

Priority, Rescue and its Financing in the Commonwealth Caribbean – Lessons from United States, United Kingdom and the European Union*

Key words: Rescue, EU State Aid Regime, Super-priority finance

Abstract

Now the dust of the global financial crisis is settling and extensive corporate failure has been exposed, the development of ‘rescue cultures’ continues to be a desired goal. This paper investigates the operation of the rescue culture in the Commonwealth Caribbean compared to United Kingdom (UK) administration and United States (US) Chapter 11 with special emphasis on priority accorded to post-petition financing. This paper confirms the existence of the rescue culture in the US, UK and Commonwealth Caribbean but laments that the two latter states fail to consider key issues of priority for post-petition finance. It also delves into a critical, but often overlooked, pillar of strong rescue frameworks: rescue financing. Taking guidance from the European Union framework on State Aid, UK schemes of Funding for Lending Scheme and National Loan Guarantee, the author proposes a fair, transparent and efficient framework encompassing state involvement and state-driven private sector engagement.

Introduction

In the late summer of 2007, ‘hurricane force’ winds blasted the financial sector of the great United States of America. Within a year, most of the world’s interconnected financial systems were demolished by a global tornado, now coined the ‘Global Financial Crisis’ (GFC). In the wake of the crisis, a ‘national lockdown’ was instituted and protectionism was evident when states placed undivided focus on their affairs and were increasingly disinterested in the survival of other nations¹. This catastrophic event resulted in significant economic regions searching for the remnants of their financial systems, questioning the role of the state and the nature of its financial regulations and

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¹ Lars Oxelheim, Lars Pehrson and Thomas Persson (eds), *The European Union and the Global Crisis*, (Executive Summary, Europaperspektiv, 2010): Solutions to this global problem “were not worked out in Brussels but rather in Berlin, London, Paris and Stockholm”; See C. Fred Bergsten, ‘Needed: A Global Response to the Global Economic and Financial Crisis’, (Testimony before the Subcommittee on Terrorism, Nonproliferation & Trade, Committee on Foreign Affairs, US House of Representatives, April 2009) <<http://www.iie.com/publications/testimony/testimony.cfm?ResearchID=1146>> accessed June 28, 2013

practices (with a desire to guide reform) and seeking to rebuild citizens' confidence in the 'market'. Most of all, a critical question was posed: who was accountable for this financial meltdown? What is critical is not unanimous acceptance of the cause of this earth-shattering calamity [which left millions unemployed and homeless²] but rather state-level responses³.

Rising from the 'ashes' of corporate failure, it is well accepted that the GFC has placed severe pressure on insolvency frameworks and, in some cases, has foreshadowed calls for reform or immediate overhaul of current frameworks. Having closely scrutinized legislation in the Commonwealth Caribbean⁴, this position applies: it is clear that, in most territories, the drafters have given deep consideration and found credible solutions to building a rescue culture, but they have failed to consider the more important issue of the financing thereof. It is unfathomable that twenty-first century insolvency legislation should omit such paramount and modern considerations. It is more 'bark than bite' and demands urgent reform.

² Impact on unemployment: European Commission: Labour Market Developments 2011: From 2000 – 2007, unemployment rate in the EU was 8.6 compared with 5.0 in the US. In 2010, unemployment rate in both EU and US was 9.6. United States: see US Department of Treasury Report: The Financial Crisis Response - In Charts (April 2012) reported that 8.8 million jobs lost and \$19.2 trillion in household wealth lost <http://www.treasury.gov/resource-center/data-chart-center/Documents/20120413_FinancialCrisisResponse.pdf> Last accessed June 18, 2013

³ Rescue financing is not limited to state-implemented measures; however, this paper's focus is state action which facilitates, encourages and 'rewards' private sector involvement in corporate rescue.

⁴ Commonwealth Caribbean Insolvency/Bankruptcy Law: Anguilla: Bankruptcy Act 2000; Antigua and Barbuda: Bankruptcy Act (Cap. 41); Barbados: Bankruptcy and Insolvency Act 2002; Bahamas: Bankruptcy Act (Cap. 69); Belize: Bankruptcy Act (Cap. 244); Dominica: Bankruptcy Act (Cap. 9:90); Grenada: Bankruptcy Act (Cap. 27); Guyana: Insolvency Act (Cap 12:21); Jamaica: Bankruptcy Act; Montserrat: Bankruptcy Act (Cap 9); St Christopher and Nevis: Bankruptcy Act (Cap 9); St Lucia: Commercial Code (Cap 244) [Title 9 - Articles 543 – 627]; St Vincent and Grenadines: Bankruptcy and Insolvency Act 2007 (Cap. 136); Trinidad and Tobago: Bankruptcy and Insolvency Act 2007 [not yet proclaimed]

The ambit of this paper is the mechanisms through which state assistance, whether directly or indirectly, may be given to troubled companies.

Establishing three crucial pillars must necessarily precede this:

- I. Corporate failure [Reality and Nature]
- II. Corporate rescue [Meaning, Importance and Types]
- III. Rescue culture [United States, United Kingdom and Commonwealth Caribbean]

Then, an extensive proposal on state rescue financing will consider both financial and non-financial measures. This includes a critical analysis of the state aid regime in the European Union⁵, with emphasis on the framework for rescue and restructuring of firms in difficulty in the non-banking sector. Analysis of recent data on the approval of such schemes is evidence of its relevance in the post-financial crisis era. Though this regime is progressive, it would be unwise to transplant it to the Commonwealth Caribbean without regard to the peculiarities of regional jurisprudence. The ultimate lesson to be learnt is the pivotal role that states may play in assisting troubled enterprises both directly (state assistance) and indirectly (through smoothing the path for assistance by the private sector).

⁵ Treaty on the Functioning of the European Union (TFEU), Articles 107 - 109

I. Corporate Failure [Reality and Nature]

Corporate Failure: A Myth?

Corporate failure, and by extension, financial crisis are not uncommon; however, the events of 2007 – 8 require scrutiny in light of their global dimension. Due to the interconnectedness of their markets, the economies of the United States and the European Union were severely affected⁶. In the European Union, the crisis affected those Members States (MS) with large and open financial sectors, strong export-orientation, large, specialised manufacturing sectors, housing market bubbles, large debts in foreign nominated currency and larger current account deficits.⁷ EU-wide unemployment was approximately 7% in 2008 and continues to rise⁸. Similarly in the US, the uncertainty created by failure of the stock market also resulted in a rise in unemployment. Across advanced economies [which include Austria, Belgium, Denmark, Germany, Iceland, Ireland, Latvia, Luxembourg, Mongolia, Netherlands, Ukraine, United Kingdom, and United States], increases in public debt of 25.1% of GDP and output losses of 4.7% of GDP were recorded.⁹ The impact on developing countries, in particular, Commonwealth Caribbean, was directly linked to their dependence on foreign

⁶ Commission, 'Economic Crisis in Europe: Causes, Consequences and Responses', European Economy 7/2009: Four key events led to the collapse of major US and EU financial institutions: (i) bursting of property bubble in the United States and the ensuing contamination of balance sheets of global financial institutions, (ii) uncertainty in the financial world caused by the rescue of Fannie Mae and Freddy Mac, (iii) the bankruptcy of Lehman Brothers and (iv) fears about the future of insurance giant: AIG; For a chronology of the main events which led to the GFC: page 9

⁷ Dennis J. Snower, 'The Impact of the Global Financial Crisis on Europe and Europe's responses' (Kiel Institute for the World Economy) <http://www.bruegel.org/fileadmin/bruegel_files/Research_contributions/AEEF_contributions/Crisis_Developments_and_Long-Term_Global_Response/AEEF4PPDenisJ.Snower.pdf> Accessed May 30, 2013

⁸ L. Dugleana and C. Duguleana, 'European State Aids in the Current Financial Crisis' Bulletin of the Transilvania University of Braşov 2010 Vol. 3 (52) 385, 387

⁹ Luc Laeven and Fabian Valencia, 'The Resolution of Banking Crises: The Good, The Bad and The Ugly', (2012) International Monetary Fund Working Paper No. 10/146

investment and cash inflows from and exports to those economies¹⁰. This real crisis demands real solutions.

Nature of Corporate Failure

Having drawn from US and EU experience on the reality of corporate failure, an understanding of the definition and the reasons for failure are fundamental to any corporate rescue discussion. Intertwined with the success of business is the high probability that risk taking will lead to crisis, and ultimately, failure¹¹ - thus, the corporate life span is said to be dependent on the 'survival of the fittest'¹². Often a company is described as 'troubled' or 'failing' but these generic terms give no insight into the stage of decline or regeneration facing the company.¹³ Pretorius notes that the world economic crisis in 2008 has created an outcry for a better understanding of the 'failure domain'. He highlights that the literature offers three possible foci relative to defining failure: decline focussed definitions, failure focused definitions and turnaround focussed definitions. For the purposes of this paper, a 'failure focussed definition' will be utilized, namely, that posited by Richardson et

¹⁰ Bruno Gurtner, 'The Financial and Economic Crisis and Developing Countries', 2010 Annual Review of International Development Policy - Issue 1, 189: GFC resulted in a rising debt burden on states: in 2008, according to the IMF, the total debt burden of all the developing countries mounted by a further USD 220 billion to a total of USD 4,429 billion and will, according to predictions, continue to rise in coming years; See also Abreu et al, 'The Effect of the World Financial Crisis on Developing Countries: An Initial Assessment', 2009 <<http://www.cigionline.org/publications/2009/9/effect-world-financial-crisis-developing-countries-initial-assessment>>, last accessed July 4, 2013

¹¹ Michelle J White, 'The Corporate Bankruptcy Decision', The Journal of Economic Perspectives, Vol. 3 No. 2 (Spring 1989) 129

¹² Marius Pretorius, 'Defining business decline, failure and turnaround: a content analysis' *SAJESBM NS* Volume 2 (2009) Issue 1, 1: 'Survival of the fittest' is compared to *organisational ecology* where the environment will naturally weed out unfit organisations and that the ability to survive over time is a function of both an organisation's suitability to the current environment and its ability to adapt appropriately if the environment evolves.

¹³ Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd Edition, Cambridge University Press, 2009) 145

al¹⁴: those organisations that will become insolvent¹⁵ unless appropriate management actions are taken to affect a turnaround in financial performance.

Consideration must also be made of the reasons underpinning corporate failure: according to Lingard, “[B]efore attempting to rescue any business, the cause of its difficulties should be analysed and no rescue will succeed unless they are remedied.¹⁶” Thomas Carlyle is oft remembered for saying “ ‘you must empty-out the bathing-tub, but not the baby along with it.’ Fling-out your dirty water with all zeal, and set it careening down the kennels; but try if you can keep the little child!” Similarly, a proper assessment of the reasons underlying failure must be deduced before any action is taken. Then, one must ‘fling-out’ (fix) the root cause of the insolvency but save the business or company if possible. Since the size, nature, industry of the business (among other things) influences this determination, there is no conclusive list of ‘reasons for failure’; rather, these reasons should be properly termed contributing factors.¹⁷

¹⁴ Richardson, Nwankwo and Richardson ‘Understanding the causes of business failure crisis: generic failure types: boiled frogs, drowned frogs, bullfrogs and tadpoles’ *Management Decision*, (2004) 32(4): 9

¹⁵ R3 Association of Business Recovery Professionals, ‘Understanding Insolvency’ (October 2008): There is a standard definition of insolvency: A company is insolvent either on a cash flow basis (unable to pay its debts as they fall due) or balance sheet basis (value of its assets is less than the sum of its liabilities)

¹⁶ J. R. Lingard, *Corporate Rescues and Insolvencies*, (first published 1986, Butterworths 1989) 3

¹⁷ Robert N. Lussier, ‘The Reasons Why Small Businesses Fail and How to Avoid Failure’, *The Entrepreneurial Executive*, Fall 1996, Volume 1, Number 2, 10 - 13

Contributing factors may be grouped into internal and external factors¹⁸. Internal factors include (a) poor management – this encompasses indecisive management¹⁹, production and marketing errors (inadequate market research) and accounting problems: inadequate, inaccurate or non-existent books and records; (b) financial factors: liquidity problems, current asset cover or external debt dependence and (c) fraud. External factors²⁰ include government policy, overseas competition, insolvency of a major competitor, market changes and calamities such as natural disaster, terrorist activities or legal liabilities. Apart from these, some companies fail due to an inability to recognise the signs of impending failure²¹.

Given the inclusion of poor management as a contributing factor, the link between corporate governance and corporate failure (and, by extension, the GFC) is often raised: does good corporate governance equal success? Ultimately, the literature is inconclusive²². Though this analysis is outside the scope of this paper, it is not disputed that poor or relaxed corporate

¹⁸ Examples of contributing factors in specific companies: ENRON and World-Com (fraud); Kodak (loss of competitive edge); Poor industrial relations (Aer Lingus Plc); Loss of customer/marketplace focus (IBM); Unsuccessful mergers/acquisitions (Baltimore Securities); Research and development failure (Elan Corporation); Loosening regulations (Lehman Brothers)

¹⁹ Nick Hood, 'Is insolvency pre-destined and can it be predicted?' (2012) 2 CRI 48: Reference made to Blacks (UK): Action was only taken when the company was in the 'red zone' for over three years

²⁰ On government policy: This may include increased taxation, financial controls or withdrawal of financial aid – Railtrack Group plc anticipated state subsidies in 2001 which were not forthcoming which resulted in this subsidiary being out in administration under the Railway Act 1993 – see Finch page; On overseas competition: Small business: Causes of bankruptcy – Don Bradley – in citing research from a 1998 paper 'Financial Difficulties of Small Business and Reasons for Their Failure' – over 39% of companies failed due to outside business conditions which include increase in outside competition

²¹ See also R3 Association of Business Recovery Professionals, Business Wave Index 1, November 2010 - Signs of distress include decreased profits, reduction in trading volume, pay cuts, use of maximum overdraft facility, difficulty in paying bills on time, selling assets to pay off debts

²² See Froud et al ['Everything for Sale' (2008) 56 Sociological Rev. 162, 165-66]: No clear evidence that corporate performance improved when companies acquired more NEDs with clearer responsibilities. See also Daily and Dalton ['Bankruptcy and Corporate Governance: The Impact of Board Composition and Structure', *Academy of Management Journal* (1994) Vol 37, No. 6, 1603 - 1617]: Structural independence does not equal performance advantage; Melvin and Hirt, ["Corporate Governance..." in Rushton (ed.), *Business Case...* (2008), 201, 204- 209] suggests there is a link between high standards of corporate governance and better performance – they also accept that there is competing evidence

governance practices may have played some role in the GFC²³ but it cannot be identified as the sole or root cause of the crisis²⁴.

II. Corporate rescue

Corporate rescue may be defined as major intervention necessary to avert eventual failure of the company or drastic action at a time of crisis²⁵ or even survival of the company or a substantial part of its business.²⁶ The definition adopted for corporate rescue is key as it is directly connected to determining the appropriate time for intervention and measuring rescue success. This paper is guided by the first definition. Before considering its benefits, two observations are worth making: (i) 'Not all lame ducks can, or should be rescued and the appropriate procedure for the genuinely doomed is liquidation'; rescue is not a right²⁷. Rescue and any accompanying finance should be reserved for those that are, according to the Cork Committee

²³ Roman Tomasic, 'Raising corporate governance standards in response to corporate rescue and insolvency' (2009) 1 CRI 5: A recent report by the International Corporate Governance Network ('ICGN') has found that poor corporate governance has been a significant cause of the current financial crisis as company boards 'failed to understand and manage risk and tolerated perverse incentives' (quoted by P Skypala, 'Time to reward good corporate governance', *The Financial Times*, 17 November 2008, at p 6). He also notes that more stringent regulation [corporate governance or otherwise] is often triggered by financial distress or collapse: eg 1992 Cadbury Report following the collapse of Maxwell and BCCI; Sarbanes Oxley Act (SOX) 2002 after the collapse of ENRON and Banking (Special Provisions) Act 2008

²⁴ See Brian R. Cheffins, 'Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown? The Case of the S&P 500', ECGI Law Working Paper N°. 124/2009; United Nations Conference on Trade and Development, 'Corporate Governance in the Wake of the Financial Crisis'; <<http://www.unctad-docs.org/files/CG-in-Wake-of-Fin-Crisis-Ch6.pdf>> last accessed July 4, 2013; Simon Deakin 'Corporate Governance and the Financial Crisis in the Long Run', Centre for Business Research, University of Cambridge Working Paper No. 417, 2010; OECD Report, 'Corporate Governance and the Financial Crisis – Key Findings and Main Messages', June 2009; Erkens et al, 'Corporate Governance in the 2007-2008 Financial Crisis: Evidence from Financial Institutions Worldwide', 2012, <<http://ssrn.com/abstract=1397685>>, last accessed July 4, 2013; Jaap Winter, 'The Financial Crisis: Does Good Corporate Governance Matter and How to Achieve it?', DSF Policy Paper, No. 14, August 2011 (x) Global Financial Crisis: Corporate Governance Failures and Lessons - Naveen Kumar, J. P. Singh

²⁵ Alice Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law*, (Sweet & Maxwell, 1997), 12 - This narrow definition has been adopted since a broad one (such as avoidance of distress and failure) would include all management activity which may be thought of as constant and repeated rescue attempts

²⁶ David Brown, *Corporate Rescue: Insolvency Law in Practice*, (John Wiley & Sons, 1996) 3

²⁷ Sandra Frisby, 'In Search of a Rescue Regime' (2004) 67(2) MLR 247, 248; See also Insolvency Service Report [cited in Frisby]: "Corporate rescue mechanisms are not intended to maintain inefficient firms that are not economically viable".

Report, “inherently viable”²⁸. (ii) Rescue of business or company? Rescue of a business occurs where the company is liquidated and successful steps are taken to retain economic or organisational aspects and/or sustain employment.²⁹ On the other hand, rescue of a company occurs where the company emerges from the rehabilitation intact and continues with the same operation often including the same workforce and owners³⁰. This paper covers both business and company rescue.

The benefits of corporate rescue are immeasurable – these include employment, encouraging entrepreneurship, removal of stigma attached to business failure³¹ and building confidence by saving businesses which have sound business plans but were affected by macroeconomic conditions. Brown suggests “It must at least be in the interests of the business community as a whole that not too many companies fail, because of the effect such statistics would have on confidence”³².

Given the benefits of rescue and the possibility of a myriad of results [reorganisation³³ (eg. managerial reforms instituted), restructuring (eg. closure of business elements), refinancing (eg injection of fresh capital), downsizing (eg management buyout (MBO)) or taking over (eg business bought by leading competitor)], restoration of a company to its healthy state

²⁸ Great Britain Insolvency Law Review Committee: *Cork Committee Report*: (1982, Cmnd 8558); This is one of the lessons gleaned from the Japanese Banking Crisis of 1990s

²⁹ Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd Edition, Cambridge University Press, 2009) 244

³⁰ Sandra Frisby, ‘In Search of a Rescue Regime’ (2004) 67(2) MLR 247, 248 – 249

³¹ Mike Stevenson, ‘The Enterprise Bill 2002 – a move towards a rescue culture?’ (2002) Vol 18, No 5 IL&P 155: The rescue culture may operate to remove this stigma associated with honest failures

³² David Brown, *Corporate Rescue: Insolvency Law in Practice*, (John Wiley & Sons, 1996) 2

³³ See Baird, ‘The Uneasy Case for Corporate Reorganisations’ *The Journal of Legal Studies*, Vol. 15, No. 1 (Jan 1986), pp. 127 – 147

is a poor lens through which success is measured³⁴. Determining a threshold for measuring success is key in determining whether the costs of rescue financing can be offset by the benefits. Further, in judging the success of an entity's rescue, one must ensure that 'zombie' businesses ['Are zombies really attacking the UK economy?' – January 2013]³⁵ are not being 'grouped' as healthy enterprises.

Finch accepts that a key consideration in ensuring success is the time of intervention. Evidence suggests that intervention which is not undertaken at an early stage or speedy nature is unlikely to achieve the desired ends³⁶. Any measurement of success should consider both short-term survival and long-term sustained economic activity.³⁷ Brown notes that a specific time should not be calculated: 'If a chronically sick patient is kept alive for an additional two years, is this medical intervention successful or is it too early to say?'³⁸ This inherent challenge makes measuring the success of a rescue regime messy and difficult.³⁹

³⁴ Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd Edition, Cambridge University Press, 2009) 243; See also David Brown, *Corporate Rescue: Insolvency Law in Practice*, (John Wiley & Sons, 1996) 2: he notes that a standard for success of return to solvency may be too rigid and unrealistic

³⁵ R3 Association of Business Recovery Professionals, 'Are zombies really attacking the UK economy' (January 2013) Page 3: Defines a zombie business as a company only able to service interest on its debt but not on the debt itself. There are four signs of a zombie business: • Just paying the interest on debts (and not the debt itself) • Will be unable to repay debts if interest rates rise • Having to negotiate payment terms with creditors • Struggling to pay debts as they fall due

³⁶ R3 Association of Business Recovery Professionals Survey of Business Recovery (2001): 77% of rescue professionals, by time of appointment, stated that no action could be taken to avert corporate failure

³⁷ Alice Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law*, (Sweet & Maxwell, 1997) 23; Cited in Belcher: Zimmerman in *The Turnaround Experience: Real world Lessons in Revitalizing Corporations* (1991) p.22: "The endurance of the recovery should be considered in determining whether success or failure has been achieved."

³⁸ David Brown, *Corporate Rescue: Insolvency Law in Practice*, (John Wiley & Sons, 1996) 2

³⁹ Alice Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law*, (Sweet & Maxwell, 1997) 24

On the face of it, the continuation of the business or company is a desirable outcome; however, just below the surface are trade-offs which must be made between the interests of key stakeholders including the creditors, debtors, employees, shareholders, the government, the customers and wider community⁴⁰. Finch notes some of these: on the one hand, creditors prefer the business to be closed with the hope that this action will maximise their returns while employees and shareholders prefer the business to remain open. On another spectrum, economists will be interested in the efficient allocation of resources and wealth-creating uses of money while political scientist will be inclined to demand that rescue processes are moulded by representative institutions.⁴¹ Due to these trade-offs, Belcher views all rescue success as 'partial'.⁴²

The term 'rescue' demands a distinction between formal and informal rescue⁴³. Formal rescue procedures are considered under Part III where an assessment of the rescue cultures of varying jurisdictions. An informal rescue is as an agreement on a contractual basis which allows parties to alter their

⁴⁰ Andrew Keay, 'Balancing Interests in Bankruptcy Law', CLWR 30 2 (206) 2 – 9. Note also Legal Department of the International Monetary Fund, *Orderly and Effective Insolvency Procedures – Key Issues* (1999): "There are social and political factors that are served by the existence of formal rehabilitation provisions and, in particular, the protection of employees of a troubled enterprise. These considerations explain why the design of rehabilitation provisions varies from country to country. When countries evaluate and reform their insolvency laws, the key question will often be how to find the appropriate balance between a variety of social, political, and economic interests that will induce all actors in the economy to participate in the system."

⁴¹ Vanessa Finch, 'Corporate Rescue Processes: the search for quality and capacity to resolve', (2010) 6 *Journal of Business Law* 502, 504

⁴² Alice Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law*, (Sweet & Maxwell, 1997) 22 – 23: It is referred to as partial since loss will be incurred by stakeholders whether it be management, employees, shareholders, secured or ordinary creditors, government or the national economy

⁴³ The choice between a formal or informal rescue is often dependent on a number of factors such as the scale of financial distress experienced by the company, size of the company, number of debtors, whether creditors are sophisticated, the nature of the business which includes the industry and market share

strict contractual rights.⁴⁴ One type of bank-driven informal rescue is the 'London Approach'⁴⁵. This may be summarised in three steps: (i) debtor informs bank that it is financially distressed; (ii) all or the majority of debtor's creditors (banks)⁴⁶ adopt an informal 'standstill': during this short period of time they agree not to enforce their strict legal rights and often pledge additional capital which is accorded priority; (iii) committee appointed by bank creditors assess the company's financial position and make a determination that it is financially distressed [lead bank negotiates a workout] or past recovery [losses in 'standstill' are shared pro rata].

Though well established, the London Approach is waning due to the internationalisation and interconnectedness of financial markets – thus, a reduction in cooperation between global organisations. However, confidence in informal rescue (now termed 'Informal Workouts') is evident in the last decade, there has been an upsurge in workouts prompted by the development

⁴⁴ Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (first published 2002, Cambridge University Press, 2009) 251 - 253; See David Brown, *Corporate Rescue: Insolvency Law in Practice*, (Wiley & Sons, 1996), 4: Finch and Brown considered the advantages and disadvantages of informal rescue. Advantages: Cost, secrecy, flexibility, no stigma of formal insolvency procedures which preserves going concern value, management has knowledge of company remains in control and their actions are not scrutinized externally, possibility of enhanced security (advanced priority in insolvency). Disadvantages: requires unanimity – creditors pursue numerous goals, no formal 'standstill' (known as 'moratorium') – thus any creditor may, without notice, enforce his strict legal right, no protection or voice for unsecured creditors, the complexity of informal rescue is amplified by the fragmentation of credit markets and the varying class of creditors

⁴⁵ Armour and Deakin, 'Norms in Private Insolvency Procedures: The 'London Approach' to the Resolution of Financial Distress', ESRC Centre for Business Research, University of Cambridge, Working Paper No. 173 <<http://www.cbr.cam.ac.uk/pdf/wp173.pdf>>, last accessed July 4, 2013; For more on the 'London Approach': see John Flood, 'Globalisation and Law' (2002) *Law and Social Theory* 311; Bank of England (BoE) Quarterly Bulletin: 'The London Approach: distressed debt trading' <<http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/qb940208.pdf>> last accessed July 4, 2013; The Law Society Gazette (23 January 1991); Flood et al, Association of Chartered Certified Accountants (ACCA) Report: The Professional Restructuring of Corporate Rescue, Research Report 45, 1995

⁴⁶ Franks and Sussman, 'Financial Distress and Bank Restructuring of Small to Medium Sized Enterprises', *Review of Finance* (2005) 9 (1): 65-96 notes that such procedures are preferred by banks, as a study of 542 UK small and medium sized financially distressed companies, show higher recovery rates for banks when compared with other creditors since banks often time liquidation close to the point at which the value of the firm is equal to the value of the bank's collateral

of international guides based on the 'London Approach'. These include the INSOL Statement of Principles for a Global Approach to Multi-Creditor Workouts (October 2000), World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (April 2001) and Asian Bankers' Association Informal Workout Guidelines – Promoting Corporate Restructuring in Asia (October 2005). However, literature discussing the effectiveness of these mechanisms is limited due to secrecy involved in such procedures.

III. Rescue Culture [United States, United Kingdom and Commonwealth Caribbean (with emphasis on Barbados)]

What is a Rescue Culture?

A rescue culture may be defined simply as “a legal and institutional response to distress that is geared in the first instance to attempting to save a troubled business rather than to close it down and distribute proceeds to creditors as quickly as possible.”⁴⁷ Hunter has offered a more extensive definition: “What then [is meant] by the term ‘rescue culture’? It is a multi-aspect concept, having both a positive and protective role, and a corrective and a punitive role. On one level, it manifests itself by legislative and judicial policies, directed to the more benevolent treatment of insolvent persons, whether they be individuals or corporations, and at the same time to a more draconian treatment of true economic delinquents. On another level, it entails the

⁴⁷ Armour and Mokal, 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002', (2005) Lloyds' Maritime and Commercial Law Quarterly 28

adoption of a general rule for the construction of statutes, which is deliberately inclined towards the giving of a profitable and socially profitable meaning (rather than a negative or socially destructive meaning), to statutes of socio-economic import. Of such statutes, insolvency legislation may justly be regarded as the paramount example.”⁴⁸ From these definitions, two key concepts may be discerned:

(a) Multi-faceted response: legal and institutional

(b) It should be geared towards rescue in the first instance but provides for exit from rescue where this is not a feasible objective

In considering the birth and development of a rescue culture, special emphasis is placed on super-priority rescue financing provisions as this gives insight into the potential for private-sector driven financing. An extensive statement of the rescue culture is beyond the scope of this work and the author’s intention is merely to highlight the existence and modus operandi of the rescue culture.

Rescue Culture in the United States

Evidence of a Rescue Culture?

The US Bankruptcy Code, since the 1970s, has facilitated the continued existence of a distressed enterprise as a going concern through rescue under Chapter 11. This stands in direct contrast to Chapter 7: liquidation. To enter Chapter 11, there is no imposed “insolvency” condition and an immediate stay

⁴⁸ Hunter in ‘Nature and Functions of a Rescue Culture’ 1999 Journal of Business Law 491

of proceedings is instituted as soon as the petition is filed⁴⁹. There is no removal of management ['debtor-in-possession'] as they continue to 'run' the affairs of the company. A US Trustee appoints a committee of creditors, which plays a pivotal role in the negotiations between the company, and the creditors⁵⁰. Whilst managing the company, they are given 180 days in smaller bankruptcies/300 days in large bankruptcies to formulate a reorganisation plan. If the court gives approval of the plan, consent of classes of creditors is needed in which dissenting creditors may be "cram down". This initial court approval ensures creditor approval is not given to a plan that would be rejected by the court due to unconformity with the requirements of the Code. After the consent of the classes is achieved, the court must again approve the plan. This ensures that the plan is compliant with the Code and the company can meet its reasonable foreseeable expenses. If the court or the creditors reject the plan, the stay of proceedings is lifted allowing creditors to enforce their claims or the company is put into liquidation under Chapter 7.

Priority for rescue financing?

Chapter 11 provides priority to rescue finance:

(i) unsecured credit may be obtained with court consent – it will be treated as an administration expense which attract priority before other unsecured claims;

⁴⁹ Bankruptcy Code (US) Chapter 11, section 363

⁵⁰ US Chapter 11, sections 1102 – 1103: This Committee has extensive powers which include the hiring of external staff to assess the viability of the company's operations eg financial accountants, lawyers

(ii) secured credit – attracting priority over pre-petition unsecured claims by treating it as an administration expense but may be prioritised above administration expenses if secured on an unencumbered asset; or

(iii) priming “liens” may give priority over pre-petition secured creditors where it can be proven that pre-petition holders are given sufficient protection and such priority is the only mechanism through which the funds may be accessed.⁵¹

Broude suggests that one of the myths that surround Chapter 11 is that debtor-in-possession priority financing harms existing secured creditors. This is strongly rejected: In the majority of cases, existing lenders continue to lend the debtor company ensuring that its collateral does not exceed the value of the company. Where the financier of the rescue is a new creditor, the statute permits super-priority through lien-priming only if the pre-existing lender is sufficiently protected.⁵² This shows the court’s respect for the existing security.

Rescue Culture in the United Kingdom

Evidence of a Rescue Culture?

Inspired by the US Chapter 11, this rescue culture, produced by the strengthening of the administration regime and abolition (in part) of the

⁵¹ David Brown, *Corporate Rescue: Insolvency Law in Practice*, (John Wiley & Sons, 1996) 763

⁵² Richard F Broude, ‘How the rescue culture came to the United States and the myths that surround Chapter 11’, (2000) Vol 16, No 5 IL&P 194, 199

administrative receivership regime, has received many accolades from the judiciary⁵³ and academics. Though Insolvency Act 1986 (IA 1986) is the birth of the rescue culture⁵⁴, the changes effected by EA 2002 gave rescue the prominence it deserved⁵⁵. The rescue culture was facilitated by a number of key changes: (a) abolition of administrative receivership [retained in circumstances relevant to capital markets] under section 250 of Enterprise Act 2002 (EA 2002); (b) refashioning of the administration procedure including the ability to appoint administrators out-of-court; and (c) abolition of Crown preference: section 251 of EA 2002.

The rescue culture is given life on consideration of the policies underpinning UK insolvency law:

(i) Efficiency: Time [1 year limit: para 76(1) Sch B1 of IA 1986 but may be extended] and Costs: Possibility of employing a pre-packaged administration⁵⁶, provision of electronic communication, remote attendance

⁵³ *Powdrill and another v Watson* [1995] 2 AC 394, 442 (HL) (Lord Browne-Wilkinson): "This 'rescue culture' which seeks to preserve viable businesses was and is fundamental to much of the 1986 Act. Its significance in the present case is that, given the importance attached to receivers and administrators being able to continue to run a business, it is unlikely that Parliament would have intended to produce a regime as to employees' rights which renders any attempt at such rescue either extremely hazardous or impossible." See also *Re Dairy Farmers of Britain Ltd* (Henderson J) [2009] EWHC 1389 (Ch), [10] - "... administration is the form of insolvency process now generally favoured by Parliament and the 'rescue culture' which it seeks to promote"; *In the Matter of Re Nortel GmbH (in administration) and other companies and other appeals* (Lloyd LJ) [2011] EWCA Civ 1124, [113] - "There is force in the argument that the potentially very large liability under an eventual contribution notice, and the open-ended nature of the obligation under a financial support direction, could be a serious impediment to the rescue culture which underlies the administration regime."

⁵⁴ The Enterprise Bill 2002 – a move towards a rescue culture? Mike Stevenson (2002) Vol 18, NO 5 IL&P 155

⁵⁵ Confirmed by Armour and Hsu, 'Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002', (2008) *European Company and Financial Law Review* 5(2), 148 – 171

⁵⁶ A pre-packaged administration is defined as an agreement between a company and its creditors made between formal entry into administration to sell the company as a going concern as soon as the company enters administration. For more on pre-packaged administration, see: Roy Goode, *Principles of Corporate Insolvency Law* (first published 1990, Sweet & Maxwell, 2011) 412 – 416, Keay and Walton (first published 2003, 2008) 125 - 130; Insolvency Service, 'Improving the Transparency of, and confidence in, pre-packaged sales in administrations (Consultation/Call for Evidence)', (March 2010), last accessed July 6
<<http://webarchive.nationalarchives.gov.uk/>+/<http://www.insolvency.gov.uk/insolvencyprofessionan>

at meetings, publication on website, passing of resolutions by correspondence, dispensing of the initial creditors meetings if it is unlikely that a distribution will be given to unsecured creditors

(ii) Transparency: External management and documents filed with the court

(iii) Flexibility: Ability to enter administration out of court, single purpose with hierarchy of objectives [this has given significant life to the rescue framework since rescuing the company as a going concern is the first possible objective⁵⁷], possible entries to administration⁵⁸, extension of one year – unlimited by court or limited to 6 months extension on creditor application⁵⁹

(iv) Accountability: Duty to act in the interest of all creditors⁶⁰, creditor voting: administrator must ensure that he reports and provides proposals for meeting of creditors in less than 10 weeks

dlegislation/con_doc_register/Pre-pack%20consultation%2031march%2010.pdf>; The Institute of Chartered Accountants in England and Wales, 'Statement of Insolvency Practice 16 - Pre-packaged sales in Administration', last accessed July 6 <<http://www.icaew.com/~media/Files/Technical/Insolvency/regulations-and-standards/sips/england/sip-16-e-and-w-pre-packaged-sales-in-administrations.pdf>> On the effectiveness and efficiency of pre-packs: Dr Sandra Frisby, 'A preliminary analysis of pre-packaged administrations' (Report to R3 - Association of Business Recovery Professionals) <http://www.r3.org.uk/media/documents/publications/press/preliminary_analysis_of_pre-packaged_administrations.pdf> last accessed July 6; Jonathan Moules, 'No new rules on insolvency' (Financial Times, 27 Jan 2012) <<http://www.ft.com/intl/cms/s/0/85926c32-4828-11e1-b1b4-00144feabdc0.html>> last accessed July 6; *Re Kayeley Vending Ltd* [2009] EWHC 904 (Cooke HH): the court took the opportunity to comment on the practice of administration pre-packaged sales

⁵⁷ See Insolvency Act 1986, Sch. B1, para 3 and 3(2) – (4)

⁵⁸ See Insolvency Act 1986, Sch. B1, para 10 (court order), para 14 (appointment by a floating charge holder) and para 22 (appointment by the company or its directors)

⁵⁹ See Insolvency Act 1986, Sch B1, para 76(2)(a): court; Para 76(2)(b): creditors

⁶⁰ See Insolvency Act 1986, Sch B1, para 3, 4, 75, 81, 88; Note that the administrator may be under a duty of confidentiality: *Re Charnley Davies* [1990] BCLC 760; administrator accountable when approved pre-pack is not in the best interest of all creditors

(v) Empowering: Court-role is minimised where administrator is appointed out of court and his actions may be shielded by the business judgment rule, empowered to do everything that is necessary or expedient for the management of the company's affairs, wide powers given to the administrator

(vi) Certainty: Ordering of claims, objectives and purposes

(vii) Fairness: Moratorium imposed so that the company is given an opportunity to plan its affairs for a possible rescue to ensure a better result for creditors as a whole, vote by creditors on proposal [secured creditors only], external manager must act in the best interest of all creditors and should not operate as the agent for a select group

Priority for rescue financing?

After consultation in 2009, the Government concluded that the need for legislative change [inclusion of provisions facilitating super-priority of rescue financing] was not apparent, as stakeholders were cautious about the need to balance the interests of all parties; in particular, consideration was given to the negative impact that such priority would have on behaviour of lending institutions⁶¹. Further, R3 Association of Business Professional, in their response, suggested two reasons for retaining the status quo: high priority of expenses incurred in administrator under rule 2.67 and the absence of a clear definition of rescue finance will create difficulty in determining which finance

⁶¹ Carolyn Swain, 'Government Response to Encouraging Corporate Rescue (Legislative Update)' (2010) 2 CRI 82

satisfies this requirement⁶². However, if the company becomes insolvent, this priority matters. This great omission will continue to be a significant hurdle to the access of rescue finance⁶³.

Rescue Culture in the Commonwealth Caribbean [emphasis on Barbados⁶⁴]

Evidence of Rescue Culture?

Any hope for Commonwealth Caribbean rescue culture is found in the proposal regime⁶⁵. Modelled on the Canadian Bankruptcy and Insolvency Act (R.S.C. , 1985, c. B-3), the initiation of this regime creates a wide moratorium for both secured and unsecured creditors. Here, secured creditors are required to give 10 days notice if they intended to enforce their security. This gives the debtor company ample time to appoint an out-of-court receiver at which time the 30-day moratorium automatically takes effect. This may be extended for a maximum of 6 months. The receiver, a trustee in bankruptcy, is required to assess the company's financial standing and produce a proposal within the moratorium period. A majority, which must include two-thirds in value, is required to approve the proposal. If the debtors fail to comply with time or other requirements imposed by the Act or creditors reject the proposal, the company converts to liquidation.

⁶² Insolvency Service 'Response by the Association of Business Recovery Professionals' (June 2009) <http://www.r3.org.uk/media/documents/publications/professional/Company_Rescue_R3_response.pdf> Last accessed July 2, 2013

⁶³ Geoffrey Yeowart, 'UK restructuring moratorium: a useful option for company rescue' (2010) 11 JIBFL 657

⁶⁴ Across the Commonwealth Caribbean, the Barbadian provision shows 'rescue culture' potential. Other jurisdictions which have a similar proposal regime include St Vincent and the Grenadines and the proposed framework in Trinidad and Tobago

⁶⁵ See Barbados Bankruptcy and Insolvency Act, Sections 12 – 37

Priority for rescue financing?

Similar to the United Kingdom regime, this Act fails to give 'super priority' for finance provided after the petition has been filed. However, the trustee in bankruptcy could negotiate to give security over unencumbered assets. At this stage in its corporate existence, it is highly unlikely that it has any such assets.

Opportunity Lost for Birth of Rescue Culture? Case Analysis: REDJet

On October 16, 2010, having invested over USD 1M, AIRONE Ventures Holding Ltd (AVL) launched their airline, REDJet Limited, in Barbados, and by extension, the Caribbean region. Its goal was to facilitate regional travel with its attractive 'USD \$9.99 before tax' fare structure. However, it faced many delays in applications for licences to fly across the region whilst having to defend allegations of an unsound business model. This claim was rebutted by its CEO who produced evidence to the contrary: low overhead costs through decisions not to invest in 'flashy cars or extravagant offices [or] travel agency fees [but rather a focus on] employee productivity and flexibility'. The first flight from Barbados to Guyana (May 10, 2011) was the beginning of its short-lived success as planes were grounded frequently due to technical issues. With claims that Caribbean Governments had failed to offer the support given to other regional airlines (LIAT and Caribbean Airlines) and international carrier (American Airlines) including financial assistance and subsidized fuel, and rejected appeals for state assistance; REDjet Limited suspended its operations on March 16, 2012 – 311 days after launch. Even if state assistance

was provided, this would be ad hoc given the absence of any state aid framework.

Leaving many customers stranded at regional airports, immediately, it sought the courts' protection [known as a moratorium or 'stay of proceedings'] under section 41 of the Barbados Bankruptcy and Insolvency Act (BIA). At this point, its woes had just begun as it was faced with claims of regional creditors. With one of its airplanes being flown out unknown to creditors, the Grantley Adams International Airport Inc. (Barbados) obtained an injunction for fees owed [regional airports were cumulatively owed just under USD 1M]. Presently, REDjet Limited is seeking the court's approval of its creditor-endorsed proposal to pay them 25 cents on every dollar owed [the minimum allowed under section 27 of the BIA].

Guided by a 'creditor driven' model of bankruptcy legislation, from the outset, only the interests of creditors were raised. The interests of employees, customers, future suppliers and ordinary citizens were irrelevant. Given that companies fail everyday, why does this failure matter? This collapse affected Barbados and the wider region, which includes Trinidad and Tobago, Guyana, St Lucia, Antigua and Jamaica, as it resulted in unemployment, loss of revenue (through suppliers and airport landing fees) and an alleged decrease in regional travel due to high airfares stemming from absence of competition. There is statutory potential for the development of a rescue culture but when the 'chips' fall, how effective is it in facilitating rescue? This begs the question

as to whether this was an opportunity lost in the annals of time for regional jurisprudential practice to explore the ambit of this rescue culture.

A comparison: US Chapter 11 vs UK's Administration Regime⁶⁶ vs Commonwealth Caribbean (Barbados) proposal regime

“The availability of [priority for] further funding while in administration is perhaps one of the greatest shortcomings of the UK regime and brightest triumphs of Chapter 11.”⁶⁷ This is evident from Table 1 below. Certainly, private banks and other lenders would be disinterested in providing their scarce finance on terms in these harsh economic times. It is clear that the United Kingdom and Barbadian regime have failed. Thus, one must turn to proposals that provide state-assisted/state-driven rescue financing.

Table 1 – A comparison of US Chapter 11, UK Administration and Barbados Proposal Regime [modelled on Canadian legislation]

	United States (Chapter 11 of the Bankruptcy Code)	United Kingdom (Administration under IA 1986 and EA 2002)	Commonwealth Caribbean – Barbados (Proposal regime under BIA 2002)
Control	Insider control – Debtor-in-possession (DIP) who formulates the plan Pro-debtor/Pro-business Justified since company initiates the process by a voluntary petition; an acceptance that the company needs 'breathing space' to work out its affairs	External control – Administrator [an insolvency practitioner] appointed (in or out of court) to whom extensive power is given Pro-creditor	External control – Trustee Pro-creditor

⁶⁶ Though the administration regime (UK) is contrasted to Chp 11 (US), Alexandra Szekely 'Chapter 11: one size fit all?' (2008) 9 JIBFL 457 notes that the UK Company Voluntary Arrangements and Schemes of Arrangements are more similar to Chp 11 regime than administration

⁶⁷ Alexandra Szekely 'Chapter 11: one size fit all?' (2008) 9 JIBFL 457, 460

	However, this DIP closely monitored by the court: imposing administrative burden not imposed in UK		
Mechanism to bind dissenting creditors	Yes - Cram down mechanism This forces the reorganisation plan on a dissenting minority if accepted by two-thirds of that class. However, this is subject to a requirement that consent must be obtained from the creditors holding two-thirds in value ⁶⁸	No	No
Role of shareholders	Yes This flows from a commitment to the entrepreneurial ethic and US-driven belief that financial troubles arise external to the company	No Shareholders presumed to bear part of responsibility for company's financial distress	No Shareholders regarded as residual claimants, their voice has no weight
Time	Often regarded as too long - standstill operates for 120 days after filing (may be extended by the court is the company is large and the reorganisation is complex) + 60 days for approval from creditors and shareholders Average Chapter 11: a year and half - statutory 18 month deadline	One year but may be extended by the court	30 days but may be extended up to six months [Application must be made very 45 days for an extension in which the court will determine whether significant process is being made]
Super-priority accorded to rescue finance	Yes Well-developed DIP financing sector * For details, see above	No This is seen as significant loophole but stakeholders suggested that reform was unnecessary	No Similar to UK regime in this respect
Rescue-facilitating regime	Only Chapter 11	A number of regimes: Schemes of arrangement: sections 895 - 9 of the CA 2006, CVA under IA 1986 and administration	Only proposal regime under the Act

Source: Author's compilation

⁶⁸ John Townsend, 'Comparing UK and US business rescue procedures: are Administration and Chapter 11 perceived to be workable and affordable?' (2007) 23 IL and P 66

IV Proposal on State Rescue Financing: Financial and Non-financial Measures

A. Financial Measures

(i) Direct Measures: State Aid Framework

There is a longstanding presumption that one of the roles of the state is job creation, preservation, and assisting financially distressed companies. Thus, in the face of distress, ‘financial refuge’ is sought in governments as the ‘public purse’ is presumed to be the ‘fattest’. However, before a proposal on state aid is made, this paper must determine whether this long-standing presumption should be disregarded. United Kingdom Prime Minister, David Cameron, emphasised that the role of the government is not to single out good and bad industries; rather, the state should make it easy for all industries. He further lamented, “governments do not create jobs, rather business do”⁶⁹. In a free market economy, it is well accepted that any state intervention, which subverts normal operation of the market, must be justified. It is the writer’s belief that the existence of a state aid regime, which operates to intervene in the free market, is justified given the proper role of the state.

The World Bank Global Financial Development Report 2013 (GFDR 2103) suggests that the role of the state is one of promoting competition and

⁶⁹ David Cameron, ‘It is business, not the state, that creates jobs’ last accessed July 6, 2013 <<http://www.dailymail.co.uk/news/article-2043971/David-Cameron-Business-creates-jobs-state--confront-difficulties.html>>

participation (particularly beyond banks to non-banks) and ensuring access and transparency⁷⁰. This report appears to be hinting at a facilitative role: this is the proper role of the state. Under this umbrella of ‘facilitation’, the state should ensure that effective and efficient procedures pave the way for business success. This will include ease of access into rescue and rescue financing procedures. Freixas and Mayer suggest that the financial crisis has called for a re-casting of the role of the state as it suggested that the state’s role is a “provider of catastrophic insurance”⁷¹. In other words, intervention should be limited to the most exceptional circumstances. They suggest that all financial systems should have “adequate systems of management in place and ways of reorganizing themselves without having to call upon the state to intervene.”⁷²

It is noteworthy that the GFDR 2013 produces evidence supporting their proposition that direct state interventions worked in the short term but created “potential longer-term harmful effects” as the crisis subsided. Thus, it is accepted that there must be some rebalancing towards less direct state involvement. In this rebalancing, limited states resources, a direct result from the implementation of austerity measures, must be wisely invested and the risks posed by viewing the state as ‘a shelter in the time of storm’ must be analysed. These include the moral hazard [company favours risk-taking behaviour with expectation that government will provide bail-out if it faces

⁷⁰ World Bank Global Financial Development Report, ‘Rethinking the Role of the State in Finance’ 11

⁷¹ Xavier Freixas and Colin Mayer, ‘Banking, Finance and the Role of the State’, *Oxford Review of Economic Policy*, Volume 27, Number 3, 2011, 397, 407

⁷² Freixas and Mayer (n. 72) 407, See also Reinert ‘The Role of the State in Economic Growth’, *Journal of Economic Studies*, Vol. 26, No. 4/5, 1999, 268 - 326

financial distress] and distortion of competition [firms are unable to compete with the assisted firm].

Despite these risks, a state undertaking this facilitative role in the 21st century is met with a gamut of difficulties that include growing fiscal deficits crippling the state's ability to provide finance and the rise of cross-border corporations increasing uncoordinated rescue attempts. These real challenges provide incentives for Caribbean states (among others) to adopt a regional state aid regime. It is unwise to leave access to finance and rescue mechanisms to the 'whims and fancies' of present leaders or the political or social dictates of newly elected governments. Such a framework is absent in the Commonwealth Caribbean region; with much haste, this issue must be addressed. Given the success of the European Union State Aid regime, guidance may be gleaned from it.

What is the European Union State Aid regime? What are its foundations? According to article 3 of the Treaty on the Functioning of the European Union (TFEU), the objective of the European Union is to set up an internal market. This objective is achieved, in part, through exclusive jurisdiction in competition law matters. This is bolstered by Protocol 27: the sound functioning of the internal market includes a component which ensures that competition is not distorted. Thus, the general principle, under Article 107 of TFEU (former Art 87 on Treaty establishing the European Community (TEC)) is state aid in any form, in general, is incompatible with the internal market unless exempted. State aid refers to forms of assistance from a public body or

publicly funded body given to selected undertakings which has the potential to distort competition and affect trade between Member States (MS) of the European Union⁷³. Thus, under article 108 TFEU, the Commission is tasked with the responsibility of controlling state aid. The general process is that MS must notify the Commission of the proposed aid instituting a standstill until the Commission has given authorisation. Procedure Regulation (659/99) defines unlawful state aid 'unnotified aid' and power is given to the Commission to mandate the claw back of that aid even if it results in the collapse of the company⁷⁴.

Four components must be satisfied to constitute state aid⁷⁵: (i) It must be by, with or through state resources [this is not limited to cash but may include grants, interest rate debates, loan guarantees, accelerated depreciation allowances, capital injections and tax exemptions⁷⁶; (ii) It must favour a particular undertaking or the production of certain goods [Thus, aid given across a MS without discretion to industry or other factors, it not state aid but rather a general measure]; (iii) It distorts or threaten distorts competition and (iv) It affects intra-community trade. Elements for which authorisation is

⁷³ DBIS, 'State Aid' (Publication, December 2012)

⁷⁴ DBIS, 'State Aid: A Beginner's Guide' (Guidance Notes – June 2010)

⁷⁵ See Case 241/94, *France v Commission (Kimberly Clark)*, [1996] E.C.R. I-3203: It is the effect and not the purpose of the state aid that is decisive

⁷⁶ DBIS, 'A State Aid Guide – Guidance for state aid practitioners' (June 2011) notes forms of state aid: State grants; interest rate or tax relief; tax credits; State guarantees (direct or indirect) or holdings; State provision of goods or services on preferential terms; direct subsidies; tax exemptions; preferential interest rates; guarantees of loans on especially favourable terms; acquisition of land or buildings either gratuitously or on favourable terms; Less obvious examples include: consultancy advice; advantages resulting from the activities of agencies for urban renewal; assistance to help companies invest in environmental projects; assistance to help a public enterprise prepare for privatisation; legislation to protect or guarantee market share; public private partnerships and contracts not open to competitive tendering

not required include: (i) De minimis regulation⁷⁷: aid under €200,000 over a 3 year fiscal period as it is treated as not having the capacity to affect intra-community trade and (ii) General Block Exemption Regulation (GBER): range of pre-approved state aid areas that do not require individual approval, however, notification must be given. However, inapplicability of these created a void where the company seeking assistance was 'in difficulty'. Thus, the Commission crafted temporary regulation to address this void: Community Guidelines on state aid for rescuing and restructuring firms in difficulty⁷⁸ (hereafter referred to as 'R&R firms in difficulty').

Under this temporary framework, three elements must be satisfied prior to receiving state aid:

I. Does the proposed beneficiary qualify as a "firm in difficulty"? The Commission regards a firm in difficulty where it is unable, whether through its own resources or with funds it is able to obtain from owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term. In particular, a firm is regarded as being in difficulty where:

(a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one

⁷⁷ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty of de minimis aid OJ L L 379/5

⁷⁸ Commission, 'Community guidelines on State aid for rescuing and restructuring firms in difficulty' (Communication): OJ 244, 01/10/2004 P. 0002 - 0017

quarter of that capital has been lost over the preceding 12 months;

(b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or

(c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

II. Has the firm been in operation at least three years preceding the request for assistance? If no, assistance may not be given.

III. Has the firm previously received rescue or restructuring aid? The general rule is 'one time last time'. Repeat state intervention is not permitted as this would result in the state maintaining inefficient organisations.

It should be noted that rescue and restructuring aids are two distinct mechanisms even though they may be combined. Apart from the three requirements above, to qualify as **rescue** aid, it must:

- Consist of reversible liquidity help in the form of loan guarantees or loans bearing normal commercial interest rates

(and at least comparable to the reference rates adopted by the Commission)

- Be restricted to the amount needed to keep the firm in business
- Only operate for time need to formulate a restructuring plan: a maximum of 6 months
- Be warranted on the grounds of social difficulties and have no impact in the industrial situation in other MS
- Be accompanied, on notification, by an undertaking by the MS to communicate to the Commission a restructuring or liquidation plan or proof that the loan has been reimbursed or guarantee terminated, not longer than six months after granting the aid

To qualify as **restructuring** aid:

- A restructuring/recovery programme to restore viability in a reasonable time period must be submitted to the Commission
- The company must implement the restructuring plan in full and observe all attached conditions
- Aid is limited to the amount needed for the restructuring and the beneficiary company must contribute a substantial proportion of the restructuring costs – this ensures that companies have ‘skin in the game’⁷⁹ [note that this requirement

⁷⁹ European Parliament Directorate General for Internal Policies, ‘State aid Crisis Rules for the Financial Sector and the Real Economy’, (Policy Department A - Economic and Scientific Policy: Economic and Monetary Affairs, June 2011): Since the largest burden falls on the taxpayer, it is recommended that assistance should only be given after private investors suffer substantial losses and credible attempts to attract capital on the market have failed

is applied flexibly to small and medium enterprises (SMEs) and firms in assisted regions]

- Strict monitoring and annual reporting is required
- Compensatory measures are taken to avoid undue distortions of competition (eg appropriate reduction of capital)

Though there were significantly fewer applications outside of the banking sector⁸⁰, state aid was useful in stabilising companies during the recent financial crisis. Table 2 (below) shows that across MS generally similar forms of state assistance were implemented in response to the financial crisis.

Table 2: National Rescue Measures in Response to the Current Financial Crisis (Selected Member States)

	State guarantee	Recapitalisation	Acquisition of Risk Positions/ Impaired Assets	State Loans	Nationalisation
United Kingdom/ Germany	✓	✓	✓	X	✓
Greece /Spain	✓	✓	X	✓	X
France	✓	✓	✓	X	X

Source: National Rescue Measures in response to the current financial crisis - European Central Bank - Legal Working Paper Series - No 8 / July 2009 - by Ana Petrovic and Ralf Tutsch

⁸⁰ Matt Evans, 'I'm about to go insolvent and I am not a bank' (2012) 6 CRI 231

Even in the post-crisis period, EC approvals of state aid for rescue and restructuring (Table 3 below) is evidence of the critical role that rescue and restructuring state aids continue to pay outside of the banking sector.

Table 3: Non-banking Rescue and Restructuring Aid Approvals

Date of Adoption	Member State	Form of Aid	Budget OB - Overall Budget AB - Annual Budget	Duration (Period)
12.1.2011	Poland	Other form of tax advantage, Debt write off	OB: PLN 30,80M	Until 31.12.2012
15.6.2011	Poland	Soft loan, Other forms of equity, Intervention	OB: PLN 8,50M	15.6.2011 – 31.12.2012
8.2.2012	Poland	Other forms of equity intervention	OB: PLN 2,30M	From 8.2.2012
21.3.2012	Poland	Direct grant	OB: PLN 5,20M	1.10.2010 – 31.12.2012
11.7.2012	Poland	Direct grant	OB: PLN 1M	1.1.2012 – 31.12.2014
27.9.2012	Germany	Soft loan	OB: EUR 2M AB: EUR 1,50M	15.10.2013 – 31.12.2013
4.10.2012	Austria	Other forms of equity intervention	OB: EUR 220M	From 1.12.2012
19.10.2012	Austria	Soft loan	OB: EUR 4M AB: EUR 1,80M	19.10.2012 – 31.12.2014
19.11.2012	Germany	Interest subsidy, Guarantee, Debt write off, Soft loan	OB: EUR 30M AB: EUR 15M	1.1.2013 – 31.12.2014
14.12.2012	Germany	Guarantee	OB: EUR 100M AB: EUR 100M	Until 31.12.2013
18.2.2013	Italy	Guarantee	OB: EUR 24M	1.5.2013 – 31.10.2013
20.2.2013	Austria	Direct grant, Other, Soft Loan	OB: EUR 4M AB: EUR 1,80M	20.2.2013 – 31.12.2014
21.2.2013	France	Guarantee	OB: EUR 18M	No duration
1.3.2013	Germany	Soft loan	OB: EUR 15M AB: EUR 2,50M	1.10.2013 – 30.9.2013
6.3.2013	United Kingdom	Other, Direct grant	OB: GBP 0,19M AB: GBP 0,19M	From 29.8.2012
15.3.2013	Italy	Guarantee	OB: EUR 25M	1.5.2013 – 1.11.2013
6.5.2013	Lithuania	Debt write off	OB: LTL 258M	2.7.2013 – 31.12.2015

Source: Author's compilation of data from the Official Journal Publications of the EU (April – June 2013)

Despite its success one must necessarily consider whether state aid (for rescue and restructuring of firms in difficulty) is the best mechanism or are there better-laced tools which may be used to facilitate corporate recovery? This determination is key given the Regulation's temporary nature and the recent extension in September 2012 with consultation expected in spring of this year. OXERA suggests that there is a long-standing presumption that government aid saves a 'considerable amount of jobs and activities that would otherwise disappear'. However, contrary to this belief, evidence about the impact of state aid intervention in jobs and activities compared with a counterfactual of no intervention, has been limited⁸¹. This flies in the face of a common justification of state intervention. Further, OXERA suggests (in an earlier work) that 77% of non-assisted firms, whether through acquisition or continuation, had survived three years after the onset of financial distress. This too strikes at the heart of state intervention⁸².

In 2010, The European Commission invited MSs and stakeholder to provide feedback on their recent experience of rescue and restructuring in light of the recent economic crisis. The United Kingdom⁸³ suggested that the threshold should be an insolvent 'firm in difficulty': pending insolvency is insufficient as this may be covered under the administration or Company Voluntary Arrangement (CVA) regimes. Further, since such assistance is highly distortive and a poor use of taxpayers' money, the first resort for assistance

⁸¹ OXERA, 'When the going gets tough: a closer look at financial distress and restructuring' (Feb 2010) n

⁸² OXERA, 'Should aid be granted to companies in difficulty? A study of counterfactual scenarios in restructuring aid' (December 2009)

⁸³ European Competition Commission, Consultation on the Review of Rescue and Restructuring aid Guidelines (Contribution: United Kingdom) <http://ec.europa.eu/competition/consultations/2010_restructuring_aid/uk_en.pdf> accessed July 6, 2013

must be the shareholders: thus funds cannot be set aside for dividend payments. It produced evidence of successful applications of rescue aid in which state aid was granted to non-banking entities: “Modec (NN19/2009) and to LDV (NN41/2009) – in neither case was this followed by restructuring aid. Modec [was] able to repay the loans offered and the rescue aid for LDV was given to allow time for a buyer to be put in place. In the event a buyer was not found and LDV were allowed to go into insolvency and exit the market”⁸⁴. Ultimately, it was firm in its belief that state aid should not be used to ‘prop up’ inefficient companies, rather, companies should be allowed to exit the market through normal exercise of bankruptcy and insolvency law.

Despite the accolades given to this framework, it is critical that the Commission, in applying these provisions, create a balance between certainty and flexibility. The flexibility required is evident where states, crushed by financial pressures, provide assistance pending the Commission’s decision⁸⁵. In May 2013, the Opinion of the Committee of the Regions on ‘EU Guidelines on State aid for rescuing and restructuring firms in difficulty’ provided nine salient points which should guide reform⁸⁶:

1. State aid is useful if its purpose is to help structurally profitable firms to overcome a period of instability, protect jobs and preserve industrial knowhow, maintain the economic fabric of a

⁸⁴ Matt Evans, ‘I’m about to go insolvent and I am not a bank’ (2012) 6 CRI 231

⁸⁵ Michael Reynolds, Sarah Macrory and Michelle Chowdhury

‘EU Competition Policy in the Financial Crisis: Extraordinary Measures’ Fordham International Law Journal, 2011, Vol 33 Issue 6, Article 3

⁸⁶ Opinion of the Committee of the Regions on State aid for rescuing and restructuring firms in difficulty (2013/C 139/04, May 17, 2013)

region, carry out public service tasks or preserve a competitive structure so as to avoid a situation of monopoly or oligopoly, as well as to allow firms that carry out an activity of strategic importance to the European Union to overcome temporary situations of global competitive stress

2. Increased assistance through the European Commission inter-service task force which will create a platform for co-ordination, exchanges and negotiation between the Commission and stakeholders, particularly in areas of restructuring
3. Establishment and maintenance of a public on-line database which allows for filing of comments by competitors who believe they will be adversely affected if the proposed beneficiary is given state aid
4. Rejection of limitation of state aid to companies in formal insolvency proceedings as it is more effective and efficient to deal with enterprises in advance of collective proceedings [This was a strong request of UK in 2010 consultation]
5. Proposal for extension of de minimis regulation to firms in difficulty with a guarantee of EUR 200 000 for SMEs and 500 000 for other firms
6. Maximum period for rescue aid measures extended: given the complexity in drafting a plan, it should have the capacity to be renewed for a further six months
7. Contribution by the beneficiary should be reduced from a minimum of 40% for medium sized enterprises to minimum of

20% and in the case of large enterprises from a minimum of 50% to a minimum of 30%

8. In light of inflation, maximum amount of aid for combined rescue and restructuring aid set at EUR 10 million in 2007 should be increased to EUR 15 million
9. A call for the simplification of the rules, improvement of their practical implementing measures and speeding up or cutting back on procedures and a renewed focus on cases which have a substantial impact the internal market

Standing alone, state aid may not be seen as the best mechanism to tackle the complexities which arise with rescue financing; however, when working in tandem with other measures (discussed below) or mechanisms outside the scope of this paper such as ban on dividends in periods of difficulty and constraints on executive pay, a sound rescue financing platform may be realised.

Given the interconnectedness and dependency of the economies in the Commonwealth Caribbean, the importance of a regional framework cannot be overemphasised. In the absence of a similarly constituted European Union, it is proposed that the operation of a regional state aid regime falls under the purview of the CARICOM Competition Commission established under Article 171 of the Revised Treaty of Chaguaramas. When one considers the preamble and the general framework of the Revised Treaty of Chaguaramas, it is built around the avoidance of the distortion of competition.

Though state aid presents essential tools implemented to assist enterprises in managing challenges brought by the development of regional marketplaces and globalisation, it would be unwise to transplant the EU framework, pitched in an unparalleled legal landscape, to the region with its unique jurisprudence. It is clear that future feasibility studies [which will include costs and benefits analysis⁸⁷] are needed prior to implementation; however, three striking observations should be made: A need for balance between investment in corporate rescue and expected 'benefits'; establishment of an oversight and supervisory committee and any finance given by state should be given through 'stage financing': release of funds is contingent on the attainment of specific targets set by the oversight committee and by extension the state.

(ii) Indirect Measures

(a) Debt write-off or tax deferrals

A close analysis of companies in distress will disclose that the state (whether through national insurance contributions or taxes) is one of the companies' largest creditors.⁸⁸ A framework allowing for state forgiveness of corporate debt⁸⁹ may be manifested in a number of ways: complete debt write-off,

⁸⁷ Abel Mateus, 'The Current Financial Crisis and State Aid in the EU', *European Competition Journal*, Volume 5, Number 1, April 2009, 1 - 18

⁸⁸ For example, Bajan Cleaning Enterprises (Barbados) Ltd owed USD 5 million to state agencies

⁸⁹ The Breendon Review, *Boosting Finance Options for Businesses*, (Commissioned by the Department of Business, Innovation & Skills - 2012, Industry Taskforce to examine this question: how do we re-shape the finance landscape to make it serve better the needs of British businesses?) <<http://www.bis.gov.uk/assets/BISCore/enterprise/docs/B/12-668-boosting-finance-options-for-business.pdf>> last accessed July 3, 2013. However, the Government, in their response ('Boosting Finance Options for Businesses - Government Response to Industry-led Taskforce'), noted the risks that arise from such incentivising investment in small companies. Further, the proposed changes would complicate the existing set-up and undermine its core purpose of providing a relatively

partial debt write-off, partial debt write-offs combined with tax deferrals, deferrals alone or rate relief. However, such a framework must be carefully crafted and monitored to minimise abuse. Condition which should be imposed includes evidence of efforts to repay state debt and that the debt should be outstanding for no more than two years or greater than a stipulated maximum.

(b) Concessions and incentives for financial institutions 'active' in corporate rescue initiatives

Within the last decade, corporate access to rescue finance has been affected by the fragmentation of debt and global financial crisis. If privately run financial institutions are to disburse their scarce resources, some incentive must be given. One proposal is tax incentives to financing institutions that provide 'first time financing' to troubled companies up to a specified maximum. The tax credit may be linked to the amount of financing. No credits should be given unless the institution has carried out due diligence checks to ensure that the company's business model is viable and when combined with the proposed finance will place it on a path to recovery.

Another incentive that the state may provide to financial institutions is guaranteeing loans on the international financial market or provision of cheaper finance. The latter may be modelled on the United Kingdom National Loan Guarantee Scheme (NLGS), launched in March 2012. Under the NLGS,

simple vehicle which encourages people to save.
<<http://www.bis.gov.uk/assets/BISCore/enterprise/docs/B/12-669-boosting-finance-options-government-response.pdf>> last accessed July 3, 2013

up to £20 billion of cheaper funding is made available to banks under a government guarantee with a two-year window. Banks will be expected to pass on this benefit to smaller businesses in the form of reduced interest rates. Another scheme is the Funding for Lending Scheme⁹⁰: according to the Market Notice published by the Bank of England (BoE), “this is designed to incentivize banks and building societies to boost their lending to UK households and non-financial companies. [It] will provide funding to banks and building societies for an extended period, at below current market rates, with both the price and quantity of the funding provided linked to their performance in lending to the UK non-financial sector”⁹¹.

This increased access to finance at a lower rate should reduce the bank’s funding costs thus encouraging lending which will once again oil the ‘economic wheels’ promoting growth. Though these funds do not cater to a firm in difficulty and were geared (in part) to small-and-medium enterprises (SMEs), the operation of these provide guidance on the establishment of schemes which provide cheaper finance to companies.

Though the effect of such schemes would take some time to prove their worth, the announcement of the introduction of such schemes was met with

⁹⁰ Jennifer Thompson and Jim Pickard ‘Funding for Lending still to prove itself’ (Financial Times, April 21, 2013) <<http://www.ft.com/intl/cms/s/0/4619906e-aa9f-11e2-9a38-00144feabdc0.html>> July 6, 2013

⁹¹ Bank of England, ‘Market Notice – Funding for Lending Scheme’ <<http://www.bankofengland.co.uk/markets/Documents/marketnotice120713.pdf>> accessed 13 July 2012

‘an improvement in credit conditions, with loan rates falling’⁹² Paul Tucker, Deputy Governor for Financial Stability at The Bank of England, suggested that though the FLS was no ‘silver bullet’, the greater than expected growth in the economy was evidence that though there was a long way to go, progress was still being made⁹³. This has resulted in the extension of the scheme for a further year until the end of January 2015. This framework should also include an invitation for proposals by the private banking sector on the removal of barriers preventing access to rescue finance for troubled companies.

B. Non-financial Measures

(i) Direct Measures: Three-Prong Approach to Law reform

There are areas in which regional legal frameworks may be reformed to strengthen the rescue culture and facilitate access and provision of rescue financing:

(a) Fundamental review of bankruptcy law

The Barbados Bankruptcy and Insolvency Act, similar to other pieces of insolvency legislation across the region, is guided by an outdated vision of bankruptcy law: creditor wealth maximization. Thus, the rights and needs of its creditors guide all of the statutory decisions relevant to the insolvency/bankruptcy of a company. Inspired by the law and economics

⁹² Bank of England, ‘News Release: Bank of England and HM Treasury – Funding for Lending Scheme: 2012 Q4 usage and lending data’ (March 4, 2013) <<http://www.bankofengland.co.uk/publications/Pages/news/2013/044.aspx>> accessed July 6, 2013

⁹³ Coreena Ford, ‘Reason for hope – Bank of England Deputy Director: Paul Tucker’ <<http://www.thejournal.co.uk/business/business-news/reason-hope---bank-england-4392132>> last accessed, July 3, 2013

movement, the creditor wealth maximization, as posited by Jackson⁹⁴ and later Jackson and Scott⁹⁵ endorse a 'common pool philosophy'. In summary, the sole goal of bankruptcy law should be the maximization and co-ordination of creditor returns, leaving creditors' pre-insolvency rights intact and hindering re-distribution efforts.

In the 21st century, the model on which bankruptcy laws are based is myopic. Regional Governments should amend their legislation to reflect current thinking underpin by a 'stakeholder-model', similar to the UK model. As seen with the REDjet (case study above), only the interests of creditors were represented in negotiations though the effects were widespread.

As suggested by Warren⁹⁶ and Korobkin⁹⁷, bankruptcy should be guided by the needs of a range of stakeholders simply because bankruptcy creates a ripple effect; it does not impact creditors alone. In all cases, bankruptcy impacts employees, suppliers, governments and the ordinary citizen; thus, rescue should, where possible, play a critical role. Warren noted that some of the relevant, but not determinative, questions which should arise in bankruptcy include who may be hurt by business failure, whether the hurt can be avoided and at what cost, who is helped by failure and whether the aid to those helped offsets the injury to those hurt: all rescue-focussed. It is well

⁹⁴ Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986)

⁹⁵ Jackson and Scott, 'On the Nature of Bankruptcy Sharing and the Creditors' Bargain', [1989] 75(2) Va. L. Rev. 155 - 204

⁹⁶ Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' in Bhandari and Weiss (eds) *Corporate Bankruptcy: Economic and Legal Perspectives* (Cambridge University Press, 1996)

⁹⁷ Professor Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717. Reference may also be made to his other works: 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas Law Review 541; 'The Role of Normative Theory in Bankruptcy Debates' (1996) 82 Iowa Law Review 75

accepted that this approach may affect the individual creditor's freedom and may even result in redistribution; however, it is necessary to accept the interdependency between individuals and businesses and, further, the failure of one business may create ripple effects in the business community. This should drive legislators to reform.

(b) Super-priority for rescue financing

As discussed above, super-priority is one of the mechanisms, which could resuscitate the giving of financial assistance by the private sector to, distressed companies in this depressed economic environment. However, this mechanism must balance certainty and predictability [for those who provide finance in the pre-distress period] with fairness. Such a framework should include (i) No state priority - Super-priority should exclude any finance provided by the state or a state-funded body, (ii) Thresholds [relevant to the size of the company and relevant industry] must be substantial to reduce possible abuse and (iii) Priority only relates to the funds disbursed in the distress period and thus exclude priority for any funds provided in the pre-distress period

(c) Legislation should be supplemented by Guides or Statement of Principles and/or Best Practices:

Statement of Principles and/or Best Practices are not innovative but have been successfully implemented and used across industries for decades. Such guides are critical in bolstering existing legislative structures. These ensure consistency in 'insolvency circles', serve as educational guides [including

awareness of proper entry and exit and the scope of legislative procedures], present legislation in simple and practical terms, reduce costs due to avoidable 'mistakes', enlighten creditors about their rights, encourage corporate activism where necessary and guide new entrants to corporate world.

The United Kingdom's 'R3 – The Ostrich Guide to Business Survival' is one successful example: this guide discusses the existing rescue culture, enlightens creditors and informs directors or owners of businesses in crisis of their rights and responsibilities. There are numerous internationally recognised guides that provide instruction on best practices for informal workouts. These include the INSOL International Statement of Principles for a Global Approach to Multi-Creditor Workouts (October 2000), World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (April 2001) and Asian Bankers' Association Informal Workout Guidelines – Promoting Corporate Restructuring in Asia (October 2005). This is key given the upsurge of informal workouts in the face of the corporate distress.

Principle 8 of the INSOL International Statement of Principles which discusses access to funding and priority is critical to our discussion and shows the potential interplay between statement of principles and existing legislative structures: "If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as

compared to other indebtedness or claims of relevant creditors.”⁹⁸ As identified above, neither the UK nor the Commonwealth Caribbean legislation provide for access or priority of rescue funding. However, the adoption/acceptance of statement of principle can fill the void presented by existing legislative structures or can act as pre-cursor to legislation where governments are timid to presently act in this regard.

(ii) Indirect Measures: General education, training and assistance

A government unit tasked with the provision of general education, training and assistance (GETA) on rescue [prevention and legislative framework] and its financing would bolster existing mechanisms geared at assisting distressed enterprises. This unit may operate through collaboration between the Ministry of Finance and/or the Attorney-General’s office. On the ‘general education’ platform, GETA, through public education, will seek to remove the stigma attached to companies involved in insolvency procedures. This may be achieved by ‘retraining’ the minds of the public about the reasons for corporate failure which in many cases are often not fraud related. Such public education programmes have been successful in Germany through their ‘Restart’ Programme which gives a second chance to honest entrepreneurs who experienced and learned from business failure.

On the ‘training’ platform, free public awareness lectures, conferences and workshops will consider key areas including the operation of insolvency legislation and supporting frameworks. Provision should also be made for

⁹⁸ INSOL International Statement of Principles for a Global Approach to Multi-Creditor Workouts (October 2000) 33

sessions where business owners are invited to give feedback on the operation of insolvency frameworks. This training should be mandatory for all businesses that receive state assistance, whether directly or indirectly. On the 'assistance' platform, a range of resources [such as financial planning] and psychological support [through networking with other business owners] should be provided.

However, these programmes must be attractive – both to business owners and prospective business owners – and flexible. This flexibility is best orchestrated through distance-learning conferences where videos are web-accessible thus reducing cost and increasing convenience and accessibility.

Conclusion

Winston Churchill is oft remembered for saying “One ought never to turn one’s back on a threatened danger and try to run away from it. If you do that, you will double the danger. But if you meet it promptly and without flinching, you will reduce the danger by half. Never run away from anything. Never!” This advice is even more fitting in the face of the global financial crisis. The legislative forefathers of the United States Chapter 11 were given birth through the pain of the Great Depression of the 1930’s. Likewise, it is hoped that the financial turmoil of 2008 – 9 has inflicted such ‘pain’ on the Commonwealth Caribbean that it, too, will be driven into action; thus, bringing forth a ‘reformed child’: ‘an active Commonwealth Caribbean rescue culture’ with provision for priority and access to rescue financing. It is well accepted that recession has played a major role in reducing the state’s

capacity to assist troubled companies. Thus, the state must play a facilitative role where private sector driven financing is incentivised. It is strongly believed that these recommendations, primarily the provision of a state aid framework, can serve as a turning point for access to finance for troubled enterprises both in the Commonwealth Caribbean region and beyond. All things considered, it is humbly, yet emphatically proposed, that these be incorporated into regional legislation.