GLOBAL FORUM ON LAW, JUSTICE AND DEVELOPMENT (GFLJD)

COMMUNITY OF PRACTICE: SOUTH AFRICA

QUESTIONNAIRE ON INSOLVENCY LAW AND COMPANY LAW

I. Introductory questions on the insolvency procedures available in the relevant jurisdiction.

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

Liquidation

Although South Africa has a distinct insolvency law, namely the Insolvency Act 24 of 1936, the liquidation of companies is first and foremost regulated by the company laws. But since the company laws are not complete in all respects in relation to company insolvencies, the Insolvency Act 24 of 1936 will also apply in relation to certain matters.

Section 343 of the (former) Companies Act 61 of 1973 determines three ways in which a company may be wound up, namely, by the court, creditors' voluntary winding-up and members' voluntary winding-up. (The new Companies Act 71 of 2008 brought about a sharp distinction between liquidation of solvent and insolvent liquidations, thus effectively adding a separate process to liquidate solvent companies.)

The 2008 Companies Act regulates the winding-up of solvent companies, while the winding-up of insolvent companies is still regulated by Chapter XIV of the 1973 Companies Act. (Notably, the provisions of the 1973 Companies Act on the appointment, removal and remuneration of the liquidator and the powers of liquidators still apply to the winding-up of solvent companies. The reason for this apparently odd approach is simply because new modernized and comprehensive insolvency legislation is expected in due course in South African law, which would remove all references to the 1973 Companies Act. So, South African insolvency law reform is moving in the direction of a largely single uniform piece of insolvency legislation.)

Reorganisation/ Rescue

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1 This questionnaire was compiled by Prof A Boraine with assistance by Dr F Cassim (University of Pretoria), Prof A Loubser (UNISA) and Mr M Klein (Practitioner).
3 Hereafter “1973 Companies Act.”
4 Hereafter “2008 Companies Act.”
The reorganization procedures consist of the formal business rescue procedures which are to be found in sections 128 to 154 of the 2008 Companies Act.

In terms of section 155 of the 2008 Companies Act, and unless a company is engaged in business rescue proceedings in terms of Chapter 6 thereof, the board of directors of a company or its liquidator, if the company is already in winding-up(liquidation), may also propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the shareholders or members of any class of its creditors. A copy of the proposal and notice of a meeting to consider the proposal must be delivered to every creditor of the company or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by the company, and to the Companies and Intellectual Property Commission (“CIPC”) established in terms of section 185 of the 2008 Companies Act.

The adoption of a compromise proposal in terms of section 155 of the 2008 Companies Act requires that it is supported by a majority in number, representing at least 75% in value of the creditors or class, as the case may be, present and voting in person or by proxy, at a meeting called for that purpose. This process could also be used for rescue purposes.

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

As background, and as briefly mentioned in paragraph 1 above, it should be understood that the South African law of insolvency consists of various pieces of legislation but four main acts largely govern the roles played by the different actors during sequestration and liquidation as such, namely the Insolvency Act 24 of 1936, Chapter 14 of the former 1973 Companies Act; the Close Corporations Act 69 of 1984, as well as the new 2008 Companies Act. (Chapter 6 of the 2008 Companies Act deals with rescue of companies and close corporations as such.)

Because different acts govern the legal position regarding insolvency, different sets of terminology are used for insolvency/bankruptcy and different dates are set for the commencement of sequestration in terms of the Insolvency Act 24 of 1936, or liquidation in terms of company legislation. (Sequestration first and foremost relates to a formal insolvency proceeding relating to the estate of a ‘debtor’ as defined in the insolvency Act of 1936, whilst liquidation refers to companies and close corporations.)

For instance, in terms of section 2 of the Insolvency Act of 1936, a ‘debtor’ is:

‘debtor’ in connection with the sequestration of the debtor’s estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies …

This means that:
1. A close corporation must be liquidated in terms of the 1984 Close Corporations Act

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5 The close corporation is a small type of business entity acknowledged by South African corporate law, and it is clothed with legal personality. Since it is no longer possible to register new close corporations, this discussion will largely focus on companies.

6 The basic acts are: The Insolvency Act 34 of 1936, also “the Insolvency Act”; the former 1973 Companies Act; and the Close Corporations Act 69 of 1984. (The effect of the new 2008 Companies Act is discussed at para 2.3 below.) Other acts could refer to insolvency and may have their own procedures see for instance – para 2 below.
read with chapter 14 of the 1973 and the 2008 Companies Act;
2. Other bodies corporate, for instance a body corporate of a sectional title scheme, are excluded from the definition of ‘debtor’.\(^7\)
3. If liquidation cannot take place in terms of the company’s legislation then the entity in question must be sequestrated. Included in this respect are trusts, clubs and voluntary associations

However, regarding other legal entities such as pension funds, banks, medical funds, insurance companies and co-operatives their winding-up and other special insolvency procedures like curatorships of banks in distress, are governed by special procedures provided for in separate pieces of legislation.\(^8\)

### 3. Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?

There are formal restructuring processes, but South African law distinguishes between individuals and other entities, which may, for instance be companies or close corporations.

**Individuals:**

A debtor, who cannot pay his or her debts, may consider a number of options when the creditors claim payment from him or her.

**Administration:** A debtor could apply for his estate to be administered in terms of section 74 of the Magistrate’s Court Act 32 of 1944. Such an application will only be granted where the debts do not exceed R50 000. Where the magistrate’s court grants such an application, the debtor must make payments to an administrator appointed by the court who distributes the funds to creditors. This procedure does not provide for a discharge of unpaid debt and is not subject to a time limitation. The debtor may thus remain subject to administration for a rather long time period.

**Debt Counselling in terms of the National Credit Act 71 of 2005\(^9\):** A ‘consumer’ (a party to a credit agreement to which the NCA applies) may apply to a debt counsellor to have him or her declared over-indebted. If the counsellor concludes that the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate’s Court make an order that one or more of the consumer’s obligations in terms of a credit agreement be re-arranged by, for example, extending the repayment period and reducing the amount of payments accordingly, or by postponing the repayment dates.

**Voluntary debt re-arrangement (creditor work out):** Following voluntary negotiations, a debtor and the creditors may agree on a restructuring of the debt.

**Entities/Companies:**

As discussed elsewhere in this document, South Africa acknowledges informal

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\(^7\) Reddy v Body Corporate of Croftdene Mall 2002 (5) SA 640 (D) 646.

\(^9\) Hereafter “the NCA”. 
arrangements (creditor work-outs), but the new 2008 Companies Act also introduced a new statutory business rescue process as well as a new statutory form of compromise.

4. What are the commencement criteria for insolvency procedures?

Liquidation of companies

4.1 Liquidation (winding-up) of companies and close corporations

A company (including an external company) registered in terms of the former 1973 Companies Act could be wound up by the High Court, or voluntarily by means of a special resolution by shareholders, or members in case of a non-profit company.\(^{10}\) Chapter 14 of the 1973 Companies Act thus provided rules for the initiation, commencement and, to a large extent, for the administration of the company in liquidation, but section 339 provided in general for the incorporation of the insolvency laws for those aspects that were not regulated in Chapter XIV as such. Other sections of Chapter XIV like section 340 also incorporated provisions of the Insolvency Act 24 of 1936, whilst some sections made it clear that they would only apply to companies being unable to pay their debts.

4.1.1 Liquidation by court order in terms of the 1973 Companies Act

In terms of the 1973 Companies Act a company may be or may have been wound up by the Court if-

(a) the company has by special resolution resolved that it be wound up by the Court;
(b) the company commenced business before the former Registrar of Companies certified that it was entitled to commence business. (This ground is no longer applicable);
(c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;
(d) in the case of a public company, the number of members has fallen below seven; (This ground is no longer applicable);
(e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;\(^{11}\)
(f) the company is unable to pay its debts;
(g) in the case of a foreign company, registered as an external company in South Africa, that company is dissolved in the country in which it has been incorporated;
(h) it appears to the Court that it is just and equitable\(^{12}\) that the company should be wound-up.\(^{13}\)

A company or body corporate shall be deemed to be unable to pay its debts if:

\(^{10}\) Section 343 of the 1973 Companies Act.
\(^{11}\) Ex parte Lebowa Development Corporation Ltd 1989 3 SA 71 (T).
\(^{12}\) The cases where the Courts have found it just and equitable to wind up the company were summarised in Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 2 SA 345 (W) and include the following: disappearance of the substratum of the company; impossibility of carrying on the business of the company; grounds analogous to those applicable to the dissolution of partnerships; lack of probity in conducting the company’s affairs; fraud with regard to the formation of the company.
\(^{13}\) Section 344 (a)-(h) of the 1973 Companies Act.
(a) a creditor to whom the company is indebted in a sum not less than R100 then due has
served on the company a demand requiring the company to pay the sum so due and
the company or body corporate has for three weeks thereafter neglected to pay the
sum or to provide security to have paid same, or

(b) any process issued on a judgement, decree or order of any court in favour of a creditor
of the company is returned by the sheriff or the messenger with an endorsement that
there is not sufficient disposable property to satisfy the judgement or that any
disposable property found did not upon sale satisfy such process; or

(c) it is otherwise proved to the satisfaction of the Court that the company is unable to pay
its debts.\textsuperscript{14}

In the case of a liquidation by Court, the liquidation commences at the date of presentation
of the application for liquidation.\textsuperscript{15}

\textbf{4.1.2 Voluntary liquidation in terms of the 1973 Companies Act}

The company may also be voluntarily liquidated. The procedure is effected by a special
resolution of shareholders or members but may be either a winding-up by shareholders or
members, or by creditors.\textsuperscript{16} The voluntary liquidation by members will be in the case where
the company is able to pay its debts, while the voluntary liquidation by creditors will be when
the company is insolvent. In both instances the process is initiated by a special resolution
by shareholders or members. In the latter case the directors present a prescribed statement
of affairs to the meeting and upon registration of the special resolution the liquidation
commences and follows the same procedure as in the case of a liquidation by Court.\textsuperscript{17}

\textbf{4.1.3 Impact of the 2008 Companies Act on liquidations of companies}

The 1973 Companies Act was, however, replaced by the new 2008 Companies Act as from
1 May 2011 when the 2008 Act came into operation. Sections 79 to 81 of the 2008
Companies Act provide for the initiation of the winding-up of solvent companies – either
voluntarily by means of a member’s resolution, or by means of a court order. The 2008
Companies Act does not provide rules to deal with the subsequent liquidation of the wound-
up solvent company but provides in section 79(2) read with Item 9(2) of Schedule 5 that the
winding-up and liquidation provisions as contained in chapter 14 of the 1973 Companies Act
will continue to apply to companies in terms of the 2008 Companies Act, bar certain sections.

With regard to the initiation of winding-up and liquidation of insolvent companies, it must
however be noted that Chapter XIV of the 1973 Act will in principle still regulate aspects of
the winding-up and liquidation of companies until new insolvency legislation has been
enacted.\textsuperscript{18}

\textsuperscript{14} Section 345 of the 1973 Companies Act. The issue here is usually that the company's assets usually exceed the amount of liabilities (factual solvency), but that it is unable to pay the debts as they fall due. The court has determined that this situation is not a bar to liquidation on account of commercial insolvency: \textit{Rosenbach & Co (Pty) Ltd v Singh’s Bazaars (Pty) Ltd} 1962 4 SA 593 (D).

\textsuperscript{15} Section 348 of the 1973 Companies Act.

\textsuperscript{16} Sections 350 and 351 of the 1973 Companies Act.

\textsuperscript{17} Section 351(2) of the 1973 Companies Act.

\textsuperscript{18} Item 9 Schedule 5 of the 2008 Companies Act.
Section 79(3) of the 2008 Companies Act allows for an application to court for an order to convert the voluntary winding-up in terms of the 2008 Act to an insolvency winding-up in which case chapter 14 of the 1973 Companies Act will apply.

[The 2008 Companies Act also aims to phase out close corporations as a business form, but winding-up and liquidations of close corporations will still be regulated by the Close Corporations Act 69 of 1984, as well as certain provisions of the 1973 Companies Act and some provisions of the 2008 Companies Act that have also been rendered applicable to close corporations.19]

**Business rescue proceedings**

Provided that liquidation proceedings have not already been initiated, section 129(2) of the 2008 Companies Act, allows the board of directors of a company that has reasonable grounds to believe that:

1. the company is financially distressed (i.e. that it is reasonably unlikely that it will be able to pay all its debts or remain solvent within the next six months as defined in section 128(1)(f) of the Act); and
2. that a reasonable prospect of rescuing the company appears to exist,

may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision in terms of s129(1) of the 2008 Companies Act.

The second method for the commencement of business rescue proceedings is an application to court for an order placing the company under supervision and commencing business rescue proceedings. The application may be made by an ‘affected person’, ie a shareholder or creditor, a registered trade union or any employee not represented by a trade union. The commencement criteria are that the court may make the order if it is satisfied that the company is in financial distress, or that it failed to pay any amount in terms of an obligation with respect to employment-related matters, or it is otherwise just and equitable to do so for financial reasons, and that there is a reasonable prospect of rescuing the company. Unlike voluntary business rescue proceedings, in the case of a court order, the application may be made even if the company is subject to liquidation proceedings.

**Debt arrangement or compromise for companies**

In terms of section 155 of the 2008 Companies Act, and unless a company is engaged in business rescue proceedings in terms of Chapter 6 thereof, the board of directors of a company or its liquidator, if the company is in winding-up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors.

**Creditor work-outs**

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19 See Item 7 of Schedule 3 of the 2008 Companies Act.
Creditor work-outs outside these formal statutory procedures are also used but these have, amongst others, the drawback that all creditors must give their consent to the plan and there is not a moratorium in place.

5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)

The most important person in the restructuring plan in terms of chapter 6 of the Companies Act of 2008 is the Business Rescue Practitioner.

A business practitioner, who was appointed following the company being put into formal business rescue procedure, and after consulting with the creditors, other affected persons and the management of the company, must prepare and publish a proposed business rescue plan, as required by section 150(5) of the 2008 Companies Act, by –
(a) informing each affected person of the availability of the plan, in the manner contemplated in section 6(11)(b)(ii) and regulation 6;
(b) conspicuously displaying a notice of the availability of the plan –
(i) at the registered office of the company that is undergoing business rescue proceedings, the principal places of conducting the business activities of the company and at any workplace where employees of the company are employed;
(ii) on any website that is maintained by the company and intended to be accessible by affected persons; and
(iii) if it is a listed company, on any electronic system maintained by the relevant exchange for the communication and inter-change of information by and among companies listed on that exchange; and
(c) providing a free copy of the plan to any affected person who requests such a copy.

The business rescue plan must set out the history of the company, its financial background, its financial position, and the practitioner’s suggestions relating to the rescue of the company.

The practitioner must thereafter convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan, at which he must invite a discussion on the plan. Employees’ representatives must also be given the opportunity to address the meeting.

Registered trade unions representing employees of the company and any employees not so represented must be consulted by the practitioner during the development of the business rescue plan. Creditors may make proposal to the practitioner for a business rescue plan.

There are numerous provisions of the business rescue regime that protect the interests of employees. This is in accordance with the underlying predominant object of preserving employment.
In addition to the rights creditors have under specific provisions of Chapter 6 of the 2008 Companies Act as “affected persons”, section 145 sets out in some detail their rights and obligations when participating in the business rescue procedure as a whole.

Although employees are also “affected persons” and therefore have specific provisions regulating their position under the business rescue procedure, in many instances they also qualify as creditors of the company in terms of section 144(2). This section states that to the extent that any employment-related amounts (for the period prior to the commencement of the business rescue proceedings) are owing to an employee of the company, then the employee is a “preferred unsecured creditor” of the company for the purposes of the business rescue procedure.

With regard to the business rescue proceedings of a company, each creditor is also entitled to: (i) formally participate in those proceedings to the extent provided for in Chapter 6; and (ii) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.

Regarding the business rescue plan generally, creditors have the right to vote to amend, approve or reject a proposed business rescue plan (as provided for in section 152). If a proposed business rescue plan is rejected, creditors have a further right to propose the development of an alternative plan, or to present an offer to acquire the interests of any or all of the other creditors so that the proposed plan can be adopted.

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

Shareholders’ rights are not directly affected by a situation of distress/insolvency of a company.

In South African corporate law no fiduciary duties are imposed on shareholders unless there is some pre-existing fiduciary relationship. The board of directors is under no legal duty to consult the shareholders in resolving to place the company under business rescue. If the board of directors does not place the company under business rescue, even though the company is financially distressed, a notice must be delivered to shareholders. Any shareholder may then lodge an application to court to commence business rescue proceedings.

During business rescue proceedings, shareholders’ shares may not be altered in classification or status unless it is approved by the court or forms part of an approved business rescue plan.

The directors are affected but directors are not specifically bound by the 2008 Companies Act to put corrective measures/plans in place. However, they do have fiduciary duties in terms of the 2008 Companies Act. Directors who decide for whatever reason not to commence business rescue proceedings while knowing that the company is in financial
distress, are obliged to inform all “affected persons” of the situation.

Directors can be declared “delinquent directors” in terms of section 162 of the 2008 Companies Act. The use of this remedy, under section 162 of the Act, can lead to the removal of directors from a company who are acting in contravention of their statutory duties.

Directors can also be liable under section 424 of the 1973 Companies Act for conducting the business of the company at a time when it was insolvent, and knowing that the company would not be able to pay its creditors. Section 22 of the 2008 Companies Act (read with section 77(3)(b)) now also regulates fraudulent or reckless trading or trading whilst a company is unable to pay its debts.

II. Shareholders’ Rights in Companies Subject to Insolvency Proceedings

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

In a liquidation situation, the shareholders are broadly notified but not in person. The notifications normally form part of the court order and must be published in newspapers. The company as such will be notified in that the Sheriff of the Court would serve court papers on the company at its registered office.

Regarding business rescue, shareholders are notified as follows. Firstly, in the case of commencement of business rescue by board resolution. The company must within 5 business days of filing the resolution, publish a notice of the resolution to shareholders. The notice may be delivered by fax, e-mail, registered post to the last known address, or other means allowed by the High Court or the Companies Regulations. A copy of the notice must also be conspicuously displayed at the company’s registered office, its principal place of business, and workplace; on its website, or on the electronic system of a relevant securities exchange if it is a listed company.

In the case of a company with a large number of shareholders, physical delivery to all the shareholders may not be practically feasible. In the case of a listed company, an announcement on the Securities Exchange News Service (SENS) is a prescribed method, in addition to individual notification of shareholders. If SENS is used as a substitute for personal service, this ought to be coupled with publication in a newspaper.

Secondly, if business rescue is commenced by order of court, each shareholder must be notified by the applicant of the application. A company that has been placed under business rescue by order of court must notify each affected person within 5 business days after the date of the court order.

8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?
Only creditors file claims. At the first meeting of creditors, the business rescue practitioner may receive proof of claims by the creditors. A shareholder must therefore also be a creditor to be able to file a claim. Only those creditors whose claims were proved at a meeting of creditors are entitled to dividends.

9. Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?

In liquidation, section 348 of the 1973 Companies Act provides that winding up is deemed to commence at the time of the presentation to the court of the application. (“Presentation to the court” refers to the time when the application is filed with the Registrar of the Court prior to the hearing and not at the time when it is heard by the court). Section 352 of the 1973 Companies Act provides that a voluntary winding-up of a company commences at the time of the registration in terms of section 200 of the 1973 Act of the special resolution authorising the winding-up.

The effect is that all the property concerned shall be deemed to be in the custody and under the control of the Master of the High Court until a provisional liquidator has been appointed and has assumed office.

Section 341 of the 1973 Companies Act is specific and makes share transfers after winding-up, void. It reads:

(1) Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void.

(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.

During business rescue, the transfer of securities is permitted if it is done in the ordinary course of business.

10. Do shareholders have the right to request that a shareholders’ meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In liquidation, the Master of the High Court will be in charge of the meetings, since he or she convenes the meetings of creditors and shareholders in terms of section 364 of the 1973 Companies Act. It is only after the First Meeting of Creditors that the Liquidator assumes control of the company. Shareholders have the right to participate in discussions at the meetings and to give direction to the Liquidator but in practise this hardly ever happens.

During business rescue, shareholders do have the right to consult with the business rescue
practitioner in view of section 150(1) of the 2008 Companies Act. Shareholders may not vote on the approval or rejection of a proposed business rescue plan, unless the plan alters the rights of that class of shares. In this event, the practitioner must convene a meeting of the relevant shareholders and call for a vote by them to approve the business rescue plan.

11. Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company-or vis-à-vis the insolvency representative?

In liquidation shareholders (members) have rights derived from the 1973 Companies Act. The instances are dealt with as follows:

- Section 344 provides that if a liquidation application is brought against a company and it is averred that 75% of the share capital is lost, or has become useless for the business of the company, the court may liquidate the company. If the majority of the members want to continue the business, the court is not inclined to grant a liquidation order unless fraud can be proven against the minority shareholders.

- Shareholders may participate in interrogations/examinations by commissioners held in terms of section 418. The Master, if he or she has not him- or herself been appointed), the liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an attorney, with or without counsel, who shall be entitled to interrogate any witness.

- Shareholders may also ask the court to determine questions arising following a voluntary winding-up in terms of section 388 of the 1973 Companies Act.

- In terms of section 386 (3) of the 1973 Companies Act the liquidator of a company-
  (a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;
  (b) in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and
  (c) in a members' voluntary winding-up, with the authority granted by a meeting of members, shall have the powers mentioned in subsection (4) as set out in the footnote below.

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(4) The powers referred to in subsection (3) are-
(a) to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;
(b) to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt;
(c) to compromise or admit any claim or demand against the company, including an unliquidated claim;
(d) except where the company being wound up is unable to pay its debts, to make any arrangement with creditors, including creditors in respect of unliquidated claims;
In terms of section 360(1) of the 1973 Companies Act any member or creditor of any company unable to pay its debts and being wound up by the Court or by a creditors' voluntary winding-up may apply to the Court for an order authorising him to inspect any or all of the books and papers of that company, whether in possession of the company or the liquidator, and the Court may impose any condition it thinks fit in granting that authority.

In terms of section 362 of the 1973 Companies Act, the Court may at any time after making a winding-up order or after a special resolution for the voluntary winding-up of a company has been registered in terms of section 200, order any director, member, trustee, banker, agent or officer of the company concerned to pay, deliver, convey, surrender or transfer to the liquidator of the company forthwith, or within such time as the Court directs.

In terms of section 387 of the 1973 Companies Act, the liquidator of a company which is being wound up by the Court, shall, in the administration of the assets of the company, have regard to any directions that may be given by resolution of the creditors or members or contributories of the company at any general meeting.

In terms of section 354 of the 1973 Companies Act, at any time after the presentation of an application for winding-up and before a winding-up order has been made, the company concerned or any creditor or member thereof may-

(a) where any action or proceeding by or against the company is pending in any court in the Republic, apply to such court for a stay of the proceedings; and

(e) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;

(f) to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;

(g) to exercise mutatis mutandis the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act 24 of 1936), conferred upon a trustee under that Act, on the like terms and conditions as are therein mentioned: Provided that the powers conferred by section 35 aforesaid, shall not be exercised unless the company is unable to pay its debts;

(h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;

(i) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.
where any other action or proceeding is being or about to be instituted against the company, apply to the Court to which the application for winding-up has been presented, for an order restraining further proceedings in the action or proceeding, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

- If the authority to sell, is sought prior to the confirmation of a provisional liquidation order the written consent of the shareholders and directors of the company must be filed with the Master.

- In the case of a company any surplus must, unless the memorandum of articles provides otherwise, be distributed among the members according to their rights and interests in the company. Unless otherwise provided, shareholders share in proportion to the number of ordinary shares held by them.

**Rescue in terms of the 2008 Companies Act**

During business rescue, shareholders are entitled to notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings. Shareholders are entitled to receive notice from the business rescue practitioner of the meeting to determine the future of the company and consider the business rescue plan.

Shareholders may attend to the meeting to consider the business rescue plan if their rights as shareholders are altered. The business rescue practitioner must convene a meeting of all classes of shareholders whose rights are altered, and call for a vote by them to approve the plan.

Under certain circumstances shareholders are given the right to make a binding offer to purchase the voting interests of persons opposed to the business rescue plan.

**12. Can shareholders make proposals for nomination of directors, if the directors continue managing the company?**

In liquidation directors do not continue managing the company.

In rescue, directors are not removed from office, but become subject to the authority of the business rescue practitioner. They must exercise their management functions in accordance with the instructions or directions of the practitioner to the extent that it is reasonable to do so. The practitioner may remove from office any person who forms part of the company’s pre-existing management and appoint any person as part of the management of the company whether to fill a vacancy or not. On the application of the practitioner, a director may be removed from office by the court for impeding the practitioner or failing to comply with Chapter 6 of the 2008 Companies Act. Various persons may also apply to court to have a director declared delinquent or under probation.

**13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an**
insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In liquidation, the 1973 Companies Act only refers to shareholders and/or members, there is no distinction between them. (There is a distinction about members called “contributories” when it comes to a company limited by guarantee but this is actually non-existing.)

Due to the nature of the local rescue procedure, this issue is not relevant to business rescue proceedings.

14. Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)

During liquidation, shareholders have the rights mentioned in paragraph 11 supra.

In business rescue, shareholders may take action against directors by applying to court to have directors declared delinquent or under probation. Directors may also incur liability for fraudulent or reckless trading; or for losses sustained by the company if they were party to an act or omission despite knowing that it was calculated to defraud a shareholder or had another fraudulent purpose. Directors are not relieved of all their fiduciary and statutory duties.

A shareholder may request that the court remove the business rescue practitioner from office on a number of grounds, eg incompetence or failure to perform his duties, failure to exercise proper care, illegal conduct, failure to satisfy relevant qualifications, conflict of interest, incapacity.

15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

During liquidation, and as mentioned in paragraph 11 above they have such a right.

In terms of the 2008 Companies Act the business rescue practitioner is given the specific task of investigating the affairs of the company and if he finds evidence of invalid transactions or failure to perform material obligations of the company, to rectify the matter. He must also send evidence of reckless trading, fraud or other contraventions of the law to the appropriate authorities to investigate and prosecute where appropriate. And take steps to rectify the matter. It appears unlikely that the shareholders will have this power although they could certainly draw his attention to such matters.
16. Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

The shareholders can only do what the legislation allows, which rights are limited. Thus, they cannot form committees in case of liquidation.

In business rescue, shareholders likewise do not have the right to form a shareholder’s committee, unlike creditors and employees.

17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

Selling and transferring of shares cannot take place during liquidation, except by the person in charge, namely the liquidator.

Regarding business rescue - see paragraph 9 above.

(Note: Paragraph 18 below should be read in conjunction with this paragraph.)

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

During business rescue shares may be transferred in the ordinary course of business only. To alter the status or classification of any issued shares of the company, the approval of the court must be obtained, or it must be done in terms of an approved business rescue plan, which must be supported by a majority of the exercised voting rights of the holders of the affected class of shares. Authorised but unissued shares may be transferred by the BR practitioner in terms of an approved BR plan, but for unauthorised shares the approval of shareholders to the BR plan providing for this, is required.

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g. does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

The shareholders do not have voting rights, only the creditors. Potentially, anything is possible. The new “owners” would give the capital and will have the say in the shares.

In relation to business rescue, see paragraph 18 above. The basic approach of the South African company law is that in the business rescue procedure, the interests of shareholders
are subordinate to the interests of creditors and employees.

20. **Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares?** (2) Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?).

Shareholders can only have pre-emption rights over new issues of shares if the company is not in liquidation. As long as it is under liquidation all control vests in the Master or liquidator. Separate reorganization procedures are those dealt with *supra* which is the business rescue process, which is subject to a business plan.

In business rescue, shareholders' rights of pre-emption do not apply to an issue of shares by the company in terms of a business rescue plan, except to the extent that the plan provides otherwise.

21. **Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company's assets have been transferred) even if the company was insolvent according to a balance-sheet test?** (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Once in liquidation, the shareholders are not seen as owners of shares, the liquidator is the one who can sell the assets,

In business rescue.....if the company survives rescue proceedings, shareholders retain their shares.

22. **Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process?** (If there are separate reorganization and liquidation procedures, does this affect the response?)

In respect of business rescue, see paragraph 18 above.

23. **Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?**

There is no legal duty on shareholders to provide goods etc. In rescue, and if they provide new capital that can be deemed to be post-commencement financing they will enjoy preferential treatment.

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21 Note that the power to decide on new issuing or conversions of shares, as well as the power to decide on the operations that affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form) are dealt with in Paragraphs 33 and 34 below.
If shareholders provide funding or finance to the company after the commencement of business rescue, this would constitute post-commencement financing to which a super-preference applies. Post-commencement finance enjoys priority over unsecured claims incurred before the rescue process.

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Where the company is put into liquidation, shareholders lose their rights as shareholders and have no contractual duties other than duties which might arise from different scenarios, i.e. as directors or creditors.

In rescue, the business rescue practitioner has the right to suspend, whether partially, entirely or conditionally, any obligation under a contract or the entire contract, for the duration of the business rescue proceedings. Furthermore, the practitioner may apply to court to cancel, on just and reasonable terms, any contractual obligation of the company that would otherwise become due during the rescue proceedings. The shareholder has a right to damages in these circumstances.

25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors' meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Shareholders (members) of a company in liquidation have rights derived from the 1973 Companies Act to take part in the meetings convened for them; in practice the shareholders very rarely take part in this. The “insolvency plan” if it is understood to mean the liquidation process, is potentially a process on which the shareholders can vote if they attend the meetings. But if the insolvency plan is an offer in terms of the new 2008 Companies Act, then they are excluded.

Shareholders may participate in interrogations held in terms of section 418 (Examination by commissioners) in case of liquidation. The Master, if he or she has not him- or herself been appointed under paragraph(a), the liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an attorney, with or without counsel, who shall be entitled to interrogate any witness.

In terms of section 387 of the 19783 Companies Act, the liquidator of a company which is being wound up by the Court, must, in the administration of the assets of the company, have regard to any directions that may be given by resolution of the creditors or members or contributories of the company at any general meeting.

In case of liquidation there is no formal insolvency plan, a company is wound up, assets are sold and an estate account lodged with the Master in terms of the provisions of the insolvency law. Creditors may object to the account. The separate reorganization procedure
is business rescue as discussed above.

In the case of business rescue, shareholders who are creditors of the company may participate in the creditors’ meeting and vote in the same way as any other creditors. A company in the same group that has a valid claim against the company in business rescue, is also treated like any other creditor.

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The answer to this question is discussed in paragraph 25 above.

In business rescue proceedings, such shareholders cannot participate in the creditors’ meeting. See further paragraph 11 above.

27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

The South African court system works on the premise that all interested parties should be notified, and if a related company has a link with the individual company, then it should be notified.

In terms of the provisions of the 2008 Companies Act on business rescue, only the shareholders of the company undergoing business rescue have the right to be notified as they are ‘affected persons’.

III. The Role of the Shareholders’ Meeting in Companies Subject to Insolvency Proceedings

28. Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

As mentioned in paragraph 11 above, shareholders’ meeting continue to exist in insolvency proceedings. Separate reorganization procedures give more rights to shareholders.

In respect of business rescue, see paragraph 11 above.

29. Does the shareholders’ meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)

As mentioned in paragraph 10 above, a shareholders’ meeting continue to exist but shareholders may only vote on certain specific issues relating to insolvency matters. Separate reorganization procedures give more rights to shareholders.
30. Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?

In liquidation and in terms of section 407, of the 1973 Companies Act, any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection. In terms of section 355 of the 1973 Companies Act, in any review by the Court of any matter under the winding-up of a company where the general body of creditors, members or contributories is affected, notice to the liquidator shall be notice to them.

In business rescue, shareholders only have the right to vote on a business rescue plan if the plan would alter the rights associated with their particular class of shares. However, any plan providing for the amendment of the company’s Memorandum of Incorporation to authorise additional shares not already authorised, must be approved by shareholders.

31. Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Directors are functus officio once the company is wound-up. The directors who continue to function during business rescue proceedings can only do so if authorized by the business rescue practitioner.

In respect of business rescue proceedings, see further paragraphs 12 and 14 above.

32. Is a shareholders’ meeting authorisation required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The company itself, a creditor, a member (shareholder) or certain officials may apply to the High Court for the winding-up of a company.

In liquidation shareholders may resolve to place the company into voluntary liquidation, or that the company must apply to court for a liquidation order.

It is not required to start a business rescue procedure. The shareholders’ meeting also does not have the authority to commence business rescue proceedings by resolution.

33. Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?

The 2008 Companies Act provides for checks and balances in the case of rescue plan in that:
An affected person,\textsuperscript{22} may apply to court to set aside the Business Rescue resolution on the grounds that:

- There is no reasonable grounds for believing the company is financially distressed;
- There are no reasonable prospects of rescuing the company; or
- The procedural requirements in section 129 were not complied with.

Such an application must take place before the adoption of a business plan in terms of section 152.

An affected person may also apply to set aside the appointment of the practitioner on the grounds that the practitioner: Does not comply with the requirements of section 138; Is not independent of the company; or, With regards to the circumstances of the company, lacks the necessary skills.

Section 146 of the 2008 Companies Act gives the shareholders certain rights during a company’s business rescue proceedings, each holder of any issued security of the company is entitled to:

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
(b) participate in any court proceedings arising during the business rescue proceedings;
(c) formally participate in a company’s business rescue proceedings to the extent provided for in this Chapter;
(d) vote to approve or reject a proposed business rescue plan in the manner contemplated in section 152, if the plan would alter the rights associated with the class of securities held by that person; and
(e) if the business rescue plan is rejected, to-
   (i) propose the development of an alternative plan, in the manner contemplated in section 153; or (ii) present an offer to acquire the interests of any or all of the creditors or other holders of the company’s securities in the manner contemplated in section 153.

In business rescue, shareholder approval is thus not required, save where the plan alters the rights of any class of shareholders. In that event, shareholders of the relevant class may challenge the business rescue plan. Such shareholders have a right to vote on the approval or rejection of the plan. Once the plan is adopted, it is binding on every shareholder, regardless of whether he was present at the meeting or voted against the plan.

34. Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? \textsuperscript{23} If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

\textsuperscript{22} Defined in s 128 of the 2008 Companies Act as each of the company’s shareholders, creditors, registered trade unions representing employees and employees not represented by such trade unions.

\textsuperscript{23} These questions are aimed at understanding whether the fact that the company is subject to insolvency proceedings allows or causes deviations from the company law rules determining the body competent to take decisions on the issue of new shares of the company, and/or from the company law rules establishing the criteria and purposes with which such decisions must comply.
To the extent necessary, the business rescue practitioner may, in accordance with the business rescue plan, issue any authorised shares of the company and determine the consideration. Moreover, the practitioner may amend the company's constitution to authorise new shares if the business rescue plan was approved by shareholders and contemplated the issue of such shares.

Section 348 of the 1973 Companies Act provides that winding up is deemed to commence at the time of the presentation to the court of the application.24 Section 352 of the 1973 Companies Act provides that a voluntary winding-up of a company commences at the time of the registration in terms of section 200 of the special resolution authorising the winding-up.

The effect is that all the property concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. The shareholders or members lose control.

Section 341 of the 1973 Companies Act is specific and makes share transfers after winding-up void. It reads:

(1) Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void.

(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders' meeting authorization required for this?

There is academic authority to the effect that business rescue may entail a restructuring, buy-out, takeover or spin-off of the company.25

36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?) Is a shareholders' meeting authorisation required?

Only the liquidator may carry on business in liquidation but for limited purposes.

In case of business rescue is subject to the Business Rescue Practitioner’s plan and in general, the appointed practitioner is an officer of the court and takes over full management control from the board and other management of the company and may delegate his duties. In terms of section 140 of the 2008 Companies Act he or she may remove anyone in

24 “Presentation to the court” refers to the time when the application is filed with the Registrar of the Court and not the time when it is heard by the judge.
management and appoint someone to a management position. Nobody may be appointed to management or as advisor if their impartiality, integrity or objectivity is compromised by a relationship with the company or if they are related to a person who has such a relationship with the company.

As an officer of the court, the appointed business rescue practitioner must report to the court as required by the rules of court. The business rescue practitioner has the duties of a director of the company. In terms of section 142 and as soon as possible, each director must deliver to the practitioner all books and records of the company affairs in the director’s possession, and inform the practitioner where other books and records are.

Within five days of the start of the business rescue proceedings, the directors must in terms of section 142(3) provide the practitioner with a Statement of Affairs which at least sets out details of:

- Material transactions which occurred within twelve months before the business rescue process began;
- Any court, arbitration or administrative proceedings involving the company;
- The company assets and liabilities over the past twelve months;
- Its income and expenses over the same period;
- The number of employees;
- Collective or other agreements relating to the rights of employees;
- Debtors and their obligations to the company;
- Creditors and their rights or claims against the company.

The company under business rescue may dispose or agree to dispose of property only in the ordinary course of business, in a bona fide transaction at arm’s length for fair value approved in advance and in writing by the practitioner, or as part of an approved business rescue plan.

37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In the course of an insolvent liquidation procedure, the liquidator will have to obtain permission from either the Master, or creditors or the court to sell specific assets out of the ordinary course of business and to sell the entire business operation of the company. A shareholders’ meeting in particular is not required.

In terms of section 134 of the 2008 Companies Act, in a business rescue, the company may only dispose of property if it is in the ordinary course of business, or in a bona fide arm’s length transaction for fair value approved in advance by the practitioner, or if it is as part of the implementation of an approved business rescue plan. A person lawfully in possession of company property of the company as a result of a contract before the business rescue proceedings began, may retain possession but the practitioner may partially or conditionally cancel or suspend such transaction. Any party to an agreement that has been suspended
or cancelled has, in terms of sections 136 (2) and (3) a claim against the company for damages only. Anybody who wants to exercise a right over property in possession of the company, needs the practitioner’s consent in writing as provided by section134.

38. Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

The shareholders’ meeting have power in relation to a decision of the liquidator to continue or reject any favourable/unfavourable contract during an insolvency procedure because the shareholders are a class on its own and the liquidator must also convene meetings for them. The position regarding business rescue have been set out above..

See also paragraph 24 above.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

When a group is involved, then the liquidators could approach the court to declare that the group be treated as a unit.26

The question is not relevant to business rescue. Each company in a company group has separate legal identities and must be in financial distress to be placed under the business rescue process.

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders’ meetings of the relevant companies involved in the coordination mechanisms, if any?

The filing of separate proceedings could be detected by the Master of the High Court as all applications must be served on this office. The Master of the High Court would then alert the court.

IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your

26 Ex parte Gore NO and Others [2013] All SA 437 (WCC) Liquidation of companies interlinking (but not officially subsidiaries)-joining of companies. The order granted the relief sought by the liquidators of 41 companies to permit certain of the assets of those companies to be dealt with as if they were the property of the holding company.
jurisdiction.

South Africa needs unified insolvency law legislation. The status quo is that we have more than three acts pertaining to “insolvency” which causes confusion. Different acts govern the legal position regarding insolvency, different sets of rules and different terminology are used for insolvency/bankruptcy and different dates are set for the commencement of sequestration/liquidation. Old procedural aspects should be and formal qualifications should be prescribed for liquidators.