The New Insolvency Act: A Breath of New Life into Insolvent and Distressed Companies in Jamaica

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The previous insolvency law regime in Jamaica was far outgrown by the modern commercial environment which is based largely on credit as a means of corporate financing. This is evident by the fact that the Companies Act 2004, though fairly recent, essentially retained the provisions dealing with corporate insolvency from the previous Companies Act 1965. Despite the amendments to the Act, the winding up rules with respect to insolvent companies were still the Companies (Winding Up) Rules, 1949 of England which contain archaic procedures. The Bankruptcy Act that governs individual insolvency had been around from 1888 with ad hoc amendments. The Supreme Court and Resident Magistrates' Courts had jurisdiction in respect of insolvency and bankruptcy respectively. This paper is only concerned with corporate insolvency.

The previous regime strongly favoured creditor wealth maximization, in that, it offered a great level of protection for creditors, sometimes at the expense of the 'life' of the company. It offered little scope for rescue and rehabilitation. This was evident by the fact that upon a company being put into liquidation, the liquidator's role, when appointed, is to collect in all the assets for the benefit of the creditors. Insolvent companies would automatically go into liquidation or receivership, which is notoriously a creditor's remedy. It was the kiss of death for companies and the creator of unemployment.

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The regime was out of touch with present reality such as the need to keep companies as viable entities which will be beneficial not only to creditors but the community as a whole. There were no express rescue mechanisms such as administration or reorganization like in the UK and US. There was, however, limited scope for rehabilitation in the provisions of the Act dealing with schemes of arrangement which are used as a means of restructuring debts. A scheme of arrangement provided for a compromise between a company and its creditors which must ultimately be sanctioned by the court before having any legal effect.

The schemes were prominent in the mid 1990's when the country was undergoing serious financial crisis with high spate of corporate insolvencies. The unpopularity of these schemes was as a result of them being very expensive and time consuming. While they should be a means of keeping the insolvent company as a going concern, they allowed for creditors to surreptitiously try to enforce their pre-insolvency rights or even file winding up petitions thus defeating any attempt by the insolvent at reaching a compromise.

The social and economic climate in Jamaica demanded a comprehensive and radical review of the insolvency law regime. The road to reform was paved by the Private Sector Organization of Jamaica (PSOJ) Insolvency Review Committee that provided a report on the Reform of Insolvency Law in Jamaica. The substantial corpus of its findings and recommendations transformed into what is now the Insolvency Act.

The Act is modelled on the Bankruptcy and Insolvency Act of Barbados which itself is modelled on the Canadian Bankruptcy and Insolvency Act. Some significant features of the Act are that it has unified the insolvency laws into one piece of legislation and has conferred jurisdiction on the Supreme Court alone.

The opening section of the Act reveals its objectives; one of which is to provide for the rehabilitation of insolvent debtors. The Act offers insolvents the options of insolvency, receivership and reorganization through the use of proposals with a view not only for the preservation of the insolvents' assets for the benefit of their creditors, but also the rehabilitation of the insolvents by forgiving the unpaid debt and thereby restoring them as viable entities.

Another interesting feature of the Act is that it contains extensive provisions dealing the relationship between an insolvent and its secured creditors. This relationship is suggested by the fact that the Act seeks to regulate the enforcement of a secured creditor's security. This is evident in the mandatory statutory provisions requiring a secured creditor to serve notice before exercising his rights. This would in many instances prompt the insolvents to make good on their indebtedness. These provisions arguably underscore one of the modern objectives of corporate insolvency law that is, creating a "window of opportunity" for the insolvents which may assist in rescuing and rehabilitating their businesses. Furthermore, the secured creditor's right may be put on hold where the insolvents file a proposal. The proposal is arguable the most significant reform in the insolvency laws.

The Act protects insolvents from legal actions of creditors by imposing a stay upon the insolvents filing a proposal or an intention to make a proposal. The Act may very well be regarded as *"an instrument of debtor relief"*. However, the creditor has some relief in the sense that the stay is not absolute upon it being ordered. Creditors, upon the imposition of the "mandatory" stay, are at liberty to apply to the court to be exempt from the stay. Stays are granted for forty-five days upon the notice of an insolvent to make a proposal. The Act makes provisions for further extension provided that an insolvent satisfies the criteria: it acted in good faith and with due diligence; the likelihood of it making a viable proposal if given the

opportunity of extension; and that no creditor would be materially affected by the stay. So essentially, what may be a "short-time" relief for the insolvents may very well extend to a 'long-term" relief to the dismay of creditors.

Another major reform which the Act provides is the ability to diagnose distressed companies from very early and deal with them before it is too late. In the regard, the Act contains provisions for the making of proposal or intention to make a proposal by companies that are not yet insolvent but which are clearly on the path of insolvency and would require some corrective and preventative measures to prevent becoming insolvent.

The Committee explored the concept of Debtor in possession financing (DIP) which is prominent in the US. This concept would be critical in Jamaica for the fact that any rescue effort would be inextricably linked to the insolvents' ability to keep the business alive, while working out an acceptable plan with its creditors. The insolvents are more familiar with the business and the operation of the company and should be allowed to remain in possession and seek financing to carry out the operation to restore it to viability. Unfortunately, this concept was not included in the Act.

The reform of the insolvency laws in Jamaica was well needed. The previous regime was insufficient to deal with this a modern and dynamic commercial environment which is based largely on credit. The previous regime displayed dominance for creditor wealth maximization. However, a modern insolvency law should seek to protect interests beyond those of just creditors. In fact, it should seek to engage and consider a wider group of stakeholders who are affected by insolvencies such as employees, suppliers and the community as a whole.

The Act has adequately responded to this modern commercial environment by having rescue and rehabilitation as its overriding objective. It sees the need to keep insolvent companies as viable entities by giving insolvents a '*breathing space'* from the claims of creditors while working out a plan to meet their liabilities.There is no doubt that many companies will now be saved in the years lie ahead.