



**INSOL**  
INTERNATIONAL



# Commencement and termination of business rescue

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# Introduction

- Two entry routes into business rescue
  - Board resolution filed with CIPC (voluntary commencement) - 91% of all BR cases; or
  - Application to court (compulsory commencement)
- Commencement leads to appointment of BRP
- Automatic consequences such as moratorium on legal proceedings against the company

# Voluntary commencement (s 129)

- Board resolution
- Shareholders do not have this power
- Has no force or effect until filed with CIPC

# Restriction on voluntary commencement

- Resolution to commence BR may not be “adopted” if liquidation proceedings have already been “initiated” (s 129(2)(a))
- Meaning of initiated is not defined –
  - is it the same as commenced or
  - after commencement or
  - before commencement

# Requirements for voluntary commencement

- Board must have reasonable grounds to believe –
  - company is financially distressed, and
  - there appears to be a reasonable prospect of rescuing the company
- Subjective view of directors and objective view of a reasonable director

# Obligation to commence (s 129(7))

- If board has reasonable grounds to believe that the company is financially distressed but decides not to adopt business rescue resolution
- Must deliver written notice to every affected person of type of financial distress and reasons for not entering business rescue
- Notice could trigger section 22(2) notice by CIPC
- No other direct sanctions for non-compliance

# Resolution by board of directors

- Must be a valid resolution as prescribed by section 73:
  - Notice to all directors
  - Majority must be present
  - Each director has one vote
  - Majority vote required for approval
- Otherwise, the resolution is invalid and a nullity
- Form CoR 123.1 must be used to file resolution with CIPC plus documents as prescribed in Practice Note 3 of 2021, including sworn statement as required by s 129(3)(a)
- BR commences on filing of resolution (s 132(1)(a)(i)) (but see Practice Note 3 of 2021: mere submission does not constitute filing))

# Appointment of business rescue practitioner

- Must be appointed within 5 business days after filing resolution
- Or such longer time as the CIPC on application will allow
- Within 2 days after appointment, notice of appointment must be filed on Form CoR123.2
- Accompanied by supporting documents as required by Practice Note 22 of 2022 (including Letter of Good Standing from BRP's accredited Professional Body)



# Notice to affected persons

- Within 5 business days after filing board resolution, company must publish notice of resolution and its effective date to every affected person as prescribed by Regulation 123(2)
- Including sworn statement of relevant facts why resolution was taken
- Substantial compliance?
- Within 5 business days after filing notice of appointment of BRP, company must publish a copy of this notice to every affected person

# Failure to comply with procedural requirements (s 129(5))

- If company fails to comply with procedural requirements of s 129(3) or (4) –
  - Resolution to commence BR “lapses and is a nullity”
  - Company may not file a further resolution within 3 months except with permission of the court
- But SCA decided otherwise in *Panamo Properties v Nel*
  - BR will only be terminated when court sets aside the resolution if considered just and equitable

# Remedies for affected persons (s 130)

- Application to court to
  - Set aside board resolution
    - ✓ No reasonable basis for believing company is financially distressed or
    - ✓ No reasonable prospect for rescuing the company or
    - ✓ Non-compliance with procedural requirements of s 129(3) and (4)
  - **and** it is just and equitable
  - Set aside appointment of business rescue practitioner
  - Demanding security from BRP
- But only until rescue plan has been approved

# Commencement by application to court (s 131)

- Unless the company has adopted a resolution to begin business rescue proceedings
- Any affected person may apply
- Company or directors in that capacity may not apply
- Applicant must **serve** a copy of the application on the company and the CIPC
- and **notify** each affected person as prescribed by the regulations
- Each affected person has the right to participate in the hearing

# Effect of application on liquidation proceedings (s 131(6))

- When **application** “is made” for business rescue it suspends current liquidation proceedings until court has adjudicated upon BR application
- Meaning of “liquidation proceedings”?
- An application for BR can be made “at any time” (s 131(1))
- Effect of suspension
- Effect on *concursum creditorum*
- When is application made for purposes of s 131(6)?

# Compulsory commencement (s 131)

- Application to court by affected person
- Court may also order business rescue during liquidation proceedings (same requirements as for any other BR application) or
- Proceedings to enforce any security against the company

# Requirements for BR order

- Financial distress and reasonable prospect of rescue
- Financial distress as defined in s 128 –commercial or factual (balance-sheet) insolvency
  - current or future?
- Alternatives –
  - failure to pay over employment-related amounts i.t.o. public regulation or contract or
  - otherwise just and equitable “for financial reasons”

# Prospect of rescue

- Reasonable prospect of achieving one of the two goals contained in definition of business rescue
- No definition of reasonable prospect
  - Objectively reasonable, based on concrete facts, not speculation
  - Not a checklist
- No final plan required on application but at least a strategy or achievable draft plan
- Opposition by major creditor(s)
- Better return for creditors – resources likely to be available



# Business rescue order

- Section 131(4) – the court may make an order placing the company under supervision and commencing business rescue proceedings
- Court must then also appoint an interim business rescue practitioner nominated by the applicant
- Section 132(1)(b) – business rescue proceedings begin when an affected person applies to the court for an order i.t.o. section 131(1) ?!!!!
- Company must notify each affected person within 5 business days of order

# Limited duration of business rescue proceedings

- Section 132(3) – if not ended 3 months after commencement or longer period allowed by the court
  - Practitioner must provide monthly progress report to each affected person and
  - (To court or) CIPC
- Report must be filed together with Form CoR 125.1

# Termination of business rescue proceedings (s 132(2))

- By court order
  - resolution or order commencing BR set aside
    - BRP must apply if no reasonable prospect of rescue and apply for liquidation ; or no financial distress if commenced by court order (s 141(2))
  - “converting” BR to liquidation
- Practitioner filing notice of termination
- Business rescue plan
  - Rejected and no further action taken by an affected person (filing of notice required?) or binding offer is refused
  - Adopted and notice of substantial implementation filed (Form CoR125.3)
- Form CoR125.2 for all other terminations



- THE END OF CHAPTER 2