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BUSINESS REORGANIZATION IN THE CARIBBEAN: A COMPARATIVE ANALYSIS OF SOME LEGISLATIVE MODELS

JOHN JEREMIE*

I. INTRODUCTION

As the close of the century draws near, the Caribbean private sector faces a common enemy. These are uncertain times. In the traditional more developed countries (known as "MDCs")[1] the new dispensation is characterized by structural adjustment and a network of interlocking conditionalities imposed by international creditor agencies. As protectionism fades, the enterprise sector, long the leisurely endeavor of a privileged few, is faced with new and demanding imperatives for survival. In the less developed countries (known as "LDCs"),[2] uncertain markets and a lack of economies of scale translate into hesitant capital investment. Structural adjustment in the region as a whole is defined by a reduction of tariff and non-tariff barriers. Competition and productivity have become the new mantras of the political directorates. Faced with these imperatives, indigenous enterprise is increasingly being forced to explore questions which go to the root of its very existence. It is now perhaps more critical than ever for Caribbean governments to recognize that the legal rules by which enterprises play often determine enterprise failure and success. The increasing competition must be accompanied by structures which ensure State support for enterprise. This support is most necessary in the area of insolvency law reform.

Insolvency rules by their very nature are enterprise trauma management rules. It is perhaps difficult to judge the extent to which the present rules effectively manage enterprise crises in the contemporary Caribbean. Official reporting is non-existent. Further attempts must be made to distill the general sentiments of practitioners from nebulous sources. It is unreasonable, however, to resist an analytical assessment of the present rules in the light of the new imperatives.

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1. The so-called MDCs include Trinidad and Tobago, Guyana, Jamaica and Barbados.

2. The so-called LDCs include St. Lucia, Grenada, Dominica, and St. Kitts.

One of the central questions now being explored in the course of the continuing international dialogue on insolvency is the extent to which insolvency legislation ought to realize broad economic objectives. This role is often characterized as a remedial function.[3] The remedial function is rooted in the broad macro-economic objectives of enhancing economic health and expansion of enterprise by legal rules which tend to facilitate these objectives, even in the case of the enterprise which has temporarily extended itself but which, nevertheless, possesses a strong financial base.

Rajak, in his work on Company Liquidations, characterizes the rationale of remedial provisions as follows:

> A creditor faced with an insolvent debtor company may take the rational choice of not petitioning for the liquidation of the debtor in the hope that it will trade itself back into solvency and thus be able to repay the debt in full.[4]

The remedial function is given substance by the existence of a jurisdiction which allows vulnerable insolvents to recover financial health. Moratoria provisions are a defining characteristic of such a jurisdiction. These provisions are designed mainly to facilitate a turnaround of vulnerable enterprises by affording such enterprises breathing space from creditors.

Moratoria provisions are now found on the statutes of several territories. In 1967, France introduced a general procedure termed "regalement judicature" which was available to "honest men of commerce," if the court was of the opinion that the relevant business, although in the throes of difficulty, could be rehabilitated.[5] The stay granted pursuant to the provisions—the 'procedure de suspencion provisoire des poursuites'—applied to both secured and unsecured creditors.[6] A judicial management procedure has been a feature of South African law since the turn of the century.[7] In Australia, there is what is termed an "official management" jurisdiction.[8] In the United States, a procedure euphemized as "Chapter XI" has existed

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3. *See* JOHN JEREMIE, GENERAL INSOLVENCY REPORT 2 *et seq.* (unpublished manuscript on file with the Caribbean Law Institute, Cave Hill Library, Barbados, West Indies).

4. HARRY RAJAK, COMPANY LIQUIDATIONS § 101 (Commerce Clearing House Inc., 1988).

5. Ordinance No. 67-820 of 23rd Sept. 1967 (France); *see generally* F.W. WOOLRIDGE, ADMINISTRATIVE PROCEDURES, INSOLVENCY LAW GUIDE AND PRACTICE SERIES 2-3 (Jordans, 1987).

6. *See* Decree No. 67-1254 of 31st Dec. 1967 (France), *referenced in* Woolridge, *supra* note 5.

7. Companies Act of 1926, § 195 *et seq.* (South Africa) (current version is at Commercial Act, ch. 14) (Act No. 61 of 1973 as amended by Acts No. 76 of 1974, No. 111 of 1976, No. 64 of 1977, No. 114 of 1977, No. 59 of 1978, No. 115 of 1979, No. 84 of 1980, No. 83 of 1981, No. 99 of 1981, No. 29 of 1982, No. 70 of 1984, No. 29 of 1985, No. 31 of 1986, No. 63 of 1988, No. 18 of 1990, and No. 69 of 1990).

8. Uniform Companies Act of 1961, pt. XI (Australia).

for some considerable time.[9] Chapter XI allows an insolvent company to seek protection by moratoria during a reorganization. In the United Kingdom, the 1986 reforms introduced an entirely new procedure termed "administration" which also allows for moratoria in certain defined circumstances.[10] Singapore has now adopted a moratorium jurisdiction[11] along the lines of the United Kingdom's jurisdiction, and the Company Creditors Arrangements Act[12] in Canada has thrived as an effective moratorium jurisdiction in that territory.

There is no universal agreement as to precisely what is necessary. In some cases the moratorium contemplated by the legislation is absolute in the sense that it binds all classes of creditors both secured and unsecured. Stays under the Chapter XI procedure illustrate this type of moratorium provision.[13] In other nations, the moratorium is qualified in the sense that it may leave untouched some particular class or type of creditor. The stay contemplated pursuant to the Canadian Bankruptcy Act illustrates this type of provision.[14] The unifying theme of moratoria provisions, irrespective of hue, is the purchase of time during which a measured approach can be taken to the affairs of the struggling enterprise. Time allows for decisions to be made in planned fashion and without the *ad hoc,* and sometimes frenzied, demands of creditors. In short, moratoria provisions fortify the affected enterprise against the terror which accompanies writs and other process documents.

The critical role of a remedial jurisdiction in facilitating the conduct of commerce cannot be seriously doubted. That role is most critical in the context of the Caribbean, which is defined mainly by fragile, developing economies. Effective moratoria provisions can also contribute to the welfare of individual enterprises, the significance of which is apparent. Nevertheless, it ought not to be concluded that such provisions can operate successfully in isolation. Measures to enhance the duties of various functionaries, such as directors and receivers, may also be required. Yet, the defining characteristic of proactive provisions is moratoria provisions. The view which has now become all-pervasive, and which the insolvency draftsman ignores at his peril, is that a State's economic growth and

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9. "Chapter XI" is codified at 11 U.S.C. § 1101 *et seq.* (1988). Earlier bankruptcy laws had similar provisions.

10. *See* Insolvency Act, 1986 (United Kingdom).

11. Companies Amended Act of 1987, pt. VIII (Singapore).

12. Companies Creditors Arrangement Act, ch. C-36 (Canada).

13. The Bankruptcy Code binds all creditors, secured or unsecured, by the "automatic stay." *See supra* text accompanying note 72.

14. The Act allows secured creditors access to their security. Bankruptcy Act, ch. 8-3, § 69(2) (Canada).

development often mirror the overall economic health of unit enterprises within that particular economy. Of course, commerce is enhanced to the extent that individual enterprises are encouraged and assisted.

In a survey of insolvency administrations in the United Kingdom during 1987, under the new moratoria provisions of the Insolvency Act, Mark Homan described the initial results as being "encouraging."[15] In fifty-five percent (55%) of his sample, he noted that the procedure enabled all or part of the enterprise to continue, albeit at times in altered form.[16] Professor Goode endorses the results as representing "a convincing justification" for the introduction of the new procedure.[17]

II. INSOLVENCY JURISDICTIONS IN THE CARIBBEAN

In the Commonwealth Caribbean the rules at present do little, if anything, to assist the troubled enterprise. It is on these very stones that a new legislative edifice would perforce be constructed. Fairly stated, there are at present three insolvency jurisdictions in all Commonwealth Caribbean territories.

The first of these, proceeding from the fringes of insolvency inward, is receivership. Receivership is primarily a creditor's remedy for enforcing his security. In general terms, the company that proceeds into receivership will more often than not be subsequently wound up,[18] although viable aspects of the business may be salvaged and sold.

The second is liquidation, or winding-up (the two terms are used indiscriminately), which may assume either of two principal forms in the Caribbean. It may be compulsory (usually on a creditor's petition) or voluntary (usually subject to creditor control). There is also, in all territories, a hybrid jurisdiction which is termed "winding-up subject to the supervision of the court."[19] The overall objective of liquidation is to administer corporate 'last rites'.[20]

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15. Mark Homan, *A Survey of Administration Under the Insolvency Act 1986: The Result of Administration Orders Made in 1987*, 3:01 (A report of Price Waterhouse for the Research Board of the Institute of Chartered Accountants in England and Wales), *referenced in* R.M. GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 112 (Sweet and Maxwell, 1990).

16. *Id.*

17. *Id.*

18. *See supra* text accompanying note 22.

19. *See* Companies Act of 1965, §205 (Jamaica) (Act. No. 7 of 1965 as amended by Acts. No. 14 of 1968, No. 7 of 1971, No. 8 of 1971, No. 37 of 1973, No. 32 of 1975, No. 26 of 1977, No. 15 of 1979, No. 32 of 1979, No. 6 of 1984, and Regulation No. 182H of 1984).

20. *See infra* text accompanying note 20.

The third is the "scheme of arrangement" jurisdiction. Scheme of arrangement provisions seek to provide a mechanism for a continuation in business of the relevant corporations. In all territories it proceeds, as discussed below, upon the almost universal consensus of the relevant creditors that the company will be better off if the particular plan is implemented for all parties concerned.

It is impossible to articulate a genuine remedial function for any of these jurisdictions. The winding-up jurisdiction is clearly and unambiguously a "corporate death" jurisdiction. Indeed it is impossible for a liquidator to attempt a corporate rescue.[21] Consideration of this jurisdiction will, therefore, not be treated further in this paper.

(A) Receivership

The receivership jurisdiction is also seriously debilitated from performing a remedial function, and, more than any other, typifies the unsatisfactory nature of contemporary Commonwealth Caribbean insolvency practice. The characteristic problem is simply stated. The floating charge, which is a monopolistic form of security through which a receiver is usually, if not invariably, appointed, allows him virtually unparalleled freedom of action. Invariably the receiver applies himself efficiently, if somewhat ruthlessly, to the task of liquidating the sums secured under the charge. The receiver's appointment itself is often but a critical acknowledgment that the company is for practical purposes destined to be wound-up.

The appointment is traditionally made when the company is at death's door because there is no point to earlier intervention by the holder of a floating security. It is only at this time that commercial prudence demands that the debenture holder take steps to protect his security by appointing a receiver. Protectionary acts of the debenture holder, of course, have the effect of shutting the door in the face of all the unsecured creditors. Receivership sends strong signals of uncertainty to the entire community of interests affected by the company's financial inviability. Available unsecured credit becomes extinct; creditors of all types become increasingly scarce. The company's standing and goodwill, which may constitute substantial assets, are inevitably eroded. It should come as no surprise that at the end of the receiver's period of tenure there is often precious little left of the company. In these circumstances contemplation of a corporate rescue is to consider the improbable.

21. *See* Companies Ordinance of 1939, §182(2) (Trinidad & Tobago), as to the restriction of a liquidator's powers to corporate dissolution.

More often than not the company proceeds inexorably into liquidation.

The receiver is an all-powerful functionary, whose functions ought to, perhaps logically, attract legislative attention; yet, no Caribbean jurisdiction has sought to legislate, in a comprehensive fashion, the qualifications of a receiver. Only Barbados has imposed a statutory duty of care on the receiver.[22] The result is that the liberal rules of common law generally apply; however, the relevant case law is far from settled. The problem is compounded because the typical well-drafted debenture will inevitably stipulate that the receiver is an agent of the company and not of the security holder who appoints him. The United Kingdom Court of Appeal recognized in *Cuckmere Brick Co. v Mutual Finance Ltd*,[23] a general duty of care applicable to mortgagees which imposes a duty to take reasonable care in a sale of mortgaged property to ensure that a fair price is obtained. Yet, the Privy Council in *China and South Sea Bank Ltd v. Tan Soon Gin*,[24] appears to resile from this position. Lord Templeman expressed the view that "the tort of negligence has not yet subsumed all torts and does not supplant the principles of equity."[25] He found, as a result, that no such duty existed on the facts before him.

Barbados is arguably distinct from the other Caribbean territories. The Companies Act (Barbados) expressly stipulates that a receiver must act "in a commercially reasonable manner."[26] If this section is given a liberal construction by the courts, it may well serve to control some of the more flagrant abuses of power existing under the liberal rules applicable to the other territories. There is, at any rate, in Barbados a strong legislative norm of prudence upon which it is possible for the courts to build.

(B) Schemes of Arrangement

Perhaps the single statutory regime in the Commonwealth Caribbean which allows for the renewal and recovery of vulnerable companies is found in the provisions which touch on Schemes of Arrangement, Compromises and Voluntary Arrangements in the region's Companies Acts. The Trinidadian provisions are typical and

22. *See* Companies Act (Barbados) (Act 54 of 1982 as amended by Acts No. 7 of 1984, No. 4 of 1986, No. 11 of 1986, No. 9 of 1987, No. 11 of 1988, and No. 1 of 1990).
23. [1971] 2 All E.R. 633.
24. [1990] 2 W.L.R. 56.
25. *Id.* at 61.
26. *See* Companies Act (Barbados), *supra* note 22.

worth citing, if only to illustrate the pitfalls of legislation in this critically important area. They provide as follows:

> 151. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.
>
> (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement the arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.[27]

The procedure is invoked by *an ex* parte application to the court by either the company or a liquidator, a creditor, or a member of the company. In the usual case, the court orders that meetings be convened of the class of creditors concerned. A notice convening the meeting must accompany every circular sent to creditors pursuant to the scheme. The circular is analogous to a prospectus and must contain information which discloses any material interests of the company's directors.[28] Where a majority in number representing three-fourths in value of those present and voting in person or by proxy at a meeting of each class approve the scheme, the court's sanction renders the scheme binding on all.

A Scheme of Arrangement given effect pursuant to legislative provisions varies in form. The compromises and arrangements to which the section relates have been described as of the "widest character, ranging from a simple composition or moratorium to an amalgamation of various companies, with a complete reorganization of their share and loan capital."[29] In fact, even the rights of debenture holders, those harbingers of doom, may be modified as may those of shareholders.

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27. *See* Companies Ordinance of 1950, §151 (Trinidad & Tobago).
28. *See, e.g.,* Coltness Iron Co. Ltd. [1951] S.L.T. 344 (U.K.).
29. L.C.B. GOWER, PRINCIPLES OF MODERL COMPANY LAW 687 (Stevens & Sons, 1979).

For any compromise or arrangement to work, *all* creditors concerned must be bound by it. The requirement that the proposal be approved by a majority in number (representing three-quarters in value of the creditors or class of creditors who are present and voting either in person or by proxy at the relevant meeting of the company), and the requirement relative to the court's sanction conceal an invidious dimension of the legislation found in the degree of protection accorded the dissenting creditor.

The position of such a creditor is clearly and unambiguously deeply entrenched, and doubly protected. First, the requirement of the court's sanction gives the objecting creditor a voice which the court can consider. Second, the relatively large majority (both in number and value) is a condition precedent to the court sanction of the scheme.

The result of the protection afforded to the minority creditor is that several meetings may need to be called and at least two approaches to the court shall be necessary. As if these defects were not enough, there is no moratorium when a compromise or an arrangement with creditors is being negotiated. Thus, during the time between the initial formulation of a scheme and its actual implementation by order of the court, each individual creditor can exercise his rights against the company. Of course, the cataclysmic effect of this on the already weakened company cannot be overstated. What such a company needs, arguably, is a genuine respite, and not a period of time during which it is game in an open season.

The fact that the jurisdiction may be defeated in relatively simple fashion by a "rogue" creditor is expensive and time consuming and a company's success depends on an unrealistic degree of creditor unanimity. In practical terms, remedial jurisdiction in the Commonwealth Caribbean at the present time is in critical need of reform. The inherent weaknesses of section 151(1) and (2) translate in reality to a veritable dead-letter as far as compositions and moratoria schemes are concerned.[30] The general trend is, therefore, for the section to be used almost exclusively to give effect to a reconstruction or amalgamation.

As noted above, it is impossible to articulate a genuine remedial function for any of the jurisdictions previously outlined. Given the demonstrable imperatives of such a jurisdiction, the experiences of other territories which have experimented with provisions in *pari materia* provide perhaps a true sounding board as to the way forward.

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30. Company Ordinance of 1950, § 151 (Trinidad & Tobago).

III. Insolvency In Other Countries

(A) The United Kingdom

The United Kingdom legislature has recently promulgated a host of provisions whose underlying theme is enterprise assistance. The right to petition the court for an administration order represents an entirely new insolvency procedure. When viewed in the wider context of the onerous duties of skill and care placed on directors the procedure is an important part of the machinery established by the legislation to enhance the viability of the entire enterprise sector by a comprehensive reform of the legal rules within which corporations exist.

Administration procedure itself has its origins in the widespread disenchantment catalogued in the Cork Report[31] as to the absence of any effective jurisdiction for the impartial management of a vulnerable enterprise in the interests of the company itself and the general body of creditors. Prior to the introduction of the procedure there was no effective safe harbor for the vulnerable enterprise in England. The floating and fixed chargee both had adequate and entrenched rights with respect to securing their charges in relation to extended credit. A delinquent debtor could be coerced into action by such a creditor without the necessity for court proceedings. The unsecured creditor who was faced with a delinquent debtor and who did not wish to resort to court process to recover his debt was the beneficiary of one right only—that of presenting a petition for the liquidation of the company.[32] As a matter of practice this right was often an empty one inasmuch it was traditionally invoked when the shell of the company was all that was left.[33] On the other hand, it was possible and indeed likely that a company could be forced into liquidation by the exercise of the powerful rights of the secured chargee. Thus, a potentially viable business could be closed down to the prejudice of the unsecured creditor in circumstances where, for one reason or another, the company was subjected to onerous obligations in terms of its present ability to pay but, nevertheless, possessed a strong financial base.

Administration procedure seeks to blunt this practice. The jurisdiction is invoked by petition.[34] The presentation of a petition for an administration order, imposes a freeze on all proceedings or

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31. Report of the Committee on Insolvency Law and Practice, Cmnd. 8558.
32. GOODE, *supra* note 15 at 110.
33. *See supra* text accompanying note 22.
34. Insolvency Act of 1986, § 9 (United Kingdom).

executions (with the exception of proceedings for the winding up of the company and the appointment of a receiver) against the company and its assets, except with leave of the court. The directors retain control of the conduct of the affairs of the company and post-petition dispositions of the company's property do not need to be validated by the court. In the new dispensation, the holder of a floating charge retains an entrenched position by the right to veto the entire administration.[35]

The automatic freeze is designed to allow for with the company's creditors and members for a rescheduling of the company's debts and a restructuring of ownership and patterns of control, as may be appropriate.[36] Professor Goode remarks that

> [T]he freezing of creditor's rights is peculiar to administration and is fundamental to the viability of the procedure. It means that the administrator can get on with the business of restoring the company to profitability without having constantly to fend off enforcement steps by individual creditors. In some cases it provides an inducement to the holders of a floating charge not to appoint a receiver and it helps to ensure that negotiations for a voluntary arrangement are not aborted by the precipitate action of a particular creditor wishing to jump the queue.[37]

Critically, the freeze ensures considerable protection, even in the period between the presentation of a petition and the grant of an order.[38]

The moratoria jurisdiction may be commenced by voluntary or involuntary act. The legislation allows the petition commencing action to be presented by the company or by the directors. A petition may also be presented by a creditor of the company. As powerful as it may be, in and of itself, the petition is merely an interlocutory measure and must eventually be supported by a definitive order.

The court will not make a substantive order on the petition unless it is satisfied that the company is or is likely to become unable to pay its debts and considers that the making of an order would be likely to achieve one or more of the stated statutory purposes:[39]

> (1) the survival of the company, and the whole or any part of its undertaking, as a going concern;
>
> (2) the approval of a voluntary arrangement;

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35. Insolvency Act of 1986, § 10(2)(b) (United Kingdom).

36. *See* R.M. GOODE, LEGAL PRINCIPLES OF CORPORATE INSOLVENCY (Sweet and Maxwell, 1990).

37. GOODE, *supra* note 22, at 111.

38. Insolvency Act of 1986, § 10(3) (United Kingdom).

39. *Id.* at § 8(3).

(3) the sanctioning of a compromise or arrangement between the company and its creditors; or

(4) a more advantageous realization of the assets than would be effected on a winding up.

(B) Singapore

The rush of international reform relative to insolvency has recently revolutionized insolvency law in Singapore. The 1987 Companies Amendment[40] provided the vehicle for change. Perhaps the most innovative of the reforms in the Amendment are those which seek to provide for moratoria in relation to vulnerable enterprises.[41] The provisions bear a striking resemblance to the English Administration provisions. Mostly all of the following applies also to the laws of the United Kingdom.

Prior to the enactment of the Amendment, a company in Singapore that could not pay its debts when they fell due could not prevent its creditors from exercising security rights or process rights to realize the value of any indebtedness owed to the creditor. As in the United Kingdom, the all-embracing characteristics of the receivership jurisdiction often precipitated the demise of companies of dubious solvency. Placing a company in receivership in many cases amounted to signing its death warrant as creditors scrambled to enforce their securities in order to save something from the wreck. The unhappy result was a forced liquidation, even though at the end of the day the company's assets may have exceeded its liabilities.

The new procedure seeks to allow companies which are in a vulnerable state of solvency breathing space in which the company may attempt to implement a plan for corporate resuscitation. The relevant provisions are to be found in Part VIII A of the Act. The jurisdiction is termed 'judicial management'[42] and is overseen by a court appointed functionary termed a judicial manager. The legislation provides for the appointment of the judicial manager upon the presentation of a petition, *inter alia,* by the company or by a creditor.[43] The company may present a petition pursuant to a resolution of the members.[44] The directors may also present a petition but only pursuant to a resolution of the members or of the board of directors.[45]

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40. Companies Amendment Act of 1987 (Singapore).
41. *Id.* at pt. VIII.
42. *Id.* at § 227A.
43. *Id.* at §§ 227A and 227B.
44. *Id.* at § 227B.
45. *Id.* at § 227B.

On the presentation of a petition for the appointment of a judicial manager, the court has jurisdiction to appoint an interim judicial manager pending the making of the substantive order.[46] It will do so, perhaps, if there is a real danger that the assets of the company may be dissipated in the interim. In any event, in the period between the presentation of a petition and the actual making of an order the company is afforded a substantial degree of protection from its creditors. No creditor may enforce any security over the company's assets.[47] This prohibition extends to instances in which goods are let on a hire purchase, under a chattels leasing agreement, or subject to a retention of title agreement.[48] Execution of a judgment already obtained may not be commenced or continued, nor may distress be levied against the company's property.[49] The mere presentation of the petition is, therefore, as in the United Kingdom, in and of itself, a powerful shield for the company.[50]

The petition is a condition precedent to the making of an order that the court is satisfied that the company is unable to pay its debts.[51] The relevant test of solvency is determined by reference to the fact of current debt repayment. The equity test (i.e. the fact that a company's assets exceed its liabilities) is therefore not decisive in determining whether it is insolvent for the purposes of a petition seeking the appointment of a judicial manager.[52] There is also an objects and purposes (a purposive) test, similar to the relevant test which exists in the United Kingdom and the court may only make an order if the order is likely to achieve one of the statutory purposes, as follows:

(a) the survival of the company, or the whole or part of its undertaking as a going concern;

(b) the approval of a compromise or scheme of arrangement; or

(c) a more advantageous realization of the company's assets than would be effected by a winding up.[53]

As in the United Kingdom, a creditor whose debt is secured by a floating charge over the company's undertaking is entitled to oppose

46. *Id.* at § 227B(10).
47. *Id.* at § 227C.
48. *Id.* at § 227C(b).
49. *Id.* at § 227C(c).
50. *See supra* text accompanying note 36.
51. Companies Amended Act of 1987, § 227B(1)(a) (Singapore).
52. *Id.* at § 227B(1)(a), which deems that the definition of "inability to pay debts" under § 254(2) applies to the judicial management.
53. *Id.* at § 227B(1)(h).

the making of a judicial management order.[54] The court must dismiss the petition if such a creditor is opposed to the making of the order unless it considers that the public interest requires the appointment of a judicial manager.

(C) *Australia*

In Australia the position is complicated by the fact that there are a number of provincial statutes which cover the field of insolvency. Yet a federal statute does exist, about which this discussion is joined. The Australian legislation boasts two sets of provisions which may be available to a company that seeks to reorder its financial affairs and to stay in existence. These are the Schemes of Arrangement provisions which are contained in Part VIII of the Companies Act[55] and the Official Management provisions which are contained in Part XI[56] of the Act. The Scheme of Arrangement provisions enable a company to realize in certain conditions a compromise or composition in respect of its liabilities so as to enable it to continue in business, albeit in an altered form. The provisions suffer from many of the deficiencies which afflict the legislation in the Commonwealth Caribbean.[57] The implementation of a scheme under Part VIII requires two separate applications to the Court, the first seeking an order to convene a meeting of the relevant creditors,[58] the other seeking a ratification of any decision arrived at in such a meeting.[59] The Australian Law Reform Commission[60] makes the following observations relative to this jurisdiction:

> This procedure is cumbersome, slow and costly. Because of these characteristics, it is particularly unsuited to the average private company. The time taken to implement a scheme varies but in general is at least two to three months. The legal and accountancy costs of even a relatively straightforward scheme are substantial. Despite time and costs, the procedure, if the proposed scheme is rejected by creditors or not approved by the Court, will not result in an insolvency administration.[61]

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54. *Id.* at § 227B(5).
55. Uniform Companies Act of 1981, pt. VIII (Australia).
56. Uniform Companies Act of 1981, pt. XI (Australia).
57. *See supra* text accompanying note 27.
58. Companies Ordinance of 1950, § 315(1) (Trinidad & Tobago).
59. *Id.* at § 315(4).
60. *See* AUSTRALIAN LAW REFORM COMMISSION, DISCUSSION PAPER (Paper No. 32).
61. *Id.*

These precise comments might as easily apply to the Scheme of Arrangement provisions in the Commonwealth Caribbean. Little is to be gained from even a cursory analysis of the relevant provisions.

The other jurisdiction which is oriented towards a corporate resuscitation is that of Official Management.[62] Official Management is available *only* to a company that will ultimately be able to pay its debts in full.[63] The jurisdiction is invoked by resolution of the directors that the company is unable to pay its debts as and when such debts become due.[64] The next step is for a meeting of creditors to be convened to consider placing the company under Official management. If the creditors so decide the company may proceed into Official Management.[65] Where the official manager concludes that payment in full of all credit is not likely, he must on pain of severe penalty take action to abort the management and allow for action to be commenced to wind the company up.[66]

Although the procedure for commencing an official management under Part XI of the Act is relatively simpler than that which obtains for a scheme of arrangement, the jurisdiction is somewhat inflexible.[67] Its inflexibility is evidenced, *inter alia*, by the duty imposed on pain of damages by section 347 to the functionary entrusted with the conduct of the administration. This means that there is little room for entrepreneurial flair and a great deal of focus on the early warning signals which could impose a duty on the administrator to abort an administration.

(D) Canada

The Canadian position, as the Australian, is complicated by the fact that Canada is a federal jurisdiction. There are several provincial statutes which deal with reorganization, but my focus shall be restricted to the federal provisions. In Canada, the primary federal provisions relative to the rehabilitation of vulnerable companies are found in the Bankruptcy Act[68] and the Company Creditors Arrangements Act.[69] The Bankruptcy Act is severely constrained in terms of its ability to allow vulnerable enterprises breathing space within which a plan to turn around the enterprise may be implemented.

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62. *See* Uniform Companies Act of 1981, pt. XI (Australia).
63. *Id.* at § 347(3).
64. *Id.* at § 335.
65. *Id.*
66. *Id.* at § 347(3).
67. The Law Reform Commission notes that "It is rarely attempted." *Supra* note 59.
68. Bankruptcy Act, ch. B-3 (Canada).
69. Company Creditors Arrangements Act, ch. C-36 (Canada).

This is so because the stay envisaged by the Act is automatic only with respect to unsecured debt.[70]

The Canadian creditor is no less averse to protecting his interests by securing them than any other. The result is that much of the typical company's debt is secured. This factor ensures that the Bankruptcy Act is a genuine non-starter as far as utilitarian moratorium provisions are concerned. It is also the reason why the Companies Creditors Arrangements Act has largely usurped the automatic stay procedures of the Bankruptcy Act as an instrument of reorganization with respect to financially-troubled enterprises. The former allows for a general stay which binds both secured and unsecured creditors. The stay is granted initially for a period of between thirty and sixty days, but if constructive negotiations are taking place, the court has power to extend the initial period.

There is a divergence in practice between provincial courts as to the extent to which an application for protection under the Act should involve the support of major secured creditors. The Ontario courts tend to require the support of at least the operating lender to the business so that, if the court is satisfied that the interests of the business' operating lender shall not be prejudiced, it will in practice grant the order.[71] In British Columbia this requirement is not as significant. At any rate and to the extent that a requirement exists, it is an informal one as the Act itself contains no positive prohibition. The exercise of contractual rights, including a landlord's rights, and even licenses granted in respect of matters such as intellectual property rights, may also be restrained during the automatic stay period. This power is designed to allow for a continuity of supplies in circumstances where continued supply is essential to the existence of the company. The court also has a discretionary power to abort the entire process which may be exercised whenever it considers that a financial reorganization has become or is shown to be implausible.

(E) *The United States*

The remedial jurisdiction has been a defining characteristic of American corporate law for a very long time. The relevant provisions are contained in Chapter XI of the Bankruptcy Code. The Code contains intricate provisions which are designed to allow individuals, partnerships, and corporations the shield of moratoria to

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70. Bankruptcy Act, ch. B-3,§ 69(2) (Canada).

71. Farrer v. Thames Ironworks, Shipbuilding & Engineering. [1912] W.N.66.

facilitate a turnaround.[72] Relief is available with respect to both voluntary and involuntary action, and a resolution of the board of directors is sufficient in the case of a company seeking protection to invoke the protection of the Code.[73]

It is perhaps safe to describe the Code as being debtor-oriented in nature. Support for this proposition can be found in the fact that the mere voluntary filing of a Chapter XI petition by an eligible debtor can, in and of itself, constitute an order for relief under Chapter XI.[74] There is no need for a court to conclude that relief is warranted. Another fact which illustrates the warmth of the Code's sentiments for the debtor is the absence of a 'purposive' requirement conditioning the availability of relief. The Code itself allows for moratoria during which time planning can take place and objectives can be crystallized in the leisure of unhurried action.

The reach of the moratoria under the Code is extensive. Pre-petition proceedings and claims, and a variety of ancillary acts, are prohibited on pain of damages.[75] The moratorium contemplated is automatic and both secured and unsecured creditors are affected.[76] A secured creditor, however, can seek relief from the stay if he can establish to the satisfaction of the court that sufficient cause exists for intervention.[77] Sufficient cause includes the existence of collateral sought to be enjoined which is unnecessary for an effective reorganization of the debtor and that the value of collateral that exceeds the secured indebtedness so that the debtor has no equity in the relevant collateral.[78]

The floating lien secured creditor is cut off as to after-acquired property from the time of filing, so that property which would have been caught by the floating lien is held free from such by the bankrupt.[79] Property in existence at the time of filing is not affected and continues to be protected.[80] Cash collateral is given an added measure of protection by those provisions of the Code which stipulate that the creditor's consent or sanction of the bankruptcy court are conditions precedent to the ability to enjoin same.[81] The section 363

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72. *See* 11 U.S.C. § 101(41) and § 109. In its decision in *Toibb v. Radloff*, 501 U.S. 157 (1991),, the U.S. Supreme Court confirmed that the reach of the provisions in Chapter XI can even benefit an individual who is not engaged in business.

73. *See* In re Al-Wyn Food Distributors Inc., 8 B.R. 42 (Bankr. M.D. Fla. 1980).

74. *See* 11 U.S.C. § 301.

75. *See* 11 U.S.C. § 362(1).

76. *See* 11 U.S.C. § 362.

77. *See, e.g.,* 11 U.S.C. § 362(d).

78. *See generally* 11 U.S.C. § 362.

79. *See* 11 U.S.C. § 552.

80. *Id.*

81. *See* 11 U.S.C. § 363.

and section 552 prohibitions usually foster a spirit of negotiation between debtor and secured creditor which might often yield a request for court sanction of a cash collateral agreement at the commencement of a Chapter XI case. A typical agreement would provide for a security interest in post-petition inventory and accounts receivable to provide comfort and protection to the secured creditor for the loss of pre-petition inventory and accounts receivable.

IV. A CARIBBEAN MODEL

As this brief survey reveals there are now several legislative models which contain moratoria provisions and which serve as useful sources of legislative precedent in the search for relevant provisions to fit the needs of the territories of the Commonwealth Caribbean. The task of reform invariably begins with a statement of objective. The latter may of course be influenced by the nature of the mischief which the law must meet.

It is abundantly clear that enterprise growth is an absolute imperative for the survival of the economies of the Commonwealth Caribbean. Strong provisions which are designed to enhance the ambience within which enterprises exist are key to the process of meaningful reform. The key ingredient of such a model is found in the existence of a meaningful stay which is available to specified entities.

Yet the stay is not the only ingredient of an effective moratorium. There is a critical policy question which few enactments have sought to address. It is the question of who assumes the mantle of control during the reorganization. In the United Kingdom, Singapore and Australia, an impartial court appointed functionary assumes the mantle of control. In the United States the debtor retains possession. This is a neat question in which the equities as it were are evenly balanced. There might be a strong case for removing those on whose watch disaster has come to the company's door. Culpable risk taking can sometimes perhaps be distinguished from entrepreneurial flair. Yet the chastened debtor may know the inner workings of his enterprise as no other. The way forward in the Caribbean ought, perhaps, to be defined by caution. In this regard it is noteworthy that in other Commonwealth countries the impartial administrator has been preferred. In a jurisdiction which is defined by relatively small size and economies, which may be overly sensitive to the health of a few defined and distinguished enterprises, it may perhaps be better to adopt a "wait and see" approach. Such an approach would err on the side of caution. The retention of the independent functionary is therefore the preferable alternative.

A meaningful blueprint for reform can perhaps safely be developed along the lines of the promulgation of an effective stay of a certain scope which is readily available to specified entities.

(A) The Stay

The absolute necessity for moratoria provisions as a means of assisting vulnerable insolvents cannot be overstated. There is very little room to controvert the empirical evidence which Mr. Homan[82] lends as a *raison d'etre* for the jurisdiction. Yet moratoria provisions do exist in today's Caribbean with little apparent success.[83]

It may safely be concluded, therefore, that essential to the viability of the jurisdiction is not merely the existence of a stay, but the existence of an *effective* stay. The efficacy of a stay depends primarily on its scope, its nature and its availability.

(1) Scope of the Stay

The scope of the stay refers to the reach of its provisions. Given the experience of other jurisdictions it is perhaps safe to conclude that a stay is effective if its scope extends the widest net of protection to the vulnerable enterprise.

In Canada we have noted before that the Bankruptcy Act leaves secured creditors untouched in the stay which is contemplated pursuant to the provisions of the Statute.[84] As a result, its gift has been scorned in favor of that of the Company Creditors Arrangements Act whose provisions capture both secured and unsecured creditors.[85] The Commonwealth Caribbean stay at present, when triggered, can catch both secured and unsecured creditors. This characteristic of the law is salutary and ought not to be tampered with.

The floating chargee, as we have noted, is given a measure of autonomy and control by the United Kingdom[86] and Singaporean[87] legislation, which he is not accorded pursuant to the provisions of the United States Bankruptcy Code.[88] It is perhaps too soon to determine the wisdom of this. Yet it is reasonably apparent that the failure to grant a veto power to such a creditor in the United States has not compromised the vigor of the United States Code.

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82. Homan, *supra* note 15 at ¶ 3:01.
83. *See supra* text accompanying note 27.
84. Bankruptcy Act, ch. B-3 § 69 (Canada).
85. *See* Company Creditors Arrangements Act, ch. C-36 (Canada).
86. *See supra* text accompanying note 34.
87. *See supra* text accompanying note 75.
88. *See* text to note 75 *supra*.

The following observations may safely be advanced with respect to the scope of the stay:

1. That the stay extend to both secured and unsecured credit;

2. That the floating chargee not be accorded a power of veto with respect to the stay.

(2) The Availability of the Stay

The availability of the stay refers to the ease with which the relevant provisions can be used. Common sense and logic suggest that the efficacy of the stay turns in large measure, not only on the scope of the stay as discussed above, but on the availability of relief. There are both substantive and procedural dimensions to this.

(a) The Substantive Dimension.

In the United Kingdom[89] and Singapore[90] the relevant stay is only within reach if an objects and purposes test can be satisfied at the *outset* of the relevant court proceeding. In Canada and the United States[91] relief is not conditioned on any such requirement.

In the United Kingdom[92] and Singapore[93] court sanction is also required, even to underpin a voluntary petition. In the United States the voluntary petition itself constitutes an order for relief.[94] It may well be that the better course may be to allow the 'purposive' test in the case of involuntary petitions but to allow voluntary petitions without more. Surely to allow the latter in the context of small societies does not open the 'floodgates' inasmuch as the negative public sanction attendant on the status of a bankrupt, by itself and without more, can operate to discourage unworthy petitions.

(b) The Procedural Dimension

In the United Kingdom and Singapore the relevant stay is available only to corporations.[95] In the United States and France it is available generally.[96] Again there is no evidence to show that the generality of the availability of the stay has caused difficulty either in

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89. *See supra* text accompanying note 38.
90. *See supra* text accompanying note 49.
91. *See* text to note 70 *supra*.
92. *See supra* text accompanying note 38.
93. *See supra* text accompanying note 70.
94. *See* text to note 70 *infra*.
95. *See* Insolvency Act (U.K.), *supra* note 33; Companies Amendment Act (Singapore), *supra* note 11.
96. *See* text to notes 5 and 68 *supra*.

the United States or in France. This coupled with the fact that Caribbean economy is characterized by the existence of informal institutions is a strong argument for urging a stay which does not exclude unincorporated associations from the gift of protection in model Caribbean legislation.

The following conclusions may safely be advanced with respect to the availability of relief:

(1) that a 'purposive' test, along the lines of that which obtains in Singapore and in the United Kingdom, ought to condition relief in the case of involuntary petitions;

(2) that the mere filing of a voluntary petition without more ought to constitute an order for relief; and

(3) that the stay ought to apply both to bodies corporate and to unincorporated bodies.

V. CONCLUSION

The necessity for effective moratoria provisions can scarcely be overstated. The challenge in the Caribbean is to make decisions which would allow for the promulgation of such provisions. The experiences of other jurisdictions provide, perhaps, a true sounding board as to the way forward. Yet regard must also be had to the prevailing local conditions. These proposals are not the only possible solutions. Nevertheless, they are proposals which are tailored to fit those conditions which prevail in contemporary Commonwealth Caribbean society. Ultimately the test of all such provisions is whether they actually assist enterprise. The penalty for failing to act decisively in the face of frenzied international competition poses a scenario which is far too horrifying for Caribbean governments to contemplate lightly. The Caribbean faces a future rendered uncertain by the very rapidity of international change. The leisurely approach to law reform which has hitherto prevailed, and which has resulted in a dearth of genuinely creative initiatives over the years, can no longer be countenanced in areas of the law which are absolutely critical to the welfare of the domestic economies. The way forward is clear. Timely reforms, which are eclectic in nature and which build on the experiences of the many, are critical to the economic development of the region. Economic growth will not take place without enterprise health. Caribbean governments ignore these simple truths at great peril.