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Business Recovery Procedures in South Africa, Namibia and Botswana and the Possible Introduction of Unified Procedures for the Region

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Acknowledgement

INSOL International is very pleased to present the 18th Technical Paper under its Technical Papers Series titled "Business Recovery Procedures in South Africa, Namibia and Botswana and the Possible Introduction of Unified Procedures for the Region". This paper was written by Eric Levenstein of Werksmans Inc.

The implementation of the Companies Act of 2008 has been delayed several times but according to the recent news reports the Department of Trade and Industry (DTI) has recommended 1 May to the Presidency as the implementation date for the Companies Act of 2008.

Once the new legislation comes into effect, it will introduce a series of laws that will provide modern business rescue mechanisms in keeping with the worldwide trend towards business rescue instead of liquidation. The replacement of judicial management by new business rescue legislation and regulations introduces a new future for financially distressed but economically viable companies in South Africa where turnarounds during informal workouts have failed or have not been deemed as viable options. Employees and trade unions will also be allowed to bring business rescue proceedings against an organisation and prevent it from being placed in liquidation.

This paper will focus on the new business rescue regime to be introduced by Chapter 6 of the new Companies Act, 2008 due to become operational in South Africa in the immediate future. It will also examine the current legal restructuring and business rescue provisions in place in South Africa, Namibia and Botswana with a specific focus on informal compromises / restructurings, judicial management, and formal offers of compromises in terms of the various Companies Acts applicable in these jurisdictions.

The paper will further focus on the possibility of establishing a regional forum for business rescue procedures to be applicable in the relevant jurisdictions and whether there is a possibility that these procedures can be implemented in other neighbouring Southern African jurisdictions in the region.

INSOL International sincerely thanks Eric Levenstein for writing this very informative paper on this important regional development in Southern Africa.

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Business Recovery Procedures in South Africa, Namibia and Botswana and the Possible Introduction of Unified Procedures for the Region

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Introduction

This paper will focus on the current legal restructuring and business rescue provisions that are in force in South Africa, Namibia and Botswana with a specific focus on informal and formal compromises / restructurings, judicial management and business rescue procedures in terms of the various Companies Acts applicable in these jurisdictions.

In particular, the paper will focus on the new Business Rescue regime to be introduced by Chapter 6 of the new South African Companies Act, 2008 ("the new Companies Act") due to become operational in South Africa in May 2011. The new Companies Act was promulgated in April 2009 and fundamentally re-writes South African Company law and consequently will have far reaching effects for South African companies.

The introduction of licensed Business Rescue Practitioners in South Africa to conduct and administer Business Rescue, will be dealt with, and in particular, their roles and duties, their interaction with directors of companies in financial distress, the manner in which they will deal with post commencement finance, the suspension and cancellation of contracts and the filing of a Business Rescue plan.

The paper will further focus on the possibility of the establishment of a regional forum for Business Rescue procedures and whether there is a possibility that these procedures can be implemented in other neighbouring Southern African jurisdictions in the region.

The discussion will explore the perceptions of the banking and labour sectors in South Africa to the introduction of Business Rescue.

South Africa

The Companies Act, 1973 ("old Companies Act") is currently applicable in respect of the conduct of companies in South Africa. The new Companies Act has been signed into law by the President of South Africa but is not yet operational. It is expected that the new Companies Act will become operational on 1 May 2011. A Companies Law Amendment Bill (July 2010) has been published which amends certain provisions of the new Companies Act and in particular Chapter 6.

South Africa has for many years been in dire need of some form of Business Rescue in respect of companies which find themselves in a situation of financial distress. As will be dealt with below, the new Business Rescue regime introduced by the new Companies Act will, for the first time, introduce a formal court-driven form of reorganisation / restructuring for companies which find themselves on the brink of insolvency.

What follows below is an exposé of the current structures in place in South Africa in respect of opportunities for reorganisations of companies who are trading in insolvent circumstances and who require urgent rationalisation, restructuring of debt and injection of capital.

1. Informal compromises / out of court restructurings

1.1 When a company finds itself in financial distress, it would often approach its creditors, on an informal out of court compromise basis, to possibly consider a moratorium of claims against the company and with the view to restructuring the company in order to ensure maximisation

♦ The views expressed in this article are the views of the author and not of INSOL International, London.

of returns to creditors in the longer term. In the moratorium scenario there must be 100% agreement by all creditors to the compromise arrangement. Unfortunately, in the voluntary informal compromise scenario, there is nothing to prevent any one creditor from applying to court to either enforce a claim against the company or alternatively to enforce a liquidation / winding-up / bankruptcy of such company.

Generally speaking, once a company approaches its creditors to attempt such informal reorganisation, such an approach would deem the company to be unable to pay its debts to creditors in terms of section 345 of the old Companies Act. Any creditor could then approach the High Court in the particular jurisdiction in which the company trades, for an order for such company's winding-up on the basis that it can prove to the satisfaction of the court that the company is unable to pay its debts. In making such a determination, a court can have cognisance of both contingent and prospective liabilities of the company.

In any moratorium discussions, agreement would have to be reached by all classes of creditors as to the ranking of creditors' claims and the recognition of creditors' security. The moratorium discussions would normally result in the conclusion of a moratorium agreement consented to by all creditors and the company. The process is driven by the willingness and level of co-operation as between the company and its creditors.

2. Formal compromises

A scheme of arrangement is currently regulated in terms of section 311 of the old Companies Act. Broadly speaking, a scheme of arrangement denotes an arrangement between a company and its members, and / or a company and its creditors, sanctioned by the High Court of South Africa, with the effect that the respective rights and obligations of the company and its members and / or creditors are affected.

The application of section 311 is very wide, and comprises schemes of arrangement of the widest character, provided that such schemes of arrangement are not contrary to the general law or ultra vires the company. A compromise or arrangement can be made between a company and its creditors (or any class of them), a company and its members (or any class of them), or a company and any combination of its creditors and members (or any class of them).

The key objective of a scheme of arrangement is to create a mechanism whereby a company can effectively negotiate with a multitude of creditors and / or members, and to judicially impose a contract between a company and its creditors and / or members, provided that the requirements of section 311 have been fulfilled.

2.1 The procedure under section 311 comprises the following -

- an application is made to court to summon meetings to consider the proposed scheme. The application can be brought by the company, member, creditor, liquidator or judicial manager of the company;

- meetings of the members and / or creditors (or any class of them) are convened, which must be summoned as directed by the court order and in the name of the chairman appointed by the court, and the notice for which contains an explanatory statement setting out the details and effect of the proposed compromise or arrangement;

- the meetings of members and / or creditors are conducted in accordance with the directions of the court. The scheme must be agreed to by a majority in number representing 75% in value of the creditors or class of creditors present and voting at the meeting, and / or a majority representing 75% of the votes of the members or class of members present and voting at the meeting. There is no minimum quorum or voting requirement;

- the liquidator submits a report to the court, if the scheme of arrangement relates to winding up or discharge from winding up of a company;

- a further application is then made to court to sanction the scheme, provided that –

- the directions of the court for convening the meetings and the requirements of section 311 have been complied with;

- the members and / or creditors acted bona fide when approving the scheme; and

- the scheme of arrangement is reasonable and fair and should be made binding on all members and / or creditors.

The afore mentioned criteria must also be considered in conjunction with the wording of section 311 of the old Companies Act, which requires that separate schemes be proposed in relation to each class of creditors or members. The effect of this provision is that, if creditors or members cannot be regarded as being of the same class, the consent of 75% of each class has to be obtained.

This process takes between three to five months depending, inter alia, on the complexity of the scheme.

Section 155 of the new Companies Act deals with a compromise between a company and its creditors. This section applies to a company irrespective of whether or not it is "financially distressed" unless it is engaged in Business Rescue proceedings (dealt with below).

The board of the company, or the liquidator of such company if it is being wound-up, may propose an arrangement or compromise of its financial obligations to all of its creditors. The proposal must contain all the information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal. What is envisaged here is a possible "pre-pack" (popular in foreign jurisdictions such as the USA) which is to be completed on an urgent basis in conjunction with the creditors of the company, shareholders, employees and directors of the company. The proposal must conclude with a certificate by an authorised director or prescribed officer, confirming that all factual information is accurate, complete and up-to-date and that all projections provided are estimates made in good faith.

Schemes have been used successfully in the past on numerous occasions to create a mechanism whereby companies have successfully negotiated with their creditors and / or shareholders.

The one factor which is difficult to predict is the attitude which the court will adopt. Different judges hold different views on schemes. If, for example, a minority shareholder chooses to object to the sanctioning of the scheme on the return day, the judge may postpone the matter or, in the extreme, even order that the scheme meeting be reconvened. The point is that it is often very difficult to anticipate how a judge will react or whether or not there will be antagonistic minorities who attempt to claim some form of redress from the courts. Generally, the court is loath to oppose the will of the majority of shareholders.

3. Judicial management

The closest South Africa has in the form of a process for Business Rescue, is Judicial Management. In terms of section 427 of the old Companies Act, where any company by reason of mismanagement or for any other cause is unable to pay its debts or is probably unable to meet its obligations and has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be able to pay its debts or to meet its obligations and become a successful concern, the court may, if it appears just and equitable, grant a judicial management order in respect of that company.

Such an application would in the ordinary course be brought by a creditor of the company. The judicial manager is obligated to assume the management of the company and recover and reduce into possession all of the assets of the company and to lay before certain meetings of creditors an account of the general state of affairs of the company, a statement of the reasons why the company is unable to pay its debts or is probably unable to meet its obligations or has not become or is prevented from becoming a successful concern. Additionally, the judicial manager must prepare a statement of assets and liabilities of the company, a complete list of creditors, particulars as to the source or sources from which

money has been or is to be raised for purposes of carrying on the business of the company and the considered opinion of the judicial manager as to the prospects of the company becoming a successful concern and of the removal of the facts or circumstances which prevent the company from becoming a successful concern.

In terms of such judicial management order, the judicial manager must assume the management of the company, conduct such management in such manner as he may deem most economical and most promotive of the interests of the members and creditors of the company, comply with any direction of the court made in the final judicial management order or any variation thereof. Additionally, the judicial manager must maintain and keep accounting records and financial statements, convene meetings of the members of the company and of the creditors of the company and provide all stakeholders with interim reports in regard to the assets and liabilities of the company, its debts and obligations as verified by the auditors of the company and all such information as may be necessary to enable creditors to become fully acquainted with the company's position as at the date of the end of the financial year or the end of the period covered by any such interim report or in the case of a private company as at a date six months after the end of its financial year.

The judicial manager, if at any time, is of the opinion that the continuation of the judicial management will not enable the company to become a successful concern, must apply to the court, after notification to members and creditors, for the cancellation of the relevant judicial management order and an issue of an order for the winding-up of the company.

The problem with judicial management in terms of the old Companies Act, is that there is no ability to prevent creditors from either enforcing claims against the company or alternatively launching proceedings (moratorium) for the winding-up of the company. Thus no automatic stay of proceedings would apply unless specifically authorised by the court. Consequently there is no cram down ability on dissenting creditors. In South African practice, judicial management is not favoured as a procedure in that, more often than not, the company will be placed into liquidation subsequent to the granting of the judicial management order.

4 Business Rescue - Chapter 6 of the new Companies Act 71 of 2008

Chapter 6 of the new Companies Act, which deals with Business Rescue and compromises with creditors, effectively replaces the existing judicial management provisions of the old Companies Act, with a modernised Business Rescue regime.

The Act introduces a new dimension to recovery and workout programs for financially distressed companies in South Africa and in particular, creates a new industry in the form of the Business Rescue Practitioner ("BRP")[1]. The BRP will be charged with overseeing the company during Business Rescue proceedings with the aim of achieving the rehabilitation of a company from a position of being financially distressed and which results in the company being ultimately rescued.

"Business Rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed[2] by providing for the temporary supervision of the company and of 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.

The Business Rescue process culminates in the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity. The Business Rescue plan's objective is to maximise the likelihood of the company continuing in existence on a solvent basis. In the event that this is not possible, the implementation of a Business Rescue plan ("BR plan") should result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

[1] In terms of the recently published Companies Law Amendment Act, provision is made for the "licensing" of BRPs by the Minister of Trade & Industry

[2] "Financially distressed" means that it appears reasonably unlikely that a company will be able to pay all of its debts as they fall due and payable within the immediately ensuing 6 months or it appears reasonably likely that a company will become insolvent in the immediately ensuing 6 months-section 128(1)(f).

Business Rescue proceedings are largely self-administered by the company under the independent supervision of the BRP. The entire process is also subject to court intervention by way of application by any "affected person" (i.e. creditor, shareholder, employee or trade union). Chapter 6 recognises the interests of these affected persons, and extensively provides for their participation in the development and approval of the BR plan.

In terms of the new legislation, any director that allows his company to carry on its business recklessly, or conducts his / herself in a manner which constitutes gross negligence, or acts in a manner with the intent to defraud any person or for any fraudulent purpose, might find him / herself personally liable on the basis that such conduct was reckless. Therefore it is incumbent upon any director of a company to ensure that as soon as he / she believes that the company is financially distressed (on the basis set out above), such director must immediately consider either filing for liquidation or Business Rescue in terms of the provisions of Chapter 6. Once a director is of the view that the company is trading in insolvent circumstances, such director is obligated to consider the passing of a resolution placing the company under supervision in terms of Business Rescue. Once a company has adopted a Business Rescue resolution, such company cannot adopt a resolution to begin liquidation proceedings until either the Business Rescue resolution has lapsed or Business Rescue proceedings have terminated. While under Business Rescue, each director of the company must attend to the requests of the BRP at all times and provide the BRP with any information about the company affairs as may reasonably be required. If, during the company's Business Rescue proceedings, the board, or one or more of the directors of the company, purport to take any action on behalf of the company that requires the approval of the BRP, that action will be void unless approved by the BRP[3]. In circumstances where any director behaves in an improper manner, the BRP may apply at any time during the Business Rescue proceedings to remove such director on the grounds that the director has failed to comply with his duties.

During Business Rescue proceedings, no legal proceedings (particularly those brought by creditors), including enforcement actions against the company or in relation to any property belonging to the company or lawfully in its possession, may be commenced with or continued with in any forum. During this process, the company may obtain financing and any such financing may be secured to the lender by utilising any assets of the company to the extent that they are not otherwise encumbered. Any post commencement finance provided by financial institutions would have preference in the order in which such loans were incurred over all unsecured claims against the company.

If Business Rescue proceedings are superseded by a liquidation order, the preference, in respect of post commencement financing, will remain in force, except to the extent of any claims arising out of the costs of liquidation.

A person may be appointed as a BRP only if such person is a member, in good standing, of a profession and who would not be disqualified for acting as a director of a company. A BRP would be further disqualified if he has a relationship with the company which would result in his integrity, impartiality or objectivity being compromised by such relationship. A BRP may be removed by court order, and upon the request of an affected person. The court may remove the BRP on grounds such as incompetence or failure to perform duties, failure to exercise a proper degree of care in the performance of the BRP's functions, engaging in illegal acts or conduct, the BRP no longer satisfies the qualification requirements, there is a conflict of interest or lack of independence on the part of the BRP or the BRP is incapacitated and unable to perform the functions of that office, and is unlikely to gain that capacity within a reasonable period of time.

The BRP's powers and duties during Business Rescue proceedings are comprehensive and challenging. The skill set of the BRP will be very different to that of the liquidator in the liquidation process. Whereas the liquidator is obligated to realise assets at value for creditors, the BRP is tasked with the obligation to consider whether or not the particular company can be rescued and trade out of its current financial predicament.

As soon as practicable after being appointed, the BRP must investigate the company's affairs, business, property and financial situation. After having done so, the BRP must consider

[3] This does equate, to a degree, to a "debtor in possession" scenario in the sense that previous management and directors remain involved by assisting the BRP in the administration of the company under Business Rescue.

whether there is any reasonable prospect of the company being rescued. If, at any time during Business Rescue proceedings, the BRP concludes that there is no reasonable prospect for the company to be rescued, the BRP must inform the court, the company and all affected persons as provided for in the Act and immediately apply to court for an order discontinuing Business Rescue proceedings and placing the company into liquidation. Likewise, if at any time during Business Rescue proceedings, the BRP concludes that there are no longer reasonable grounds to believe that the company is financially distressed, the BRP must immediately inform the court, the company and all affected persons. Again, the BRP is obligated to apply to court for an order terminating Business Rescue proceedings.

It is contemplated that in a situation where Business Rescue fails, and loss or damage is caused to any affected person (in particular creditors), the liquidator duly appointed in such company may very well institute action against such BRP personally to recover such loss or damage caused by a failure on the part of the BRP to properly exercise his duties in the business recovery process. If the standards of directors conduct have not been adhered to, the liquidator may very well consider actions for the recovery of loss or damage on this basis alone.

If the Business Rescue process concludes with an order placing the company in liquidation, any person who has acted as BRP during the Business Rescue process may not be appointed as liquidator of the company. The BRP is entitled to charge an amount to the company for his remuneration and expenses in accordance with the tariff. These tariffs are now prescribed in regulations published by the Minister and consist of hourly rates as well as possible contingency fee arrangements that can be agreed to as between the company and it's creditors. The BRP is furthermore entitled to propose an agreement with the company providing for further remuneration, in addition to that prescribed by tariff, and to be calculated on a basis of a contingency relating to the adoption of the BR plan or the attainment of any particular result in the Business Rescue proceedings. Such agreement must be approved by the holders of a majority of the creditors' voting interests as well as that of shareholders.

The main aim of Business Rescue is clearly the filing and approval of a BR plan which can be successfully implemented by the BRP. After consultation with creditors and other affected persons, and the management of the company, the BRP must prepare a BR plan for consideration and possible adoption at a meeting. During Business Rescue proceedings, a BRP may cancel or suspend entirely, partially or conditionally any provision of an agreement to which the company was a party, at the commencement of the Business Rescue period (other than a contract of employment). Should a BRP believe that a particular contract is prejudicial to the company and the successful implementation of a BRP plan, then he/she can apply to court to cancel such a contract. Any party to an agreement that has been suspended or cancelled may assert a claim for damages. This section is controversial in nature as this introduces a unilateral ability by the BRP to materially affect the rights of parties that have contracted with the company. The BRP can effectively elect to suspend contracts which, in his view, prejudice the company or affect the ability of the company to trade through the Business Rescue proceedings. Of course any decision to suspend a contract must be included in the proposed BR plan and would be placed before creditors for voting and approval. Any creditor detrimentally affected by a proposed suspension of its contract could always vote against the approval of the BR plan. Any application to court for the cancellation of a contract can be opposed by the counter party.

The new Companies Act prescribes the information that is reasonably required to be included in the proposed BR plan in order to assist affected persons in deciding whether or not to accept or reject the plan. The BR plan must be divided into 3 parts dealing with the Background, Proposals and Assumptions and Conditions which must be included in the plan.

Once the Business Rescue plan has been prepared, the BRP must conclude the plan with a certificate by him stating that any actual information provided appears to be accurate, complete and up to date and projections provided are estimates in good faith on the basis of factual information and assumptions as set out in the statement. The BRP will have to be very careful when filing this certificate. All information included in the proposed BR plan must be reasonably verified by the BRP to avoid possible comeback on the part of a liquidator if the plan fails and the company goes into liquidation. The BR plan must be published by the BRP within 25 business days after the date on which such BRP is appointed or such longer time as

may be allowed by the court, on application by the company or the holders of the majority of the creditors' voting interests.

The BRP must convene and preside over a meeting of creditors called for the purpose of considering the proposed BR plan within ten business days after the publication of that plan. At such meeting, the BRP must introduce the proposed BR plan for consideration by creditors and shareholders. The BRP must play an active role in advising and informing the meeting whether he believes that there is a reasonable prospect of the company being rescued. The BRP is obligated to allow employees' representatives (including trade union representatives) to address the meeting in respect of the proposed BR plan. At the meeting the BRP is to invite discussion and call for voting on any motions to amend the proposed BR plan or to adjourn the meeting in order to revise the plan for further consideration or alternatively to vote for preliminary approval of the plan. The proposed BR plan will be approved on a preliminary basis if it is supported by more than 75% of the creditors' voting interests that were voted; and if the votes included at least 50% of the independent creditors' voting interests. A proposed BR plan might therefore be rejected at such meeting or approved on a preliminary basis or possibly such BR plan might be approved and adopted as a final BR plan subject to satisfaction of any conditions on which that plan is contingent.

Once a BR plan has been finally adopted, it is binding on the company and on each of the creditors of the company and on any holder of the company's securities whether or not such creditor or such holder was present at the meeting, voted in favour of the adoption of the BR plan or in the case of creditors, had proven their claims against the company.

The company under the direction of the BRP, must take all necessary steps to attempt to satisfy any conditions on which the BR plan is contingent and implement the BR plan as adopted. When the BR plan has been substantially implemented, the BRP must file a notice of the substantial implementation of the BR plan. At that point, the company will be released from the status of being under "Business Rescue" and continue to trade in the ordinary course.

The real challenge for South African corporates, liquidators and corporate turnaround specialists will be the manner in which the new provisions will apply in practice. Whether the new BRPs will have the requisite skill set to implement effective BR plans remains to be seen. There will have to be a considerable shift in the mindset of creditors away from the destructive consequences of liquidation, with the incumbent sale of assets at "fire-sale" values, as opposed to saving companies in terms of a Business Rescue.

The courts will also need to embrace the new legislation by being open to the terms and proposals set out in the BR plan and will have to have an open minded approach to assist in the process and thereby save companies trading in financial distress.

Namibia

At present the Namibian government is in the process of introducing a new Companies Act 28 of 2004 ("the 2004 companies Act"), which will replace the South African based Companies Act of 1973 which is currently in use. The 2004 Companies Act and Regulations came into effect on 1 November 2010.

The 2004 Companies Act essentially retains the much criticised judicial management procedure (inherited from the old South African Companies Act) as the only existing rescue provision that may be instituted by way of a High Court application. An application for judicial management is based on the fact that a company by reason of mismanagement or for any other cause is unable to pay its debts or is probably unable to meet its obligations; that it has not become or is prevented from becoming a successful concern; and that there is a *reasonable probability* that, if placed under judicial management, it will be enabled to pay its debts or to meet its obligations and thus be in a position to trade as a successful concern. The Court may then, if it appears just and equitable, grant a judicial management order in respect of that company.

If the order is granted the control of the company passes to the Master and thereafter to the judicial manager. The judicial manager must compile a report on the financial position of the

company and on the prospects of the company becoming successful and submit it to meetings of creditors and members. The wishes of the creditors and members will be taken into account by the Court in the exercise of its discretion to grant a final judicial management order. Creditors may also decide on subordinating pre-filing debt to new capital (debt). If a final judicial management order is granted, the judicial manager assumes the management of the company and must apply the assets of the company with the object of restoring the company to a successful concern. The directors are therefore not left in possession of the company at all.

The judicial manager or any other interested party may apply to court for the cancellation of the judicial management order if it appears that the purposes of the order have been fulfilled and that the company is trading as a successful concern. If it appears that it is undesirable that the order should remain in force and that the company should be wound up, application can be brought for the cancellation of the judicial management order and the liquidation of the company.

A popular rescue method for an insolvent company in terms of the 1973 Companies Act is the (statutory) compromise or arrangement in terms of sections 311 and 312 of that Act. The popularity of this procedure is mainly due to certain income tax benefits and more specifically, to preserve the assessed losses available in the company. If the company ceases trading, the assessed loss is lost, while it can be set off against future income if the company is resuscitated before such cessation. The 2004 Companies Act retains this procedure in that section 317 provides that where any compromise is proposed between a company and its creditors or any class of them, the High Court may, on the application of the company or any creditor or member of the company or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager, order a meeting of the creditors or class of creditors, to be summoned in such manner as the court may direct.

If the compromise or arrangement is agreed to by a majority in number representing three-fourths in value of the creditors present and voting such compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors (also the recalcitrant minority) and also on the company or on the liquidator or on the judicial manager.

The requirements are therefore that there must be a compromise and that it must be between the company and its creditors. A compromise pre supposes a dispute regarding rights or the enforcement of rights. A requirement of the scheme is usually also that a pre-existing liquidation (or judicial management order) must be cancelled. With the 311-procedure the proposer usually tries to improve the insolvency of the company by agreeing to subordinate its debt in favour of later creditors, subject to the solvency of the company being restored. The Court then evaluates the efficacy of the subordination as well in exercising its discretion to cancel the liquidation or judicial management order. If cancelled, the company would be able to resume business. It appears that this type of arrangement will still be effective in terms of the 2004 Companies Act.

Within the sphere of Business Rescue the 2004 Companies Act has largely retained the judicial management system, which system has been met with criticism in South Africa. Unlike Namibia, South Africa has opted for an altogether new Business Rescue procedure to be introduced by its new Companies Act.

Bostwana

The Botswana Companies Act, 2003 provides for judicial management of companies in certain circumstances.

Whenever application would be made to the court for liquidation of any company on the ground that such company is unable to pay its debts, or that, by reason of its mismanagement or of its probable inability to meet its obligations or become a successful concern or for some other cause, it is just and equitable that the company should be wound up, and the court, upon consideration of the facts, is of the opinion that, notwithstanding any present inability of the company to meet its obligations, or the existence of any other fact or circumstance alleged in the application, there is a reasonable probability that if the company be placed under

judicial management, it will be enabled to meet such obligations and to remove the occasion for liquidation, the court is granted the option, in its discretion, provided it is just and equitable to do so, to postpone an order of liquidation and instead of granting a liquidation order, grant a judicial management order to be of force either for a period stated in the order or for an indefinite period.

A judicial management order may also be granted by the court in respect of any company on the application of any member or creditor if it appears to the court, that by reason of mismanagement or any other cause, it is desirable that the company should be placed under judicial management.

Before granting a judicial management order in terms of the above, the court may refer the case to the Master of the High Court in Botswana for a report on any circumstances which appear to him to justify the court in withholding a judicial management order or postponing consideration of such an order. The Master is then obligated to inspect the books and documents of the company and assess any information regarding the affairs of the company from any person who is or was an officer of the company or has presented the petition or made an affidavit in the proceedings. Before granting an order for judicial management the court may, in its discretion, declare that the affairs of the company ought to be investigated by an inspector appointed by the Registrar of the High Court. Any report furnished by the Master shall be provided to the company and to the applicant for the judicial management order.

The judicial manager is obligated immediately after his appointment to recover and reduce into his possession all the assets of the company and to undertake the management of the company. He is obligated to conduct such management in a manner which he may deem most economic and most conducive to the interests of the members and creditors.

If at any time the judicial manager is of the opinion that the continuance of the judicial management would not enable the company to meet its obligations and remove the need for judicial management or liquidation, he may apply to court for the cancellation of the judicial management order and the issue of a winding up order.

Subsequent to the judicial management order, and on the application of the judicial manager or any other interested person, if it appears to the court that the purpose of the judicial management order has been fulfilled, or that for any reason it is undesirable that such an order should remain in force, the court may cancel such an order and the judicial manager shall be divested of such management. In cancelling the judicial management order, the court shall give such directions as may be necessary to resume the management and control of the company by the directors. The directions may include the summoning of a general meeting of members for the election of new directors.

Like Namibia, Botswana does not have any further legislation allowing for Business Recovery processes at this stage.

The Southern African regional solution to business rescue

It appears that South Africa will be the leader in the region in respect of the introduction of Business Rescue procedures which have not existed formally in other Southern African regions. There is a sense that other Southern African countries will keep a close watch on the roll out of the new Business Rescue procedures in South Africa in order to establish whether or not it is a practical and workable solution to effective restructurings by way of a formal court process.

The South African Development Community ("SADC") was constituted by way of a declaration and Treaty signed by ten heads of state in government in Windhoek, Namibia on 17 August 1992. South Africa joined on 29 August 1994. Current membership of SADC stands at 15. Members, are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mocambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

The diversity of the member states creates difficulty in respect of a proposal for a Southern African regional solution for Business Rescue. SADC, by way of Treaty, has undertaken that a

wide range of activities be pursued jointly by the member states. The principle is that these activities are to be undertaken in pursuit of social and cultural objectives including harmonization of political and socio-economic policy in respect of member states.

SADC has always encouraged people of the region to take initiatives to develop strong economic ties and that all member states participate fully in the implementation of SADC projects.

There is clearly a need for a system to become operative in respect of Business Rescue. As stated above, judicial management (for example as applicable in Namibia and Botswana) does not appear to be a methodology which has been successfully employed to save companies. It is more often than not, a pre-cursor to liquidation. These processes are all court driven and take a lengthy period of time to complete. Whether or not a court grants an order for a moratorium or a stay of proceedings would be entirely at the discretion of the court when application is made.

South Africa has stepped forward with the introduction of Chapter 6 of the new Companies Act. The manner in which this is to roll forward has been met with some anxiety by labour unions, the financial and banking institutions as well as liquidators and lawyers practising in South Africa. Nevertheless, time will tell as to whether or not the business rescue system that is due to become effective through the new legislation that is due to come into force soon is practical and can be applied successfully to save companies.

If it is successful, there is no reason why the Business Rescue model should not be rolled out into the SADC region with the possible centre for Business Rescue being located in South Africa. This would further enable cross-border business recovery issues to be dealt with expeditiously as between trading partners such as Namibia, Botswana and South Africa. South Africa have, for a long period of time, recognised foreign trustees appearing in the South African courts in respect of dealing with assets located in South Africa. In respect of cross-border insolvency law in the South African legal system, it is necessary to distinguish between the current position under South African common law and the statutory position that will apply once the Cross-Border Insolvency Act comes into full effect. The Act was assented to on 8 December 2000 and came into effect on 28 November 2003.This Act adapts the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on Cross Border Insolvency, adopted in Vienna on 30 May 1997 and which is referred to as 'the UNCITRAL Model Law'. The Cross-Border Insolvency Act will not take full effect, however, until the Minister of Justice has designated the foreign states in respect of which the Act will apply[4].

The Cross-Border Insolvency Act, when it comes into force, is the international system for co-operation intended by the UNCITRAL Model Law. It will provide a gateway for foreign representatives to gain access to South African proceedings, and for South African representatives to gain access to foreign proceedings. The Cross-Border Insolvency Act, though limited by its designation requirements in s2 (2)-(5), does enable South African courts and practitioners to play a positive role in co-operating with their foreign counterparts, particularly in attempting business rescues. Once the foreign representatives have gained access to the South African legal system via the Cross-Border Insolvency Act, however, they will have to abide by the relevant South African rules, substantive and procedural.

Furthermore, all SADC countries observe similar insolvency laws and company laws to South Africa. In virtually all of the member countries, their insolvency and Company Acts are modelled more or less on South African statutes. Many judgments granted in the SADC member countries follow or complement those of South Africa.

There is a strong argument that a uniform approach to problems surrounding insolvencies, workouts, recoveries and liquidations should be encompassed in one SADC statute. Whether or not this is practical is uncertain.

[4] To date the relevant foreign states have not yet been designated so the Act remains stillborn

It is respectfully suggested that the most pressing need is to rescue companies that are operating in a position of financial distress and that a regional Business Rescue model would be very appropriate.

The role players and their views

The Business Rescue procedures will be strongly driven by the labour sector in South Africa. Many labour unions have considered the effects of Business Rescue on their constituents and employees. Clearly the labour unions, as an affected person, are alive to the fact that labour can make applications to court to convert a company in liquidation into Business Rescue proceedings. Once labour has successfully converted a liquidation into a Business Rescue, any employees who provide services to the company in the period of Business Rescue would be regarded as post-commencement financing. This will have the result of employee claims having a preference over claims of lenders irrespective of whether such claims are secured. Employees will therefore be elevated to a position of "super priority" creditors (above lenders) after Business Rescue proceedings have commenced.

The financial institutions in South Africa have commented on this aspect of the legislation and are concerned that there might be a clash of interests between that of labour, creditors and the Business Rescue Practitioner in an effort to rescue the company from its financial position of distress. Applications made for Business Rescue when there is no opportunity or likelihood of the company trading its way out of financial difficulties would be disastrous.

It is hoped that once the legislation is operative, all of the stakeholders will use the mechanism in a manner beneficial to the financial success of the company going forward rather than become embroiled in costly and protracted litigation.

Conclusion

The new Business Rescue dispensation in South Africa does now become a driver for the introduction of a similar regime for Southern African states. Business Rescue brings the region into line with foreign jurisdictions such as the UK (Administration), USA (Chapter 11) and Australia. The goal being in each jurisdiction to achieve the corporate recycling of businesses in financial distress with a view to maximising returns for creditors, the preservation of jobs, goodwill and the continuance of corporates as a going concern into the future.

When all is considered, the Southern African region is in dire need of a workable system to ensure the continued survival, if possible, of companies trading in financial difficulty. A fresh approach is needed and one which would bring the region into the "corporate rescue" mould of foreign jurisdictions.

South Africa has clearly been the leader in this regard and the Business Rescue system is clearly aimed at the rehabilitation of companies, alternatively ensuring that a Business Rescue dividend surpasses that which would be achieved in a liquidation. Internationally, rescue culture has come to the fore and there is no reason why the SADC countries should not seriously consider a regional dispensation for Business Rescue.