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A Case for Specialised Insolvency and Business Rescue Courts in South Africa

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Abstract

An effective insolvency system provides for liquidation as well as business rescue procedures. South Africa has attempted to maintain this standard since the promulgation of the Companies Act 61 of 1973. The Companies Act 1973 provided rescue procedures in the form of judicial management. However, judicial management failed because it relied mainly on the courts. The procedure was later replaced by the business rescue procedure in Chapter 6 of the Companies Act 71 of 2008. The Companies Act 2008, provides a rescue procedure for companies in financial distress by imposing a moratorium of legal proceedings against the company while the business rescue practitioner prepares a business rescue plan. Although business rescue is a modification of judicial management it appears that it still needs some improvements, especially on the involvement of the court. In this article, it is argued that to avert repeating the same failure as judicial management, South Africa should set up specialised business rescue courts. The rationale behind business rescue proceedings is at the centre of recovering financially distressed companies and in the long run, the economy. Hence, specialised judges

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should be appointed to increase the knowledge and expertise of those that administrate business rescue cases. Further, this approach guarantees a uniform application of the law and increases predictability. Through a brief exploration of the American and English bankruptcy courts, it is concluded that South Africa should adopt a separate court system or division-based type of courts.

Keywords: business rescue courts; case management; judicial expertise; uniformity and certainty; liquidation proceedings

1 INTRODUCTION

Only three years after the pandemic-induced global recession of 2020, the global economy is again confronted with tremendous issues. Concerns about an imminent global recession are growing in response to the significant deceleration in Gross Domestic Product.[1] Moreover, rising global borrowing costs are heightening the risk of financial stress among the many emerging market and developing economies that have accumulated debt at the fastest pace in more than half a century over the past decade.[2] Statistics South Africa has reported that between 2020 and 2022, over 3000 companies have been liquidated, and more than 1800 estates of natural persons and partnerships have been sequestrated.[3] Furthermore, as a result of the current energy crisis, it is anticipated that more than one-third of small and medium-sized businesses will cease operations by the end of 2023.

Given these factors, an efficient business rescue scheme becomes indispensable to resuscitating financially distressed companies and reviving the economy. Academics, practitioners, and judges have already welcomed the Chapter 6 business rescue scheme as an improvement to the previous judicial management.[4] However, although the legislature limited the court's involvement, relying on the general courts may compromise the effectiveness of the business rescue scheme. This article makes a case for the establishment of specialised insolvency and business rescue courts to improve the effectiveness of the business rescue scheme.[5] It is divided into three parts: the first part is an examination of the role of the court during judicial management, and the second part is an in-depth examination of the different factors that must be considered to establish specialised courts. The last part is a comparative assessment of different models of business rescue courts implemented in the United States, United Kingdom, Kenya, and South Africa.

1 Guénette, Kose, and Sugawara "Risk of Global Recession in 2023 Rises Amid Simultaneous Rate Hikes" 2022 *World Bank Press Release* 3–4.

2 *Ibid.*

3 Statistics South Africa http://www.statssa.gov.za/publications/P0043/P0043March2022.pdf (accessed 30-01-2022).

4 Levenstein "An Appraisal of the New South African Business Rescue Procedure" (LLD Thesis, University of Pretoria 2016) 261–262; see also; Rajaram, Singh and Sewpersadh "Business Rescue: Adapt or Die" *South African Journal of Economic and Management Sciences* 3; Lamprecht "Business Rescue Replacing Judicial Management: An Assessment of the Extent of Problems Solved" 2008 *South African Journal of Accounting Research* 183–196; *Koen and Another v Wedgewood Village Golf* 2012 2 SA 378 (WCC) para 14. *African Bank Corporation of Botswana LTD v Kariba Furniture Manufacturers (Pty) Ltd* 2013 6 SA 471 (GN) para 40.

5 Jia "Specialised Courts, Global China" 2022 *Virginia Journal of International Law* 567. The article defines specialised courts as courts with limited jurisdiction over one or more specific fields of law. See also Baum *Specialising the Courts* (2011) 6.

2 THE COURT'S INVOLVEMENT IN JUDICIAL MANAGEMENT

The idea that a corporate debtor in financial distress should be given a second chance to recover dates back to 1926 when parliament in South Africa approved the adoption of judicial management.[6] Judicial management was a statutory corporate rescue procedure designed to provide relief to companies experiencing financial difficulties.[7] It attempted to achieve this by imposing a moratorium on creditors,[8] divesting the company's control from previous management, and appointing a judicial manager to restructure the company.[9] During this era, it was accepted that public interests, such as protecting jobs, paying debts, and keeping the debtor in business, overshadowed the traditional view that a debtor is a commercial outcast and insolvency should be punished by way of liquidation.[10]

Despite several submissions that judicial management should be abolished due to its low success rate and instances of abuse, the Van Wyk de Vries Commission, appointed in 1963,[11] recommended that it be retained in the Companies Act 1973.[12] The Companies Act 1973 made several amendments to the original version of judicial management, but the general perception remained that judicial management was a miserable failure.[13] Numerous factors contributed to the failure of judicial management; however, most critics blame the involvement of the court.[14] There are five primary reasons why the Court's involvement was detrimental to the success of judicial management.

First, the High Court was the only venue for commencing judicial management.[15] As a result, the board of directors could not resolve to commence judicial management. Instead, a company in financial distress was required to apply for a provisional and final judicial management order.[16] This approach meant that the applicant would have to approach the Court twice for almost the

6 Hansard House of Assembly Debates 6, 25 February 1926 col 996-7. The concept of endeavouring to rescue an insolvent company rather than liquidating it was so novel that the Minister of Justice at the time, responsible for directing the "draft legislation through Parliament", had to proffer an explanation as to where the idea had originated from, and how it would be utilised.

7 Judicial management was first housed in the Companies Act 46 of 1926 later replaced by ss 427–440 of the Companies Act 61 of 1973.

8 See s 428(2)(c) Companies Act 1973 stipulates that the Court has discretion to grant a moratorium on all actions against the company. No action may be brought against the company without the Court's permission.

9 See s 428(2)(c) Companies Act 1973.

10 Kloppers "Judicial Management: A Corporate Rescue Mechanism in Need of Reform?" 1999 *Stell Law R* 417; see also Rajak and Henning "Business Rescue for South Africa" 1999 *SALJ*262; Loubser 2010: 2–4; Loubser "Some Comparative Aspects of Corporate Rescue in South African Company Law" (LLD Thesis, University of South Africa 2010).

11 The Commission of Enquiry into the Companies Act appointed in 1963 under the chairmanship of M r Justice J Van Wyk de Vries. See also Cilliers; Benade; Henning, Du Plessis and Delport *Corporate Law* (2000) para 2.15.

12 See Main Report of the Commission of Enquiry into the Companies Act (RP 45 of 1970) 524–525.

13 See Chatsanga "Judicial Management as a Business Rescue Scheme: a Critique of Judicial Management as a Rescue Scheme" (LLM dissertation, University of Zimbabwe 2017) 65–66; Burdette "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1)" 2004 *SAMerc LJ* 246. See also Loubser "Judicial Management as a Business RescuePprocedure in South African Corporate Law" 2004 *SA Merc LJ* 137; In *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd and Another* 2001 1 SA 223 (C) para 39 the Court provides a comprehensive explanation for the failure of judicial management.

14 Maphiri "The Suitability of South Africa's Business RescuePprocedure in the Reorganisation of Small-to-medium-sized Enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code" 2018 *Michigan Business & Entrepreneurial Law Review* 109; Levenstein (LLD thesis 2016) 60–61; Kloppers "Judicial Management Reform Steps to Initiate a Business Rescue" 2001 *SA Merc LJ* 370.

15 See s 427 Companies Act 1973. The restrictive approach was critisised in *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd and Another* 2001 1 SA 223 (C) para 39.

16 See s 428 and s 427 Companies Act 1973.

same order. Due to procedural delays, companies already on the brink of insolvency would struggle to recover. Kloppers argues that considering these different proceedings, the cost of applying and running judicial management was not feasible.[17] Rajak and Henning add that this made the procedure expensive and unsuitable for small and medium enterprises.[18] Thus, the need to approach the Court might have deterred many companies from using the procedure. Second, the courts adopted a conservative approach to judicial management. Burdette points out that the courts saw judicial management as an extraordinary measure and not a viable alternative to liquidation.[19] The courts reasoned that a creditor of a company that cannot pay its debts is entitled to make use of liquidation proceedings to recover payment of their claims.[20] Thus, judicial management was viewed as a special procedure only reserved for large companies.[21]

Third, the judicial management moratorium did not take effect automatically.[22] After obtaining a judicial management order, the debtor was required to apply to the Court for a stay of legal proceedings against the company.[23] Additionally, in cases where the Court declined to issue a moratorium order, the judicial management was doomed to fail because the company was not protected from creditors seeking to enforce its claims.[24] Fourth, there was no mechanism for the courts to monitor the activities of the judicial manager.[25] This could have been in the form of a requirement to draft a formal rescue plan.[26] As such, the judicial manager was under no obligation to meet specified objectives within specified time frames and was compensated regardless of whether the process was successful or not. Lastly, the procedure relied on general courts.[27] The High Court dealt with issues arising from judicial management, from commencement[28] to termination.[29] The main problem with reliance on general courts was that there were no specialised judges, and neither were there any records suggesting that judges received further education and training in dealing with companies under judicial management. It is posited that the weaknesses in judicial management legislation would have been mitigated by the Court had

17 Kloppers 2001 *SA Merc LJ* 370.

18 Rajak and Henning 1999 *SALaw J*268. Olver argues that a company with gross assets under R10 000, already in financial difficulty cannot bear the costs of judicial management and as such judicial management is not a suitable form of "business rescue" for small companies. See Olver "Judicial management: A Case for Law Reform" 1986 *THRHR* 87.

19 Burdette 2004 *SA Merc LJ* 247; Kloppers 2001 *SA Merc LJ* 378.

20 In *Tenowitz v Tenny Investments Ltd Tenowitz v Tenny Investments (Pty) Ltd* 1979 2 SA 680 (E) para 683 the court describes this right of creditors as an "*ex debito justitiae*" right to liquidate the company.

21 The restrictive approach was critised in *Le Roux Hotel Management* para 39.

22 Loubser (LLD Thesis, University of South Africa 2010) 31–32; Kloppers 1999 *Stellenbosch LR* 430.

23 See s 428(2) Companies Act 1973. In *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 3 SA 344 (W) it was held that no *concursus creditorum* is created by a judicial management order.

24 Kloppers 1999 *Stell Law R* 430; See also Henning "Aspekte van Curchéance van Betaalinge in die Respyt- en Insolvensiereg" 1991 *THRHR* 538.

25 Loubser (LLD Thesis, University of South Africa 2010) 31–32; 41–44.

26 Numerous commentators on judicial management have argued that a reasonably detailed plan of action to save the company is critical to a successful rescue and have cited the absence of any provisions for the formulation and acceptance of such a plan as a reason for judicial management's failure. See Kloppers 1999 *Stell LR*427; Rajak and Henning 1999 *SALJ* 267–268; Smits "Corporate Administration: A Proposed Model" 1999 *De Jure* 103.

27 See s 1 Companies Act 1973 defined Court as meaning "the Court which has jurisdiction under this Act in respect of that company or other body corporate, and, in relation to any offence under this Act, includes a magistrate's court having jurisdiction in respect of that offence."

28 See ss 427–440 of the Companies Act 1973.

29 See s 440(1) of the Companies Act 1973. The Court could terminate a judicial management proceedings upon application if it appeared that the purpose of judicial management was accomplished or if, for whatever reason, continuation was undesirable.

the Parliament appointed specialised judges with expertise in business and insolvency.

In 2008, the legislature adopted the Companies Act 2008 and included a new business rescue procedure. It has been more than a decade since the adoption of the Chapter 6 business rescue, and commentators have paid little attention to the involvement of the Court. The Chapter 6 business rescue can best be described as a hybrid debt-restructuring procedure which is a contrast with judicial management.[30] A hybrid debt restructuring is an out-of-court process that combines the characteristics of contractual workouts and caps the Court's involvement. [31] However, the success of contractual workouts depends on the collaboration and cooperation of all affected parties, and this may be difficult to achieve. Disputes often arise, necessitating the intervention of the Court. For instance, creditors may challenge the validity of the company's resolution to commence business rescue, or an individual creditor may wish to enforce his claims before the end of the business rescue process. There are also risks associated with restructuring, including the possibility of abuse of the rescue process and marginalisation of minority creditors. Alas, the legislature foresaw that the Court's involvement was indispensable to the success of the business rescue process. Nonetheless, to avert the same mistakes and flaws that rendered judicial management a celebrated failure, it is suggested that South Africa should move away from general courts and consider establishing specialised insolvency and business rescue courts.

3 FACTORS FOR CONSIDERING SPECIALISED COURTS

The notion of specialised courts is not foreign to the South African legislature. There are several specialised courts within the judicial system, including those of tax, labour, and patents.[32] This does not mean that setting up a specialised court is an easy task, several factors must be weighed before the legislature promulgates enabling legislation. These factors include (i) selecting the subject matter for adjudication; (ii) determining the possible tenure for judges; (iii) determining the appropriate organisational hierarchy; (iv) setting up structures to enable access to litigants and; (v) budgetary issues.[33] Due to the need for a comprehensive examination of actual data, this article does not address the financial and budgetary implications of specialised courts.[34] Below is an explanation of these factors in support of the view that South Africa should consider creating specialised courts for business rescue and insolvency proceedings.

3 1 Selecting a Specialised Subject Matter

The first and most crucial factor is selecting a specialised subject matter. Zimmer recommends that it should be established that due to the specific and intricate complexity of the legal issues and/or factual issues, generalist court judges are unlikely to process their varied caseload with

30 Garrido "World Bank Report on Out of Court-debt Restructuring" 2012 *World Bank Report* paras 93–95. https://documents1.worldbank.org/ (accessed 05-01-2023).

31 *Ibid.*

32 See Manyatera "Criteria for Appointments to Specialised Superior Courts: Perspectives from Mozambique, South Africa and Zimbabwe" 2019 *Univ of Botswana LJ* 60–70.

33 See Zimmer "Overview of Specialised Courts" 2009 *International Journal for Court Administration* 4; See also Revesz "Specialised Courts and Administrative Lawmaking System" 1990 *Univ of Penn L R* 1121; Dreyfuss "Specialized Adjudication"1990 *Brigham Young Univ LR* 377–441; Gruber, Cohen and Mogulescu, "Penal Welfare and the New Human Trafficking Intervention Courts'"2016 *Florida LR* 1333; Hon. Suzanne Anton, Q.C "Specialized Courts Strategy Ministry of Justice" March 2016 British Columbia https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/specialized-courts-strategy.pdf (accessed 26-11-2023).

34 See example the Legislative Budget Board, Financing the Judiciary in Texas, Legislative Primer: www.lbb.state.tx.us/Documents/Publications/Primer/1508_Financing_the_Judiciary.pdf; Garoupa, Jorgensen and Vazquez, "Assessing the Argument for Specialized Courts: Evidence from Family Courts in Spain," 2010Int'l JL Pol'y & Fam 54.

the necessary expertise and efficiency in the legal field, or the number of disputes is so small that they would only occasionally deal with them.[35] The legal field should also be relatively simple to technically and substantively distinguish from other areas of the law and continues to nurture enough litigation to support the establishment of a specialised tribunal.[36] Generally, two main issues must be determined: a specialised subject and a consistent flow of cases for litigation.

First, business rescue and insolvency proceedings have developed into complex legal and business subjects that warrant the establishment of specialised courts.[37] In *Northern Pipeline Construction Company v Marathon Pipe Line Company*,[38] the United States Supreme Court held that bankruptcy proceedings present largely technical questions given to "extreme specialisation".[39] To have a clearer view of the complexities of business rescue, one must evaluate the qualifications and competencies of the business rescue practitioner.[40] Basically, the practitioner must understand the knowledge and expertise in mercantile law, accounting, economics, and business.[41] Regarding financing, the practitioner must command an understanding of financial engineering to maximise the available finances and keep the business insolvency.[42] Moreover, the practitioner must be well-versed in econometrics and business analytics to evaluate the prospects of resuscitating the business. In practice, Fannon and Murphy note that corporate insolvency and rescue requires a unique collaboration between legal and accounting professions.[43] Commenting on the competencies of business rescue practitioners, Pretorius states that teaching basic business management skills is not enough since enterprises in financial distress require more complicated skills than what an ordinary attorney can provide.[44] The knowledge and expertise needed for one to become an expert business rescue practitioner may take a lifetime to gain.

It is one thing for a lawyer to learn a new area of law, but expecting a lawyer to understand the formulas for econometrics, financial engineering, and business analytics is quite another. The advantage of practising as a business rescue practitioner is that the firm or the debtor may hire other experts to assist the practitioner. The situation may be challenging if a business rescue case is brought before a general judge who is not well-versed in the intricate issues of the case. With caseloads spanning numerous disciplines outside the law, the possibility of a generalist judge acquiring significant technical understanding in insolvency and business rescue is slim.

For this reason, the World Bank Principles recommends that insolvency proceedings should

35 Zimmer 2009 *Int'l J for Court Administration* 4; See also Revesz 1990 *Univ of Penn LR* 1121.

36 *Ibid.* See Legomsky *Specialised Justice* (1990) 24 states that "[a] high level of technicality in a particular field had traditionally been seen as an important reason [for] a specialised court."

37 See McKenzie "Judicial Independence, Autonomy and the Bankruptcy Courts" 2010 *Stanford LReview* 773; Jia 2022 *Virginia J Int'l L* 568.

38 *Northern Pipeline Construction Company v Marathon Pipe Line Company*, 458 U.S. 50 (1982).

39 *Northern Pipeline Construction Company v Marathon Pipe Line Company*, 458 U.S. 50 (1982) 118 compared to McKenzie 2010 *Stanford LR* 773–774.

40 See Mpofu, Nwafor and Selala "Exploring the Role of the Business Rescue Practitioner in Rescuing a Financially Distressed Company" 2018 *Corporate Board: Role, Duties and Composition* 20–26.

41 Kierulff and Petersen "Finance is Everything: Advice from Turnaround Managers" 2009 *Journal of Business Strategy* 44–51.

42 See s 138 Companies Act 2008 states that a person may be appointed as the business rescue practitioner of a company only if the person is a member in good standing of a legal, accounting, or business management profession accredited by the Companies and Intellectual Property Commission.

43 Fannon and Murphy 2012 *Corporate Insolvency and Rescue (Preface)* 1.

44 Pretorius "A Competency Framework for the Business Rescue Practitioner Profession" 2014 *Acta Commercii* 2*;* Midanek "How to Pick the Right Turnaround Manager" 2002 *Journal of Private* Equity 24 refers to these as the knowledge, skills, and abilities associated with "war zone" experiences; yet the particular competencies required remain elusive.

be overseen and adjudicated by an independent court and, where possible, assigned to judges with specialised insolvency expertise.[45] As highlighted above, the Court's ability to handle the sometimes complicated commercial issues involved in insolvency proceedings depends not only on its knowledge and experience of specific legislation and business practices but also on the frequency with which this knowledge and experience is updated.[46] Damle argues that "because generalist judges must handle all areas of the law, they generally are unable to develop expertise in any one area."[47] The Legislative Guide suggests that to address judicial capacity, court employees, including judges, clerks, and other administrators, should be regularly educated and trained on recent insolvency law developments.[48] This approach has the potential to increase legal expertise in the field of insolvency and business rescue.[49] More so, judgments from specialised courts with judges who have more expertise and experience in the relevant area are more likely to be of a higher quality reducing the number of appeals.[50]

Second, ideally the jurisdiction should be one where the legal system is progressing, even if at a slow pace.[51] Specialised judges are most efficient when they have a consistent influx of new cases arising from conflicts in the emerging field of law that fall under their jurisdiction.[52] Zimmer argues that potential domains for achieving successful specialisation encompass taxation, bankruptcy, patents and trademarks, international trade and tariffs, old-age retirement/disability and associated benefits, employee benefits, environmental and natural resources regulation, public land and water management, and insurance.[53] Calitz argued that with regard to business rescue and insolvency proceedings, specialised courts should be created not based on the case flow but because of the nature of business rescue.[54] Business rescue proceedings are urgent in nature,[55] hence, litigants should have easy access to the courts. Basically, the goal should be to separate those matters that, in relation to their significance, place the most significant strains on the efficiency of the generalist courts.

45 World Bank Principles 2015, 29 para D1.2. see European Union Directives 2019, 35 para 86. The European Union Directives also endorse that its Member States ensure that members of judicial and administrative authorities dealing with procedures involving preventive restructuring, insolvency, and debt discharge are appropriately trained and have the necessary expertise for their responsibilities.

46 Legislative Guide 2005, 34 para 5.

47 Damle "Specialize the Judge, not the Court: A Lesson from the German Constitutional Court" 2005 *Virginia LR* 1227.

48 Legislative Guide 2005, 34 para 5.

49 See Legomsky *Specialised Justice Courts: Administrative Tribunals and Cross-national Theory of Specialization* (1990) 7. The author states that specialty judges acquire the experience, and often training, to become experts on a single social issue and in a specific area.

50 Wood, Miller and Kaplan "Specialty Courts: Time for a Thorough Assessment" 2018 *Mississippi College LR* 335.

51 See Damle 2005 *Virginia LR* 91, 1267–1311.

52 *Ibid*.

53 Zimmer 2009 *International Journal for Court Administration* 4–5.

54 Calitz "Symposium on Business Rescue and Insolvency Law Education" On 19 October 2023, Professor André Boraine from the University of Pretoria Faculty of Law and Professor Juanita Calitz from the University of Johannesburg Faculty of Law collaborated to host the inaugural Symposium on Business Rescue and Insolvency Law Education.

55 *Koen v Wedgewood Village Golf* para 10 the Court held that "[i]t is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted."

3 2 Assessing the Tenure of Specialised Judges

After determining whether there is a special subject matter, the legislature must determine the term of office for the specialised judges.[56] When choosing whether to include lifetime tenure as a requirement for appointing a judge to a specialised court, assessing whether the court will be a transitory or permanent part of the judicial landscape is crucial. How likely is it that the limited jurisdiction and specialised subject matter will result in a steady or rising rate of litigation? Does the number of cases concerning this area of law and subject matter fluctuate significantly over time? What will judges with tenure for life do if this occurs? Is it possible that as the application of the law becomes so precise that attorneys will be able to fairly evaluate the merits of their cases and instead reach settlements, the number of disputes in the subject area, which may have increased over the past decade, will begin to decline and eventually disappear? These are fundamental questions to which the legislature must provide coherent responses.

In the case of insolvency and business rescue, the INSOL Judicial Group reported that the withdrawal of government COVID-19 assistance (loans, wage grants, payment holidays, restrictions on the enforcement of property rights arising from mortgages and tenancies) would increase insolvency applications (bankruptcy, winding up, administration, voluntary arrangements) and that courts across the globe should expect an "avalanche" of work.[57] The Bank of International Settlements states that insolvency applications will rise by 20 per cent in advanced economies.[58] Menezes comments that the sudden rise in insolvency filings will likely strain the most sophisticated, resourced, and well-structured judiciary. Particularly in emerging markets, it will be difficult to meet an increase in demand by scaling existing systems because the effective management of insolvency cases requires a degree of technical specialisation and expertise that take time to develop.[59] The South African economy is not immune to these negative predictions. Statistics South Africa has already recorded 1700 liquidations over the last 12 months, excluding business rescue applications by companies. The courts in South Africa should expect a floodgate of applications for business rescue and liquidation proceedings, and the legislature may prevent the collapse of the judicial system by creating temporal or permanent specialised insolvency and business rescue courts.

The advantage of a specialised insolvency and business rescue court is that it will promote effective case management.[60] A trial judge with specialised knowledge of the subject matter of the cases is in a better position to impose and monitor rules for case management. The specialised judge would require less time to research and reflect on the fundamental issues of the case and, as a result, can provide direction and guidance to the attorneys earlier in the case than a generalist judge.[61] Furthermore, over time specialised judges may gain the ability to routinely make case-related decisions extemporaneously, with little time or support for research, consultation, and contemplation, but deliver well-crafted opinions. This is advantageous to the

56 Menezes "INSOL Virtual 2021 Judicial Webinar – Avalanche Warning!" 2021 INSOL International https://www.insol.org/Focus-Groups/Judicial-Group.

57 *Ibid*.

58 *Ibid.*

59 *Ibid.* 1.

60 See Bruff "Specialized Courts in Administrative Law" 1991 *Administrative Law Review* 330.

61 See Arlota "Do Specialised Courts Make a Difference? Evidence from Brazilian State Supreme Courts" 2016 *European Business LR* 487–500. The author analyses (at 630) cases heard by Brazilian State Supreme Courts on questions of constitutionality and compares decisions by specialised and non-specialised panels to determine whether specialised courts performed better on a range of performance measures including duration of the hearing, length of judgment, dissent of opinions and claimant success.

business rescue proceedings because they are meant to be swift and cost-effective.[62] Lastly, when a specialised area of the law is allocated to the jurisdiction of a special court, judges in courts with general jurisdiction are no longer burdened with matters in that area of the law.

3 3 Determining the Proper Organisational Structure.

When considering whether to create a specialised court, it is necessary to determine the hierarchy of the courts. In this regard, it must be decided whether specialised courts are created at the trial or the appellate level.[63] When the adjudication of a complicated subject needs specialised knowledge, such knowledge should be located at the level of fact-finding or trial. In the grand scheme of things, specialised courts may function most effectively at the first-instance level, where (i) judges with the necessary subject-matter expertise are capable of analysing complex technical issues; and (ii) appeals are not automatic but must be based on allegations of grave error by the first-instance court.

In South Africa, business rescue or insolvency proceedings are initiated at the High Court, and where litigants are not satisfied with the Court's decision, they are allowed to appeal to the Supreme Court of Appeal, which is one of the highest appeal courts of the land. Concerning business rescue cases, Levenstein applauds the current judgments as displaying a sound understanding of the provisions in Chapter 6.[64] However, it is contended that there are numerous contradictory judgments, and some judges, instead of exercising their quasi-legislative authority, that blame the legislature for drafting errors.[65] For instance, in the case of *Advanced Technologies and Engineering Company Pty Ltd v Aeronautique et Technologies Embarquees SAS*,[66] the Court in Johannesburg held that section 129 of the Companies Act 2008 required full compliance with the prescribed procedural requirements in subsections (3) and (4) and did not provide for the possibility of mere substantial compliance being sufficient or for condonation of non-compliance. Whereas, in *Ex parte Van den Steen NO and South Gold Exploration (Pty) Ltd*,[67] the High Court in Johannesburg held to the contrary. It held that substantial compliance with the notification requirements is allowed by section 6(9) of the Companies Act 2008. From this example, the High Court within the same province held two contradictory judgments on the same provision. These judicial inconsistencies and contradictions do not guarantee the uniform application of the law.

Specialised courts are appropriate when there are compelling justifications or requirements for uniformity or consistency in the application of the law.[68] Business rescue and insolvency proceedings are concerned with the financial welfare of persons (natural or juristic) involved

62 See *Koen v Wedgewood Village Golf* para 10, the court held that "[i]t is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted."

63 Zimmer 2009 *International Journal for Court Administration* 4–5.

64 Levenstein (LLD Thesis, 2016).

65 See *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd and Others* [2016] ZAWCHC 124 para 36; *Re ABSA Bank v Caine NO* [2014] ZAFSHC 46 paras 24–26; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] 3 All SA 303 (SCA) para 49, item 11.

66 *Advanced Technologies and Engineering Company Pty Ltd v Aeronautique et Technologies Embarquees SAS* Unreported case no 72522/ 20110 (GNP).

67 *Ex parte Van den Steen NO and South Gold Exploration (Pty) Ltd* Unreported case no 3624/2013 (WCC). Compare the decision in *Oakdene Square Properties* para 26 to a contrary decision in *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 5 SA 515 (GSJ) para 12.

68 Bruff 1991 *Administrative LR* 331.

in economic activities.[69] Therefore, the law that oversees the administration of such persons must be uniform and certain to ensure legal certainty and also business efficacy. Uniformity in decision-making leads to predictability. The main benefit of predictability is that it lessens the need for litigation, minimises the likelihood that parties will discover legal grounds to bring a dispute to court, and increases public confidence in the court system.

3 4 Setting Up Structures to Enable Access to Litigants

When establishing a specialised court that encompasses the jurisdiction previously held by multiple generalist courts, it is crucial to address the matter of accessibility.[70] Placing generalist courts in various regions of a country allows for convenient access to legal proceedings for all individuals.[71] However, establishing a specialised court in the capital city to handle intricate areas of law may restrict the accessibility of certain litigants who are located far away from the court.[72] This could potentially favour those who live in or near the capital city. The specialised court should be situated in a geographically central location, near all major population centres.[73] Considering that the proposed court will not only deal with business rescue but will also include insolvency proceedings it is suggested that for easy access each province should have a division within its general courts that deals with business rescue and insolvency proceedings. This suggestion is explained in detail below.

4 DIFFERENT MODELS OF INSOLVENCY AND BUSINESS RESCUE COURTS

A variety of court systems can be adopted to address the issue of specialisation. According to Gramckow and Walsh, the selected model should consider the significance of the underlying issue it seeks to solve as well as the local circumstances, particularly the volume of cases intended to be specialised cases.[74] The more cases that require special treatment, whether in the form of legal expertise, administration, or facilities, the greater the need for more comprehensive specialisation and the greater the justification for investment.[75] The following specialisation models are presented in descending order of comprehensiveness, beginning with the most comprehensive option, which involves specialisation at all court levels, from trial courts to appeals courts.

4 1 Establishment of a Separate Court System

The legislature may choose to create a separate court system. A separate court system may take the form of a separate court housed in its own building, using a unique procedure from other courts.[76] This type of court may be created either to better account for variations in procedures or because administrative procedures and court rules have been modified to accurately reflect the unique demands of the cases filed to the court.[77] These courts can be organisationally part of the jurisdiction's general court system or a separate hierarchy of specialised courts that may

69 Fannon and Murphy *Corporate Insolvency and Rescue* (Preface, 2012) 1; Fletche *The Law of Insolvency* (2002) 3.

70 Zimmer 2009 *International Journal for Court Administration* 6–7.

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

74 Gramckow and Walsh "Developing Specialised Court Services: International Experiences and Lessons Learned" 2013 *Justice and Development Working Paper Series* 10.

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

include distinct specialised appeal courts.[78] One example is the United States bankruptcy courts.

A brief history of bankruptcy courts reveals that Article 1 of the United States Constitution authorises Congress to establish uniform bankruptcy laws throughout the nation.[79] Tabb states that the framers of the United States Constitution had the English bankruptcy system in mind when they included the power to enact "uniforms laws on the subject of bankruptcies."[80] Considering that South Africa was a colony of England, the United States provides a relevant example to study when considering creating specialised bankruptcy courts.

The first bankruptcy legislation was the US Bankruptcy Act of 1800, which authorised the district court judges to appoint non-judicial commissioners to oversee and help administer bankruptcy proceedings.[81] Since the Bankruptcy Act of 1800 contained a five-year sunset provision, it was replaced by the Bankruptcy Act of 1841, which granted district courts "jurisdiction in all matters and proceedings in bankruptcy," including developing rules for proceedings and appointing bankruptcy commissioners and assignees.[82] However, the Bankruptcy Act of 1841 was repealed because of high administration costs, lack of state law exemptions, and creditor frustrations. In 1867, Congress enacted the Bankruptcy Act of 1867, the first legislation that recognised district courts as "constituted courts of bankruptcy" with original jurisdiction in all bankruptcy matters.[83] In response to abuses and excessive fees, Congress repealed the Act of 1867. The Bankruptcy Act of 1867 was replaced by the Bankruptcy Act of 1898 and later the Chandler Act of 1938. The two latter pieces of legislation did not amend any provisions related to bankruptcy courts.

The current bankruptcy courts were created under the Bankruptcy Reform Act of 1978, which was later amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The Bankruptcy Reform Act of 1978 established bankruptcy courts in each district and allowed the appointment of separate judges, appointed by the President and confirmed by the Senate, to serve 14-year terms.[84] While bankruptcy courts may now hear all matters arising in or related to bankruptcy cases, judges remain non-Article III adjuncts of the district court. In *Northern Pipeline Const. Co. v Marathon Pipe Line Co.*,[85] the Supreme Court declared the broad delegation of jurisdiction to bankruptcy courts unconstitutional.[86] The Court stayed its decision to give Congress time to amend the provision.[87] In response, Congress passed the Bankruptcy Amendments and Federal Judgeship Act, which replaced the 1978 provisions dealing with jurisdiction, venue, jury trials, and appeals.[88] In terms of the amendments, bankruptcy courts

78 *Ibid.*

79 Article 1, s 8 of the Constitution of United States of America 1787.

80 Tabb "The History of the Bankruptcy Laws in the United States" 1995 *ABILR* 6.

81 See s 1 of the Bankruptcy Act of 1800 (2 Stat. 19) states that the district courts of the United States does not, like the chancellor in England, have exclusive jurisdiction over the entire execution of the bankrupt law. They cannot remove assignees, nor compel them to account.

82 See s 8 and s 16 of the Bankruptcy Act of 1841 (5 Stat. 440) provides that all jurisdiction, power, and authority, conferred upon and vested in the district court of the United States by this Act, in cases of bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District.

83 See Bankruptcy Act of 1867 (14 Stat. 517).

84 See ss 15 1(a)–159 Bankruptcy Reform Act of 1978 See also Boyes and Faith "Some Effects of the Bankruptcy Reform Act of 1978" 1986 *The Journal of Law & Economics* 29(1): 139–149.

85 *N. Pipeline Constr. Co v Marathon Pipe Line Co Co*., 458 U.S 50, 87 (1982).

86 *Ibid.* 50–57.

87 *Ibid* 63–67.

88 Bankruptcy Amendments and Federal Judgeship Act of 1984; see Wilensky "The Bankruptcy Amendments And Federal Judgeship Act Of 1984: An Unconstitutional Vesting Of Subject Matter Jurisdiction" 1986 *San Diego LR* 939–955.

become units of the district courts with jurisdiction by district court reference.[89] Furthermore, bankruptcy courts are authorised to enter final orders on core matters, with non-core matters subject to *de novo* rule by the district court, absent consent of the parties.[90] Generally, bankruptcy courts are courts of limited jurisdiction as they derive the power to hear core bankruptcy matters from the district court.[91]

Felsenfeld states that the establishment of specialised bankruptcy courts worldwide, apart from other court systems, will foster a sense of international fraternity among bankruptcy judges, similar to what already occurs among lawyers in related professions.[92] This has the potential to greatly facilitate the harmonisation of international insolvency legislation. Courts in various nations that function harmoniously, either via formal or informal means, are most effective in resolving highly intricate disputes.[93] We concur with Felsenfeld's suggestion and add that it would be easy for business rescue practitioners to oversee the implementation of business rescue plans that extend to other jurisdictions.

4 2 Creation of a Separate Court Division or Bench within a Court

A general court may create a specialised division or bench with less formality than through a law passed by the legislature, often with merely administrative rules or court-adopted guidelines.[94] This type of court division may be assigned several judges, court officials, and courtrooms, as well as a separate building.[95] Judges may be permanently or temporarily assigned to a specific division to satisfy short-term specialisation demands or assess specialised procedures and services to inform future expansion.[96] Special divisions or benches can be a highly flexible way of pursuing specialisation without significantly greater administrative effort or other costs.[97] The most relevant example in this regard is the English insolvency system. The current South African legislation on corporate insolvency is mainly derived from the English legislation.[98]

The history of courts in England and Wales has gained a reputation for being long and complicated. Legal historians commonly traced it to the Against Such Persons As Do Make Bankrupts Act of 1542.[99] According to this Act, a creditor could initiate bankruptcy proceedings by filing a complaint with one of three Lords: the Lord Chancellor, the Lord President, and

89 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333 (codified in scattered sections of 11 U.S.C. and 28 U.S.C.). 14. Section 157(a) states: "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

90 See s 157 Bankrutpcy Amendments and Federal Judgeship Act of 1984.

91 See s 157(b)(1) Bankruptcy Amendments and Federal Judgeship Act of 1984 states that "[b]ankruptcy courts may hear and determine all cases under title 11 and all core proceedings arising under title II or arising in a case under title 11 referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title."

92 Felsenfeld "A Comment About a Separate Bankruptcy System" 1996 *Fordham LR* 2529.

93 *Ibid*.

94 Gramckow and Walsh 2013 *Justice and Development Working Paper Series* 10.

95 *Ibid*.

96 The use of specialised divisions or benches is very common in British Commonwealth countries, such as India and New Zealand.

97 See Kleandrov "On the Directions of Improving the Mechanism of Judicial Power in Ensuring the Fairness of Justice" 2021 *Gosudarstvo i Pravo* 7–23. Coviello, Ichino and Persico "Measuring the Gains from Labor Specialization" 2019 *Journal of Law and Economics* 403–426.

98 Calitz "System of Regulation of South African Insolvency Law: Lessons from the United Kingdom" 2008 *Obiter* 352–372.

99 See Levinthal. "The Early History of English Bankruptcy." 1919 *Univ of Penn LR*1–20; Brunstad "Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law" 2000 *The Business Lawyer* 499–591.

the Lord Privy Seal.[100] The Lord Chancellor, together with the officeholders mentioned above, constituted the Court of Chancery.[101]

While the Court of Chancery retained jurisdiction over bankruptcy concerns, bankruptcy administration was delegated to commissioners who sat on committees.[102] These committees were in charge of making many of the decisions that are now deemed judicial.[103] Because commissionership was frequently awarded as a kind of political patronage, most of the commissioners were not qualified to adjudicate bankruptcy cases.[104] As a result, the system had fallen into disrepute by 1801 and was subsequently abolished.[105]

As of 1847, the bankruptcy proceedings had been formally incorporated into the High Court, with the majority of the work being performed by Registrars in Bankruptcy.[106] However, a substantial amount of work was determined by the Chancery Division judges.[107] A possible change could have been introduced by the Cork Committee in 1982. The Cork Report suggested establishing insolvency courts with exclusive jurisdiction over all insolvency matters regardless of the person's legal status whether a natural or juristic person.[108] However, the proposal was not implemented in the Insolvency Act 1986, which is the current legislation regulating insolvency law.

The Insolvency and business reorganisation proceedings are currently dealt with at the Insolvency and Companies List, formally known as the Bankruptcy Court, forming part of the Chancery Division.[109] The Chancery Division is one of three parts of the High Court of Justice, the others being the Queen's Bench Division and the Family Division.[110] The Insolvency and Companies List is a specialist list within the Chancery Division. It comprises two sub-lists: "Insolvency" and "Companies".[111] The work of the Insolvency and Companies Lists cover both corporate and individual insolvency under the Insolvency Act 1986, and the Insolvency (England and Wales) Rules 2016, as well as matters of company law outside the insolvency context, such as

100 See the 1542 Act, entitled "An Act Against Such Persons as Do Make Bankrupt". Tabb "The Historical Evolution of the Bankruptcy Discharge" 1991 *American Bankruptcy LJ* 325–371.

101 See Collins "Bankruptcy in the Court of Chancery, 1674–1750" (PhD Thesis, University of York 2020) 27–48; Carne "A Sketch of the History of the High Court of Chancery from Its Origin to the Chancellorship of Wolsey" 1927 *Virginia Law Register* 391–421.

102 Collins (PhD Thesis 2020) 47–48.See also Maddock *A Treatise on the Principles and Practice of the Court of Chancery, 3 edn* Vol 2(1837) 785–786.

103 Collins (PhD Thesis 2020) 47–48.

104 Finch, *Earl of Nottingham, Manual of Chancery Practice, and Prolegomena of Chancery and Equity* (1965) 161–165.

105 Collins (PhD Thesis 2020) 23.

106 The Business and Property Courts of England & Wales *Chancery Guide* 2022 https://www.judiciary.uk/wp-content/uploads/2023/01/Chancery-Guide-2022-October-web2.pdf.

107 Bankruptcy proceedings in London were generally conducted in Lincoln's Inn and later in The Guildhall. However, the volume of work and the need for reform warranted the creation in 1832 of a permanent bankruptcy court, called the Court of Review, which removed jurisdiction from the Lord Chancellor. This was abolished in 1847 and the jurisdiction of the Court of Chancery was restored. The Registrars in Bankruptcy whose role was largely administrative when created in 1821, but which gradually developed into a judicial office, in particular after the almost total abolition of the commissioners in 1831.

108 Cork Report 1982,1003–1004 – "The court would have jurisdiction over all insolvency matters including: a. personal insolvency (other than debts arrangement orders); b. corporate insolvency; call matters relating to receivership and to administrators; d. disputes over the appointment or removal of all classes of insolvency practitioners; e. matter relating to IVAs; f. other insolvency matters specially recommended."

109 *Chancery Guide* 2022.

110 *Ibid.*

111 *Ibid.*

shareholder disputes, in claims or petitions under the Companies Act 2006.[112]

4 3 Appointment of Judges with Special Expertise

If a Court does not receive a sufficient volume of cases that could benefit from specialised processing and expertise, or if it cannot predict the volume of such cases in the future, it may encourage judges to acquire this specialised subject knowledge so that they can be assigned to handle these cases when they appear before the Court. The specialist judge forms part of the general court and only presides on specialised subject matters as they are filed. This approach was adopted in the South African Companies Act 2008.

It is important to note that the Department of Trade and Industry published guidelines to the legislature, which resulted in the current Companies Act 2008. According to the Reform Guidelines, the legislature should consider setting up a dispute resolution mechanism to provide recourse to aggrieved shareholders.[113] Although the Reform Guidelines recommended that creating a new institution for business rescue or insolvency may not be necessary, the Companies Act 2008 authorises the establishment of designated judges. Section 128(3) of the Companies Act 2008 provides:

> [T]he Judge President of a High Court may designate any judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue.[114]

Since the promulgation of the Insolvency Act 24 of 1936 and the Companies Act 1973, no specialised courts have been set up for judicial management or winding up. Hence, section 128 is a welcome change. However, it is argued that South Africa should move away from the designated specialised judge approach and create separate specialised courts or divisions. The appointment of designated judges in terms of section 128 of the Companies Act 2008 attracts unintended negative consequences. First, section 128 envisions the appointment of any judge specialising in commercial law, including business rescue and corporate insolvency. This implies that for each province in South Africa, only one or two judges are designated for business rescue proceedings. The main problem with appointing designated judges is that specialised judges adjudicate cases in courts populated by specialised attorneys who regularly appear before them. Therefore, the designated judges would run the risk of developing professional bias towards business rescue practitioners. In effect, the Court may gradually but inextricably be captured by its own specialised bar, causing the general bar and the public to lose faith in its independence and objectivity. Nonetheless, this flaw may be mitigated by creating a separate court or division that is constituted by several specialised judges. It may be difficult to capture the judiciary if the legislature ensures institutional independence by appointing several specialised judges to work in a separate Court or as a panel in a division.

Second, the other downside of section 128 of the Companies Act 2008 is that it only authorises the appointment of specialised business rescue judges at the High Court. There are no specialised Magistrates in lower Courts, yet many natural persons apply for debt review in terms of Chapter 4 of the National Credit Act 2005. The debt counsellor receiving the application may only refer the matter to the Magistrate's Court and not the High Court. Third, the current approach to specialisation provides little opportunity for cross-pollination that tests and improves new ideas and novel approaches in interpreting and applying the business rescue and insolvency law. In *African Bank Corporation of Botswana Limited v Kariba Furniture Manufacturers (Pty)*

112 It also includes claims for the disqualification of company directors under the Company Directors Disqualification Act 1986 ("CDDA 1986").

113 Guidelines for Corporate Law Reform 2004, 50.

114 Section 128(3) of the Companies Act 2008.

Ltd, the court held that "there is a conscious attempt by the legislature, in chapter 6 of the Act, to keep the role of the court in business rescue proceedings to a minimum."[115] Basically, the current attitude of the general courts is to distance the Court from business rescue proceedings. In other words, the Courts are reluctant to engage with the economic and business aspects of business rescue.

It is recommended that the legislature may extend the jurisdiction of the Companies Tribunal to include the Chapter 6 business rescue proceedings. The Companies Tribunal is established in terms of Chapter 8 Part B of the Companies Act 2008. Its functions are outlined in section 195 as including the power to decide any application that may be submitted in terms of the Act. The Court has the authority to facilitate the settlement of conflicts as outlined in Part C of Chapter 7.[116] Additionally, it is responsible for carrying out any additional duties given to it in terms of the Companies Act 2008 or listed in Schedule 4.[117] However, it does not have the jurisdiction to hear matters arising from the Chapter 6 business rescue proceedings. It is argued that the Companies Tribunal should have jurisdiction to hear business rescue proceedings for the following reasons: The presiding officers are experts not only in the law but also economics, business. and public affairs.[118] Therefore, in contrast to the general courts, the Tribunal is presided over by specialists in many fields that are pertinent to the recovery of financially distressed companies. The Tribunal already possesses a well-established infrastructure and an efficient administrative system. Furthermore, the executive does not need to make substantial budgetary adjustments to accommodate the construction, and employment of specialised judges. Lastly, it will be more convenient for the legislature to make amendments to the Companies Act 2008 or its Schedule, as opposed to enacting a new legislation that would establish a specialist court.

5 CONCLUSION

The South African economy is still recovering from the COVID-19 pandemic, but more slowly than projected. The forecast is clouded with risks, and continuous reforms and investments are necessary to accelerate economic growth and the eradication of poverty. It is argued that insolvency systems have the potential to salvage the economy by providing alternatives to liquidation proceedings. One such idea is the judicial management regime. This regime provides restructuring procedures for companies in financial distress; however, it failed because of relying on the Court's involvement. The situation was aggravated by relying on general courts and not appointing specialised insolvency judges. The current business rescue system is also dependent on Court intervention, and in order to avoid repeating the same mistake that led to judicial management failure, South Africa should consider establishing specialised insolvency and business rescue courts.

The law of insolvency and business rescue has grown increasingly technical and complex due to the inclusion of elements from disciplines such as accounting, business, and finance. For this reason, commentators[119] and international instruments[120] urge legislatures to create specialised courts and appoint specialised insolvency judges. This approach will, in turn, increase expertise in business rescue, improving the quality of judgments. Furthermore, considering the projected

115 *Corporation of Botswana Limited v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 6 SA 4 7 1 (GN) para 51.

116 See s 195(1)(b) Companies Act 2008.

117 See s 195(1) (c) Companies Act 2008.

118 Section 194 Companies Act 2008 states that the "Tribunal must comprise— (a) persons with suitable qualifications and experience in economics, law, commerce, industry or public affairs; and (b) sufficient persons with legal training to satisfy the requirements of subsection 3(a)."

119 Legislative Guide 2005, 34 para 5–7.

120 Menezes 2021 INSOL International.

global recession, courts will be flooded with insolvency and business rescue proceedings. Therefore, specialised courts offer a case management approach that is cost and time effective. In addition to that, specialised courts ensure uniform application of the law throughout the country.

Three primary models of specialised courts can facilitate insolvency and business rescue proceedings: a separate court system, court division and specialised judge approach. If the South African courts experience a high influx of insolvency and business rescue cases, the judiciary should implement section 128 of the Companies Act 2008 and add more judges. Nonetheless, this can only be a temporary measure, for effective administration of insolvency and business rescue cases, it is recommended that the legislature set up separate insolvency court systems the same way as implemented in the United States of America or England. This article is not exhaustive in its coverage of all aspects pertaining to the establishment of a specialist court. Therefore, more research in this field is crucial.