Development of Reform Proposals to Better Resolve Insolvencies in the Caribbean

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PROJECT REPORT

PROJECT BACKGROUND

This project and report was commissioned at the request of the Caribbean Export Development Agency (Caribbean Export), in its capacity as the Secretariat for the Caribbean Association of Investment Promotion Agencies (CAIPA). CAIPA was launched in 2007 to facilitate the collaboration of regional Investment Promotion Agencies (IPAs). Its emphasis is on activities which are best undertaken at regional or sub-regional rather than at national levels as they promote the Caribbean as a prime destination for intra and extra-regional investment. Caribbean Export is the secretariat of CAIPA.

CAIPA has requested this study as a part of its broader efforts to help improve the business environment in the Caribbean by improving the region’s ability to resolve insolvency. The Caribbean trails in effective methodologies to resolve troubled-debt situations and these deficiencies are reflected in low regional rankings in the World Bank´s Doing Business Indicators for Resolving Insolvency. The overarching goal is an improved business environment in the CARIFORUM region, with effective bankruptcy-insolvency systems that provide the necessary legal frameworks to enable viable firms to reorganize, where they can be saved, and an orderly means of exit from the marketplace, when they cannot. This study seeks to identify deficiencies in legislation and practice and provide suggested measures to resolve these deficiencies. This assessment aims to inform policy making, increase the understanding of the existing gaps and propose national and regional recommendations for reform. The recommendations and results of this assessment will be shared with regional stakeholders.

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The ICR Facility supports public and private stakeholders in African, Caribbean and Pacific (ACP) countries in creating a more conducive, sustainable and inclusive business environment and investment climate.

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PROJECT PARTICIPATION

Fifteen Caribbean members of the OACPS, who are also members of CAIPA,[1] support this initiative. They are: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago.

The author is grateful for the kind support and assistance of the core project team: Suzette Hudson (Caribbean Export Development Agency), Steffen Felix (GIZ), Nelissa Kay Moreen Hines and Antonia Preciosa Menezes (International Finance Corporation) and to all who were interviewed or otherwise participated in this study.

PROJECT SCOPE AND ACCESS LIMITATIONS

This Report is the result of a limited 55-day remote "desk review" performed under a number of substantial constrains mostly due to Covid-19 related travel restrictions. Nonetheless, observations gleaned from review of laws, regulations, interviews, and other materials revealed a number of deficiencies, areas for potential improvement, opportunities to raise scores, and areas that require closer in-depth examination and future study. The timing and circumstances presented several cumulative challenges, particularly those due to Covid-19 lockdown restrictions. Some of the challenges were anticipated while others not, such as political instabilities and natural disasters, such as the recent happenings in Haiti. (Details of the limitations encountered can be found in ANNEX B to this report.) **However, despite the challenges, the project team believes there is sufficient information to deliver a high-level overview assessment that focuses on broader regional patterns and systemic deficiencies that will be of help in crafting future insolvency reforms.** These findings are embodied in this Report**.**

What we could do. Despite the many constraints and limitations, the project focused on available information, primarily: (1) the laws and regulations themselves (reviewing for consistency with current recommended practices and emerging norms, including the *UNCITRAL Legislative Guide on Insolvency Law,*[2] the *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes (2021*),[3] and the author's own legislative check-list) and (2) analysis of the *World Bank's Doing Business rankings for "Resolving Insolvency,"* to understand the underlying causes of the poor rankings and to determine how best to address the gaps and deficiencies identified. Due to time and space constraints of this limited review a point-by-point evaluation of each specific deficiency in each of the fifteen laws is not presented. However, using these tools we were nonetheless able to identify a significant number of specific country-level deficiencies as well some broader overall regional patterns including gaps in institutional capacity. **Despite significant limitations in time, resources and access, a comprehensive overall picture emerges and significant gaps and areas for future development have been identified and presented in this Report.**

[1] The Caribbean Forum (CARIFORUM) is a subgroup of the Organization of African, Caribbean and Pacific States and serves as a base for economic dialogue with the European Union.

[2] *United Nations Commission on International Trade Law*, *UNCITRAL Legislative Guide on Insolvency Law,* (United Nations 2005), UN Publication No. E.05.V.10 ISBN 92-1-133736- 4. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

[3] *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes (2021*)(International Bank for Reconstruction and Development - The World Bank). https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf

EXECUTIVE SUMMARY

Financial failure of business enterprises is a fact of life in even the most prosperous and well-functioning economies. A bankruptcy-insolvency system is critical and necessary component of any market-based economy. It regulates the complex intersection of the rights and responsibilities of all the diverse stakeholders involved and the manner that other substantive laws (property rights, secured transactions, mortgages) are dealt with in its proceedings. Precisely how financial failure is handled in a country should be of great concern to all participating in the arena of commerce, particularly investors, because future decisions on whether or not (and to what extent) they will invest are based in large part on the assessment of business risk and likelihood of recovery when financial difficulty is encountered. Likewise, modern entrepreneurship and new business start-up activity is deeply affected because a majority of new business ventures do not succeed and many of the most successful entrepreneurs have had one or more business failures before their successes. Fewer will attempt to risk a new business venture in an environment where they will face overly burdensome processes, punitive consequences and inordinate social stigma should they fail.

The overarching purpose of a bankruptcy-insolvency[4] system is to establish a collective legal mechanism for the resolution of the claims of the entire universe of creditors in a single legal proceeding. It should, at minimum, provide a legal framework to rescue viable firms where possible and provide an orderly means of exit from the marketplace for firms that cannot. An efficient bankruptcy system provides a method to recycle assets and resources back into productive use. Those same assets can be bought inexpensively by others and form the basis for a new business that may hire workers, pay taxes and contribute to the growth of the economy. A good bankruptcy-insolvency system promotes the flow of credit by protecting creditor rights, thereby lowering overall lending risk, which, in turn, enhances the availability of less costly credit to finance economic growth.

There are four major systemic drivers of an effective insolvency system:

- **Legal Framework** that is properly balanced.
- **Implementing Institutions** that are effectively enabled.
- **Creditors** that are adequately empowered.
- **Professionals** that are competent and adequately compensated.

Once properly in place, the balance between powers and incentives operates to naturally move cases forward in a fair and equitable manner. As far as effectively enabled implementing institutions are concerned, it is vitally important to have sufficient institutional capacity in place to develop and enact self-initiated changes to legal and operational framework to adapt to changing economic circumstances. This review is prepared with this in mind in the prioritization of its findings.

Three sets of standards were used as basic guideposts for evaluation:

(1) *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes* (2021).[5]
(2) *UNCITRAL Legislative Guide on Insolvency Law*;[6] and
(3) the author's own proprietary checklist.

[4] The terms "insolvency" and "bankruptcy" are imprecise and often used interchangeably throughout the world. However, most of the Caribbean laws use "insolvency" to refer to laws addressing business enterprises and legal persons, while the term "bankruptcy" to refer to laws addressing individuals.

[5] *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes* (2021)(International Bank for Reconstruction and Development - The World Bank) https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf

[6] *UNCITRAL Legislative Guide on Insolvency Law,* (United Nations. 2005), UN Publication No. E.05.V.10 ISBN 92-1-133736- 4. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

The review has revealed a number of findings generated from three main areas: (1) Institutional Capacity (to self-detect and address system inadequacies); (2) Legal Framework "Gap Analysis" (observations and comments derived from the laws and regulations); (3) Deficiencies cited by the World Bank Doing Business "Resolving Insolvency" indicators. An in-depth point-by-point evaluation of each specific deficiency of each country law is not provided due to practical time and space constraints of this limited review. However, these tools were used to identify and address the most significant country-level deficiencies, broader overall regional patterns and important gaps in institutional capacity, as building internal institutional capacity will have a deeper and longer lasting impact than any one-time review.

The world has changed. The economic environment in which all countries operate has evolved profoundly in recent times. Economic laws -- especially those addressing financial failure -- need to be upgraded with modern tools to address the new realities of a changing global marketplace as well as temporary economic shocks, such as the financial after-effects of the COVID-19 and natural disasters such as earthquakes and hurricanes. **Modern insolvency laws address these modern needs – especially modern business rescue provisions that are able to effectively address temporary economic shocks rather than simply closing otherwise viable businesses at the first sign of financial difficulty.**

A majority of the laws in the Caribbean that are subject to this review were based on early UK, Canadian and civil law legacies originally adopted at a time (mostly early 1900s) when economies were far different than they are today. Some have made incremental changes through the years, while others less so. Aside from one recent major exception[7] these amendments have not provided the needed modernizations. Most have not even kept pace with the legislative upgrades that the base countries have deemed necessary to make, such as the most current important modernizations made by the UK in its newly enacted *Corporate Insolvency and Governance Act (2020)*.[8] While this Report identifies specific gaps and problem areas for technical amendment, the greater question is whether mere incremental technical changes are likely to be sufficient to address modern needs.

In summary, there is a clear and immediate need for:

Updated laws for modern times. The laws in the region are generally out of date and need revision to reflect current circumstances, modern commercial practices, and international best practices. A "policy and technical" review is needed in each country to consider upgrades that, at minimum, consider and keep up with relevant changes in base country legislation countries (UK and Canada), with global standards and with current best practices. Such a policy and technical review is recommended immediately and at five-year intervals.

Overarching institutional and supervisory structure. Establish a standing official government body or ministry designee with authority to: (1) monitor overall systemic functioning (system statistics, stakeholder's outreach); (2) study current developments and potential solutions regionally and globally; and (3) propose and drive needed amendments. The official capacity to conduct periodic technical and policy reviews to initiate changes going forward as new circumstances require is vital. Only some countries currently have an official Office of Supervision or designated official for oversight of the insolvency system.

Periodic regional conference of Insolvency Supervisors. Convene a regularly scheduled gathering of regional insolvency supervisors to discuss systemic insolvency issues, problems

[7] *Antigua and Barbuda, Companies Act (Amended) 2020*, Act No. 17 of 2020 (Official Gazette Vol. XL. No. 51 dated 15 July 2020). http://admin.theiguides.org/Media/Documents/Companies-Amendment-Act-2020.pdf

[8] *The Corporate Insolvency and Governance Act (2020) UK Public General Acts.* https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

encountered, approaches for resolution, common matters affecting the region for proposed legislative reforms. Currently no such forum exists.

Permanent regional network of Insolvency Supervisors. Establish a permanent network of regional insolvency supervisors or key insolvency officials to support more immediate peer-to-peer communications regarding current developments on local and regional insolvency issues in the interim between regional insolvency supervisor conferences. Currently no such formalized peer network exists.

More specifically,

Enhanced business rescue tools. Provide much-needed upgrades for business rescue (reorganization) for greater effectiveness in modern times, as well as streamlined procedures for Micro, Small and Medium Enterprises (MSMEs), Out of Court Workout tools, mediation and/or other cost-effective easily implementable measures to save businesses that can be saved. New provisions addressing some of the same gaps in the UK-based laws were recently enacted by the UK in 2020[9] and can serve as a useful guide for possible Caribbean reforms.

Enhanced creditor participation. Address identified gaps in creditor abilities select or approve administrators, approve major asset sales, to request debtor financial information and to object to certain other creditor's claims when necessary.

Additionally,

Addressing World Bank "Resolving Insolvency" indicator gaps. Along with the independent gap-evaluation, our review sought to gain an understanding why the Resolving Insolvency indicators for many of the fifteen Caribbean countries were low and whether these scores were indicative of greater problems which could be addressed in future reforms. We note that the low rankings were a strong motivating factor in the commissioning this review.

A detailed understanding of how the indicators work (especially the interaction of the two halves of the World Bank evaluation, "Recovery" and "Framework") is crucially important as they strongly impact Caribbean scores in very particular way. Close examination revealed that:

(1) Countries with a predominant use of *non-bankruptcy receivership procedures* resulted in relatively high "Recovery" scores that overshadowed relatively poor "Framework" scores, resulting in higher rankings than would otherwise be merited on the strength of their insolvency frameworks alone;

(2) Countries receiving a "No Practice" evaluation on the "Recovery" side of the indicator (meaning there were no cases upon which the WB analysis could be based) operated to *completely negate* consideration of relatively high "Framework" scores. The "No Practice" designation automatically meant a zero ("0") overall score for that country with a "last-place" bottom ranking (168 out of all 168 countries) *even though the country achieved very high marks on their framework.* This was indeed the case with three Caribbean countries in our review. <u>This is essential to understanding that a "No Practice" designation means that any improvements in the legal framework will not improve that country's score and rank</u>;

And finally,

(3) Any legislative or systemic improvement that a country makes that is not captured within the World Bank's sixteen "Framework" index factors will not increase their scores.

[9] *The Corporate Insolvency and Governance Act (2020)*.

The details supporting the above conclusions, as well as other important findings are discussed within this Report.

NOTE ON INSOLVENCY TERMINOLOGY

The use of terminology in the field of bankruptcy-insolvency varies widely. The main functionary responsible for administering the insolvency proceedings has no single universal term. The laws reviewed seem to refer to the key operative in the insolvency process differently (Trustee, Liquidator, Receiver, Assignee, Insolvency Representative, Insolvency Practitioner, Administrator) and vary even within the same law depending on the function performed in different types of proceedings. Even the terms "Bankruptcy" and "Insolvency" are often used interchangeably throughout the world. However, in the UK and Canada, as well as in the Caribbean laws based in these two systems, the term "Bankruptcy" generally refers to procedures governing personal or individual financial failure, while "Insolvency" generally refers to procedures for business enterprises.

For convenience and uniformity within this Report we use the following terminology:

"Administrator" to refer to the main operative professional fulfilling the full range of functions (without distinguishing between functions preformed in different types of proceedings).

"Supervisor of Insolvency" to refer to the head or main government official in charge of the *Office of Supervision* or other official regulatory body that governs the insolvency system.

"Insolvency" (to refer to business or enterprise proceedings) and "Bankruptcy" (to refer to personal proceedings) in this Report unless otherwise indicated.

GOALS OF AN INSOLVENCY SYSTEM

Clarity on the goals of an insolvency system is vital before any systemic reform can take place as the purpose of insolvency is often misunderstood. First and foremost, an insolvency system preforms an *economic function*. It is not social legislation; nor is it an extension of criminal justice, although there are aspects of each encountered tangentially. When a debtor is unable to service all its obligations according to their contractual terms, the collective legal mechanism of insolvency can be invoked in place of the standard legal enforcement rights of individual creditors normally available under other non-insolvency laws. An insolvency system in its most basic form envisages the orderly collection and distribution of assets after conversion to cash, preventing a race of diligence by creditors to dismember the debtor. Insolvency proceedings contemplate the fair and equitable treatment of all creditors based upon their rights and priorities established by law, not based upon which creditor initiated its enforcement action first. Without a collective insolvency proceeding, the first creditors to succeed in exercising their rights could conceivably take all the assets, leaving nothing for other remaining creditors of equal priority. When the preservation of a debtor enterprise as a going concern results in a greater overall recovery for creditors than business closure and sale of assets, a good insolvency system provides a transparent legal framework to enable a business rescue.

Therefore, it is critical that there be in place a transparent, certain, practical and workable legal mechanism to:

- accomplish an efficient, fair and equitable reorganization where an economically viable business enterprise can be saved;
- accomplish an orderly, fair and efficient liquidation when it cannot;
- accomplish an equitable distribution of proceeds to creditors, respecting type and rank of the claim in accordance to clear rules for doing so;
- provide a method to recycle assets and labor back to productive use within an economy;
- provide clear and predictable procedures, deadlines and outcomes;
- provide appropriate incentives for timely movement toward case resolution;
- provide an equitable allocation of risk;
- provide protection of creditors rights;
- serve as a backdrop for negotiation and out of court resolution of disputes.

And as is often overlooked -

- An insolvency system is a *societal statement on entrepreneurship and business risk-taking*. A high percentage of new business fail even the best economies in the best of times, and a non-punitive, efficient insolvency system encourages taking chances on new ideas will not happen if the most creative entrepreneurs are stalled in endless procedural and punitive proceedings.

Finally, timeliness is crucial to the proper functioning of a bankruptcy system. Delay wastes assets and resources, negatively affecting both debtor and creditor.

The *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes (2021)*,[10] Part C 1: *Legal Framework for Insolvency,* sets out *Key Objectives and Policies*, as follows:

Though country approaches vary, effective insolvency systems should aim to:

- *Integrate with a country's broader legal and commercial systems;*
- *Maximize the value of a firm's assets and recoveries by creditors;*
- *Provide for the efficient liquidation of both nonviable businesses and those where liquidation is likely to produce a greater return to creditors and the reorganization of viable businesses;*
- *Strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one procedure to another;*
- *Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;*
- *Provide for timely, efficient, and impartial resolution of insolvencies;*
- *Prevent the improper use of the insolvency system;*
- *Prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments.*
- *Provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information;*
- *Recognize existing creditor rights and respect the priority of claims with a predictable and established process; and*
- *Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.*

Additionally, the *UNCITRAL Legislative Guide on Insolvency Law*[11] sets forth the following key objectives:

> *1. In order to establish and develop an effective insolvency law, the following key objectives should be considered:*
>
> *(a) Provide certainty in the market to promote economic stability and growth;*
>
> *(b) Maximize value of assets;*
>
> *(c) Strike a balance between liquidation and reorganization;*
>
> *(d) Ensure equitable treatment of similarly situated creditors;*
>
> *(e) Provide for timely, efficient and impartial resolution of insolvency;*
>
> *(f) Preserve the insolvency estate to allow equitable distribution to creditors;*
>
> *(g) Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information;*
>
> *and*

[10] *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes* (2021)(International Bank for Reconstruction and Development / The World Bank), C 1: *Legal Framework for Insolvency.*

[11] *UNCITRAL Legislative Guide on Insolvency Law,* (United Nations. 2005), UN Publication No. E.05.V.10 ISBN 92-1-133736- 4. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

(h) Recognize existing creditors rights and establish clear rules for ranking of priority claims.

2. The insolvency law should include provisions addressing both reorganization and liquidation of a debtor.

3. The insolvency law should recognize rights and claims arising under law other than the insolvency law, whether domestic or foreign, except to the extent of any express limitation set forth in the insolvency law.

4. The insolvency law should specify that where a security interest is effective and enforceable under law other than the insolvency law, it will be recognized in insolvency proceedings as effective and enforceable.

5. The insolvency law should include a modern, harmonized, and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended.

KEY ATTRIBUTES: WHAT AN INSOLVENCY SYSTEM SHOULD CONTAIN

While it is relatively easy to articulate generalized goals for an insolvency system, it is quite another to delineate the actual necessary contents of a law that will achieve these goals.

Because financial failure can affect any industry and enterprises from almost any sector can be subject to an insolvency proceeding (except for banks, insurance and financial institutions which are typically subject their own specific regulatory regimes), insolvency law frameworks must be sufficiently broad and general to handle such a wide variety of commercial activity.[12] And because an insolvency law framework stands at the intersection of other substantive (non-insolvency) laws, particularly mortgage, secured transactions and other credit-related laws, the insolvency law will need to embody carefully-rafted balances of rights and responsibilities throughout its provisions.

To achieve the above-stated goals, an insolvency law by its nature requires a comprehensive statue that generally needs to include the following key attributes:[13]

- Eligibility criteria designed to filter out inappropriate petitions.
- Balanced rules enabling creditor-initiated petitions.
- Penalties for false bankruptcy petitions and false claims.
- Sufficient protection of assets from loss or dissipation.
- Sufficient access to debtor information and transparency.
- Penalties for withholding or submitting false information.
- Efficient processes with reasonable deadlines.
- Role of administrator with appropriate expertise.
- Role of court and institutions appropriate expertise.
- Incentivized administrator compensation.
- Sufficient creditor role and power / recognition of a creditors committee.
- Sufficient moratorium or "automatic stay" against premature dismemberment.
- Provisions assuring continued ordinary-course business operations.
- Protection of secured claims during moratorium period.
- Streamlined claim submission procedures.
- Effective claim verification objection procedures.
- Sufficient avoidance actions for fraudulent, improper or preferential conveyances.
- Effective provisions for preservation or elimination of contracts.
- Adequate notice procedure for sale of assets and adequate opportunity to object.

[12] Insolvency laws are generally complex and lengthy, typically ranging from 80 - 400 pages in length.

[13] Adaptation of M. Stevanovich, "*Key Elements BK Law*" unpublished list for proposed bankruptcy legislation (dated November 6, 2001) and of *"RawFactors2"* unpublished list of attributes (dated January 23, 2002). A partial analysis of the presence and the degree of effectiveness of the listed attributes within the current law was performed in this analysis.

- Provisions for abandonment or foreclosure in satisfaction of secured claims.
- Clear distribution priority scheme recognizes appropriate claim rank.
- Respect for secured, administrative and special status claims.
- Equal treatment for foreign or domestic claims and claimants.
- Appropriate treatment of employee wage claims and social protection.
- Appropriate treatment of tax and government claims.
- Clear provisions governing the accumulation of interest/penalties.
- Streamlined business rescue / reorganization scheme
- Appropriate roles for existing management in reorganizations.
- Mechanism for restriction on or removal of management where appropriate.
- Clear rules for submitting a reorganization plan.
- Creditor reorganization plans or input permitted.
- Appropriate and reasonable deadlines for plan submission.
- Provisions for obtaining deadline extensions where appropriate.
- Provision for termination of reorganization when success is no longer likely.
- Rational classification of claims and voting on reorganization plans.
- Provision permitting the overrule of dissenting creditors.
- Priority and rank of claims established in non-bankruptcy law respected.
- Minimum protection afforded to overruled minority creditors.
- Provision to allow for reorganization financing and priority.
- Enhanced priority for any reorganization financing.
- Permitted use of debt-to-equity conversion and other key reorganization tools.
- Provisions for plan modification and cure of defaults.
- Provision for conversion from reorganization to liquidation.
- Discharge of debtor obligations upon case conclusion.
- Provisions for streamlined case closure.
- Cross-border insolvency provisions (UNCITRAL Model Law).
- Non-discrimination foreign creditors and claims.
- Tax neutrality and exemption from certain other regulatory requirements.
- Clear finality of proceedings.
- Standard of care/liability of the administrator/trustee.
- Suspension of limitations periods during moratorium periods.
- Claims of guarantors against creditors unaffected by proceedings.

This is by no means an entirely exhaustive list. New provisions are needed as economic circumstances change and evolve, including specified provisions for micro and small businesses, provisions for consolidated administration of group enterprise insolvencies and special provisions addressing the aftermath of specific crises, disasters or occurrences, such as natural disasters (earthquake, hurricane) or the COVID-19 pandemic. The listed attributes serve as a useful guidepost[14] for consideration and evaluation of the Caribbean laws in this review.

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[14] Qualitative analysis beyond binary "yes/no" presence or absence of an attribute is highly subjective in nature and usually requires assessment of how a provision is applied by practitioners and courts in actual practice. Moreover, how provisions work in conjunction with each other is an important consideration, as the absence of a provision in one place may be remedied or mitigated by the presence of another elsewhere in the law. Virtually any attempt to perform a qualitative analysis of an insolvency law is to some extent limited when performed from a distance as an academic desk review. Notwithstanding, this analysis was performed drawing from experience on how similar provisions have worked in other countries with primary emphasis on items of highest priority and potential reform impact.

I. STATUS QUO

The following chart summarizes basic information on the current insolvency regimes compiled from a number of sources, primarily from official statutes obtained directly from government websites and from interviews and other secondary sources including the World Bank Doing Business 2020 surveys for Resolving Insolvency.[15] The laws of fifteen Caribbean states reviewed fall into three broad categories: Canadian based, UK based, and Civil Law based.

SUMMARIZED OVERVIEW OF STATUS QUO

			LEGAL FRAMEWORK				WB PRESUMPTION	
		WB RANK	Date of Legislation	Last Amended	New Law Expected	Base / Influence	PROCESS ASSUMED BY WB	PRESUMED RESOLUTION
1	Antigua & Barbuda	132	1889	2020		UK	F/L	Peacemeal Sale
2	Bahamas	71	1870	2012	X	UK	R	Going Concern
3	Barbados	35		2002		CAN	R	Going Concern
4	Belize	91		2000		UK	R	Going Concern
5	Dominica	136	1889	1991		UK	F	Peacemeal Sale
6	Dominican Republic	124	1956	2015		Civil	F/L	Peacemeal Sale
7	Grenada	168		2016		CAN	NP	None
8	Guyana	163	1901	2012		UK	R	Peacemeal Sale
9	Haiti	168	-	-		Civil	NP	None
10	Jamaica	34	1880	2014	X	CAN	R	Going Concern
11	Saint Christopher & Nevis	168		2013		CAN	NP	None
12	Saint Lucia (draft)	131		Pending	X	CAN	NP	None
13	Saint Vincent & the Grenadines	168		2007		CAN	NP	None
14	Surinam	139	1935	1986		Dutch	L	Peacemeal Sale
15	Trinidad & Tobago	83		2007		CAN	R	Peacemeal Sale

		KEY PROCEDURES						TYPES						OFF
		Reorganizations	Liquidations	Receiverships	Foreclosure	Composition	Other	Corporate	Small Business	Summary Adminstration	Fast Track	Personal	International	Supervisor of Insolvency
1	Antigua & Barbuda	X	X		X			X				X		
2	Bahamas	X	X	X				X		X		X	X	
3	Barbados	X	X	X				X		X		X	X	X
4	Belize	X	X	X				X		X		X		
5	Dominica	X	X		X			X				X		
6	Dominican Republic	X	X		X			X		X		X	X	
7	Grenada	X	X					X		X		X	X	X
8	Guyana	X	X	X				X		X		X		
9	Haiti	-	-	-	-	-	-	-	-	-	-	-	-	-
10	Jamaica	X	X	X				X		X		X	X	X
11	Saint Christopher & Nevis		X											X
12	Saint Lucia (draft)	X	X	X						X		X	X	X
13	Saint Vincent & the Grenadines	X	X					X		X		X	X	X
14	Surinam		X											
15	Trinidad & Tobago	X	X	X				X		X		X	X	X

Key:
R - Receivership
L - Liquidation
F - Foreclosure
NP - No Practice

Note: The "WB Presumption" section refers to the presumed manner in which the World Bank Doing Business hypothetical debt resolution business case was deemed most likely to be conducted under the given country's law, as it is presented within the World Bank's Doing Business 2020 report for that specific country. "Process Assumed" refers to the type of procedure likely to be used to process the hypothetical case, while the "Presumed Outcome" refers to the assumed hypothetical outcome achieved as a result of using that procedure. See: World Bank Doing Business methodology for Resolving Insolvency: https://www.doingbusiness.org/en/methodology/resolving-insolvency

RECENT REFORM MEASURES

Over the past several years, a number of countries have taken measures to improve their insolvency systems. Six have established public offices responsible for the oversight or administration of insolvency cases: Trinidad & Tobago (2015), St. Christophers and Nevis (2015), St. Vincent & The Grenadines (2016); Jamaica (2016), Grenada (2018) and Barbados (2002), with another proposed in a draft law (St. Lucia). Seven have added "business rescue" reorganization procedures: Antigua and Barbuda (2020), Dominican Republic (2018), Grenada (2018), Jamaica (2016), St. Vincent and the Grenadines (2016), St. Christophers and Nevis (2015), Trinidad & Tobago (2015). A number of initiatives to revise and up-grade insolvency legislation are in progress. These include St. Lucia (new amendments "submitted to parliament"*)*, Jamaica (new draft "submitted to cabinet") and the Bahamas

[15] *Unavailability of case statistics.* We experienced difficulty in obtaining sufficient caseload statistics for insolvency cases to make cross-jurisdiction comparison possible. Nor were non-insolvency case statistics (such as receiverships and foreclosure) available making cross-method comparison impossible. The lack of a main point-person in each jurisdiction encumbered our ability to seek out and locate relevant statistics that might be available within various ministries during the limited project time frame.

(new law "expected soon"). Additionally, we are area of at least one regional reform project[16] that currently endeavors to upgrade the Bankruptcy and Insolvency Acts of Barbados, Trinidad and Tobago and St. Vincent and the Grenadines.

II. GAP ANALYSIS

This review has revealed a number of gap findings generated from three main areas: (1) Institutional (capacity to detect and address system inadequacies); (2) Legal Framework (specific observations and comments derived from the laws and regulations); and (3) the *World Bank Doing Business* indicators for "Resolving Insolvency" (deficiencies identified in the low scores on specific insolvency indicators). Not surprisingly, there is a certain amount of overlap in the deficiencies identified.

There are four major systemic drivers of an effective insolvency system:

- **Legal Framework** that is properly balanced.
- **Implementing Institutions** that are effectively enabled.
- **Creditors** that are adequately empowered.
- **Professionals** that are competent and adequately compensated.

Once properly in place, the balance of powers and incentives operates to naturally move cases forward in a fair and equitable manner**.** The proper empowerment of creditors and adequate incentives for professionals (particularly Administrators) are addressed within the legal framework. As for effectively enabled implementing institutions, it is vitally important to establish the capacity to identify, consider, and develop self-initiated legal framework enhancements that address gaps and concerns in a manner that comports with international standards and emerging modern practices. This review is prepared with this in mind in the prioritization of findings.

EVALUATION CRITERIA

Evaluation of the legislative frameworks governing insolvency presented here utilized three sets of standards basic guideposts for evaluation:

(1) *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes* (2021);[17]
(2) *UNCITRAL Legislative Guide on Insolvency Law;*[18] and
(3) the author's own proprietary checklist.

The standards were used to identify broad, overarching patterns of strengths and deficiencies that may or may not be recognized at a regional level. Since the laws fall into three broad base categories (Canadian, UK and Civil Law) identification common deficiencies may be useful for cooperative efforts to develop harmonized and regional solutions.

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[16] IMPACT Justice (*Improved Access to Justice in the Caribbean)* is an eight-year regional civil society justice sector reform project funded by the Government of Canada implemented from within the Caribbean Law Institute Centre, Faculty of Law, The University of the West Indies (UWI), Cave Hill Campus since 2014.

[17] *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes* (2021)(International Bank for Reconstruction and Development - The World Bank) https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf

[18] *UNCITRAL Legislative Guide on Insolvency Law,* (United Nations 2005), UN Publication No. E.05.V.10 ISBN 92-1-133736- 4. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

A. INSTITUTIONAL CAPACITY

The importance of institutional capacity in the effectiveness of an insolvency system cannot be overstated:

> *An insolvency law is a part of an overall commercial legal system and is heavily reliant for its proper application not only on a well-developed commercial legal system, but also on a well-developed institutional framework for administration of the law. The choices made in developing or reforming an insolvency law will therefore need to be closely linked to the capacities of existing institutions. The insolvency system will only be effective if the courts and officials responsible for its implementation have the necessary capacity to provide the most efficient, timely and fair outcome to those for whose benefit an insolvency regime exists. If that institutional capacity does not already exist, it is highly desirable that reform of the insolvency law be accompanied by institutional reform, where the costs of establishing and maintaining the necessary institutional framework are weighed against the benefits of providing a system that is efficient and effective and in which the public has confidence.*

UNCITRAL Legislative Guide on Insolvency Law, at 33.

It is impossible to comprehensively assess the level, adequacy and effectiveness of institutional capacity in each of the fifteen Caribbean countries surveyed from a far without the direct observation, interview of participants and stakeholders and/or review of caseload statistics over a sufficient period of time, none of which was possible his review. Nonetheless, certain deficiencies in institutional capacity became clear during our review. They are discussed below.

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1. OFFICIAL AWARENESS AND PRIORITY FOR INSOLVENCY REFORM

Awareness of insolvency deficiencies among government officials was lacking in a number of Caribbean countries that are part of this survey.

Critical to any reform effort is the understanding within appropriate levels of government of the critical need for reform in this area. The current study was initiated by CAIPA based upon the recognition that the relatively low scores received by many of the fifteen CAIPA countries in the World Bank Doing Business survey for “Resolving Insolvency” can negatively impact their ability to attract investment. Moreover, with the current Covid-19 pandemic business downturn, the subject of debt-resolution and insolvency system functioning should be an important governmental concern.

Yet, in many of the countries that are part of this survey we were unable to locate and contact a key responsible government official with oversight authority to address our project inquiries, answer questions regarding procedures or discuss emerging findings. This in itself is indicative of a lack of attention at a sufficiently high level of the current state of systemic insolvency issues. The lack of attention to insolvency reform at the appropriate level of government is in itself a serious drawback, as legislative improvements typically require official sponsorship for enactment into law.

Where official attention to insolvency matters is indeed lacking, some level of preliminary “awareness and outreach” directed toward high-level government officials regarding the importance of insolvency reform is indispensable to create the right environment for reform to become a reality. The right official needs to engage on the issues, receive and act upon suggested improvements by the donor and expert communities, practitioners, stakeholders and the public at large and to generate a heightened level of interest in making the needed changes. This is particularly critical for countries that received the lowest of scores in the World Bank rankings, as these rankings stand as a broadly publicized negative marker for potential investment in those countries. Finding and alerting the right government counterparts is essential to any program of reform.

Recommendation: Development and implementation of a preliminary “awareness and outreach” program directed toward high-level government officials on the need for insolvency reform, involving donor and expert communities, practitioners, stakeholders and the public at large.

Estimated Cost: $0 - $75,000 (each country)

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2. SUPERVISOR OF INSOLVENCY OR DESIGNATED OFFICIAL

Less than half of the countries subject to this review have an Office of Supervisor of Insolvency or other overarching institutional body with regulatory oversight over the insolvency system.

All countries should have at least one specifically identified official serving the designated authority over the insolvency system, if not the establishment of an entire independent supervisory agency. A permanent government body or, at minimum, a ministry designee with authority to: (1) monitor overall systemic functioning (system statistics, stakeholder’s outreach; (2) study current developments and potential solutions regionally and globally (professional regulator network); and (3) propose and drive the enactment of any needed amendments. The official capacity to conduct periodic technical and policy reviews to initiate changes going forward as new circumstances require is vital to fair, effective and efficient insolvency system functioning.

Only a few countries within this survey currently have instituted public offices (typically called “Office of Supervision”) responsible for the general administration of the insolvency system: Granada (2018), Jamaica (2016), St. Vincent and the Grenadines (2016), St. Christopher and Nevis (2015), Trinidad and Tobago (2015) and Barbados (2002), while St. Lucia has proposed such in a new draft law currently under consideration. While some countries indeed had well-developed government, agencies staffed by officials (a recommended practice), the designation of designation of an official within an executive branch ministry would be a cost-effective interim measure. As case volumes increase the role of a single designated official’s role can be expanded according to needs, and, when cost-justified, perhaps evolve into a full government agency. Most likely to reside in an executive branch agency (Ministry of Justice, Economy or Finance) or other appropriate division of government.

The difficulty in finding a key contact for purposes of this study serves as evidence of the need for such a centralized authority with at least nominal responsibility over the insolvency system functioning. It was in many cases impossible to gather even basic statistics on insolvency cases, status of practitioners. This lack of information severely hampered this study ability to obtain a sense of the usage and balance between relative pathways for the resolution of debt (receivership v. business rescue) which is crucial to understating what needs to be fine-tuned to achieve this balance.

The scope of responsibilities can include:

- Gathering of insolvency statistics.
- Reporting on the status of the insolvency system functioning.
- Evaluation of the legal framework (every 5 years).
- Convening stakeholder groups to determine what improvements need to be made.
- Conduct public information and awareness efforts.
- Complaints against professional misconduct.
- Standing to be heard in court and object to specific cases.
- Officially promulgate professional ethical standards.
- Licensing of Practitioners.

- Maintenance of the official list of practitioners (or banned/license revoked).
- Independent review of professional practitioner reports, accounts of receipts and disbursements and final statements.
- Maintain public records of proposals insolvency filings and notices sent to the supervisor.
- Propose and set professional training standards.
- Conduct or oversight of professional training sessions.

In addition, the *World Bank Principles (2021),* D 7.1: *Role of Regulatory or Supervisory Bodies* cite the need for a regulatory body with the following attributes:

The bodies responsible for regulating or supervising insolvency representatives should:

- *Be independent of individual representatives;*
- *Set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency, and accountability; and*
- *Have appropriate powers and resources to enable them to discharge their functions, duties, and responsibilities effectively.*

A feasibility study in each country should be performed to determine whether that country would benefit from the establishment of an Office of Supervision over insolvency as such a recommendation can only be proposed after a full and objective evaluation, including cost-benefit, based upon actual caseload statistics and other volume and scale considerations.

Nonetheless, as stated above, if the establishment of an entire independent supervisory agency is not feasible, all countries should have at least one designated government official to serve as the primary identifiable authority over the insolvency system, with responsibility for monitoring overall system functioning (system statistics, stakeholder's outreach), studying current developments and potential solutions regionally and globally, serving as the country's official delegate to periodic regional insolvency supervisor conferences (*Section 3 below*) and network of regional insolvency supervisors (*Section 4 below*), and serving as the main official focal point for the conduct of periodic technical and policy reviews (*Section 5 below*). For those countries who have established such a unit, an operation efficiency review might be suggested to determine if the unit could benefit from automation (case management software) to leverage the existing oversight capacity.

Recommendation 1: Perform a study to determine the feasibility of establishing an Office of Supervision with regulatory oversight authority over the proper functioning of the insolvency system.

Estimated Cost: $35,000 - $60,000 (each country)

Recommendation 2: Establish an Office of Supervision with enumerated powers to monitor, study, oversee, and advance the effectiveness and efficiency of the insolvency system.

Estimated Cost: $250,000 - $4 million (each country)

Recommendation 3 (alternatively): Designate at least one responsible government official possessing sufficient supervisory authority on insolvency matters.

Estimated Cost: $40,000 - $95,000 (each country)

Case Study: Offices of Supervision in the Caribbean

Barbados. The Office of the Supervisor of Insolvency[1] was established by the *Bankruptcy and Insolvency Act* of Barbados in 2002. The law provides Supervisor of Insolvency with the mandate to "supervise the administration of estates and matters to which the Act applies" and has, among other powers, a general supervisory function over all estates in bankruptcy, commercial reorganizations, proposals and receivership; issues licenses qualified trustees; maintains a public record of all bankruptcy and insolvency proceedings, conducts investigations where there are indications of an offence having been committed and may intervene in any matter or proceedings in Court, where the Supervisor considers it expedient to do so, as if it were a party in the proceedings.

Trinidad & Tobago. Similarly, the Trinidad and Tobago established the Office of the Supervisor of Insolvency[1] under Trinidad and Tobago's *Bankruptcy and Insolvency Act* in June 2014. This law provides the Supervisor of Insolvency with a similar supervisory mandate as Barbados (described above). The Trinidad and Tobago OSI resides within the Ministry of Finance, and has a staff of four to six, currently comprised of the Supervisor, a Senior Legal Officer (currently vacant), two Insolvency Analysts, one Business Operations Assistant and one Temporary Clerk. The stated budget allocation is estimated at $4.0 million for fiscal 2020-2021.

St. Vincent and the Grenadines. Additionally, the Office of the Supervisor of Insolvency[1] was established by St. Vincent and the Grenadines' Bankruptcy and Insolvency Act of 2007 with accompanying secondary legislation, the *Bankruptcy and Insolvency Regulations,* were passed in 2015. This law provides the Supervisor of Insolvency with a similar supervisory mandate as Barbados and Trinidad & Tobago (described above) including the express mandate to supervise the administration of all estates and matters to which the Act applies, including a general supervisory function over all estates in bankruptcy, commercial reorganizations, proposals and receiverships. A key role of the Office of Supervisor of Insolvency is to ensure that the administrative processes under the law are carried out in a fair, transparent and effective manner, with appropriate public records and statistics, and jointly with private sector Trustees licensed by the Supervisor of Insolvency, and with the Courts. The regulatory, administrative and supervisory functions of the Office of the Supervisor of Insolvency are derived from statutory law and are carried out independently.

3. PERIODIC REGIONAL CONFERENCE OF INSOLVENCY SUPERVISORS

A regional gathering of insolvency supervisors should be convened in a conference setting to discuss insolvency issues, problems and approaches, common matters affecting the region and potential legislative reforms.

In conjunction with the five-year policy and legislation review suggested below (in Section 5), there should be a regularly held forum for high-level policy and technical discussion among insolvency regulators in the region to discuss developments, identify key issues, current and emerging challenges, deficiencies and gaps in the function of insolvency systems and related laws or regulations, and to explore common approaches and individual and regional solutions. Consensus building on what currently needs to be addressed (or at least the gaining awareness of issues in neighboring countries that might soon affect others) as well as discussion of common approaches and possible regional solutions can be a part of the agenda.

Such a forum would enable problem-solving discussions that result in less divergence in what was once common uniform legislation. The laws of the region appear to contain a collection of separately developed amendments with unnecessarily inconsistent practices and terminology. Periodic regional discussions would encourage common directions and legislative reforms that decrease the likelihood of unnecessary permutations where once-common legislation grows increasingly divergent over time. Better uniformity, where it can be achieved, provides the advantage of enabling the use of case law decisions from neighboring jurisdictions as non-binding guidance. For example, where the *UNCITRAL Model Law on Cross-Border Insolvency* (Discussed in *Section G.1.*

below) is adopted the jurisprudence of other jurisdictions that have also enacted this model can provide useful non-binding illumination of how provisions have been interpreted in practice.)

The essential idea is a gathering in the form of a two to three-day conference in a selected city in the region, perhaps held in conjunction with gatherings of international organizations, such as *INSOL - International Association of Restructuring, Insolvency & Bankruptcy Professionals*,[19] which is the leading international insolvency society, with extensive expertise in convening high-level insolvency-related roundtable and professional conferences throughout the world.

Recommendation: Convene a regional conference of insolvency supervisors to discuss and consider new developments, regional and local issues and possible legislative amendments.

Estimated Cost: $65,000 - $150,000 (combined annual cost)

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4. PERMANENT REGIONAL NETWORK OF INSOLVENCY SUPERVISORS

Establish a permanent network of regional insolvency supervisors or key insolvency officials to support more immediate communications in the interim between Regional Insolvency Supervisor Conferences.

A permanent network of regional insolvency supervisors or insolvency officials should be established for supervisors to confer and communicate more directly, formally or informally, on situations that arise in the day-to-day administration and functioning of the insolvency system in the periods between the periodic regional supervisor conferences. Issues arise in daily practice that might benefit from immediate peer-to-peer discussion. Currently no formal protocol or mechanism exists to facilitate such a discussion. Such a formalized network would enable such immediate peer-to-peer consultations.

The mechanics of this can be as simple as an updated email list, or group established on one of the various communication platforms (skype, zoom, viber, whatspp). It can optionally encompass a formal letter agreement or written protocol to converse monthly, bi-monthly, or as frequently as is practical.

Recommendation: Establish a permanent professional network of regional insolvency supervisors or key insolvency officials to stay currently apprised of new developments, regional and local issues as they arise.

Estimated Cost: $0 - $5,000 (combined annual cost)

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5. PERIODIC (FIVE YEAR) OFFICIAL REVIEW MANDATED BY LAW

A policy and technical review in each country is needed to consider upgrades that keep pace with the relevant base legislation countries, current modern trends and evolving practices. Such a review is recommended at five-year intervals.

As detailed in *Section B* (below), Caribbean laws are generally outdated and in need of modernization for effectiveness in today's world. Lacking provisions and tools that are part of emerging standards of insolvency practice, they are not properly aligned to address modern economic circumstances, particularly in the area of business rescue. Currently the Caribbean laws are a collection of predominantly Canadian, UK and civil code-based statutes that have not kept pace with changes in base county legislation, all of which is detailed in the following sections of this Report.

[19] *INSOL International* is a world-wide federation of national associations of accountants and lawyers who specialize in turnaround and insolvency. INSOL's vision is to be the global association for restructuring and insolvency professionals operating in every country involved in influencing global restructuring and insolvency practice and policy. https://www.insol.org

Economies change. A periodic comprehensive review, performed at five-year intervals, is needed to determine what aspects of the insolvency system are in need of repair. This review can be modeled on the participative stakeholder input methodology used by the UK, Canada and other countries to regularly evaluate the functioning of their insolvency laws. Canada, for example, has a statutorily mandated five-year periodic review of both the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*,[20] where a government body, *Industry Canada,*[21] conducts public consultations to obtain stakeholder input on what needs amending.

See Annex A: *Amendments and Improvements in the UK and Canadian Laws* for an in-depth description of the reviews that Canada and the UK performed prior to amending their own insolvency laws.

Caribbean countries should strongly consider what amendments were adopted in countries of their base legislation, particularly Canada and the UK, to determine whether they are relevant to their own economies and circumstances. Quite simply, if Canada or the UK felt the need to address a gap in their own legislation, the same or similar gap might need to be addressed locally.

As complex area of comprehensive economic legislation, the reform of an insolvency law generally requires the convening of an official multidisciplinary panel of experts: a high-level expert commission representative of the profession and affected stakeholders is necessary to study and recommend changes:

- Bankruptcy law is at the juncture/conflict point of a number of substantive laws (secured transactions, mortgage, property, employment, securities) and involve inherent stakeholder compromises.
- Balance and division of procedural responsibilities, powers, rights and duties are re-defined and redistributed/adjusted.
- Matters of scale require the study of the precise values to be included within the provisions (thresholds, penalties, incentives) which requires specific consideration of local economy to be relevant and workable.
- Consideration of specific local economic/societal/cultural concerns (key industries, seafaring, tourism, mining) and keeping special provisions consistent with international best practices.

The process itself is an absolute necessity for obtaining stakeholder buy-in on compromises that are always inherent in the crafting of legislation on such a wide-ranging and complex subject that intersects with (and bends) many other non-insolvency laws. There are no real shortcuts to this process.

Recommendation: Conduct a comprehensive policy and technical review of the functioning of the insolvency system on a regular periodic (five-year) basis to identify legislative gaps, emerging issues and inefficiencies to generate recommendations for legislative amendments.

Estimated Cost: $150,000 - $550,000+ (each country)

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[20] The 1997 amendments to section 216 of the *Bankruptcy and Insolvency Act (BIA)* and section 22 of the *Companies' Creditors Arrangement Act (CCAA)* included a provision that both Acts would be referred to a Committee of Parliament for review five years after coming into force.

[21] *Innovation, Science and Economic Development Canada* (ISED) is the Canadian federal institution that works with Canadians across the country in all areas of the economy to improve conditions for investment, enhance Canada's innovation performance, increase Canada's share of global trade and build a fair, efficient and competitive marketplace. https://www.ic.gc.ca/eic/site/icgc.nsf/eng/home

B. LEGAL FRAMEWORK UPGRADE

IMMEDIATE UPDATE OF LAWS TO MODERN STANDARDS AND CONDITIONS

Laws in the Caribbean need significant updating to conform to modern standards and current economic conditions. Aside from the regular five-year periodic review recommended in *Section A.5* (above), an immediate update to most Caribbean laws reviewed is recommended. Most are not aligned for modern (now and future) digital economy, modern financial and post-covid world.

- Most are based on old versions of UK and Canadian models.
- None are currently updated with the improvements made to laws they were based on.
- Only one exceeded its base legislation with an entirely new law.
- Most require the enhancement and strengthening of business rescue provisions.
- Most require improved creditor participation measures.
- Many have a misalignment of incentives that prevent business rescue.
- Virtually all require technical amendments to conform to current international standards.

Outdated laws need to be updated for modern times. With the notable exception of Antigua and Barbuda,[22] the laws in the region are generally out of date and need revision to reflect current circumstances, modern commercial practices, and international best practices. Most (essentially all but three) of the fifteen Caribbean laws are based on old versions of UK and Canadian models. Amendments made over time appear to be piecemeal in nature, without notable coordination or harmonization among countries regionally and were apparently done without reference to more current versions of the legislation upon which these laws were originally based. Those based upon UK and Canadian laws essentially adopted legacy versions without the many subsequent upgrades, leaving a patchwork of laws containing varying degrees of amendment.

IMPORTANT NOTE: The newly amended Antigua and Barbuda *Companies Act* (2020) came into force July 15, 2020. It contains entirely new insolvency provisions and is, in essence, a new insolvency law that addresses a majority of the gaps identified below. The scores captured by the *World Bank Doing Business 2020* indicators displayed below (and elsewhere throughout this report) reflect the evaluation of the old law prior to the recent July 2020 amendments.

In the intervening years, both the UK and Canadian insolvency laws have undergone significant amendment based on recommendations from a number of formally commissioned in-depth studies performed by special government-appointed expert commissions (i.e. UK's *Cork Report*,[23] 1982; Canada's *Tassé Report*,[24]1970, both discussed in *Annex A* to this Report). These comprehensive reviews were followed by a flow of subsequent periodic studies resulting in amendments that extend through to the present. **Revisions that both Canada and the UK have adopted over time echo a global trend moving toward a business rescue culture by their addition of enhanced restructuring and reorganization tools to their existing legal frameworks.** This is particularly evidenced by the most recent UK amendments, *The Corporate Insolvency and Governance Act (CIG*

[22] Antigua and Barbuda amended its Companies Act in 2020 to include modern reorganization and creditor protection provisions. *Companies Act (Amended) 2020*, Act No. 17 of 2020 (Official Gazette Vol. XL. No. 51 dated 15 July 2020). The date of enactment likely resulted in the missing of the cutoff for consideration in the 2020 World Bank Doing Business report. *http://admin.theiguides.org/Media/Documents/Companies-Amendment-Act-2020.pdf*

[23] *UK Trade and Industry Committee, Cork Report: administration and CVA*, UK Parliament Publications, (December 20, 1999) (containing a synopsis of the recent history of UK insolvency reforms including the Cork Report.) *https://publications.parliament.uk/pa/cm199900/cmselect/cmtrdind/112/11206.htm#note1*

[24] R. Tassé, *Report of the Study Committee on Bankruptcy and Insolvency Legislation,* (Ottawa: Study Committee on Bankruptcy and Insolvency Legislation, 1970) (the "Tassé Report"). https://publications.gc.ca/site/archivee-archived.html?url=https://publications.gc.ca/collections/collection_2021/isde-ised/RG62-1-1970-eng.pdf

Act),[25] which came into force on June 26, 2020, which add, among other things, an entirely new "Restructuring Plan" containing provisions inspired by US Chapter 11 reorganization procedures.[26]

Canada and the UK regularly evaluate and improve their laws. Canada and the UK both have formal processes for regular evaluation and amendment of their laws to keep up with changing times. The synopsis presented in *Annex A* illustrates the Canadian and UK processes of evaluation and the formal review commissions that culminated in amended insolvency laws with special attention to the newly enacted CIG Act, which can be useful for considering amendments to Caribbean laws.

See: Annex A - Amendments and Improvements in UK and Canadian Law.

In sum, the Caribbean with laws that are based upon UK model do not reflect the significant updates that the UK itself deemed necessary to adopt for modernization consistent with changing commercial circumstances and international norms. As such, they remain generally less equipped to address business failure in a modern commercial economy, particularly with respect to the utilization of modern methods for business rescue. *Specific deficiencies in business rescue provisions, are discussed in detail in the following sections.* (*See: Section C and D below*.)

A comprehensive "policy and technical review" is needed in each country to consider legislative upgrades to keep pace with modern practices and standards as well as the changes in base-country legislation by convening of an official government committee[27] or multidisciplinary stakeholder expert group to perform the needed review.

Recommendation: Establishment of an official government committee or multidisciplinary stakeholder expert group for a comprehensive policy and technical review of the current functioning of the insolvency law and practice with the goal of proposing amendments for enactment.

Estimated Cost: $75,000 - $150,000 (each country)

C. BUSINESS RESCUE: GENERAL DEFICIENCIES

BUSINESS RESCUE REORGANIZATION PROVISIONS INADEQUATE

Business Rescue reorganization provisions are outdated and need to be strengthened and modernized.

Business Rescue: What it is and why it is necessary. Business Rescue is generally viewed as a more desirable alternative to business closures and liquidation. It contemplates continued business operations, the possibility of job preservation, and a greater recovery for creditors than through business closure and liquidation. Business rescue should only be attempted where there is *a realistic possibility* of recovery. There must be a real, operational underlying business to reorganize. In a significant percentage of cases this will not be the situation, and some form of business closure and liquidation will be the most likely course of action to maximize the value of the remaining assets.

Most business rescue methodologies involve a written document (called a "plan," "proposal," "scheme of arrangement") that essentially proposes how creditors will be paid and when. The plan is brought to

[25] *UK Public General Acts* (2020)(online UK legislation) https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

[26] "The permanent insolvency measures contained in the Act (previously announced by the Government, and in development before Covid-19) mark a major change in UK insolvency law towards a business rescue culture more in line with U.S. insolvency (chapter 11)." A. Shalchi and L. Conway, *New business support measures: Corporate Insolvency and Governance Act 2020 (UK House of Commons Library Research Briefing, 1 July 2021)(The House of Commons Library is a research and information service based in the UK Parliament.) https://researchbriefings.files.parliament.uk/documents/CBP-8971/CBP-8971.pdf*

[27] Consultation principles that UK government departments use for engaging stakeholders when developing policy and legislation are published online. http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf

creditors for their consideration and vote. The plan must be accepted by the requisite majority creditors according to provisions of the governing law. If the creditors do not vote in favor of the plan, the most likely result will be the conversion of the proceedings into a liquidation governed by the bankruptcy law. Obviously, in order to gain creditor acceptance, the plan will need to propose payment that is more attractive to creditors than the alternative of liquidation.

The *UNCITRAL Legislative Guide on Insolvency Law,*[28]states the purpose of a reorganization plan as follows:

> *The purpose of reorganization is to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers. With different constituents involved in reorganization proceedings, each may have different views of how the various objectives can best be achieved.*

The World Bank in its *Doing Business Resolving Insolvency*[29]*"Good Practices," Establishing Effective Reorganization Proceedings*, stated:

> *The highest recovery rates are recorded in economies where reorganization is the most common insolvency proceeding. Reorganization aims to restore the financial well-being and viability of a debtor's business so that the business can continue to operate through means that may include debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern. The ultimate purpose is to allow the debtor to overcome its financial difficulties and resume or continue its business operations.*

Immediate need for modernization of business rescue provisions. Our evaluation of the currently existing business rescue provisions with the laws of the Caribbean subject to this review revealed numerous specific deficiencies (detailed below) that, when taken together, indicate an overall inadequacy for modern challenges. Review of the textual provisions of laws themselves reveal old, outdated substandard mechanisms that seriously diminish likelihood of accomplishing successful business rescues in instances where businesses could be saved. As shown in the enumerated findings below, most [30]do not reflect modern "good practices" prescribed by the *World Bank Principles*[31] or the *UNCITRAL Legislative Guide*[32] and reveal specific gaps that impede the use of business rescue. Some countries appear to have long-standing non-insolvency traditions (receivership and foreclosure) that, while efficient, serve as disincentives for creditor participation in business rescue efforts. There is a need for more powerful reorganization provisions, streamlined procedures for micro and small businesses, provisions enabling non-bankruptcy "out of court workouts," and/or other easy-to-implement cost-effective tools to save businesses. Even those laws that are inspired by the UK model do not reflect any of the critical new business rescue related updates that the UK itself deemed necessary to strengthen and expand its own rescue toolkit.[33] The main conclusion is that business rescue provisions in most the Caribbean laws surveyed need to be

[28] *UNCITRAL Legislative Guide on Insolvency Law*, at 209.

[29] https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/good-practices#Establishing

[30] With the exception of the newly enacted *Antigua and Barbuda Companies Act (amended) 2020*, Act No. 17 of 2020 (Official Gazette Vol. XL. No. 51 dated 15 July 2020).

[31] *World Bank Principles (2021).*

[32] *UNCITRAL Legislative Guide on Insolvency Law.*

[33] The UK enacted the *Corporate Insolvency and Governance Act (CIG Act) 2020* which significantly enhances the UK's business rescue capacity with the addition of a new "Restructuring Plan" that addresses gaps in its own UK Scheme, particularly with the new ability to outvote ("cram-down") an entire dissenting class of creditors and/or shareholders. The CIG Act address a number of existing gaps that are also prevalent in most Caribbean laws in this review including: the addition of new moratorium to address inadequacies in keeping assets in place to facilitate the development of a rescue plan; ban on *ipso facto* clauses to prevent fatal disruption in business relations; provisions that maintain provision of essential goods and services; and new "cramdown" provisions for dealing with dissenting hold-out creditors and entire classes of creditors. As such it can be used as a guide for necessary Caribbean reforms. *The Corporate Insolvency and Governance Act (2020) UK Public General Acts.* https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

significantly revised and updated to be effective. A number of specific technical amendments to remedy deficiencies in business rescue regimes are discussed in the following section. *See: Section D (below).*

Recommendation: Revision of business rescue provisions to meet modern standards, local and regional relevance, that reflect all necessary upgrades that the UK and Canada have already enacted to enhance their business rescue capacities.

Cost: Unknown [34] (Cost involved in proposing and enacting technical amendments in each country.)

D. BUSINESS RESCUE: SPECIFIC GAPS

1. OPERATING DURING RESCUE AND DEVELOPMENT OF RESCUE PLAN

The deficiencies discussed below relate to the ability for a business to continue to operate while in a business rescue, where a business is immediately hit from all sides with *ipso facto* clauses (discussed below), the discontinuance of goods and services, the denial of credit or funding (with or without priority), and the lack of a shield from creditor actions such as lawsuits, seizure actions, receivership or foreclosure, all of which make it virtually impossible to plan and execute a business recovery.[35] The *World Bank Principles*, (C.9): *Stabilizing and Sustaining Business Operations,*[36] clarifies the need to stabilize and sustain business operations during insolvency procedures to preserve the possibility of a successful business rescue:

> *The business should be permitted to operate in the ordinary course. Subject to appropriate safeguards, the business should have access to commercially sound forms of financing, including on terms that afford a repayment priority under exceptional circumstances, to enable the debtor to meet its ongoing business needs.*"

The observed gaps in the Caribbean law subject to this review are as follows:

(a) Inadequate moratorium against seizure of assets needed for reorganization. The primary purpose of a moratorium is to provide a protected grace period for enterprises to continue regular operations while exploring options for business rescue and negotiating with creditors on the formulation of a restructuring plan. If critical assets that are necessary for continued business operations are seized or repossessed by secured creditors the debtor will be unable to continue to operate and the reorganization will fail. Even the most modern, equipped business rescue framework will fail in not supported by a proper moratorium against secured creditor action.

The *World Bank Principles*[37]recommend such a moratorium:

> *A stay of actions by secured creditors also should be imposed in liquidation proceedings to enable higher recovery of assets by sale of the entire business or its productive units, and in reorganization proceedings where the collateral is needed for the reorganization. The stay should be of limited, specified duration, strike a proper balance between creditor protection and insolvency proceeding objectives, and provide for relief from the stay by application to the court based on clearly established grounds when the insolvency proceeding objectives or the protection of the secured creditor's interests in its collateral are not achieved. Exceptions to the general rule on a stay of enforcement actions should be limited and clearly defined.*

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[34] The cost will vary from country to country based upon what is necessary to prepare, propose and enact technical amendments to the laws and regulations in each.

[35] The UK enacted the *CIG Act* with provisions that specifically address these gaps in the UK law.

[36] *World Bank Principles* (2021), C 9: *Stabilizing and Sustaining Business Operations.*

[37] *World Bank Principles* (2021), C 5.3: *Provisional Measures and Effects of Commencement.*

In our review of the subject Caribbean laws, we generally encountered stay provisions that were generally inadequate in all but one of the laws.[38] Stay provisions tended to be ambiguous, unclear or altogether contradictory, particularly on the circumstances where a secured asset is protected from seizure and/or sale. Some of the laws that initially appeared to provide a stay of certain actions were later followed by exceptions that seemed altogether contradict the rule.

We note that a number of Caribbean countries have shown a predominant use of non-insolvency creditor-led Receiverships as the main method for dealing with debt resolution. Without an effective moratorium to prevent premature seizure of a critical business asset, this pattern is likely to continue as there is no incentive for secured creditors to participate in a business rescue regardless of the presence of a viable company and a modern restructuring framework.

Case Study: Overreliance on Receivership can result in the underuse of Business Rescue.

The use of non-insolvency receiverships negatively impacts the use of business rescue provisions. The immediate resort by creditors to receivership as the predominant remedy for default operates to remove assets necessary for business reorganization. Where creditor action against the seizure of key business assets are not stayed by a moratorium there simply may no longer be a viable operating business to reorganize. The risk is in premature closure and liquidation -- that some viable companies will have their main assets seized and sold in receivership or foreclosure where business value (and enhanced creditor recovery) would be better preserved through an effective business rescue proceeding. Receiverships are most likely in situations where there is a single creditor with a predominant position (bank with a floating-lien or other mechanism where most or all assets are pledged to a single secured lender). A number of Caribbean countries have relied on traditional bank-led receiverships as the main and most efficient method for dealing with business failure (particularly the Bahamas and Belize) which scored high overall marks despite receiving relatively low scores on the strength of their respective insolvency frameworks. Countries with such well-developed receivership traditions are less likely to utilize the business rescues regimes (whether in the form of proposal, scheme, reorganization plans) where there is no moratorium or other incentive to delay immediate asset seizure. Four countries (Bahamas, Belize, Dominica, and Guyana) are UK based legal regimes that appear to rely heavily on receiverships.

Further evidencing the need to remedy a gap in the current Caribbean laws, particularly those with a UK base, we note that the UK itself has added an automatic moratorium specifically to bolster its new Restructuring procedures by providing a temporary shield from creditor actions to enable plan formulation in its newly enacted UK CIG Act 2020.[39] (The moratorium lasts for an initial 20 business day period, extendable twice for additional 20-day periods without creditor consent; up to 12 months with creditor consent; and beyond 12 months only upon an application to the court.)

A similar clear and comprehensive moratorium is recommended for Caribbean countries.

(b) Inadequate ban on *ipso facto* clauses. For similar reasons as the moratorium discussed above, a ban on "*ipso facto"* clauses is necessary to prevent fatal disruption in contracts for goods and services thwarting the ability of a business to operate while formulating a plan of rescue. *Ipso facto* clauses are contractual provisions automatically trigger negative consequences by the occurrence of a specific contractual event (such as a payment default, petitioning for insolvency, act of bankruptcy) resulting in a change in the relationship. These clauses can automatically trigger a termination clause in a supplier's contract, invoke a high rate of interest, punitive penalty, require "cash only" transactions or other negative consequences that make it virtually impossible to continue to operate or attempt to reorganize.

[38] Antigua and Barbuda's new *Companies Act* provides a comprehensive moratorium in its "automatic stay" in Section 546. See: *Antigua and Barbuda Companies Act (Amended) 2020.*

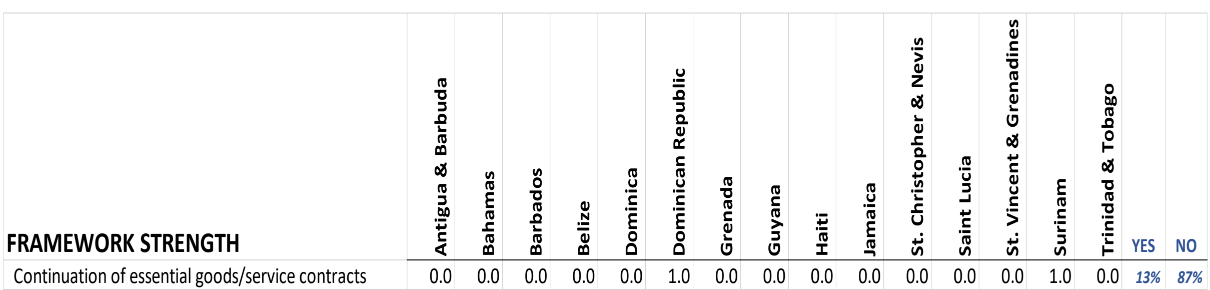
[39] *The Corporate Insolvency and Governance Act (2020) UK Public General Acts.* https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

The UK has recently added a ban on *ipso facto* clauses as a part of its new CIG Act 2020.[40] The CIG Act includes safeguards to ensure that continued supplies are paid for and that suppliers can be relieved of the requirement to supply if it causes them excessive hardship.

In our review we found no law that stated an outright "ban" on *ipso facto* clauses. We did, however, encounter laws containing a number of provisions that appeared to prevent the discontinuance of only certain specified actions; however, it is not entirely clear whether the breadth of these provisions would collectively be sufficient to enable a business rescue without undue hindrance. (Presumably, they would function to the same limited extend as in the UK law prior to the enactment of the outright ban in CIG Act, meaning that the gap left by those provisions were of sufficient concern that the UK felt the need to remedy them with a more comprehensive ban.)

This ban, like the moratorium (discussed above) and the continuation of goods and services (discussed below), is critical for a business to continue to operate in the ordinary course to preserve the possibility of a successful business rescue. A similar clear ban on *ipso facto* clauses is recommended for the countries in this review.

(c) Inadequate provisions for continuation of goods and services. Similar to the ban on *ipso facto* clauses discussed above, the ability to continue certain contracts for goods and services is essential to the debtor's survival during insolvency proceedings and for business rescue. The World Bank Principles[41] have made clear that stabilizing and sustaining business Operations and continuing essential services is critical.



FRAMEWORK STRENGTH	Antigua & Barbuda	Bahamas	Barbados	Belize	Dominica	Dominican Republic	Grenada	Guyana	Haiti	Jamaica	St. Christopher & Nevis	Saint Lucia	St. Vincent & Grenadines	Surinam	Trinidad & Tobago	YES	NO
Continuation of essential goods/service contracts	0.0	0.0	0.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	0.0	13%	87%

The *Resolving Insolvency* Framework matrix from the *World Bank Doing Business Report* above shows 'continuation of essential goods and services' was 87% deficient as only two of the fifteen countries (Dominican Republic and Surinam –none of the UK or Canadian based laws) had sufficient continuity in essential goods and services to warrant a point. Our own review of the Caribbean laws found that most of the laws reviewed had vague, unclear and somewhat contradictory language (or required specific permissions) concerning whether and on what circumstances the debtor was able to continue to procure goods and services.

Like the moratorium and *ipso facto* clauses, the UK CIG Act adds stronger language to prevent disruption in the provision of business goods and services that includes necessary safeguards to ensure that continued prospective supplies are indeed provided with limited exceptions where non-payment causes hardship. We recommend amendments that add these provisions.

Gaps (d), (e) and (f) Reorganization Index factors (below). The *World Bank Doing Business Resolving Insolvency* "Reorganization Index" addresses the next three gaps identified, each of which

[40] *The Corporate Insolvency and Governance Act (2020) UK Public General Acts.* https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

[41] *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes* (2021)(C9: *Stabilizing and Sustaining Business Operations).*

is discussed below. Antigua and Barbuda has remedied all three gaps (d), (e) and (f) in its new *Companies Act (Amended) 2020.*[42]

FRAMEWORK STRENGTH	Antigua & Barbuda	Bahamas	Barbados	Belize	Dominica	Dominican Republic	Grenada	Guyana	Haiti	Jamaica	St. Christopher & Nevis	Saint Lucia	St. Vincent & Grenadines	Surinam	Trinidad & Tobago	YES	NO
REORGANIZATION INDEX (0-3)																	
Which creditors vote on proposed plan	0.0	0.0	1.0	0.0	0.0	0.5	1.0	0.0	0.0	1.0	1.0	0.0	1.0	1.0	1.0	*50%*	*50%*
Requires dissenting at least as much as in liquidation	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	*0%*	*100%*
Creditor classes/vote separately/equal w/in class	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	*0%*	*100%*

(d) Which creditors may vote on a proposed plan. The *World Bank Doing Business* methodology for this indicator measures whether the reorganization plan is voted on only by those creditors whose rights are modified or affected by the plan. (A score of 1 is assigned if yes; a score of 0.5 if *all* creditors vote on the plan, regardless of its impact on their interests; a score of 0 if creditors do not vote on the plan or if reorganization is not available.) In other words, a class of creditors that is to receive full and complete payment on their claims is not compromised or impaired in any way under the proposed plan and therefore has no need to vote on the plan, as it would be automatically presumed (by law) to be in favor. From the above matrix covering these three *Reorganization Index* factors we see that only half had acceptable provisions governing which creditors may vote on a plan. Review of the laws revealed a lack of clarity in whether a law precludes voting by creditor classes that are not impaired by treatment under the proposed plan.[43] Most did not contain an express exclusion of unimpaired creditors, which in all likelihood means they have the right to vote. The addition of such a provision as a technical amendment clarification is recommended.

(e) Opposing creditors receive at minimum equal to or greater than in liquidation. As stated in the *World Bank Principles,*[44] C14.3 *Plan voting and approval*, this basic protection for dissenting creditors is recommended:

> *Plan approval should be based on clear criteria aimed at achieving fairness among similar creditors, recognition of relative priorities, and majority acceptance, while offering opposing creditors or classes a dividend equal to or greater than they would likely receive in a liquidation proceeding.*

World Bank Principles, C14.3 9. Moreover, the *UNCITRAL Legislative Guide on Insolvency Law*[45] states that:

> *[A] dissenting class of creditors that is to be bound to the plan should receive as least as much as they would have received in liquidation proceedings.*

From our review we found none of the laws (other than Antigua and Barbuda) contained the basic minimal protection for dissenting creditors that they would receive at least as much as in a liquidation. This finding is consistent with the with the WB indicator scores displayed in the above matrix for the Caribbean countries surveyed whereby none of the fifteen Caribbean countries received a point for its

[42] Antigua and Barbuda Companies Act (Amended) 2020, Act No. 17 of 2020 (Official Gazette Vol. XL. No. 51 dated 15 July 2020). *http://admin.theiguides.org/Media/Documents/Companies-Amendment-Act-2020.pdf*

[43] The new 2020 Antigua and Barbuda amended law provides that unimpaired classes are deemed to have accepted the plan. See: Section 602 (6). Antigua and Barbuda Companies Act (Amended) 2020. *Id*.

[44] *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes (2021)(*C14.3: Plan voting and approval).

[45] *UNCITRAL Legislative Guide on Insolvency Law*, at 216.

presence. (We must note that the *Doing Business 2020* indicator scores show UK and Canada with this deficiency as well.) The UK CIG Act 2020[46] has included a new provision to the UK law to address this gap with the introduction of the *Restructuring Plan* with the requirement that dissenting would not be worse off than in a "relevant alternative" (meaning either in a liquidation or in "quick sale' of the business in what is often referred to in the UK as a "pre-pack" sale).

We recommend amendments for Caribbean countries to add a provision to their laws that grants this basic creditor protection. Such a provision adds an important safeguard and should be introduced as a technical amendment. It presents little by way of additional cost or administrative burden to implement.

(f) Class voting on business rescue plan and possible cramdown provisions. Voting by creditors to approve or reject a proposed plan involves multiple issues and can become quite complex. The *UNCITRAL Legislative Guide on Insolvency Law*[47] provides:

> *Designing the provisions of an insolvency law on approval of the plan requires a number of different issues to be considered, such as whether all creditors and equity holders are entitled to vote on the plan; whether voting on approval of the plan should be conducted in classes; and the manner in which creditors that do not approve a plan ("dissenting creditors") will be treated. Some underlying principles are that creditors whose rights are modified or affected by a plan, including secured creditors, can only be bound by the plan if they have been given the opportunity to vote on that plan; that secured creditors should vote separately from unsecured creditors; that creditors of the same class should each receive the same treatment under the plan; and that a dissenting class of creditors that is to be bound to the plan should receive as least as much as they would have received in liquidation proceedings.*

Accordingly, the WB Doing Business indicator is composed of three parts, which measure:

- whether creditors entitled to vote on the plan are divided into classes,
- whether each class votes separately, and
- whether the creditors within each class are treated equally.

(The Doing Business methodology indicates that a score of "1" is assigned if the voting procedure has a*ll three features*; "0" if the voting procedure does not have all three.) From the above matrix we see that none[48] of the fifteen Caribbean counties achieved a positive score for separate class voting (nor do the UK and Canada on their own 2020 Doing Business scores for this indicator). Most of the laws examined allowed voting on a business-rescue plan at least some basic form. However, laws differed in what classes are allowed, how formulated, as well as voting standards. Most permitted the separation of creditors into separate classes of similarly situated claims for the purposes of voting on a plan. Most required all voting creditor classes to vote in favor of plan for it to be approved. The specified percentages of required votes were generally similar (most often, requiring a majority in number and 2/3 in claim amount). This vote provides the main mechanism for binding dissenting creditors over their opposition to the plan. Unanimity among all creditors is therefore not required for all to be bound by the terms of the plan -- the outvoted "hold-out" creditor is nonetheless bound by the affirmative majority vote. (This binding of the dissenting creditor or creditors is colloquially known as "cram down" in professional insolvency circles.)

The provisions encountered (and described above) appear to be generally consistent with UK and Canadian base legislation, whereby dissenting creditors can only be bound if they are outvoted within

[46] *The Corporate Insolvency and Governance Act (2020) UK Public General Acts.* https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

[47] *UNCITRAL Legislative Guide on Insolvency Law,* at 216.

[48] With the exception of the new 2020 Antigua and Barbuda amended law which enable classification and cross-class cramdown. See; Section 602 and 605. Antigua and Barbuda Companies Act (Amended) 2020.

the single class in which they belong, along with the requirement that all classes vote in favor of the plan. In no law reviewed did we encounter provisions that enable “cross-class” cramdown, whereby the affirmative vote of one or more classes serves to override the vote of another entire class that voted against the plan (except within the newly amended Antigua and Barbuda 2020[49] law). We note that the UK in its recently enacted CIG Act (2020) has added provisions enabling cross-class cramdown within the rules governing the new “Restructuring Plan.” The CIG Act provides the ability to overrule an entire dissenting class (or classes) of creditors and/or shareholders who have not voted in favor of the plan.[50]

While the addition of the cross-class cramdown expands the possibilities for the rescue of large businesses with complex capital structures, the question of just how beneficial the inclusion of cross class cramdown provisions would be in a given Caribbean economy. Although such situations may not be encountered in a majority of cases, their addition is nonetheless recommended as a possibility to be utilized whenever cases warranting their use arise.

Adequacy of voting percentages. **As indicated above, most of the laws required a creditor affirmative vote of a majority in number and 2/3 (as high as 3/4 in one case) in amount. These are consistent with the UK and Canadian laws on which they are based and appear to be adequate. Vote thresholds are in essence a policy choice – it depends on the economy and how great a threshold is desirable on balance between the rights of the creditors and the rescue of a debtor enterprise.**

(g) Ability to obtain new credit with priority status. Among the measures that encourage business rescue, the possibility of reorganization financing is key. New funding in the form of reorganization financing can make the difference between rescue success or failure. Insolvency laws should contain language that enables the provision of new money whether in the form of ordinary credit, unsecured or secured by collateral, and in certain circumstances with priority over existing security interests. The *World Bank Principles,*[51] B 3.2: *Enabling legislative framework*, recommend as follows:

> *Corporate workouts and restructurings should be supported by an enabling environment, one that encourages participants to engage in consensual arrangements designed to restore an enterprise to financial viability. An environment that enables debt and enterprise restructuring includes laws and procedures that:*
>
> ** * **
>
> *Encourage lending to, investment in, or recapitalization of viable financially distressed enterprises.*

Obtaining credit in the context of an insolvency proceedings requires a balance between the interests of existing creditors (especially those possessing a lien, security interest or floating charge) and the lender providing new funding. Seldom will a new lender wish to provide unsecured funding to a company already experiencing demonstrated financial difficulty only to rank at the back the cue without the benefit of a security interest and probably even a first position “super-priority.’

[49]See: Section 602 and 605. *Antigua and Barbuda Companies Act (Amended) 2020*.

[50] Authors Ian Jack, Emma L. Menzies, Rupert Cheetham, Samantha De Souza of Greenberg Traurig, LLP have prepared an excellent summary of the CIG Act of 2020: “*The Corporate Insolvency and Governance Act 2020: Changes to UK Insolvency Laws,” The National Law Review* (Volume XI, Number 242, August 12, 2020). https://www.natlawreview.com/article/corporate-insolvency-and-governance-act-2020-changes-to-uk-insolvency-laws

[51] *World Bank Principles (2021),* B 3.2 *Enabling Legislative Framework*.

FRAMEWORK STRENGTH	Antigua & Barbuda	Bahamas	Barbados	Belize	Dominica	Dominican Republic	Grenada	Guyana	Haiti	Jamaica	St. Christopher & Nevis	Saint Lucia	St. Vincent & Grenadines	Surinam	Trinidad & Tobago	YES	NO
Possiblity of post-commencment credit	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	0.0	1.0	*53%*	*47%*
Priority for post-commencment credit	0.0	0.0	0.5	0.0	0.0	0.5	0.5	0.0	0.0	0.5	0.5	0.0	0.5	0.0	0.5	*23%*	*77%*

The *World Bank Doing Business Resolving Insolvency* matrix above shows that the '*possibility of post-commencement credit*' and '*priority for post-commencement credit*' both of which were found lacking in the laws of the countries surveyed, with 53% complaint for the former and only 23% compliant for the latter. This was consistent with our own findings, where the ability of credit was indeed permitted via the administrator under certain circumstances in a number of laws, however, the grant of a priority security interest was less prevalent. The only law encountered (not included in the above survey) that contained clear provisions, essentially a hierarchy of rules for obtaining credit with varying levels of security (ordinary course, administrative priority, lien, junior lien, senior-super priority) was found in Section 566 of the newly enacted Antigua and Barbuda *Companies Act (Amended) 2020*.[52] We recommend that clear and specific provisions for a debtor company to obtain credit with reference to all requirements needed for differing levels of security and/or priority be added to laws in the Caribbean.

(h) Ability to cure minor default. Not all occurrences of default in the implementation of a business rescue plan (be it a proposal, scheme of arrangement, restructuring plan or other formally approved rescue plan) should rise to the level of requiring termination and liquidation of the entire enterprise. Minor defaults may occur and/or legitimate disputes with an individual creditor may arise that warrant swift resolution without risking the entire reorganization to the detriment of all the other creditors. A proportional mechanism to address and remedy such *de minimis* defaults should be set forth in the law. The majority of the Caribbean laws reviewed did not appear to contain clear specific procedures for the cure of minor default in plan implementation (other than a generalized statement that the court has the power to make any order to give the law proper effect). A well-defined procedure to address minor disputes and *de minimis* defaults should be added to address this gap.

(i) Modification of plan. As with minor defaults, most of the laws reviewed did not appear to contain clear procedures for a modification of a confirmed business rescue plan when circumstances have changed, other than the above-mentioned generalized court power to make any order to give the law proper effect. Even with this generalized power, a court is unable to reference any articulated standard within the law for granting such an order in the case of plan modification.

The *World Bank Principles*,[53] C14.4 *Plan implementation and amendment,* states that:

> *A plan should be capable of amendment (by vote of the creditors) if it is in the interests of the creditors. Where a debtor fails or is incapable of implementing the plan, this should be grounds for terminating the plan and liquidating the insolvency estate.*

The UNCITRAL Legislative Guide,[54] *11. Amendment of a plan after approval by creditors*, paragraphs 67-68, recommends procedures as follows:

> *67. Depending upon the nature of the modification it may not be necessary to obtain the approval of all classes of creditors, since in some cases obtaining that approval may prove difficult. Alternative approaches may include permitting small modifications to be approved by*

[52] See: Section 566: *Obtaining Credit, Antigua and Barbuda Companies Act (Amended) 2020.*

[53] *World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes (2021)(C 14.4 Plan implementation and Amendment).*

[54] *UNCITRAL Legislative Guide on Insolvency Law,* para. 67-68 at *230-231*.

> *the court or by the creditors affected by the modification; or requiring creditors who supported the plan to be notified of proposed modifications and permitting them to object within a specified period of time or otherwise be deemed to have accepted the modification. The same approaches may be taken to creditors who did not approve the plan. Where the modification proposed is significant, the approval of all creditors may be required.*
>
> *68. Whichever approach is adopted, it is desirable that the insolvency law require relevant creditors (whether all creditors or only affected creditors) to be notified of any proposed modification[.]*

Technical amendments providing clear procedures governing plan modification, both minor and significant changes, are recommended.

Case Study: Consensual Modification of an Approved Plan.
In an actual case that occurred during our review, a plan modification issue arose that where no provision of law governed a needed consensual plan modification. Both debtor and creditors agreed that the terms of a fully-approved rescue plan needed modification due to changing circumstances outside of any of the parties control. The debtor's business revenue estimates had declined as a result of the COVID-19 pandemic lockdowns and anticipated a future inability to make the payments required under the plan. Neither the creditors nor the debtor wished to terminate the plan or close the business. Both agreed to a modified debt repayment schedule to be included within a revised rescue plan's binding terms. However, there were no express provisions in the law covering the procedure to accommodate the modification. This situation demonstrated a clear gap in the law and the need for provisions governing plan modification.

(j) Inclusion of list of possible reorganization measures. Reorganization provisions should be enabling in nature with the right level of clarity and flexibility for the debtor and creditor to craft a solution acceptable to the requisite creditor majorities. The *World Bank Principles*: B3.3 state:

> *Flexibly accommodate a broad range of restructuring activities, involving asset sales, discounted debt sales, debt write-offs, debt reschedulings, debt and enterprise restructurings, and exchange offerings (debt-to-debt and debt-to-equity exchanges)*

Prospective debtors that are considering use of the business rescue provisions might be unaware of all the specific measures, tools and possibilities permitted to proposed in a plan, proposal or scheme to enable a business rescue. We believe it helpful to provide a detailed list of reorganization measures that is set out in the law itself. Only one of the laws we encountered [55] set out a list of specific reorganization measures plainly within the law itself. The following list of reorganization techniques are offered as an example.

Proposed measures may include:

- *Retention of all or part of the property of the debtor's assets;*
- *Sale of all or part of the assets, with or without the lien, pledge or security interest;*
- *Transfer of property (even inventory) in satisfaction of claims;*
- *Closure of unprofitable operations or changing business activities;*
- *Cancellation or reformulation of burdensome or unfavorable contracts or leases;*
- *Deferment of debt payments, or providing for repayment by installments;*
- *Modification of maturity dates, interest rates, or other terms of a loan or security;*
- *Full or partial debt forgiveness;*

[55] See: Section 606 "*Contents of Plan," Antigua and Barbuda, Companies Act (Amended) 2020*.

- *Satisfaction or modification of pledges, liens or security interests;*
- *Conversion of unsecured loans into secured loans;*
- *Pledge of unencumbered assets;*
- *Conversion of debt to equity;*
- *Obtaining of new credit, with or without priority;*
- *Obtaining of new investment;*
- *Challenge and invalidation of claims lacking in legal validity;*
- *Curing of defaults;*
- *Termination of employment;*
- *Transfer of unencumbered assets in satisfaction of claims;*
- *Amendments of the debtor's charter, by laws or other founding or governing documents;*
- *Merger or consolidation with one or more entities;*
- *Transfer of all or part of the property to one or more existing or newly formed entities retaining or distributing shares.*
- *Cancellation or issuance of new securities by the debtor, or of a newly created entity;*
- *Any other legal mechanisms not prohibited by law.*

A debtor company should be able to utilize any one or more of these measures, alone or in combination, or any other measure not otherwise prohibited. We recommend the revision of existing business rescue provisions to specify the kinds of measures permitted for business rescue.

COMBINED COST ESTIMATE: TECHNICAL AMENDMENTS TO CURE ABOVE DEFICIENCIES

List of legislative technical amendments needed to remedy deficiencies identified above: Provision to enable creditors to file for reorganization.

- Provision to add an expanded moratorium.
- Provision to ban ipso facto clauses.
- Provision to continue contracts supplying essential goods and services.
- Provision to clarify which creditors may vote on a plan.
- Provision enabling new credit with possible priority status.
- Provision granting protection for dissenting creditors to receive to at least as much as they would in a liquidation.
- Provision permitting creditor classes for voting on a plan, that each class may vote separately, and that creditors in the same class be treated equally.
- Provision to enable creditors to object to decisions on other creditor's claims.
- Provision governing plan modifications and cure of minor defaults.
- Provision explicitly listing possible reorganization measures.

These can be remedied through narrowly tailored legislative amendments directly address the deficiencies.

Recommendation: Enact technical amendments to remedy the deficiencies identified above.

Estimated Cost: Unknown. (Cost involved in proposing and enacting technical amendments in each country.)

2. PRE-PACKAGED | PRE-NEGOTIATED REORGANIZATION PLAN

In only one of the fifteen countries subject to this review did we encounter provisions that specifically enabled a pre-packaged reorganization.[56] One of the most effective mechanisms to altogether avoid business interruption, reduce the negative publicity and stigma associated with insolvency and reduce the length of proceedings is through "pre-packaged" or "pre-negotiated" business rescue reorganization plans. A pre-packaged reorganization encourages debtors to avail themselves of insolvency proceedings at an earlier stage of financial difficulty when there is a greater chances of business recovery.

How a prepackaged rescue plan works. The proposed terms of a reorganization plan, proposal or scheme are discussed and negotiated with creditors in advance of any formal insolvency proceedings. A proposed rescue plan containing the agreed-upon terms is submitted at the same time as the petition for opening the proceedings, or very shortly thereafter. The court then schedules the required approval hearing, as is the procedure in ordinary plan approval circumstances. The court will validate the vote and confirm that all other legal-prescribed provisions have been fulfilled. This pre-packaged tool is most useful for situations where the debtor is able to inform creditors of its financial difficulties, discuss terms for the restructuring of its debts and convince the required majority to support the plan before any enforcement or insolvency steps are taken. It is most effective where there is substantial advance agreement with a majority of creditors without serious controversy.

Sophisticated creditors understand that the pre-pack permits a quick reorganization with minimal business interruption and negative publicity (to the benefit of both the debtor and creditors) thereby preserving the value of the business to the highest extent possible. We recommend adding provisions within the law that enable and support prepackaged reorganization as an additional tool or the rescue of viable businesses with the least amount of business interruption, stigma, cost and delay.

Recommendation: Addition of legislation that enables and supports prepackaged reorganization plans as an additional tool for the cost-effective rescue of viable businesses with the least amount of business interruption.

Cost: Unknown. (Cost involved in proposing and enacting technical amendments in each country.)

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3. NON-BANKRUPTCY REGIMES: OUT OF COURT WORKOUT AND MEDIATION

In our limited review, no country appeared to have a substantial informal non-bankruptcy Out-of-Court Workout (OCW) or a pre-bankruptcy mediation[57] framework designed or intended to support business rescue. An effective out-of-court workout mechanism or other pre-bankruptcy procedure, such as mediation, can provide an added avenue for debt-resolution aside from formal court-led procedures. The *World Bank Principles*[58] state the importance of informal (non-court) workouts:

> *Corporate workouts should be supported by an environment that encourages participants to restore an enterprise to financial viability. Informal workouts are negotiated in the "shadow of the law." * * * A country's financial sector (possibly with help from the central bank or finance ministry) should promote an informal out-of-court process for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure—*

[56] The Dominican Republic permits prepackaged reorganizations. *Law 141-15 on Restructuring and Liquidation of Companies and Business Persons* (enacted 2015, entered into effect 7 February 2017). *See:* M. Fernadez, M. Alacantara Conelio, *Brief overview of insolvency proceedings, (*Global Restructuring Review, 20 November 2017)("The law provides for 'pre-pack agreements', which may be presented if the debtor and the majority of his creditors reach a restructuring agreement prior to the commencement of a restructuring process.") https://globalrestructuringreview.com/review/restructuring-review-of-the-americas/2018/article/dominican-republic

[57] Mediation only seems to be utilized for individual Bankruptcy instances and not for business disputes underlying claims asserted for the commencement of insolvency proceedings or for specific business claim resolution between a creditor, group of creditors and the debtor.

[58] *World Bank Principles (2021)*, B 4.1: *Informal Workout Procedures*, at 7.

> *especially in markets where enterprise insolvency is systemic. An informal process is far more likely to be sustained where there are adequate creditor remedies and insolvency laws.*

The *Principles*[59] further state:

> *An informal workout process may work better if it enables creditors and debtors to use informal techniques, such as voluntary negotiation or mediation or informal dispute resolution*."

Depending on the circumstances, particularly in a post-covid financial recovery period, an effective OCW regime may offer a simplified, structured debt-relief measures not found in any of the current debt-resolution avenues with the added advantage of no court involvement and lower cost. An effective OCW regime, which relies on consensual agreement, can be used to strike an agreement with just a single or few main creditors providing breathing space for dealing with smaller but numerous trade creditors who remain unaffected by the OCW, all which is done outside formal court-based insolvency proceedings. Similarly, pre-bankruptcy mediation may be used to prompt an initial debtor-creditor dialogue that, at the very least, informs all parties of the consequences and expected outcomes of available procedures. This helps the parties see which avenue might yield a better, more effective result rather than an immediate resort to existing court-led procedures that are more rigid, costly, time-consuming and complex. We recommend that OCW and Mediation systems be explored to see whether adoption would be beneficial to the overall debt resolution outcomes in each Caribbean jurisdiction.

Recommendation: Conduct a study to explore whether the adoption of Out of Court Workout and / or Mediation systems would be beneficial to the overall debt resolution outcomes.

Cost: $45,000 - $60,000 (each country)

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4. SIMPLIFIED PROCEEDINGS FOR MICRO AND SMALL ENTERPRISES

Provisions specific to Micro and Small Enterprises were for the most part not in existence the laws reviewed. We generally encountered "Summary Administration" provisions that purport to address small insolvencies which typically mandated light or less stringent requirements for noticing and other purely procedural matters of administration, as shown in the example below:

> Illustrative example: "*Security deposits by a trustee not required unless directed by the supervisor; notices need not be published in a local newspaper; all notices, statements and other documents shall be sent by ordinary mail; a first meeting of creditors is optional, to be called by the trustee, supervisor or by creditors who have a specified aggregate amount; appointment of inspectors as optional with the trustee, in the absence of directions from the creditors, may do all things that may ordinarily be done by the trustee with the permission of the inspectors; consolidation of proceedings of individuals who, because of their relationship, could reasonably be dealt with as one estate; notice of bankruptcy and notice of application for ands impending automatic discharge of the bankrupt may be given in a single notice*."

It is difficult to gage the adequacy[60] of these lightened measures without case data and interviews of practitioners who have experience with, and without, Summary Administration.

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[59] *World Bank Principles (2021)*, B 4.1: *Informal Workout Procedures*, at 7.

[60] We noted that in some cases the threshold amounts for applicability of Summary Administration appeared outdated (i.e., debtor property does not exceed $1,500. Guyana, Section 105).

None of Summary Administration provisions reviewed provide a separate specific pathway or specialized commencement criteria for micro or small enterprise. The *World Bank Principles for (2021),*[61] *C18: Key Objectives and Policies,* suggest a number of specific measures for reorganization and liquidation of Micro and Small Enterprise insolvencies that are broader than those typically found in Summary Administration:

- *Simplified well-defined eligibility criteria*. Juridical and natural persons deemed MSEs by each country. All personal and business debts of a natural person should be included in simplified insolvency proceedings. mandatory or optional for use by eligible debtors.

- *Commencement Criteria.* Debtors should have easy access to simplified reorganization proceedings in case of insolvency and also at an early stage of financial difficulty. The law should establish a debtor's filing showing proof of basic criteria as a rebuttable presumption of insolvency or financial difficulty. MSE liquidation proceedings may be commenced on the application of a creditor provided that it is established that the debtor is insolvent.

- *Conversion of Proceedings.* The law should define specific circumstances which enable conversion of: i. Simplified insolvency proceedings to ordinary insolvency proceedings and vice versa; and, ii. Simplified reorganization proceeding to simplified liquidation and vice versa. The law should address the implications of conversion of proceedings.

- *Procedural Formalities and Deadlines.* The law should specify information and minimal procedures by which simplified insolvency proceedings should be commenced and closed, keeping them straightforward, speedy and cost-effective. Simplified insolvency proceedings should require fewer and less complex procedural formalities and shorter deadlines than those required in ordinary insolvency proceedings. In particular, complex and costly rules on notice, publications, creditors' committees and assemblies, filing and resolution of claims, liquidation of assets of the debtor and distribution of proceeds to creditors should be disabled or streamlined.

- The law should allow the use of electronic tools and data to simplify processes. Online filing and standardized forms should be utilized if practical.

World Bank Principles for Effective Insolvency and Debtor/Creditor Regimes

A targeted evaluation of the adequacy and effectiveness of current Summary Administration provisions and exploration of the need for a legislative upgrade toward specialized provisions of the nature specified in the *World Bank Principles* (cited above) to address Micro and Small Enterprises is recommended.

Recommendation: Targeted evaluation of the adequacy and effectiveness of current Summary Administration provisions and exploration specialized provisions for Micro and Small Enterprises.

Cost: $45,000 - $60,000 (each country)

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5. PROVISIONS FOR SPECIAL SITUATIONS: COVID-19 RELIEF AND NATURAL DISASTERS

Specific special procedures for unusual situations should be considered to provide targeted relief in emergency situations.

Insolvency laws are both substantive and procedural in nature. Specialized provisions with lowered thresholds, extended or shortened deadlines, relaxed procedures, notification rules, or other measures, instituted on a permanent or temporary basis, should be considered to address the

[61] *World Bank Principles* (2021), C 18*: Key Objectives and Policies*, at 29 -31.

practical or economic effects of the COVID-19 pandemic and/or natural disasters, such as hurricane damage. Provisions that address not only the financial aspects of debt relief but practical issues as well. During pandemic lockdowns or natural disasters courthouses and other institutions may be entirely closed making it impossible to comply with procedural requirements, mandated appearances and statutory deadlines.

Many insolvency and business-related laws have been modified recently to introduce changes prompted by the COVID-19 pandemic,[62] including the UK in the CIG Act 2020.

Recommendation: Survey and explore specialized temporary or permanent measures to address unusual situations and provide targeted relief in emergency situations, such as COVID-19 pandemic and/or natural disasters.

Cost: $45,000 - $60,000 (each country)

E. CREDITORS AND ADMINISTRATORS

1. CREDITOR PARTICIPATION

Rules for creditor participation in insolvency cases are in need of strengthening.

Creditors have a significant interest in the conduct of insolvency proceedings as they have the primary economic stake in the outcome. As such, they are often the key drivers of the insolvency process when properly enabled with balanced rights and powers. Insolvency laws envisage varying degrees of creditor involvement in proceedings and while there is no universal standard as to the level of involvement, there are emerging practices that are recognized as providing an effective balance between the powers and roles of creditors and the other functionaries in an insolvency system.

As the *UNCITRAL Legislative Guide on Insolvency Law*[63] provides:

> *In general, a determination as to which functions should be given to creditors involves a consideration of the overall design of the insolvency law and the balance to be achieved between the roles of the court, the insolvency representative, the debtor and creditors, in particular in terms of oversight and supervision. To some extent, the different functions given to creditors reflect different insolvency cultures and traditions and, in particular, different expectations on the part of creditors as to the level of their participation in insolvency proceedings. However, creditor participation is increasingly regarded as an important element of an insolvency law, especially as a counter-balance to the roles assigned to other participants under the law and as an important means of safeguarding creditor interests.*
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> * * *
>
> *The desirability of facilitating high levels of creditor participation must be balanced against the need to ensure that the creditor representation mechanism remains efficient and cost-effective and avoids creditors involving themselves in matters that will not have an impact on their interests [.] (although often it may be difficult to draw a clear distinction between those matters which do have such an impact and those which do not).*

[62] For a discussion of the kinds of measures that countries have implemented, see: *Overview of Insolvency and Debt Restructuring Reforms in Response to the COVID-19 Pandemic and Past Financial Crises : Lessons for Emerging Markets* (World Bank Group Working Paper, March 8, 2021). This working paper is part of a series of COVID-19 notes developed by the World Bank Group's *Equitable Growth, Finance and Institutions* team, highlighting concrete examples of insolvency and debt restructuring reforms undertaken in response to the COVID-19 pandemic as well as past crises. It can be viewed online at: https://openknowledge.worldbank.org/handle/10986/35425

[63] *UNCITRAL Legislative Guide on Insolvency Law*, at 191.

Additionally, the *World Bank Doing Business, Resolving Insolvency, Good Practice, Promoting Creditor Participation*[64] states the following:

> *Research shows that if creditors are not protected or allowed to participate in insolvency proceedings, they will have less incentive to lend in the future, leading to less-developed credit markets.*
>
> *Creditors are key participants in insolvency proceedings—the maximized value of the assets is closely tied to the recovery of creditors, whether financial lenders, employees or trade creditors. Thus, it is key that creditors play an important role in insolvency proceedings as well as the powers, liabilities and rights in the rescue process. Good practice suggests that legal frameworks establish specific and direct provisions allowing the following creditor's rights:*

The above-stated practices are embodied in the four-factor *Creditor Participation Index* within the *World Bank Doing Business Revolving Insolvency* rankings from which the detailed results for the fifteen countries subject to this study are presented below.

FRAMEWORK STRENGTH	Antigua & Barbuda	Bahamas	Barbados	Belize	Dominica	Dominican Republic	Grenada	Guyana	Haiti	Jamaica	St. Christopher & Nevis	Saint Lucia	St. Vincent & Grenadines	Surinam	Trinidad & Tobago	YES	NO
CREDITOR PARTICIPATION INDEX (0-4)																	
Creditor approval of selection/appoint insolv rep	1.0	0.0	1.0	1.0	1.0	0.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	0.0	1.0	60%	40%
Creditor approval for sale of substantially all assets	0.0	0.0	1.0	0.0	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	0.0	1.0	47%	53%
Creditor right to request information from insolv rep	0.0	0.0	1.0	0.0	0.0	0.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	1.0	1.0	47%	53%
Creditor right object to accepting/rejecting claims	0.0	1.0	0.0	1.0	1.0	1.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	1.0	0.0	40%	60%

The Creditor Participation indicators show relatively low scores across the board for the fifteen Caribbean countries subject to this study. They are consistent with what we generally observed in our review of the legislation. Findings for each indicator are addressed below.

(a) Creditor ability to select or approve the insolvency representative. The *World Bank Doing Business, Good Practice, section on promoting creditor participation,*[65] states the following regarding the right to select the insolvency representative:

> *Because the insolvency practitioner's fees are deducted from creditors' returns, they are highly motivated to seek out a professional who is familiar with the nature of the debtor's business, activities or type of assets, or who has special knowledge to handle the particular circumstances of the case. The risk that an insolvency practitioner might favor the creditor who nominated him or her can be mitigated by provisions that allow for other creditors to move to replace the insolvency practitioner, for example at the first creditor's meeting. Moreover, once a strong framework for regulating insolvency practitioners is in place, an insolvency practitioner can be held accountable for his or her professional conduct.*

A number of the laws reviewed showed the basic creditor safeguard of selecting the insolvency administrator as lacking. This deficiency was consistent with the *World Bank Doing Business* survey which found only 9 out of 15 countries (60%) had adequate provisions for creditor involvement in selecting or approving an administrator. The addition of this specific power as a technical amendment is highly recommended as it adds an important safeguard and does not present an inordinate administrative burden.

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[64] *World Bank Doing Business, Resolving Insolvency, Good Practice, Creditor Participation, promoting creditor participation* https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/good-practices

[65] *World Bank Doing Business (2020) Resolving Insolvency, Good Practice, Creditor Participation. Id.*

(b) Creditor ability to approve the sale of substantial assets. The *World Bank Doing Business, Good Practice*[66]states as follows regarding *the right to approve the sale of substantial assets of the debtor:*

> *The law should incorporate a number of procedural safeguards to make sure that the procedures are fair, transparent, well publicized and that the manner of sale chosen maximizes the value for the estate. To that end, where assets of the insolvency estate are to be sold, the law should require that the creditors are notified and consulted on the sale of assets (outside of the ordinary course of business). Good practice suggests that creditors should be allowed to challenge the sale of the assets (either with the insolvency representative or the court, as appropriate) if they disapprove, to ensure that their interests are also protected. As such, the creditors will be able to require that neutral, independent professionals value the assets and that collusion between the debtor and prospective bidders is discouraged.*

Additionally, the *UNCITRAL Legislative Guide on Insolvency Law*[67] specifically mentions the creditors committee[68] as an appropriate consultative body for major decisions requiring creditor approval such as the sale of assets outside the ordinary course:

> *Insolvency laws provide for a creditor committee to undertake a range of functions, which may include advising the insolvency representative of the wishes of creditors with respect to issues such as the sale of assets outside the ordinary course of business[.]*

A properly balanced insolvency law should provide that creditors are notified and consulted on the sale of assets outside of the ordinary course of business. *The World Bank Doing Business* survey shows less than half of the subject countries, 7 out of 15 (only 47%), as compliant. Many of the laws reviewed did not provide clear guidance on this issue. The level of required creditor notice, and creditor decisional authority appears to be unclear or substantially lacking in a number of laws. In some we encountered confusion in situations where a "Committee of Inspectors"(comprised of three to five select creditors) had not been formed causing the decisional authority to devolve to the administrator in absence of such committee. It appeared that the lack of a Committee of Inspectors could result in a major asset sale altogether evading creditor notification and review. Clear rules governing whether the sale of the business, a division, or any major asset should be brought to either the general body of creditors, to a representative committee (whether a Committee of Inspectors or Creditors Committee) or directly to the specifically affected creditor should be set forth in the law. The addition of rules governing the level of creditor notice and applicable decisional authority is highly recommended and should be introduced as a technical amendment to each law non-complaint law.

(c) Creditor ability to request information on the debtor's business and financial affairs. The *World Bank Doing Business, Good Practice,*[69]states the following:

> *Good practice suggests that individual creditors should have the right to request information about the financial state of the debtor on a continuous basis throughout the insolvency proceedings without significant impediments. The most common way to gain access to such information is through a request to the insolvency representative who manages the business affairs of the debtor.*

[66] *World Bank Doing Business Resolving Insolvency (2020). Id.*

[67] *UNCITRAL Legislative Guide on Insolvency Law, para. 111* at 200-201.

[68] The creditors committee is discussed in Section E.2 (below).

[69] *World Bank Doing Business Resolving Insolvency, Good Practice, Creditor Participation. Id.*

The ability to request information from the administrator is an important part of the balance between the functionaries in an insolvency case, yet it is found to be lacking in over half the laws surveyed as the Doing Business indicators show only 7 out of 15 countries (47%) as compliant. The addition of this specific power to request and obtain debtor financial information as a technical amendment is highly recommended as it adds an important safeguard that is lacking in a majority of the laws.

(d) Creditor ability to object to other creditor claims. One of the most significant creditor powers is the ability to object to another creditor's claim. This ability serves as a needed additional check against the possibility of fraudulent or over-stated claims improperly asserted against the limited resources of the debtor. *The World Bank Doing Business, Good Practice*[70] states as following:

> *The law should establish specific and direct provisions allowing the right of individual creditors to object to the decision of the insolvency representative regarding acceptance or rejection of its own claims, as well as object to the decision of the insolvency representative regarding the acceptance and value of claims of other creditors.*

In most of the Caribbean laws subject to this review, creditors with an approved claim are indeed permitted to view other creditor claims, however, they have no direct standing to raise a challenge to the claim or to the administrator's decision approving that claim. This deficiency noted in the World Bank Doing Business survey with only 6 out of 15 countries (only 40%) in compliance. The addition of this specific power as a technical amendment is highly recommended as it adds an important safeguard lacking in a majority of the laws.

COMBINED COST ESTIMATE: TECHNICAL AMENDMENTS TO CURE ABOVE DEFICIENCIES

List of legislative technical amendments needed to address deficiencies in the four enumerated *Creditor Participation* indices include:

- Provision to add creditor ability to approve the sale of substantial assets.
- Provision to add creditor ability to select or approve the administrator.
- Provision to enable creditor requests for information on debtor business and financial affairs.
- Provision to enable creditors to object to decisions on other creditor's claims.

These can be remedied through narrowly tailored legislative amendments directly addressing the deficiencies.

Recommendation: Enact technical amendments to remedy the deficiencies identified above.

Estimated Cost: Unknown. (Cost involved in proposing technical amendments in each country)

2. ESTABLISHMENT OF CREDITORS COMMITTEES

Laws should enable creditors and other stakeholder groups to formally establish an official committee with sufficient powers and standing to act within proceedings.

Our review found no provisions that governed the creation and operation of formal "Creditors Committees" (or other joint body of similarly situated stakeholders) that enable joint action. Such a committee is an officially recognized group with defined with powers under the law with standing and authority to act on the group's behalf in an insolvency proceeding. While creditors may act individually to protect their own rights in an insolvency proceeding, where there is a large number of unsecured creditors holding claims of relatively small amounts, acting individually is simply not cost beneficial. While each creditor is entitled to engage its own counsel, voice its own objections and attend meetings on its own behalf, the cost can soon exceed the value of the creditor's unpaid claim. Since

[70] *World Bank Doing Business Resolving Insolvency, Good Practice, Creditor Participation*, *Id.*

the rights of the unsecured creditors are essentially identical, it makes sense that they should want to organize a committee of a few selected representatives that will act for the benefit of the whole.

A number of laws encountered enable the creation of a "Committee of Inspectors"' comprised of three to five creditors for the purposes of "superintending" the administration of the insolvency estate with approval authority over certain defined actions of the administrator. While appearing on the surface to be similar, a Committee of Inspectors is not the same as a Creditors Committee in terms of role, function, composition and authority. The *World Bank Principles (2021)*[71] recommend the creditors committee as the "preferred mechanism" for creditor monitoring and case participation:

> *Creditor interests should be safeguarded by appropriate means that enable creditors to effectively monitor and participate in insolvency proceedings to ensure fairness and integrity, including by creation of a creditors' committee as a preferred mechanism, especially in cases involving numerous creditors.*
>
> *Where a committee is established, its duties and functions, and the rules for the committee's membership, quorum and voting, and the conduct of meetings should all be specified by the law. The committee should be consulted on non-routine matters in the case and have the ability to be heard on key decisions in the proceeding. The committee should have the right to request relevant and necessary information from the debtor. It should serve as a conduit for processing and distributing that information to other creditors and for organizing creditors to decide on critical issues. In reorganization proceedings, creditors should be entitled to participate in the selection of the insolvency representative.*

The *UNCITRAL Legislative Guide on Insolvency Law*[72] also recommends the ability to establish a creditors committee in appropriate circumstances:

> *88. In terms of the mechanisms for participation, some insolvency laws provide for full meetings of creditors to be convened at key points in the proceedings. Other laws permit the formation of a committee, on which creditors sometimes may share representation with equity holders and possibly other parties in interest, comprising a smaller number of creditors (which number may be specified in the insolvency law) to facilitate the participation in the administration of the estate. The former approach is most useful in cases with small numbers of creditors or where creditors are located in the same geographical region. The latter may be more useful where there are large numbers of creditors or creditors are located in different regions or even different countries. The mechanism used for participation will also depend upon the immediate issue before creditors. Many insolvency laws include both of these approaches, with significant issues, such as approval of a reorganization plan[.]*
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> * * *
>
> *111. Insolvency laws provide for a creditor committee to undertake a range of functions, which may include advising the insolvency representative of the wishes of creditors with respect to issues such as the sale of assets outside the ordinary course of business and formulation of the reorganization plan; consulting with the insolvency representative and other principals in the proceeding, such as the existing management of the debtor; participating in the development of a reorganization plan; or possibly supervising the insolvency representative. These functions may be established by the insolvency law, directed by the court or determined in cooperation with the insolvency representative.*

[71] *World Bank Principles (2021), Sections* C 7.1 and C 7.2*: Creditors and the Creditors' Committee.*

[72] *UNCITRAL Legislative Guide on Insolvency Law*, para. 88 and 111 at pages 200-201. (For additional detail on the recommended operation and governance of creditors' committees*, see also*: paras. 99 – 115 at 197- 205).

Recommendation: Technical amendments of law and regulations to provide for the creation and operation of a creditors committee.

Cost: Unknown. (Cost involved in proposing and enacting technical amendments in each country.)

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3. REGULATION AND LICENSING OF INSOLVENCY ADMINISTRATORS

Detailed requirements for appointment should be specified clearly and licensing standards or minimum qualifications should be set within the law or regulations for increased transparency.

The administrator is the key operative functionary in an insolvency case. The engagement of properly qualified professionals with is crucial to successful case administration. The *UNCITRAL Legislative Guide on Insolvency Law*,[73] section on *Insolvency Professionals - Capacity/Compensation/ Supervision,* states as follows:

> *[T]he insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.*

The *World Bank Principles (2021)* [74] section on the *Competence and Integrity of Insolvency Representatives*, states:

The system should ensure that:

- *Criteria as to who may be an insolvency representative should be objective, clearly established, and publicly available;*
- *Insolvency representatives be competent to undertake the work to which they are appointed and to exercise the powers given to them;*
- *Insolvency representatives act with integrity, impartiality, and independence; and*
- *Insolvency representatives, where acting as managers, be held to director and officer standards of accountability, and be subject to removal for incompetence, negligence, fraud, or other wrongful conduct.*

There is no universal standard set of appointment requirements applicable to all cases. The required qualifications for appointment in a specific case will vary depending upon the type of proceeding, the nature, size, and complexity of operations, proposed role and level of supervision required. Accordingly, this will vary from case to case, and region to region. Overly stringent qualifications will limit the pool to be considered and too lenient qualifications will not assure the expertise and experience needed for larger and more complex cases. On this, the *UNCITRAL Legislative Guide on Insolvency Law*, [75] states that a balance is needed:

> *In determining the qualifications required for appointment as an insolvency representative, it is desirable that a balance be achieved between stringent requirements that lead to the appointment of a highly qualified person, but which may significantly restrict the pool of*

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[73] *UNCITRAL Legislative Guide on Insolvency Law, Insolvency Professionals – Capacity/Compensation/Supervision,* at 174. (*See also:* Section B. *The insolvency representative* (containing a comprehensive discussion of qualification and oversight administrators, at pages 174 -180).

[74] *World Bank Principles (2021)* Section D 8: *Competence and Integrity of Insolvency Representatives.*

[75] *UNCITRAL Legislative Guide on Insolvency Law, Insolvency Representative, Qualifications, para 36,* at 174.

> *professionals considered to be appropriately qualified and add to the costs of the proceedings, and requirements that are too low to guarantee the quality of the service required.*

The majority of the laws reviewed seemed to state only general criteria governing the appointment and licensing of administrators rather than clearly specified standards. A more transparent practice would entail the setting out qualification standards and appointment criteria in the law itself or in related regulations similar to those set forth in Canadian regulations. The Canadian regulations serve as an excellent example of transparent practice in this regard.

Recommendation: Official issuance of clear standards and specific requirements that are set forth in the law or regulations or are otherwise published and publicly available.

Cost: $0 - $25,000 (each country)

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4. ADEQUACY OF PROFESSIONAL ADMINISTRATOR COMPENSATION

Adequate compensation of insolvency professionals relative to local norms and conditions is essential for assuring the participation of properly qualified professionals.

Proper compensation of professionals in insolvency cases, particularly administrators, is essential to effective system functioning. Proper compensation attracts appropriately skilled professionals. Insolvency cases can be complex and require sufficiently skilled specialized professionals to be engaged. The *UNCITRAL Legislative Guide on Insolvency Law*[76] stated the following regarding the determination of the amount or administrator renumeration:

> *[R]remuneration should be commensurate with the qualifications of the insolvency representative and the tasks it is required to perform and should achieve a balance between risk and reward in order to attract appropriately qualified professionals.*
>
> * * *
>
> *It is highly desirable that the insolvency law establish a mechanism for fixing the insolvency representative's remuneration that is clear and transparent enough to avoid disputes and to provide some level of certainty as to the costs of insolvency proceedings.*

The UNCITRAL Legislative Guide goes on to set out a comparison of compensation methodologies and important considerations concerning each.[77]

The majority of laws reviewed in this survey provide for "committees of inspection" to set administrator compensation, or where no such committee exists, by "ordinary resolution of creditors" (typically meaning majority creditor vote). In essence, the creditors set administrator compensation and remuneration of costs. By way of example, a typical compensation provision reads as follows:

> <u>Example of typical provision:</u> *Where the creditors appoint anyone to be assignee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or if the creditors so resolve by the committee of inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realized by him after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend.*

[76] *UNCITRAL Legislative Guide on Insolvency Law,* Section 7. Remuneration of the insolvency representative, (a) Determination of quantum, *paras. 53 and 57 at 180-182,*

[77] See: *UNCITRAL Legislative Guide on Insolvency Law*, Section 7. *Remuneration of the insolvency representative (a) Determination of quantum, at 180-182* (containing a comprehensive discussion of various methodologies for administrator compensation).

From the above sample provision, it is impossible to precisely calculate how much an administrator will be paid, if at all. A more transparent practice would be to issue an official published scale for compensation similar to that which appears in the Canadian regulations. Unlike the Canadian law and related regulations, there appears to be little by way of any official published guidance delineating how compensation is established in most of the laws reviewed. Without knowing how compensation is set, it is impossible to gage whether it is adequate to attract the appropriate level of professionally qualified persons. Moreover, without access to information on the local economy, specifically data on prevailing local professional fees and information on what compensation was actually earned (and paid) in past insolvency cases, there is no realistic reference point to determine whether the compensation was sufficient to attract the requisite level of qualified professionals to insolvency practice.

Recommendation: Perform a localized survey and study of the adequacy of professional compensation in insolvency cases to determine whether compensation is sufficient to attract adequately qualified professionals.

Cost: $25,000 - $45,000 (each country)

INTERNATIONAL PRACTICE EXAMPLE: ADMINISTRATOR AND PROFESSIONAL COMPENSATION

Often overlooked is the incentive structure and the role that professional compensation plays in the ability to achieve insolvency system reform. In the US, one highly impactful yet often overlooked systemic change occurred in how professionals were compensated in bankruptcy-insolvency cases. Enactment of the US Bankruptcy Code in 1978 brought major changes in the US system, particularly in allowing professional compensation consistent with prevailing market rates. Aside from the new technical advances in the law, the new provisions permitting professional compensation served to attract a more highly qualified cadre of lawyers, accountants and other experts to insolvency practice. This significantly raised the standards of practice and professionalism in insolvency case administration in the US.

F. CASE COMMENCEMENT CRITERIA

Case commencement criteria should be balanced, accessible to debtors and creditors, and not discourage early access to rescue proceedings.

Case commence criteria starts the formal insolvency process and invokes the jurisdiction of the courts. On the commencement of proceedings, the *UNCITRAL Legislative Guide on Insolvency Law*[78] *states as follows:*

> *As a general principle it is desirable that the commencement standard be transparent and certain, facilitating access to insolvency proceedings conveniently, cost-effectively and quickly to encourage financially distressed or insolvent businesses to voluntarily commence proceedings. * * * Restrictive access can deter both debtors and creditors from commencing proceedings, while the effects of delay can be harmful to the value of assets and the successful completion of insolvency proceedings, in particular in cases of reorganization. Ease of access needs to be balanced with proper and adequate safeguards to prevent improper use of proceedings.*

Criteria for debtor petitions should be designed not to discourage the debtor from seeking to reorganize before its condition deteriorates beyond repair. Criteria for creditors should include the requirement that the debtor be in default of its obligations generally, to avoid the use of the

[78] *UNCITRAL Legislative Guide on Insolvency Law, Section B. Commencement of proceedings, paras. 21 and 22,* at 45.

bankruptcy system for single debtor-creditor disputes. A monetary threshold may be added to discourage case commencement based on unreasonably small claims. Further, a monetary sanction against any creditor proposing an improper petition should be a part of the law to discourage abuse.

FRAMEWORK STRENGTH	Antigua & Barbuda	Bahamas	Barbados	Belize	Dominica	Dominican Republic	Grenada	Guyana	Haiti	Jamaica	St. Christopher & Nevis	Saint Lucia	St. Vincent & Grenadines	Surinam	Trinidad & Tobago	YES	NO
COMMENCMENT OF PROCEEDINGS INDEX (0-3)																	
DEBTOR Commencment	0.5	0.5	1.0	0.5	0.5	1.0	1.0	0.5	0.5	1.0	1.0	0.5	1.0	1.0	1.0	*77%*	*23%*
CREDITOR Commencment	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	*50%*	*50%*
Commencement basis (Liquidity / Balance Sheet)	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	*100%*	*0%*

From the scores in the *World Bank Doing Business* indicators above we see that no deficiency was found in the commencement basis (all fifteen show 100% compliance). Debtor commencement had relatively high 77% compliance, but creditor commencement shows compliance of only 50% as all cases showed only 0.5 of a point. Under the World Bank Doing Business methodology, laws where creditors are enabled to initiate *both* liquidation and reorganization proceedings, score of 1 is assigned; where creditors can only initiate *one* of these types (either liquidation or reorganization) only 0.5 is assigned. Here, the half-point is solely due to a 100% across-the-board *failure to provide creditors with the ability to initiate reorganization proceedings* in addition to liquidation proceedings. No Caribbean country in this review had provisions for a creditor to commence business rescue proceedings.[79] The lack of a creditor's ability to petition for debtor's reorganization is the most salient deficiency in this review.

Recommendation: Perform a review of the effectiveness of current commencement criteria and add provisions enabling the commencement of business rescue proceedings by creditor petition.

Cost: $30,000 – 45,000 (each country)

G. OTHER ISSUES

1. UNCITRAL CROSS-BORDER INSOLVENCY PROVISIONS

Adoption of UNCITRAL Cross-border or other international insolvency provisions were not prevalent among a majority of Caribbean countries surveyed.

Growing trade across the region and internationally requires some methodology dealing with insolvencies that span across multiple jurisdictions. The *UNCITRAL Model Law on Cross-Border Insolvency*[80] has become the *de facto* global standard for international insolvency provisions, currently adopted by 49 states in a total of 53 jurisdictions.[81] As a protocol, it sets forth how incoming international requests will be treated in the home jurisdiction and clarifies the authority for which home jurisdiction practitioners exercise in international matters abroad Its provisions govern a wide range of assistance to foreign courts and administrators addressing issues of access, recognition, relief,

[79] Antigua and Barbuda, newly enacted 2020 law, enables a creditor, or group of creditors, to petition for insolvency and subsequently to submit a plan of reorganization after a statutory period of exclusivity has expired. *See:* Sections 556 and 598(3). *Companies Act (Amended) 2020,* Act No. 17 of 2020 (Official Gazette Vol. XL. No. 51 dated 15 July 2020). *http://admin.theiguides.org/Media/Documents/Companies-Amendment-Act-2020.pdf*

[80] *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, (January 2014) (United Nations Publication Sales No.: E.14.V.2, ISBN 978-92-1-133819-5, e-ISBN 978-92-1-056399-4). https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf

[81] The UNCITRAL website provides that legislation based on the Model Law has been adopted in 49 States in a total of 53 jurisdictions. https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

cooperation and coordination. It does not require reciprocal adoption. The US and Canada have adopted this model.

Of the fifteen countries in this review, only the Dominican Republic was officially listed by UNCITRAL as enacting the Model Law according to the UNCITRAL list.[82] However, from our review it appears that many of the Canadian based laws had at least to some extent included language that addressed international Insolvency (including Barbados, Grenada, Jamaica St. Vincent and the Grenadines, Trinidad and Tobago) while the UK based laws generally did not. However, we note that legislative amendments in the Bahamas enacted international provisions that emulate the Model Law.[83]

Interestingly, we note how Jamaica has indeed authorized the Model Law's adoption. Jamaica, in its *Insolvency Act of 2014*, Section 287 (1) authorized the Minister to require the UNCITRAL Model:

> *The Minister, may by regulations, give effect in Jamaica with or without modifications, to the UNCITRAL Model Law on Cross-Border Insolvency, and make provision for the recognition by the Court of and insolvency proceeding commences in foreign jurisdictions, the effect in Jamaica of the recognition by the Court of an insolvency proceeding commenced in a foreign jurisdiction, and the obligations of the Court in connection with any such insolvency proceeding.*

In the related Jamaican Insolvency Regulations enacted subsequently in 2015, the provisions that deal with international insolvency are extensive and appear to borrow or adopt language from the UNCITRAL Model to a certain extent. The scope of our review did not permit a detailed line-by-line comparison of precise content of those provisions in comparison to the UNCITRAL Model or with other international provisions, however, such an analysis might be suitable for future work.

We recommend full adoption of the UNCITRAL Model Law as it is a well-crafted, widely used standard that enables ease of functioning in cross-jurisdictional cases. The Model Law is well supported with a guide to enactment, articles and legislative materials and has the benefit of a growing body of interpretive case decisions that serve to aid other jurisdictions as persuasive authority on its use.

Recommendation: Full and complete adoption of the *UNCITRAL Model Law on Cross-Border Insolvency* as the emerging global standard.

Cost: Unknown. (Cost involved in proposing and enacting technical amendments in each country.)

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2. TAX NEUTRALITY

Measures proposed and in formal insolvency procedure approved reorganization plan should be "tax neutral" and not be construed as a "taxable event" that incurs new or additional tax liability.

World Bank Principles: *B3 Enabling Legislative Framework*, state that a law should:

> *B3.4 Provide favorable or neutral tax treatment with respect to losses or write-offs that are necessary to achieve a debt restructuring based on the real market value of the assets subject to the transaction;*
>
> *B3.5 Address regulatory impediments that may affect enterprise reorganizations;*

World Bank Principles: B3.4 and B3.5

> *Creation of a new or additional tax liability within a plan framework (such as imputed income "debt forgiveness" or "gains" on asset sales) discourages debtors from seeking relief under*

[82] UNCITRAL website. Id.

[83] S. Rolle-Kapousouzoglou, *Bahamas - Changes to the Insolvency Law,* IFLR1000 (October 9, 2015). https://www.iflr1000.com/NewsAndAnalysis/Bahamas-Changes-to-the-insolvency-law/Index/3906

> *laws designed to aid in the rescue of viable businesses and add a level of complexity as they typically involve estimates on values of assets in a distressed situation. Likewise, exemption from securities registration for newly issued shares of a reorganized company or those issued in a debt-to-equity swap should net be subject to the same costly and comprehensive stock-issuance disclosures as are ordinary new issue shares. Creditors taking shares are already familiar with the company and its financial situation through its existing debt transaction and are not equivalent to new purchasers at arm's length tantamount to uninformed public – they are taking shares in exchange for debt.*

Only one of the laws reviewed had provisions that appeared to address taxation issues.[84]

Recommendation: Technical amendment of law to clarify that reorganization measures do not constitute taxable events that incur new or additional tax liabilities.

Cost: Unknown. (Cost involved in proposing and enacting technical amendments in each country.)

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3. MATTERS OF SCALE

Monetary thresholds, penalties deadlines and other matters of scale must be proportional and consistent with economic realities to be effective.

A number of provisions were encountered that raised questions of appropriate scale. These provisions prompted the question whether the threshold amounts were appropriate to operate as the intended safeguards. Certain penalties and disincentives found in a number of the laws seemed too low in amount for modern times, giving the appearance that the laws were in need of updating.[85] Provisions must be proportional and relevant to modern economic realities. Such items can only be adjusted in reference to the specifics of the local economy. We recommend a review of all 'matters of scale" for current relevance. Below is a list of items that are a typically a matter of scale which may require updating.

Monetary Thresholds:

- Jurisdictional thresholds for case commencement (Canada: $5 million in liabilities)
- Creditor case commencement thresholds (to discourage abuse)
- Micro and Small company insolvency thresholds (what constitutes small)
- Summary Administration
- Distribution thresholds

Monetary Incentives and Disincentives:

- Court Fees.
- Penalties and Fines.
- Professional fees (Administrators: *See Section D. 4 above*)

Timeline and Action provisions:

- Deadlines for actions (throughout the laws – whether they are still workable)
- Reach-back periods for preferences (how far is sufficient)
- Reach-back periods for inequitable transfers (how far is sufficient)
- Voting on business rescue plans (what level of creditor majority should be required)
- Prepackaged/Pre-negotiated plans (requirements)

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[84] Antigua and Barbuda had special tax provisions in this regard. *See*: Section 610. *Antigua and Barbuda Companies Act (Amended) 2020*, Act No. 17 of 2020 (Official Gazette Vol. XL. No. 51 dated 15th July, 2020). *http://admin.theiguides.org/Media/Documents/Companies-Amendment-Act-2020.pdf*

[85] Example: Case opening by creditors holding two or more claims totaling as little as $200 was observed. This is more than likely to be inadequate as a creditor petition threshold.

- Special provisions for specific industry (farm/fisheries/mining/tourism)
- Noticing and Filing (upgrade for modern electronic communication)

Recommendation: Commission a study of all matters of scale mandated by law or regulations, including any monetary (jurisdictional thresholds, fees, penalties and disincentives) in terms of current economic relevance, as well as all time and action requirements (specified deadlines, periods, voting requirements) in terms of current workability.

Cost: $35,000 - $50,000 (each country)

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4. PRACTICE AND PROCESS EFFICIENCY

Process Review. A process review that examines how cases flow though the insolvency system is recommended. A well-conducted process review can serve to root out procedural inefficiencies, propose elimination of unnecessary steps, suggest more optimal realignment of internal responsibilities, eliminate a "battle of forms," eliminate redundancies in information requested and provided, and identify conflicts between insolvency administration and other departments of government (particularly company registries and tax authorities). A process review usually entails the creation of a system-flow map after a physical "*w*alk-though" observation of typical case movement from commencement to closure, along with interviews of system users, stakeholders and officials, all of which serve to reveal procedural inefficiencies where they exist.

A process review of this kind requires an on-the-ground physical presence with extensive access to facilities and people (government officials, system functionaries, stakeholders). Such a review draws upon disciplines that include both consulting and law (standard process efficiency balanced against legal due process considerations). The results of a process review may be followed by consensus-building and technical drafting assistance for modification of legislation or regulations needed to accommodate any proposed procedural changes recommended in the completed review. This does not include additional costs of implementation (realignment of staffing, physical workspace modification) and/or automation (software customization, hardware purchase, installation and training).

Recommendation: Conduct process review of the insolvency system to identify procedural inefficiencies, develop a report of findings and recommended changes.

Cost: $50,000 - $75,000 (each country)

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5. DECRIMINALIZATION | DESTIGMATIZATION OF FINANCIAL FAILURE

A review of insolvency and all related laws (company law, criminal laws) for any discriminatory or punitive provisions that reflect or cast stigma on legitimate users of an insolvency regime in recommended. Such provisions are known to lessen the use (and the effectiveness) of the insolvency laws. Discriminatory provisions include termination of employment, prohibitions from serving in executive management positions, serving on boards, or serving in official government positions.

In a number of countries in our review, we encountered prohibitions on serving in particular positions of local government if involved in an insolvency proceeding or adjudicated insolvent. These were often mitigated by a procedure where the individual may obtain a certification that insolvency was not due to any fault of their own. Provisions such as these are predicated on the assumption that insolvency is due to malfeasance or wrongdoing and embody outdated notions of culpability for mere

financial failure.[86] They embody and promote unnecessary stigma. The laws should be reexamined and reformulated to place the burden in reverse, with the presumption of propriety unless evidence of wrongdoing is shown. This is especially important in current times where Covid-19 related lockdowns are the clear primary causes of revenue short-falls that, in some cases, will lead to the perfectly-proper use of insolvency procedures through no fault of the company's managers officers, directors, officers or owners.

Aside from the elimination of punitive and discriminatory language, affirmative inclusion of anti-discrimination provisions set out within the law itself, can provide some protection against discriminatory treatment based solely on use of the insolvency proceedings. The recently enacted amendments in Antigua and Barbuda (2020) contain an example of such provisions, covering both government and private action. Section 575. *Protection against discriminatory treatment*, reads as follows:

> *(1) A governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a company that is or has been a debtor under this Part, or another company or person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this Part, has been insolvent before the commencement of the case under this Part, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this Part.*
>
> *(2) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been associated with a debtor under this Part, solely because such debtor is or has been a debtor under this Part, has been insolvent before the commencement of the case under this Part, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this Part.*

Antigua and Barbuda Companies Act (Amended) 2020[87]

Recommendation: Commission a study of the insolvency and other related laws (company law, criminal law) to identify any unnecessary, overly punitive or discriminatory provisions that reflect or create stigma surrounding the proper of the insolvency system with report of recommended changes.

Cost: $25,000 - $45,000 (each country)

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6. REFORM LAG | LACK OF PUBLIC OUTREACH

Awareness-raising of reforms. Newly implemented reforms that are not publicized are often overlooked by stakeholders. It is important that any significant reform be accompanied by a focused stakeholder outreach-notification campaign. When surveyed, stakeholders tend to describe their negative experiences with the old unreformed framework and do not reflect experiences with reformed system. When responding to inquiries or surveys responders often site examples of past experiences and practices that have already been remedied. Without assurances that stakeholder comments reference newly reformed system, scores and rankings will never change. One solution is to conduct Public-Private Dialogue (PPD) sessions to fully inform stakeholders of recent reform

[86] An excellent news article that directly addresses this stigma is authored by Fayola Evans Roberts who is the Supervisor of Insolvency in Jamaica, entitled: "*Bankruptcy a tool, not a stain,"* Jamaica Gleaner (published 5 June 2018). https://jamaica-gleaner.com/article/commentary/20180606/fayola-evans-roberts-bankruptcy-tool-not-stain

[87] *Antigua and Barbuda Companies Act (Amended) 2020.*

implementation and, importantly, to solicit feedback on how things are working and see information on new issues that need to be addressed. Also critical is the timing of these sessions which might be conducted prior to known regularly scheduled evaluations.

Recommendation: Perform coordinated public stakeholder outreach to create public awareness of reforms implemented.

Cost: $0 - $75,000 (each country)

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7. ENGAGEMENT WITH WORLD BANK DOING BUSINESS TEAM

Our own experienced in conducting this review revealed a steep inability to access basic information in many of the subject countries. *See: Section A.1 (above).* We can only surmise that the World Bank Doing Business and other initiatives might have encountered similar challenges in obtaining information for their evaluations, especially in locating case data. The establishment of high-level contacts between Supervisors of Insolvency (or other designated official) in each country and the World Bank's Doing Business team would serve to facilitate better information-sharing and communication which would enable the World Bank and others to more efficiently and effectively perform a complete, objective and accurate review.[88]

Recommendation: Establish high-level contacts between Insolvency Supervisors (or other designated official) and World Bank's Doing Business "Resolving Insolvency" team to facilitate better communication and information-sharing.

Cost: $0 - $5,000 (each country)

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[88] In at least one instance, the country Supervisor of Insolvency presented information that on its face appeared to supplement the World Bank Doing Business data which could possibly affect their findings. The information pertained to actual cases that have passed through the system such that a "No Practice" evaluation may no longer be warranted. Direct contact with World Bank Doing Business team to share information is recommended as all should benefit from an improved flow of information.

III. DOING BUSINESS METHODOLOGY

NOTE ON THE WORLD BANK METHODOLOGY

The World Bank Doing Business "Resolving Insolvency" methodology was introduced in 2008 with the *Strength of Insolvency Framework* index introduced in Doing Business 2015. The index was based on the *World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes (2011)* and the *United Nations Commission on International Trade Law's Legislative Guide on Insolvency Law (UNCITRAL 2004)*. The "Doing Business" report is an often-cited cross-jurisdictional comparative tool that has served as the catalyst for numerous reform efforts throughout the world, especially for insolvency and debt-resolution systems.

Discontinuation announced. On September 19, 2021, the World Bank Group management announced its decision to discontinue the Doing Business report. (https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report) Our Report was in progress when this announcement was made, and references only *Doing Business 2020* data.

Any point-by-point indicator analysis has inherent weaknesses. We note that any set of indicators are a subset of a greater picture and thereby possess inherent weaknesses. We reference the specific indicators used in the *Resolving Insolvency* framework which are the factors used in the *2020 Doing Business* reports for each country. They are not comprehensive as they comprise a small set of sixteen representative indicators that (1) enable country-to-country comparison; and (2) diagnostically identify gaps that may be indicative of greater problems for further exploration. The sixteen "*Strength of Insolvency Framework*" indicators can still completely miss a significant problem area and still fail to recognize a substantial reform occurring in an area not captured by its measurements. (An example in the Caribbean is the establishment of offices of insolvency supervision: Between 2002 -2015 at least five countries established an official "Supervisor of Insolvency" unit, yet this reform is not captured within the indicators.) Moreover, the simple binary presence or absence of one of the sixteen framework factors does not speak to the quality of the factor present, nor are matters of scale considered.

RESOLVING INSOLVENCY SCORE ANALYSIS

Along with the independent gap-evaluation performed above, our review also sought to understand why the indicators for the fifteen Caribbean countries were so low. We note that the low Doing Business "Resolving Insolvency" rankings were a strong motivating factor in the commissioning this review. Below is a summary chart of the scores and rankings for the fifteen subject countries:

		RESOLVING INSOLVENCY	RANK	SCORE
1	1	**Jamaica**	34	70.11
	2	**Barbados**	35	69.76
2	3	**Bahamas**	71	53.43
	4	**Trinidad & Tobago**	83	48.45
	5	**Belize**	91	46.14
3	6	**Dominican Republic**	124	37.97
	7	**Saint Lucia**	131	35.92
	8	**Antigua & Barbuda**	132	35.59
	9	**Dominica**	136	34.68
	10	**Surinam**	139	33.8
	11	**Guyana**	163	22.38
4	12	**Grenada**	168	0.0
	13	**Haiti**	168	0.0
	14	**Saint Vincent & the Grenadines**	168	0.0
	15	**Saint Christopher & Nevis**	168	0.0

Source: Compiled from World Bank Doing Business 2020 reports for Resolving insolvency, May 2019.

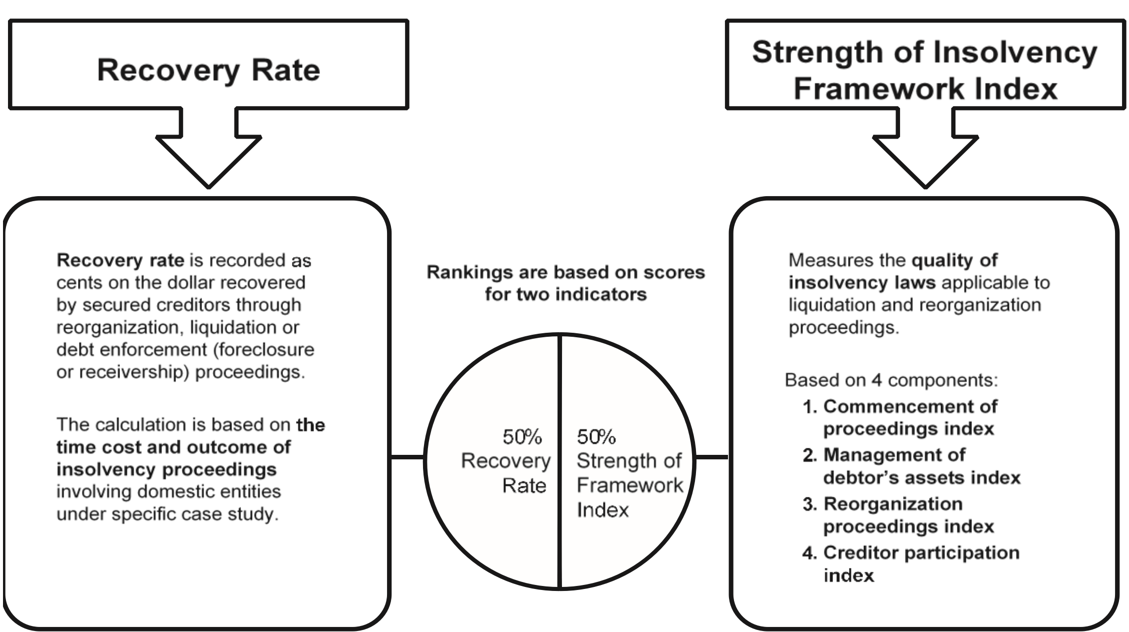
The summary breakdown shown above, prepared from data extracted from the World Bank Doing Business rankings from 2020, yields four categories: (1) the top scorers: Jamaica and Barbados (in the upper 20% of all 168 countries); (2) mid-range scorers: Bahamas, Trinidad and Tobago, and

Belize; (3) low scorers: Antigua and Barbuda, Dominica Surinam and Guyana (in the lower quartile of 168 countries), and (4) remaining four tied for last: Grenada, Haiti, St. Vincent and the Grenadines and St. Christopher and Nevis (all ranked 168 out of 168 countries).

UNDERSTANDING THE METHODOLOGY IN THE CONTEXT OF THE CARIBBEAN

To understand why the Caribbean scores and rankings are low, particularly for the four countries receiving zero scores, it is essential to understand the *Doing Business* methodology[89] from which the scores are generated -- especially before embarking on major reforms, because in some cases (as we explain below) improving the law will not change the Doing Business scores.

What Does Resolving Insolvency Measure?



Source: World Bank Doing Business Resolving Insolvency.

The *Resolving Insolvency* scores are comprised of two separate parts: "*Recovery Rate*" and "*Strength of the Insolvency Framework*."

Strength of the Insolvency Framework involves an evaluation of the text of the insolvency law against a scale of sixteen factors within four general index categories:

- Commencement of Proceedings index (0-3)
- Management of Debtor's Assets index (0-6)
- Reorganization Index (0-3)
- Creditor Participation Index (0-4)

Note: A "SUMMARY OF INSOLVENCY FRAMEWORK INDEX CHART" presenting a country-by-country compilation of detailed scores given for each of the sixteen indicators appears on Page 55 below.

Recovery Rate is the estimated rate of recovery in a hypothetical case in the given system, calculated based on the *time*, *cost* and *outcome* of proceedings in each economy, using a hypothetical business (a hotel) to compare expected results across economies. A series of assumptions regarding the business and the case are used to make the analysis uniform. The

[89]The World Bank Doing Business methodology for Resolving Insolvency appears here: *https://www.doingbusiness.org/en/methodology/resolving-insolvency*

business is experiencing liquidity problems. Professionals contacted in the given economy indicate how such a case would likely proceed, what the outcome would be and an estimate the time and costs involved. The recovery rate is presented as “cents on the dollar” recovered by secured creditors through judicial reorganization, liquidation as well as through other non-insolvency enforcement mechanisms, including foreclosure or receivership.

Source: World Bank Doing Business Resolving Insolvency.

The combined scores for *Recovery*” and *Strength of Framework* comprise the overall *Resolving Insolvency* score. Country scores sorted from highest to lowest results in a country’s rank.

However, a closer look at the component detail reveals the following:

		RESOLVING INSOLVENCY	RANK	SCORE	RECOVERY RATE	FRAMEWORK	FR RAW	
1	1	Jamaica	34	70.11	66.4	11.0	11.0	
	2	Barbados	35	69.76	65.7	11.0	11.0	
2	3	Bahamas	71	53.43	64.4	6.0	6.0	
	4	Trinidad & Tobago	83	48.45	26.1	11.0	11.0	
	5	Belize	91	46.14	56.7	5.0	5.0	
3	6	Dominican Republic	124	37.97	9.6	10.5	10.5	
	7	Saint Lucia	131	35.92	43.5	4.0	4.0	
	8	Antigua & Barbuda	132	35.59	37.1	5.0	5.0	
	9	Dominica	136	34.68	29.6	6.0	6.0	
	10	Surinam	139	33.8	7.7	9.5	9.5	
	11	Guyana	163	22.38	18.4	4.0	4.0	
4	12	Grenada	168	0.0	NP	0.0	11.0	Actual Assessed Score
	13	Haiti	168	0.0	NP	0.0	3.0	
	14	Saint Vincent & the Grenadines	168	0.0	NP	0.0	11.0	
	15	Saint Christopher & Nevis	168	0.0	NP	0.0	11.0	

Source: Compiled from World Bank Doing Business 2020 reports for Resolving insolvency, May 2019.

The above shows that **four countries** received a zero “0” evaluation on their respective insolvency frameworks. However, when we look at the detailed “raw” scores achieved for their respective frameworks, they tell a different story: three of the four actually received very high framework scores (“11”) equal to the top scorers in this survey. **The above shows that despite very high framework scores a country can still receive a low (last place) ranking. It also shows that a country with very poor framework scores can still receive a high ranking.** Below we explain why.

IMPACT ON CARIBBEAN SCORES

There are three important considerations that heavily impact the scores and rankings of the fifteen subject Caribbean countries in this report:

(1) The ”NP” (No Practice) negates everything else. Where a country that has not had an actual live case in the preceding twelve months (essentially meaning no cases upon which the WB analysis could be based) a “NP” (“No Practice”) designation is given for the “Recovery” half of the index. The “NP” designation *completely negates* any consideration of the country’s Framework scores and automatically receives a zero (“0”) overall score resulting in last-place bottom ranking of 168 out of

168 countries in the global Doing Business survey. Yet actual raw scores achieved on the *Strength of the Framework* show that three of the four Caribbean countries receiving a "No Practice" *actually received very high marks equal to the top scores in this survey*. (Grenada, St. Vincent and the Grenadines, St. Christopher and Nevis achieved *Framework* scores of "11" which equal the top two scorers, Jamaica and Barbados.)

Why this is the case. Within each country's *Resolving Insolvency* evaluation there is "Measure of Quality" page which displays the detailed sixteen indicator scores achieved by that country. This standard explanatory note appears at bottom of the page:

> *Note: Even if the economy's legal framework includes provisions related to insolvency proceedings (liquidation or reorganization), the economy received 0 points for the strength of the insolvency framework index, if time cost and outcome indicators are recorded as "no practice."*

The Doing Business rationale[90] for this is stated as follows:

> *If an economy had zero completed cases a year over the past five years involving a judicial reorganization, judicial liquidation or debt enforcement procedure (foreclosure or receivership), the economy receives a "no practice" mark on the time, cost and outcome indicators. This means that creditors are unlikely to recover their money through a formal legal process. The recovery rate for "no practice" economies is zero. In addition, a "no practice" economy receives a score of 0 on the strength of insolvency framework index even if its legal framework includes provisions related to insolvency proceedings (liquidation or reorganization).*

Without any case activity, the score will remain zero no matter how many legislative improvements are identified, adopted or implemented. This is important not only for how the current and past rankings were determined, but also for **understanding that a "No Practice" will mean that any *future* improvements to the legal framework will not improve the country's score or rank unless actual practice case activity is present.**

(2) High recoveries from non-bankruptcy receiverships overshadow bad framework scores. Because "Recovery" scores also include results achieved by non-insolvency procedures[91] predominantly used in some countries (receiverships and foreclosures, which essentially entail the direct repossession of secured collateral by banks), the resulting high Recovery scores raise their overall evaluations despite having low scoring Frameworks. (Bahamas and Belize with framework scores of 6.0 and 5.0 respectively).

(3) Reforms that are not captured by one of the indicators will not result in an improved score. The "Framework" indicator analysis selectively evaluates only 16 indicators as a proxy for overall framework health. Any improvements to an insolvency system that are not within the sixteen indicators will not be reflected in their score. A country can make strong systemic reforms that greatly improve their ability to resolve cases effectively and efficiently and yet the improvements will not result in any change in their Resolving Insolvency scores.

[90] *World Bank, Doing Business Resolving Insolvency* methodology. https://www.doingbusiness.org/en/methodology/resolving-insolvency

[91] It is unclear why receivership and foreclosure are included in the WB Recovery half of the analysis. While receiverships may provide a swift and efficient means for an individual creditor (usually a bank) to deal with a loan default, it is not an insolvency procedure (collective in nature) and its use is not reflective of a functioning bankruptcy-insolvency system, particularly the use of modern business rescue tools**.** The successful use of receivership or foreclosure as the main debt-resolution methodology operates to mask the reality of a weak or inadequate insolvency framework.

Case Study: St. Vincent and the Grenadines – Case Availability v. No Practice designation.

St. Vincent and the Grenadines (SVG) was one of the four countries receiving "0" for "Resolving Insolvency" resulting in a 2020 ranking of 168 (tied for last place). Yet, SVG received a "Framework Strength" score of 11 out of 16 possible -- the very same score that regional top-scorers Jamaica, Barbados and Trinidad & Tobago received on Framework Strength which is the same score that the UK and Canada achieved in the 2020 survey. This is due to the NP ("No Practice") designation the "Recovery Rate" component of the overall score which entirely precludes any combined score, resulting in an overall "0." The World Bank report states there were no relevant cases in the past 12 months of the evaluation period for SVG. Upon discussing the findings with the Supervisor of Insolvency for St. Vincent and the Grenadines, we were informed that SVG indeed had cases that could have been evaluated by the World Bank Doing Business team and was provided a list of supporting information and data. The Supervisor also conveyed her belief that several Framework compliance indicators were in error. If there were indeed cases as the Supervisor of Insolvency indicated, then the NP evaluation is in error, as is the overall score and the resulting ranking. We cannot determine with any certainly whether or not the cases listed qualify for evaluation pursuant to the World Bank Doing Business requirements, however, the matter is worthy of further inquiry. The Supervisor of Insolvency indicated that neither she nor any representative of her office, had contact with the WB Doing Business team at the time their survey was performed, but expressed an interest in discussing the availability of actual cases with them, not only to rectify the 2020 evaluation, as necessary, but to ensure proper and accurate consideration for future WB Doing Business evaluations.

POSSIBLE SOLUTION: PILOT CASE "WALKTHROUGH"

As detailed above, the World Bank indicator evaluations state that a "No Practice" was assigned when a country lacked completed cases over a specified a period that involved judicial reorganization, judicial liquidation or debt enforcement procedure (foreclosure or receivership). To address this gap, we suggest (a) verifying whether were truly no actual cases for evaluation in the requisite period; and (b) exploring the possibility of organizing and conducting a "walk-through" of an actual case through the system. Such a case "walk-through" would entail a supervisor or group of professionals (perhaps on a voluntary basis) identify an actual live case as it proceeds through the system from commencement on to conclusion, documenting the steps in order to evidence its existence as an actual live case. A number of pilot case walk-throughs could be recorded, the documentation of which could serve as the basis for future Word Bank Doing Business evaluations.

Recommendation: Perform actual live pilot case "walk throughs" using volunteer professionals to assist, shadow, guide and document actual cases from commencement through conclusion.

Estimated Cost: $0 - $50,000 (each country)

SUMMARY OF INSOLVENCY FRAMEWORK INDEX CHART

FRAMEWORK STRENGTH	Antigua & Barbuda	Bahamas	Barbados	Belize	Dominica	Dominican Republic	Grenada	Guyana	Haiti	Jamaica	St. Christopher & Nevis	Saint Lucia	St. Vincent & Grenadines	Surinam	Trinidad & Tobago		
	UK	UK	C	UK	UK	Civ	C	UK	Civ	C	C	C	C	Dutch	C		
DB RANK 2020	**132**	**71**	**35**	**91**	**136**	**124**	**168**	**163**	**168**	**34**	**168**	**131**	**168**	**139**	**83**		
DB SCORE	**35.59**	**53.43**	**69.76**	**46.14**	**34.68**	**37.97**	**0.00**	**22.38**	**0.00**	**70.11**	**0.00**	**35.92**	**0.00**	**33.80**	**48.45**		
STRENGTH OF FRAMEWORK INDEX	**31.3**	**37.5**	**68.8**	**31.3**	**37.5**	**65.6**	**0.0**	**25.0**	**0.0**	**68.8**	**0.0**	**25.0**	**0.0**	**59.4**	**68.8**		
RECOVERY RATE	**37.1**	**64.4**	**65.7**	**56.7**	**29.6**	**9.6**	**NP**	**18.4**	**NP**	**66.4**	**NP**	**43.5**	**NP**	**7.7**	**26.1**		
STRENGTH OF INSOLVENCY FRAMEWORK (0-16)	**5.0**	**6.0**	**11.0**	**5.0**	**6.0**	**10.5**	**NP**	**4.0**	**NP**	**11.0**	**NP**	**4.0**	**NP**	**9.5**	**11.0**		
																Compliance	
COMMENCMENT OF PROCEEDINGS INDEX (0-3)																**YES**	**NO**
DEBTOR Commencment	0.5	0.5	1.0	0.5	0.5	1.0	1.0	0.5	0.5	1.0	1.0	0.5	1.0	1.0	1.0	*77%*	*23%*
CREDITOR Commencment	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	*50%*	*50%*
Commencement basis (Liquidity / Balance Sheet)	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	*100%*	*0%*
MANAGEMENT OF DEBTORS ASSETS INDEX (0-6)																	
Continuation of essential goods/service contracts	0.0	0.0	0.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	0.0	*13%*	*87%*
Rejection of burdensome contracts	1.0	0.0	1.0	0.0	1.0	1.0	1.0	1.0	0.0	1.0	1.0	1.0	1.0	1.0	1.0	*80%*	*20%*
Avoidance of preferential transactions	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	0.0	1.0	1.0	1.0	1.0	1.0	1.0	*93%*	*7%*
Avoidance of undervalued transactions	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	1.0	1.0	*60%*	*40%*
Possiblity of post-commencment credit	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	0.0	1.0	*53%*	*47%*
Priority for post-commencment credit	0.0	0.0	0.5	0.0	0.0	0.5	0.5	0.0	0.0	0.5	0.5	0.0	0.5	0.0	0.5	*23%*	*77%*
REORGANIZATION INDEX (0-3)																	
Which creditors vote on proposed plan	0.0	0.0	1.0	0.0	0.0	0.5	1.0	0.0	0.0	1.0	1.0	0.0	1.0	1.0	1.0	*50%*	*50%*
Requires dissenting at least as much as in liquidation	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	*0%*	*100%*
Creditor classes/vote separately/equal w/in class	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	*0%*	*100%*
CREDITOR PARTICIPATION INDEX (0-4)																	
Creditor approval of selection/appoint insolv rep	1.0	0.0	1.0	1.0	1.0	0.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	0.0	1.0	*60%*	*40%*
Creditor approval for sale of substantially all assets	0.0	0.0	1.0	0.0	0.0	1.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	0.0	1.0	*47%*	*53%*
Creditor right to request information from insolv rep	0.0	0.0	1.0	0.0	0.0	0.0	1.0	0.0	0.0	1.0	1.0	0.0	1.0	1.0	1.0	*47%*	*53%*
Creditor right object to accepting/rejecting claims	0.0	1.0	0.0	1.0	1.0	1.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	1.0	0.0	*40%*	*60%*
TOTAL	**5.0**	**6.0**	**11.0**	**5.0**	**6.0**	**10.5**	**11.0**	**4.0**	**3.0**	**11.0**	**11.0**	**4.0**	**11.0**	**9.5**	**11.0**		

Source data: World Bank Doing Business 2020 Country Reports.

ANNEX A

AMENDMENTS AND IMPROVEMENTS IN UK AND CANADIAN LAW

Both Canada and the UK regularly evaluate and improve their laws to keep up with changing times. Both have formal processes for doing so on a regular basis. The summaries below illustrate the process of evaluation and the frequency of the formal reviews that culminate in amended insolvency laws. The series of revisions that both Canada and the UK have adopted over time echo the trend toward enhanced tools for business rescue, evidenced most recently by recent UK enactment of the *Corporate Insolvency and Governance Act (CIG Act)*[92] on June 26, 2020 with its addition of new restructuring reorganization tools to the UK's legal framework. The Canadian and UK process of revision are discussed below, with special attention to the newly enacted CIG Act which may serve useful in considering amendments to Caribbean laws.

Canada. Canada has a long history of amending its insolvency laws to keep up with changing times. The Insolvency Act of 1869 (known as "*An Act Respecting Insolvency*") was the first bankruptcy and insolvency related law in Canada, originally applying to traders, including unincorporated trading companies and partnerships.[93] Today, Canada has three main insolvency statutes the *Bankruptcy and Insolvency Act* ("BIA") and *Companies Creditors Arrangements Act* ("CCAA"), and the *Winding-up and Restructuring Act*. The BIA was developed from the Bankruptcy Act of 1919, which was substantially revised in 1949 and more recently in 1992, 1997 [94] and 2019.[95] The BIA is an all-encompassing Act providing for both personal and corporate insolvencies offering alternatives ranging from bankruptcy for individuals and corporations to consumer proposals for individuals and reorganizations for business enterprises. The CCAA applies to reorganizations of corporations having over $5 million in debt. Unlike reorganizations under the BIA, the CCAA provides for a court-driven process that grants judges a high degree of flexibility to deal with cases before them.[96] The CCAA, enacted in 1933, became more widely used tool for reorganizing corporations in the mid-1980s. The CCAA was amended in 1997 and the BIA in 1992 and 1997.[97] The 1997 amendments to the BIA[98] and the CCAA[99] added a mandate that both Acts would subject to a Committee of Parliament for review five years after coming into force. Like the *Cork Report* in the UK (discussed below), a number of reforms were adopted in response to a major government study: "*Report of the Study Committee on Bankruptcy and Insolvency Legislation*" (the Tassé Report).[100]

[92] UK Public General Acts (2020)(online UK legislation) https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

[93] Y. Edillor, *Law amendments for Canada's bankruptcy and insolvency laws this 2019,* The Law Times (January 6, 2020) (Synopsis of Canadian Insolvency law history). https://www.lawtimesnews.com/practice-areas/corporate-commercial/the-law-amendments-for-canadas-bankruptcy-and-insolvency-laws-this-2019/324553

[94] Amiri Dear, "*Copying Canada – A Critical Analysis of The Barbados Bankruptcy And Insolvency Act* "Master of Laws Graduate Department, Faculty of Law, University of Toronto 2013 (containing an excellent summary of the influence of Canadian insolvency law in the Caribbean).

[95] W. MacLeod, N. Stewart, *Insolvency Amendments Now in Force Under the BIA and CCAA* (November 01, 2019)(synopsis of amendments to the BIA and CCAA effective November 1, 2019 through Bill C-97). https://www.mccarthy.ca/en/insights/blogs/restructuring-roundup/insolvency-amendments-now-force-under-bia-and-ccaa

[96] *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Marketplace Framework Policy Branch Policy Sector, September 2002).

[97] Amiri Dear, id.

[98] Section 216.

[99] Section 22.

[100] R. Tassé, *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Study Committee on Bankruptcy and Insolvency Legislation, 1970) (the "Tassé Report"). ttps://publications.gc.ca/site/archivee-archived.html?url=https://publications.gc.ca/collections/collection_2021/isde-ised/RG62-1-1970-eng.pdf

United Kingdom. In 1977 a wide-ranging review of UK insolvency law and practice was commissioned by the *Secretary of State for Trade and Industry*, under the chairmanship of Sir Kenneth Cork.[101]. The *Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558* (the "Cork Report") was the culmination of this study which set out recommendations on modernization and reform of the UK insolvency laws. The study, issued in June 1982, found that the law required major reforms, particularly in terms of business rescue provisions, including the recommendation of two new or revised procedures, “Administration” and “Company Voluntary Arrangement.” The *Cork Report* was followed by a White Paper in 1984, *A Revised Framework for Insolvency Law (1984) Cmnd 9175*, which led to the *Insolvency Act 1986.* Both schemes were consolidated in the 1986 *Insolvency Act*, and implemented in detail by the 1986 *Insolvency Rules.*[102] Since then, the UK law has undergone periodic review and revision, with the most recent significant amendments in 2020, discussed below.

UK Corporate Insolvency and Governance Act (CIG Act) of 2020. On 26 June 2020, the *Corporate Insolvency and Governance Act (CIG Act)*[103] came into force. The *CIG Act* brought fundamental changes to the UK’s company and insolvency laws (a) to provide temporary assistance to companies and their directors during the COVID-19 crisis; and (b) to significantly upgrade the UK’s business rescue restructuring tool kit. The CIG Act implements measures contained in the UK Government's consultation on Insolvency and Corporate Governance which concluded in August 018. These highly advanced amendments respond to the immediate consequences of the business downturns resulting from the COVID-19 pandemic (including temporary relaxation of wrongful trading rules for presentation of creditor demands and winding-up petitions, and flexibility in requirements for shareholder meetings and corporate filings) and provide permanent changes enabling business rescue (including a new “Restructuring Plan, ”and the ability to “cram-down” entire dissenting classes of creditors and/or shareholders, as well as a ban on “ipso facto” clauses and a new moratorium in support).

A recent *UK House of Commons Library Research Briefing* paper issued in July of 2021, entitled “*New business support measures: Corporate Insolvency and Governance Act 2020*” illuminated the provisions of the new CIG Act as follows:

> *The Corporate Insolvency and Governance Act 2020 (CIGA 2020) received Royal Assent on 25 June 2020. Its measures fall into two sets: permanent measures to update the UK insolvency regime, and temporary measures to insolvency law and corporate governance intended to assist struggling businesses during the pandemic. Almost all its provisions commenced on 26 June 2020, but most of its temporary business protection measures have retrospective effect from 1March 2020. The Government has since announced multiple extensions of the Act’s temporary measures. These extensions sought to assist businesses whilst coronavirus-related restrictions remain in place.*
>
> ***The permanent measures***
> *The permanent insolvency measures contained in the Act (previously announced by the Government, and in development before Covid-19) mark a*

[101] *UK Trade and Industry Committee, Cork Report: administration and CVA*, UK Parliament Publications. (December 20, 1999) (containing a synopsis of the recent history of UK insolvency reforms including the Cork Report.) *https://publications.parliament.uk/pa/cm199900/cmselect/cmtrdind/112/11206.htm#note1*

[102] Id. *UK Trade and Industry Committee, Cork Report: administration and CVA*, UK Parliament Publications. (December 20, 1999) (containing a synopsis of the recent history of UK insolvency reforms including the Cork Report.) *https://publications.parliament.uk/pa/cm199900/cmselect/cmtrdind/112/11206.htm#note1*

[103] *UK Public General Acts.* https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

major change in UK insolvency law towards a business rescue culture more in line with U.S. insolvency (chapter 11).

The new permanent measures are:

- *A new restructuring plan to help viable companies struggling with debt obligations. Courts can only sanction a restructuring plan (that binds creditors) if it is "fair and equitable". In other words, creditors vote on the plan, but the court can impose it on dissenting creditors (known as "cross-class cram down").*

- *A free-standing moratorium for UK companies to give companies a formal "breathing space" in which to pursue a rescue or restructuring plan. During this moratorium no creditor action can be taken against the company without the court's permission. The moratorium is overseen by a monitor (an insolvency practitioner) but responsibility for the day-to-day running of the company remains with the directors (in effect, it is a "debtor-in-possession" procedure). Temporary modifications to the new (and otherwise permanent) moratorium procedure have been made to relax the entry requirements. Temporarily, a company may enter a moratorium if it has been subject to an insolvency procedure in the previous 12 months; measures also ease access for companies subject to a winding up petition. The temporary moratorium rules have been extended and are due to expire on 30 September 2021.*[104]

- *A prohibition on termination (or so called "ipso facto") clauses that are engaged when a company enters an insolvency procedure, a moratorium or begins a restructuring plan. In effect, the Act prevents suppliers from stopping their supply while a company is going through a rescue process. The Act includes safeguards to ensure that continued supplies are paid for, and suppliers can be relieved of the requirement to supply if it causes hardship to their business. Small suppliers were exempt from the obligation to supply until 30 June 2021 so that they can protect their business if necessary.*

Ali Shalchi and Lorraine Conway, ***"****New business support measures: Corporate Insolvency and Governance Act 2020,* 5 Commons Library Research Briefing (UK House of Commons Library Research Briefing, 1 July 2021)(The House of Commons Library is a research and information service based in the UK Parliament.) *https://researchbriefings.files.parliament.uk/documents/CBP-8971/CBP-8971.pdf*

Note: An excellent summary describing the enhancements, both temporary and permanent, advanced by the enactment of the CIG Act is presented in recent article by authors Ian Jack, Emma L. Menzies, Rupert Cheetham, Samantha De Souza of Greenberg Traurig, LLP entitled, "*The Corporate Insolvency and Governance Act 2020: Changes to UK Insolvency Laws*," appearing in *The National Law Review* (Volume XI, Number 242, August 12, 2020).[105]

[104] The temporary COVID-19 measures of the UK's CIG Act 2020 have recently been extended. https://www.twobirds.com/en/news/articles/2020/uk/corporate-insolvency-and-governance-act-2020-temporary-covid-19-measures-extended

[105] *https://www.natlawreview.com/article/corporate-insolvency-and-governance-act-2020-changes-to-uk-insolvency-laws*

ANNEX B

LIMITATIONS CONFRONTED IN CONDUCTING THIS REVIEW

Remote "desk review" – no travel. The most anticipated constraint involved the lack of physical access. The project was designed purely as a "desk review" with no travel visits to any countries due to Covid-19 related restrictions in effect during the project period. It was understood that during the current restricted environment all aspects of the project would be done remotely.

Limited time/resource/access limitations. This project is comprised of one individual consultant conducting a 55-day effort covering fifteen countries in a remote desk review. As such, this project was commissioned with a number of understood constraints from conception. However, we encountered a number of additional logistic, communication, accessibility constraints while proceeding that are detailed below. An understanding of the constraints is key to understating the direction and output culminating in this Report and its recommendations for follow-up work.

Primary contacts. A primary contact person was sought for each of the fifteen countries to serve as the main focal point for further inquiry, confirmation of factual information, gathering of statistics, arrangement of interviews, circulation of surveys and other necessary on-the-ground actions. A considerable amount of time and effort was expended on establishing a primary lead for each country; however, we were able to confirm suitable primary contacts within the limited timeframe. The contacts sought were to be government officials sufficiently knowledgeable and involved in insolvency governance to serve as the project's primary source of current information, laws, regulations (translations where necessary), amendments thereto, the status of reform efforts currently in progress, basic case procedural information, basic case statistics, as well as to be the main point of contact for connection to practitioners and stakeholders for in-depth inquiry into local practices. In many cases, the officials contacted were not sufficiently involved in the insolvency, bankruptcy or debt resolution processes to engage as an effective counterpart or to refer us to others who were able to effectively engage within the limited project timeframe. The inability to establish a primary counterpart heavily impacted planned project activities and adjustments were made to realign project work.

Laws and regulations. Laws and regulations in these countries that address insolvency and bankruptcy tend to range between 80 to 400 pages, much higher when regulations and other related statues and materials are included. Important debt-resolution provisions are often found scattered through other laws not using the titles "Bankruptcy" or "Insolvency," such as "Winding Up," "Liquidation," or "Receivership" or other business laws. In one instance encountered in our review, an entire comprehensive reorganization law was found situated within amendments to the country's "Company Act." Over 3,000 pages were reviewed in this project, including UNCITRAL and World Bank standards and the UK and Canadian Laws. In some cases, however, the most current, complete statutes governing the full subject matter were not always available. Some were outdated, incomplete (with important provisions buried within other laws) and some with questionable translation.

In-country practice evaluation and caseload statistics. From experience we know that the written letter of the law tells only part of the story, and that actual practice is key to a clear understanding of what properly functions and what does not. The vital input that usually accompanies an actual site visit (physical observation, document and process-flow mapping, walk-through observations, and face-to-face interviews with key officials, practitioners, ancillary professionals, and actual users of the system) was not contemplated or enabled in this project. Despite this limitation, the team believed that caseload statistics and survey instruments might shed at least some light upon the current status of practice in each country, essentially to enable comparison of annual case volume trends, the variance in case distribution among types of procedures (business rescue, liquidation, receiverships,

foreclosure), the relative balance between resolution mechanisms and to perform some level of cross-jurisdictional comparison. However, even this quantitative overview was not possible due to the lack of sufficient comparable case statistics to enable useful analysis.