

Expectations of a business rescue plan: international directives for Chapter 6 implementation

M. Pretorius & W. Rosslyn-Smith

ABSTRACT

Preliminary analysis of business rescue plans suggested that a significant contrast exists between international reorganisational plans and those being published under the newly formed business rescue regime in South Africa. Since the South African regime has emerged from an international insolvency framework, an international benchmark was used to effectively assist in creating an evaluation tool. To better understand the expectations demanded of the plan, principles from comparable international regimes were identified. Data on regimes were obtained, scrutinised and reported on; the expectations were extrapolated and aligned with Chapter 6 of the South African Companies Act, No. 71 of 2008, to determine whether the Act complied with a set of expectations based on an international perspective. The proposed framework shows the key principles that govern rescue plans worldwide. The framework could serve as a guideline for the evaluation of rescue plans and help practitioners to enhance what is seen as their key task, namely to compile the rescue plan. Comparison with the five key principles found by the research reveals particular shortcomings in Chapter 6 of the South African Companies Act of 2008. International regimes indicate that the rescue plan should adhere to a broader and more extensive set of expectations than those explicitly provided for by the Act.

Key words: business rescue, South African Companies Act, business plans, measurement, international insolvency, administration, rehabilitation

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Introduction

In preparing for battle, I have always found that plans are useless, but planning is indispensable.” Dwight D. Eisenhower

In recent years, insolvency systems around the world have begun to adopt formal mechanisms to aid financially distressed companies that are engaged in reorganisation. Such systems acknowledge that, as a general rule, a business offers greater value as a going concern than when in liquidation. South Africa has until recently lacked a formal, modern rehabilitation framework. The introduction of the Companies Act, No. 71 of 2008, presented ailing companies with a possible alternative to liquidation in the form of business rescue. Chapter 6 of the Companies Act encompasses the objectives and procedures to be followed before, during and after a company has filed for business rescue. The primary purpose is the restructuring of the affairs of the company in order to either ensure that the company continues in existence on a solvent basis, or provide a better return for the creditors and shareholders than would ordinarily result from liquidation (Winer, Levenstein & Barnett 2008).

Business rescue has emerged, however, from far more established rehabilitation regimes. The essence of corporate rescue processes was initiated by the United States (US) adoption of Chapter 11 in 1978 (Jacoby 2006). The literature on business rescue has consequently emerged from a primarily ‘developed world’ model, with very little research focused on why and how it takes place in an emerging market. South Africa, China and Argentina are among a handful of developing economies to adopt a system ostensibly inspired by the US example (Moore & Lubben 2008: 4). Though distinct in many ways, it still qualifies as a ‘modern’ rescue regime, sharing similarities with countries such as Germany, Australia, the United Kingdom (UK) and Canada (Rajak & Henning 1999: 286; Loubser 2010: 207; Anderson 2008; Holtzhauzen 2010: 113).

A prominent component of these rescue proceedings is the business rescue plan, also known as a reorganisation plan or proposal. Pretorius (2013) reports preparing the plan as a key task of the rescue practitioner. Insolvency laws generally cover a number of issues relating to the plan. These include the nature or form of the plan; when it is to be prepared; who is allowed to prepare the plan; its content; how it is to be approved by creditors; whether court approval is required; the effect of the plan; and, finally, how it is to be implemented. These strict guidelines usually take the form of expectations in order to accommodate the wide variety of circumstances and conditions the plan would be expected to cater for. The majority of these expectations would certainly be aligned directly with the objectives of the relevant regime, ensuring the system achieved its intended purpose in the best possible manner.

This paper reviews the theoretical base of international reorganisation plans, for local application. Firstly, we aimed to ascertain the expectations of the plan held by the various regimes in the light of their prevailing influencers within the regime contexts. Secondly, we determined from these expectations the principles that represent the core purposes of the reorganisation plan. Lastly, we aligned the form and nature of Chapter 6 of the South African Companies Act, No. 71 of 2008, with these principles in order to suggest a framework based on the international expectations of the business rescue plan.

Key focus of the study

To develop the industry and increase the success of business rescue, both practitioners and academics need to grasp what constitutes an effective and adequate business rescue plan. The Companies Intellectual Property Commission (CIPC) also has a vested interest. As it has been tasked as the regulator, research in this field will help the CIPC to evaluate plans more effectively. The rescue plans offer major insight into the practitioner's abilities (Lothringen 2013, pers. com.). The focus of this study is to establish the expectations of the plan set by international counterparts in corporate rescue regimes. This study is intended to establish a set of principles that can be used to develop local expectations of business rescue plans. The aim is to ultimately construct a foundation for an effective and objective tool to interpret the contents of business rescue plans in South Africa.

Literature review

The international regimes of turnaround and business rescue

The recent introduction of business rescue has brought South Africa in line with international insolvency practices by establishing statutory corporate rescue procedures with the intention of protecting financially distressed businesses (Vriesendorp & Gramatikov 2010). While the term 'business rescue' has been coined as a native phase for the concept, it shares many similarities with modern reorganisation regimes (Rajak & Henning 1999: 286). More importantly, it emulates a global trend in insolvency legislation. The concept is governed, inter alia, by Chapter 6: 'Business rescue and compromise with creditors' within the Companies Act (hereafter referred to as Chapter 6).

Most modern insolvency systems offer financially distressed debtors two distinct formal avenues to resolve such difficulties. The first, and notably the most

traditional, is liquidation, whereby the debtor's assets are seized and sold and the proceeds distributed to creditors in relation to their debt exposure. The alternative is commonly known as rehabilitation, colloquially referred to as business rescue. This route has in recent years become more common among developed nations, a trend that ironically emerged from South Africa in 1926 under the term 'judicial management' (Westbrook 2010: 122). Modern rehabilitation has, however, evolved substantially since then and become a commercial tool devoted to maintaining a business as a going concern.

The modernisation of South Africa's insolvency law has enabled features generally consistent with international best practices to be incorporated (Johnson & Meyerman 2010: 20). Thus it is regarded as a modern rescue regime, in line with other contemporary, effective, efficient and well-regulated commercial law systems. Smits (1999: 86) defines the trend as follows:

Modern corporate rescue and reorganisation seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judicial bankruptcy procedures, reorganisation seeks to maximise, preserve and possibly even enhance the value of a debtor's business enterprise, in order to maximise payment to the creditors of the distressed debtor.

In line with international practice is the preparation and implementation of a rescue plan (Burdette 2004: 259; United Nations 2005: 209). Though varying guidelines and regulations exist, the plan remains a critical component of most modern rescue systems. The literature provides an overview of the business rescue plan from an international perspective. In the context of South Africa's Chapter 6, it offers an insight into the expectations set by the most relevant regimes. The US, UK, Australia and Canada are all regarded as modern systems representing the latest international developments (Burdette 2004: 438). Current legislation is predominantly modelled on the best practices in these countries (Du Preez 2012: 10), which therefore serve as compatible international benchmarks in this study.

While reviewing the plan in a specific regime, 'agency theory' (also referred to as the principal-agent theory) should always be considered in line with the principles of the insolvency law (Lan & Heracleous 2010: 301; Pretorius & Holtzhausen 2008: 92). Such factors would no doubt influence the plan. Where the primacy of creditors' interests predominates over equity interest, the court and other affected parties may have influence over proceedings as well. Figure 1 distinguishes between natural and artificial influencers over the plan. Natural influencers exist within formal and informal turnarounds and are not duly enforced by law. Artificial influencers are unique to formal turnaround proceedings. They vary between legal frameworks, but are intended to influence the shape of the plan. The concern about artificial

influencers is that they vary in accordance with the expectations set by a regime. The disclosure of information needed for informed assessment rests on a plan that is objective, transparent and ultimately effective. Identifying generic expectations should thus be done in the light of such circumstances, so as to avoid any undue influence as far as possible.

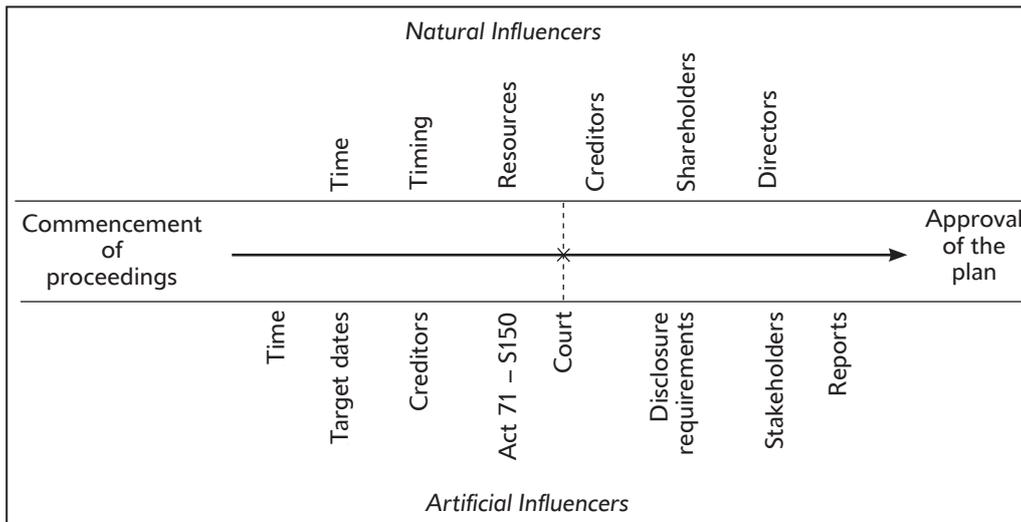


Figure 1: Influencers over the business rescue plan

Legislation generally prescribes when a plan is to be prepared; who is allowed to prepare the plan; the content; means of approval; whether court confirmation is necessary; the effect of the plan; and how it is to be implemented. Some laws go so far as to dictate the standardised information to be presented. All of this aims to guide proceedings to meet the expectations with which the law aligns itself.

The paper proceeds by describing the core elements of each regime as it impacts on the reorganisation plan. The Acts referred to are the relevant Acts governing the specific regime being discussed.

South Africa: Chapter 6 Business Rescue

Business rescue, as defined by the Act, refers to the proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company and the management of its affairs, business and property, as well as a temporary moratorium on the rights of claimants against the company or in respect of property in its possession (Republic of South Africa 2008).

Business rescue is designed to resolve a company's future direction quickly. An independent and suitably qualified person, referred to as a business rescue practitioner, takes full control of the company to try to work out a way to save the business. Where a turnaround is unlikely to succeed, the aim is to administer the affairs of the company in a way that results in a better return for creditors than they would have received if the company had been liquidated. The process culminates in the development and, if accepted, the implementation of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity.

Affected parties (i.e. creditors, shareholders, employees or trade union) are recognised through their participation in the development and approval of the plan. They are in addition entitled to bring about an application for court intervention throughout the process. Since the Act has only recently been introduced, limited literature on the topic exists to date. Currently the industry is bound solely by section 150, with few court judgements to interpret it so far.

United States of America

Credited with initiating the reform of bankruptcy and insolvency statutes with the birth of the modern-day rescue culture, the US has had a profound impact on the industry (Moore & Lubben 2008: 3; Du Preez 2012: 10). As prescribed in Chapter 11 of the Bankruptcy Code 1978, filing for the reorganisation of a company brings about a moratorium on enforcement proceedings against the debtor company or its property while a plan of reorganisation (US Plan) is worked out with its creditors (Franks, Nyborg & Torous 1996: 89; McCormack 2008: 517). The provisions of the code allow a firm to remain in operation while management reassesses its business plan and negotiates the restructuring of its capital structure, binding all existing creditors and shareholders to the plan's acceptance (Bracewell & Giuliani 2012: 2). The objective of Chapter 11 is defined by the US Supreme Court as follows (McCormack 2008: 521):

In proceedings under the reorganisation provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future. ... By permitting reorganisation, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners ... Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap'.

The first 120 days offer the debtor in possession (DIP) an 'exclusivity period' to propose a reorganisation plan, but thereafter any creditor may do so. Of note is that the party which has the ability to file a plan can greatly influence the direction of the Chapter 11 case (Bracewell & Giuliani 2012: 18). Notably unlike the case in business rescue, management remains in control of the company in the majority of filings.

The result is that the debtor has significant influence over the plan, something that is not unnatural in an informal rescue situation.

The expectations of the Chapter 11 reorganisation plan are set by the parties responsible for its approval, being the creditors and the court. The creditors' vote is required for any plan to progress; however, in the event of a 'cramdown', they are less of an authority than one might at first think (Kunkel, Peterson & Mitchell 2009: 3). The ultimate confirmation rests with the bankruptcy court. The court must in all fairness approve a plan that is feasible, is in the best interest of creditors, fair and equitable and completed in good faith.

The expectations of shareholders are somewhat less pertinent, as they have no real bargaining power other than the ability to delay the proceedings (Hubbard & Stephenson 1997: 550; Loubser 2010: 116). However, the reorganisation plan overall favours a debtor-friendly ideology, and as management typically plays a major role in its preparation, it tends to be 'closer to home', leading to overly optimistic projections (Hubbard & Stephenson 1997: 551). In reality, deviations from the 'absolute priority' rule are common, with shareholders often getting something out at the cost of unsecured creditors. The inclusion of 'death trap' provisions in reorganisation plans, where an impaired class, in particular an equity class, receives a distribution under the plan in return for an affirmative vote (Bloch 2009: 1), is evidence that additional artificial influence is needed to prevent unfair discrimination.

In accordance with paragraph (11)11 USC § 1129, the court can only approve a plan that is feasible (Bracewell & Giuliani 2012: 27). The feasibility of the plan depends on its turnaround strategy. The goal of the debtor's plan focuses on restoring the company to financial health, not simply through debt restructuring, but in addition through managerial decisions aimed at producing a more efficient business entity (Elson, Helms & Moncus 2002: 1925). It must therefore detail the strategic mechanisms that are forecasted to return the company to financial health. Such a plan would be obligated to explain how it aims to cover its expenses, including creditors' claims (Bracewell & Giuliani 2012: 23; Balovich 2002). The US plan is therefore expected to serve as a feasibility declaration detailing the turnaround strategy so that it can be evaluated to determine its overall likelihood of success.

The plan should clearly communicate its intention and impact on the rights of creditors. The role of creditors in the US regime is heavily affected by the debtor-friendly principles the process abides by. They are by all accounts, however, nothing less than one of the primary concerns of the plan. Underlying the reorganisation is the notion that creditors will gain more from the continued existence of the company than from its liquidation (Bracewell & Giuliani 2012: 24). The onus is on the plan to prove that this is indeed the case. The 'fair and equitable' requirement of the plan, an

extension of the ‘absolute priority’ rule, mandates the plan to pay a creditor class in full before any class junior to it receives a distribution (Hubbard & Stephenson 1997: 550). If a creditor objects to the plan, it must forgo a ‘best interests of creditors’ test in court. In the event that a class of creditors rejects the plan, a ‘fair and equitable’ test is necessary, and a ‘cramdown’, where the court approves a plan despite creditor objections, is possible (Kunkel et al. 2009: 3). To ensure the court is well equipped to subdue the rights of a creditor, Chapter 11 (11 USC § 1125) requires that a disclosure statement be presented. There is assurance that in any event creditors should not suffer at the expense of equity and that their return should always exceed that of liquidation. Creditors can also challenge the debtor’s valuation of its collateral and the feasibility of the plan (Kunkel et al. 2009: 3). The end result is that the US plan is mandated to clearly communicate issues of concern to creditors.

An approved reorganisation plan is binding on all creditors and cannot be modified after ‘substantial consummation’ of it has taken place (Carlson 2010: 2). According to 11 USC § 1141, the effect of confirmation results in the plan’s forming a contractual document binding on the debtor and all the creditors. The plan releases the debtor from any debt that arose before the commencement of proceedings for relief, unless otherwise stated. The contractual ramifications of this are further reason for a clear and transparent plan. It is the responsibility of all parties to ensure that the plan is capable of achieving its objectives, a task that inevitably relies on the content within the plan. The expectation therefore of all the parties affected is that the plan contains the contingencies that would accommodate possible deviations and bring focus to areas of high risk.

Chapter 11 goes to great lengths to ensure the plan is published in good faith. Most notable is the preparation of a disclosure statement that informs interested parties about the plan. The US code under 11 USC § 1125 relates to the post-petition disclosure and solicitation of the plan. A disclosure hearing is held to ensure that the disclosure statement contains accurate information, and that all classes have been adequately informed about the plan before voting (Bloch 2009: 4). The code defines ‘adequate information’ in section 1125(a)(1) as:

information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan.

In addition to the disclosure statement, Chapter 11 requires the plan to pass a ‘best interests of creditors’ test for an objecting creditor or shareholder, as previously mentioned. All tests are designed to ensure that the plan is objective and realistic. The

US plan is therefore encouraged to be transparent and objective as far as possible, in order to facilitate effective decision making by creditors and the court.

Section 364 of the Bankruptcy Code (11 USC § 364 – Obtaining credit) gives the DIP a few options to restructure the business. ‘DIP financing’ is one of the most prominent forms of post-commencement financing (PCF) available. Section 364(d) offers super-priority status to investments, to counteract the high levels of risk associated with distressed financing. However, the impact of such investment decisions has major consequences for all the parties involved. The US plan would require a breakdown of such investment decisions, detailing the benefits and risks they pose to the affected parties. Fortunately this is not left to the discretion of the author, as the disclosure statement is expected to contain adequate information to enable a hypothetical investor to make an informed judgement (Bracewell & Giuliani 2012: 20).

United Kingdom

The United Kingdom offers distressed companies a number of procedures, namely administration, administration receivership, company voluntary arrangement and scheme of arrangement. The UK Insolvency Act (1986) contains the majority of information pertaining to bankruptcy, except for administration, which is governed in legislation by Part 10 of the Enterprise Act (EA) (2002). This represents the UK’s formal procedures for dealing with financially troubled companies, and is possibly the best contender to equate to the US’s Chapter 11 (Finch 2012: 304). However, unlike the case under Chapter 11, yet like that under Chapter 6 in South Africa, a ‘practitioner in possession’ regime is used through the appointment of an administrator (practitioner). The UK Insolvency Act thereafter sets out a particular ranking of objectives to be achieved by the administrator (Wilson & Deniz 2008: 1):

- Rescuing the company as a going concern;
- Achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration); or
- Realising property of the company in order to make a distribution to one or more secured or preferential creditors.

The revised version of the Act aspires to propagate a ‘rescue culture’, inspired by the priorities set in Cork’s Report of 1982, which also included transparency, accountability, inclusivity and additional legal formalities (Fitch 2003: 122; Fletcher 2004: 122). A statutory moratorium is offered to administrators, under which an investigation of the company’s affairs is conducted and a proposal of administration

(UK Plan) formulated by the administrator for the purposes set out in the order. The proposal must be published as soon as possible, but in any event within eight weeks of the administrator's appointment. Rule 2.33 of the UK Insolvency Act (Parliament of the United Kingdom 1986) prescribes the mandatory content to be present in the proposal (Lord Chancellor 1986: 70). Once complete, it is then subjected to creditors' review, whereby it can be approved, rejected or amendments proposed to it. Administration is, however, not a complete process in itself, but instead a means of reaching a 'scheme of arrangement', or company voluntary arrangement (CVA).

A CVA under the Insolvency Act offers the administrator an out-of-court route to compile a plan, thus reducing costs and time. The alternative is a scheme of arrangement, which is more complex and may take more time to implement, but it binds all creditors without exception, making it more powerful than a CVA (Daley & Shuster 2013). A scheme of arrangement must be approved by a court and is used for large companies with a substantial number of classes of creditors or shareholders. Legislation on effecting a scheme of arrangement can be found in the Companies Act (2006), Part 26 (ss.895–901) and Part 27 ('Special Rules for Public Companies').

The administration process is directly influenced by the administrator, who can be appointed in three ways: by the court, by the holder of a qualifying floating charge, or by the company and any of its directors. However, the process is severely creditor-friendly, allowing secure creditors the ability to influence the selection of an administrator (Wilson & Deniz 2008: 2). This makes them generally powerful, highly informed players who are well placed to control and contribute to the administration procedure (Finch 2012: 305). In addition, the lack of a 'debtor in possession' regime means directors cannot make rescue decisions while in administration, but are consequently required to consult the administrator (Finch 2012: 306). Once in administration, the company's business is conducted almost entirely outside court supervision. This offers a less costly and time-consuming avenue, but does result in creditors having far greater influence over the proposal than would otherwise be the case.

The expectations derived from the UK Insolvency Act are far more defined than those of the US Chapter 11. The administrator's proposal should take into account the objectives of the administrator, as stated above, and in so doing align itself with the procedural values of transparency, inclusivity and legal formality (Finch 2012: 304).

The first part of the proposal outlines the details of events leading to the appointment of the administrator and the costs that have been incurred to date (Sch. B1, para 49 Insolvency Act 1986; Walton 2009: 103). Accompanying these is basic information describing the company, its administrator, directors and a breakdown of

its financial position (Walton 2009: 103). The desired result is to provide a context for the plan and communicate legal formalities to the relevant parties. Full disclosure by the administrator must be made to creditors to appear to satisfy the equitable conflict rules.

Central to the plan is that the administrator must describe the route to recovery, accompanied with a timeframe. If the administrator is of the opinion that the purposes of administration cannot be achieved, the reasoning for this must be explained (Loubser 2010: 208). Rule 2.33(2)(m) provides that the proposal should contain details of how it is envisaged that the purpose of administration will be achieved. The proposal in this regard must reveal the mechanisms to be used to restore the business to financial health. Rule 2.33(2)(o) of the Insolvency Rules (1986) requires the proposal to explain how the company will continue to be financed if the plan is approved (Loubser 2010: 208). In most rescues, additional financing is required in order to execute a turnaround strategy, and this is therefore considered a prudent condition. While an administrator has the authority to borrow and encumber assets, no incentive or protection is given to post-commencement lenders (Plainer & Ball 2003: 14). The UK plan is expected to attract investment while ensuring the best return for creditors. Both of these depend on the feasibility declaration of the plan, which is mandatory and should be communicated with the interests of potential investors in mind and win the vote of creditors.

The proposal for a CVA or scheme of arrangement offers a binding contract on all affected parties. In the case of a CVA, secured and preferential creditors cannot be bound without their consent. However, in a scheme of arrangement, all parties can be contractually bound. In either case, the proposal, if approved, becomes a legally binding contract. Like the US plan, the proposal is expected to take the form and nature of a legal document in ensuring that the rights and interests of all parties are protected.

The suggestion of further transparency from Cork's Report is evident in the UK Enterprise Act (2002). Creditors are expected to be provided with sufficient information to allow them to participate in the proceedings in a meaningful way. To ensure this, paragraph 49 of Schedule B1 and Rule 2.33 of the Insolvency Rules (1986) detail specifics to be present in the plan. Amendments to the insolvency rules, which took effect in April 2010, have further improved transparency throughout the proceedings. More emphasis is placed on transparency when dealing with pre-packaged plans. The Statement of Insolvency Practice 16 (SIP 16) of 2009 introduced a list of requirements that pre-packaged plans should adhere to (Conway 2012: 3). Much of this statement focuses on ensuring transparency.

Australia

Australia's Corporations Act (Australian Government 2005), through a process known as 'voluntary administration' (VA), provides for temporary protection from creditors, and delegates corporate governance responsibilities to an external administrator over the company's ailing affairs (Routledge 2007: 8). In line with modern rescue legislation, the objective of the proceeding, as stated in Part 5.3A, section 435A of the Act, is to allow the

- business, property and affairs of an insolvent company to be administered in such a way that:
- it maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

To ensure this, Australian legislation offers a flexible and relatively inexpensive procedure to the company, allowing it some breathing space so that it can attempt a compromise or arrangement with its creditors (Sellars 2001: 2). The procedure commences as soon as the debtor appoints an administrator. The primary objective of the administration is then to obtain the creditors' acceptance of the proposed Deed of Company Arrangement (AUS Plan) and thereafter its implementation (Kloppers 1999: 421). Once appointed, a 28-day moratorium is immediately in effect, with a possible 35-day extension conditional on court approval. In the event that creditors accept the deed, the company has 21 days from the meeting of creditors to decide whether it will accept and execute the plan. However, should the company fail to do so, this will lead to the commencement of liquidation (Australian Government 2005). At the point where the deed of company arrangement has been fully executed, the administration comes to an end and the company is thereafter regulated by such deed (Burdette 2004: 439).

VA was designed to be swift and efficient by eliminating almost any court involvement (Sellars 2001: 9). The process has in many cases gone from beginning to end without any consideration by the court whatsoever. However, the Act does afford the court specific powers, in particular when a party considers the scheme is being abused. While the court may be called on at any point in the proceedings, this is avoided as far as possible. Influence over the proceedings is more likely to derive from creditors and the administrator in charge. Despite its 'creditor-friendly' disposition, the number of companies entering the scheme that are rescued is increasing. The process shares more favourable characteristics with a 'debtor-oriented' regime (Sellars 2001: 12).

The deed of company arrangement is a plan comprising decisions that consider the present condition of the company and the ultimate goal of restoring the company to a sustainable going concern. Once approved, the plan acts as the 'constitution of the company' (Kloppers 1999: 422). The administrator then executes the turnaround in accordance with the deed. Such a plan would demand detailed workings of the administrator's intentions, setting out the process that will unfold. In addition to this, it also affords substantially affected parties the ability to influence the feasibility of the plan. The Act gives the administrator a great deal of flexibility in the types of proposal allowed in a deed of company arrangement. However, the degree of information provided is limited to the minimum needed for a creditor to make an informed assessment of the plan (Australian Securities and Investments Commission 2008: 6).

In the light of the limited court involvement, the deed is primarily targeted at the interests of creditors in order to attain a favourable vote. The Act does require the deed to contain specific information, ensuring the content is sufficient for decision-making purposes. These can be found under Section 444A, Part 5.3A of the Corporations Act (2005). The deed is responsible for providing the terms and conditions, warranties and indemnities, the extent or nature of obligations, and relationships between those persons who are a party to it. In addition, the minutes of all meetings must be recorded and lodged. Details regarding the 'committee of inspection' are also expected to be disclosed. 'Prescribed provisions' are deemed to be automatically included in the plan unless otherwise discussed (Australian Securities & Investments Commission 2008: 9). In so doing, it aims to communicate to all the affected parties a sufficient degree of information.

Chapter 5.3A 444D and 444G clearly explain the effect of the deed on creditors and other affected parties. The deed of company administration, once approved, is binding on all unsecured creditors and only the secured creditors that have agreed to be bound. In the event that a secured creditor has not agreed to be bound by the plan, and that creditor's discord threatens the viability of the process, the court is granted power to keep such creditor from exercising its security. The content and nature of the deed is therefore cognisant of such contractual powers and is bound to enforce them in any event. The Act requires that a provision in terms of termination of the deed be included.

The Corporations Act makes clear provision for a transparent plan. Much of the onus in this regard is placed on the administrator to ensure that the plan is in the interests of creditors (Part 5.3 Section 438). To clear the administrators of suspicion of any ulterior motives, they are obliged to declare all indemnities and relevant relationships (436DA Declarations by Administrator) and expected to update their

declaration should it be deemed out of date at any time. The disclosure of information in order for creditors to understand the proposal and appreciate its legal and practical implications is enhanced by a report set out in Section 439A for the release of such information.

The Australian Act offers little encouragement to ensure that the deed makes provision for distressed investors, nor does it offer any incentives for post-commencement financing. The Act does, however, allow extensive flexibility when working with a deed of company arrangement. The rationale is that this enables the plan to meet the particular circumstances of the company and its creditors in a way that could attract investment. In addition, the management liabilities of the insolvent company are enhanced by the deed, a feature most useful when securing post-commencement funding. Recent reforms have encouraged investment, allowing equity to be raised far more easily than before (PricewaterhouseCoopers 2009: 14). Administrators are now granted specific powers to transfer shares without the court's or shareholders' approval, and exempted from the detailed and costly disclosure obligations that accompanied issuing new equity before. The plan, however, remains the most persuasive means of attracting any possible investment.

Canada

Canada offers distressed companies two formal procedures for restructuring an insolvent business. The first, and less popular of the two, is legislated by the Bankruptcy and Insolvency Act (Canadian Government 1985a) (BIA), which requires a proposal to be submitted to the court. Alternatively, rehabilitation can come in the form of the Companies' Creditors Arrangement Act (Canadian Government 1985b) (CCAA). This Act, which is a federal law, allows the company to restructure its financial affairs through a formal 'Plan of Arrangement' (CA Plan). Both statutes are largely similar and differ only in minor technicalities (Grundy 2006: 83). The CCAA is restricted to larger corporations, with a prerequisite of having over CDN\$5 million owing to creditors in order to file (International Insolvency Institute 2003: 1). Notably, banks, insurance, trust and loan, railway and telegraph companies are all excluded by the Act. In line with international legislature, the primary object is to assist financially distressed companies to avoid bankruptcy while maximising returns for their creditors, preserving both jobs and the company's value as a going concern.

The process is initiated by an application to the court by the debtor. The court typically grants protection after it has reviewed the company's projected cash flow and financial statements. Should the court deem fit, it will issue an order giving the company 30 days of protection, otherwise known as a 'Stay', from its creditors (FMC

Law 2010: 127). The court is permitted to prolong the Stay in order to facilitate the preparation of the plan. The company is expected to continue operating during the Stay period, and may commence restructuring activities at any time. The Stay order is obligated to be accompanied by an appointed 'monitor', who oversees the work of the debtor to ensure that the court's instructions are complied with, and relays feedback to the court should any activity hinder the viability of the debtor.

Influencers over the process are quite similar to those in the US's Chapter 11, although there is no ability to 'cram down' the classes of creditors (Besant 2013: 5). The process favours debtor-friendly principles, which are expected to have an impact on the plan. CCAA proceedings are carried out under the supervision of the court, which has the final say in approving the Plan of Arrangement. The CCAA legislation allows a company to address its shareholders, in addition to its creditors, if it so chooses. However, the shareholder's vote is most likely to be revoked if they consider they will be affected by the plan. For the plan to be successful, creditors per class would need a majority in favour of the plan. The strongest artificial influence over the plan is expected to come from the court.

The CCAA is vague with regard to the expectations of the plan, with little statutory guidance provided by the Act. Legislation allows for a great deal of flexibility in designing the plan, which is ultimately limited by the integrity of the drafters and by what the creditors are willing to support (Grundy 2006: 115). The contents of the plan are therefore guided by experience gained over the past two decades and the related jurisprudence. This has resulted in a reasonably predictable and consistent approach to the publication of plans (Fitch 2003: 1). A proposal under BIA, however, has a number of mandatory conditions it must fulfil, which are set out as priorities under the Act. The bulk of the plan remains constrained by the same rules as a Plan of Arrangement (Grundy 2006: 116).

The plan filed under the CCAA normally includes an information circular detailing the arrangement and its effect on all classes of creditors and shareholders (if an arrangement with shareholders is being proposed) or any other affected party (Grace 2011: 2). The focal point is usually how creditors are being compromised by the plan. At the procedural hearing, the court reviews the plan to ensure that all the affected parties have been clearly informed about the process that has taken place and the proposed strategy going forward. Sections 6(5), 6(3) and 6(6) of the Act (1985a) make special provision to ensure that the plan accommodates employees, as regards the treatment of pension schemes in particular. Moreover, the plan's decorum expects a clear detail of definitions, meetings forgone and an outlay of procedural matters to be expected. In all, the document is expected to relay all the relevant information to the affected parties. An interesting concept that has emerged is that of

Substantive Consolidation of the plan, the primary objective of which is to facilitate easier communication of the plan to creditors (Fitch 2003: 3).

Like Chapter 11, the CCAA prescribes the holding of a ‘disclosure hearing’ in the form of a ‘fairness inquiry’, the objective of which is to ensure that the plan is fair, reasonable and equitable (Sarra 2007: 244). A criterion in determining whether the plan is compliant is set out by the judicial authority as follows (Grundy 2006: 121):

1. The composition of the unsecured vote
2. The recovery creditors would receive in liquidation or bankruptcy
3. Alternatives to the plan
4. Whether there has been oppression of rights of certain creditors
5. Whether there is unfairness to shareholders
6. Public interest, including the interests of the debtor’s employees.

An additional feature to ensure transparency of the plan requires the court-appointed monitor/trustee to supervise the proceedings and the development of the plan on behalf of the affected stakeholders (Section 11.7). This role entails monitoring the operations of the debtor in assisting with the process, and sometimes includes the drafting of the plan itself. The required information circular, in addition to the trustees’ report, which must be approved by the monitor, is intended to ensure fairness and transparency of the plan and proceedings.

Under section 6 of the CCAA, the creditors are permitted to alter the plan at the meeting of creditors. An amended plan may be reconsidered by the debtors, but if it remains unchanged it will be voted on and then passed to the court for ‘sanctioning’. A sanctioned plan is binding on all creditors whose claims are compromised by the plan. This is clearly stated under Division II 66.28(2) of the BIA for a proposal, and under Part 1 6(1) of the CCAA. The plan is then expected to take effect once certain closing conditions have been completed (Grundy 2006: 123).

The CCAA offers a number of options for interim financing under section 11.2(1). A favourite of these is similar to DIP financing under the US Chapter 11, the provision of which is intended to be to the benefit of all the interested parties, as it enables the debtor to maintain the going-concern value of the business. The DIP prides itself on a super-priority charge that favours the lender above all other creditors. The rationale is to address the inability of a financially distressed company to either acquire trade credit from existing suppliers or to raise additional funds to finance the daily operations after the company has filed. DIP financing is known to usually pass unchallenged in court, since it involves such deliberated negotiations to reach a point of consensus. The court is obliged, however, to ensure that such investments pass a

'balance of prejudices' test. In addition, the plan is expected to outline any financial agreement proposed or already accepted by the court.

All four regimes acknowledge and support the notion that the business is of higher value as a going concern than it would be if it were liquidated. While the objectives may vary in accordance with a creditor-friendly or debtor-friendly disposition, and with the presence and degree of influencers, what is clear is that the plan remains a stand-alone document that fulfils a mainstream role in the formal turnaround process. Expectations within the regimes showed consistency with the objectives set by the overseeing legislature and so could be clearly identified in this study.

Research objectives and questions

This study posed the following investigative questions:

- 'What are the functions and aims of the rescue plan?'
- 'Are there broad principles to direct the compilation of a rescue plan (based on international regimes)?' and finally,
- 'Are the guidelines in the South African Companies Act (2008) aligned with these principles?'

Research design and approach

The study set out to use the questions mentioned under research objectives and questions simultaneously to guide the research. Table 1 indicates the research design components used to direct the research flow and focus based on Yin's (2003: 21) design.

Key scientific beliefs of the researchers

To answer these questions, the researchers were aware of their own methodological values, beliefs and particular philosophical assumptions. These assumptions could influence the way in which the research was conducted and are stated in the introduction and throughout the paper in order to explain the intellectual climate in which the research was undertaken.

Grounded theory approach

A grounded theory approach was used as the research strategy (Saunders, Lewis & Thornhill 2009: 148). As data were collected, so the formation of an initial theoretical framework emerged. Multiple sources were reviewed to draw sound observations

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leading to the identification of themes (leads) that were further supported by continued exploration of the literature.

Table 1: Research design components

Component	Description
Research question/ problem	What guidelines gleaned from international regimes could direct business rescue plans in South Africa?
Context	Turnaround and business rescue
Propositions	<ol style="list-style-type: none"> 1. The functions and expectations of the rescue plan are clear. 2. There are certain principles to be followed in the compilation of a rescue plan (based on international regimes). 3. These principles are incorporated in Chapter 6 of the South African Companies Act.
Units of investigation	<p>The functions and aims (expectations) of the rescue plan</p> <p>The principles involved</p>
Units of analysis	<p>Literature</p> <p>International turnaround regimes</p> <p>Chapter 6 of the Act</p>
Logic linking the data to the propositions	Generic guidelines, principles and elements should be available in the international texts and regime description.
Criteria for interpreting the findings	Principles identified from regimes

Source: Adapted from Yin (2003: 21)

Ontological positions

Ontological positions comprise researchers' views on the nature and essence of the research reality. Both researchers are objective realists who believe that knowledge comes from facts associated with real-life cases and their context. When either researcher found repeated mentions of practices and praxis, they could generalise them. The researchers aimed to maintain a critical view of each regime and interpret legal works from an international insolvency perspective. Their interest focused on understanding and describing a set of principles that could provide an international perspective on the expectations of a rescue plan for South Africa.

Epistemological positions

In attempting to answer the research questions, the researchers were aware of their own individual methodological values, beliefs and philosophical assumptions. These

assumptions could influence how the research was conducted and are stated in order to understand the 'intellectual climate' in which it took place. The theory of knowledge (epistemology) of a researcher describes how one can discover underlying principles about social phenomena and how one can demonstrate knowledge. The researchers' personal experiences with business failure and involvement in rescues ignited their interest in business rescue. At the same time, as an academic and turnaround consultant and as a postgraduate student, they have a preference for factual directives. Therefore the approach was based on a grounded theory approach (Corbin & Strauss 1990).

Research method

Research setting and background

Rescue and turnaround regimes from four leading countries were obtained and scrutinised. As the philosophies underlying the regimes and their expectations of the rescue plan became clear, principles were identified and expanded in search of guidance for the compilation of plans. The interpretations were based on the shared objectives of the plans observed between regimes (see Table 1), which in turn gave direction to the identification of the principles that governed the structure of the plan.

Findings

The research data gathered revealed that all four regimes regarded the rehabilitation of the company as their primary objective, while maximising the return for creditors. The aim of the reorganisation plan was, by all accounts, to meet the legislative objectives in such a manner that the relevant parties could determine whether or not to accept the plan.

The nature of the business rescue plan requires it to accommodate a wide number of circumstances and conditions. As expected, the legislature therefore refrained from detailing a prescribed format to which plans should adhere, but rather relied on expectations that had emerged through jurisprudence or legislative amendments. The expectations of all the regimes were seen to be similar in nature, although they were evidently aimed at serving the interests of parties responsible for the plan's final approval. Despite artificial influence over the development of the plan, the contents remained subject to five core principles. Expectations identified in all four regimes indicate the existence of these principles in the plan throughout all four regimes. The

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following principles emerged as the primary guidelines in the development of the reorganisation plan:

- The business rescue plan serves as a tool for feasibility declaration.
- The business rescue plan serves as a medium of communication.
- The business rescue plan serves as an enabler of transparency.
- The business rescue plan serves contractual obligations.
- The business rescue plan serves to attract and secure post-commencement funding (PCF).

Table 2 provides a breakdown of the supporting expectations in each regime for the five principles identified.

Table 2: Supporting expectations for determining the principles

US Plan	UK Plan	Australian Plan	Canadian Plan	South African Plan
Reorganisation Plan	Proposal of Administration	Deed of Company Arrangement	Plan of Arrangement	Business Rescue Plan
Regime orientation				
Debtor-friendly	Creditor-friendly	Creditor-friendly	Debtor-friendly	Debtor-friendly
Plan approval				
Court	Creditors/Court	Creditors	Court	Creditors
Business rescue plan serves as a tool for feasibility declaration				
The plan must prove feasibility (11 USC § 1129)	Turnaround Strategy Rule 2.33 (2) (o)	Constitution of the company	Jurisprudence	Chapter 6 Section 150 (2)a
Absolute Priority Rule				
Business rescue plan serves as a medium of communication				
Disclosure Statement	Statutory content (Insolvency Act 1986, Sch B1, para 49.)	Statutory Content (Section 444A Part 5.3A)	Procedural hearing	Chapter 6 Section 150 (2)
'Best Interests of Creditors' Test	Full disclosure to creditors/creditor committees	Prescribed provisions	Creditors' information package/ Trustees' Report	Creditor Meetings

Table 2 continued

Table 2 continued

Business rescue plan serves as an enabler of transparency				
Disclosure hearing/ statement	Details of the plan (Paragraph 49 of Schedule B1 and Rule 2.33 of the Insolvency Rules 1986)	Statutory Content (Section 444A Part 5.3A)	Fairness Inquiry	Chapter 6 Section 150 (2)
'Best Interests of Creditors' Test	Procedural values – Cork Report	s439A Report	Fairness criterion	Practitioner's liability
Proposed in good faith (11 USC § 1129 (a) (3))		Administrator's liability	Trustees' report	Chapter 6 Section 150 (4)a
		Declarations by administrator (s436DA)		
Business rescue plan serves contractual obligations				
11 USC § 1141 – Effect of confirmation	Binding on all parties (Insolvency Rules, SI 1986/1925 Rule 1.19)	Binding on all parties of the plan (Chapter 5.3A 444D and 444G)	Binding on all parties of the plan (Division II 66.28(2) BIA / Part 1 6(1) CCAA)	Chapter 6 Section 152 (4)
Business rescue plan serves to attract and secure post-commencement funding (PCF)				
11 USC § 364 – Obtaining credit	Explanation of future funding (Rule 2.33 (2) (o))		Interim financing (Section 11.2(1))	None
Disclosure statement	Statement of Insolvency Practice 16 (SIP 16)		DIP financing	

Principles for the development of the reorganisation plan

The five principles for the development of the reorganisation plan are discussed in the following subsections.

Business rescue plan serves as a tool for feasibility declaration

The outcome of the plan is reliant on what is feasible; that is, based on the facts, circumstances and practical assumptions, the plan involves a strategy intended to rehabilitate the company and in so doing offer creditors a better return. In a liquidation claim, however, a creditor's return is at far less risk of varying than in rehabilitation, where the risk exists that the plan might fail. As a result, the proposed route to recovery is pertinent to creditors evaluating the risk of the proposed return.

Some insolvency laws also give the court the authority to reject a plan on the grounds that it is not feasible (Bracewell & Giuliani 2012: 27). A clear expectation of all the regimes is that the plan should lay out a route to recovery in order for the relevant parties to adequately scrutinise it and determine the extent of its feasibility.

The rescue plan has the potential to serve as a powerful strategic management tool (Hall 1980: 75; Holtzhauzen 2010: 113). It provides a clear reference point during the rapid and often confusing changes common during the rescue process. It also safeguards key resources by clearly acknowledging and preserving those on which the strategy for recovery is based (Balgobin & Pandit 2001: 14). This principle requires the plan to explain how the business will remain operational and successfully reorganised, how implementation of the plan will be supervised, and the timeframe for its implementation.

As a strategic tool, the rescue plan assists practitioners to plan and coordinate the reorganisation process (Flamholtz, Nayer & Lal 2005: 54). Grant (2003: 491) explains that with the increased volatility of the business environment associated with most turnaround situations, systematic strategic planning is more difficult, yet it is still crucial to plan strategically. In some cases, a process of 'planned emergence' strategies is evident (Grant 2003: 515).

Business rescue plan serves as a medium of communication

Balgobin and Pandit (2001: 314) maintain that a rescue plan that is communicated properly will help clarify and safeguard critical resources. Kow (2004: 242) endorses this by concluding that a communications plan must form part of the turnaround strategy. He further reiterates that the plan should identify and make clear why the company is undergoing the turnaround effort, how it will do so, what the employees can expect during the process, and what the company will gain from the effort.

According to Section 150(2) of the South African Companies Act: 'The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan.' Effective communication is thus implied as a means of adequately informing creditors. Furthermore, the plan must persuade key stakeholders to believe in the future potential of the business by building credibility, confidence and trust in the future prospects of the business.

The business rescue process usually leaves the practitioner with little time for discussion with all the affected parties. Until the plan is published, the majority of the stakeholders may be oblivious to the turnaround strategies or the reasons for distress. Though this is not advisable, it is often the case. The business rescue plan

therefore plays a key communication role in the turnaround process; it needs to be clear, understandable and holistic with regard to the reorganisation of the company going forward. Practitioners should be aware of rumours and misconceptions that creditors may have, and address these shortfalls in the plan. Moreover, the plan is bound to be heavily laden with legal jargon. Authors of the plan ought to be aware that the relevant parties may lack the legal knowledge to interpret many parts of the plan. Though in many of the regimes the onus is not on the practitioner to accommodate such persons, this does in all likelihood hinder the primary objective of the plan.

Business rescue plan serves as an enabler of transparency

The governing legislature requires that the plan be transparent and predictable. The rationale is to enable potential lenders and creditors to understand how proceedings function and to assess the risk accompanying their position as a creditor in the event of rehabilitation. Success in this regard will promote stability in commercial relations and nurture lending and investment at lower-risk premiums. Transparency and predictability will in addition allow creditors to clarify priorities, prevent arguments by offering a backdrop against which relative rights and risks can be assessed, and help define the limits of any discretion (United Nations 2012: 13). Vague and loosely designed plans have the potential to undermine not only the confidence of all participants, but also their willingness to make investment decisions. As far as possible, the plan should clearly indicate all provisions that may affect the rights of creditors or alter their risk profile.

The disclosure hearing or fairness enquiry, in the US and Canada respectively, showcases prime examples of how legislatures have extended themselves in addressing the prevalence of transparency. In some cases the use of a third party, such as a trustee, is deemed fit to oversee the preparation of the plan from within the company so that critical information is not omitted. Such provisions are merely 'fail-safes' throughout the process; the ultimate assurance of transparency should stem from the possessed liability of the author. If a plan is discovered to have concealed information or presented misleading information, the courts or administrative agencies should be afforded the appropriate penalties.

A report compiled by the World Bank (2005: 7) stresses the importance of transparency, especially in emerging markets, through on-going monitoring, whether before or during a restructuring, or after a reorganisation plan has been implemented. The disclosure of basic information comprising financial statements, operating statistics and detailed cash flow projections is needed for sound risk

assessment. A characteristic of firms in financial distress is weak corporate governance (Elloumi & Gueyié 2001: 16). As the newer insolvency legislation supports a more debtor-friendly environment and information is a factor of time, disclosure of what is known and what is not known is vital to maintaining a transparent process. The practitioner functioning under the influence of 'agency theory' could contribute further complications.

Business rescue plan serves contractual obligations

All the regimes ensure that if a plan is approved by the required parties, it becomes a binding contract thereafter. The ramifications thereof are integral to the reorganisation process and enable the recovery of the business by ensuring critical support for the turnaround. The plan is expected to disclose the nature and extent of any binding obligations it requires from the parties involved.

In certain regimes, including that of the US, the courts play an active role in binding creditors and rendering the plan enforceable on parties that might not necessarily have approved the plan. Such a case is indicative of formal rehabilitation, as the court resembles an artificial influencer in order to increase the chances of success of the reorganisation (United Nations 2005: 218).

Where a plan is approved by creditors without ratification by the court, the legislation grants parties, including the debtor, the right to challenge the approval of the plan. Some insolvency laws also offer a 'cram-down' provision that enables one or more classes to make the plan binding on other classes. Such a mechanism would, however, require court intervention to succeed. The result is that the plan must be fair and in the best interests of the majority of stakeholders in order to be truly binding.

In South Africa, the business rescue plan, once it has been adopted by creditors and the shareholders of the company, becomes a document binding on all the affected parties. This includes any persons present or not present at the meeting, irrespective of the nature of their vote or the fact that they have proven a claim (Section 152(4) 2008).

The company, under the supervision of the practitioner, must take all the necessary measures to fulfil the conditions to which the execution of the plan may be subject, and to implement the plan itself. The practitioner is also bound by the terms of the plan and, by virtue of his or her position of power, is inevitably responsible for the implementation of the plan. The parties are contractually bound until the business rescue plan has been substantially implemented, whereupon the business rescue practitioner must file a notice to that effect (Section 152(8) 2009).

Obviously the business rescue plan must contain sufficient guidelines, as well as provide adequate information to all the affected parties, in order to be considered. The contractual obligation of the plan makes it difficult for the practitioner to recuse himself subsequent to its approval. Furthermore, the practitioner can be held liable for omitting critical information from the plan that was known at the time of publication (Museta 2011: 53). This requires that the plan encompass all relevant information, not only for decision-making purposes but to prevent legal action against the process and the practitioner.

Business rescue plan serves to attract and secure PCF

To ensure the continued operation of the distressed entity after the commencement of formal proceedings, it is critical to obtain a source of new finance as soon as possible. To sustain the business as a going concern, business activities such as goods and services from suppliers, labour costs, insurance, rent, maintenance of contracts and other operating expenses, along with the costs of maintaining the value of assets, require access to funds of some sort. The premise of post-commencement funding extends from short-term recovery needs to the long-term strategy of the reorganisation plan (United Nations 2005: 113).

The reorganisation plan is expected to address any sort of PCF that has been required, approved or recommended. The plan should set out the effects of funding on the business and on the interests of any affected party. The pros and cons of any financial arrangement should be clearly addressed for objective decision-making. Incentivised tools within insolvency legislatures are aimed at encouraging PCF (Du Preez 2012: 36). This may afford the ability to authorise super-priority status to credit or debt incurred. Such actions inevitably have far-reaching consequences. Where the plan is concerned, the reasoning and use of such tools offered by formal reorganisation need to be explicitly exposed.

In many cases the plan undertakes the burden of attracting the bulk of PCF. Accommodating investment within the plan is a strategic, and in most cases critical, move. Where funding is conditional on the plan's approval, or vice versa, the plan should afford the mechanisms to do so effectively. In some cases the plan may prohibit new borrowing unless the need for it is identified in the plan.

The contractual nature of the plan cannot be overlooked by investors either. Where the plan ratifies any sort of PCF, it affords no exception to the lender unless obviously stated. Securing and binding lenders to the plan enables the mitigation of risk, which is used when approving the plan (United Nations 2005: 115).

Comparing the principles of the plan with Chapter 6

Sections 150–154 of the Companies Act, No. 71 of 2008, deal with the development and approval of the business rescue plan. The Act prescribes in Section 150(2)a–c a set of mandatory elements to be included in the plan. Table 3 lists these elements and correlates them with the most relevant principle. These elements do not constitute sufficient information for the decision-making, but are rather a baseline of information expected to be included in any meaningful plan. The majority of these elements are associated with the principle of feasibility declaration. Other requirements, such as the remuneration agreement and practitioner’s certificate, are transparency mechanisms. Communication is implied but not explicitly detailed, while no mention is made of PCF or expectations thereof with regard to the plan. In cases where elements fall short of each principle, it is assumed that the following clause within the Act can be called on:

The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan (Republic of South Africa 2008).

What can be deduced immediately is that Chapter 6 falls significantly short of addressing the five principles associated with the plan. For example, no reference is made to presenting a turnaround strategy, nor is there a requirement that a cash-flow projection should accompany the plan. The elements listed in Table 3 are not well defined, so that it is difficult to assume their relevance to each principle. While the aims of business rescue are certainly in line with those of other modern rescue regimes, the chapter fails to address these principles with detail and clarity. The Act, in addition, makes no use of any mechanisms or tests to ensure transparency, fairness or feasibility.

It may not be necessary to amend the legislation to address these issues, as regulators have been used for this purpose by some regimes. Case law has also been responsible for many of the established expectations; in the US and Canada, where this is most common, specialised bankruptcy courts have been set up.

Implications for industry

This study aimed to assist practitioners and parties affected by the business rescue plan by developing from the expectations of international regimes a set of principles that would assist in the structure and content of the plan. Business rescue in South Africa is currently highly under-skilled and backed by little experience in formal rehabilitation mechanisms. Though Chapter 6 is modelled on a modern rescue system, it still requires local uptake of knowledge, experience and culture to become

Table 3: Classifying Chapter 6 requirements in relation to international directives

Section 150	Element	Tool for feasibility declaration	Medium of communication	Enabler of transparency	Contractual obligations	Attract and secure PCF
2 (a)						
(i)	List of all the material assets	•				
(ii)	List of creditors		•			
(iii)	Probable dividend to creditors in the event of liquidation	•	•			
(iv)	List of holders of issued securities		•			
(v)	Remuneration agreement			•		
(vi)	Informal proposal by any creditor		•			
2 (b)						
(i)	Nature of moratorium	•				
	Duration of moratorium	•				
(ii)	Extent to which debts will be released from payment	•	•			
	Debts converted to equity in the company or another company	•				
(iii)	On-going role of the company	•				
	Treatment of contracts going forward	•	•			
(iv)	Property available to pay creditors' claims	•				•
(v)	Order of preference in which creditors will be paid	•				
(vi)	The benefits of adopting the plan as opposed to liquidation		•			
(vii)	Effect on each class of the company's issued securities	•				
2 (c)						
(i)(aa)	Conditions for the business plan to come into operation	•				
(i)(bb)	Conditions for the business plan to be fully implemented	•				
(ii)	The effect on the employees going forward	•				
(iii)	Conditions for the business plan to end	•				
(iv)	Projected balance sheet	•				
3 (a)	Material assumptions on which the projections are based	•				
3 (b)	Alternative projections based on varying assumptions and contingencies	•				
	Projected statement of income and expenses	•				
3 (a)	Material assumptions on which the projections are based	•				
3 (b)	Alternative projections based on varying assumptions and contingencies	•				
4	Certificate by the business rescue practitioner			•		

effectively established. The literature gathered in this paper was used to extrapolate a set of principles to assist in the formulation of better plans. Furthermore, the study aimed to guide the local expectations of a business rescue plan.

The regulator may benefit from this research, as it gives guidelines that could be useful in future licensing of rescue practitioners, as well as training requirements.

Limitations of the study and suggested future research

The most significant limitation of the study was the limited pool of local academic literature on business rescue, as well as on the rehabilitation plan. Little or no research has been published on the expectations, nature or structure of the plan. Reference to the plan is frequently made, but it is rarely discussed in depth. In addition, the researchers found limited rich knowledge and access to case law in each of the regimes examined. As is characteristic of formal rehabilitation, case law constitutes a fair amount of insight into rehabilitation protocol and expectations. Although it was not the intention of this research to provide a legal view on the topic, this would nevertheless have added to the study.

Since the business rescue scene is still a relatively young one, research in this field is needed and fairly open. Future research with regard to the topic of this paper should consider adding to information on local expectations and assist in evaluating existing plans with a measurement tool. Future research could also expand the scope of study by comparing business rescue with international regimes in various spheres. This would dramatically help academics as well as industry to adopt better mechanisms to operate effectively and increase the scope of knowledge in understanding the impact of the plan. Finally, there is a need to evaluate business rescue plans based on the principles and guidelines in Chapter 6.

References

- Anderson, C. 2008. *Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective*. Australia: Griffith Business School.
- Australian Government 2005. Corporations Act 2001. Commonwealth Consolidated Acts. Canberra: Office of Legislative Drafting and Publishing.
- Australian Securities and Investments Commission 2008. *Voluntary Administration: a Guide for Creditors*. Canberra: ASIC.
- Balgobin, R. & Pandit, N. 2001. 'Stages in the turnaround process: the case of IBM UK', *European Management Journal*, 19(3): 301–316.
- Balovich, D. 2002. Chapter 11 confirmation. [Online] Available at: <http://www.creditworthy.com/3jm/articles/cw42402.html>. Accessed: 12 March 2013.

- Besant, C. 2013. *Canadian Bankruptcy, Insolvency and Restructuring Overview*. Toronto: Baker & McKenzie LLP.
- Bloch, A.K. 2009. 'Do death trap provisions breathe life into a chapter 11 reorganization plan?', *Journal of Applied Economy*, 2: 1–18.
- Bracewell & Giuliani LLP. 2012. *Chapter 11 of the United States Bankruptcy Code: Background and Summary*. Houston, TX.
- Burdette, D.A. 2004. 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (a)', *South African Mercantile Law Journal*, 16: 409–447.
- Canadian Government 1985a. Bankruptcy and Insolvency Act. Ottawa: Minister of Justice.
- Canadian Government. 1985b. Companies' Creditors Arrangement Act (R.S.C. 1985, c. C-36). Department of Justice Canada. [Online]. Available at: <http://laws-lois.justice.gc.ca/eng/acts/C-36/>.
- Carlson, D.G. 2010. *Modified Plans of Reorganization and the Basic Chapter 13 Bargain*, Working Paper No. 287: 1–79. Benjamin N. Cardozo School of Law, Yeshiva University, New York City.
- Conway, L. 2012. *Company Rescue Procedures*. London: Home Affairs Section.
- Corbin, J.M. & Strauss, A. 1990. 'Grounded theory research: procedures, canons, and evaluative criteria', *Qualitative Sociology*, 13(1): 3–21.
- Daley, P.P. & Shuster, G.W. Jr. 2013. Basic provisions of United Kingdom insolvency law. [Online]. Available at: <http://www.abiworld.org/committees/newsletters/international/vol1num3/ReorgEuroUnion2.pdf>. Accessed: 15 March 2013.
- Du Preez, W. 2012. The status of post-commencement finance for business rescue in South Africa. Unpublished. Johannesburg: Gordon Institute of Business Science.
- Elloumi, F. & Gueyié, J-P. 2001. 'Financial distress and corporate governance: an empirical analysis', *Corporate Governance*, 1(1): 15–23.
- Elson, C.M., Helms, P.M. & Moncus, J.R. 2002. 'Corporate governance reform and reemergence from bankruptcy: putting the structure back in restructuring', *Vanderbilt Law Review*, 55: 1917–1932.
- Finch, V. 2012. 'Corporate rescue: a game of three halves', *Society of Legal Scholars*, 32(2): 302–324.
- Fitch, M.A. 2003. Plans of reorganization under the Companies' Creditors Arrangement Act in Canada: An overview. 3. [Online] Available at: http://www.fasken.com/files/Publication/5aa50a0d-cd24-4ab2-bd4a-92ecef8b0964/Presentation/PublicationAttachment/662f4968-70f5-4b1b-ac9b-abc49e2a8381/MAF_PLANS_OF_REORGANIZATION_UNDER_THE_CCAA_IN_CANADA.pdf. Accessed: 4 March 2013.
- Flamholtz, E., Nayer, M. & Lal, S. 2005. *Strategic Planning for a Turnaround*. New Delhi: Strategic Innovations.
- Fletcher, I.F. 2004. 'UK corporate rescue: recent developments – changes to administrative receivership, administration, and company voluntary arrangements – The Insolvency

- Act 2000, the White Paper 2001, and the Enterprise Act 2002', *European Business Organization Law Review*, 5: 119–151.
- FMC Law. 2010. Doing business in Canada. [Online] Available at: <http://www.doingbusinessincanada.com/legal-guide-0/corporate-insolvency-1/arrangements-under-the-companies-creditors-arrangement-act-234>. Accessed: 20 March 2013.
- Franks, J.R., Nyborg, K.G. & Torous, W.N. 1996. 'A comparison of US, UK, and German insolvency codes', *Financial Management*, 25(European Corporate Finance): 86–101.
- Grace, S.A.F. 2011. 'Proceedings under Canada's Companies' Creditors Arrangement Act', *American Bankruptcy Institute Journal*, 10(1): 1–4.
- Grant, R.M. 2003. 'Strategic planning in a turbulent environment: evidence from the oil majors', *Strategic Management Journal*, 24: 491–517.
- Grundy, S. M. 2006. *The Insolvency Laws of Canada*, Huntington, NY: Juris Publishing.
- Hall, W.K. 1980. 'Survival strategies in a hostile environment', *Harvard Business Review*, 58(5): 75–85.
- Holtzhausen, G. 2010. Modelling business turnaround strategies using verifier determinants from early warning signs theory. Doctoral dissertation, University of Pretoria, Pretoria.
- Hubbard, J. & Stephenson, K. 1997. 'Bankrupt stocks, reorganization plans and market efficiency: Are bankrupt stocks overpriced?' *Quarterly Review of Economics and Finance*, 37(2): 547–562.
- International Insolvency Institute. 2003. *The Canadian Insolvency System: A Brief Overview*. Montreal: International Insolvency Institute.
- Jacoby, M. 2006. 'Fast, cheap, and creditor-controlled: Is corporate reorganization failing?', *Buffalo Law Review*, 54(2): 401–438.
- Johnson, G.W. & Meyerman, G.E. 2010. *Insolvency Systems in South Africa*. Johannesburg: United States Agency for International Development.
- Kloppers, P. 1999. 'Judicial management: a corporate rescue mechanism in need of reform?', *Stellenbosch Law Review*, 3: 417–435.
- Kow, G. 2004. 'Turning around business performance: Part 1', *Journal of Change Management*, 4(3): 229–246.
- Kunkel, P.L., Peterson, J.A. & Mitchell, J.A. 2009. *Bankruptcy: Chapter 11 Reorganizations*. University of Minnesota.
- Lan, L.L. & Heracleous, L. 2010. 'Rethinking agency theory: the view from law', *Academy of Management Review*, 35(2): 294–314.
- Lord Chancellor 1986. *The Insolvency Rules 1986*. London: Thomson Reuters (Legal).
- Lothringen, A. 2013. Interview, 26 May. Personal communication. Senior Manager, CIPC.
- Loubser, A. 2010. *Some Comparative Aspects of Corporate Rescue in South African Company Law*. Pretoria: University of South Africa.
- McCormack, G. 2008. 'Control and corporate rescue: an Anglo-American evaluation', *International and Comparative Law Quarterly*, 56(3): 515–551.

- Moore, D.J. & Lubben, S.J. 2009. Financial distress and emerging markets, In Gregoriou, G.N. (Ed.), *Emerging Markets: Performance, Analysis and Innovation*. London: Chapman & Hall/Taylor & Francis.
- Museta, G.M. 2011. The development of business rescue in South African law. LLM dissertation, University of Pretoria, Pretoria.
- Parliament of the United Kingdom. 1986. Insolvency Act 1986. [Online] Available at: legislation.gov.uk. Accessed: 15 March 2013.
- Parliament of the United Kingdom 2002. Enterprise Act 2002. [Online] Available at: legislation.gov.uk. Accessed: 15 March 2013.
- Parliament of the United Kingdom. 2006. Companies Act 2006. [Online] Available at: legislation.gov.uk. Accessed: 15 March 2013.
- Plainer, A. & Ball, C. 2003. *Comparison of Chapter 11 of the United States Bankruptcy Code and the System of Administration in the United Kingdom*. New York: Jones Day Gouldens.
- Pretorius, M. 2013. 'Tasks and activities of the business rescue practitioner: a strategy as practice approach', *Southern African Business Review*, 17 (3).
- Pretorius, M. & Holtzhauzen, G. 2008. 'Critical variables of venture turnarounds: a liabilities approach', *Southern African Business Review*, 12(2): 87–107.
- PricewaterhouseCoopers. 2009. *Distressed Investing in Australia*. Sydney: PWC.
- Rajak, H. & Henning, J.J. 1999. 'Business rescue for South Africa', *South African Law Journal*, 116(2): 262–287.
- Republic of South Africa. 2008. Companies Act 71 of 2008, *Government Gazette*, No. 32121, Volume 421. Pretoria: Government Printer.
- Routledge, J. 2007. 'The decision to enter voluntary administration: Timely strategy or last resort?', *Journal of Law and Financial Management*, 6(2):8–12.
- Sarra, J.P. 2007. *Rescue: the Companies' Creditors Arrangement Act*. Toronto, Canada: Thomson Carswell.
- Saunders, M., Lewis, P. & Thornhill, A. 2009. *Research Methods for Business Students*. Harlow: Financial Times/Prentice Hall.
- Sellers, M.A. 2001. Corporate voluntary administration in Australia. Forum for Asian Insolvency Reform. Insolvency reform in Asia: An assessment of the recent developments and the role of judiciary. Bali, Indonesia, 7–8 February: Corporate Insolvency Unit. [Online] Available at: <http://www.oecd.org/dataoecd/8/24/1874188.pdf>. Accessed: 4 March 2013.
- Smits, A.J. 1999. 'Corporate administration: a proposed model', *De Jure*, 32: 80–107.
- United Nations. 2005. Legislative guide on insolvency law. [Online] Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html. Accessed: 23 November 2013.
- United Nations. 2012. UNCITRAL model law on cross-border insolvency with guide to enactment. [Online] Available at: http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf. Accessed: 21 March 2013.

- Vriesendorp, R.D. & Gramatikov, M.A. 2010. 'Funding corporate rescue: The impact of the financial crisis', *INSOL International Insolvency Review*, 19(3): 209–237.
- Walton, P. 2009. 'Pre-packin' in the UK', *International Insolvency Review*, 18: 85–108.
- Westbrook, J.L. 2010. *A Global View of Business Insolvency Systems*. Washington: Martinus Nijhoff.
- Wilson, K. & Deniz, A. 2008. *A Short Guide to UK Insolvency Law: Administration*. London: Paul Hastings.
- Winer, P., Levenstein, E. & Barnett, L. 2008. *Business Rescue: a Novel Feature of the New South African Companies Act 71 of 2008*. Pretoria: Werksmans Attorneys.
- World Bank. 2005. World Bank principles for effective creditor rights and insolvency systems. [Online] Available at: <http://www.worldbank.org/ifa/IPG%20-%20Revised%20Pples%20FINAL%20%5B21%20Dec%202005%5D.pdf>. Accessed: 21 December 2012.
- Yin, R.K. 2003. *Case Study Research: Design and Methods*. Thousand Oaks, CA: Sage.