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INTRODUCTION TO BUSINESS RESCUE AND IMPORTANT DEFINITIONS

01

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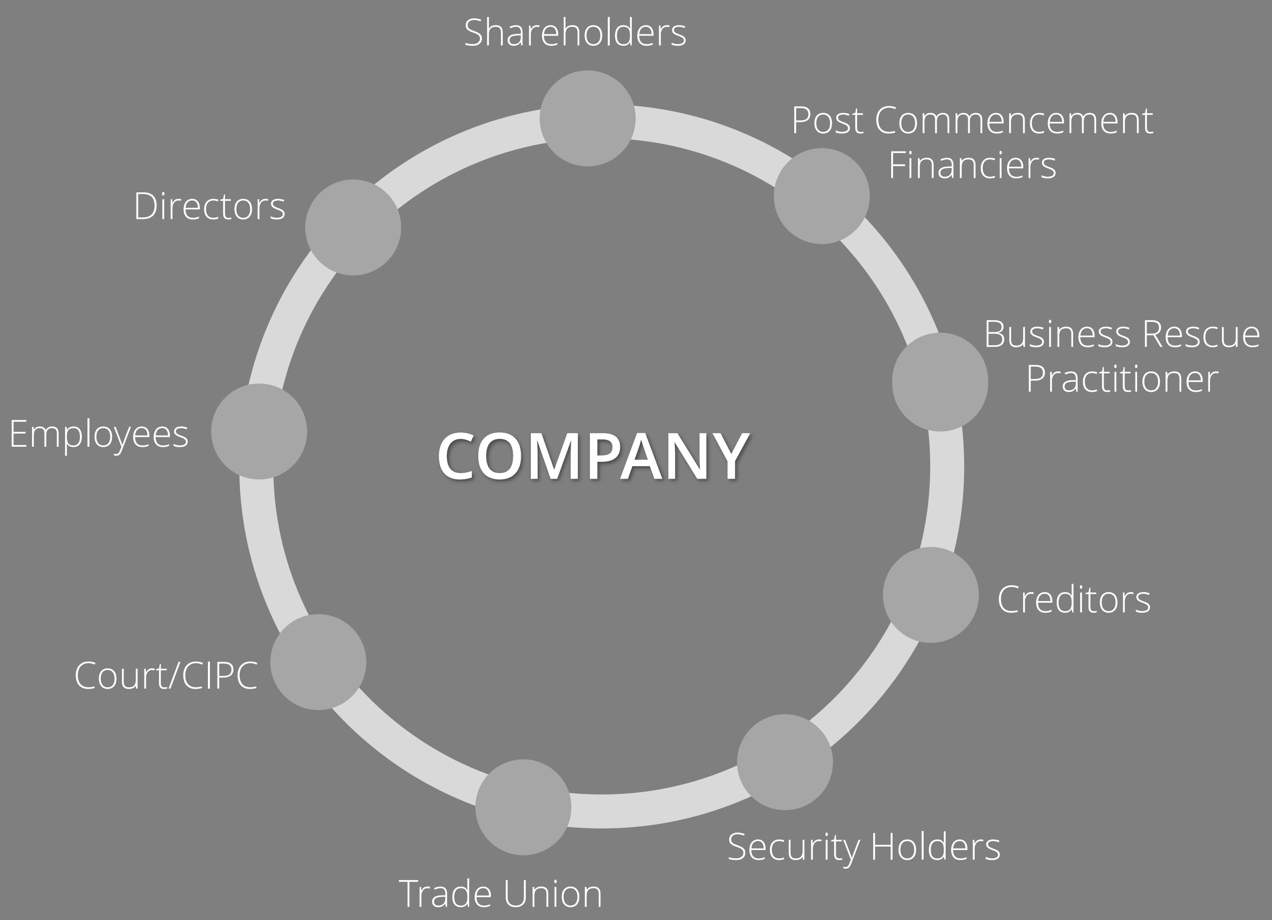
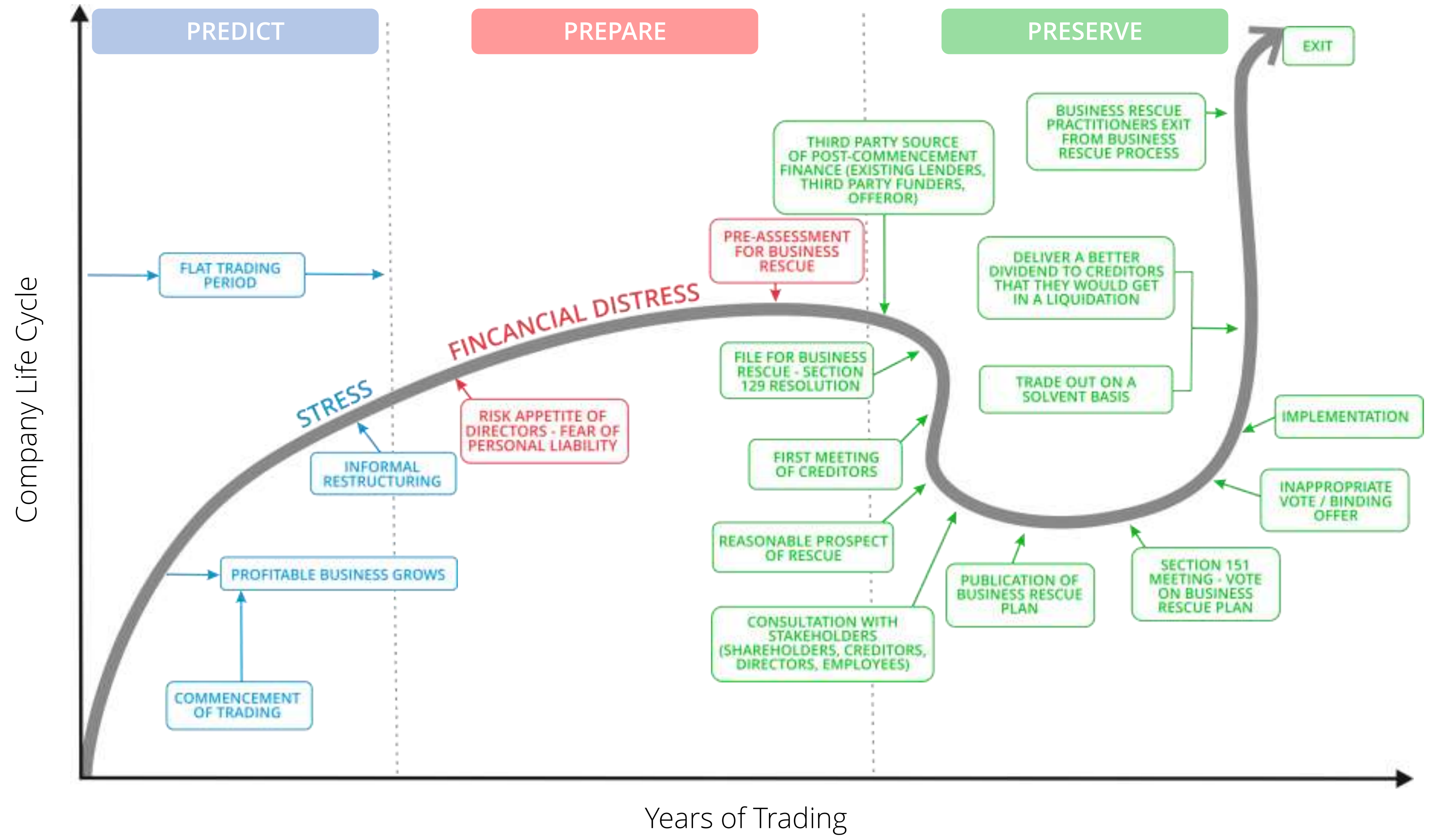
What is Business Rescue

- Companies Act 71 of 2008 (Act) - 1 May 2011
- Introduced a new process of restructuring companies in financial distress called business rescue
- Created opportunities in the merger & acquisition field for the acquisition of distressed assets
- Shifted from a corporate culture of liquidation to one of rescue
- Judgments handed down by our courts have been informative for the most part in paving the way for the successful application of business rescue
- The aim of business rescue is to allow for the supervision of a distressed company by the business rescue practitioner with the objective of either rescuing the company and allowing it to trade out of its financial predicament, or offering creditors a better dividend than would otherwise be achieved through liquidation
- Business rescue and the application and interpretation of Chapter 6 are an evolving concept
- South Africans have embraced the new legislation and have begun to accept that business rescue is now part of the South African legal restructuring landscape
- Having some knowledge of the new restructuring dispensation is essential as most companies may be exposed to business rescue at various levels

The Role Players within the Business Rescue environment



3 P's of Business Rescue



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Pre-2011 – Before our New Business Rescue Legislation

- Only liquidation
- Minimum dividends for unsecured creditors
- Favoured the banks (secured creditors)
- Resulted in massive job losses
- Bad for SA economy
- Negative outcomes for stakeholders

"THE PAST IS WHERE YOU LEARNED THE LESSON. THE FUTURE IS WHERE YOU APPLY THE LESSON."

Pre-2011 – Before our New Business Rescue Legislation

Insolvent Companies

- Cannot pay their debts as and when they fall due (commercial insolvency)
- Insolvent balance sheet – liabilities exceeds assets (factual insolvency)

Alternatives for directors of insolvent companies

- a) Informal Restructuring
- b) Judicial Management
- c) Liquidation

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Recognition of the Failure of Corporate Rescue in South Africa

- 1926 – introduction of judicial management
- Shortcomings and failure of judicial management
  - Outdated,
  - Highly formalistic and
  - Creditor-oriented.
- A new dispensation for corporate rescue in South Africa was necessary
- Mid-1980s – South Africa lagged behind modern international trends in relation to turnarounds or corporate rescue
- South Africa = liquidation (creditor-focused) culture
- Internationally = rescue-oriented approach
- The "corporate rescue" trend
  - Began with the introduction of the Chapter 11 procedure by the US Bankruptcy Code of 1978.
  - Worldwide trend is to attempt to rehabilitate insolvent companies instead of simply liquidating.

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International Examples

- USA – Chapter 11 proceedings
- UK – voluntary arrangements and administration process of the UK Insolvency Act, 1986 and Enterprise Act, 2000
- Australia – Part 5.3A of the Corporations Act, 2001
- Canada – restructuring processes set out in the CCAA and BIA

The Development of a South African Corporate Rescue Culture

- Focus on saving companies rather than destroying them
- Maximize return for creditors
- Avoid selling assets piecemeal (at "fire-sale" values), rather try and sell business as a going concern
- Keep business afloat in order to save jobs
- Retain and preserve goodwill of the business in order to maximize sale value
- Good for the economy as a whole
- Higher returns for creditors in the long run even if business could not be restored to a solvent and profitable status

Internationally recognized Principles of Corporate Rescue

- Moratorium on creditor's claims
- Cram-down provisions for dissenting creditors
- Supervision by an independent person
- Debtor-friendly
- Voluntary access

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Key Features of Business Rescue

- Business rescue has brought South Africa in line with international rescue principles
- Key features of business rescue
  - Largely self-administered by the company.
  - Subject to court intervention at any time by way of application to court by any of the stakeholders.
  - Interests of shareholders, creditors, and employees are recognized and balanced.
  - Allows for a company to be fully resuscitated or return a better dividend than creditors would get in a formal winding-up procedure.

Key Features of Business Rescue

Moratorium	Stay on legal proceedings & enforcement action against the company and in respect of property belonging to the company or lawfully in its possession.
Post-Commencement Finance	That which becomes due and owing to employees during business rescue proceedings for rendering services to the company and funding which is provided to a company, during the company's business rescue, by means unrelated to employment (including the provision of credit or services during business rescue).
Management of Company	Business Rescue Practitioner has full management control of the company in substitution for the board of directors. The board maintains its powers and duties but all decisions must be taken with the approval of the Business Rescue Practitioner – otherwise all transactions are void!
Contracts	Certain provisions/the whole contract may be suspended or cancelled by the Business Rescue Practitioner. Cancellation can only be done following an application by the Business Rescue Practitioner to Court.

Key Features of Business Rescue

Employees	Remain employed unless they are retrenched in accordance with labour legislation (Section 189 of the Labour Relations Act).
Stakeholders	Continuously engaged by the Business Rescue Practitioner in the process.
Voting on Plan	Plan will be approved if more than 75% of the creditors, voting at value, vote in favour of the plan and 50% of the independent creditors vote in favour of the plan. Creditors get a vote on the plan at the value of their claim (unless their claim is subordinated by agreement). Shareholders vote on the plan if their rights are affected by the plan.
Binding Offer	A creditor or shareholder may buy the voting interest of another creditor or shareholder who voted against the adoption of a plan if such vote results in the plan not being adopted.
Cram Down	An adopted business rescue plan is binding on all creditors whether or not they voted in favour of the plan, against the plan, were present at the meeting or proved a claim.
Discharge of Debt	Unless a business rescue plan provides otherwise, creditors and/or shareholders whose claims are compromised by the business rescue plan are prohibited from enforcing the balance of their claims after the adoption of the plan (possibly against sureties) – does not apply to guarantees!

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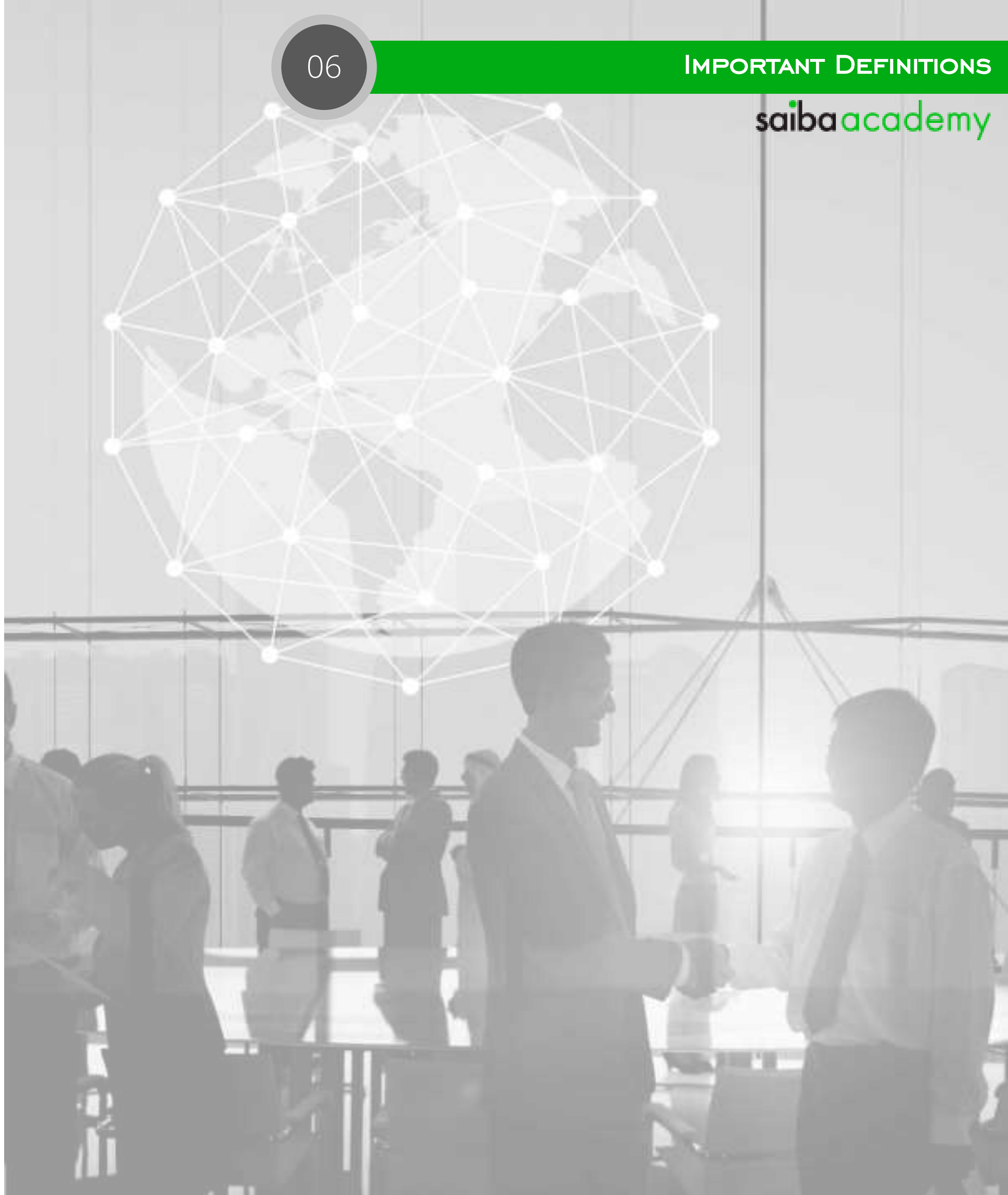
Important Definitions

Definitions relevant to the business rescue provisions of the Act:

- Affected Person – shareholder, creditor, registered trade union representing employees of the company or if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives
- The term Affected Person applies to all parties who are stakeholders in a business rescue proceeding
- The term "creditor" has not been defined but includes employees of the company if any amounts are due and payable prior to the commencement of business rescue proceedings
- The provisions of Chapter 6 apply to close corporations
- Chapter 6 does not apply to external or foreign companies registered in South Africa



Important Definitions

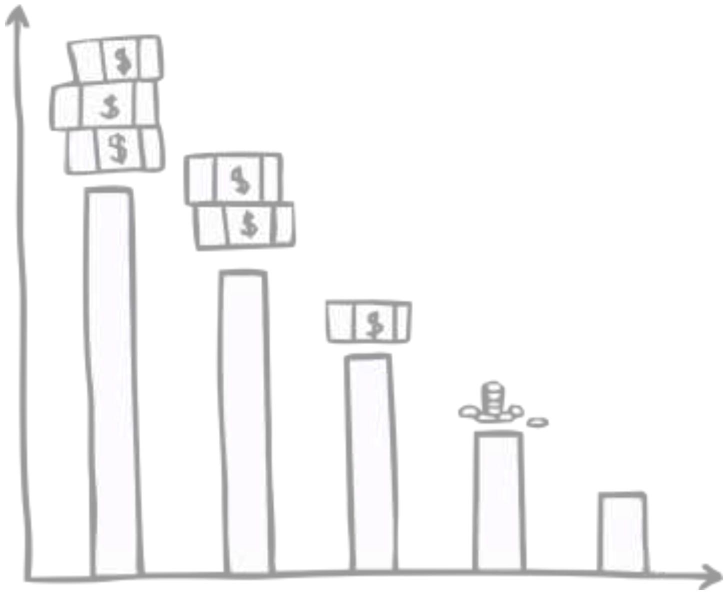
- **Business Rescue** - proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
  - temporary supervision of the company, and of the management of its affairs, business and property;
  - temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
  - development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that –
    - maximizes the likelihood of the company continuing in existence on a solvent basis; or
    - results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

Important Definitions

- Business Rescue Practitioner - a person appointed, or two or more persons appointed jointly, to oversee a company during business rescue proceedings –
  - two or more persons (could also include a junior and an experienced or senior practitioner)
  - “person” – contemplates appointment of a company.
- Becomes the supervisor of the company while it is in rescue (supervises the board of directors)
- Need to have a license to be appointed as a business rescue practitioner
- Licensed by the Companies & Intellectual Properties Commission (CIPC)
- Licenses can be revoked
- Skill set of the business rescue practitioner is critically important – needs to be able to “turn the company around”!

Important Definitions

- Financially Distressed - 6 month forward looking test -
  - it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months (commercial insolvency test); or
  - it appears to be reasonably likely that the company will become “insolvent” within the immediately ensuing six months (factual/balance sheet insolvency).
- Clear distinction between “insolvent” and “financial distress”



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End of Unit 01

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