



# INTERNATIONAL INSOLVENCY INSTITUTE

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## **DISCUSSION ISSUES REGARDING DIRECTORS' AND OFFICERS' RESPONSIBILITIES IN INSOLVENCY AND PRE-INSOLVENCY CASES**

*Committee on Corporate and Professional Responsibility*

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## PRELIMINARY ISSUE:

Through the good efforts of UNCITRAL, a Legislative Guide for Insolvency has been developed and approved which recognizes the benefits of reorganization/refinancing in addition to, in appropriate cases, the expeditious liquidation of assets and prompt distribution to creditors. Should the officers and directors be encouraged by law to seek one or another result or to prefer one over the other ?

1. Should a model insolvency regime attempt to redefine the duties and liabilities of officers and directors of insolvent or near-insolvent companies when the companies reach that condition?
2. Should the law of officer and director liability in the center of main interest be given comity in other jurisdictions where the insolvent company or its affiliates have assets and do business?
3. Should a model insolvency regime generally presume that existing management should remain in control absent fraud or gross incompetence? Should it specify that an independent party (such as a corporate restructuring officer) supervise the restructuring, refinance or liquidation of the company's affairs?
4. Under a model insolvency regime, should Management's reliance on outside professional advisors create a "safe harbor" presumption that, absent fraud or bad faith, the directors and officers are not personally liable for harm caused during the company's slide into insolvency or liquidation? See, e.g., *Continental Assurance Co. of London PLC* [1997] 1 BCLC 48 (Ch. D. 1997)
5. Should a model insolvency regime include presumptions or sanctions that discourage management from creating complex corporate structures that impede financial transparency?
6. Should a model insolvency regime recognize exculpatory provisions in corporate charters to limit personal liability of officers and directors of insolvent companies so as to maximize the opportunity for a realistic reorganization of the company?
7. Should a model insolvency regime authorize officers and directors to obtain indemnity from the corporation or insurance to protect against personal liability? What limitations should exist on these protections?
8. Should officers and directors who have been disqualified from future service in that role in one company be disqualified from service at other companies as well?
9. Who are the proper parties to be granted standing to assert direct, indemnity, or insurance claims arising out of actions by officers and directors of an insolvent company? Should it be a designated estate representative for the benefit of all the creditors or should it include individual creditors and other stakeholders independent of the estate representative?

10. Should a model insolvency regime require court supervision and approval of restructurings and liquidation, or should less formal, and nonjudicial, processes be authorized?