CHAPTER FOUR
CORPORATE REHABILITATION PROCEEDINGS

4.0. Introduction

In almost all developed countries, as well as in a number of developing countries, insolvency systems have two distinct formal pathways for handling the problem of debtors unable to pay their debts as they fall due. First, there is the traditional approach, which can be said to have dominated insolvency systems up until a generation or so ago and that is often called liquidation. This refers to the process by which the unpaid or underpaid creditors seize control of the assets belonging to the debtor (most often through a representative, not surprisingly often called a “liquidator”) and arrange for the piecemeal sale of these assets and distribution of the proceeds amongst themselves. This process generally entails the dismantling of the business belonging to the debtor and, with that destruction, the loss of employment for the employees, the termination of transactions and assignments before completion, and other wasteful or disruptive consequences.

Second—perhaps in reaction to what was seen as unnecessary wastefulness—the approach of debtor rehabilitation has been developed.

A number of general points should be made in connection with this bifurcated approach to bankrupt debtors. In the first place, the idea of rehabilitation is also rooted in legal tradition but not the same tradition as that from which liquidation originates. The latter may be described as a formal process, most commonly arising from a court order initiating a process that takes place under the supervision of the court.\(^1\) The traditional rehabilitation process, by contrast, may be more informal; it springs from the collective concerns of creditors and is subsequently translated into an agreement with the debtor as to the future conduct

\(^1\) However, it should be noted that many Commonwealth jurisdictions supplement the compulsory, court-centered procedure with a streamlined creditors’ voluntary liquidation procedure.
of the business. The importance of the process in this context lies in its independence of any assistance from, or approval by, any court or other public institution. Yet its inability to bind creditors who refuse to be party to the agreement made a formal rehabilitation pathway inevitable.

4.1. History and Key Issues

The concept of a formal business rescue regime in modern times can be traced back at least to 1926 when, under the description of Judicial Management, it was introduced into South Africa by the South African Company Law Amendment Act of that year. This regime was adopted almost in its entirety by Australia in 1961, where it was called “Official Management.” Both these regimes have been widely recognized as failures. Following the recommendations of the wide-ranging Australian Law Reform Commission Report, Official Management was abolished in 1993 and replaced by the regime of Voluntary Administration. South Africa’s Judicial Management remains on the statute book, and although much work has been done on radical reform in this area, a new implementing statute (a Companies Act) with a wholly new business rescue regime is still in bill form and its enactment is not expected before 2010.

Insolvency “rehabilitation,” or “reorganization” or “rescue” is everywhere devoted to maintaining all or a major part of a business as a going concern. It may be devoted to saving the company (which remains in the hands of the original owners) or merely to saving the business (which is sold to the highest bidder as a complete unit). The former was often the goal with rehabilitation laws and the original Chapter 11 in the United States, while the latter is the common result under some more recent enactments and in many contemporary Chapter 11 cases.

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2 For another view of this history, see Philip Wood, PRINCIPLES OF INTERNATIONAL INSOLVENCY 21–27 (2007).
3 See Part IX, Australian Companies Act 1961.
6 See, for example, Rajak & Henning, op. cit.