as a *Mareva* injunction, prevent the debtor from dissipating its assets.

**(b) The enforcement of security**

Mortgages over real estate are enforced typically by the creditor taking possession and sale, although foreclosure or the appointment of a receiver of rents is also possible. Mortgages over personal property are typically enforced by sale and other security documents.

Debentures provide for the secured creditor to appoint a receiver/manager to take possession of and realise the property charged to the secured creditor.

Landlords, although not strictly secured creditors, have a right of distress on goods found on the demised properties.

Trade creditors may be able to recover the property through the use of retention of title clauses, provided that the property remains identifiable.

It is envisaged under the Bankruptcy and Insolvency Act that a secured creditor seeking to enforce its security will have to give 10 days' notice of its intention to do so and there will be a stay of enforcement for a period of 10 days.

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

Corporate creditors have the same position as other creditors. Like every creditor, they are entitled to present a petition to wind up a corporate debtor on the grounds that it is unable to pay its debts. A company is deemed to be unable to pay its debts if:

- it has failed to pay, secure or compound a debt due to a creditor in excess of TT\$5,000 within three weeks of being served with a notice by that creditor requiring payment;
- the execution or other process issued through a judgment decree or order in favour of the creditor has been unsatisfied in whole or part; or
- it is proved to the satisfaction of the court that the company is unable to pay its debts. The company itself may present a petition to be wound up on the grounds that it is unable to pay its debts.

Though not strictly a bankruptcy/liquidation process, debenture holders typically enforce their security through the appointment of receivers/managers.

**(d) Formal corporate rescue processes**

The Companies Act provides for the appointment

of a receiver/manager who takes over from the board of directors and can manage the business to a state of solvency. Apart from this, the existing regime does not provide for any formal rescue process.

Under the Bankruptcy and Insolvency Act, it is envisaged that a proposal for a composition for an extension of time or for a scheme of arrangement may be made by an insolvent person, receiver, liquidator, bankrupt or a trustee of the estate of a bankrupt to the creditors generally either as a group or separated into classes.

**(e) Informal corporate rescue processes**

Under the existing regime, there is no statutory framework for an informal rescue of an insolvent company.

In informal rescue processes, management will typically approach the company's bankers for increased facilities, but this is usually granted only upon the provision of a debenture charging the full assets to the bank with cross-guarantees from the directors.

An alternative is sometimes to seek an equity injection from a private investor. If the equity is sufficiently large, the investor usually takes over or gains some say in the management of the company.

A solvent company may, for the purposes of a reorganisation, go through a process of voluntary winding-up and have the whole or part of its business transferred to another company in exchange for shares, policies or like interests for distribution to members.

A company may also take advantage of the amalgamation process under which two or more locally incorporated companies may amalgamate and continue as one company.

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

These processes include:

- voluntary or court-ordered winding-up proceedings under the Companies Act;
- the appointment of a private receiver under a security agreement where the assets are charged in favour of a secured creditor; and
- the use of a court-appointed receiver.

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

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

When a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court.

In a winding-up by the court, any disposition of the company's property, including things in action, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after commencement of the winding-up, is void. Mortgagees have the option of enforcing their respective securities and proving for any shortfall.

Floating charges given over a company's undertakings or property created within 12 months of the commencement of the winding-up are invalid, unless it is proven that the company was solvent immediately before the commencement of the winding-up (not considering the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the floating charge in question, together with interest on that amount).

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

Under the Bankruptcy and Insolvency Act, the filing of a notice of intention brings with it an automatic stay in favour of the debtor for an initial period of 30 days.

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

See section 1.1(e) above. Debt collection and enforcement of security measures are unaffected by any informal corporate rescue process.

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

Under the existing regime, the Trinidad and Tobago courts do not recognise any foreign insolvency procedures involving companies incorporated in Trinidad and Tobago. It is up to the discretion of the

court as to how much judicial assistance it will give to foreign corporate rescue procedures properly exercised over foreign corporations carrying on business in Trinidad and Tobago.

The Bankruptcy and Insolvency Act includes provisions governing international insolvencies which permit a foreign representative in a foreign proceeding relating to bankruptcy or insolvency to apply to have a foreign order recognised and to seek other relief as deemed appropriate. The Trinidad and Tobago courts can apply legal and equitable principles governing the recognition of foreign insolvency orders, but are not required to give effect to an order that would be contrary to Trinidad and Tobago legislation.

### **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?**

In circumstances where it is determined that the business of the company has been carried on in any of the following ways, the court may declare that any of the company's officers, whether past or present, or any other persons who were knowingly parties to the carrying on of the business in that manner, are personally responsible for all of the company's debts or such of the debts as the court directs:

- with intent to defraud its creditors or the creditors of any other person;
- for a fraudulent purpose;
- with reckless disregard of the company's obligation to pay its debts or liabilities; or
- with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities.

Such persons face criminal prosecution, and on conviction can face a fine of up to TT\$10,000 or imprisonment of up to six months. Such officers or persons may be banned from participating in the management of any company for up to five years, and monies due from or securities given by the company to them may be charged to pay the debts due by them.

If in the course of winding-up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present officer or liquidator of the company, has misapplied, retained or become liable or accountable for any money or property of the

company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may compel him to repay or restore the money or property, or any part thereof, with interest or to contribute such sum to the assets of the company by way of compensation. Delinquent officers and members of a company may also face prosecution.

These liability provisions are relatively new and substantially increase the exposure of directors. They have not yet been comprehensively tested before the courts.

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

Formal procedures carry the advantage of an immediate stay of proceedings which protects management from actions by creditors or other stakeholders. Formal procedures are typically triggered only when there is absolutely no hope of recovery via normal debt collection methods. Winding-up by the courts upon a creditor's petition is relatively rare in Trinidad and Tobago. A reason for this has been the reluctance of professional accountants to act as liquidators in compulsory winding-ups, since there is often difficulty in getting their fees paid. It remains to be seen whether the new provisions which increase the liability of directors and other company officers will change this position.

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

Out-of-court restructurings often take the form of a negotiated agreement between the debtor and its secured creditors. In order to succeed, the consent of all creditors and suppliers is needed.

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

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

Upon the issue of a winding-up order, the directors are dismissed and their powers to act on the company's behalf cease.

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

At present, there is no formal corporate rescue process in Trinidad and Tobago. However, under

the Bankruptcy and Insolvency Act, subject to any court order, the debtor will retain the ability to conduct its business.

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

Upon the initiation of an informal corporate rescue process, the directors remain in charge and manage any such process.

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

### **5.1 Who is responsible for the 'case management control and administration of a corporate bankruptcy/liquidation, a formal rescue and an informal rescue?**

#### **(a) Corporate bankruptcy/liquidation**

In a winding-up, the liquidator has full control of the company's affairs, but in a court-administered winding-up the liquidator is subject to control by the committee of inspection and the court.

#### **(b) Formal rescue**

A formal rescue is possible where a receiver/manager is appointed; in such case it is the receiver/manager who controls the business and operations and is responsible for the development of any formal rescue plan.

#### **(c) Informal rescue**

A company's board of directors usually manage the informal rescue in conjunction with any banker or equity investor that is providing funding for the rescue.

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

At present, there is no statutory framework for formal rescues in Trinidad and Tobago. In an informal rescue, the company's board of directors is responsible for preparing a restructuring plan in conjunction with any banker or equity investor that is providing funding for the rescue.

Under the Bankruptcy and Insolvency Act, it is envisaged under the proposal provisions that the company would be responsible for the development of the restructuring plan.

### **5.3 Who are the key players? What are their roles and responsibilities?**

In a winding-up, the liquidator and the committee of inspection are the key players, while in an informal winding-up it is the company's board of directors.

The liquidator has the primary responsibility of managing the winding-up of the company, disposing of the assets, collecting debts, identifying and paying off the creditors and making calls on the contributories. The committee of inspection has a supervisory role and its approval is a prerequisite to the liquidator taking certain prescribed actions.

### **6. What financial information is available to creditors?**

In a liquidation, the financial information available to creditors comprises the initial statement of affairs, any financial information which may be provided in any public examination of the company's affairs and the statutory returns made from time to time by the liquidator.

In all other cases, the only financial information available to a creditor is the capitalisation of the company and, in the case of listed companies, financial statements required by the stock exchange. Where a receiver is appointed, additional financial information is available from the statement of affairs and abstracts which are required to be delivered by the company.

## **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?**

If the advance is given as debt, any floating charge given to secure the new money will be deemed void if there is a winding-up within 12 months of the granting of the floating charge, unless it is proved that the company was solvent immediately after the creation of the charge (not considering the amount of any cash paid to the company at the time of, subsequent to the creation of or in consideration for the floating charge in question, together with interest on that amount).

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

Lenders providing new money are not given statutory priority. Priority can be obtained only through the granting of mortgages, which have priority over secured assets, and through the creation of floating charges, which are subject to the limitation set out in section 7.1(a) above.

### **7.2 Ranking of creditors**

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

Payments are made in the following order:

- fees and expenses properly incurred in preserving, realising or obtaining the company's assets;
- taxed costs of the petition;
- remuneration of the special manager (if any);
- costs and expenses of any person who makes or concurs in making the company's statement of affairs;
- taxed charges of the shorthand writer appointed to make an examination of the company;
- the liquidator's necessary disbursements;
- remuneration of the liquidator's employees;
- the liquidator's remuneration;
- approved expenses of the committee of inspection;
- *pari passu*:
  - taxes, rates and charges payable to the government, public authorities and the National Insurance Board;
  - employees' wages and salaries in respect of services rendered in the four-month period immediately before the commencement of the winding-up;
  - severance benefits to employees not exceeding two months' basic wages or salary; and
  - certain workmen's compensation obligations; and
- unsecured debts.

Mortgages and fixed charges are paid in priority out of the secured assets if the mortgagee/secured creditor elects to rely on its security.

### **7.3 Avoidance of antecedence 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?**

In a liquidation, failure to register specified charges over the company, including mortgages and debentures, within 30 days of creation makes them void against the liquidator.

Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property which is deemed a fraudulent preference or a fraudulent conveyance, assignment, transfer of sale or disposition shall be invalid in the event of a company's winding-up.

Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors is void.

Where a company is being wound up, a floating charge on the undertakings or property of the company created within 12 months of the commencement of the winding-up is invalid, unless it is proved that the company was solvent immediately after the creation of the charge (not considering the amount of any cash paid to the company at the time of, or subsequent to the creation of, and in consideration for, the charge, together with interest on that amount).

Where a creditor has issued execution against the goods or lands of a company, or has attached any debt due to the company, and the company is subsequently wound up, it shall not be entitled to retain the benefit of the execution or attachment, unless it completed the execution or attachment before the commencement of the winding-up.

### **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?**

See sections 1.1(d) and (e) above.

### **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?**

If creditors are not satisfied with the conduct of a winding-up, they can seek to influence the committee of inspection through their directions to the liquidator. In extreme circumstances, such creditors can seek to have the liquidator removed by the court.