



INSOL
INTERNATIONAL



Introduction to Business Rescue

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Outline of Presentation

- General Introduction and a bird's eye view of the business rescue procedure
- Important definitions in section 128(1) of the Companies Act
- Overview of the business rescue procedure
- The creditor versus debtor focused approach
- Two objectives of business rescue
- Entry routes into business rescue
- The business rescue practitioner
- Moratorium

Outline of Presentation continued....

- Post-commencement finance
- The business rescue plan
- Creditors
- Directors
- Employees
- Shareholders
- When is business rescue most appropriate?
- Recent examples: Tongaat Hulett; Rea Vaya; Ellies
- Case Study – Fast Flights Airlines Limited

1.5 General Introduction and a bird's eye view of the business rescue procedure

- Given the current economic climate, business rescue proceedings are becoming increasingly relevant
- The Companies Act 71 of 2008 (which came into operation in May 2011) introduced business rescue proceedings to the South African legal and restructuring landscape
- Business rescue replaced the outdated judicial management procedure
- The aim of business rescue is to allow for the supervision of financially distressed companies by a business rescue practitioner with the objective of either rescuing the company and allowing it to trade out of its financial predicament, or if this is not possible, offering the company's creditors and shareholders a better dividend than would otherwise be achieved through liquidation
- Attempting to restructure financially distressed companies (as opposed to simply liquidating them) has been the new global trend
- Business rescue accords with the "corporate rescue culture" and other international standards of corporate rescue USA (Chapter 11 proceedings) and the UK (Administration)
- Having some knowledge of the new restructuring dispensation is essential as most companies may be exposed to business rescue at various levels

A man in a dark wetsuit is floating in the ocean, looking distressed with his mouth open. The water is dark blue and choppy. The sky is overcast and grey. In the top left corner, there is a small orange horizontal bar.

- HISTORIC CORPORATE FAILURES

EXAMPLES OF LARGE CORPORATE FAILURES / COLLAPSES

- **USA**

- Pan Am Airlines (1991)
- WorldCom (2001)
- Enron (2001)
- Arthur Andersen (2002)
- Polaroid (2005)
- Lehman Bros (2008)
- Bear Sterns (2008)
- Madoff (2008)
- Nortel (2009)

EXAMPLES OF LARGE CORPORATE FAILURES / COLLAPSES

- **UK**

- Barings Bank (1995)
- Northern Rock (2008)
- Royal Bank of Scotland (2008)
- ABN Amro (2008)

- **AUSTRALIA**

- One Tel (2001)
- HIH Insurance (2001)

SOUTH AFRICAN EXAMPLES OF LARGE CORPORATE FAILURES / COLLAPSES: PRE-BUSINESS RESCUE LEGISLATION (2011)

- Phoenix Air
 - OneTime
 - Sun Air
 - Nationwide
 - Velvet Sky
 - Macmed (pharmaceutical)
 - Retail Apparel Group (RAG) (clothing)
 - Gotvil Timbers (timber)
 - TAK (automotive)
- 
- Airlines

1.5 General introduction continued.....

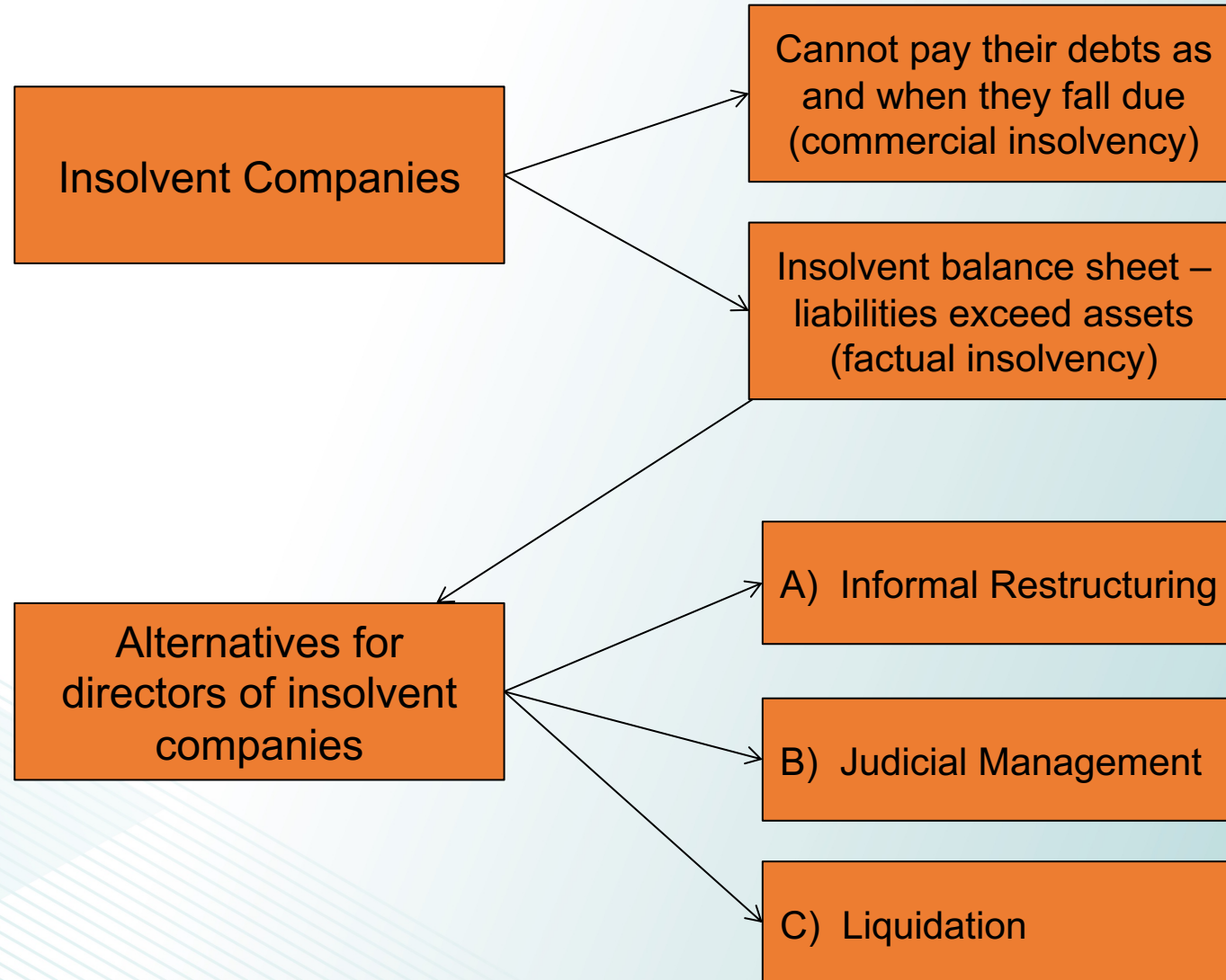
- Business rescue attempts to secure and balance the opposing interests of creditors, shareholders and employees
- Traditionally, South African insolvency law could be regarded as a "pro-creditor" regime
- In contrast, the business rescue process is characterised by an emphasis on the balancing of the rights and interests of all relevant stakeholders
- A shift from creditors' interests to a broader range of interests
- The rationale is to preserve the business, coupled with the experience and skill of its employees, which may in the end prove to be a better option for creditors in securing the full recovery of the debt – Focus is on "saving companies not destroying them"
- Business rescue and its application and interpretation are a continuously evolving concept, as reflected in the numerous judgements handed down by South African courts on the subject

1.5 General introduction continued.....

- The 4 principles of business rescue:
 - Maximising returns for creditors;
 - Avoiding the piece meal sale of assets at "fire-sale" values in a liquidation;
 - Retaining and preserving the goodwill of the business of the company; and
 - Keeping businesses afloat in order to preserve employment.



SOUTH AFRICA: PRE-2011



Business rescue overview

- Pre-2011, before our new business rescue legislation –
 - Only liquidation
 - Minimum dividends for unsecured creditors
 - Favoured banks (secured creditors)
 - Massive job losses
 - Bad for SA economy
 - Negative outcomes

So... clearly there was a need for change...

2011 – new 2008 Companies Act

- South African government had to look to modern rescue regimes available in international / foreign jurisdictions
 - Chapter 11 (USA)
 - Administration (UK)
 - Voluntary Administration (Australia)
 - CCAA Procedure (Canada)
- Draft new rescue legislation for South Africa (Canadians)
- Need to retain and preserve jobs (employment)
- Chapter 6 of South African Companies Act, 2008 (introduced in 2011)

Chapter 6 of the 2008 Companies Act outcomes

- Provides a fresh start for financially distressed companies through a restructuring of debt (creditors)
- Can restructure the company's business, management, contracts and employees
- Opportunity to implement a creative reorganisation of the company's business affairs
- Preservation of jobs
- Better returns for creditors
- Company can continue to trade on a solvent basis into the future

Business rescue – A new mechanism for restructuring companies in financial distress

- South Africa now has an established and new mechanism for restructuring companies – business rescue is a real alternative for companies in financial distress!
- Mirrors the mechanism for restructuring found in the USA (Chapter 11) and the UK (Administration)
- Brings South Africa into line with international corporate rescue regimes
- A new playing field for venture capitalists, hedge funds, private equity firms and distressed funds
- Opportunity to pick up distressed assets at discounted prices
- Mechanism to save jobs and ensure continuity for suppliers of a company

1.5 General introduction continued.....

A BIRD'S EYE VIEW OF THE BUSINESS RESCUE PROCESS

- a) Important definitions in business rescue
- b) The debtor focused approach of Chapter 6 of the Companies Act 2008 (as opposed to the creditor-focused approach seen in traditional insolvency law)
- c) The two objectives of business rescue
- d) Role of directors



1.6.1 Important definitions in section 128(1) of the Companies Act

"Affected person"

- Section 128(1)(a) of the Companies Act 2008 defines "affected person" as follows:
- "'Affected person', in relation to a company, means -
- (a) a shareholder or creditor of the company;
- (b) any registered trade union representing employees of the company; and
- (c) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;"

1.6.2 Important definitions in section 128(1) of the Companies Act continued.....

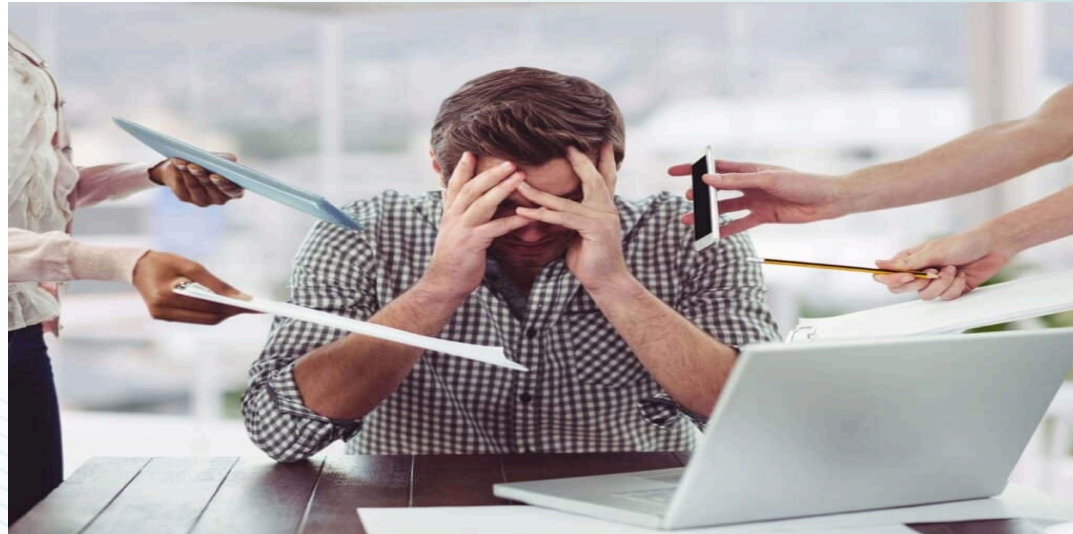
"Business rescue"

- proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –
 - temporary supervision of the company, and of the management of its affairs, business and property;
 - temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
 - development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that –
 - maximizes the likelihood of the company continuing in existence on a solvent basis; or
 - results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

1.6.3 Important definitions in section 128(1) of the Companies Act continued.....

"Business Rescue Practitioner"

- "Business rescue practitioner" means a person appointed, or two or more persons appointed jointly, in terms of Chapter 6 of the Companies Act 2008 to oversee a company during business rescue proceedings and "practitioner" has a corresponding meaning.



Business Rescue Practitioner

- **Business Rescue Practitioner** - a person appointed, or two or more persons appointed jointly, to oversee a company during business rescue proceedings –
 - two or more persons (could also include a junior and an experienced or senior practitioner)
 - “person” – contemplates appointment of a company – not practically possible
- **Who is the business rescue practitioner?**
 - Accountants
 - Lawyers
 - Business Turnaround Specialists
 - Ex-liquidators

Business Rescue Practitioner

- He becomes the supervisor of the company while it is in rescue (supervises the board of directors)
- Need to have a license to be appointed as a business rescue practitioner
- Licensed by the Companies & Intellectual Properties Commission (CIPC)
- Licenses can be revoked
- Skill set of the business rescue practitioner is critically important – needs to be able to “turn the company around”!

1.6.4 Important definitions in section 128(1) of the Companies Act continued.....

"Court"

- "Court", depending on the context, means either-
- (a) the High Court that has jurisdiction over the matter; or
- (b) either-
- (i) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of section 128(3) of the Companies Act 2008; or
- (ii) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of section 128(3) of the Companies Act 2008.



1.6.5 Important definitions in section 128(1) of the Companies Act continued.....

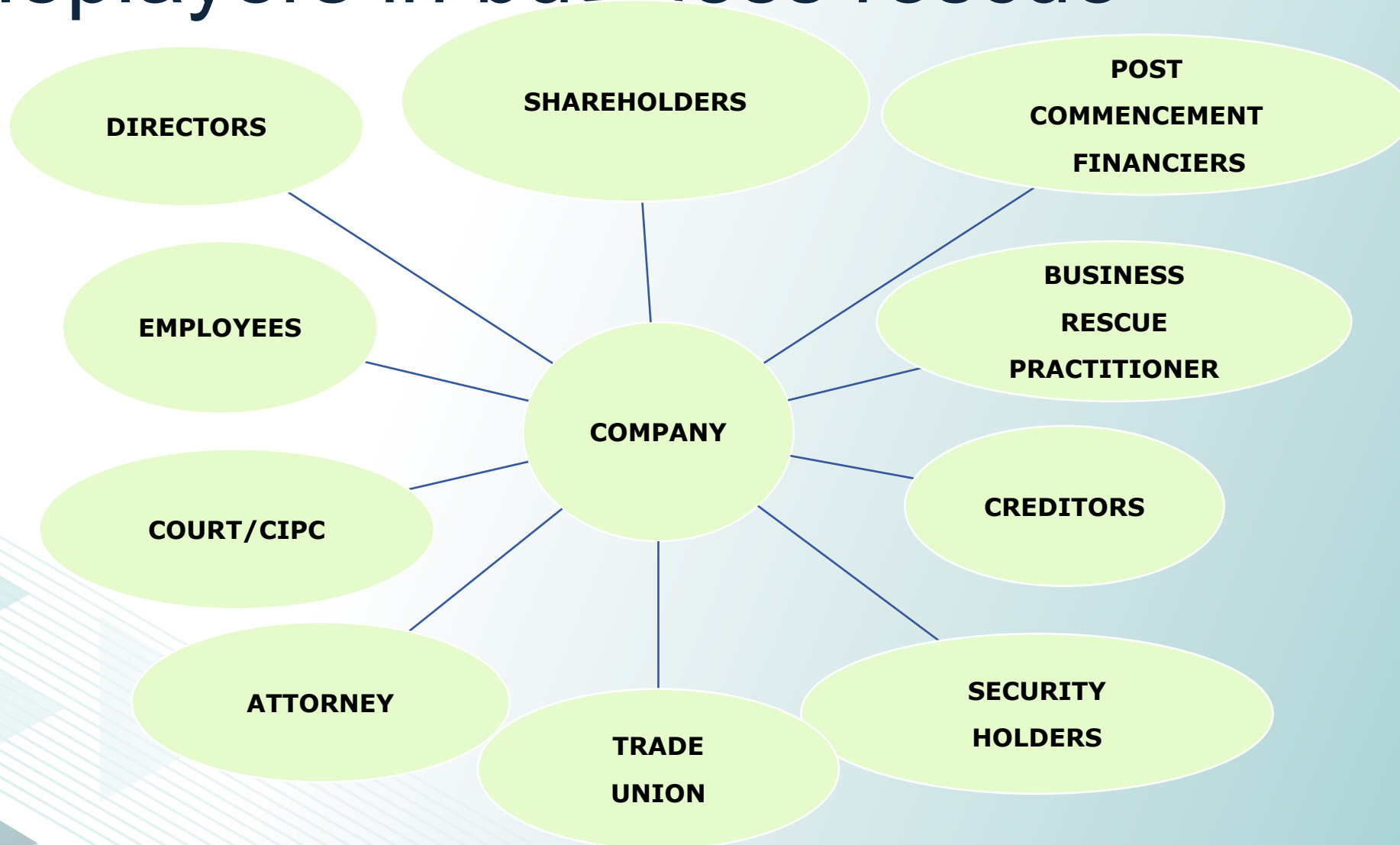
"Financially distressed" -

- in reference to a particular company at any particular time, means that —
 - it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
 - it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
- The test for financial distress is forward-looking
- It is intended to allow directors of companies to look into the future to determine whether the company is reasonably likely to run into cash-flow problems in the immediate ensuing six-month period.
- This six-month period was determined to be a sufficient period of time to allow directors to consider business rescue before it is too late.

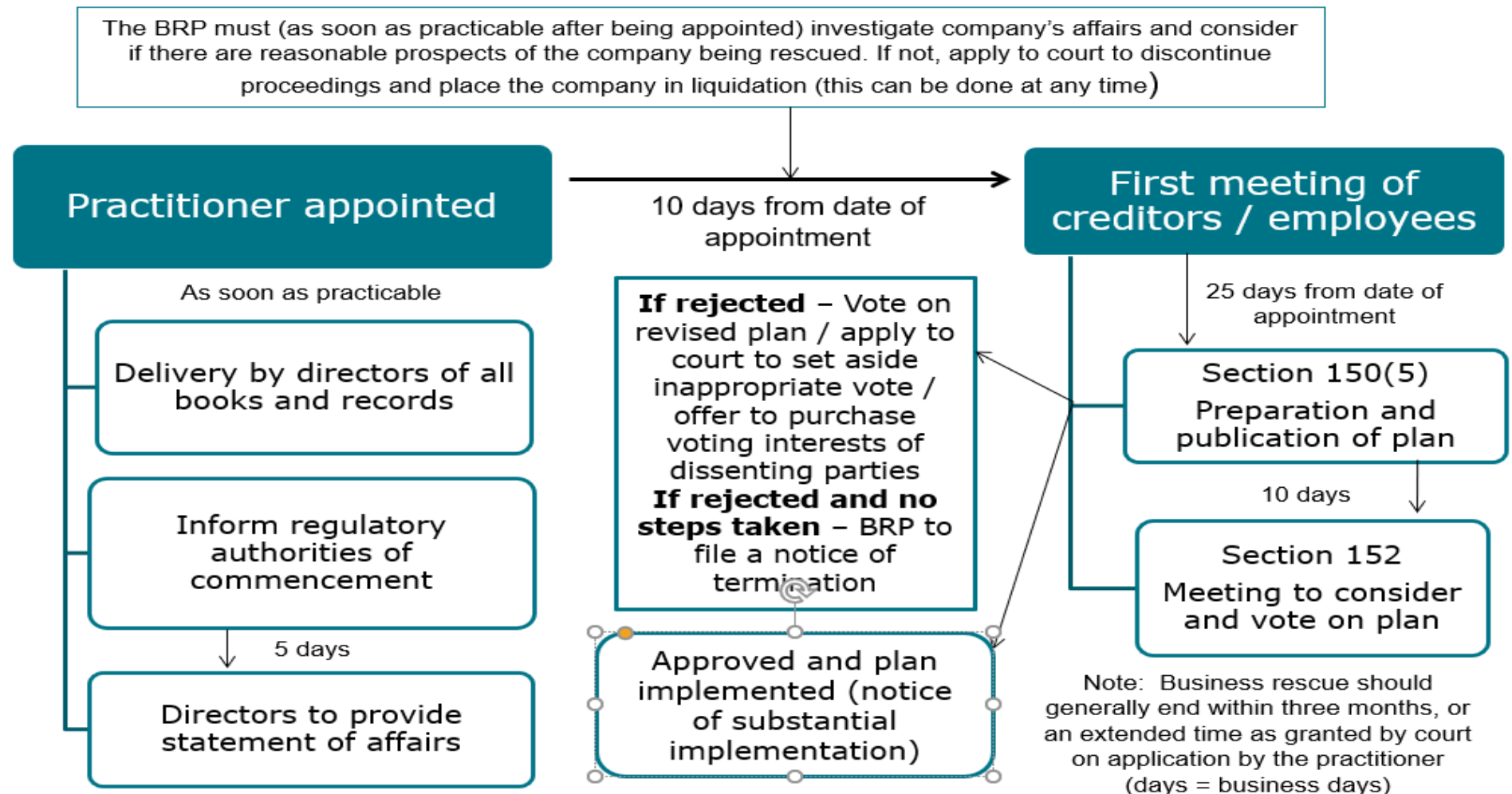
Test for business rescue

- Financially distressed – 6 month forward looking test:
 - It appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing *six months* (commercial insolvency test); or
 - it appears to be reasonably likely that the company will become "insolvent" within the immediately ensuing *six months* (factual/balance sheet insolvency).
- Clear distinction between "insolvent" and "financial distress"
- If already "insolvent", company must go into liquidation
- Business rescue test –
 - forward looking test
 - contemplates impending insolvency (commercial insolvency or factual insolvency)

Roleplayers in business rescue



1.7 Overview of the business rescue procedure/process

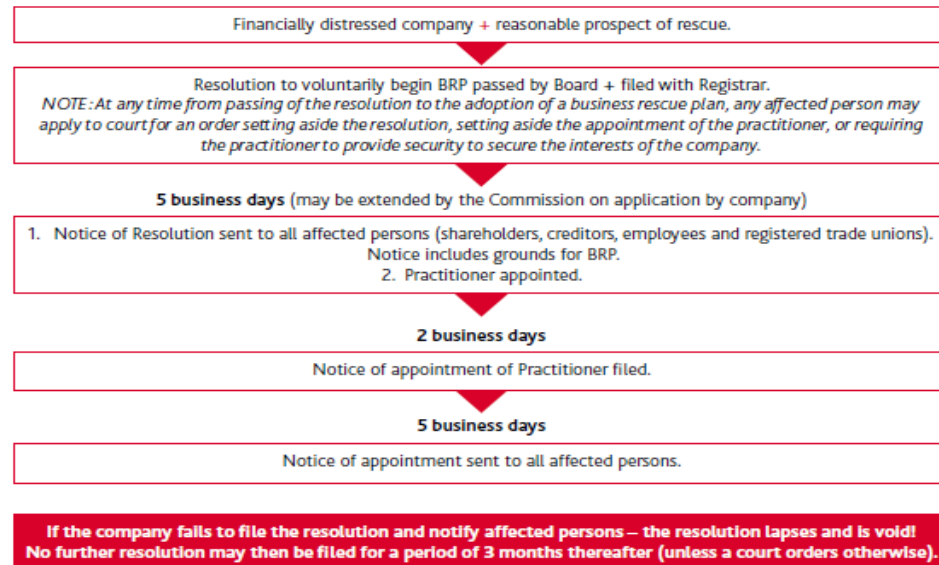


1.7 Overview of the business rescue procedure/process

3. Flowcharts illustrating the Business Rescue process

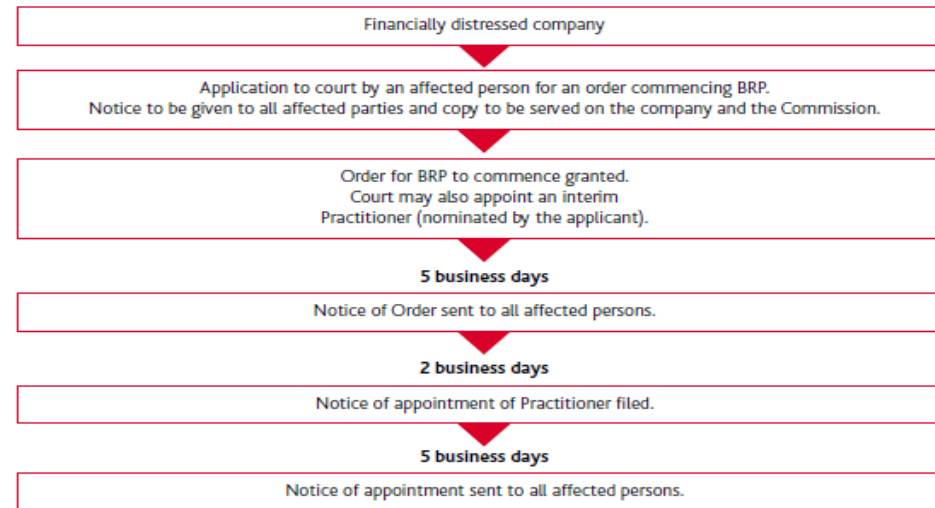
- A – Company resolution to commence BRP
- B – Court order to commence BRP
- C – General overview of BRP (from commencement via resolution/court order to termination of BRP)

A – Company resolution to commence BRP



From this point: see General Overview of the timing relating to BRP in C.

B – Court order to commence BRP



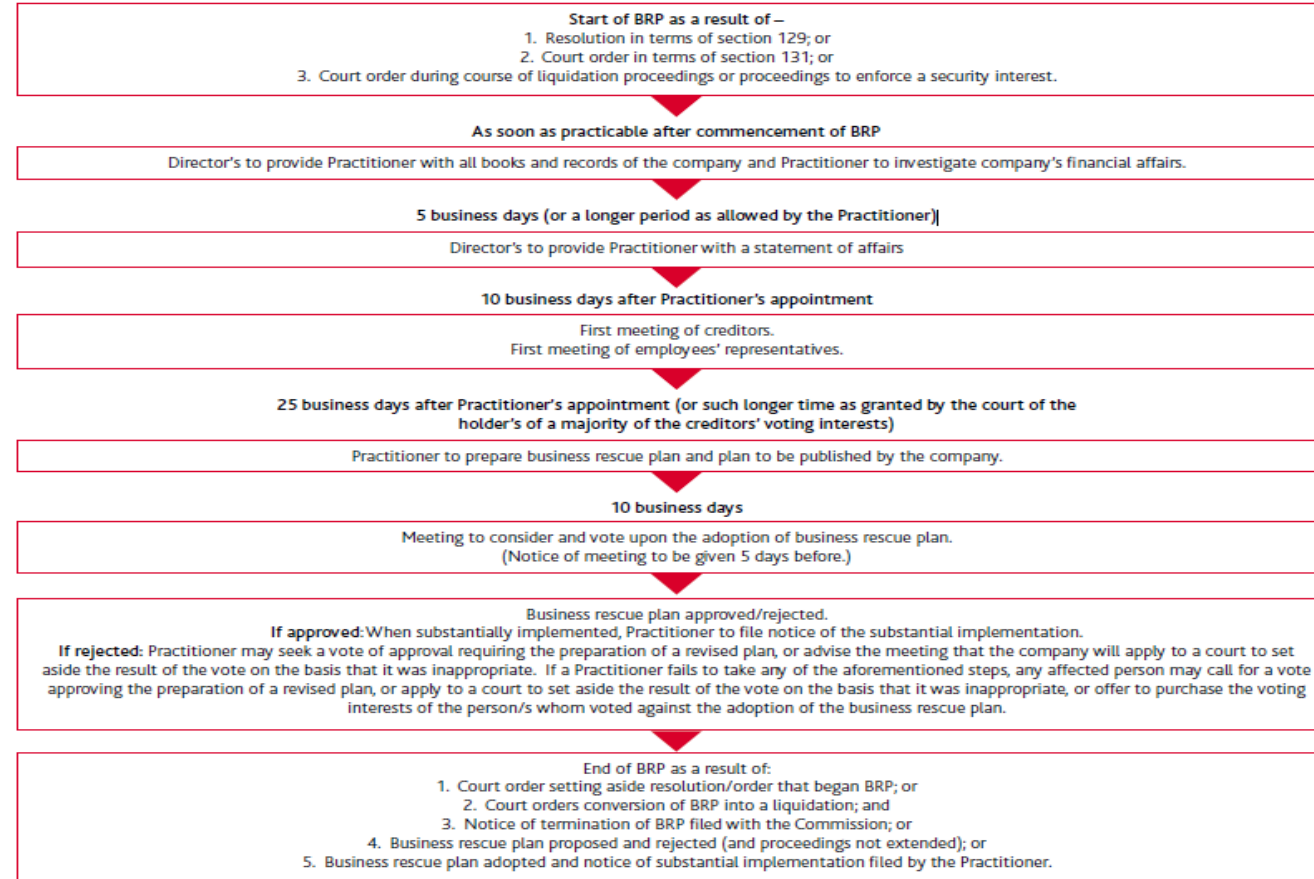
From this point: see General Overview of the timing relating to BRP in C.

1.7 Overview of the business rescue procedure/process

3. Flowcharts illustrating the Business Rescue process process continued

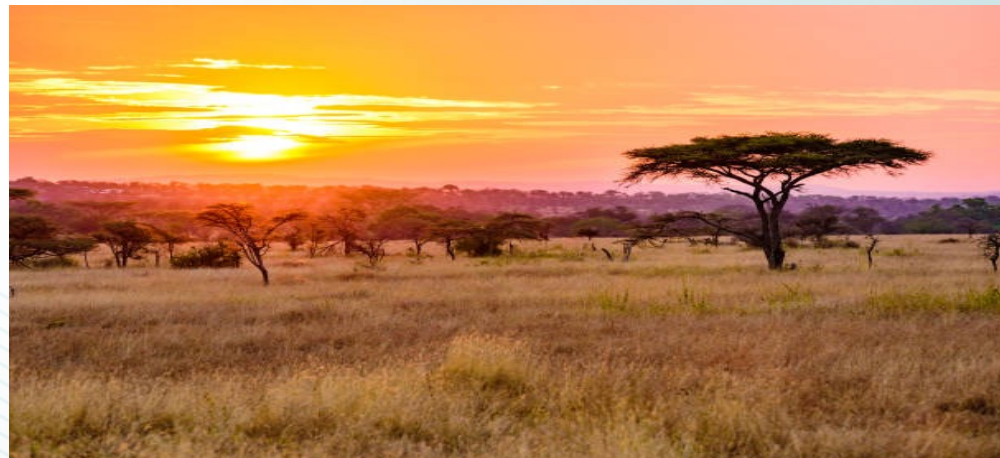
C - General overview of the timing relating to BRP

Note: In terms of section 132(3) BRP should generally end within 3 months! (Unless an extension is granted by the court on application by the practitioner)



1.7.1 The creditor focused vs the debtor focused approach

- Pro-creditor regime or pro-debtor?
- Balance the rights and interests of all stakeholders Section 7(k)
- Breathing space = Moratorium = Key feature of the business rescue process
- Commercial Insolvency vs Factual Insolvency
- The objective – Approval of the business rescue plan
- Key – Implementation of the business rescue plan



1.7.2 Two objectives of business rescue

"Business Rescue"

- Development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that –
 - maximizes the likelihood of the company continuing in existence on a solvent basis;
or
 - results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company

Board of directors

- Directors facing financial distress or insolvency are in a difficult position!



Duties of directors – section 129(7) notice

- > Directors have an obligation to consider the financial state of the company from time to time – especially when they enter the "twilight zone of insolvency"
- > If company is financially distressed, the directors have **two choices** –
 1. Pass a resolution to commence business rescue; or
 2. Send out what is commonly referred to as a "section 129(7) notice" -
 - > notify affected persons of the nature of the company's financial distress (ie impending commercial or balance sheet insolvency); and
 - > reasons for not adopting a resolution to commence business rescue

Directors' responsibility – section 129(7) notice

- > Notice needs to be carefully considered as it can have serious consequences, such as constituting an “act of insolvency”, and causing suppliers to stop supplying the company or precipitating a compulsory business rescue
- > Failure to comply may result in personal liability for directors
- > This will focus directors' minds in any financially distressed company

Before making the decision to commence business rescue – conduct a Pre-assessment (by nominated business rescue practitioner)

- > Investigation (at instance of company or creditor/s) into the business, dealings and affairs of the company, while not regulated by the Companies Act, may be necessary
- > Type of company is determinative of suitability of business rescue (i.e. retail vs investment property company)
- > Prior to the board or an affected person placing a company into business rescue, consideration should be given to –
 - > the nature and business of the company;
 - > extent to which business rescue is the appropriate procedure for that company; and
 - > extent to which business rescue would be more beneficial for the company than a liquidation
 - > reckless – not to do a pre-assessment

Decision to enter business rescue?

- Difficult in small privately owned companies (especially with a history of family involvement – too emotionally attached). Need input from independent/non-executive directors to make the "right decision", devoid of personal interests and agendas (eg. suretyships and damages claims)
- Cannot be "blind to reality"... cannot always blame financial distress on a "poor economy" – sometimes "it is just a bad business"!
- Decision to enter business rescue is usually brought about by an "aggressive creditor"... pushes company over the abyss... and where there is an urgent need for the protection of a moratorium
- Delay in the intervention of a business rescue process results in creditors carrying the risk of diminished dividends
- If the company is not a candidate for business rescue – preferable to place it into liquidation

1.7.3 Entry routes into business rescue

Two entry routes into the business rescue process

- The first route is a company resolution (voluntary commencement)
- The second is a formal court application by an affected person (compulsory commencement)

Entry into business rescue

Voluntary Business Rescue

Board resolution passed by a simple majority

Practitioner is nominated in the resolution

Company is financially distressed (ie will not be solvent on its balance sheet or will not be able to pay its debts when they fall due within the next six months)

Reasonable prospect that the company can be saved.

Cannot adopt a resolution if liquidation proceedings have been initiated

Compulsory Business Rescue

Affected person (shareholder, creditor or employee) makes application to court

Company is financially distressed

Company has failed to pay over any amount in terms of an obligation under or in terms of public regulation, or contract, with respect to employment related matters

Just and equitable to do so for financial reasons

There is a reasonable prospect of rescuing the company

Voluntary commencement

- In terms of section 129(1), a company's board of directors can pass a resolution in terms of which the company resolves to commence the business rescue process
- These two important restrictions on the commencement of voluntary business rescue proceedings
- A resolution commencing business rescue proceedings cannot be adopted if liquidation proceedings have already been initiated by or against the company
- A resolution to commence business rescue is of no force and effect until it has been filed with the CIPC

1.7.4 The business rescue practitioner

- During a company's business rescue proceedings, the business rescue practitioner, in addition to any other powers and duties set out in Chapter 6, has full management control of the company in substitution for its board and pre-existing management
- The business rescue practitioner is an officer of the court for the duration of a company's business rescue proceedings, and must report to the court in accordance with any applicable rules of, or orders made, by the court
- A business rescue practitioner also has the same responsibilities, duties and liabilities of a director of the company, as contemplated in sections 75 to 77 of the Companies Act
- A business rescue practitioner may be held liable in accordance with any relevant law for the consequences of any act of omission amounting to gross negligence in the exercise of the powers and performance of the functions of a practitioner
- Given the important role played by business rescue practitioners during the business rescue process, Chapter 6 of the Companies Act sets out various specific requirements that must be satisfied before a practitioner may be appointed to act as such during business rescue proceedings
- Importance of a pre-assessment report

THE MORATORIUM (STAY OF CLAIMS)

FREEZING OF ALL CLAIMS WHILE IN BUSINESS RESCUE



1.7.5 Moratorium (Section 133)

- A primary aim of business rescue proceedings is to offer a distressed company some breathing space to allow its affairs to be restructured in such a way as to allow it to continue to operate as a going concern
- This is achieved through a general moratorium on claims (a "stay" on claims)
- The moratorium on claims is a fundamental aspect of any successful rescue mechanism, aimed at the restructuring of the debt of a company that is financially distressed
- Section 133 of the Companies Act –
 - provides that during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with the written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable

1.7.5 Moratorium continued....

- The High Court has exclusive jurisdiction over business rescue matters, and as such, a party seeking to initiate proceedings, including those that concern an employment-related claim, against a company in business rescue, must secure the written consent of the business rescue practitioner or obtain the leave of the High Court to institute those proceedings
- Arbitration proceedings are legal proceedings for which the written consent of the business rescue practitioner or the leave of the court is required in terms of section 133
- The moratorium on legal proceedings in section 133 finds no application in legal proceedings against a company's business rescue practitioner in connection with the business rescue plan including its interpretation, adoption or implementation

Section 133(1) – stay on legal proceedings (moratorium)

- Moratorium –
 - prevents the prosecution of claims against the company while it is subject to the business rescue process
 - designed to provide the company with “breathing space” while the business rescue practitioner attempts to rescue the company through the preparation and implementation of the business rescue plan
 - without this element, a creditor would be able to enforce its rights during the process or apply for the liquidation of the company
- No legal proceedings (including enforcement action) against the company or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum

Exceptions to the Moratorium

- With the written consent of the practitioner
- With the leave of the court – must be well motivated (**Redpath Mining South Africa (Pty) Ltd v Piers Marsden NO & Others (SGHC) (2012)**)
- As a set-off against any claim made by the company in legal proceedings, irrespective of when the proceedings commence
- Criminal proceedings against the company/directors
- Proceedings concerning any property or right over which the company exercises the powers of a trustee
- Proceedings by a regulatory authority in the execution of its duties after written notification to the practitioner
- **Moodley v On Digital Media & 13 Others 2014 (11 July 2014)** – moratorium does not apply to proceedings to set aside the business rescue plan and to interdict the implementation of the business rescue.

Post-commencement finance

- Introduced a concept called post-commencement finance ("PCF")
- Distinguishes between two types of PCF –
- that which becomes due and owing to employees during business rescue proceedings
- funding which is provided to a company, during the company's business rescue, by means unrelated to employment (including the provision of credit by a supplier if it is approved by the BRP)
- PCF may be provided in exchange for security over unencumbered assets of the company
- PCF - financier will generally provide PCF if it will be guaranteed that its claim against the company will be secured

1.7.6 Post-commencement finance (Section 135)

- Post-commencement finance is the life-blood of the company while it is undergoing its restructuring process under business rescue
- Post-commencement finance is funding that is provided to the company after the date of commencement of business rescue proceedings
- In view of the importance of securing some level of ongoing finance in order to continue functioning in the marketplace, the Companies Act provides statutory protection and elevates the status of such funding above the claims of the company's pre-business rescue creditors (waterfall of payments in a business rescue)
- Without such preference being conferred, very few, if any, lenders would be prepared to continue to finance a company in circumstances where it is financially distressed and has been placed under business rescue
- During business rescue proceedings the company may obtain "finance" secured by the unencumbered assets of the company but payable after business rescue practitioners' remuneration and costs related to the proceedings and claims related to employment arising during the rescue proceedings in the order of preference indicated in section 135 of the Companies Act

Contracts in business rescue

- Business rescue practitioner can suspend or cancel (prejudicial) contracts (that are affecting the company's ability to trade effectively) – section 136.
- Practitioner may –
 - entirely, partially or conditionally suspend, for the duration of the proceedings, any obligation of the company that –
 - arises under an agreement to which the company was a party at the commencement of the proceedings; and
 - would otherwise become due during those proceedings; or
 - apply urgently to court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any agreement to which the company is party.
- The counter-party can only assert a claim for damages (a concurrent claim) and not specific performance.

The Business Rescue Plan



1.7.7 The business rescue plan (Section 150)

- The practitioner, after consulting the creditors, other affected persons, and the management of the company, is obligated to prepare a business rescue plan for consideration and possible adoption at a meeting convened for this purpose
- The consideration of the business rescue plan is the most significant part of the business rescue process, as the business rescue plan will ultimately, if voted in and approved, give the company a chance to be rescued
- Section 150 contains detailed provisions of the information that must be contained in a proposed plan
- The detailed information required in terms of section 150 is to ensure that sufficient information is placed before the creditors and other stakeholders in order that they may make an informed decision regarding the adoption (or not) of the plan
- The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by the court on application by the company, or the holders of a majority of the creditors' voting interests

1.7.7 The business rescue plan continued.....

- A rescue plan is adopted by creditors (subject to approval by holders of securities if their interests are affected) if it is supported by 75% of voting interests and 50% of independent creditors' voting interest
- A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of the 2008 Companies Act. The court has no power to cram down a plan on creditors which they have not discussed and voted on at such a meeting
- A secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company.
- An adopted plan is binding on the company in business rescue, and all the creditors and holders of the company's securities. Once adopted or approved in terms of section 152, a business rescue plan forms the foundation of the business rescue proceedings to which all the affected persons are bound. It is binding on the company, on each creditor and on every holder of securities of the company whether or not that person was present at the meeting, voted in favour of adoption of the plan or in the case of creditors, had proven their claims against the company.

The approval of the business rescue plan

- Plan approved on a preliminary basis if –
 - supported by holders of more than **75% of the creditors'** (all creditors – secured/unsecured) voting interests that were voted (at value); and
 - votes in support of proposed plan included **at least 50% of independent creditors'** voting interests, if any, that were voted (independent creditors are defined as creditors who are not related to company, director or practitioner)
- “50% of the independent creditors’ voting interests” – 50% of the total amount of independent creditors of the company
- If the plan affects the rights of securities holders, they also vote on the plan
- Plan will be finally adopted if it is supported by 51% of the securities holders or class of securities holders who are affected by the plan

The rejection of the business rescue plan

- **"New proposal"** is put forward – publish a revised plan
- **"Binding Offer"** –
 - any affected person or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed the adoption of the plan (and as a result of which the plan was rejected) at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated
 - offer that is binding only on the offeror and capable of acceptance by the offeree – **African Banking Corporation of Botswana Limited v Kariba Furniture Manufacturers (Pty) Ltd & Others – SCA (20 May 2015)**
 - does not create the necessary tension between creditors who carry the vote and the possibility of their being “bought out” at liquidation value

The rejection of the business rescue plan continued...

- > **"Inappropriate Vote"** – practitioner or affected person if the practitioner does not, can apply to court to set aside a vote on a plan. If the court finds it reasonable and justifiable (grounds are set out in section 153(7)) taking into account –
 - > the interests represented by the person or persons who voted against the proposed business rescue plan;
 - > the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and
 - > a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

The binding effect of the business rescue plan

- Section 152(4) - a business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person –
 - was present at the meeting;
 - voted in favour of the adoption of the plan; or
 - in the case of creditors, had proven their claims against the company
- **African Banking Corporation of Botswana Limited v Kariba Furniture Manufacturers (Pty) Ltd & Others 2013** - cram down provision which has its origins in the US Bankruptcy Code of the Bankruptcy Reform Act 1978 –
 - necessary for the successful implementation of a business rescue plan
 - therefore, no option to set aside the plan once adopted

1.7.7 The business rescue plan continued.....

- In terms of section 154(1), a business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it
- In terms of section 154(2), if a business rescue plan has been approved and implemented in accordance with Chapter 6, a creditor that is owed a debt immediately before the beginning of the business rescue process is not entitled to enforce any debt owed to it by the company, except to the extent provided in the business rescue plan

Stressed Stakeholders



1.7.8 Creditors

- 145 Participation by creditors
- (1) Each creditor is entitled to- (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings; (b) participate in any court proceedings arising during the business rescue proceedings; (c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and (d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.
- (2) In addition to the rights set out in subsection (1), each creditor has- (a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and (b) if the proposed business rescue plan is rejected, a further right to- (i) propose the development of an alternative plan, in the manner contemplated in section 153; or (ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153.
- (3) The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.

1.7.8 Creditors

- (4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests- (a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and (b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.
- (5) The practitioner of a company must- (a) determine whether a creditor is independent for the purposes of this Chapter; (b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4)(b); and (c) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section 151.
- (6) Within five business days after receiving a notice of a determination contemplated in subsection (5), a person may apply to a court to- (a) review the practitioner's determination that the person is, or is not, an independent creditor; or (b) review, re-appraise and re-value that person's voting interest, as determined in terms of subsection (5)(b).

1.7.9 Directors

- Section 137(2)
- (2) During a company's business rescue proceedings, each director of the company-
- (a) must continue to exercise the functions of director, subject to the authority of the practitioner;
- (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;
- (c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and
- (d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).

1.7.10 Employees

- Section 144
- Rights of employees
- (1) During a company's business rescue proceedings any employees of the company who are- (a) represented by a registered trade union may exercise any rights set out in this Chapter- (i) collectively through their trade union; and (ii) in accordance with applicable labour law; or (b) not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.
- (2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.

1.7.11 Shareholders

Shareholders (security holders) – Section 146

- (d) vote to approve or reject a proposed business rescue plan in the manner contemplated in section 152, if the plan would alter the rights associated with the class of securities held by that person; and
- (e) if the business rescue plan is rejected, to— (i) propose the development of an alternative plan, in the manner contemplated in section 153; or (ii) present an offer to acquire the interests of any or all of the creditors or other holders of the company's securities in the manner contemplated in section 153.



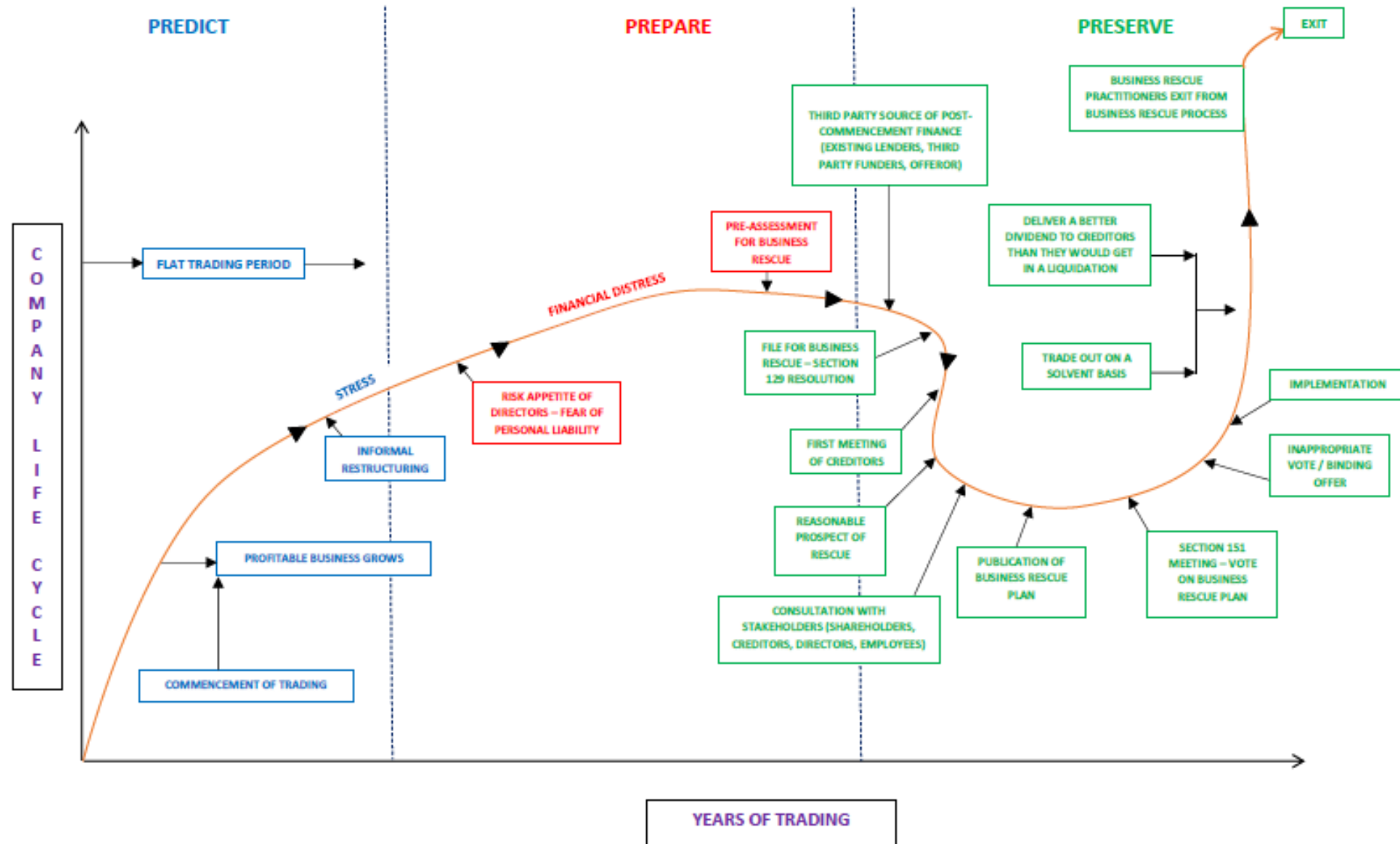
Duration of business rescue proceedings

- Section 132(3)– if the company’s business rescue proceedings haven’t ended within three months or such time as the court may allow, then the practitioner must –
 - prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and
 - deliver the report and each update in the prescribed manner to each affected person, and to the —
 - court, if the proceedings have been the subject of a court order; or
 - CIPC, in any other case

Termination of business rescue proceedings

- Business rescue proceedings end when –
 - court –
 - sets aside the resolution or order that began the business rescue proceedings; or
 - converts business rescue proceedings into liquidation proceedings;
 - business rescue practitioner files a notice of termination of business rescue proceedings with CIPC (and applies to court if the company is no longer in need of rescue)
 - business rescue plan has been –
 - proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the Act; or
 - adopted and the business rescue practitioner has subsequently filed a notice of substantial implementation of the plan

3 Ps of Business Rescue



1.8 When is business rescue appropriate?



DO NOT LEAVE IT TOO LATE!

1.8 When is business rescue appropriate?

- In *Antonie Welman v Marcelle Props 193 CC*, it was held that business rescue proceedings are not for terminally ill corporations, but are rather for ailing entities which, if given time, may be rescued and become solvent. Accordingly, not all companies are suitable for business rescue, and much will depend on the specific cause of the company's financial distress.





1.8 When is business rescue appropriate?

Tyre Corporation Cape Town Proprietary Limited & Others v GT Logistics Proprietary Limited & Others (Rogers J) [2016] (WCC)

"Current commercial or factual insolvency is not a prerequisite. This is understandable. But it does not follow that, because the company is already commercially or factually insolvent, and thus obviously financially distressed, it can no longer be the subject of business rescue. Such an interpretation would be inconsistent with s 5(1) read with s 7 of the Act, particularly paras 7(d) and (k), since it would oblige the court to liquidate a company even though there might be a reasonable prospect of rescuing it."

- > First signs of financial distress – company should consider business rescue
- > If more than just "financially distressed" the company may consider other options such as a liquidation, but business rescue is still an option

Business Rescue – recent examples (2023/2024)

TONGAAT HULETT





ELLIES ELECTRONICS



REA VAYA BUS CORPORATION

DEW CRISP



1.8 Case Study?



FAST FLIGHTS AIRLINES LIMITED

Self assessment questions for Chapter 1

See page 23 of notes

Q & A

Thank You