



UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA

- MCom Dissertation -

CRITICAL ELEMENTS FOR DECISION MAKING IN BUSINESS

RESCUE PLANS

by

Wesley John Rosslyn-Smith

Student number	27317197
Contact number	084 866 4555
Contact email	wesley.rs@live.co.za
Institution	University of Pretoria
Home department	Business Management
Supervisor	Prof M. Pretorius
Supervisor's Email	marius.pretorius@up.ac.za
Strategy of inquiry:	Quantitative and qualitative research

Submitted in fulfilment of the requirements for the degree  
MCom in Business Management  
in the

FACULTY OF ECONOMIC AND MANAGEMENT SCIENCES  
at the

UNIVERSITY OF PRETORIA

Date of submission:  
2014-02-01

## FACULTY OF ECONOMIC AND MANAGEMENT SCIENCES

### Declaration Regarding Plagiarism

The Faculty of Economic and Management Sciences emphasises integrity and ethical behaviour with regard to the preparation of all written assignments.

Although the lecturer will provide you with information regarding reference techniques, as well as ways to avoid plagiarism (see the “Guidelines on Referencing” document), you also have a responsibility to fulfil in this regard. Should you at any time feel unsure about the requirements, you must consult the lecturer concerned before submitting an assignment.

You are guilty of plagiarism when you extract information from a book, article, web page or any other information source without acknowledging the source and pretend that it is your own work. This does not only apply to cases where you quote the source directly, but also when you present someone else’s work in a somewhat amended (paraphrased) format or when you use someone else’s arguments or ideas without the necessary acknowledgement. You are also guilty of plagiarism if you copy and paste information directly from an electronic source (e.g., a web site, e-mail message, electronic journal article, or CD-ROM) without paraphrasing it or placing it in quotation marks, even if you acknowledge the source.

You are not allowed to submit another student’s previous work as your own. You are furthermore not allowed to let anyone copy or use your work with the intention of presenting it as his/her own.

Students who are guilty of plagiarism will forfeit all credits for the work concerned. In addition, the matter will be referred to the Committee for Discipline (Students) for a ruling. Plagiarism is considered a serious violation of the University’s regulations and may lead to your suspension from the University. The University’s policy regarding plagiarism is available on the Internet at <http://www.library.up.ac.za/plagiarism/index.htm>. Also see the notes for Theme 2.

For the period that you are a student in the Faculty of Economic and Management Sciences, the following declaration must accompany **all** written work that is submitted for evaluation. No written work will be accepted unless the declaration has been completed and is included in the particular assignment.

I (full names & surname):	Wesley Rosslyn-Smith
Student number:	27317197

#### Declare the following:

1. I understand what plagiarism entails and am aware of the University’s policy in this regard.
2. I declare that this assignment is my own, original work. Where someone else’s work was used (whether from a printed source, the Internet or any other source) due acknowledgement was given and reference was made according to departmental requirements.
3. I did not copy and paste any information directly from an electronic source (e.g., a web page, electronic journal article or CD ROM) into this document.
4. I did not make use of another student’s previous work and submitted it as my own.
5. I did not allow and will not allow anyone to copy my work with the intention of presenting it as his/her own work.

W J Rosslyn-Smith

Signature

15 January 2014

Date

## TABLE OF CONTENTS

CRITICAL ELEMENTS FOR DECISION MAKING IN BUSINESS RESCUE	
PLANS .....	2
1 INTRODUCTION .....	2
1.1 BACKGROUND .....	2
1.2 PROBLEM STATEMENT .....	3
1.3 PURPOSE STATEMENT .....	3
1.4 RESEARCH QUESTIONS .....	4
1.5 ACADEMIC VALUE AND CONTRIBUTION OF THE STUDY .....	4
1.6 DELIMITATIONS AND ASSUMPTIONS .....	5
1.7 LIST OF ABBREVIATIONS .....	6
2 LITERATURE REVIEW ON REORGANISATION .....	8
2.1 GENERIC STRUCTURAL FEATURES OF REORGANISATION .....	11
2.2 THE RESCUE PLAN .....	12
2.3 SOUTH AFRICAN CONTEXT .....	14
2.4 RESEARCH ETHICS .....	17
3 PAPER 1 .....	20
EXPECTATIONS FOR A BUSINESS RESCUE PLAN: INTERNATIONAL	
DIRECTIVES FOR CHAPTER 6 IMPLEMENTATION .....	20
3.1 INTRODUCTION .....	22
3.2 KEY FOCUS OF THE STUDY .....	23
3.3 LITERATURE .....	23
3.3.1 The international regimes of turnaround and business rescue ...	24
3.3.2 Research objectives and questions .....	40
4 RESEARCH DESIGN .....	40
4.1.1 Research approach .....	40
4.1.2 Key scientific beliefs of the researchers .....	41

4.1.3	Grounded theory approach .....	41
4.1.4	Ontological positions.....	42
4.1.5	Epistemological positions.....	42
4.2	RESEARCH METHOD.....	42
4.2.1	Research setting and background .....	43
5	FINDINGS.....	43
5.1.2	Comparing the principles of the plan with Chapter 6 .....	50
5.1.3	Implications for industry .....	52
5.1.4	Limitations of the study and suggested future research.....	53
6	REFERENCES .....	54
7	PAPER 2.....	62
	STAKEHOLDER EXPECTATIONS OF THE BUSINESS RESCUE PLAN FROM A SOUTH AFRICAN PERSPECTIVE .....	62
7.1	INTRODUCTION .....	64
7.1.1	Key focus of the study.....	65
7.1.2	Literature.....	65
7.1.3	Research objectives and questions .....	70
7.1.4	The potential value-add of the study .....	70
7.1.5	Research design and methodology .....	70
7.2	FINDINGS.....	74
7.2.1	Discussion of findings .....	75
7.3	CONCLUSION .....	90
7.3.1	Contribution to Management.....	92
7.3.2	Limits of the Study and Suggested Future Research.....	92
7.4	REFERENCES .....	94
8	SUMMARY AND CONCLUSION .....	99
9	LIST OF REFERENCES.....	103

## LIST OF FIGURES

Figure 1	Failure Slide .....	9
Figure 2	Failure Slide .....	9
Figure 3	Overlapping relations between out-of- court restructurings and formal insolvency proceedings .....	13
Figure 4	Dissertation Framework .....	16
Figure 5	Influencers over the business rescue plan .....	26
Figure 6	Conceptual framework of the rescue plan in South Africa .....	75
Figure 7	Relative support by subjects for elements of the feasibility declaration ...	77
Figure 8	Relative support by subjects for elements associated with communication .....	81
Figure 9	Relative support by subjects for elements that enable transparency.....	84
Figure 10	Relative support by subjects for elements that affirm the contractual obligations of the plan .....	87
Figure 11	Relative support by subjects for elements of post commencement finance.....	89
Figure 12	Approaching the plan .....	91

## LIST OF TABLES

Table 1	List of abbreviations .....	6
Table 2	Research design components .....	41
Table 3	Supporting expectations for determining the principles .....	44
Table 4	Classifying Chapter 6 requirements with international directives.....	51
Table 5	Research design components (modified from Yin (2003:21)).....	71
Table 6	Interview Statistics.....	74

## CHAPTER 1

CHAPTER 1:	Introduction	2
	Literature Review on Reorganisation	8
CHAPTER 2:	Paper 1	20
CHAPTER 3:	Paper 2	62
CHAPTER 4:	Summary and Conclusion	99
CHAPTER 5	List of References	103

## CRITICAL ELEMENTS FOR DECISION MAKING IN BUSINESS RESCUE PLANS

# 1 INTRODUCTION

## 1.1 BACKGROUND

For the first time in over a century the world is revisiting its views on insolvency. As governments begin to explore the possibilities and benefits of salvaging businesses as opposed to terminating them we have embarked on an adventure that may possibly have a significant impact on how business operates. With insolvency laws now venturing into rehabilitation systems, they are becoming more complex and astute. Furthermore, it has reeled in the attention of academics to explore and decrypt the intricacies of these procedures and apply context to their application for business studies.

Until recently an international insolvency framework overseeing reorganisation of business has to large extent been moulded by developed economies. The benefits of reorganisation are widely accepted with more and more insolvency regimes adopting provisions on formal reorganisation proceedings. Emerging economies, such as South Africa, have reacted by instituting modern rescue legislation carefully choreographed by leading regimes such as the United States, United Kingdom and Australia to name a few. In South Africa it takes the form of business rescue found in Chapter 6 of the Companies Act 71 of 2008 (the Act). As an emerging market combatted by numerous challenges and unique circumstances the regime has embarked on its own course. This thesis investigates one of the critical components of the business rescue procedure namely the business rescue plan (reorganisational plan). The research offers a framework grounded by expectations aimed at assisting practitioners in drafting better plans, aid creditors in critically assessing the plan and finally to provide a means of evaluating the plan. The framework entails a comparison of international expectations of the document. Findings revealed international directives for the implementation of Chapter 6's business plan. The second part of the research involved aligning those principles with the expectations of stakeholders. The empirical findings

confirmed detailed shortcomings in the requirements of the plan as well as future suggestions for improvement.

## **1.2 PROBLEM STATEMENT**

Preliminary analysis of published business rescue plans suggested a shortfall in compliance with the act (Rosslyn-Smith & Pretorius, 2012). Further investigation revealed that there exists no satisfactory framework to assist in the plan's formulation. The new business rescue legislation provides little guidance as to the necessary presentation of the proposal. Practitioners, creditors and the regulator are unequipped to decisively analyse and deconstruct the plan in terms of compliance. The problem to be investigated is to determine, benchmarked by international regimes, the elements expected to effectively comply and succeed with the business rescue plan.

## **1.3 PURPOSE STATEMENT**

The purpose statement of this study is to investigate and identify a set of expectations based on comparable regimes that could assist in the formulation and implementation of a business rescue plan that is better compliant with the legal parameters and expectations of the South African regime.

For this, a set of international principles were identified based on the expectations held by the United States, United Kingdom, Canadian and Australian reorganizational regimes. A literature review provided compelling evidence to suggest that the international principles existed and offered legitimate direction for a reorganizational plan. Following this, the expectations of industry experts were deconstructed and analysed to ascertain if the principles were indeed applicable to the South African context and to what extent they applied. By determining these expectations, the researcher was able to provide the basis of a satisfactory framework that could assist in the formulation of useful rescue plans.



International research, described in the literature review, has demonstrated that business rescue legislation encourages the plan to exceed the rigid conditions, prescribed in the Act, to be successfully adopted.

## **1.4 RESEARCH QUESTIONS**

The primary research questions that guide this study are as follows:

- Are there broad principles to direct the compilation of a rescue plan (based on international works)?
- What are the expectations of a business rescue plan from a local perspective?
- To what extent do these principles apply to the South African regime?

These are underpinned by the following research questions:

- What are the functions and aims of the rescue plan?
- Are the guidelines from the South African Companies Act (2008) aligned with the international principles?
- Is the plan expected to exceed the rigid conditions prescribed in the Act, to be successfully adopted?

## **1.5 ACADEMIC VALUE AND CONTRIBUTION OF THE STUDY**

Reorganisation is a well-documented topic, having been researched from a number of developed world perspectives. Business rescue represents a fresh addition to the field, offering a unique process set into action in one of the world's prominent developing nations. The regime though has only entered its third year and remains relatively undocumented. Academics know little about how the regime is unfolding as well as any indication of where it is heading. While comparable regimes may offer insight into how business rescue will unfold it requires exploration to determine to what extent those regimes are applicable.

The proposal or reorganizational plan is regarded as one of the most integral aspects of reorganisation. The plan however remains less researched than other topics within the field. From a business rescue perspective it remains an unexplored area altogether to date. The business rescue plan comprises of distinct characteristics that preside over a predominately out-of-court system.

This study aims to explore the characteristics of the business rescue plan. It firstly aims to identify tangible connections to its international counterparts and determine what is expected from it. Using the international benchmark, industry leaders related business rescue proceedings and provide insight into their expectation of the plan. The research is intended to assist academics, practitioners, creditors and the state to better understand the objectives of the proposal as well as offer a means to interpret it. This study is intended to assist practitioners by better aligning their plan with the expectations of the targeted audience, provide creditors and other affected parties with clearer information and finally to offer the regulator and other institutions a means to better evaluate the plan.

## **1.6 DELIMITATIONS AND ASSUMPTIONS**

The study has several delimitations related to its context, constructs and theoretical perspectives. The study was delimited to examine with respect to the current conditions of the business rescue plan as of January 2013, in consideration after the evaluation of the first fifty plans reported at the onset of the regime (Rosslyn-Smith & Pretorius, 2012). At the time of the research, few court judgments have been made pertaining to the rescue plan and have been considered by the researchers. However it is not within the scope of this study to include the perspective of the court. The study has been conducted from a business management perspective framed within the Critical Management Studies movement. For this reason the study will be delimited from a detailed legal or financial view of elements to the plan. It is not the intention of the researchers to define the parameters of a business rescue plan nor go so far as to set a template. Rather the findings are aimed to assist and support the formulation and evaluation of the document. Due to the complexity and variety of circumstances

the plan is expected to conform to, it is accepted that the findings will not always be applicable and that exceptions are more than likely to occur.

## 1.7 LIST OF ABBREVIATIONS

**Table 1 List of abbreviations**

BR	Business Rescue
BRP	Although the author has not used this acronym, readers should be made aware that this term is used interchangeably to refer to 'Business Rescue Practitioner' or 'Business Rescue Plan'. The latter is more suitable for this dissertation.
Business Rescue	Synonyms include: rescue, formal turnaround, reorganization, reorganisation, restructuring, arrangement, administration,
CIPC	Companies Intellectual Property Commission
DIP	Debtor In Possession
PCF	Post Commencement Funding
The Act	Refers to the relevant Act being discussed under the nearest heading
UN	United Nations
UP	University of Pretoria

CHAPTER 1:	Introduction	2
	Literature Review on Reorganisation	8
CHAPTER 2:	Paper 1	20
CHAPTER 3:	Paper 2	62
CHAPTER 4:	Summary and Conclusion	99
CHAPTER 5	List of References	103

## 2 LITERATURE REVIEW ON REORGANISATION

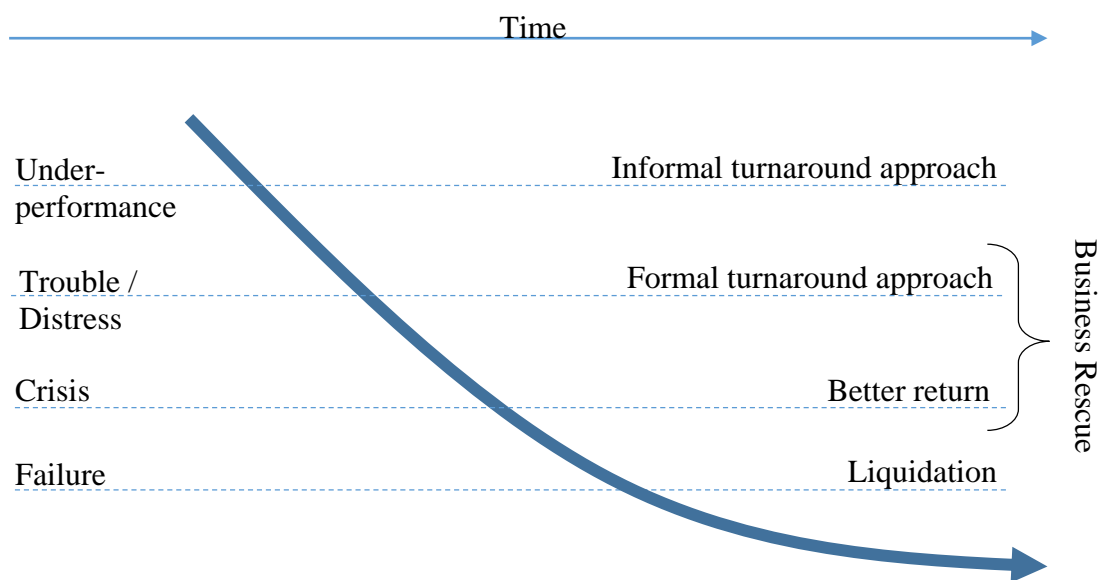
The panic of 1893 brought about a series of events that partook in an evolution of business thinking, in particular, a cultural shift in the perception of corporate failure. At the time the United States had forgone almost 84000 kilometres of railroad to receivers (Meade, 1901:205). The sheer size and worth of the railroad companies deluded any possibility of liquidation. A notion buoyed by common law maxims *salus populi suprema lex est* (the welfare of the people is the supreme law). Through their growing desperately, the bankrupt railroad companies saw refuge in the form of 'reorganization'. All interests, equally concerned, pressed the US congress to craft the notion into law (Hansen, 2000:379). The remedies of which were to (1) to pay off or fund the floating debt; (2) to provide funds for betterments and for working capital; (3) to reduce fixed charges within a conservative estimate of net earnings (Meade, 1901:207). The concept embroiled a 'new-fashioned' receivership, one where debtors could commence proceedings and, to a certain extent, control. More so the objective went beyond merely protecting creditors' rights, it obsessed itself with a greater ideal. The result of which is considered to have paved the way for modern reorganization (Hansen, 2000:379, Franks & Sussman, 2005:295).

After the parleying of the American railroad companies the concept of reorganisation also surfaced in South Africa in 1926 under the designation of Judicial Management. The regime is regarded as the first formal business rescue regime in modern times (Wood, 2007:21). It was soon after replicated in Australia in 1961 with little avail as both systems were subsequently regarded as failures (Westbrook, 2010:122). Thereafter the concept of rehabilitation infiltrated various insolvency systems, each reflecting the legal, historical, political, and cultural context of the countries that have developed them (Martin, 2005:4). Various terms such as "rescue," "reorganization," "restructuring," "arrangement," "administration," "composition" or "reconciliation" emerged as synonymous for the concept. Reorganisation scheduled in Chapter 11 of the United States Bankruptcy Code remains one of the flagship regimes internationally.

The United Nations Commission on International Trade Law (UNCITRAL) (2005:7) defines reorganization as “the process by which the financial well-being and viability of a debtor’s business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern”. Reorganisation is commonly associated with formal business turnaround proceedings.

The alternative is the use of informal turnaround techniques. Figure 2 helps position reorganisation in a framework. Important to note is the position that reorganisation (formal turnaround) takes in preference to informal turnaround and liquidation.

**Figure 2 Failure Slide**



Source: Adapted from Nieman and Pretorius (2004:87)

A company is more likely to attempt an informal or contract-based rescue before considering a formal turnaround. The informal approach evades involvement by the court which can be more complex, timely and expensive (World Bank, 2005:5). Informal turnaround retains its attractiveness because of the degree of flexibility it awards its directors and is relatively inexpensive to execute. However, in the event that an informal turnaround is no longer viable a business then would initiate formal

rescue proceedings. Formal measures are expected to alter the landscape in order to increase the possibility of reaching a consensus. As a result a debtor- or creditor-friendly position is adopted in addition to more protection and mechanisms tailored to support the ailing company during the process.

Insolvency or otherwise known as bankruptcy legislation often bundle formal turnaround and liquidation laws together. While the two lie consecutively on the failure side (Figure 2) they fundamentally differ. Reorganisation centres itself around the readjustment of the affairs of a beleaguered company while maintaining it as a going concern. Whereas liquidation concerns itself with the final disposition of the company's assets for cash (Anderson & Wright, 1982:29). The two are mutually exclusive bearing their objectives differ significantly thus resulting in altered skillsets and knowledge to effectively execute. It should be noted however that reorganisation can be used to preserve and possibly enhance of the value of the insolvency estate to yield a better return than in liquidation (United Nations Commission on International Trade Law, 2005:26).

Modern developments and trends in the area of reorganisation demonstrate the growing disparity between the two forms of insolvency. 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.'

Given the economic disparities, cultural gaps and historic experiences between nations it comes as no surprise that each bankruptcy system conforms to its own set of ideals, influencing the techniques and instruments afforded to distressed entities (Martin, 2003:390). International institutions such as the World Bank's 'Principles for Effective Creditor Rights and Insolvency System' and the UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, are designed to assist countries to equip their insolvency laws with a modern, harmonized and fair framework to address more

effectively instances of cross-border insolvency (United Nations Commission on International Trade Law, 2005:307, World Bank, 2005).

## **2.1 GENERIC STRUCTURAL FEATURES OF REORGANISATION**

A company that finds itself in financial distress is often confronted with disorder. Its incumbent managers are riveted between a course of conduct that would serve either the interests of their creditors or the interests of their shareholders, one at the expense of the other. Where informal negotiations fail reorganisation proceedings are designed to alter the landscape and offer the debtor an alternative route to treaty. Proceedings afford the entity in distress some breathing room to recover from its temporary liquidity difficulties or more permanent overindebtedness and, where necessary, provide it with an opportunity to restructure its debt and its relations with creditors (United Nations Commission on International Trade Law, 2005:27). The process is sustained by the notion where the claims of creditors will derive greater value from the continued operation of the debtor's business and shareholders will circumvent the onslaught of liquidation.

The structural features of reorganisation are critical in enabling the mechanisms and systems necessary to facilitate business recovery however, prevent the abuse or prolong the agonising inevitability of failure. Although reorganisation regimes may differ, there exist a number of distinguishable aspects among most modern systems. The company in distress should voluntarily or by the means of affected parties surrender to proceedings. On realisation, proceedings should commence and a strict protocol is expected to transpire. Initiation of a stay period or moratorium is mostly likely to ensue, whereby affected parties are temporary restrained from any actions against the debtors assets. The entity is expected to continue trading under the supervision of its existing management or via the appointment of an independent custodian or possibly both. Post commencement tools are awarded to assist in stabilisation and recovery. The stay is granted to facilitate in the formulation of a plan that advises creditors, shareholders and the debtor itself on a proposed recovery strategy. The plan is consequently held to a vote by creditors, where upon acceptance



results in its implementation. Alternatively the plan can look to the court for its approval under Chapter 11 (United Nations Commission on International Trade Law, 2005:20).

The most fundamental power of proceedings presides over the development and execution of the reorganisation plan (rescue plan). It contains the hopes to reverse the losses and restore the financial health of the company. While each regime prescribes different exceptions of the plan, it ultimately needs to serve as a decision making tool.

## **2.2 THE RESCUE PLAN**

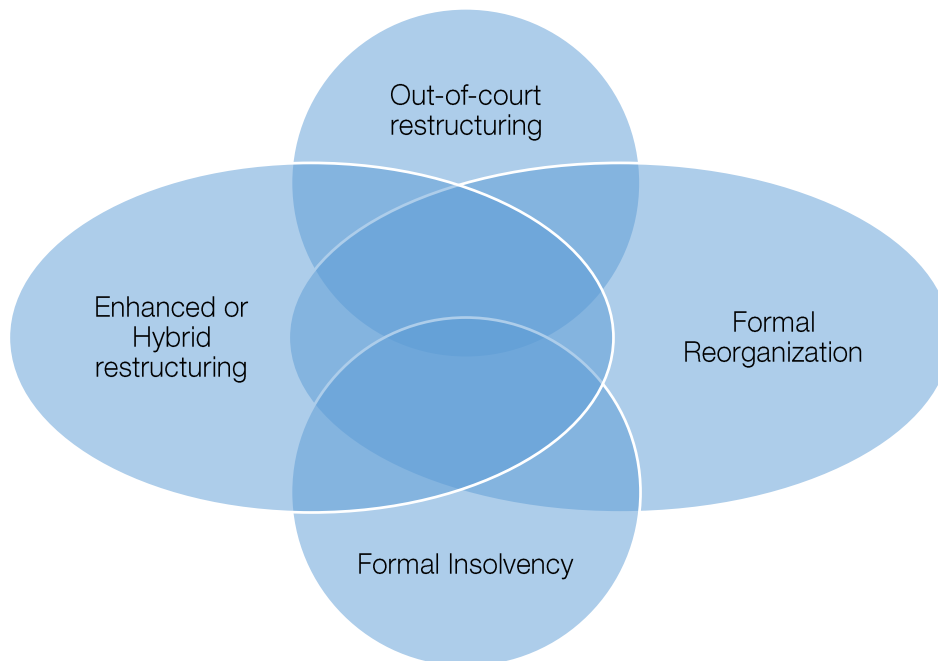
Insolvency laws are fairly obscure when defining the parameters of the reorganisational plan. The objective of the document is to explain the financial well-being and viability of the business and how it can be restored, if possible. This in most cases relies on a unique and abstract level of thinking that would easily be in conflict with a prescriptive template. It is generally considered wise to outline expectations the plan should fulfil and limit specifics as much as possible, allowing dynamic and innovative solutions to prosper (Klee, 1995:555). UNCITRAL Legislative Guide on Insolvency Law (2005:17), advocates a few basic requirements of the plan. Firstly, the rights and obligations of the debtor should be detailed. Thereafter the responsibilities and functions of the receiver or practitioner are expected to be clarified. The role and duties of creditors are in addition to be carefully laid out with the ranking and management of their claims. Claims in respect of liquidation should be analysed. Costs and expenses relating to proceedings should be substantiated upon including the remuneration of the insolvency representative. Discussion about the dissolution of the business is also required. Finally, the plan should explain how and when proceedings should end (United Nations Commission on International Trade Law, 2005:17).

The plan takes on various forms depending on the regime in question. It is known as a scheme of arrangement, deed of company arrangement, reorganizational or a business rescue plan. Business rescue though is a better term that includes business debtors other than corporations or companies and affords for circumstances where the juristic person itself does not survive the rescue procedure, but the actual business of the juristic person survives wholly or in part (Kloppers, 1999:418). Each regime

pervades its own objectives for the formulation, approval and implementation of the plan (Westbrook, 2010:151). The time allocated to developing the plan can vary from 21 to 120 days with the possibility of extending it under certain circumstances (United Nations Commission on International Trade Law, 2005:213). The process though is typically inflexible, requiring court or the majority support of the creditors to approve any postponement of such a nature.

Expedited reorganization proceedings or more commonly known as prepackaged plans are becoming more and more popular. A prepackage plan has the effect of establishing a deal in advance of the appointment of an administrator and it allows statutory procedures to be implemented at maximum speed (Finch, 2006:568, Garrido, 2012:48). The idea here is to attempt merging an out-of-court workout with formal rehabilitation in order to benefit from both schemes. Depicted in Figure 3, all four forms of turnaround can be applied, some in conjunction with others if needed.

**Figure 3** Overlapping relations between out-of- court restructurings and formal insolvency proceedings



Source: Adapted from Garrido (2012:4)

A prepackage plan, if supported by a regime, may need to solicit to certain statutory criteria (Barliant, Karcazes & Sherry, 2004:450). The issue of independence remains particularly relevant in this case, whereby the prepackaged plan should clarify any

collusion between parties during its drafting. According to Salerno and Hansen (1991:39) there are four essential ingredients to a prepackaged plan:

- Foresight of management in realistically assessing and evaluating financial problems.
- Willingness and ability of management to incur the professional fees necessary to implement the prepackaged reorganization.
- Formulation of a viable exit strategy and a business plan that is acceptable to the bulk of a business's creditors and equity holders.
- A creditor group that is willing to negotiate the prepackaged reorganization.

The advantages of adopting a prepackaged reorganisation can include reduced disruption and risk of a decline in reputation, employees, asset value, customers or suppliers of the business. The cost of the rehabilitation also subsides both in the short and long term (Devaney, 2007:26). It is for reasons like these that the concept has gain much moment over past few year amongst the more established regimes.

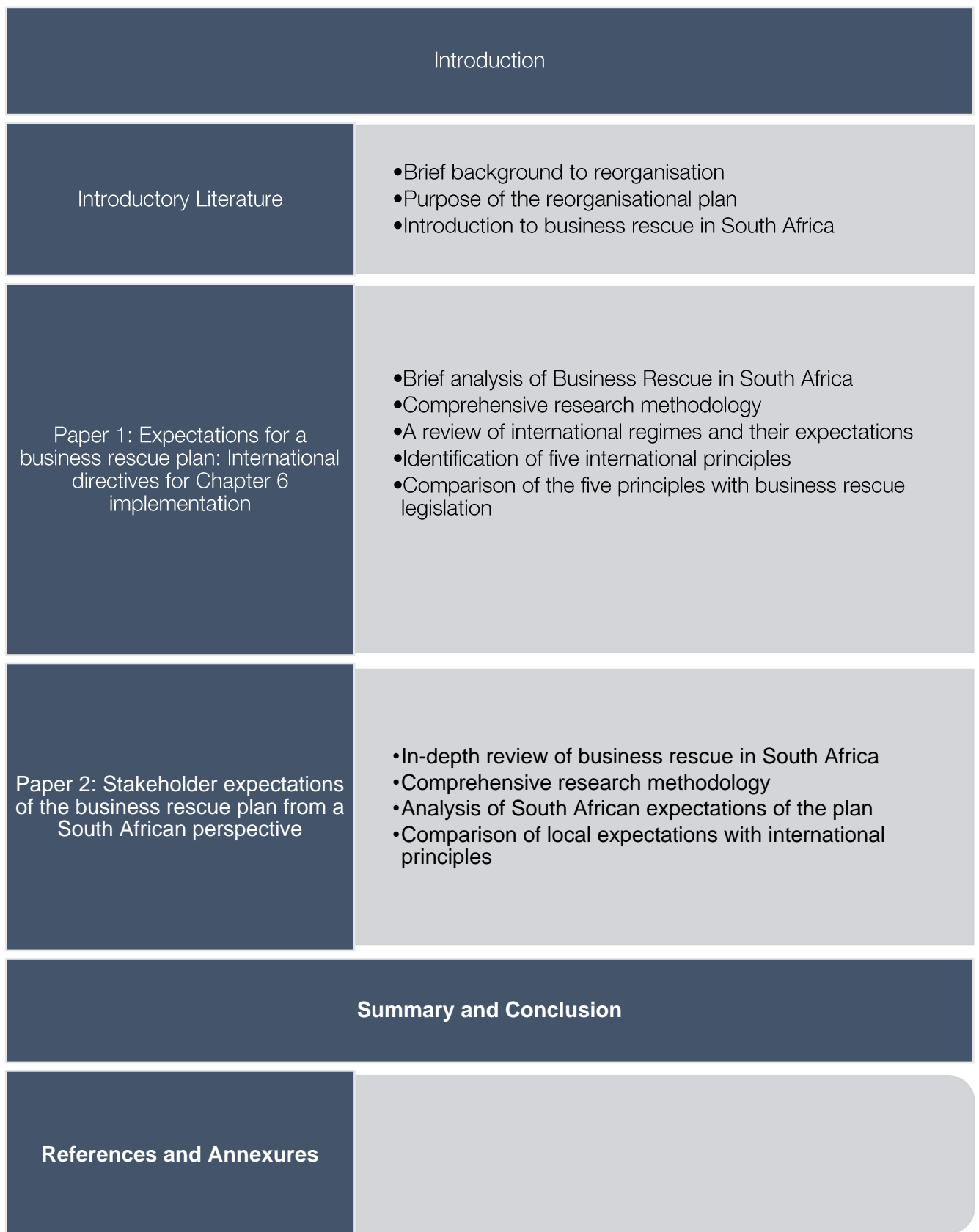
### **2.3 SOUTH AFRICAN CONTEXT**

Turnaround management reviewed from a South African perspective is a fairly new discipline (Holtzhauzen, 2010:29). The science remains relatively unexplored by both business and academics alike. Formal-turnaround has for long existed in an abstract form know as Judicial Management (Loubser, 2010:2), however it was widely regarded as a failure since it provided little incentive to pursue rehabilitation as opposed to liquidation by the liquidator. For this reason, in addition to mounting international pressure (Martin, 2005:2), South Africa instituted a reform to The Companies Act, Act 61 of 1973, now known as the old Companies Act. Its successor, the Companies Act, Act 71 of 2008, introduced in Chapter 6 a new and modern formal-turnaround process known as 'business rescue'. The process entails a predominately out of-court system yielding with it a new industry.

Business rescue comprises of a formal commercial process deploying consultative practises sustained by a moratorium period (stay). The process is overseen by a

business rescue practitioner, whose appointment is regulated by the Companies and Intellectual Property Commission (CIPC). The practitioner is conditionally obligated to ensure the likelihood of the company's continued existence on a solvent basis. They are then responsible for the company's affairs, business and property until approval of a business rescue plan (reorganizational plan). The plan remains the primary task of the practitioner during proceedings and must not only comply strictly with the Act but entice a favourable vote from the creditors.

**Figure 4 Dissertation Framework**



## **2.4 RESEARCH ETHICS**

This study has considered and upheld to the best degree the ethical standards defined by Cooper and Schindler (2008:34). The researchers were devoted to maintaining an objective view, minimising the possibility of bias and data misinterpretation. A concerted effort was made to evade careless errors and reduce negligence as far as possible while applying careful and critical judgment at all times.

Subject's informed consent to participate in the research was obtained as per the guidelines of the University of Pretoria. This ensuring subjects were provided with information about the purpose of the study, the sponsor, who the researchers are, how the data will be used and what participation was require of them.

The subjects were granted the privilege of confidentiality and anonymity by the researchers to best aid the purposes of the study and to prevent any harm or negative effects against the subjects and their organisation.

Professional standards were adhered to best of the researches abilities supported by the ideals of honesty and integrity.

## CHAPTER 2

CHAPTER 1:	Introduction	2
	Literature Review on Reorganisation	8
CHAPTER 2:	Paper 1	20
CHAPTER 3:	Paper 2	62
CHAPTER 4:	Summary and Conclusion	99
CHAPTER 5	List of References	103

MANUSCRIPT 'EXPECTATIONS OF A BUSINESS RESCUE PLAN:  
INTERNATIONAL DIRECTIVES FOR CHAPTER 6 IMPLEMENTATION'

Thank you for submitting your manuscript for publication in the Southern African Business Review. Your article has been found acceptable for publication and will be published in one of the editions of the SABR in 2014.

Kind regards

Prof AA Ligthelm

Chief Editor: SABR



### **3 PAPER 1**

## **EXPECTATIONS FOR A BUSINESS RESCUE PLAN: INTERNATIONAL DIRECTIVES FOR CHAPTER 6 IMPLEMENTATION**

***Marius Pretorius***  
***Wesley Rosslyn-Smith***

**University of Pretoria**  
**South Africa**

**Correspondence to:**

[marius.pretorius@up.ac.za](mailto:marius.pretorius@up.ac.za)

[wesley.rs@live.co.za](mailto:wesley.rs@live.co.za)

**Postal address: Department of Business Management, UP, 0002.**

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

## SYNOPSIS

**Purpose:** To investigate expectations of the business rescue plan comparable with international regimes, and consequently determine the central principles that govern the plan.

**Problem investigated:** A compliant rescue plan is one that fulfils its expectations. To determine the expectations of the plan, we need to gain an international perspective and evaluate this in comparison with local perspectives on Business Rescue. Since the South African regime has emerged from an international insolvency framework, we need an international benchmark to effectively assist in creating an evaluation tool. The drawback is that such expectations have yet to be determined as a means to fairly judge the plan.

**Design:** Data on regimes from four leading countries was obtained, scrutinised and reported on; then expectations of the plan were identified and a set of principles was established. These principles were 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 international perspectives.

**Findings:** Similarities and differences between regimes were identified, leading to the establishment of key principles guiding the expectations of what a business rescue plan is to achieve on publication. A framework is here proposed, identifying the interrelationships between the principles. The rescue plan was found to serve as: a tool for feasibility declaration; a medium of communication; an enabler of transparency; a contractual obligation; and finally a means to assist decision making for attracting post-commencement finance.

**Originality and Value:** Rescue regimes are evaluated through a process that involves interpretation. The proposed framework shows the key principles that govern rescue plans worldwide. The framework could serve as a guideline for evaluation of rescue plans and help practitioners to enhance what is seen as their key task, namely to compile the rescue plan.

**Conclusion:** 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 plan should adhere to a broader and more extensive set of expectations than those explicitly provided for by the Act. Though indicative of newer legislation, the Act falls significantly short of adequately addressing the five principles. The study showed that over time clear expectations are built up from continuous reviews from the court and critique by creditors. The principles, however, remain consistent across all four regimes and international insolvency standards. This suggests a substantial reason for considering all five principles when compiling or evaluating the business rescue plan.

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

### 3.1 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; Holtzhausen 2010: 113).

A prominent component of these rescue proceedings is the business rescue plan, also known as a reorganisation plan or proposal. 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. First, 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.

### **3.2 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 (Lotheringen, 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.

### **3.3 LITERATURE**

### **3.3.1 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 phrase 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).

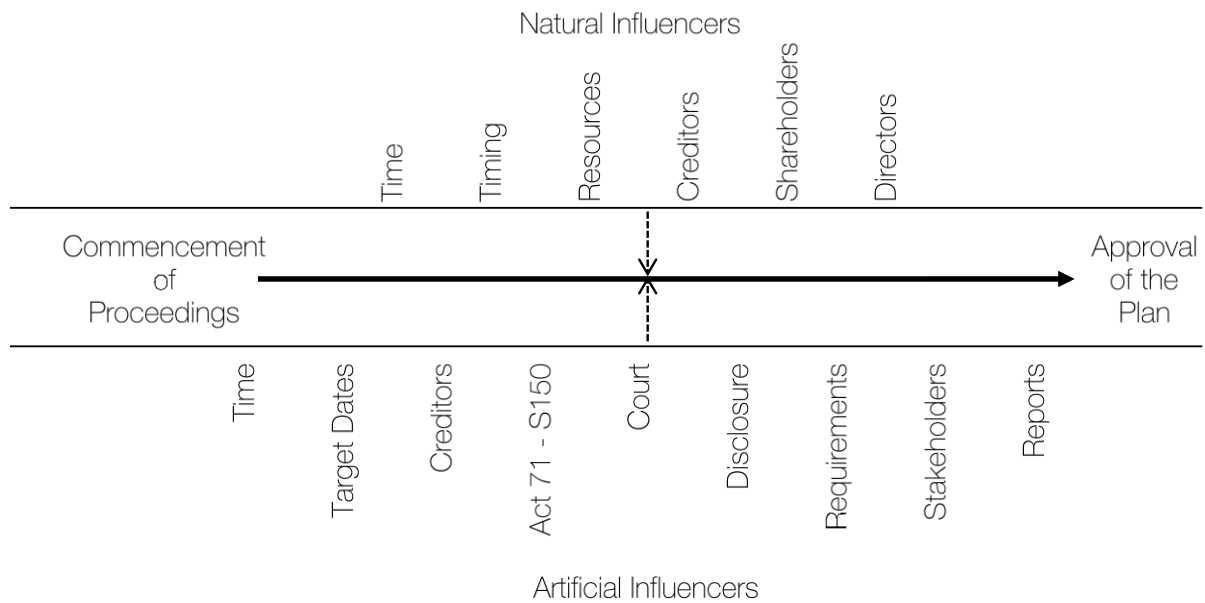
Most modern insolvency systems offer financially distressed debtors two distinct formal avenues to resolve such difficulties. The first, and notably the most traditional, is liquidation, whereby the debtor’s assets are seized and sold and proceeds distributed to creditors in relation to their debt exposure. 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 2004a: 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 2004b: 438). Current legislation is predominantly modelled on the best practices in these countries (Du Preez 2012: 10), and therefore they serve as a compatible international benchmark 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 & Holtzhauzen 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 5 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 of generic expectations should thus be done in the light of such circumstances, so as to avoid any undue influence as far as possible.

**Figure 5 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 the law aligns itself with.

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

### **3.3.1.1 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 been only recently 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.

### **3.3.1.2 United States of America**

Credited with initiating the reform of bankruptcy and insolvency statutes with the birth of 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, however, by all accounts, 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) enables 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).

### 3.3.1.3 *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 within 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 therefore this is 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 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 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.

#### **3.3.1.4 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
- if 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 2004b: 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, 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.

### **3.3.1.5 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 only differ 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, though 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 this is to ensure 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):

- The composition of the unsecured vote
- The recovery creditors would receive in liquidation or bankruptcy
- Alternatives to the plan
- Whether there has been oppression of rights of certain creditors
- Whether there is unfairness to shareholders
- 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 which 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 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.

### **3.3.2 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?’

## **4 RESEARCH DESIGN**

### **4.1.1 Research approach**

The study aimed to use these questions simultaneously to guide the research.

**Table 2 Research design components**

Component	Description
Research question/problem	What are the guidelines gleaned from international regimes that could direct business rescue plans in South Africa?
Context	Turnaround and business rescue
Propositions	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 SA Companies Act.
Units of investigation	The functions and aims (expectations) of the rescue plan The principles involved
Units of analysis	Literature International turnaround regimes Chapter 6 of the Act
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

#### **4.1.2 Key scientific beliefs of the researchers**

To answer the above 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 order to explain the intellectual climate in which the research was undertaken.

#### **4.1.3 Grounded theory approach**

A grounded theory approach was used as the research strategy (Saunders, Lewis & Thornhill 2009: 148). As data was collected, so the formation of an initial theoretical framework emerged. Multiple sources were reviewed to draw sound observations leading to the identification of themes (leads) that were further supported by continued exploration of the literature.

#### **4.1.4 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.

#### **4.1.5 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).

## **4.2 RESEARCH METHOD**

#### **4.2.1 Research setting and background**

Rescue and turnaround regimes from four leading countries were obtained and scrutinised. As the philosophies underlying the regimes and their expectation 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 5), which in turn gave direction to the identification of the principles that governed the structure of the plan.

## **5 FINDINGS**

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 a manner in which 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 was expected, the legislature therefore refrained from detailing a prescribed format that plans should adhere to, 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, though 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 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 3 provides a breakdown of the supporting expectations in each regime for the five principles identified.

**Table 3 Supporting expectations for determining the principles**

US Plan	UK Plan	AUS Plan	CA Plan	SA Plan
Reorganisation Plan	Proposal of Administration	Deed of Company Arrangement	Plan of Arrangement	Business Rescue Plan
<b>Regime Orientation</b>				
Debtor-friendly	Creditor-friendly	Creditor-friendly	Debtor-friendly*	Debtor-friendly
<b>Plan Approval</b>				
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				
<b>Business rescue plan serves as a medium of communication</b>				
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
<b>Business rescue plan serves as an enabler of transparency</b>				
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)		
<b>Business rescue plan serves contractual obligations</b>				
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)
<b>The business rescue plan serves to attract and secure Post Commencement Funding (PCF)</b>				
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	

#### **5.1.1.1 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 there exists the risk 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 that is 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).

#### **5.1.1.2 *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 it, 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 prime objective of the plan.

#### **5.1.1.3 *Business rescue plan serves as an enabler of transparency***

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, showcase prime examples of how legislature has extended itself in addressing the prevalence of transparency. In some cases the use of a third party, such as a trustee, is deemed fit to overlook 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. Should a plan be discovered to have concealed information or presented misleading information, 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 ongoing 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.

#### **5.1.1.4 *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 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.

#### **5.1.1.5 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 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 legislature 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).

### **5.1.2 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 4 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).*

**Table 4 Classifying Chapter 6 requirements with international directives**

Section 150	Element	Tool for feasibility declaration	Medium of communication	Enabler of transparency	Contractual obligations	Attract and secure PCF
<b>2 (a)</b>						
(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		•			
<b>2 (b)</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	•				
<b>2 (c)</b>						
(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 acknowledges: •

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 in listed in Table 4 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 by some regimes. Case law has also been responsible for many of the expectations set up; however, in the US and Canada, where this is most common, specialised bankruptcy courts have been set up.

### **5.1.3 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 establish itself effectively. 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.

#### **5.1.4 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. Though 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 look towards 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.

## 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*. 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.

Burdette, D.A. 2004a. '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.

Burdette, D. 2004b. 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (b)', *South Africa 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: <http://laws-lois.justice.gc.ca/eng/acts/C-36/>.

Carlson, D.G. 2010. 'Modified plans of reorganization and the basic chapter 13 bargain'. *Benjamin N. Cardozo School of Law*, Working Paper No. 287:1–79.

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*. Johannesburg: Gordon Institute of Business Science.

Elloumi & Gueyié. 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', *The 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. Available at: [http://www.fasken.com/files/Publication/5aa50a0d-cd24-4ab2-bd4a-92ecef8b0964/Presentation/PublicationAttachment/662f4968-70f5-4b1b-ae9b-abc49e2a8381/MAF\\_PLANS\\_OF\\_REORGANIZATION\\_UNDER\\_THE\\_CCAA\\_IN\\_CANADA.pdf](http://www.fasken.com/files/Publication/5aa50a0d-cd24-4ab2-bd4a-92ecef8b0964/Presentation/PublicationAttachment/662f4968-70f5-4b1b-ae9b-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*. IIPM Intelligence Unit Publication: 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*. 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*. Juris.

Hall, W.K. 1980. 'Survival strategies in a hostile environment', *Harvard Business Review*, 58(5): 75–85.

Holtzhauzen, G. 2010. Modelling business turnaround strategies using verifier determinants from early warning signs theory. Pretoria: University of Pretoria.

Hubbard, J. & Stephenson, K. 1997. 'Bankrupt stocks, reorganization plans and market efficiency: Are bankrupt stocks overpriced?' *The 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.

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 G.N. Gregoriou (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*. Thesis for LL.M., University of Pretoria, Pretoria..

Parliament of the United Kingdom. 1986. Insolvency Act 1986. Available at: [legislation.gov.uk](http://legislation.gov.uk). Accessed 15 March 2013.

Parliament of the United Kingdom 2002. *Enterprise Act 2002*. Available at: [legislation.gov.uk](http://legislation.gov.uk). Accessed 15 March 2013.

Parliament of the United Kingdom. 2006. *Companies Act 2006*. Available at: [legislation.gov.uk](http://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. & Holtzhausen, G. 2008. 'Critical variables of venture turnarounds: A liabilities approach', *Southern African Business Review*, 12(2): 87–107.

Pricewaterhousecoopers, B.D. 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*. Thomson Carswell.

Saunders, M., Lewis, P. & Thornhill, A. 2009. *Research methods for business students*. Financial Times/Prentice Hall.

Sellars, 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. 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*. Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html).

United Nations. 2012. *Uncitral model law on cross-border insolvency with guide to enactment*. Available at: [http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial\\_Perspective\\_ebook-E.pdf](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: <http://www.worldbank.org/ifa/IPG%20-%20Revised%20Pples%20FINAL%20%5B21%20Dec%202005%5D.pdf>. Accessed December 21 2012.

Yin, R.K. 2003. *Case study research: Design and methods*. Thousand Oaks, CA: Sage.

CHAPTER 1:	Introduction	2
	Literature Review on Reorganisation	8
CHAPTER 2:	Paper 1	20
CHAPTER 3:	Paper 2	62
CHAPTER 4:	Summary and Conclusion	99
CHAPTER 5	List of References	103

## 7 PAPER 2

# STAKEHOLDER EXPECTATIONS OF THE BUSINESS RESCUE PLAN FROM A SOUTH AFRICAN PERSPECTIVE

*Wesley Rosslyn-Smith*

*Marius Pretorius*

University of Pretoria  
South Africa

**Correspondence to:**

[marius.pretorius@up.ac.za](mailto:marius.pretorius@up.ac.za)

[wesley.rs@live.co.za](mailto:wesley.rs@live.co.za)

**Postal address: Department of Business Management, UP, 0002.**

# Stakeholder expectations of the business rescue plan from a South African perspective

## **ABSTRACT**

**Background:** *A business rescue plan has to comply with a new and vague set of obligations regulated by South African legislation. Expectations of the plan are largely unknown, yet crucial in determining compliance. Establishing an effective benchmark for the plan is essential for the growth and success of the industry.*

**Purpose:** *The study set out to answer these questions: What are the most crucial elements needed to fill the gap between the specifics of the Companies Act (2008) and the further elements needed to meet the plan's primary objective of providing adequate information to stakeholders? What are the international principles applicable to rehabilitation plans and what elements underpin them?*

**Method:** *Thirteen industry experts were selected and interviewed to identify the most crucial elements of the business rescue plan. Sampling was a combination of convenience and purposive sampling. Data collection obtained data on subjects' opinions, rankings, agreement and ratings.*

**Results:** *The study was able to confirm that there is indeed a gap between the mandatory elements prescribed in section 150(2) and the provision of sufficient information required by section 150(1) of the Companies Act No. 71 of 2008. The survey revealed that in the subjects' expert opinion, the international principles are applicable to the business rescue plan.*

**Conclusion:** *The crucial elements of the rehabilitation plan selected by the experts offer insight and clarity in terms of what is expected of the plan.*

**Key words:** *Business Rescue, Companies Act, Business Plans, Measurement, Insolvency, Turnaround, Reorganisation*

## 7.1 INTRODUCTION

“In any case you mustn't confuse a single failure with a final defeat.” — F. Scott Fitzgerald, *Tender Is the Night*

Corporate reorganisation, a subset of insolvency procedures, has to a large extent been moulded by developed economies. International insolvency frameworks are partially unaccustomed to the realities present in emerging markets. While reorganisation may take a number of different forms, the benefits are increasingly accepted, and insolvency laws in several countries include provisions for formal reorganisation proceedings. South Africa has through the promulgation of the Companies Act No. 71 of 2008 (“the Act”) in April 2009, effective on 1 May 2011, joined the international community in adopting a modern reorganisation regime. Chapter 6 of the Act, which deals with business rescue, is the generic term billed to define and instruct formal reorganisational proceedings.

‘Business rescue’ proceedings are designed to offer a financially distressed debtor the necessary breathing space to recover from its temporary liquidity difficulties and, if necessary, provide it with an opportunity to restructure its debt and its relations with creditors in order to continue with its business activities. The Act requires a s131 court order or an ss129 and ss130 company resolution to commence proceedings, followed by the appointment of a business rescue practitioner (‘practitioner’). The practitioner is expected to affirm the appointment if he or she believes there is a reasonable prospect of rescuing the company and it is within his or her ability to do so. The management of the company’s affairs, business and property is then placed under the temporary supervision of the practitioner. A temporary moratorium on the rights of claimants against the company is immediately initiated.

The focus of proceedings is then shifted to the development and implementation, if approved, of a plan to rescue the company. Twenty-five business days, with exception, are awarded to the practitioner after appointment to construct and publish a viable business plan. The objective of the plan is to detail the mechanisms and outcomes to be used so that the company can overcome its financial difficulties and resume normal commercial operations on a solvent basis. In the event that this is not possible, the

implementation of the proposal must result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. S150 of the Act prescribes the content to be presented in the business rescue plan. The overarching mandate is to provide *sufficient information to the affected parties for them to reach a decision* regarding its adoption. S150(2) details specific elements to be included in the document; however, this only results in the bare minimum required for compliance, and it is generally accepted that the plan should go beyond it.

### **7.1.1 Key focus of the study**

This study aims to explore what experts in the field of business rescue regard as crucial elements of a business rescue plan. The research focuses on clarifying the unspecified gap (void) left when the plan is expected to go beyond the detailed specifics of s150(2) (Republic of South Africa, 2008), in order to fulfil its primary objective of providing adequate information to the affected parties. International principles derived from similar regimes are evaluated to ascertain if they are relevant to business rescue. The principles are discussed, as well as ways to better meet them. Fundamental elements are scrutinised and explored, to gather insight into how the industry can evolve. This study does not intend to formulate a template for the rescue plan, but rather to initiate a school of thought as to how the plan should behave, and expose contentious issues currently being faced.

### **7.1.2 Literature**

The introduction of Chapter 6 of the new Companies Act, No. 71 of 2008 ("the Act") has brought to light a new era for South African insolvency in the form of business rescue. While its predecessor, judicial management of the Companies Act of 1926, was at first a pioneer, over time it became outdated and ineffective (Westbrook, 2010:122, Kloppers, 1999:417). Chapter 6, however, aims to reverse that by implementing a more efficient and modern recovery mechanism for financially distressed companies in a way that balances the rights of affected parties (Du Toit, 2012:1). This bold piece of legislature is aimed at improving national unemployment

and offering better rehabilitation techniques to ailing businesses (Johnson & Meyerman, 2010:8). The judicial management process had no statutory provision for the development or drafting of a rescue plan (Loubser, 2010:41). One of the major innovations of business rescue, however, is the prerequisite that a rescue plan must be prepared in order to illustrate how the rehabilitation of the company will be achieved. The absence of this requirement is believed to be one of the reasons why judicial management rarely led to a successful rescue (Loubser, 2010:115).

A large body of literature – starting from the work by Dolan (1983:26), Balgobin and Pandit (2001:304) and others (Westbrook, 2010:151, World Bank, 2005:6, INSOL International, 2000:26) – has drawn attention to the importance of the rescue plan in both formal and informal turnaround situations. The objective of the information-gathering, due diligence and evaluation processes provided for by legislature is to allow the relevant stakeholders to evaluate the debtor's position and make the best decision (INSOL International, 2000:26).

Recent research into business rescue has revealed numerous challenges facing the industry. Le Roux and Duncan (2013:69) identified the fact that the majority of creditors involved in business rescue proceedings had little to no knowledge of the regime and what it involved. Their research indicates that a poor expectation of the plan stems from a lack of understanding and experience within the industry. Research conducted by Pretorius (2013a:13) into the competencies required by a business rescue practitioner revealed that most entailed critical elements of the business plan. This reiterated that a direct correlation between the practitioner's ability to draft the plan and the effectiveness of the rescue. A preceding study (Pretorius & Holtzhausen, 2008:103) found that legitimacy, resource scarcity, leadership capacity, strategy options, data integrity and integration were the most relevant assets of practitioners.

Research makes it clear that the practitioner requires a defined skill set to design, publish and implement the plan successfully. Furthermore, correlation between the needs and expectations of the affected parties and the content published in the plan is crucial to its eventual adoption (United Nations, 2005:190).

The act details the procedural guidelines to be followed throughout the business rescue proceedings. Strict accordance with the Act must be followed from the onset of proceedings, by both the directors and the affected parties, until substantial implementation is reached.

After publication of the plan, the practitioner must convene and preside over a meeting of creditors and any other bearers of voting power to consider the proposed plan (Republic of South Africa, 2008:s151(1)). The document must provide sufficient information to enable the parties to make an informed decision, requiring only a 75 percent majority in attendance of the meeting to be approved (Republic of South Africa, 2008:s152(2)a). The Act defines an affected party as a shareholder, creditor, employee (or their representative) or a registered trade union representing employees of the company. Affected persons have various rights throughout the business rescue process (Republic of South Africa, 2008:s128(1)(a)). Section 7(k) (Republic of South Africa, 2008) of the Act extends the targeted audience by “providing for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”. While not all stakeholders of the company may be awarded voting rights, they are implicitly included in proceedings by the Act.

#### **7.1.2.1 *International principles for the business rescue plan***

Five international principles were identified by Pretorius and Rosslyn-Smith (2014 forthcoming) as directives for the implementation of the business rescue plan. That research entailed evaluating the expectations held by four prominent regimes, namely those of the United States, United Kingdom, Canada and Australia. The researchers examined expectations of the reorganisational plans of these regimes, in the context of their insolvency frameworks. The plan was found to serve as a tool for feasibility declaration, a medium of communication, an enabler of transparency, a contractual obligation and finally to assist decision making for attracting post-commencement finance (PCF). These principles are the comparative benchmarks used for this study and are therefore briefly discussed as follows:



The first principle calls for the **business rescue plan to serve 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. 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, be successfully reorganised and how implementation of the plan will be supervised, with reference to a timeframe detailing its execution.

The second principle entails the **business rescue plan's serving as a medium of communication**. Balgobin and Pandit (2001:314) maintain that a rescue plan which is communicated properly will help clarify and safeguard critical resources. Kow (2004:242) talks about a 'communications plan' and explains that the plan should make clear why the company is undergoing the turnaround effort, how it will do it, what the employees can expect during the process, and what the company will gain from the effort. Effective communication is statutorily required in order to adequately inform 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. Until the plan is published, the majority of the stakeholders may be oblivious to the turnaround strategies or the reasons for distress. This principle makes the point that though the plan is usually heavily laden with legal jargon, the language used should be reconsidered carefully in light of these aspects.

The next principle requires the **business rescue plan to serve its contractual obligations**. Since the plan is in essence a binding contract, it enables various remedies to assist with the rehabilitation. The practitioner, creditors and possibly other external parties may also be bound by the terms of the plan and, by virtue of their position, remain responsible for its implementation. The parties are contractually bound until the business rescue plan has been substantially implemented. 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. The

contractual nature of the plan has far-reaching consequences that ought to be contemplated.

The fourth principle calls for the **business rescue plan to serve as an enabler of transparency**. International expectations require 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 disagreement (United Nations, 2012:13). Vague and loosely designed plans could 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.

Finally, the last expectation identified is that the **business rescue plan should 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. The premise of post-commencement funding extends from short-term recovery needs to the long-term strategy of the reorganisational plan (United Nations, 2005:113). The reorganisational plan is expected to address any sort of PCF that has been 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 evaluation by affected parties. Incentivised tools within insolvency legislature 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, it needs to explicitly elaborate upon the reason for and use of such tools offered by formal reorganisation.

Literature on the business rescue plan remains limited, and most of the aspects of the plan have remained uncontested in South African courts at the time of this review. It

is not the intention of this study to incorporate the views of the court, though the researchers are cognisant of the latest judgments relating to the business rescue plan to date.

### **7.1.3 Research objectives and questions**

International research, described in the literature review, has demonstrated that business rescue legislation encourages the plan to exceed the rigid conditions prescribed in the act in order to be successfully adopted. This study aims to find substantive evidence that additional expectations of the plan exist. Following the identification of key international expectations (Pretorius & Rosslyn-Smith, 2014 forthcoming), the opinion of key industry experts would determine whether these principles are applicable to the South African regime, and to what extent they should apply. Therefore, the following investigative questions are presented:

- What are the expectations of a business rescue plan from a local perspective?
- Are they in line with the international principles?
- How far should these expectations be explored?

### **7.1.4 The potential value-add of the study**

The study has embarked on a new aspect of reorganisation: to explore and detail the workings of the business rescue plan as part of a formal turnaround process. Limited literature has discussed the intricacies of the plan and its impact on proceedings. Though this study by no means aims to completely define the plan, it does hope to initiate further exploration into the various aspects it presents. Beyond that, this study is intended to assist practitioners by better aligning their content with the expectations of their targeted audience; provide creditors and other affected parties with clearer expectations; and finally offer the regulator and other institutions a means to better evaluate the plan.

### **7.1.5 Research design and methodology**

#### **7.1.5.1 *Research Approach***

An exploratory analysis was applied, with confirmatory and descriptive elements aimed at better understanding a new phenomenon. This pertains to expectations associated with a business rescue plan, from the perspectives of professionals proficient in the field of business rescue (Saunders & Lewis, 2012). Analysis of pre-existing rescue plans identified a disparity between the expectations held by decision makers and the content published. A literature review of international benchmarks further revealed areas beyond the detail of the Act, suggesting that there were additional elements the plan should satisfy. The fact that local literature was limited suggested that a qualitative research approach be used to explore the phenomenon in more depth (Cooper & Schindler, 2008:140). The study aimed to use these questions simultaneously to guide the research.

**Table 5 Research design components (modified from Yin (2003:21))**

Component	Description
Problem	There are no clear guidelines for what should be included in a business rescue plan.
Research question / problem	What are the expectations of the business rescue plan from a South African perspective?
Context	Turnaround and business rescue
Propositions	<ul style="list-style-type: none"> <li>• Proposition #1: There are expectations that extend beyond the prerequisites of section 150(2)a of the Companies Act No. 71 of 2008.</li> <li>• Proposition #2: The expectations of the business rescue plan fall in line with international principles.</li> <li>• Proposition #3: Key expectations can be identified and defined.</li> </ul>
Phenomenon investigated	Primary: Expectations of experts in the field of business rescue. Secondary: Five international principles of the rescue plan (benchmark)
Units of observation	<ul style="list-style-type: none"> <li>• Thirteen senior experts from six key industries influencing business rescue in South Africa.</li> <li>• Chapter 6 of the Companies Act No. 71 of 2008</li> </ul>
Method	Specialist and expert interviews

Logic linking the data to the propositions	Industry experts are tasked to understand and evaluate the plan. The chosen individuals are all final decision makers, best suited to offer critical insights into the content of the plan in order to perform their task effectively. Experts are poised to offer the best objective expectations of the plan.
Criteria for interpreting the findings	<ul style="list-style-type: none"> <li>• The expectations identified by industry experts</li> <li>• Experts' support of the international principles</li> <li>• The experts' reasoning and explanation of their expectations</li> </ul>

### **Key Scientific Beliefs of the Researchers**

To answer the above 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 to understand the 'intellectual climate' in which the research was undertaken.

### **Ontological Positions**

Ontological positions comprise researcher A and B's 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. Where 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. The interest focused on understanding and describing a set of principles that could confirm the international perspective on the expectations of a rescue plan for South Africa (Saunders, Lewis & Thornhill, 2009:110).

### **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 the research was conducted. The

theory of knowledge (epistemology) of the researchers describes how they are able to discover underlying principles about social phenomena and how one can demonstrate knowledge. The researchers have personal experience in the context of business rescue. At the same time, as an academic and turnaround consultant and as a post graduate student, they have a preference for factual directives.

#### **7.1.5.2    *Research setting and background***

The researcher conducted 13 interviews with high-level experts, covering six discrete but critical professions pertaining to the field of business rescue. Subjects with practical experience and knowledge in the field of business rescue were chosen. The six disciplines included practitioners, lawyers, creditors, banking representatives, distressed venture capitalists and government officials associated with the regulator. A semi-structured interview format was chosen, by conducting non-standardised, one-to-one interviews with subjects (Saunders et al., 2009:320). During the interview, subjects were requested to reflect on their understanding of the plan and what they expected from it. Following an open-ended discussion, the subjects were led with a protocol aligned with the international principles mentioned above. Both open and closed questions were used to improve understanding of the results (Blumberg, Cooper & Schindler, 2008:143).

#### **7.1.5.3    *Sampling***

The research question required experienced and qualified professionals to ascertain holistic views of the plan in its various forms. Subjects with significant exposure to multiple types of plan were needed. The business rescue environment offered a limited population of professionals meeting this criterion. Using these characteristics/criteria, a judgement-sampling technique was applied. The purposive selection of subjects considered peer recommendations, socioeconomic status, extent of knowledge of insolvency, and level of exposure to decision-making experience in the business-rescue environment. The purposive sample size for the research was determined after theoretical saturation arose. The ideal number of twelve interviews sufficed to achieve this milestone (Guest, 2006:59). Represented in the sample were practitioners, bankers, legal specialists, potential government investors and creditors.

**Table 6 Interview Statistics**

Description	Quantity
Total number of interviews	13
Number of disciplines covered	6
Total length of all interviews	854.15 minutes
Average length of interviews	65.7 minutes
Shortest interview	45.54 minutes
Longest interview	79.55 minutes

#### **7.1.5.4 Data analysis**

Descriptive data from the interviews was collected and disseminated into single thought elements. Salient themes were then identified and categorised into the appropriate underlying international principle (Fossey, Harvey, McDermott & Davidson, 2002:728, Marshall & Rossman, 2006:158). Discovery-focused techniques aim to establish patterns and connections between elements of data require the use of inductive reasoning (Leedy & Ormrod, 2001:33, Fossey et al., 2002:728). The interviews, direct observations and physical artefacts were converged to assist with the interpretation (Yin, 2003:89).

## **7.2 FINDINGS**

Figure 6 Conceptual framework of the rescue plan in South Africa



Figure 6 presents a framework based on the findings of this research. It shows at its centre the five international guideline principles associated with turnaround plans for which literature does exist. On the outside it shows the contributions of this research, populated with specific elements covering the different expectations of the subjects as categorised by the researchers. Each element is expanded on in detail below.

### 7.2.1 Discussion of findings



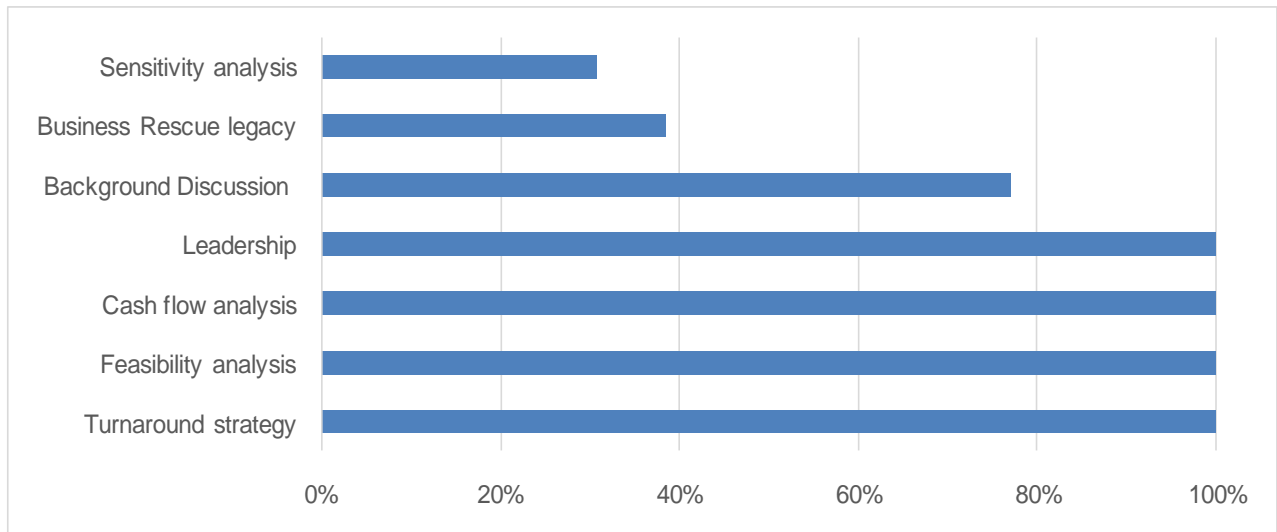
The research uncovered a number of interesting results, while supporting general beliefs as to the nature of the plan and the direction it should follow. Most promising is that all the subjects interviewed supported all five principles and could align their expectations in accordance with them. Generally accepted expectations surfaced within each principle, indicating that more often than not the views of the subjects were in line with one another. These expectations are explored in more detail below, in combination with any outliers that accompanied them.

### **7.2.1.1 *Business rescue plan as a feasibility declaration***

The act allows for two distinct types of a plan to be pursued by the practitioner. The first, and notably the most controversial, is a plan aimed solely at achieving a better return, perhaps more accurately referred to as a controlled wind-down proposal. Here the objective of the practitioner is simply to attain a higher return for creditors than would result from a liquidation procedure. This process in essence is simply the disposal of the company's assets, and differs only marginally from liquidation, justifying the use of terminology like: "soft, glorified, informal and disguised" liquidation. The plan is somewhat clinical and minimal in nature and offers no means of salvaging the company as an ongoing concern. Subjects offered little insight into a better return plan (wind-down proposal). The general consensus was that bare minimum compliance was needed, with strong reasoning by the practitioner as to why this direction had been chosen. The need for a feasibility declaration in such a plan would prove redundant – unless to substantiate the view that pursuing a turnaround strategy would be unviable. However, the viability analysis is still relevant, but as viability is found negative it is not included in the plan.

The second, and more indicative of business rescue, is that of a turnaround plan. Here the objective centres on saving the entity as a whole and deploys various strategies to do so. The second of the two options is significantly more complex where a shred of 'personality' is usually required. While both types are suitable forms of rescue plan (by law), they differ significantly with regards to their expectations. Support for the elements associated with the feasibility declaration by the subjects is shown in Figure 7 and discussed in order of process rather than order of support.

**Figure 7 Relative support by subjects for elements of the feasibility declaration**



### The Background

The turnaround plan, which is better known as a reorganisational plan within the international community, attracted significantly greater interest from the subjects. While the Act already encompasses a large majority of the expectations identified, a number of additional elements were revealed. In-depth detail of the background of the business was deemed essential, offering insight and context to the situation. This also assisted in building credibility among parties already familiar with the company's affairs. Such detail was emphasised by a number of subjects, suggesting the background be elaborated on further. Reasons for the company's distress should form part of the background analysis. Clear and concise reasons must be given as to why the business is in financial trouble. The practitioner should furthermore make a clear distinction between the symptoms and causes of distress. Often vague macro-environmental factors are blamed, without any mention of internal reasons, leading to further frustration and distrust in the plan by affected persons.

Part of the turnaround strategy is the actions already taken by the practitioner. The plan should list these events and explain how they contribute to the overall turnaround strategy. Implementation is a key component of the plan (Dolan, 1983:26); therefore, elaborating on these decisions and how they have been executed to date can contribute to the credibility of the strategy. Proper consultation in relation to how the

plan will be executed is paramount to persuading decision makers (creditors) to vote for the plan.

### **Feasibility Analysis**

The feasibility analysis (study) concerns itself with one of the key expectations of the plan: “Is there still a viable business?” (Pretorius, 2013b:21). All the subjects stressed this point in one form or another, emphasising repeatedly how important it was. The feasibility study is usually conducted prior to filing for business rescue by the practitioner. A viability analysis/due diligence of the company’s affairs should be ideally conducted after filing, to ratify many of the assumptions made in the feasibility study. Critical success factors should be identified and coupled with possible risks. Defining the boundaries of feasibility is also important, to assist parties in knowing when to ‘pull the plug’. The feasibility study was also expected to explore the competitive environment. Analysis of whether or not the opportunity for the company to exploit its market still exists usually remains unanswered. Subjects were also asked if there was room for an objective test for feasibility; however, the general consensus was that the industry was too young and that best practices should be established beforehand.

### **The Turnaround Strategy**

Closely linked to the feasibility and viability of the company is the turnaround strategy. All the subjects recognised that it was vital to have a turnaround strategy presented in the plan. The turnaround strategy usually forms the bulk of the document, encompassing various sections used to substantiate and describe how the plan will unfold. One subject described it as follows: “The turnaround strategy needs to flow like a story”. The task of engineering a strategy is by no means an easy one. Though subjects acknowledged this to be a mammoth task, they reiterated that the strategy must be backed by facts as much as possible. Synonymous with turnaround situations is the credibility of data (Pretorius & Holtzhauzen, 2008:99), and as a consequence stakeholders require the strategy to be substantiated by a creditable source. Disclosing source documents and utilising external data such as bank statements and industry norms can be of great help. Industry benchmarking enables critical and objective evaluation of the strategy itself. In addition to this, practitioners should refer to past business turnaround models where possible. Interlinking it to past plans that have been successful would increase stakeholder confidence.

## **Cash Flow Analysis**

Forecasted financials accompanying the strategy are usually the most scrutinised section. Subjects indicated that the business model, with all its assumptions and alternative scenarios, should in combination with the financials be stress tested and elaborated on as far as possible. The most important element identified was that of a cash-flow projection, despite its not being a requirement of section 150 of the Act (Republic of South Africa, 2008). All subjects referred to the cash-flow statement as an integral part of their decision-making process. The importance of this component cannot be emphasised enough. The plan is expected to make 'cash-flow sense' to interested parties. The distressed environment is indicative of cash-flow constraints as well as obvious hurdles inhibiting rehabilitation. As a consequence, tailoring the cash-flow statement is necessary to reflect the harsh reality that awaits the company.

## **Sensitivity Analysis**

To improve decision making, the cash-flow forecast should further incorporate alternative scenarios and be accompanied by a sensitivity analysis. A SWOT breakdown could identify critical resources supplemented by a risk assessment. Such critical components should be evaluated and incorporated in the sensitivity analysis in order to minimise the risk forgone by the sure monetary (rand) amount offered in liquidation. It is also important for any PCF funder's critical evaluation of the turnaround strategy.

## **Business Rescue Legacy**

An aspect not often found in plans and yet one which the subjects deemed essential for securing long-term PCF is that of BR legacy. The term was identified and coined only after several interviews; however, the underlying concept was supported by all the subjects. The phrase refers to the negative sentiment and reputation left behind by the business rescue proceedings. The concept of formal rehabilitation is new to many South Africans (le Roux & Duncan, 2013). Business rescue follows a debtor-friendly orientation, in contrast to a strong creditor-centred insolvency system. The culture of debt forgiveness is still fairly new, and as a result business rescue proceedings can have a negative effect on the company's reputation with suppliers, customers and staff. Acknowledging and implementing mechanisms to address

reputation early in the strategy is expected and regarded essential for long term partners of the rescue.

## **Leadership**

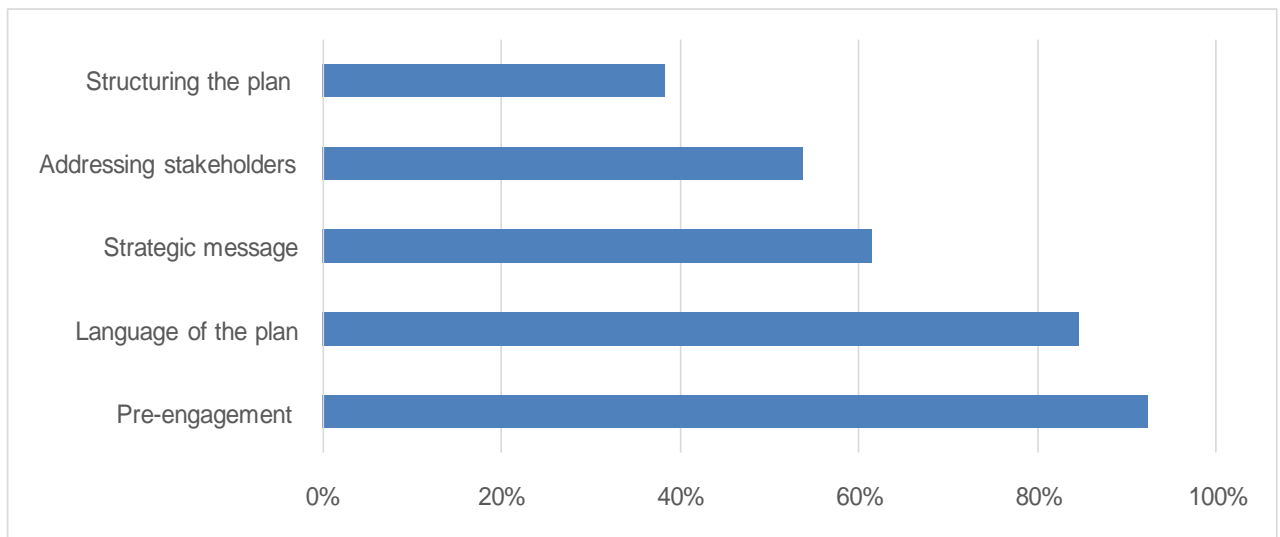
There is an unclear yet important expectation for the plan to address leadership. 'Leadership' has been chosen to describe this concept since the role might be held by the practitioner or new or existing management. Most notably are the roles and capabilities of the practitioner. Practitioners should use the plan to motivate and install confidence in their interim leadership position as the right person for the job.

In most plans the topic surrounding management is a contentious one, particularly where management or the directors of the company are believed to be part of the reason for distress. The practitioner is obliged to report any unlawful or careless conduct by the directors in terms of s141(c) of the Act (2008). In addition, when creditors 'want blood' and feel management is to blame, pressure to disclose or clarify the situation becomes more pertinent. Where fraud or reckless trading is suspected of taking place, the issue should be addressed as to how the practitioner will expose it. The competencies and leadership of a company are a contentious matter, which the plan should not avoid. Furthermore, a succession plan should also be covered to clarify leadership roles after the practitioner and his or her team have left and substantial implementation has been achieved.

### **7.2.1.2 Business rescue plan as a medium of communication**

It is stated under section 150(2) of the Act that the plan must provide sufficient information for decision-making purposes. This then requires the plan to take the form of a decision-making document that can be effectively interpreted by all the affected parties in order for them to make fair judgment on the rescue process. The plan, if properly communicated, also offers a clear reference point amid the rapid and often confusing changes among multiple parties. Subjects reiterated that the plan should be a stand-alone document encompassing all the relevant information, but be the result of on-going communication with all the stakeholders throughout the drafting process. Figure 8 depicts the subjects' support for the different elements.

**Figure 8 Relative support by subjects for elements associated with communication**



### **Pre-engagement**

A key success factor identified by most subjects was that of pre-engagement with the affected parties, as critical to an effective and successful plan. Pretorius (2013b:21) also identified the importance of this element during proceedings. Assessing the knowledge and expectations of the affected parties beforehand assists the practitioner to identify the style, language and form to be used. Pre-engagement also allows the practitioner to manage expectations and educate stakeholders. At best, the plan should come with no surprises when published. The Act allows for the formation of a creditors' committee to assist with this process.

### **Language of the Plan**

As a decision-making document, subjects were asked what language proficiency was required to interpret the plan effectively. In many cases the plan is targeted at a multitude of parties with varying knowledge and language skills. Though acknowledging that this posed a dilemma, the subjects suggested that the plan's executive summary should cater for most readers and exclude any legal or financial jargon. The bulk of the plan, however, is expected to be a professional document requiring legal, financial or applicable knowledge in the relevant industry to interpret. However, legal or professional jargon should not be used to cloud the content, and a well-balanced knowledge of business should suffice at all times. Subjects in addition

suggested the use of a terminology booklet to define and standardise business rescue terminology. This could be read in conjunction with the plan.

### **Strategic Message**

At its core the plan is a sales document that must ultimately persuade its targeted audience of creditors to vote in favour of its proposed rescue strategy. As with any sales pitch, it is not just about what you say but also how you say it. Subjects agreed that it was unlikely that a ‘dry’ or clinical plan would fly when considering a business in severe distress. Convincing the readership requires emphasising key points and not getting bogged down in technicalities. Uncertainty does mist much of the proposal, as a number of estimations and assumptions are required. In all, however, the document should confirm a ‘glimmer of hope’ and confidence while delivering its message, as one of the subjects expressed it. The ambience of the plan can influence the sentiment behind its approval and implementation.

In some cases the plan may fall into the public domain. Currently it is unsure whether or not the plan is a public document; however, if this is so, those drafting it must consider its public exposure and the repercussions thereof. The media and external stakeholders could gain access to the document, making it vulnerable to misinterpretation and scrutiny by public opinion. Though this would have no impact on the voting procedure, it could contribute to the business rescue legacy discussed earlier. Furthermore, the opportunity should be taken to stifle rumours and address areas of concern. Practitioners should be cognisant of these and control them through remedies such as press releases and contact channels.

Though subjects supported the notion that the plan could entice and bolster support, they also warned against painting a ‘blue sky’. Over-optimistic strategies were heavily criticised; these usually reduce confidence in the practitioner. The recommendation is then to propose a strategic but realistic message in order to protect the practitioner’s reputation.

### **Addressing Stakeholders**

The plan is statutorily obligated to address three affected parties: shareholders, creditors, and employees and the trade union representing them. The focus is

generally on creditors, yet the plan is expected to also detail how both employees and shareholders will be affected. Where employees are concerned, the plan usually offers little insight into their role in the future. Mention of how change management and uncertainty will be dealt with can be greatly beneficial. Understanding the staff complement is key to the implementation of the strategy.

It is unlikely that the volume and variety of creditors faced in a business rescue will allow a tailored response to the concerns of each in the plan. Creditors should not expect intricate details to be discussed unless they are deemed crucial to the overall strategy. However, subjects recommended that a dispute-resolution mechanism should be in place, as well as clarification on claims for all the creditors involved. Consultation with creditors before publication is pertinent to attaining their insight and input, which would also lead to greater support.

A contentious issue was reported over whether the plan should accommodate an extended readership. Other than the three affected parties, the practitioner should consider additional stakeholders. All regulatory parties must be informed of proceedings (Republic of South Africa, 2008:s140(1)a); however, subjects questioned whether they should be addressed in the plan. Research data was unclear as to whether or not an extended readership should be considered, but subjects warned that this might distract from the purpose of the document. It was advised that stakeholders who play an integral role in the turnaround strategy should be mentioned. However, additional research is required to establish whether neglecting to mention external stakeholders, such as lobby groups, would have any detrimental effect on the rescue.

### **Structuring the Plan**

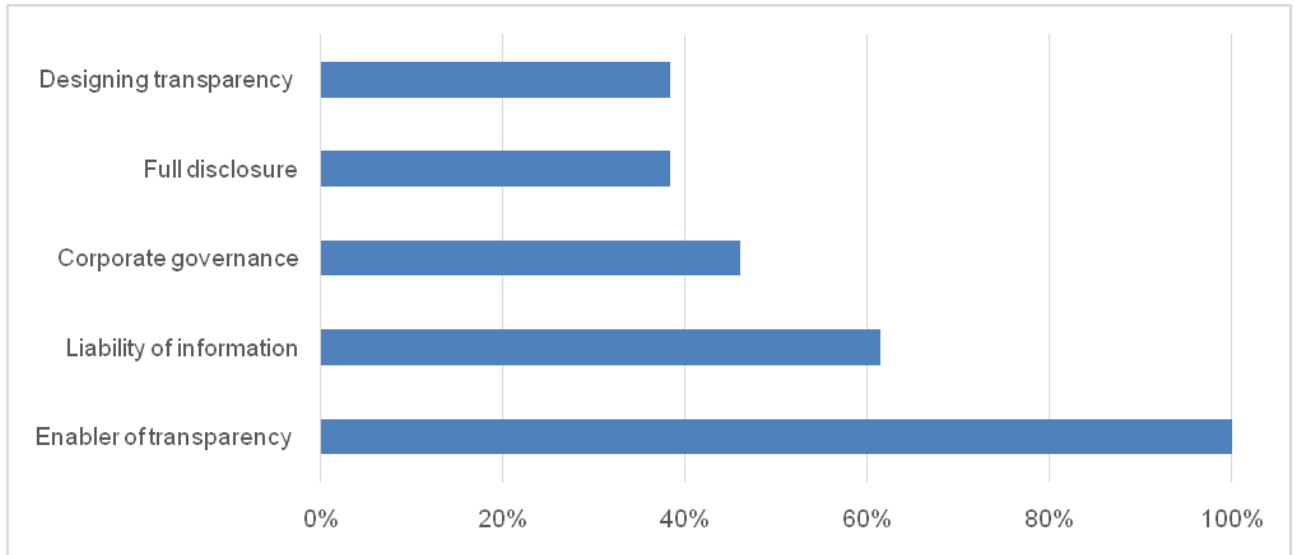
How the plan is structured was of concern to a number of subjects. The document is expected to be professionally indexed and easy to read. Minutes of meetings should be attached, with all the relevant documentation. Detailed annexures are useful and allow for in-depth investigation. In some cases major institutions would be required to scrutinise the plan. Configuring sections in line with the organisational structure of large creditors could be helpful, as it would reduce the time taken to review the plan.



### 7.2.1.3 *Business rescue plan as enabler of transparency*

All the subjects agreed that the plan is a tool for transparency and should disclose all the relevant information required for decision-making purposes. This entails detailing events leading up to the publication (history) of the plan and events planned to unfold after its approval. Information specified in the plan is provided to creditors and other interested parties to assist them to properly assess the plan. Under s150(2) of the Act (2008), mandatory information must accompany the proposal, supported by appropriate mechanisms for obtaining it. The plan should satisfy the key objective of transparency and assist in ensuring creditor confidence in proceedings. A fair and balanced stance should always be maintained when confidentiality concerns arise from access to potentially sensitive financial and operational information relating to the debtor, even though that information may ultimately enter the public domain through approval or confirmation of the plan by a court. Figure 9 indicates the subjects' degree of support for each element.

**Figure 9** Relative support by subjects for elements that enable transparency



#### **Full Disclosure**

On a practical level, the plan cannot be expected to divulge unrelated information to affected parties. With a few exceptions, the majority of the subjects agreed that the practitioner had the discretion to withhold information where deemed appropriate. The capabilities of the practitioner are believed to be sufficient to make such judgements.

Affected parties should request specific information prior to publication to assist the practitioner. Where information deemed relevant has been withheld, mention should be made of this, with substantiation and associated reasoning. It was clear from data obtained through the interviews that section 150(2) of the Act would not automatically result in full disclosure and that in the majority of cases the plan would need to extend further to obtain compliance in terms of disclosure.

Where the plan enters the public domain, it may be less prone to discuss intricate details that might be considered detrimental to the rehabilitation of the company if disclosed. Other aspects such as reputational damage and the business rescue legacy might then be considered. However, its objective as a decision-making document is obstructed without adequate information. Where creditors and other parties do not believe that the disclosed information is convincing, their views should be acknowledged, allowing the plan as proposed to be amended or in the course of the confirmation process.

### **Liability of Information**

The practitioner is obligated to conclude the plan with a certificate confirming that the information contained in the plan is accurate, complete and up to date (Republic of South Africa, 2008:s150(4)). Furthermore, estimates should be made in good faith on the basis of factual information and assumptions. Subjects reiterated that the practitioner remains ultimately responsible for the disclosure of information. The practitioner on appointment should be comfortable with facilitating a thorough, independent assessment of the business activities in order to engineer a plan accurate enough for affected parties to make a decision.

The plan is also expected to expose any fraudulent activities or misappropriation by directors, or at least acknowledge that the matter is being dealt with. A growing concern of the subjects was that business rescue is being used to safeguard directors. This issue should be addressed, to avoid frustrating creditors and to maintain confidence in proceedings.

## **Corporate Governance**

Synonymous with distressed ventures is a shortfall in corporate governance. Subjects were indecisive as to whether it played a role in the plan, indicating that though it was an important issue it might distract from the intended focal points. The view was that corporate governance should remain a 'golden thread' throughout the plan. But basic recovery methods should be the biggest concern, suggesting that "when you've saved them from drowning, then start giving them vitamins".

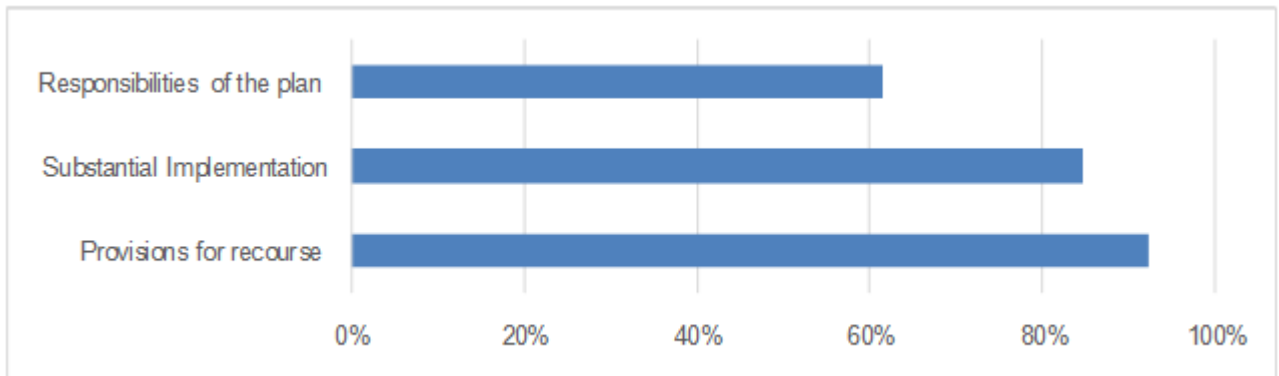
## **Designing for Transparency**

The structure and language of the plan will affect transparency. Obscuring details with legal jargon or concealing them with heavily laden addenda will not suffice. The nature of the document must recognise and accommodate a dynamic audience which is required to yield a decision within a short period of time. Communication channels and timelines as to when and how information will be distributed on the plan's progress should be mentioned. The design of the plan is important to ensure information is effectively disclosed and understood.

### **7.2.1.4** *Business rescue plan as contractual obligation*

When the plan has been approved by the requisite majority of creditors and equity holders, it becomes a binding document on all the affected parties, including the practitioner. The contractual make-up of the plan offers a number of powerful remedies for the practitioner and the affected parties. The general sentiment among subjects was that this feature is not being utilised nearly as much as it should be, and that the contractual aspects of the plan are being neglected. The dynamic nature of the plan affords it the ability to legally bind key resources and secure ongoing support and responsibilities from individuals. Utilised correctly, contractual clauses can enforce areas of the turnaround strategy, thus giving it the necessary muscle to achieve completion. Figure 10 depicts the elements relevant for inclusion as contract elements.

**Figure 10 Relative support by subjects for elements that affirm the contractual obligations of the plan**



### **Provisions for Recourse**

In the majority of cases the plan should be based on a number of reasonable assumptions. Detailing the assumptions, as well as the risks posed by them, offers insight into the feasibility of the plan and better mitigates liability concerns. The volatile nature of turnaround often requires alternative scenarios to be projected, against the possibility that key assumptions could fail. A prominent expectation that was identified was that scenario planning (options) was a definite requirement element in the plan. Contractually engineering a plan to adapt to various scenarios extends its effectiveness and possibility of success. It allows recourse, without defaulting on the primary strategy and consequently having to develop a new business rescue plan. Subjects indicated that where recourse beyond the alternative scenarios was required, the plan should then elaborate on procedures to be followed, such as renewed creditor meetings.

### **Substantial Implementation**

Another contractual aspect of the plan is to offer measurable milestones/objectives to be achieved, in order to facilitate ongoing communication and monitoring. Subjects stressed the need for performance indicators to be defined and communicated. Time-based reports, such as those requested by the regulator, should be mentioned, in addition to milestones linked to outputs such as payments. Components interlinking the feasibility study with the performance indicators could offer a grounded perspective as to whether or not the viability of the business still remains. Implementation should involve a 'gated' process.

The final objective that should be defined is substantial implementation. Subjects reiterated that this remains an elusive term used by practitioners, and should be explicitly defined. Scorecards also appear to be under-utilised in rescue plans. Clarifying ‘substantial implementation’ can reduce the liability on the practitioner. It also reduces the possibility of abuse. The practitioner’s remuneration is directly linked to the duration of business rescue, offering an incentive to continue the process for longer than it should last.

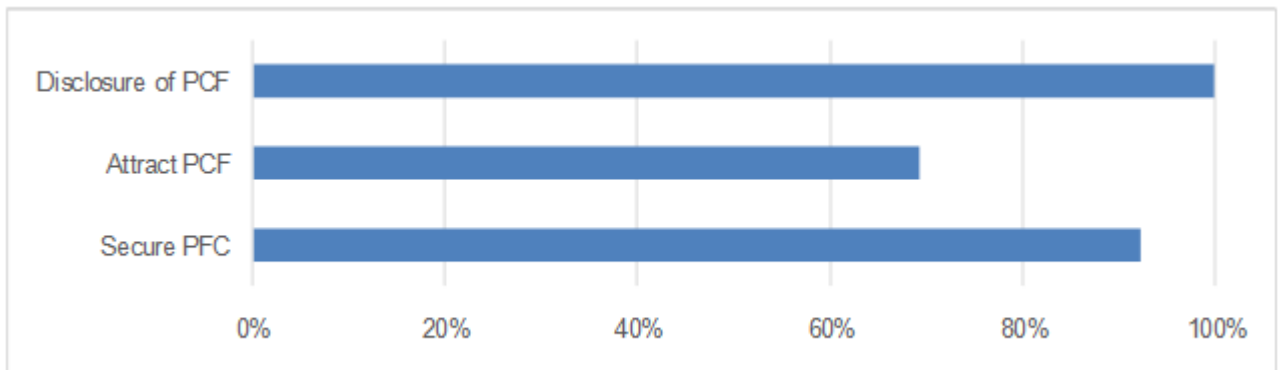
### **Responsibilities to the Plan**

Ultimately the plan requires the collaboration of parties to achieve its objective. The practitioner often plays only a facilitation role in its implementation. Key suppliers, partners and employees are often critical success factors in the proposed strategy. Using the plan for its contractual abilities can be of significant value. Subjects encouraged the plan to secure the support of key players, employing contractual subordination, clarifying relationships and detailing penalties for breach of contract. Where the plan is obligated to clarify any infringements on an affected party’s rights, the party’s responsibilities should accompany it.

#### **7.2.1.5** *Attract and secure post commencement funding*

In accordance with the research into PCF by Pretorius and Du Preez (2013), the consensus from subjects was that the plan is expected to include, in detail, all financing required from filing (day one of business rescue) until the closure of rescue proceedings. The plan, however, can detail either the working of a prearranged PFC deal or the attraction of PFC financing. The two alternatives are vastly different, as they influence the entire agenda of the document.

**Figure 11 Relative support by subjects for elements of post commencement finance**



### **Locking in Secured PFC (Pre-vote)**

The plan is geared towards the presentation, and approval by creditors, of 'Post Plan' or Exit Finance (du Preez, 2012:93). Where PFC has been secured pre-publication, it would be focused on gaining creditor support. The investor in such a case would form part of the plan's development and there would be no need to pitch an investor's agenda. It should rather be designed to sway creditor support for the PCF deal. Subjects expected such a proposal to contain detail workings of the deal, including the return on investment.

### **Attracting New PCF (Post-vote)**

In the adverse scenario, where PCF has not been secured prior to the publication of the plan, the plan is expected to attract and secure a PFC deal. Subjects indicated that this would be the less favoured approach, as it requires a far more compelling argument to succeed. Confirmation should ensure the creditors' blessing for a financing tender, and be testament to their ongoing support. Data obtained also suggested that investor confidence relied heavily on proving long-term sustainability and detailed cash movements. Research (Pretorius & Du Preez, 2013) has identified a number of key expectations from potential financiers: the viability of the business, underlying business model, independent verification of data, sound and sustainable rescue plan, proper pre-assessment of the business and a thorough analysis of the rescue and liquidation scenario.

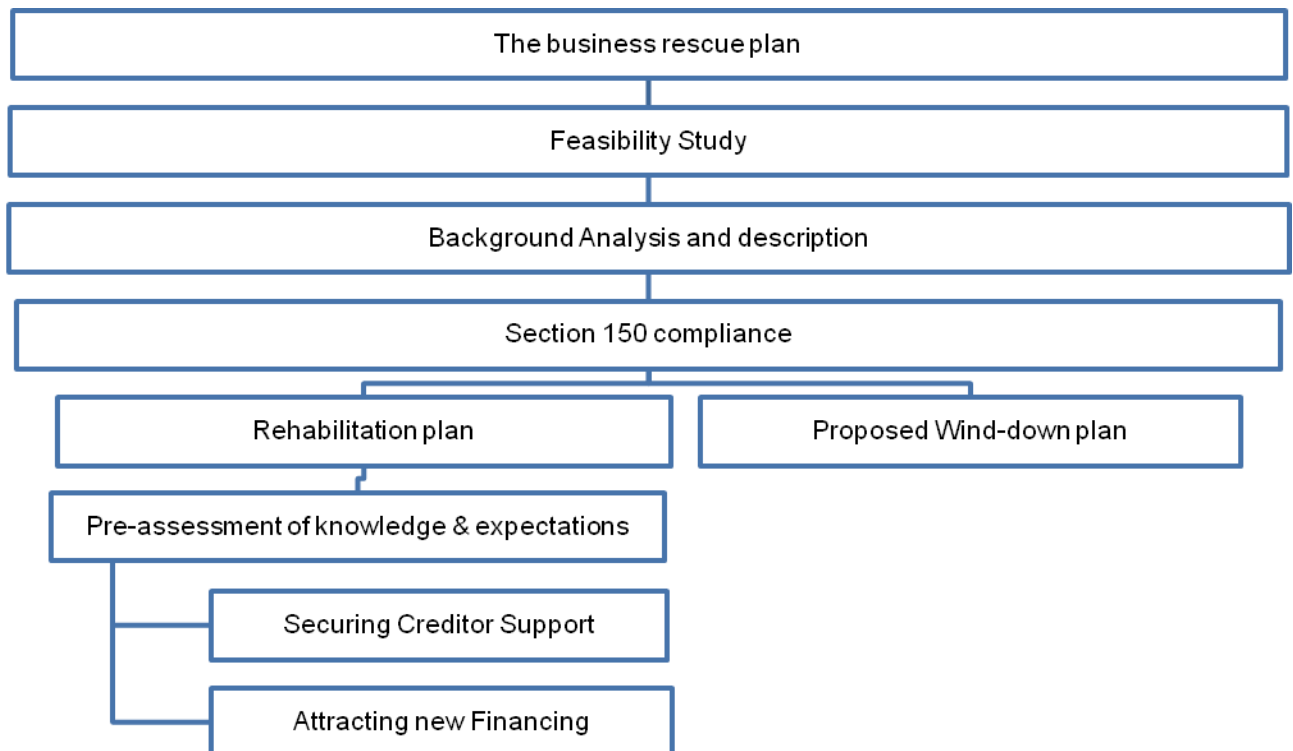
## **Disclosure of PCF**

The disclosure of PCF deals was soundly supported by the majority of subjects, as indicated in Figure 11 , emphasising that information pertaining to any PCF deal is critical to the assent to the plan. Supporting arguments held that any PCF deal has the ability to affect the feasibility and fairness attributed to the proposal. The impact of PCF transactions should be clear and the plan should detail the benefits or risks they pose to the rescue process. Should the plan seek approval prior to the conclusion of any PFC deal, it should stipulate conditions for the approval of any deal, or request that any PFC be brought back to a creditors' meeting for ratification.

## **7.3 CONCLUSION**

Analyses of opposing expectations by subjects revealed that many of these were associated with what the plan aimed to achieve. Engineering the plan correctly is crucial to firmly aligning the correct expectations with a business rescue situation. Based on the expectations determined by subjects, detailed above, Figure 12 offers a perspective on how to approach and construct the plan to better serve the expectations of the required audience.

**Figure 12 Approaching the plan**



Determining the feasibility and viability of the entity is required before anything else. This step, though premature, constitutes the first phase of the plan. Following the feasibility analysis, the practitioner is tasked with the investigation of the affairs of the company (Republic of South Africa, 2008:s141 ), and so the background description is compiled. At this stage the bulk of information has been gathered and elements required in section 150(2) can be fulfilled. The result of the investigation thus far should point to a rehabilitation plan or a proposed wind-down, the two being distinctly different. If a proposed wind-down is chosen, the plan in its current form should suffice to meet the expectations of the affected parties. In the case of a rehabilitation plan, a pre-assessment of the affected parties' knowledge and resources should be determined in order to facilitate effective communication. If PCF is required, the plan is then fractured again in order to either seek funding or the support of the creditors. The expectations pertaining to the rehabilitation plan remain the basis of this study.

The study was able to confirm that there is indeed a gap between the mandatory elements prescribed in section 150(2) and the provision of sufficient information to



enable stakeholders to make a decision, as required by section 150(1) of the act. Opinions of the expert subjects confirmed that accepted international principles are applicable to the business rescue plan (Pretorius & Rosslyn-Smith, 2014 forthcoming). The elements formulated in this study from stakeholder expectations of the business rescue plan offer insight and clarity in terms of what is expected of the plan. Where subjects held opposing views, consenting elements were engineered to better grasp the concept.

### **7.3.1 Contribution to Management**

This research contributes to the management body of knowledge. Figure 6 in this study serves as a framework to guide business rescue plan development. It combines international guidelines with local expectations to formulate guidelines for compiling the plan. Affected persons, especially creditors, should benefit from this framework, as would practitioners in training.

### **7.3.2 Limits of the Study and Suggested Future Research**

The study was constrained by limited literature on the topic of business rescue, in particular on the rescue plan. At the time of the research, business rescue had only operated for approximately thirty months. These factors could possibly have limited the exploration and interpretation of the findings. Though subjects were requested to offer objective counsel, the risk of bias in view of their discipline or social desirability remains plausible (Saunders et al., 2009:326). The limitations and pitfalls of individual depth interviews recognised by Marshall and Rossman (2006:102) and by Ritchie and Lewis (2003:138) were acknowledged, and mitigated as far as possible. The researchers acknowledge that the number of subjects interviewed may hinder the study, even though data saturation was reached after eight interviews. Finally, the study relied heavily on the researchers' own interpretation, and therefore this is accepted as a plausible limitation.

Business rescue remains relatively untouched in terms of academic literature and a number of its aspects require extensive investigation. The findings of this study have

uncovered a number of opportunities for further research, in particular the direct impact of omitting expectations. Additionally, exploration into best practices in terms of the structure and presentation of information should be considered.

## 7.4 REFERENCES

Balgobin, R. & Pandit, N. 2001. Stages in the turnaround process: The case of IBM UK. *European Management Journal*, 19(3):301-316.

Blumberg, B., Cooper, D. R. & Schindler, P. S. 2008. *Business research methods*, New York, NY, McGraw-Hill Higher Education

Cooper, D. R. & Schindler, P. S. 2008. *Business research methods*, New York, NY, McGraw-Hill Higher Education.

Dolan, P. F. 1983. A four-phased rescue plan for today's troubled companies. *Journal of Business Strategy*, 4(1):22-30.

Du Preez, W. 2012. The status of post-commencement finance for business rescue in South Africa. Johannesburg: Gordon Institute of Business Science.

Du Toit, L. 2012. *Tax implications for business rescues in South African law*. University of Pretoria.

Fossey, E., Harvey, C., McDermott, F. & Davidson, L. 2002. Understanding and evaluating qualitative research\*. *Australian and New Zealand journal of psychiatry*, 36(6):717-732.

Guest, G. 2006. How many interviews are enough?: An experiment with data saturation and variability. *Field Methods*, 18(1):59-82.

INSOL International 2000. *Statement of principles for a global approach to multi-creditor workouts*, London, INSOL International.

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*, 10:417-435.

Kow, G. 2004. Turning around business performance: Part 1. *Journal of Change Management*, 4(3):229-246.

Le Roux, I. & Duncan, K. 2013. The naked truth: Creditor understanding of business rescue: A small business perspective. *Southern African Journal of Entrepreneurship and Small Business Management*, 6(167):57-74.

Leedy, P. D. & Ormrod, J. E. 2001. *Practical research: Planning and design. 7th edition*, Upper Saddle River, NJ, Merrill Prentice Hall.

Loubser, A. 2010. Some comparative aspects of corporate rescue in South African company law. Pretoria: University of South Africa.

Marshall, C. & Rossman, G. B. 2006. *Designing qualitative research*, Thousand Oaks, CA, Sage.

Pretorius, M. 2013a. A competency framework for the business rescue practitioner profession. *Acta Commercii*

Pretorius, M. 2013b. Tasks and activities of the business rescue practitioner: A strategy as practice approach. *South African Business Review*, 17(4):1-26.

Pretorius, M. & Du Preez, W. 2013. Constraints on decision making regarding post-commencement finance in business rescue. *Southern African Journal of Entrepreneurship and Small Business Management*, 6:168-191.

Pretorius, M. & Holtzhauzen, G. T. D. 2008. Critical variables of venture turnarounds: A liabilities approach. *Southern African Business Review*, 12(2):87-107.

Pretorius, M. & Rosslyn-Smith, W. 2014 forthcoming. Expectations for a business rescue plan: International directives for chapter 6 implementation. *Southern African Business Review*.

Republic of South Africa 2008. Companies Act 71 of 2008. *Government Gazette No 32121 Volume 421*. Pretoria: Government Printer

Ritchie, J. & Lewis, J. 2003. *Qualitative research practice: A guide for social science students and researchers*, Thousand Oaks, CA, Sage.

Saunders, M. & Lewis, P. 2012. *Doing research in business and management*, Harlow, Pearson Education.

Saunders, M., Lewis, P. & Thornhill, A. 2009. *Research methods for business students*, London, Financial Times/Prentice Hall.

United Nations. 2005. Legislative guide on insolvency law. Available from: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](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. Available from: [http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial\\_Perspective\\_ebook-E.pdf](http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf) [Accessed 15 June 2013].

Westbrook, J. L. 2010. *A global view of business insolvency systems*, Washington, Martinus Nijhoff.

World Bank. 2005. World bank principles for effective creditor rights and insolvency systems. [worldbank.org](http://www.worldbank.org) [Online]. Available from: <http://www.worldbank.org/ifa/IPG%20-%20Revised%20Pples%20FINAL%20%5B21%20Dec%202005%5D.pdf> [Accessed 21 December 2013].

Yin, R. K. 2003. *Case study research: Design and methods*, Thousand Oaks, CA, Sage.

## CHAPTER 4

CHAPTER 1:	Introduction	2
	Literature Review on Reorganisation	8
CHAPTER 2:	Paper 1	20
CHAPTER 3:	Paper 2	62
CHAPTER 4:	Summary and Conclusion	99
CHAPTER 5	List of References	103

## 8 SUMMARY AND CONCLUSION

The purpose of this chapter is to summarise the outcome of this study in the form of a summary of findings. The preceding papers have detailed conclusions summarising the outcomes of the research in each case. The following summary beings perspective to the entire study and discusses how the problem statement, research questions and propositions have been addressed. A brief overview of the finds of each paper is mentioned.

International insolvency laws are evolving rapidly as the benefits of effective reorganisational processes become more and more evident. Modern rescue regimes have taken decades to develop and are by no means close to perfected. The configuration of business rescue has further modernised rehabilitation law. The new regime has deployed new techniques while being grounded by older systems. Business rescue is a new discipline and faces numerous challenges. However, the system lacks the formidable wisdom to gain real traction. Until then external regimes provide a pool of knowledge based on trial and tested remedies to explore.

Section 150 was proposed as a means of ensuring a business rescue plan is permissible and sufficient for the purposes of attaining an out-of-court decision on the proceedings. The expectations of similar regimes clearly indicate a modification of s150 to better serve its primary mandate. This study has shown that to further enhance the effectiveness of the plan it must extend itself beyond the parameters initially perceived to be adequate in the Act.

We conclude that the best proposal considers the five international principles, namely to serve as a tool for feasibility declaration, Act as a medium of communication, be an enabler of transparency, serve as a contractual obligation and finally to assist decision making for attracting post commencement finance. These principles serve as critical elements for decision making in business rescue plans. The pursuit of compliance maximisation by a reorganising debtor is better achieved by adopting the principles and applying them strategically with the best intentions.



For creditors the incentive to ensure maximisation of their claim is pursued by in-depth perusal of the plan. Though practitioners may succeed in confirmation of a poorly constructed plan it presents a pragmatic flaw to warrant such risk. Asking the right questions is part of achieving transparency and assurance that efforts to exploit the value of the firm have been recognised. Communication and rich information flow reduces the risk that creditors are required to bear. Evading threshold questions regarding critical success factors is ludicrous and unnecessary, enveloping the concept that sufficient information is reached only after enough information has been disclosed to make a fair and informed judgment upon.

It is obvious the plan pertains to a broader audience than phased in the Act. The prudent investment required by distressed companies cannot disregard the implications of the plan in finding or securing post-commencement funding. Success factors stretch beyond the predefined issues of compliance and are the ultimate objective of proceedings.

Stakeholder's expectations correspond to the international principles yet deviate substantially from current practices, indicating a shortfall between author and reader. The situation infers that more is needed by all parties to better meet each other's demands. Instituting an effective and efficient rehabilitation process requires inclusion of stakeholder expectations. Failure to do so will evidently call for greater involvement by the courts, escalating expenses and prolonging proceedings.

The plan resides as an astute and complex document composed under strict deadlines and directed at a vast audience. The process of compiling the document requires a strategic understanding about events to unfold. Each plan serves its own agenda and cannot be critiqued by a preformatted template. The rescue process requires flexibility for formulating a plan and stifling the process or content should be avoided. The plan can however follow a predefined path that can assist in correlating the expectations of stakeholders with the realities of a feasible turnaround solution.

There are circumstances that will allow exclusion of many of the elements proposed in the findings. The event of which should not inhibit reluctant readers from finding ample reasoning as to why they have been omitted. Skilled practitioners should be

adequately equipped to defend the nature and structure of their plan. Proceedings are hinge on consultative practises that results in a plan that can effectively reorganise a company.

## CHAPTER 5

CHAPTER 1:	Introduction	2
	Literature Review on Reorganisation	8
CHAPTER 2:	Paper 1	20
CHAPTER 3:	Paper 2	62
CHAPTER 4:	Summary and Conclusion	99
CHAPTER 5	List of References	103

## 9 LIST OF REFERENCES

Please note the following list of references pertains to chapters 1 and 4. The papers in this dissertation are concluded by their relevant references.

Anderson, J. C. & Wright, P. G. 1982. Liquidating plans of reorganization. *Am. Bankr. LJ*, 56:29.

Barliant, R., Karcazes, D. G. & Sherry, A. M. 2004. From free-fall to free-for-all: The rise of pre-packaged asbestos bankruptcies. *Am. Bankr. Inst. L. Rev.*, 12:441-471.

Devaney, N. 2007. Step in the wrong direction-UK and us regulators must turn their attention to the rise of pre-packaged insolvencies, a. *Int'l Fin. L. Rev.*, 26:26-27.

Finch, V. 2006. Pre-packaged administrations: Bargains in the shadow of insolvency or shadowy bargains? *Journal of business law*, 2006(Sep):568-588.

Franks, J. & Sussman, O. 2005. Financial innovations and corporate bankruptcy. *Journal of Financial Intermediation*, 14(3):283-317.

Garrido, J. M. 2012. *Out-of-court debt restructuring*, World Bank.

Hansen, B. 2000. The people's welfare and the origins of corporate reorganization: The wabash receivership reconsidered. *Business History Review*, 74(3):377-406.

Holtzhausen, G. 2010. Modeling business turnaround strategies using verifier determinants from early warning signs theory. Pretoria: University of Pretoria.

Klee, K. N. 1995. Adjusting chapter 11: Fine tuning the plan process. *Am. Bankr. LJ*, 69:551-572.

Kloppers, P. 1999. Judicial management -a corporate rescue mechanism in need of reform? *Stellenbosch Law Review*, 3:417-435.

Loubser, A. 2010. Some comparative aspects of corporate rescue in South African company law. Pretoria: University of South Africa.

Martin, N. 2003. Common-law bankruptcy systems: Similarities and differences. *Am. Bankr. Inst. L. Rev.*, 11:367-581.

Martin, N. 2005. The role of history and culture in developing bankruptcy and insolvency systems: The perils of legal transplantation. *Boston College International and Comparative Law Review*, 28(1):1-76.

Meade, E. S. 1901. The reorganization of railroads. *Annals of the American Academy of Political and Social Science*, 17:25-63.

Nieman, G. & Pretorius, M. 2004. *Managing growth: A guide for entrepreneurs*, Juta Academic.

Republic of South Africa 2008. Companies Act 71 of 2008. *Government Gazette No 32121 Volume 421*. Pretoria: Government Printer

Rosslyn-Smith, W. & Pretorius, M. 2012. Current condition of business rescue plans. (Unpublished Research): University of Pretoria.

Salerno, T. J. & Hansen, C. D. 1991. A prepackaged bankruptcy strategy. *Journal of Business Strategy*, 12(1):36-41.

Smits, A. J. 1999. Corporate administration: A proposed model. *De Jure* 80-107.

United Nations Commission on International Trade Law. 2005. Legislative guide on insolvency law. Available from:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html)

[Accessed 23 November 2013].

Westbrook, J. L. 2010. *A global view of business insolvency systems*, Brill.

Wood, P. R. 2007. *Principles of international insolvency*, Sweet & Maxwell.

World Bank. 2005. World bank principles for effective creditor rights and insolvency systems. *worldbank.org* [Online]. Available from: <http://www.worldbank.org/ifa/IPG%20-%20Revised%20Pples%20FINAL%20%5B21%20Dec%202005%5D.pdf> [Accessed 21 December 2013].