INTRODUCTION

How is the conduct of Officers and Directors of corporations in financial distress influenced by the civil and criminal sanctions to which those people might be exposed? How might it be influenced? These questions were posed in the International Insolvency Institute Committee on Corporate and Professional Responsibility.

A first step in an attempt to answer these questions was to prepare a somewhat simple Questionnaire relating to the duties of officers and directors and to the potential sanctions for breach of those duties. The Committee circulated that Questionnaire to Insolvency professionals who are members of the International Insolvency Institute, or members of one of two international associations of law firms - Lex Mundi and Terralex. These materials include a compilation of the responses received to the Questionnaire. The Committee thanks those who spent time and considerable thought to the responses.

The Questionnaire Results show that ample legal tools exist in most jurisdictions to provide "discipline" to the conduct and decisions of corporate officers and directors to avoid losses and damage to creditors of companies that are insolvent. Questions remaining to be answered include how extensively these legal tools are used to remedy losses suffered by creditors or to cause the officers and directors to seek consensual or judicial resolution of the companies financial distress as opposed to "riding out the storm" in an effort to preserve equity to the ultimate loss of creditors.

These materials also include a Memorandum relating to the Duties of Officers and Directors to the creditors of insolvent companies in the United States: Knowing "When To Hold Them And When To Fold Them": Negotiating The Fiduciary Challenges Facing Officers And Directors Post-Insolvency.

This Memorandum demonstrates that the law in this area is rather amorphous and is not very well defined; it has been continuing to evolve toward greater potential liability to officers and directors who cannot demonstrate that they have done their best to maximize enterprise values and to reduce creditor exposure to financial failure.

The Questionnaire Results seems to indicate that officers and directors of failed companies may bear a higher risk of criminal sanctions in some non-United States jurisdictions than they would for similar conduct in the United States. It may be that the US law will migrate toward harsher sanctions to officers and directors who ignore potential significant losses of value to the claims of creditors, particularly creditors with whom they trade. It may be that the lower level of fear of severe sanctions in the United States acts to encourage consensual reorganization activities rather than seeking early court protection. The Answers remain unknown.

KNOWING "WHEN TO HOLD THEM AND WHEN TO FOLD THEM": NEGOTIATING THE FIDUCIARY CHALLENGES FACING OFFICERS AND DIRECTORS POST-INSOLVENCY

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I. INTRODUCTION

Despite the apparent upturn in the United States' economy, challenges facing officers and directors of insolvent corporations are more relevant now than ever. In connection with the recent demise of several public companies, lawsuits against officers and directors (and accountants) have become increasingly more common.[2] Directors of financially healthy corporations are usually familiar with their fiduciary duties to shareholders. However, the expansion of those duties once the corporation enters the "zone of insolvency" can often place directors at an uncomfortable crossroads: should a director cut his or her losses, resign from the board, and face the likely blame from others, including the director's successors, for the corporation's financial troubles?[3] Or should the director remain on board to either right the ship or maximize recovery for creditors, at the risk of his or her own personal liability?[4] This decision to "hold them" or "fold them" may require more sophisticated officers and directors to evaluate what protections, if any, the corporation has in place to minimize these risks. This Memorandum summarizes the current rules regarding the "zone of insolvency" and the expanded fiduciary duties of officers and directors within the "zone." We also make certain recommendations regarding how corporate officers and directors may mitigate their risks post-insolvency. The prospect of liability to officers and directors makes an understanding of these concepts important to those who advise companies.

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2 See, e.g., Richard B. Schmitt and Henny Sender, CEO's Wealth May Be at Stake in Investor Suits, WALL STREET JOURNAL, August 9, 2002 at B1, available in 2002 WL-WSJ 3403151; Carla J. Feldman, Suing the Boss: Suits Name Managers, Others in Current Crackdown on Corporate Responsibility, More Company Big Shots May Face Personal Liability, NATIONAL LAW JOURNAL, July 28, 2003, at 13, col. 2.

3 The discussion in this Memorandum of the fiduciary duties of directors applies equally to non-director officers. Most courts do not distinguish between the fiduciary duties of directors and non-director officers. See J. Douglas Bacon and Jennifer A. Love, When Good Things Happen to Bad People: Practical Aspects of Holding Directors and Managers of Insolvent Corporations Accountable, 10 J. BANKR. L. & PRAC. 185, 187 (2001).

4 In foreign jurisdictions, officers and directors can sometimes be subject to criminal sanctions, including imprisonment, for doing business with knowledge of the corporation's insolvency. While the penalties within the United States are certainly less severe, the risk of more serious liability for directors of foreign corporations raises several interesting issues which are not addressed by this Memorandum. For instance, could directors of an insolvent U.S. corporation be subject to criminal liability in jurisdictions where its foreign subsidiaries conducted business?

II.
DISCUSSION

A. When Do Fiduciary Duties to Creditors Arise?—Defining "Insolvency".

Typically, officers and directors of a solvent corporation owe fiduciary duties to the corporation and its shareholders, the violation of which may subject directors to personal liability. Under Delaware law, these duties include the duty of care, the duty of loyalty and the related duty of disclosure when seeking shareholder action.[5] When evaluating the conduct of directors in respect of their fiduciary duties, courts apply the "business judgment rule," an evidentiary presumption that business decisions are made by disinterested and independent directors on an informed basis with the good faith belief that the decisions are in the best interests of the corporation.[6]

During the last two decades, significant case law has developed holding that directors of an insolvent corporation owe fiduciary duties not only to the corporation and its shareholders, but also to the corporation's creditors. This theory has its roots in the "trust fund doctrine," an early equitable concept under which the directors of an insolvent corporation hold the corporation's property in trust for payment to creditors. The "trust fund doctrine" transforms the contractual relationship between an insolvent corporation and its creditors into that of a trustee and its beneficiaries.[7]

Unfortunately for those seeking predictability, the precise moment upon which these expanded duties arise may be difficult to pinpoint. While a formal filing of bankruptcy may be sufficient to trigger fiduciary duties to the corporation's creditors, it certainly is not necessary, and a corporation may have entered the "zone of insolvency" well before bankruptcy.[8] More recent developments in the case law would suggest that duties to creditors might arise at the point when the corporation becomes "insolvent in fact,"[9] or perhaps at an earlier point, when it enters the "vicinity of insolvency."[10] Furthermore, decisions relating to these issues are likely

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5 See Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995). This Memorandum does not attempt to address pre-insolvency fiduciary duties in detail. For an in depth discussion of the fiduciary duties of officers and directors of solvent corporations, see DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE (5th ed. 1998).

6 See BLOCK, et al., supra note 5.

7 See, e.g., Bovay v. H. M. Byllesby & Co., 38 A.2d 808 (Del. 1944)

8 See Pepper v. Litton, 308 U.S. 295, 307, 60 S.Ct. 238, 245 (1939).

9 See, e.g., Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 787-90 (Del. Ch. 1992); Value Property Trust v. Zim Co. (In re Mortgage & Realty Trust), 195 B.R. 740, 751 (Bankr. C.D. Cal. 1996) ("It is the time of insolvency, not the time of the filing of a bankruptcy case, that determines the ripening of these additional fiduciary duties."); Clarkson Co. v. Shaheen, 660 F.2d 506, 512 (2d Cir. 1981) (rejecting claim under New York law that duties do not arise until "liquidation is 'imminent and foreseeable'"). But see Tigrett v. Pointer, 580 S.W.2d 375, 386 (Tex. Civ. App. 1978) (opining that fiduciary duties owed to creditors are not triggered until pre-bankruptcy insolvency is coupled with the cessation of business by the insolvent).

10 See Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications. Corp., No. CIV.A.12150, 1991 WL 277613, at *34 (Del. Ch. Dec. 30, 1991) [hereinafter "Credit Lyonnais"]. See also Brandt v. Hicks, Muse & Co. (In re Healthco Int'l, Inc.), 208 B.R. 288, 300 (Bankr. D. Mass. 1997) ("[W]hen a transaction renders

to be made in 20/20 hindsight well after the fact and may be heavily influenced by an assessment of the parties' motives.

Competing definitions of the "zone of insolvency" may make it difficult "to confidently predict which insolvency definition a court will use in a creditor's suit for breach of fiduciary duty."[11] To illustrate, the Delaware Chancery Court in Geyer v. Ingersoll Publications Co. held that directors' duties to creditors arise upon "insolvency in fact," but in an unpublished, though widely cited, opinion, Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., the same court held that the duties arise in the "vicinity of insolvency."[12]

To further complicate the issue, there are no bright-line standards for determining when a corporation becomes insolvent under any of these definitions. And regardless of which test or definition a court adopts, "application of these definitions in a particular factual pattern may be difficult, and reasonable individuals may reach different conclusions."[13] Several of the financial tests used by courts to define the zone of insolvency and its parameters are discussed below.

1. "Insolvency in Fact"—Balance-Sheet Test and/or Cash-Flow Test.

Courts which have tied fiduciary duties to creditors upon "insolvency in fact" have typically done so using one of two tests: the balance-sheet test (liabilities in excess of assets)[14] and the cash-flow test (an inability to pay debts as they become due).[15] Some courts have embraced both tests.[16] In Geyer v. Ingersoll Publications Co., the Delaware Chancery Court relied on Webster's Dictionary for the ordinary meaning of the term "insolvency," concluding that an entity is insolvent when it is unable to pay its debts as they become due in the usual course of business (cash-flow test), or when the entity's liabilities are in excess of a reasonable market value of its assets (balance-sheet test).[17] Similarly, in A.R. Teeters &

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a corporation insolvent, or brings it to the brink of insolvency, the rights of the creditors become paramount").

11 Andrew D. Shaffer, Corporate Fiduciary—Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About, 8 AM. BANKR. INST. L. REV. 479, 515 (2000).

12 See supra notes 9 and 10.

13 Royce de R. Barondes, Fiduciary Duties of Officers and Directors of Distressed Corporations, 7 GEO. MASON L. REV. 45, 71 (1998).

14 See, e.g., Official Comm. of Unsecured Creds. v. Toy King Distribs., Inc. (In re Toy King Distribs., Inc, 256 B.R. 1, 57 (Bankr. M.D. Fla. 2000); Barrett v. Commonwealth Fed. Savings and Loan Assn. (In re Barett), 104 B.R. 688, 693 (Bankr. E.D. Pa. 1989); LaSalle Nat'l Bank v. Perelman, 82 F. Supp. 2d 279, 291-92 (D. Del. 2000).

15 The "cash flow" test is also referred to as the "equitable" insolvency test. See, e.g., Geyer, 621 A.2d at 789; Credit Lyonnais, 1991 WL 277613; Shakey's, Inc. v. Caple, 855 F. Supp. 1035, 1042-43 (E.D. Ark. 1994); Parkway/Lamar Partners, L.P. v. Tom Thumb Stores, Inc., 877 S.W.2d 848, 850 (Tex. Ct. App. 1994).

16 See, e.g., Geyer, 621 A.2d at 789, Brandt v. Hicks, Muse & Co. (In re Healthco International, Inc.), 208 B.R. 288, 301-02 (Bankr. D. Mass. 1997) (Stating that both the "balance-sheet test" or the "cash-flow test" are equally applicable to determine the point at which directors begin to owe fiduciary duties to creditors.)

17 See Geyer, 621 A.2d at 789.

Associates, Inc. v. Eastman Kodak Co., the Arizona Appeals Court applied multiple tests when it held that a corporation is insolvent when: (1) it has ceased to pay its debts in the ordinary course of business, (2) it cannot pay its debts as they become due, or (3) its liabilities are greater than its assets.[18]

2. "Vicinity of Insolvency" and "Unreasonably Small Capital"—Insolvency Before "Insolvency in Fact".

"Insolvency in fact" is ultimately a snapshot analysis of a corporation's viability, measuring a company's present ability to pay its debts. Therefore, under the balance-sheet and cash-flow tests, directors of a corporation that is "technically solvent but doomed to fail" would owe no duties to creditors.[19] Likewise, a corporation could be "solvent in fact," notwithstanding presently disputed claims or liabilities which could arise far into the future.[20] In consideration of these limitations, some courts have held that directors' duties to creditors are triggered within the "vicinity of insolvency" or when a corporation has "unreasonably small capital."[21] Under these standards, liability to creditors would arise before a corporation is actually insolvent, but when insolvency is reasonably foreseeable, or when a transaction creates an unreasonable risk of insolvency.[22]

B. Fiduciary Duties to Owing to Creditors, Shareholders, and Other Constituencies of An Insolvent Corporation.

Once a corporation is within the zone of insolvency (whether that "zone" is defined by the corporation's "insolvency in fact" or the corporation being within the "vicinity of insolvency"), the officers and directors owe fiduciary duties to the corporation's creditors and may be sued by creditors for violation of those duties. What is not as clear is whether the fiduciary duties to creditors replace the duties owed to shareholders, or whether the directors owe concurrent duties to both constituencies. Some courts have concluded that directors of an insolvent corporation owe fiduciary duties to both creditors and shareholders, while providing little guidance as to the relative priority of those duties or how they should be carried out.[23]

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[18] See A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co., 836 P.2d 1034, 1041 (Ariz. Ct. App. 1992).

[19] Pereira v. Cogan, 294 B.R. 449, 521 (S.D.N.Y. 2003) (quoting Geron v. Schulman (In re Manshul Const. Corp.), 2000 WL 1228866, at *54 (S.D.N.Y. Aug. 30, 2000).

[20] See Ann E. Conaway Stilson, Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors, 20 DEL. J. CORP. L. 1, 14 (1995).

[21] See, e.g., Pereira v. Cogan, 294 B.R. 449, 521 (S.D.N.Y. 2003).

[22] See, e.g., Miramar Resources, Inc. v. Shultz (In re Shultz), 208 B.R. 723, 729 (Bankr. M.D. Fla. 1997) (holding that fiduciary duties to creditors arise upon the "brink of insolvency," where an impending transaction will render the corporation insolvent); Brandt v. Hicks, Muse & Co. (In re Healthco Int'l, Inc.), 208 B.R. 288, 302 (Bankr. D. Mass. 1997) (finding a breach of fiduciary duties to creditors on the part of the directors occurs when the directors voted in favor of a transaction that leaves the corporation insolvent or with unreasonably small capital).

[23] See, e.g., Credit Lyonnais, 1991 WL 277613, at *34 n.55 (speaking in terms of a duty to the "corporate enterprise," which encompasses shareholders and creditors); LaSalle Nat'l Bank v. Perelman, 82 F. Supp. 2d 279, 290 (D. Del. 2000) ("Under Delaware law, officers and directors of a corporation generally do not owe a fiduciary duty to the creditors of the corporation unless the corporation is insolvent.") (citing Credit

Other courts have held that the fiduciary obligations of directors "shift from the stockholders to the creditors,"[24] upon entering the zone of insolvency, implying that the directors no longer owe shareholders any fiduciary duties. There is little case law discussing what duties, if any, are owed to other corporate constituencies upon insolvency.

It is unclear whether courts will draw upon the business judgment rule in evaluating the directors' business decisions within the zone of insolvency.[25] For instance, the Credit Lyonnais court, in imposing a duty upon directors to maximize a near insolvent corporation's "community of interest," did not mention the availability of the business judgment rule for the protection of business decisions in light of that duty.[26] However, since Credit Lyonnais, at least one Delaware case, Angelo, Gordon & Co. v. Allied Riser Communications Corp., has specifically applied the presumption of the business judgment rule in a breach of fiduciary duty action by creditors.[27] Those courts applying the business judgment presumption to directorial conduct are likely to uphold the directors' decisions "unless those seeking damages can show that such actions are venal."[28] Moreover, courts are likely to apply the most weight to the business judgment rule where directors' decisions are focused on maximizing the enterprise value of the company for all constituencies as opposed to using control to leverage advantage for management or for junior interests.

Irrespective of whether continuing duties may be owed to shareholders within the zone of insolvency, corporate governance principles may dictate that directors still consider the views of shareholders. Delaware recognizes the continuing right of shareholders to elect directors after the corporation has become insolvent.[29] Therefore, while directors may not be personally liable to shareholders for failure to optimize shareholder's return post-insolvency, shareholders who would like to pursue different policies could simply remove the directors.[30]

Lyonnais, 1991 WL 277613, at *34); Bank Leumi-Le-Israel, B.M. v. Sunbelt Indus. Inc., 485 F. Supp. 556, 559 (S.D. Ga. 1980) ("In the case of an insolvent corporation, the directors and officers stand as trustees for the benefit of creditors first and stockholders second."); Value Property Trust v. Zim Co. (In re Mortgage & Realty Trust), 195 B.R. 740, 750 (Bankr. C.D. Cal. 1996).

[24] See, e.g., FDIC v. Sea Pines Co., 692 F.2d 973, 977 (4th Cir. 1982); Official Comm. of Unsecured Creds. v. Toy King Distribs., Inc. (In re Toy King Distribs., Inc.), 256 B.R. 1, 57, 166-67 (Bankr. M.D. Fla. 2000) (holding that director's fiduciary duty shifts from shareholders exclusively to creditors exclusively).

[25] See, e.g., Creditors Comm. v. Haverty (In re Xonics, Inc.), 99 B.R. 870, 876 (Bankr. N.D. Ill. 1989) (stating that actions of the board "must suffice unless [creditors] can show that the conduct … offends accepted notions of fiduciary duties"); Devereux v. Berger, 284 A.2d 605, 612 (Md. 1971) (applying business judgment rule in the context of insolvency).

[26] See Stilson, supra note 20, at 63.

[27] See Angelo, Gordon & Co. v. Allied Riser Communications Corp., 805 A.2d 221, 229 (Del. Ch. 2002).

[28] Creditors Comm. v. Haverty (In re Xonics, Inc.), 99 B.R. 870, 876 (Bankr. N.D. Ill. 1989).

[29] See Saxon Indus., Inc. v. NKFW Partners, 488 A.2d 1298, 1300 (Del. 1985) ("Insolvency alone, irrespective of degree, does not divest the stockholders of a Delaware corporation of their right to exercise the powers of corporate democracy.")

[30] See Barondes, supra note 13, at 70.

C. Liability for Breach of Fiduciary Duties to Creditors.

In the United States, directors are generally not subject to criminal penalties in connection with an alleged breach of their fiduciary duties; allegations of criminal fraud, securities fraud, embezzlement, perjury and the like are often joined in allegations in complaints filed by plaintiffs against officers and directors. Directors may face significant monetary liability as a result of civil lawsuits by aggrieved creditors (or by bankruptcy trustees acting on their behalf), which are becoming more and more common as this area of law develops.[31] Recent high profile corporate scandals in cases such as Enron, Global Crossing and WorldCom have fueled the fervor against officers and directors, and creditors have joined with shareholders in pursuing claims against departed executives.[32] In cases involving such high levels of corporate misconduct, liability to creditors can be staggering.[33]

D. Protective Measures Available to Directors.

What can directors do to fulfill their expanded fiduciary duties post-insolvency? The simple answer is for directors to first identify whether the corporation is within the "zone," recognizing that fiduciary duties to creditors may arise well before the corporation's liabilities exceed its assets. Directors must then act on an informed basis, in such a way that considers the interests of the corporate enterprise, not just the corporation's shareholders. We believe that critical decisions should be driven by the goal of maximizing corporate value. Moreover, directors should avoid allegations that the company was run without the expectation that creditors could be paid.[34] Once the corporation is within the "zone of insolvency", the option of

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31 See Patrick Danner, Mortgage.com Suit Ends in Settlement, MIAMI HERALD, July 26, 2003, at 1, available in 2003 WL 60040494 (referencing $130,000 to be paid by insurer to settle $3,000,000 lawsuit brought by creditors of Mortgage.com against the company's principal); Report Brings Closure to Lomas, MORTGAGE SERVICING NEWS, April 19, 2002, available in 2002 WL 10922629 (discussing actions brought by bankruptcy trustee on behalf of creditors against former officers and directors of Lomas Mortgage for negligence, fraud, corporate waste and breach of fiduciary duty).

32 See Carla J. Feldman, Suing the Boss: Suits Name Managers, Others in Current Crackdown on Corporate Responsibility, More Company Big Shots May Face Personal Liability, NATIONAL LAW JOURNAL, July 28, 2003, at 13, col. 2 ("Recent corporate scandals have also produced a flurry of lawsuits by shareholders, pension fund managers and creditors against directors, officers and executives. Officers and directors of companies such as Enron Corp., Global Crossing and WorldCom have been named in suits for breach of fiduciary obligation; misrepresentation; and stock, securities and pension fraud.") See also Stephen Taub, Lenders Want $70 million From Former Enron CEO and His Wife – Meanwhile, Enron Wants Customers to Pay . . . , CFO.COM, February 4, 2003, available in 2003 WL 9773337; Final Report of Neal Batson, Court-Appointed Examiner, Appendix D, In re Enron Corp., (Bankr S.D.N.Y. Case No. 01-16034 (ALG)). (While the Examiner's report in Enron makes specific reference only to the directors' breaches of fiduciary duties to shareholders, claims by creditors could arise under the same analysis.)

33 See Citigroup to Pay $2.65 Billion to Settle WorldCom-Related Suit, WSJ.COM, May 10, 2004.

34 In many non U.S. jurisdictions, "trading" while insolvent is prohibited. The underlying rationale for this concept is that company officers who continue to "trade" with creditors when they know or should know that the company cannot pay the resulting debts are engaging in a species of fraudulent conduct. These concepts may migrate to the U.S. just as other U.S. legal concepts have migrated abroad.

resigning one's position to avoid liability is somewhat unsatisfactory. The "Geronimo Defense" has been rejected.[35]

Directors seeking more comfort may consider adopting the following measures to minimize their liability to creditors.

1. Filing for Bankruptcy.

A bankruptcy filing is a clear hallmark of insolvency and, consequently, that the directors thereafter owe duties to the corporation's creditors. Thereafter, directors can seek bankruptcy court approval for business decisions made post-filing, which may insulate officers and directors from attack by creditors. In essence, the filing of bankruptcy allows directors to have the bankruptcy court validate the directors' exercise of business judgment. A possible risk of filing for bankruptcy for non-business reasons is to expose directors to liability to shareholders, whose recovery through the bankruptcy process will be subordinated to that of creditors.

2. Obtaining Professional Advisors.

Hiring professional advisors or investment bankers to help steward directors through the zone of insolvency is another way directors can limit liability. Obtaining an outside financial advisor to evaluate the condition and prospects of the corporation could help define whether the corporation is within the vicinity of insolvency or identify whether directors have a reasonable chance of averting insolvency. Moreover, getting an impartial opinion that business decisions contemplated by the board are reasonable or even advisable might dissuade a court from finding that the directors breached their fiduciary duties to creditors when those measures fail. While engaging financial advisors may present a short term cost to the corporation (unless the retention is based on a success-fee arrangement), directors can assert that the retention inures to the benefit of the corporate enterprise.

3. Exculpation by Corporate Charter.

Delaware law is ambiguous as to whether fiduciary duties to creditors can be abrogated by corporate charter. Delaware's General Corporation Law provides that a corporation's certificate of incorporation may contain a provision "eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders . . . ."[36] A corporation may consider adopting an exculpatory corporate charter to bind both creditors and shareholders. However, the Delaware General Corporation Law

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[35] See Xerox Corp. v. Genmoora Corp., et al., 888 F.2d 345, 355 (5th Cir. 1989).

[36] DEL. CODE ANN. tit. 8, § 102(b) (2000).

makes no reference to exculpation of post-insolvency fiduciary duties, and the enforceability of such a provision with respect to creditors is questionable.[37]

4. Insurance or Indemnity Funds.

Directors can request that the corporation purchase a directors and officers liability policy, establish an indemnity fund, or provide a combination of the two to reduce the exposure to directors in the event of a creditor lawsuit. It is now a common practice for public corporations to purchase insurance for liabilities resulted from shareholder derivative actions. However, at least one commentator suggests that D&O insurance against liability to creditors may be prohibitively expensive.[38] Unlike lawsuits brought by shareholders, many of whom may have little personal interest in the litigation, creditors claims may be more contentious and less likely to settle.[39] Insurers who are aware of the potential cost of litigating creditor suits are likely to pass these costs on to the corporation in the form of higher premiums.

Directors relying on a combination of D&O insurance and the proceeds of an indemnity fund should also be aware that both sources may not be available in their entirety to indemnify directors. Insurance policies may provide, under a single liability limit, both direct coverage to directors and officers as well as coverage to the corporation for funds expended indemnifying the officers and directors.[40] Contributions by the corporation pursuant to an indemnity fund may ultimately reduce the coverage available to directors under the D&O policy.

III.
CONCLUSION

Directors and officers of corporations within the "zone of insolvency" are confronted with significant challenges above and beyond those facing their counterparts at solvent corporations. The zone of insolvency brings with it a new set of fiduciary of duties, the onset of which may be difficult to determine. However, with foresight and proper planning, officers and directors can successfully negotiate the obstacles in this developing area of law.

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37 See Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 789 (Del. Ch. 1992).

38 See Barondes, supra note 13, at 80.

39 See id. at 81.

40 See In re Allied Digital Technologies Corp., 306 B.R. 505 (Bankr. D. Del. 2004).

QUESTIONNAIRE

International Insolvency Institute
Committee on Corporate and Professional Responsibility

Party Responding: _____

Jurisdiction: _____

			YES	NO
A.	Please summarize the duties and responsibilities of officers and directors of a company in your jurisdiction and how, if at all, those duties and responsibilities change when the company becomes financially distressed.			
	1.	Before the company becomes financially distressed, do the officers and directors have duties to:		
		a. Creditors?	_____	_____
		b. Employees?	_____	_____
		c. Shareholders?	_____	_____
		d. The Government?	_____	_____
	2.	When the company becomes financially distressed, do the officers and directors have duties to:		
		a. Creditors?	_____	_____
		b. Employees?	_____	_____
		c. Shareholders?	_____	_____
		d. The Government?	_____	_____
	3.	Can shareholders or creditors sue the officers and directors for alleged violation of those duties <u>prior</u> to the commencement of an insolvency/reorganization procedure?	_____	_____
	4.	Can shareholders or creditors sue the officers and directors for alleged violation of those duties <u>subsequent</u> to the commencement of an insolvency/reorganization procedure?	_____	_____
B.	What civil and criminal exposure exists for the officers and directors if they violate their duties and responsibilities?			

			YES	NO
	1.	Do the officers and directors have criminal exposure if they violate their duties and responsibilities?	_____	_____
	2.	Are they subject to imprisonment?	_____	_____
	3.	Do the officers and directors have exposure to civil claims to the groups in:		
		a. Question A.1 above?	_____	_____
		b. Question A.2 above?	_____	_____
	4.	Does the existence of potential personal civil or criminal liability become a factor in officers and directors deciding when and if to put the company in a formal insolvency/reorganization procedure?	_____	_____
	5.	Is insurance available at realistic premiums which is designed to protect officers and directors from claims that arise while operating a financially distressed company and, if so, is its availability a factor in deciding when and if to put the company in a formal insolvency/reorganization procedure?	_____	_____
	6.	Is there any personal civil or criminal exposure which acts to prevent officers and directors from resigning their positions once the company becomes financially distressed?	_____	_____
	7.	Do trustees or other parties frequently sue officers and directors for violation of their duties after the commencement of an insolvency/reorganization procedure?	_____	_____
	8.	Are suits against officers and directors typically successful?	_____	_____
C.	Subsequent Restrictions on Officers – Directors			
	1.	In the event that a company becomes insolvent, is an officer or director of the insolvent company legally restricted from acting as an officer or director in another company	_____	_____
	2.	In the event an officer or director becomes personally insolvent, is he/she legally restricted from continuing to act as an officer or director of:		
		a. his/her current company?	_____	_____
		b. another company?	_____	_____

			YES	NO
	3.	In the event that a company becomes insolvent, is an officer or director of the insolvent company legally restricted from obtaining credit as a promoter of a second company	_____	_____
	4.	If the answer to C1 or C3 is "yes", is the legal restriction imposed when the officer or director has been found to have committed malfeasance	_____	_____
	5.	If the answer to C1 or C3 is "yes", is the legal restriction imposed when the officer or director has been found to have committed mismanagement	_____	_____
D.	Please supply any additional information including examples of how these rules have been applied in your jurisdiction.			

A. Summarize duties and responsibilities of officers and directors of a company and how, if at all, those duties and responsibilities change when the company becomes financially distressed.

COMMENTS	JURISDICTION
Directors and officers fiduciary duties are owed to the company which consists of the shareholders when the company is solvent, and as the company becomes financially troubled, the company interests of creditors have to be considered as they are the ones with an economic interest in the company. There are statutory duties imposed on directors and officers.	Bermuda
We have to point out that our answers to questions 1 and 2 are based on the presumption that "financially distressed" means "over-indebtedness". The company becomes over-indebted when it has stopped payments, as well as in case some public obligation is not fulfilled, whereas that is established by some official act or some monetary obligation under a commercial transaction established by some effective act.	Bulgaria
See Attachment A	Colombia
Under the Commercial Code of Japan, in principle, officers and directors have no duties to creditors, employees, shareholders and the government. However, creditors, employees and shareholders may claim damages against directors if those directors breach their duties to the company, intentionally or gross-negligently.	Japan
Singapore directors have fiduciary duties (e.g. act in the company's interests). Not situation specific duties.	Singapore
Article 23 of the Company Law – The officers and directors shall truthfully implement their jobs and perform the duty of care as a "good administrator". The officers and directors who violate such duties and incur damage to the company shall be liable for compensation. Further, the officers and directors who violate laws and regulations in performing their jobs and incur damage to others shall be held severally and jointly liable with the company for compensation.	Taiwan
See Attachment A	United States
The duties and responsibilities of officers and directors concern mainly the diligent discharge of their functions and the principle of responsibility in the adoption of measures. They also imply that the company's best interests should always be promoted. In cases of financial distress, as is predictable, the officers' and directors' behavior will be more closely scrutinized, in an attempt to discover what rule, if any, that behavior has had on the company's troubles.	Uruguay

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   a. Creditors?

JURISDICTION	YES	NO
Australia	X	
Australia		X
Barbados	X	
Bermuda		
Bolivia		X
Botswana	X	
Brazil	X	
Bulgaria		X

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   a. Creditors?

JURISDICTION	YES	NO
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)		X
Canada (Ontario)		X
Canada (Ontario)	X	
Canada (Ontario)	X[1]	
Cayman Islands		X
China (PRC)		X
Colombia	X	
Denmark	X	
Ecuador		X
Egypt		X
Finland	X	
Finland	X	
France		
Germany		X
Germany	X	
Greece		X[2]
Greece	X	
Hungary[3]		X
Hungary		X
Indonesia	X	
Indonesia		X
Italy	X	
Japan	X	
Jordan		X
Korea		X
Kuwait	X	
Latvia	X	
Lebanon		X
Luxembourg	X	
Malaysia		X[4]
Mexico		X
Monaco	X	
Norway		X
Peru	X	

[1] Under most Canadian corporate statutes, the "oppression" remedy permits a court to make any order it decides is necessary to rectify conduct of a corporation or its directors that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any security holder, creditor, director or officer of the corporation.

[2] Under Greek Law, officers and directors do not have any fiduciary or other duties towards third parties, including creditors and shareholders, by reason of their involvement in the management or representation of their company. Officers and directors may be held personally liable vis-à-vis third parties, including creditors, only for breaches of the law directly causing damages to them, that are causally connected with such breaches (torts), and to the extent the damages do not relate to claims of which they may seek satisfaction against the company.

[3] Note: "Distressed" shall mean that (i) reorganization process has been started or (ii) liquidation process has been ordered by final decision of the court.

[4] As a general rule, if a company is in a solvent state, the courts do not readily impose a fiduciary duty upon the directors to creditors, present or future, of the company. *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd & Ors.* [1983] 1 Ch 258 CA.

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   a. Creditors?

JURISDICTION	YES	NO
Philippines		X
Portugal	X	
Romania		X[5]
Scotland	X	
Scotland		X
Singapore	X	
Slovenia		X
South Africa	X	
South Africa	X	
Spain		X
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States		X[6]
Uruguay	X	
Uruguay	X	
Venezuela		X

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   b. Employees?

JURISDICTION	YES	NO
Australia	X	
Australia		X
Barbados		X
Botswana		X
Brazil	X	
Bulgaria		X
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)		
Canada (Ontario)	X	
Canada (Ontario)	X	
Cayman Islands		X[7]
China (PRC)		X
Colombia	X	

5 As a general rule, but see exceptions ON Attachment A for Romania.

6 *See Simons v. Cogan*, 542 A.2d 785, 786 (Del. Ch. 1987) ("It has now become firmly fixed in our law that among the duties owed by directors of a Delaware corporation to holders of that corporations' debt instruments, there is no duty of the broad and exacting nature characterized as a fiduciary duty."); *see also Quadrangle Offshore (Cayman) LLC v. Kenetech Corporation*, 1999 WL 893575, at *7, *8 n.14 (Del. Ch.), aff'd 751 A.2d 878 (Del. Supr. 2000) ("The rights of debt holders are restricted to those provided in the instrument creating the debtor/creditor relationship. . . . As with all contracts, however, the rights and obligations expressed in the certificate [of designation] are protected by an implied covenant of good faith and fair dealing.")

7 The company, rather than the directors, owe duties to the employees.

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   b. Employees?

JURISDICTION	YES	NO
Denmark	X	
Ecuador	X[8]	X[9]
Egypt		X
Finland		X
Finland		X
France	X	
Germany		X
Germany	X	
Greece	X[10]	
Greece	X	
Hungary		X
Hungary		X
Indonesia	X	
Indonesia		X
Italy	X	
Japan		X
Jordan		X
Korea		X
Kuwait	X	
Latvia	X	
Lebanon		X
Luxembourg	X	
Malaysia		X[11]
Norway	X	
Peru	X	
Philippines	X	
Portugal	X	
Romania		X
Scotland	X	
Scotland		x
Singapore		
Slovenia		X
South Africa		X
South Africa	X	
Spain		X

8 Yes, the legal representatives.

9 No, members of the board.

10 Under Law 690/45, as amended by Law 1336/95, and Law 255/97, as amended by Law 2676/99, officers and shareholders as well as company representatives are liable towards the employees of the company for non-payment of agreed salaries, wages and remunerations of such employees and/or of the due social security contributions on behalf of such employees. Likewise, pursuant to Law 2224/94, as amended by Law 2639/98, the above persons are liable for non-compliance with applicable safety-at-work standards. Financial hardship on behalf of the company does not release officers, directors and representatives from their respect duties and/or liabilities.

11 Unlike the English Companies Act 1985, the Malaysian Companies Act does not expressly provide that the directors of a company are to have regard to the interests of the company's employees in the performance of their functions. Chan & Koh's Company Law. Malaysia Corporate Service para 6.206. However, under para 7 of the Third Schedule, companies are empowered to establish and support various facilities calculated to benefit employees, past employees, and their dependents and to provide for pensions and allowance. The Third Schedule powers are available to companies by virtue of Section 19(1)(c) of the Malaysian Companies Act 1965.

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   b. Employees?

JURISDICTION	YES	NO
Sweden		X
Sweden	X	
Taiwan	X	
Turkey		X
Turks & Caicos Islands	X	
United States		X[12]
Uruguay	X	
Uruguay	X	
Venezuela		X

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   c. Shareholders?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	X	
Bermuda		
Bolivia	X	
Botswana		X
Brazil	X	
Bulgaria	X	
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)		X[13]
Canada (Ontario)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Cayman Islands		X[14]
China (PRC)		X[15]
Colombia	X	
Denmark	X	
Ecuador	X	
Egypt	X	
Finland	X	
Finland	X	
France	X	
Germany	X	

12 Absent unusual circumstances, employers do not owe fiduciary duties to their employees. There is a general and strong presumption that employment relationships generally are "employment at will." *See, e.g., Hawkes v. University Physicians, Inc.*, 6 F. Supp. 2d 445, 449 (D.Md. 1998).

13 Individually.

14 There is no general duty to shareholders. Duties are owed to the company, although the shareholders can adopt the company's action against the directors in certain circumstances.

15 According to the PRC Company Law, the general manager (officer) of a company shall be responsible for the company's board of directors, rather than the shareholders. Pursuant to a judiciary note issued by the Supreme Court, the shareholders in a listed company may bring a lawsuit for any misleading and false statements. Except for shareholders in a listed company, the court will not admit a lawsuit brought by shareholders in a company other than a listed company.

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   c. Shareholders?

JURISDICTION	YES	NO
Germany	X	
Greece		X[16]
Greece	X	
Hungary	X	
Hungary		X
Indonesia	X	
Indonesia	X	
Italy	X	
Japan		X
Jordan	X	
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon	X	
Luxembourg	X	
Malaysia	X[17]	
Mexico		X[18]
Monaco	X	
Norway	X	
Peru	X	
Philippines	X	
Portugal	X	
Romania		X[19]
Scotland	X	
Scotland	X	
Singapore	X	
Slovenia	X	
South Africa	X	
South Africa		X
Spain	X	
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States	X	
Uruguay	X	
Uruguay	X	

16 According to Article 22a paragraph 1 of Law 2190/20, officers and directors are liable towards the company for any damage caused to it by any act or omission connected with the discharge of their duties, unless they prove that, in discharging such duties, they have displayed the requisite diligence standard set forth in Greek Company Law. By way of clarification, officers and directors are not liable directly towards shareholders of the company, although the latter, acting as members of the company's General Meeting, may or may not discharge them from their liabilities towards the company.

17 When the company is solvent, the company's interests correspond with the interest of its shareholders. Thus, the directors and officers have a fiduciary duty to consider the interests of shareholders in the discharge of their duty to the company. Chan & Koh's Company Law. Malaysia Corporate Service.

18 Administrators have duties towards the company, but not towards the shareholders as such. Duties include abiding by the company's bylaws and the law, acting with due care and acting in the best interests of the company.

19 As a general rule, but see exceptions mentioned on Attachment A for Romania.

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   c. Shareholders?

JURISDICTION	YES	NO
Venezuela	X	

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   d. The Government?

JURISDICTION	YES	NO
Australia	X	
Australia		X
Barbados	X	
Bermuda		
Bolivia		X
Botswana		X
Brazil	X	
Bulgaria		X
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)		
Canada (Ontario)	X	
Canada (Ontario)	X	
Cayman Islands	X	
China (PRC)		X[20]
Colombia	X	
Denmark	X	
Ecuador	X[21]	X[22]
Egypt	X	
Finland		X
Finland		X
France		X
Germany		X
Germany	X	
Greece	X[23]	
Greece	X	
Hungary	X	
Hungary		X
Indonesia		X
Indonesia		X
Italy		X
Japan		X
Jordan	X	
Korea		X

[20] State-Owned Enterprises are supposed to owe duties to the State Government.

[21] Yes, the legal representatives.

[22] No, members of the board.

[23] Laws 2523/97, 2065/92 and 2214/94 stipulate that the managing director of a company, all cooperating directors, as well as company representatives are liable vis-à-vis the Greek State for non-payment of company debts to the State and State entities. Under Law 1882/90, Chairmen of the Board of Directors and managing directors are liable for any incidents of tax evasion of the company, while they are not released from any such liability by reason of termination of their office.

1. Before the company becomes financially distressed, do the officers and directors have duties to:

   d. The Government?

JURISDICTION	YES	NO
Kuwait	X	
Latvia	X	
Lebanon		X
Luxembourg		X
Malaysia	X[24]	
Mexico		X
Monaco	X	
Norway		
Peru	X	
Philippines	X	
Portugal	X	
Romania		X[25]
Scotland	X	
Scotland		X
Singapore		
Slovenia	X[26]	
South Africa		X
South Africa		X
Spain		X
Sweden		X
Sweden		X
Taiwan		
Turkey	X	
Turks & Caicos Islands		X
United States		X
Uruguay	X	
Uruguay	X	
Venezuela		X

2. When the company becomes financially distressed, do the officers and directors have duties to:

JURISDICTION	COMMENTS
Luxembourg	If by financially distressed it is meant that the company is unable to pay its debts as the fall due but has not yet entered into formal insolvency proceedings. Once the company has entered into formal insolvency proceedings the duties of the officers and directors are at an end.

[24] Companies Commission of Malaysia Act 2001 (Act 614), Part III – Functions and Powers of the Commission, Section 17 Functions of the Commission: The functions of the Commission shall be … (d) to encourage and promote proper conduct amongst directors, secretaries, managers and other officers of a corporation, and self-regulation by corporations, companies, businesses, industry groups and professional bodies in the corporate sector in order to ensure that all corporate and business activities are conducted in accordance with established norms of good corporate governance. Companies Commission Guidelines: 1.4 Should stay abreast of the affairs of the company and be kept informed of the company's compliance with relevant legislations and contractual requirements.

[25] As a general rule, but see exceptions mentioned on Attachment A for Romania.

[26] To the financial authorities.

2. When the company becomes financially distressed, do the officers and directors have duties to:

a. Creditors?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	X	
Bermuda		
Bolivia	X	
Botswana	X	
Brazil	X	
Bulgaria		X
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Cayman Islands		X
China (PRC)		X
Colombia	X	
Denmark	X	
Ecuador		X
Egypt	X	
Finland	X	
Finland	X	
France		X
Germany	X	
Germany	X	
Greece		X
Greece	X	
Hungary	X	
Hungary		X
Indonesia	X	
Indonesia		X
Italy	X	
Japan		X
Jordan		X
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon		X
Luxembourg	X	
Malaysia	X[27]	
Mexico	X	
Monaco	X	
Norway	X	
Peru	X	
Philippines	X	

[27] Directors of a company are imposed with the statutory duty to take into consideration the interest of its creditors when the company is insolvent. This is to ensure that the creditor's interest may not be prejudiced. A payment made to the prejudice of current and continuing creditors when a likelihood of loss to them ought to have been made known is capable of constituting misfeasance by the directors; and hence they may be made liable for it. *Walker v. Wimborne* [1976] 137 CLR 1; *Nicholson v. Permakraft (NZ) Ltd* [1985] 1NZLR 172; *Federal Express Pacific Inc. & Anor v. Meglis Airfreight Pte Ltd & Ors* [1998] MSCLC 96,881

2. When the company becomes financially distressed, do the officers and directors have duties to:

a. Creditors?

JURISDICTION	YES	NO
Portugal	X	
Romania		X[28]
Scotland	X	
Scotland	X	
Singapore	X	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain	X	
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States	X[29]	
Uruguay	X	
Uruguay	X	
Venezuela		X

2. When the company becomes financially distressed, do the officers and directors have duties to:

b. Employees?

JURISDICTION	YES	NO
Australia	X	
Australia	X[30]	
Barbados		X
Bermuda		
Bolivia	X	
Botswana		X
Brazil	X	
Bulgaria		X
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Cayman Islands		X
China (PRC)		X
Colombia	X	
Denmark	X	
Ecuador	X[31]	X[32]
Egypt		X

28 As a general rule, but see exceptions mentioned on Attachment A for Romania.

29 See Attachment A

30 In their capacity as employees.

31 Yes, the legal representatives.

32 No, members of the board.

2. When the company becomes financially distressed, do the officers and directors have duties to:

b. Employees?

JURISDICTION	YES	NO
Finland		X
Finland		X
France	X[33]	
Germany		
Germany	X	
Greece	X	
Greece	X	
Hungary	X	
Hungary		X
Indonesia	X	
Indonesia		X
Italy	X	
Japan		X
Jordan		X
Korea		X
Kuwait	X	
Latvia	X	
Lebanon		X
Luxembourg	X	
Malaysia		X[34]
Mexico	X[35]	
Monaco	X	
Norway	X	
Peru	X	
Philippines	X	
Portugal	X	
Romania		X
Scotland	X	
Scotland		X
Singapore	X	
Slovenia	X	
South Africa		X
South Africa	X	
Spain	X	
Sweden		X
Sweden	X	
Taiwan	X	
Turkey		X
Turks & Caicos Islands	X	
United States	X[36]	

[33] Example: subscription to the AGS, insurance to guaranty the payment of wages

[34] Generally, the publication of the winding up order serves as a notice of dismissal to the company employees; *Re General Rolling Stock Co.* (1827) 7 Ch App 646.

[35] Employees and tax authorities are considered as creditors.

[36] Maybe. The case law is not well developed as to whether parties other than creditors are the beneficiaries of fiduciary duties when a company is in the zone of insolvency. *See Credit Lyonnais Bank Nederland, N.V. v. Pathe Comm. Corp.*, 1991 Del. Ch. LEXIS 215, at *108 (Del. Ch., December 30, 1991) ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to **the corporate enterprise**.") (emphasis added). *See also Equity Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1042 (Del. 1997) (summarizing the Credit Lyonnais as holding that, where foreseeable financial effects of a board decision may fall upon

2. When the company becomes financially distressed, do the officers and directors have duties to:

b. Employees?

JURISDICTION	YES	NO
Uruguay	X	
Uruguay	X	
Venezuela		X

2. When the company becomes financially distressed, do the officers and directors have duties to:

c. Shareholders?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	X	
Bermuda		
Bolivia	X	
Botswana		X
Brazil	X	
Bulgaria	X	
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)		X[37]
Canada (Ontario)	X	
Canada (Ontario)	X[38]	
Canada (Ontario)	X	
Cayman Islands		X[39]
China (PRC)		X
Colombia	X	
Denmark	X	
Ecuador	X	
Egypt	X	
Finland	X	
Finland	X	
France	X[40]	
Germany	X	
Germany	X	
Greece		X
Greece	X	
Hungary	X	
Hungary		X
Indonesia	X	
Indonesia	X	
Italy		X

creditors as well as holders of common stock, as where the corporation is in the vicinity of insolvency, an independent board may consider impacts upon **all corporate constituencies** in exercising its good faith business judgment for the benefit of the corporation).

37 Individually.

38 Theoretically yes but in practice significantly qualified.

39 There is no general duty to shareholders. Duties are owed to the company, although the shareholders can adopt the company's action against the directors in certain circumstances.

40 For example, if they made an error of management before the commencement of a reorganization procedure.

2. When the company becomes financially distressed, do the officers and directors have duties to:

c. Shareholders?

JURISDICTION	YES	NO
Japan		X
Jordan	X	
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon	X	
Luxembourg	X	
Malaysia	X[41]	
Mexico		X
Jordan	X	
Monaco	X	
Norway	X	
Peru	X	
Philippines	X	
Portugal	X	
Romania		X[42]
Scotland	X	
Scotland		X
Singapore	X	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain		
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States	[43]	
Uruguay	X	
Uruguay	X	
Venezuela	X	

2. When the company becomes financially distressed, do the officers and directors have duties to:

d. The Government?

JURISDICTION	YES	NO
Australia	X	
Australia		X
Barbados	X	
Bermuda		
Bolivia	X	
Botswana		X
Brazil	X	
Bulgaria	X	

41 The directors and officers still owe a duty to the shareholders on the actions that they have done before the winding up. Their duty still subsists on those actions.

42 As a general rule, but see exceptions mentioned on Attachment A for Romania.

43 See footnote 36.

2. When the company becomes financially distressed, do the officers and directors have duties to:

d. The Government?

JURISDICTION	YES	NO
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Canada (Ontario)		
Cayman Islands	X	
China (PRC)		X
Colombia	X	
Denmark	X	
Ecuador	X[44]	X[45]
Egypt	X	
Finland		X
Finland		X
France		X
Germany	X	
Germany	X	
Greece	X	
Greece	X	
Hungary	X	
Hungary		X
Indonesia		X
Indonesia		X
Italy		X
Japan		X
Jordan	X	
Korea	X	X
Kuwait	X	
Latvia	X	
Lebanon		X
Luxembourg		X
Malaysia		X[46]
Mexico	X	
Monaco	X	
Norway		X
Peru	X	
Philippines	X	
Portugal	X	
Romania		X[47]
Scotland	X	
Scotland		X
Singapore		
Slovenia	X[48]	

[44] Yes, the legal representatives.

[45] No, members of the board.

[46] The Malaysian Companies Act 1965 states that a company in winding up should pay all federal tax assessed under any written law under Section 292(1)(f). However, no mention is made as to the director or officer having any due *per se* in such situation.

[47] As a general rule, but see exceptions mentioned on Attachment A for Romania.

2. When the company becomes financially distressed, do the officers and directors have duties to:

d. The Government?

JURISDICTION	YES	NO
South Africa		X
South Africa		X
Spain		
Sweden		X
Sweden		X
Taiwan	X	
Turkey	X	
Turks & Caicos Islands		X
United States	[49]	
Uruguay	X	
Uruguay	X	
Venezuela		X

3. Can shareholders or creditors sue the officers and directors for alleged violation of those duties prior to the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
Australia	X	
Australia		X
Barbados	X	
Bermuda		Xx[50]
Bolivia		X
Botswana	X	
Brazil	X	
Bulgaria	X	
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)		X
Canada (Ontario)	X	
Canada (Ontario)	X	
Cayman Islands	X	
China (PRC)		X[51]
Colombia	X	
Denmark	X	
Ecuador	X	
Egypt	X	
Finland	X	
Finland	X	

[48] In public companies.

[49] See footnote 36.

[50] Shareholders have no immediate right of action against directors and officers. The duty being owed the company, it is the company who has the right to bring actions against the directors and officers. If the company will not bring such action, there is provision for an action to be brought by shareholders derivatively on behalf of the company. Creditors have no rights of action against the directors and officers directly as no duty is owed directly to them.

[51] According to the PRC Company Law, the general manager (officer) of a company shall be responsible for the company's board of directors, rather than the shareholders. Pursuant to a judiciary note issued by the Supreme Court, the shareholders in a listed company may bring a lawsuit for any misleading and false statements. Except for shareholders in a listed company, the court will not admit a lawsuit brought by shareholders in a company other than a listed company.

3. Can shareholders or creditors sue the officers and directors for alleged violation of those duties prior to the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
France	X	
Germany	X	
Germany	X[52]	
Greece	X[53]	
Greece	X	
Hungary		X[54]
Hungary		X
Indonesia	X	
Indonesia	X	
Italy	X	
Japan		X
Jordan	X	
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon	X[55]	
Luxembourg	X	
Malaysia		X[56]
Mexico		X
Monaco	X	
Norway	X	
Peru	X	
Philippines	X	
Portugal	X	
Romania		X[57]
Scotland		X
Scotland	X	
Singapore	X[58]	
Slovenia	X	
South Africa	X	
South Africa	X	

[52] In principal they can only sue the company; only in very exceptional cases or in cases the directors/officers commit a tort they can be sued by creditors/shareholders directly (an important and frequent case of a tort in connection with insolvency is the delayed institution of insolvency proceedings by the directors).

[53] As a matter of rule, neither creditors nor shareholders of a company may sue its officers or directors for violation of their duties and responsibilities towards the company. By way of exception, creditors may address a tort action against officers and directors, while shareholders representing 1/3 of the company's share capital may request from the Board to sue the latter on behalf of the company. Recent jurisprudence of Greek courts points out to the opposite direction, by recognizing to individual shareholders the right to sue officers and directors for their acts and omissions giving rise to the reduction of the intrinsic value of the company's shares.

[54] Note: As it has been backed up by consequent court practice, shareholders are not entitled to sue the director(s) directly. Even if damage was caused by the director by failing to perform his duty towards the shareholder, the shareholder may only due the company but not the director.

[55] Shareholders

[56] A member/shareholder may not sue the directors and officers on the company's behalf. Only the company has the right to sue. The "proper plaintiff rule" or the "rule in *Foss v. Harbottle*" is applicable. However, it is to be noted that shareholders may still sue if the exceptions in the *Foss v. Harbottle* rule applies and in terms of taking action by minority shareholders.

[57] As a general rule, but see exceptions mentioned on Attachment A for Romania.

[58] i.e. fiduciary duties

3. Can shareholders or creditors sue the officers and directors for alleged violation of those duties prior to the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
Spain	X	
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States	X[59]	
Uruguay	X	
Uruguay	X	
Venezuela	X	

4. Can shareholders or creditors sue the officers and directors for alleged violation of those duties subsequent to the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
Australia	X	
Australia	X[60]	
Barbados		X
Bermuda	X[61]	
Bolivia	X	
Botswana		X[62]
Brazil	X	
Bulgaria	X	
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Canada (Ontario)	X[63]	
Cayman Islands		X[64]
China (PRC)		X[65]

[59] As noted in the introductory answer to Question 1, above, it is the fact of insolvency and not the filing of an insolvency case or petition that shifts the directors' duties from shareholders to those of creditors and the corporate enterprise. *Geyer*, 621 A.2d at 789 (duties to creditors arise when a corporation is "insolvent in fact," meaning "unable to pay its debts as they fall due in the usual course of business" or "when it has liabilities in excess of a reasonable market value of assets held."). Accordingly, if a breach of those duties takes place prior to an actual insolvency proceeding, the directors could be sued immediately.

[60] Creditors

[61] As a matter of Bermuda law, the rights of the company can only be exercised by the liquidator once the company has entered liquidation. However, under the Companies Act 1981 there is provision for shareholders and/or creditors to bring action against the directors and officers for alleged fraudulent trading. This section is rarely used by shareholders and creditors as the benefit that will accrue from a successful action under this section must be shared amongst all creditors and cannot be retained by the party brining the action.

[62] But criminal penalties apply

[63] In the case of a reorganization, the stay of proceedings may prevent claims against directors during the case unless leave of the court is obtained. The legal liability of the directors and officers continues, although in some cases orders made in CCAA restructurings provide specific protection for directors and officers.

[64] Any actions against the directors will vest in the liquidator.

[65] Pursuant to *Regulations of the PRC Supreme People's Court on Various Issues Regarding Bankruptcy Trials* effective on September 1, 2002, liquidation committee may bring a civil lawsuit against the legal representative and/or people directly

4. Can shareholders or creditors sue the officers and directors for alleged violation of those duties subsequent to the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
Colombia	X	
Denmark	X	
Ecuador	X	
Egypt	X	
Finland	X	
Finland	X	
France		X[66]
Germany		X
Germany	X[67]	
Greece	X[68]	
Greece	X	
Hungary	X[69]	
Hungary		X
Indonesia	X	
Indonesia	X	
Italy		X
Japan		X
Jordan	X	
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon	X[70]	
Luxembourg	X[71]	
Malaysia		X[72]
Mexico	X[73]	
Monaco	X	
Norway	X	
Peru	X	

responsible for the company filing bankruptcy. Shareholders and creditors do not have standing to sue the bankrupted company.

66 The article L. 624-6 allows the administrator or the representative of creditors but not shareholders.

67 In principal only in case of tort. In many of these cases, however, only the administrator-in-insolvency is entitled to take action against the directors/officers during the insolvency proceedings.

68 The liability of officer and shareholders is subject to a five-year limitation period, commencing on the date of act or omission giving rise to such liability. The subsequent commencement of a procedure of bankruptcy/reorganization of the company during this period does not prejudice the company, the state or employees from raising respective claims against officers or shareholders.

69 Following termination of a company (as a result of a liquidation process or otherwise), indemnification claims of the company vis-à-vis its former officer(s) may be brought against such officer(s) by the shareholders of the company having such position at the date of termination of the company.

70 Shareholders

71 Yes, but normally it is the liquidator who takes action after the commencement of insolvency procedures.

72 When a company is insolvent, this does not mean that the creditors may sue the directors. Directors do not owe a duty in that sense to the creditors. *Kuwait Asia Bank EC v. National Mutual Life Nominees Ltd.* [1990] 3 WLR 297,317 (Privy Council on appeal from New Zealand); Walter Woon Company Law. Corporate actions may be commenced by the liquidator [Sections 236(a) and 269(1)(b)]. The liquidator may commence the action in the name of the company or in his own name. Walter Woon Company Law p318.

73 Creditors, but not shareholders, may file claims.

4. Can shareholders or creditors sue the officers and directors for alleged violation of those duties subsequent to the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
Philippines	X	
Portugal	X	
Romania	X	
Scotland	X	
Scotland	X	
Singapore	X[74]	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain	X	
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States	X[75]	
Uruguay	X	
Uruguay	X	
Venezuela	X	

B. What civil and criminal exposure exists for the officers and directors if they violate their duties and responsibilities?

COMMENTS	JURISDICTION
There are various statutory offenses contained in the Companies Act 1981 and other statutes. In addition, there is provision for actions for breach of fiduciary duty to the company, fraudulent preference and fraudulent trading (civil/quasi-criminal) under the Companies Act and for fraudulent conveyance under the Conveyancing Act 1983.	Bermuda
Our answers in Section B are based on the presumption that "officers" and "directors" are actually members of the managing body of the company and not just employees of it.	Bulgaria
Depends upon the penalties imposed by statute (where liability is imposed under legislation) and/or by the Court	Canada (British Columbia)
See Attachment A	Columbia
The officers and directors shall be held responsible for civil liability for compensation under Article 23 of the Company Law described above. If the officers and directors were to be found of any willful misconduct in their failing to perform the duties, they will be sued criminally for breach of trust, which, if convicted, will incur a criminal sanction of not exceeding 5-year imprisonment.	Taiwan

1. Do the officers and directors have criminal exposure if they violate their duties and responsibilities?

JURISDICTION	YES	NO
Australia	X	
Australia	X	

[74] i.e. fiduciary duties

[75] Typically, such an action will belong to the bankruptcy estate, and will be brought by the Trustee or the Debtor for the benefit of all creditors, as opposed to such an action being brought by one or even several individual creditors for their benefit. [cite].

1. Do the officers and directors have criminal exposure if they violate their duties and responsibilities?

JURISDICTION	YES	NO
Barbados	X	
Bermuda	X	
Bolivia	X	
Botswana	X	
Brazil	X	
Bulgaria	X	
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X[76]	
Canada (Ontario)		X[77]
Cayman Islands	X	
China (PRC)	X	
Colombia		X
Denmark	X	
Ecuador	X	
Egypt		X
Finland	X	
Finland	X	
France	X	
Germany	X	
Germany	X[78]	
Greece	X[79]	
Greece	X	
Hungary	X	
Hungary	X	
Indonesia	X	
Indonesia	X	
Italy	X	
Japan	X	
Jordan	X	
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon		X[80]
Luxembourg	X	
Malaysia	X[81]	

76 Theoretically yes but in practice significantly qualified

77 In most cases, the liability directors face is civil liability for amounts not paid by the corporation. In a few cases, directors may be prosecuted for failing to cause the corporation to comply with its obligations.

78 Yes, especially when they do not institute insolvency proceedings on time.

79 See, e.g. Law 1882/90, minimum imprisonment of four months to one year, depending on the outstanding amount of tax due and of up to ten years, depending on the amount of tax evasion.

80 Unless they commit an action punishable as such criminally (e.g. embezzlement).

81 If, in the course of winding up, it appears that a director or officer of the company had been involved in insolvent trading, then the officer and director commits an offence under Section 303(3) of the Malaysian Companies Act 1965. Similarly, the court has powers to examine and compel a director and officer of the company who is guilty of misfeasance, breach of trust or duty to repay or restore money or property misapplied or retained pursuant to Section 305(1) of the Malaysian Companies Act 1965 and this is in addition to any criminal liability [Section 305(3)]. This power arises only in the course of winding up and on the application of the liquidator, a creditor or contributory. A director and officer may also be criminally liable if they

1. Do the officers and directors have criminal exposure if they violate their duties and responsibilities?

JURISDICTION	YES	NO
Mexico	X[82]	
Monaco	X	
Norway	X	
Peru	X	
Philippines	X	
Portugal	X	
Romania	X	
Scotland		X
Scotland		X
Singapore	X[83]	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain	X	
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States		X[84]
Uruguay	X[85]	
Uruguay	X	
Venezuela	X[86]	

2. Are they subject to imprisonment?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	X	
Bermuda		X
Bolivia		X
Botswana	X	
Brazil	X	
Bulgaria	X	
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	

had been fraudulent in the course of winding up pursuant to Section 304 of the Malaysian Companies Act 1965. Section 306 of the Malaysian Companies At 1965 provides for the prosecution of delinquent officers and directors (inclusive), which is criminal in nature.

82 Only after a "concurso" (reorganization/bankruptcy) process begins.

83 Depends on the breach (e.g. Section 157 Companies Act attached)

84 Generally speaking, criminal liability only results from affirmative wrongdoing, such as fraud, embezzlement, or the like.

85 In case they act fraudulently.

86 It depends on the type of bankruptcy: (1) Fortuitous: The one resulting from force majeure, thus leading the merchant to a cease of payment and the impossibility to pursue its business operations; (2) Culpable: The one resulting from a negligent conduct by the merchant; (3) Fraudulent: In which fraudulent acts by the merchandiser take place in order to cause damages to its shareholders. The Culpable and Fraudulent Bankruptcies have criminal exposure (see Venezuela on Attachment A).

2. Are they subject to imprisonment?

JURISDICTION	YES	NO
Canada (Ontario)	X[87]	
Canada (Ontario)		X
Cayman Islands	X	
China (PRC)	X	
Colombia		X
Denmark	X	
Ecuador	X	
Egypt		X
Finland	X	
Finland	X	
France	X	
Germany	X	
Germany	X	
Greece	X[88]	
Greece	X	
Hungary	X	
Hungary	X	
Indonesia	X	
Indonesia	X	
Italy	X	
Japan	X	
Jordan		X
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon		X[89]
Luxembourg	X	
Malaysia	X[90]	
Mexico	X	
Monaco	X	
Norway	X	
Peru	X	
Philippines	X	
Portugal	X	
Romania	X	
Scotland		X
Scotland		X
Singapore	X	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain	X	
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	

87 Theoretically yes but in practice significantly qualified

88 See footnotes 2, 16 and 53 above.

89 Unless they commit an action punishable as such criminally (e.g. embezzlement).

90 For insolvent trading, the penalty is imprisonment for one year or five hundred thousand ringgit. If the offense is for fraudulent trading, the penalty is imprisonment for three years or ten thousand ringgit.

2. Are they subject to imprisonment?

JURISDICTION	YES	NO
Turks & Caicos Islands	X	
United States		X
Uruguay	X	
Uruguay	X	
Venezuela	X[91]	

3. Do the officers and directors have exposure to civil claims to the groups in:

   a. Question A.1 above?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	X	
Bermuda	X	
Bolivia	X	
Botswana	X	
Brazil	X	
Bulgaria		X
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X[92]	
Canada (Ontario)	X	
Cayman Islands	X	
China (PRC)		X
Colombia	X	
Denmark	X	
Ecuador	X	
Egypt	X	
Finland	X	
Finland	X	
France	X[93]	
Germany	X	
Germany	X	
Greece	X	
Greece	X	
Hungary	X	
Hungary		
Indonesia	X	
Indonesia	X	
Italy		X
Japan	X	
Jordan	X	
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon	X	

91 In the cases of Culpable or Fraudulent Bankruptcy.

92 Theoretically yes but in practice significantly qualified

93 Example: (Article L. 225-251 of the Code de Commerce) Directors can be liable for errors of management.

3. Do the officers and directors have exposure to civil claims to the groups in:

   a. Question A.1 above?

JURISDICTION	YES	NO
Luxembourg	X	
Malaysia	X[94]	
Mexico		X
Monaco	X	
Norway	X	
Peru	X[95]	
Philippines	X	
Portugal	X	
Romania	X	
Scotland	X	
Scotland	X	
Singapore	X	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain	X	
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States	X	
Uruguay	X	
Uruguay	X	
Venezuela	X	

3. Do the officers and directors have exposure to civil claims to the groups in:

   b. Question A.2 above?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	X	
Bermuda	X	
Bolivia	X	
Botswana		X
Brazil	X	
Bulgaria	X	
Canada (Alberta)	X	

94 When a company is wound up, a liquidator is empowered to recover losses suffered by the company in acquiring any property, business or undertaking at an overvalue from its director. This right to recovery also applies to sale by the company of any of its property, business or undertaking to such persons at an undervalue. [Section 295 of the Malaysian Companies Act 1965]. Therefore, a civil claim pursuant to Section 304 of the Malaysian Companies Act 1965 for example, extends personally to the director and officer, without any limitation of liability, for all or any of the debts incurred by the company [Section 304 of the Malaysian Companies Act 1965]. Accordingly, the Court also has the power to assess damages against delinquent officers in civil claims against them [Section 305 of the Malaysian Companies Act 1965].

95 About this item, we have to mention that the duties and responsibilities of the officers and directors of the company exist when there have been damages that came from agreements or acts that were against the law, the bylaws or were done with fraud, abuse of faculties or gross negligence.

3. Do the officers and directors have exposure to civil claims to the groups in:

   b. Question A.2 above?

JURISDICTION	YES	NO
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X[96]	
Canada (Ontario)	X	
Cayman Islands	X	
China (PRC)		X
Colombia	X	
Denmark	X	
Ecuador	X	
Egypt	X	
Finland	X	
Finland	X	
France	X[97]	
Germany	X	
Germany	X	
Greece	X	
Greece	X	
Hungary	X	
Hungary		
Indonesia	X	
Indonesia	X	
Italy		X
Japan	X	
Jordan	X	
Korea	X	
Kuwait	X	
Latvia	X	
Lebanon	X	
Luxembourg	X	
Malaysia	X[98]	
Mexico	X	
Monaco	X	
Norway	X	
Peru	X[99]	
Philippines	X	
Portugal	X	
Romania	X	
Scotland	X	
Scotland	X	
Singapore	X	

96 Theoretically yes but in practice significantly qualified.

97 Example: (Article L. 624-3 of the Code de Commerce) Directors can bear liabilities.

98 Section 306 of the Malaysian Companies Act 1965 provides that when a company is wound up, any offense that had been committed by the officers including directors whether it being a past or present officer of the company can be held liable to the offense alleged to be committed then.

99 About this item, we have to mention that the duties and responsibilities of the officers and directors of the company exist when there have been damages that came from agreements or acts that were against the law, the bylaws or were done with fraud, abuse of faculties or gross negligence.

3. Do the officers and directors have exposure to civil claims to the groups in:

   b. Question A.2 above?

JURISDICTION	YES	NO
Slovenia	X	
South Africa		X
South Africa	X	
Spain		
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey	X	
Turks & Caicos Islands	X	
United States	X	
Uruguay	X	
Uruguay	X	
Venezuela	X	

4. Does the existence of potential personal civil or criminal liability become a factor in officers and directors deciding when and if to put the company in a formal insolvency/reorganization procedure?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	[100]	
Bermuda	X	
Bolivia		X
Botswana	X	
Brazil		X
Bulgaria		X
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	[101]	
Canada (Ontario)	X	
Canada (Ontario)	X[102]	
Canada (Ontario)	X	
Cayman Islands	X	
China (PRC)		X
Colombia	X	
Denmark	X	
Ecuador	X	
Egypt		X
Finland	X	
Finland	X	
France	X	
Germany	X	
Germany	X	
Greece		X
Greece	X	
Hungary		X[103]

[100] We have no information which permits us to answer this accurately.

[101] Possibly.

[102] Theoretically yes but in practice significantly qualified.

4. Does the existence of potential personal civil or criminal liability become a factor in officers and directors deciding when and if to put the company in a formal insolvency/reorganization procedure?

JURISDICTION	YES	NO
Hungary		X
Indonesia		X
Indonesia		X
Italy	X	
Japan	X	
Jordan	X	
Korea	X	
Kuwait		X
Latvia		X
Lebanon		X
Luxembourg	X	
Malaysia		X[104]
Mexico		X
Monaco	X	
Norway	X	
Peru		X
Philippines		X
Portugal	X	
Romania	X	
Scotland	X	
Scotland	X	
Singapore	X[105]	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain	X	
Sweden	X	
Sweden	X	
Taiwan		X
Turkey	X	
Turks & Caicos Islands	X	
United States		X[106]

103 A conflict rule of the Company Act [for a period of three years after establishment of insolvency (order of liquidation) of a company, a person who acted as an executive officer of the company to be liquidated for one year or more during the period of two years prior to the date of the final ordering of such liquidation may not be an executive officer of another company] is a factor for a director when deciding whether to manage a financially distressed company.

104 This is not a ground provided for a company to be wound up by Section 218 Malaysian Companies Act 1965. Furthermore, in *Re John While Springs (s) Pte Ltd* [2001] 2 SLR 248 (HC, Singapore) a winding-up petition was refused, *inter alia*, even on the ground that the petitioners themselves had been in breach of their fiduciary duties as directors of the company.

105 If relevant to establish the company is insolvent.

106 Not really. Most officers and directors realize that attempts to control an insolvency case or a distressed company solely to prevent others from suing them often simply results in greater liability. In addition, although the issue is not entirely settled, most cases seem to hold that when a company is insolvent, officers and directors will not be held liable for the choices they make as long as they are in good faith. That is to say, the "business judgment rule," which "a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company" applies in an insolvency case. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose.") (citations omitted). *Angelo, Gordon & Co., L.P. v. Allied Riser Communications Corporation*, 2002 WL 208074, at 6 (Del. Ch.) ("[E]ven where the law recognizes that the duties of directors encompass the interests of creditors, there is room for application of the business judgment rule."); *In re RSL Primecall, Inc.*, 2003 WL 22989669, at *8-*9 (Bankr. S.D.N.Y.).

4. Does the existence of potential personal civil or criminal liability become a factor in officers and directors deciding when and if to put the company in a formal insolvency/reorganization procedure?

JURISDICTION	YES	NO
Uruguay		X
Uruguay		X
Venezuela	X	

5. Is insurance available at realistic premiums which is designed to protect officers and directors from claims that arise while operating a financially distressed company and, if so, is its availability a factor in deciding when and if to put the company in a formal insolvency/reorganization procedure?

JURISDICTION	YES	NO
Australia	X[107]	
Australia		X
Barbados	[108]	
Bermuda	X	
Bolivia		X
Botswana		X
Brazil	X	
Bulgaria		X
Canada (Alberta)	X	
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)		X
Canada (Ontario)	X[109]	
Canada (Ontario)	X[110]	
Cayman Islands		X
China (PRC)		X
Colombia		X
Denmark	X	
Ecuador		X
Egypt		X
Finland		X
Finland	X	
France		
Germany		
Germany	X[111]	X
Greece	N/A[112]	
Greece		X
Hungary	N/A	
Hungary		

107 In some circumstances, it is a factor

108 We have no information which permits us to answer this accurately.

109 Theoretically yes but in practice significantly qualified.

110 Insurance is available, but the scope and cost of the coverage becomes an increasing problem if the debtor is in financial difficulty. The potential liability directors could face is often a factor in deciding when and if to put the corporation into a formal proceeding. This is a particular issue if the debtor has a large number of employees. Several of the types of claims directors can be liable for are employee-related and if there are many employees, directors could face claims for large amounts that accrue over a very short time period.

111 Directors and Officers Insurances are available; especially because of the potential of criminal exposure, they are not a factor in deciding when to institute the proceedings.

112 Available insurance policies normally cover exposure of companies and not personal liabilities of officers and directors.

5. Is insurance available at realistic premiums which is designed to protect officers and directors from claims that arise while operating a financially distressed company and, if so, is its availability a factor in deciding when and if to put the company in a formal insolvency/reorganization procedure?

JURISDICTION	YES	NO
Indonesia		X
Indonesia		X
Italy	X	
Japan	X	
Jordan		X
Korea		X
Kuwait		X
Latvia		X
Lebanon		X
Luxembourg		X
Malaysia		X[113]
Mexico		X
Monaco	X[114]	
Norway	X	X
Peru		X
Philippines	X	
Portugal		X
Romania	X	
Scotland		X
Scotland		X
Singapore		X
Slovenia		X
South Africa		X
South Africa	X	
Spain		
Sweden	X	
Sweden	X	
Taiwan		X
Turkey		X
Turks & Caicos Islands	X	
United States	X[115]	
Uruguay		[116]
Uruguay		X
Venezuela		X

[113] Section 140(1) of the Malaysian Companies Act 1965 provides that any provision contained in the articles or in a contract with the company which exempts any officer or director of the company against liability arising in respect of negligence, default, breach of duty or breach of trust, in relation to the company, is void. A company may indemnify an officer or director against liability incurred in successfully defending any civil or criminal proceedings. This section is aimed at preventing exclusion clauses contained in the articles or outside contracts such as insurance operating to the advantage of officers and directors who breach their duties.

[114] While technically possible, there is no practice on which to draw.

[115] Fiduciary insurance is available to officers and directors of an insolvent company, but based on our anecdotal experience, it is expensive, and creditors of a bankruptcy estate may object to using company funds to purchase it.

[116] The recourse to insurance by officers and directors is very unusual.

6. Is there any personal civil or criminal exposure which acts to prevent officers and directors from resigning their positions once the company becomes financially distressed?

JURISDICTION	YES	NO
Australia		X
Australia		X
Barbados		X
Bermuda		X
Bolivia		X
Botswana		X
Brazil		X
Bulgaria		X
Canada (Alberta)		X
Canada (British Columbia)		X
Canada (British Columbia)		X
Canada (Ontario)		X
Canada (Ontario)		X
Canada (Ontario)	X[117]	
Cayman Islands		X
China (PRC)		X
Colombia		X
Denmark		X
Ecuador		X
Egypt		X
Finland		X
Finland		X
France		
Germany		X
Germany	X[118]	X
Greece		X
Greece	X	
Hungary		X
Hungary		X
Indonesia		X
Indonesia		X
Italy		X
Japan	X	
Jordan		X
Korea	X	
Kuwait		X
Latvia		X
Lebanon		X
Luxembourg		X
Malaysia		X[119]
Mexico		X
Monaco		X
Norway		X

[117] In many cases, directors decide not to resign, at least for a period of time, in order to ensure they can demonstrate that they acted appropriately.

[118] In general, they can resign whenever they want (happens frequently mainly because of B.1.); yet, resigning does not release them from an already existing (civil and criminal) liability and can lead to a civil exposure in case the resigning takes place in an inopportune moment (e.g. during a financial crisis of the company if there is only one director).

[119] The Malaysian Companies Act 1965 is silent on this matter. In fact, once winding up order is made, the director's office ceases. Presumably, there should not be any personal civil or criminal exposure, which acts to prevent them from resigning once the company becomes financially distressed.

6. Is there any personal civil or criminal exposure which acts to prevent officers and directors from resigning their positions once the company becomes financially distressed?

JURISDICTION	YES	NO
Peru		X
Philippines		X
Portugal		X
Romania		X
Scotland		X
Scotland	X	
Singapore		X
Slovenia		X
South Africa		X
South Africa		X
Spain		X
Sweden		X
Sweden		X
Taiwan		X
Turkey		X
Turks & Caicos Islands		X
United States	[120]	
Uruguay		X
Uruguay		X
Venezuela		X

7. Do trustees or other parties frequently sue officers and directors for violation of their duties after the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
Australia	X	
Australia		X
Barbados	[121]	
Bermuda		X[122]
Bolivia		X
Botswana		X
Brazil		X
Bulgaria		X
Canada (Alberta)		X
Canada (British Columbia)		X
Canada (British Columbia)		X
Canada (Ontario)	X	
Canada (Ontario)	X[123]	
Canada (Ontario)	X	
Cayman Islands		X
China (PRC)		X
Colombia		X
Denmark		X
Ecuador		X

[120] Maybe. See Attachment A.

[121] The Bankruptcy and Insolvency Act 2001-34 is a very new act in Barbados. At the moment, we do not know how it will operate.

[122] Not frequently in Bermuda but more frequently in the U.S. as most of the companies in Bermuda which are non-local companies, have directors and officers, have creditors and shareholders located in other jurisdictions.

[123] Theoretically yes but in practice significantly qualified.

7. Do trustees or other parties frequently sue officers and directors for violation of their duties after the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
Egypt		X
Finland	X	
Finland	X	
France		X[124]
Germany	X	
Germany	X	
Greece		X[125]
Greece	X	
Hungary		X[126]
Hungary		X
Indonesia		X
Indonesia		X
Italy		X
Japan		X
Jordan		X
Korea		X
Kuwait	X	
Latvia	X	
Lebanon		X
Luxembourg		X
Malaysia		X[127]
Mexico		X
Monaco		X
Norway		X
Peru		X[128]
Philippines		X
Portugal		X
Romania		X
Scotland		X
Scotland		X
Singapore		X
Slovenia		X
South Africa		X
South Africa	X	
Spain	X	
Sweden		X
Sweden	X	
Taiwan		X
Turkey	X	
Turks & Caicos Islands	X	
United States	X[129]	

124 Less than 20%

125 Following the commencement of a bankruptcy or reorganization procedure, the main focus of the bankruptcy or reorganization administrator is the preservation of the bankruptcy property and its allocation among bankruptcy creditors; claims against officers and directors shall mainly be raised to the extent necessary to enhance the scope of this property.

126 Probably, it will be more frequent in the future.

127 Based on case law study, there are few cases on point. However, this question should be based on statistics obtained from the courts. The results must factor in the facts of the case itself.

128 Criminal suits are sometimes used by creditors on interested parties to exert pressure over directors and officers and collect their debt.

7. Do trustees or other parties frequently sue officers and directors for violation of their duties after the commencement of an insolvency/reorganization procedure?

JURISDICTION	YES	NO
Uruguay		X
Uruguay		X
Venezuela		X

8. Are suits against officers and directors typically successful?

JURISDICTION	YES	NO
Australia	X[130]	
Australia		X
Barbados	[131]	
Bermuda		[132]
Bolivia		X
Botswana		X
Brazil		X
Bulgaria		X
Canada (Alberta)		X
Canada (British Columbia)	X	
Canada (British Columbia)	[133]	
Canada (Ontario)	X	
Canada (Ontario)	X[134]	
Canada (Ontario)		X[135]
Cayman Islands	[136]	
China (PRC)		N/A[137]
Colombia		X
Denmark		
Ecuador		X
Egypt		X
Finland	X	
Finland		X
France	X	
Germany	X	
Germany	X	

129 We have found this sort of lawsuit is more and more common, as many bankruptcy cases in the US result in very little funds available for creditors.

130 In a majority of cases

131 The Bankruptcy and Insolvency Act 2001-34 is a very new act in Barbados. At the moment, we do not know how it will operate.

132 Difficult to say – in Bermuda probably not – but overseas they may be more successful.

133 Depends on the facts.

134 Theoretically yes but in practice significantly qualified.

135 Claims against director for unpaid amounts for which directors are directly liable are not unusual, and often result in a settlement payment if the facts do not support a strong due diligence defense. Claims against directors for breach of other duties have become more common, but are usually vigorously opposed and have only succeeded in a few cases.

136 This depends on the merits of the suit. Apart from a small number of specific statutory duties, the Companies Law does not contain extensive duties imposed on directors. However there are a number of common law duties. There is no judicial or policy in favor of either harsh or light treatment of delinquent directors.

137 Most cases have not been published; therefore, it is not clear whether cases against directors or officers are typically successful.

8. Are suits against officers and directors typically successful?

JURISDICTION	YES	NO
Greece		X[138]
Greece		X
Hungary	N/A	
Hungary		X
Indonesia		X
Indonesia		X
Italy		X
Japan	X	
Jordan		X
Korea	X	
Kuwait	X	
Latvia		X
Lebanon		X
Luxembourg		X
Malaysia	[139]	
Mexico		
Monaco		X
Norway		X
Peru		X[140]
Philippines		X
Portugal		X
Romania		X[141]
Scotland		X
Scotland		X
Singapore		
Slovenia		X
South Africa		X
South Africa	X	
Spain	X	
Sweden		X
Sweden	X	X
Taiwan		X
Turkey		X
Turks & Caicos Islands	X	
United States	[142]	
Uruguay	[143]	

138 Success of lawsuits depends on the applicable legal standards. Given that Greek courts apply the "business judgment rule", entitled parties must adduce sufficient evidence to the effect that the officers' and directors' acts and omissions manifestly violated this rule as well as a reasonable director's business expectations and projections.

139 Depends on factual situation.

140 Criminal suits are sometimes used by creditors on interested parties to exert pressure over directors and officers and collect their debt.

141 As a general rule, but see the circumstances mentioned at item D.

142 This cannot be generalized with a "yes or no" answer – the answer is sometimes. Success or failure depends on the facts of the case, how egregious the officer and director conduct is, the availability of insurance, the availability of funds to vigorously prosecute the action against officers and directors, and other factors. Where these cases are successful, they can result in liability in the tens of millions of dollars. *See Pereira v. Cogan*, Case No. 00 Civ. 619 (RWS) (S.D.N.Y. Judgment entered June 25, 2003).

143 This will depend on whether these suits have grounds for their filing or not.

8. Are suits against officers and directors typically successful?

JURISDICTION	YES	NO
Uruguay		X
Venezuela	[144]	

C. Subsequent Restrictions on Officers – Directors

COMMENTS	JURISDICTION
We have to point out that the officer/director cannot be "personally insolvent" in their capacity of physical persons under Bulgarian legislation.	Bulgaria
According to the provision of the Article 246/4 of "Law on Commercial Companies", a member of the executive management can't be a person who was convicted of a criminal offense committed against the economy, against labor relations and social security, against legal traffic, against the management of socially owned resources and natural resources, or against public or private property, who shall not be eligible for management within five years from the final verdict and not before a period of two years has elapsed after he has served a prison term.	Slovenia

1. In the event that a company becomes insolvent, is an officer or director of the insolvent company legally restricted from acting as an officer or director in another company?

JURISDICTION	YES	NO
Australia	X[145]	
Australia		X
Barbados		X
Bermuda		X
Bolivia		X
Botswana		X
Brazil		X
Bulgaria	X	
Canada (Alberta)		X
Canada (British Columbia)		X
Canada (British Columbia)		X
Canada (Ontario)	X	
Canada (Ontario)		X
Canada (Ontario)		X
Cayman Islands		X
China (PRC)	X[146]	
Colombia	X	
Denmark		X
Ecuador		X
Egypt		X
Finland		X
Finland		X

[144] It will depend on the legal arguments included in the claim. Additionally, in Venezuela there is no official public entity or institution to keep records of statistics for judicial procedures. In order to obtain this kind of information, we would have to physically appear before all courts around the country to acquire said information. Therefore, it is beyond our capabilities to provide an accurate answer for this specific question.

[145] If ordered by Court or becomes bankrupt.

[146] Pursuant to Article 57 of the *PRC Company Law*, a person is prevented from serving another company as its officer, a supervisor, or a director if such person served as a director, or general manager of a bankrupted company, **and** he was personally liable for the bankruptcy; and such restriction shall be valid within three years of the completion of liquidation of the bankrupted company.

1. In the event that a company becomes insolvent, is an officer or director of the insolvent company legally restricted from acting as an officer or director in another company?

JURISDICTION	YES	NO
France		X[147]
Germany		X
Germany		X[148]
Greece		X[149]
Greece		X
Hungary	X[150]	
Hungary	X	
Indonesia	X[151]	
Indonesia	X	
Italy	X	
Japan		X
Jordan		X
Korea		X
Kuwait		X
Latvia		X
Lebanon		X
Luxembourg	X[152]	
Malaysia	X[153]	
Mexico		X
Monaco	X	
Norway		X
Peru		X[154]
Philippines		X
Portugal	X[155]	
Romania		X
Scotland		X
Scotland		X
Singapore		X[156]

147 Except the case of the Article L. 622-32 of the Code de Commerce after a liquidation.

148 In general not; however, there are restrictions in case they are sentenced because of an insolvency offense. In this case, they are banned for five years.

149 Officers and directors of a company limited by shares are not considered as "traders" in the sense given to this term by Greek Law, and therefore may not be declared as insolvent. Under Greek Law, only traders may be placed under a bankruptcy or reorganization procedure.

150 A conflict rule of the Company Act [for a period of three years after establishment of insolvency (order of liquidation) of a company, a person who acted as an executive officer of the company to be liquidated for one year or more during the period of two years prior to the date of the final ordering of such liquidation may not be an executive officer of another company] is a factor for a director when deciding whether to manage a financially distressed company.

151 If he/she is responsible for the bankruptcy.

152 Yes, they can be but it is not automatic.

153 Section 130A of the Malaysian Companies Act 1965 aptly provides that a person who had been a director of a company that had become insolvent shall not, without leave of the Court, be a director in another company for a period of five years. As a result of the contravention of the above Section, imprisonment for three years or ten thousand ringgit or both would happen.

154 We have to point out that in case the company is declared bankruptcy, the chairman of the board of directors is legally restricted from acting as an officer or director in another company.

155 When the insolvency is declared guilty, the judge identifies the person(s) responsible and declares his/her restriction to act as an officer or director of any company for a period of that can go from 2 years to 10 years.

1. In the event that a company becomes insolvent, is an officer or director of the insolvent company legally restricted from acting as an officer or director in another company?

JURISDICTION	YES	NO
Slovenia	X	
South Africa		X
South Africa		X
Spain		X
Sweden		X
Sweden		X
Taiwan		X
Turkey		X
Turks & Caicos Islands		X
United States		X
Uruguay		X
Uruguay		X
Venezuela		X

2. In the event an officer or director becomes personally insolvent, is he/she legally restricted from continuing to act as an officer or director of:

   a. his/her current company?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	X	
Bermuda	X	
Bolivia		X
Botswana		X
Brazil		X
Bulgaria		X
Canada (Alberta)		X
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Cayman Islands		X
China (PRC)	X	
Colombia		X
Denmark		X
Ecuador	X	
Egypt		X
Finland		X
Finland	X	
France	X	
Germany		X
Germany		X[157]
Greece	X[158]	

156 But an application may be made by the Official Receiver to disqualify him on the basis that he is unfit (Section 149 Companies Act attached).

157 In general not; only in cases she/he is sentenced because of an insolvency offense.

158 Following the initiation of a bankruptcy or reorganization procedure, the management of the company's property is assigned to the party appointed as administration of the company.

2. In the event an officer or director becomes personally insolvent, is he/she legally restricted from continuing to act as an officer or director of:

   a. his/her current company?

JURISDICTION	YES	NO
Greece	X	
Hungary	N/A[159]	
Hungary[160]		
Indonesia	X	
Indonesia	X	
Italy	X	
Japan	X[161]	
Jordan	X	
Korea		X
Kuwait	X	
Latvia		N/A[162]
Lebanon	X[163]	
Luxembourg	X[164]	
Malaysia	X[165]	
Mexico		X
Monaco	X	
Norway		X
Peru		X[166]
Philippines		X
Portugal	X	
Romania		X
Scotland	X	
Scotland	X	
Singapore	X	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain		X
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey		X
Turks & Caicos Islands		X

159 As of now, concept of personal insolvency is unknown in Hungarian law.

160 There is no personal bankruptcy in Hungary.

161 The word "insolvent" means that the relevant individual has been declared by a court as bankrupt. The Commercial Code of Japan disqualifies a bankrupt individual (so declared by a court) from directorship of companies. In other words, unless and until a certain individual is declared by a court as bankrupt, the said individual may act as a director, even if the individual is in fact bankrupt.

162 Insolvency of individuals not provided by the law.

163 In case of repeated bankruptcy or fraudulent bankruptcy.

164 Yes, but it is not automatic. It is a decision to be taken by the court.

165 The Articles of a company usually provide that the office of the director shall become vacant if the director becomes bankrupt. Article 72 of Table A, Fourth Schedule.

166 One in case the officer or director is declared personally bankrupt, he/she is legally restricted from continuing to act as an officer or director of his/her current company and/or another company.

2. In the event an officer or director becomes personally insolvent, is he/she legally restricted from continuing to act as an officer or director of:

   a. his/her current company?

JURISDICTION	YES	NO
United States		X
Uruguay		X
Uruguay		X
Venezuela		X

2. In the event an officer or director becomes personally insolvent, is he/she legally restricted from continuing to act as an officer or director of:

   b. another company?

JURISDICTION	YES	NO
Australia	X	
Australia	X	
Barbados	X	
Bermuda	X	
Bolivia		X
Botswana		X
Brazil		X
Bulgaria		X
Canada (Alberta)		X
Canada (British Columbia)	X	
Canada (British Columbia)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Canada (Ontario)	X	
Cayman Islands		X
China (PRC)	X	
Colombia		X
Denmark		X
Ecuador	X	
Egypt		X
Finland		X
Finland	X	
France	X	
Germany		X
Germany		X[167]
Greece		X
Greece	X	
Hungary	N/A	
Hungary		
Indonesia	X	
Indonesia	X	
Italy	X	
Japan	X	
Jordan	X	
Korea		X
Kuwait	X	
Latvia		N/A
Lebanon	X[168]	

[167] In general not; only in cases she/he is sentenced because of an insolvency offense.

2. In the event an officer or director becomes personally insolvent, is he/she legally restricted from continuing to act as an officer or director of:

   b. another company?

JURISDICTION	YES	NO
Luxembourg	X[169]	
Malaysia	X[170]	
Mexico		X
Monaco	X	
Norway		X
Peru		X[171]
Philippines	X	
Portugal	X	
Romania		X
Scotland	X	
Scotland	X	
Singapore	X	
Slovenia	X	
South Africa	X	
South Africa	X	
Spain		X
Sweden	X	
Sweden	X	
Taiwan	X	
Turkey		X
Turks & Caicos Islands		X
United States		X
Uruguay		X
Uruguay		X
Venezuela		X

3. In the event that a company becomes insolvent, is an officer or director of the insolvent company legally restricted from obtaining credit as a promoter of a second company?

JURISDICTION	YES	NO
Australia		X
Australia		X
Barbados		X
Bermuda		X
Bolivia	X	
Botswana		X
Brazil		X
Bulgaria		X

168 In case of repeated bankruptcy or fraudulent bankruptcy.

169 Yes, but it is not automatic. It is a decision to be taken by the court.

170 Section 125 of the Companies Act 1965 states clearly that every person who is an undischarged bankrupt who is a director, except with leave of the Court, shall be guilty of an offense. Such offense warrants imprisonment for five years or one hundred thousand ringgit fine or both. The Court shall not give leave under this section unless notice of intention to apply has been served on the Minister and on the Official Receiver and the Minister and the Official Receiver or either of them may be represented at the hearing of and may oppose the granting of the application.

171 One in case the officer or director is declared personally bankrupt, he/she is legally restricted from continuing to act as an officer or director of his/her current company and/or another company.

3. In the event that a company becomes insolvent, is an officer or director of the insolvent company legally restricted from obtaining credit as a promoter of a second company?

JURISDICTION	YES	NO
Canada (Alberta)		X
Canada (British Columbia)		X
Canada (British Columbia)		X
Canada (Ontario)		X
Canada (Ontario)		X
Canada (Ontario)		X
Cayman Islands		X
China (PRC)	N/A	
Colombia		X
Denmark		X
Ecuador		X
Egypt		X
Finland		X
Finland		X
France		X
Germany		X
Germany		X
Greece		X
Greece		X
Hungary		X
Indonesia		X
Indonesia		X
Italy		X
Japan		X
Jordan		X
Korea		X
Kuwait		X
Latvia		X
Lebanon		X
Luxembourg		X
Malaysia		X[172]
Mexico		X
Monaco		X
Norway		X
Peru		X
Philippines		X
Portugal	X	
Romania		X
Scotland		X
Scotland		X
Singapore		X
Slovenia		X
South Africa		X
South Africa		X
Spain		X
Sweden		X
Sweden		X
Taiwan		X
Turkey		X

[172] Although the company is insolvent and the director is prohibited from being a director in another company, there is no prohibition against the directors in promoting companies. Walter Woon Company Law p232.

3. In the event that a company becomes insolvent, is an officer or director of the insolvent company legally restricted from obtaining credit as a promoter of a second company?

JURISDICTION	YES	NO
Turks & Caicos Islands		X
United States		X
Uruguay		[173]
Uruguay		X
Venezuela		X

4. If the answer to C1 or C3 is "yes", is the legal restriction imposed when the officer or director has been found to have committed malfeasance?

JURISDICTION	YES	NO
Australia	X[174]	
Australia		
Barbados	N/A	
Bermuda		
Bolivia		X
Botswana		
Brazil		
Bulgaria		X
Canada (Alberta)		
Canada (British Columbia)	N/A	
Canada (British Columbia)		
Canada (Ontario)		None
Canada (Ontario)		
Canada (Ontario)		
Cayman Islands	N/A	
China (PRC)		X
Colombia	X	
Denmark		
Ecuador	X	
Egypt		
Finland		
Finland		
France		
Germany		
Germany		
Greece	N/A	
Greece		
Hungary		X
Hungary		
Indonesia	X	
Indonesia	X	
Italy	X	
Japan		
Jordan	N/A	
Korea		
Kuwait		
Latvia		
Lebanon		
Luxembourg	X[175]	

[173] Not legally, though he or she may be restricted in fact.

[174] But only in some circumstances – court action.

4. If the answer to C1 or C3 is "yes", is the legal restriction imposed when the officer or director has been found to have committed malfeasance?

JURISDICTION	YES	NO
Malaysia		X[176]
Mexico		
Monaco	X	
Norway		
Peru		
Philippines		
Portugal	X	
Romania		
Scotland	N/A	
Scotland		X
Singapore		
Slovenia	X	
South Africa	N/A	
South Africa		N/A
Spain		
Sweden		
Sweden		
Taiwan		
Turkey		
Turks & Caicos Islands		
United States		
Uruguay		
Uruguay	N/A	N/A
Venezuela		

5. If the answer to C1 or C3 is "yes", is the legal restriction imposed when the officer or director has been found to have committed mismanagement?

JURISDICTION	YES	NO
Australia[177]		
Australia		
Barbados	N/A	
Bermuda		
Bolivia		X
Botswana		
Brazil		
Bulgaria		X
Canada (Alberta)		
Canada (British Columbia)	N/A	
Canada (British Columbia)		
Canada (Ontario)		None
Canada (Ontario)		

175 It can be imposed when the director or officer has been found to have contributed to the bankruptcy of the company by his/her gross or qualified negligence.

176 According to the Halsbury's Laws of Malaysia Vol. 6, when misfeasance is proven, the court examines into the conduct of the person. Subsequently, the order is to compel him to repay or restore the money or property or any part of the money or property respectively with interest at such rate as the court thinks just, or to contribute such sum to the company's assets by way of compensation in respect of the misfeasance as the court thinks just. Therefore, the legal restriction imposed when the officer or director has been found to have committed misfeasance differs from an officer or director of a company that becomes insolvent.

177 Not mere mismanagement – requires to be more - court order required. Otherwise yes

5. If the answer to C1 or C3 is "yes", is the legal restriction imposed when the officer or director has been found to have committed mismanagement?

JURISDICTION	YES	NO
Canada (Ontario		
Cayman Islands	N/A	
China (PRC)	X	
Colombia	X	
Denmark		
Ecuador	X	
Egypt		
Finland		
Finland		
France		
Germany		
Germany		
Greece	N/A	
Greece		
Hungary		X
Hungary		
Indonesia	X	
Indonesia	X	
Italy	X	
Japan		
Jordan	N/A	
Korea		
Kuwait		
Latvia		
Lebanon		
Luxembourg	X[178]	
Malaysia	X[179]	
Mexico		
Monaco	X	
Norway		
Peru		
Philippines		
Portugal	X	
Romania		
Scotland	N/A	
Scotland		X
Singapore		
Slovenia	X	
South Africa	N/A	
South Africa		N/A
Spain		
Sweden		
Sweden		
Taiwan		
Turkey		

[178] It can be imposed when the director or officer has been found to have contributed to the bankruptcy of the company by his/her gross or qualified negligence.

[179] Section 130 of the Malaysian Companies Act 1965 applies, *i.e.* when a person is convicted for any offense in connection with the management of a corporation, subsequently, he cannot be a director in another company unless and until he obtains leave from the Court. Section 130A which is stated above is applicable as well. Therefore, the position would be that the same legal restriction applies in both situations.

5. If the answer to C1 or C3 is "yes", is the legal restriction imposed when the officer or director has been found to have committed mismanagement?

JURISDICTION	YES	NO
Turks & Caicos Islands		
United States		
Uruguay		
Uruguay	N/A	N/A
Venezuela		

D. Please supply any additional information including examples of how these rules have been applied in your jurisdiction.

COMMENTS	JURISDICTION
See Attachment A	Australia
	Australia
See Attachment A	Barbados
Directors and officers' fiduciary duties are owed to the company which consists of the shareholders when the company is solvent, and as the company becomes financially troubled, the company interests of creditors have to be considered as they are the ones with an economic interest in the company. There are statutory duties imposed on directors and officers.	Bermuda
	Bolivia
See Attachment A	Botswana
See Attachment A	Brazil
See Attachment A	Bulgaria
	Canada (Alberta)
	Canada (British Columbia)
	Canada (British Columbia)
	Canada (Ontario)
	Canada (Ontario)
See Attachment A	Canada (Ontario)
	Cayman Islands
See Attachment A	China (PRC)
	Colombia
	Denmark
See Attachment A	Ecuador

D. Please supply any additional information including examples of how these rules have been applied in your jurisdiction.

COMMENTS	JURISDICTION
We have answered this questionnaire based on joint stock and limited liability companies. Other types of companies, e.g., partnerships, where normally a partner is the director of the companies, and in the case of the company being declared bankrupt, the director will also become personally bankrupt. Therefore, a portion of our answers will change accordingly.	Egypt
See Attachment A	Finland
See Attachment A	Finland
	France
See Attachment A	Germany
	Germany
See Attachment A	Greece
	Greece
	Hungary
See Attachment A	Hungary
See Attachment A	Indonesia
See Attachment A	Indonesia
	Italy
	Japan
	Jordan
	Korea
See Attachment A	Kuwait
On January 1, 2002, the new Commercial Law entered into force in Latvia, providing for a transitional period until the end of 2004, when all companies have to re-register from the Company Register with the commercial Register. During this transitional period, the previous laws regulating the business activities are still applicable to the companies registered in the Company Register. Only a small portion of the companies are already re-registered in the Commercial Register, on which the new Commercial Law is binding. Therefore, there is no litigation practice and cases which would have been appealed at all court instances and decided by the Senate of the Supreme Court, the highest judicial level, in respect of the liability of the board members in case of insolvency or bankruptcy of the company.	Latvia
	Lebanon
	Luxembourg
	Malaysia
	Mexico

D. Please supply any additional information including examples of how these rules have been applied in your jurisdiction.

COMMENTS	JURISDICTION
See Attachment A	Monaco
Please note that the questions and answers above will, for Norwegian purposes, not give a correct impression of the situation in Norway. Most questions need to be more specific and adjusted to the relevant situation in order to imply a relevant and correct answer. Consequently, most of the questions may be answered differently depending on the situations in questions. To publish the questions and the answers at set out above is therefore not recommendable.	Norway
	Peru
	Philippines
See Attachment A	Portugal
See Attachment A	Romania
In Scotland the duties to creditors increases when a company becomes financially distressed and the duties to shareholders consequently decreases. There are statutory rules protecting employee rights. The creditors can be secured, preferred or ordinary in ranking. There are strict rules about the incurring of further credit when insolvent and the insolvency practitioner (IP) has powers to challenge preferences and transactions at an undervalue. The IP also has to report on the directors' conduct to the Government who have power to apply for disqualification orders.	Scotland
See Attachment A	Scotland
See Attachment A	Singapore
See Attachment A	Slovenia
	South Africa
	South Africa
	Spain
	Sweden
See Attachment A	Sweden
	Taiwan
See Attachment A	Turkey
See Attachment A	Turks & Caicos Islands
	United States
Suits brought against directors or officers are not usual in Uruguay, and when they exist, it is usually within the context of a conflict between shareholders. There is scarcely any jurisprudence on these matters	Uruguay
See Attachment A	Uruguay

D. Please supply any additional information including examples of how these rules have been applied in your jurisdiction.

COMMENTS	JURISDICTION
See Attachment A	Venezuela

AUSTRALIA

1. Numerous actions are brought for insolvent trading practices successfully.
2. Company directors are quite frequently barred usually on application of the corporate regulator (ASIC) for improper conduct as an director.
3. Actions are frequently brought for "civil penalty order" by ASIC against defaulting directors – resulting in a civil penalty – non-custodial.
4. Actions are brought by liquidators for breach by directors of their duties as directors under the Corporations Act.

BARBADOS

Under the Companies Act Cap. 308 of the Laws of Barbados ("CA") directors have the following duties:

1. A duty, in exercising their powers and discharging their duties to manage the company (section 58) , to act honestly and in good faith with a view to the best interests of the company; and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. (section 95) In determining what are the best interests of a company, a director must have regard to the interests of the company's employees in general as well as to the interests of its shareholders.

(section 95(2))

2. Where a director is a party to a material contract or proposed material contract with the company, or is a director or an officer of any body, or has a material interest in any body, that is a party to a material contract or proposed material contract with the company, a duty to disclose in writing to the company or request to have entered in the minutes of meetings of directors the nature and extent of his interest. (section 89)

3. If the company's auditor demands, to supply him with such information, explanations, records, etc., that he considers necessary to make his report on the company's financial statements are required by section 164 of the CA. (section 165)

4. To call a meeting of the shareholders if requested to do so by a shareholder of not less than 5% of the company's voting shares. (section 129)

5. To call an annual meeting of shareholders no less than 18 months after the company comes into existence, and subsequently not later than 15 months after the last annual meeting. (section 105)

6. To approve the company's financial statements in writing. (section 150)

7. To place the financial statements of the company before the shareholders at the annual meetings. (section 147)

8. In general, directors must comply with the CA and its regulations, and with the articles and by-laws of the company, and any unanimous shareholder agreement relating to the company.

Directors also have duties imposed on them under the Value Added Tax Act 1996-15, the National Insurance and Social Security Act Cap. 47 of the Laws of Barbados and the Income Tax Act Cap. 73 of the Laws of Barbados with respect to the payment of value added tax and national insurance contributions for employees of the company, and payment of income tax by the company and forwarding PAYE income tax deducted from employees' remuneration to the Inland Revenue Department.

Where a company is financially distressed, all of the duties outlined above continue to apply, and in addition:

1. The company's ability to give financial assistance to a shareholder, director, officer or employee of the company or an affiliated company is restricted. (CA section 53)

2. If the company paid a dividend, other than a stock dividend, or redeemed or purchased for cancellation any of the shares of the capital stock of the company within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, the Court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent. If the Court finds that such a transaction occurred when the corporation was insolvent or it rendered the corporation insolvent, the Court may give judgment to the trustee against the directors of the corporation, jointly and severally, in the amount of the dividend or redemption or purchase price, with interest on the dividend, redemption or

purchase price, that has not been paid to the corporation where the Court finds that the directors did not have reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or the transaction would not render the corporation insolvent. (Bankruptcy and Insolvency Act 2001-34 (BIA) section 76). (This section of the BIA contains a typographical error, we have quoted it here as we believe it ought to read, based on the Canadian legislation on which the BIA is based).

3. Where a corporation commits an offense under the BIA, any director who directed, authorized, assented to, acquiesced in or participated in the commission of the offense is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offense, whether or not the corporation has bee prosecuted or convicted. (BIA section 240)

Prior to commencement of an insolvency/reorganization procedure:

1. A complainant may bring a derivative action on behalf of the company under Division L Part 1 of the CA against the directors for breach of their duties under the CA. Complainants can be shareholders, debenture holders, or former share or debenture holders, other directors or officers or former directors or officers of the company, the Registrar of Companies or any other person the Court considers a proper person to bring the action. (CA section 225)

2. If any director does not comply with the CA, or the regulations, articles, by-laws, or any unanimous shareholder agreement of the company, a complainant or creditor of the company may, in addition to any other right he has, apply to the Court for an order directing the director to comply with, or restraining the director from acting in breach of, any provisions of the CA, the regulations, articles, by-laws or unanimous shareholder agreement, as the case may be. (CA section 235)

3. Complainants may also bring actions to restrain oppression of shareholders or debenture holders under section 228 of the CA and relief under this section could include removal of the directors and/or financial relief.

4. It is an offence under the CA to:

   a. Make a false report. (section 432 – penalty BDS $5,000 or 6 months imprisonment or both – subsection (3) applies this to directors in particular)

   b. Fail to notify the auditor of a detected error in a financial statement. (section 433(j) - penalty BDS $5,000 or 6 months imprisonment or both – applies to directors in particular)

   c. Generally, the Company's contravention of several of the provisions of the CA with respect to record keeping, issue of prospectus and allotment of shares, soliciting proxies, reporting to the Registrar of Companies and circulating financial statements to shareholders usually carries a penalty BDS $5000 or 6 months imprisonment or both, and directors who knowingly authorized the contravention are also guilty of the offence. (CA sections 433 and 434)

   d. Contravention of any other provision of the CA carries a penalty of BDS $5,000. (section 435)

5. There are also criminal sanctions for failing to comply with the requirements of the Value Added Tax Act, the National Insurance and Social Security Act and the Income Tax Act and these also carry penalties of fines and/or terms of imprisonment.

After commencement of an insolvency/reorganization procedure, the BIA provides that where a Company commits an offence under the BIA, any director who directed, authorized, assented to, acquiesced in or participated in the commission of the offense, is a part to and guilty of the offense, and is liable on conviction to the punishment provided for the offense, whether or not the corporation has been prosecuted or convicted.

Offenses under the BIA include:

1. Making a fraudulent disposition of property.

2. Refusing or neglecting to answer fully and truthfully all proper questions put at any examination held pursuant to the BIA.

3. Making a false entry or omission in a statement or accounting.

4. Concealing, destroying, mutilating, falsifying making omissions in or disposing of documents affecting or relating to the bankrupt's property or affairs.

5. Obtaining credit or property by false representations.

6. Fraudulently concealing or removing property of a value of $50 or more or any debt due to or from the bankrupt.

7. Pledging or disposing of any property obtained on credit.

8. Leaving Barbados and taking any property to the amount of $2,000 or attempting to do so.

9. Failing to comply with any Court order to make payments towards his estate or to make all the disclosures and deliver all property to the trustee as required under the BIA. (Penalty – on summary conviction BDS $10,000 or imprisonment for up to one year or both, or on conviction - on indictment, BDS $20,000 or imprisonment for up to 3 years, or both.)

10. Engaging in business without disclosing that he is an undischarged bankrupt.

11. Obtaining credit without informing the creditor that he is an undischarged bankrupt. (Penalty BDS $10,000 or imprisonment for up to one year, or both)

12. Having previously been bankrupt or reorganized, engaging in business without keeping proper books and records or concealing, destroying, mutilating, falsifying or disposing of any book or record during the two years preceding the subsequent bankruptcy. (Penalty - BDS $10,000 or imprisonment for up to one year, or both)

13. Entering into any transaction to obtaining a benefit to which he or another person would not be entitled. (penalty - BDS $10,000 or imprisonment for up to one year, or both.)

14. Failing to do community service if ordered to do so. (Penalty – summary - BDS $10,000 or imprisonment for up to 1 year or both - indictment – BDS$20,000 or imprisonment for 3 years or both)

Generally, any other contravention of the BIA carries a penalty - BDS $10,000, or imprisonment for up to two years, or both. Community service can be added to any of the penalties listed above. Orders for damages to be paid can also be made in favor of persons suffering loss as a result of any offense committed under the BIA.

Because the Bankruptcy and Insolvency Act is so new, we do not have any examples of how it has been applied in Barbados. It is possible that our Courts may follow the Canadian cases as our Act is based on Canada's federal Bankruptcy and Insolvency Act 1992.

BOTSWANA

General Criminal Offenses Before Liquidation: These offenses are applicable to any person and not just directors and officers of a liquidated company.

1. Prosecution and imprisonment for three years for destroying or concealing records prior to sequestration.
2. Prosecution and imprisonment for three years for concealment of liability or pretense as to existence of assets.
3. Prosecution and imprisonment for one year for failure to keep proper records or unlawful disposition of assets
4. Imprisonment for at least two years for undue preferences or contracting without expectation of ability to pay.

General Offenses After Liquidation: These offenses are also applicable to any person.

1. Imprisonment for three years for failure to give information or deliver assets of the liquidated company.
2.. Imprisonment for one year for obtaining credit during insolvency or offering inducements.
3. Imprisonment for six months for failure to attend meetings or give explanation of insolvency.
4. Imprisonment for perjury.
5. Imprisonment for six months for failure (without reasonable excuse) to appear before meeting of creditors or court to answer questions.
6. Imprisonment for three years for removing and concealing property to defeat an attachment.

BRAZIL

1. General. In general, Managers of Brazilian companies are not liable for the obligations they place themselves under on behalf of their companies, for acts practiced in the ordinary course of business. However, Managers are personally liable for damages caused by their acts either: (i) fraudulently/negligently; or (ii) in breach of the law or the bylaws of the company. Also, Managers shall not be liable for illegal acts of other Managers unless: (i) they are connivent with the practice of such acts; (ii) they neglect in the discovery of such acts; or (iii) they know of such acts and make no attempt to avoid their practice. By use of the "Apparent Authority Theory", the Company may be held jointly liable to third parties for any acts of its Managers, even if such acts were performed with abuse or in misuse of managerial powers or in violation of provisions of law or bylaw.

Managers are bound to the following duties/obligations:

(i) Diligence. Managers must exercise the care and diligence the active and honest man/woman use in their own business.

(ii) Act to the benefit of the Company. Managers shall act to the benefit of the company.

(iii) Loyalty. Managers shall serve the Company with loyalty, and they shall not use privileged information or opportunities known in the course of business to their own benefit or to the benefit of third parties.

(iv) Conflict of Interests. Managers shall take no part and in no way interfere with company deliberations or operations that conflict with their own interests, and they shall inform the other managers of their impediment.

The express approval of the Financial Statements and Economic Results by the stockholders, without restriction, in a General Meeting of the Stockholders shall discharge the civil liability of the Managers over such documents.

2. Tax Debts. Although the Manager acts on behalf of the Company, the Company is the one paying and liable for the applicable taxes. Therefore, Managers shall not be liable for the payment of Company taxes unless such taxes result from management acts performed with abuse or misuse of managerial powers.

3. Social Security Debts. The Managers are subsidiarily (in relation to the Company) liable for debts arising from social security obligations, provided that both following conditions occur: (i) the managerial powers were exceeded or the acts were performed in breach of the provisions of law; and (ii) the Company was irregularly terminated.

4. Labor Debts. There is no express and specific provision in the Brazilian law on the liability of Managers for labor debts. However, in general, Brazilian Courts provide jurisprudence by which the corporate veil is pierced and the Managers held objectively liable for labor debts of the companies they administer. Managers may have their personal assets pledged as security for company labor debts.

5. "Consumer" Protection Law. Concerning consumer protection, the law expressly provides the disregard of the legal entity whenever the supplier is construed to act in abuse of right, breach of the law, in tort, in violation of company bylaws or articles of association, or in cases of bankruptcy, receivership or termination of companies due to mismanagement.

6. Economic Right / Antitrust Law. Managers can be held objectively, and jointly and severally liable with the Company, for damages resulting from violations of certain provisions of the antitrust law.

7. Environmental Liability. Managers can be held objectively, and jointly and severally liable with the Company, for damages resulting from violations of certain provisions of the environmental protection law.

8. Criminal Liability. The Managers can be criminally prosecuted for violation of provisions of *e.g.*, the Penal Code, the Consumer Protection Law, the Environment Protection, and Economic Right laws.

9. Insurance as a means to hold the Managers estate harmless. In view of the possibility of Manager to be held liable for acts of Company management, the Brazilian legal system allows civil liability insurance.

BULGARIA

In case of insolvency or over-indebtedness, the company through its managing body is obliged to file a petition for institution of bankruptcy proceedings within 15 days. In case of non-compliance with this obligation for announcement, the officer/director will be liable before the creditors for damages caused by such delay.

The persons who manage and represent the trade company which becomes insolvent and within 15 days from suspending the payments does not declare so in court shall be punished by imprisonment of up to three years or by a fine of up to 5,000 BGN.

CANADA (ONTARIO)

The directors of a debtor corporation may be liable under federal and provincial laws for various claims against the corporation. The most common areas of potential director liability are for employee wages and vacation pay, unpaid source deductions from employee wages for taxes and related obligations, non-compliance with environmental legislation, and pension plan liabilities. Directors can also be personally liable under corporate legislation for permitting the corporation to pay a dividend or to repurchase or retract shares when it is insolvent. There is a "due diligence" defense to many but not all of these liabilities.

Directors have fiduciary duties to shareholders under corporate law. Canadian corporate law does not specifically state that directors have fiduciary duties to creditors and does not contain specific "wrongful trading" liability. However, there is developing case law in Canada that suggests that directors have a duty to act in the best interests of creditors of the corporation if the corporation is insolvent or close to insolvency. In addition, directors can be liable to creditors under the "oppression" remedy in many Canadian corporate statutes if they authorize the corporation to act in a manner that is oppressive to or that unfairly disregards the interests of various types of stakeholders, including creditors.

CHINA (PEOPLE'S REPUBLIC OF CHINA)

Currently, two sets of laws of the People's Republic of China (the "PRC") govern bankruptcy procedures, of which one is PRC Bankruptcy Law applicable to bankruptcy of the State-Owned Enterprises only, and PRC Civil Procedures govern bankruptcy of other types of legal person. The Companies hereof shall refer to legal person other than the SOEs.

COLOMBIA

Duties and Responsibilities :

1. Officers and Directors of a Company owe the duty of care, under which they must act diligently in all Company matters.
2. The loyalty duty establishes that Officers and Directors shall act in the best interest of the Company abstaining from incurring in conducts that may affect the Company, e.g. disclosing industrial and commercial company secrets. Corporate officers and directors are not entitled to use their position of trust to satisfy the personal/particular interests.
3. Duty to act in good faith on what they believe is the best interest of the Company overall.
4. Duty of candor pursuant to which Officers/Directors must abstain from participating directly or indirectly for his own interest or for such of third parties resulting in unfair competition acts or conflicts of interests, except as expressly authorized.
5. Duty to act within the law and the by-laws of the Company. It is also their responsibility that every person that works for the Company act within the Company's by-laws and the general commercial laws.
6. Duty to develop the corporate purpose: Officers and Directors have the duty to develop the social object established in the Company's by-laws.
7. Duty to allow the exercise of the functions of the internal auditor.

Officers and Directors are exposed to the following civil and criminal actions:

1. Civil actions of responsibility brought by Company, Shareholders or Creditors.
2. Shareholder(s) sue on behalf of the Company for damages caused to the Company (i.e. a derivative suit)
3. Shareholders or small group of shareholders sue on behalf of all shareholders (i.e. class action, accion de grupo).
4. Imprisonment for misuse of privileged information.
5. Imprisonment for false statement on a public document.

ECUADOR

The concept of a legal entity ("persona juridica") is very strong in the civil law system. This means that the legal entity is completely separate of its members, accordingly their acts do not provoke any legal effect on other companies.

On the other hand, the distinction between an officer and a member of the board is also important, depending upon who are the legal representatives of the company in accordance with the by-laws. Legal representatives are personally liable before the employees for salaries and all labor obligations, as well as before the government for taxes.

Both legal representatives and board members are liable for their acts before the shareholders, from a civil points of view. If their acts involve a crime, they are criminally responsible. The civil responsibility of directors is limited to certain acts established by law.

Once the company is declared in dissolution either by the authority (Superintendence of Companies) or by decision of the shareholders, a liquidator is appointed and legal representatives and board members are cancelled.

A company cannot be declared in bankruptcy but after following the procedure for a preventive proceeding ("concurso preventivo") with the Superintendence of Companies, a similar procedure to the U.S. Chapter 11. If this procedure fails, then the bankruptcy continues.

FINLAND

Duties of Management

The duties of a Board of Directors and a Managing Director in a Finnish company are usually organized so that the Managing Director is responsible for managing the company's day-to-day operations in accordance with instructions and orders of the Board of Directors. The Board of Directors is responsible for the management and proper arrangement of the operations of the company as well as proper supervision of the bookkeeping and the control of the financial matters of the company. It is the duty of the Managing Director to see that the bookkeeping complies with law and that financial matters are handled in a reliable manner.

If it becomes evident that the company has lost more than half of its share capital, the Board of Directors must convene a Shareholders' Meeting. If the Shareholders' Meeting fails to petition for liquidation (or to undertake eventual rehabilitation measures), the Board is required to petition the court to initiate the liquidation process. Once the liquidation process has been initiated and one or more liquidators have been appointed, the Board of Directors and the position of the Managing Director are dissolved.

If the company employs more than 30 employees, it has an obligation to inform the employees twice during the financial year of the financial status of the company including development prospects, as well as of any significant changes thereto.

Liability of Management

Each member of the Board of Directors is liable for any damage caused intentionally or negligently to the company while performing his or her duties as a Board member. The Board members' liability for damage caused to shareholders and third parties is specifically conditioned upon a violation of the Companies Act or the company's Articles of Association. Furthermore, individual Board members may be personally liable for damage caused by acts or omissions that are held to constitute a criminal offense. The liability of the Managing Director is, with the necessary changes, the same as for Board members.

If the company faces financial distress, Board members and the Managing Director may face criminal liability for debtor's dishonesty, fraud or favoring a creditor pursuant to the Finnish Criminal Code. In addition, if the company has failed its duty to withhold payroll tax, social security contribution or other tax, the members of the management of the company may be deemed liable and may face criminal liability. This applies if the failure to withhold such payments is due to other reasons than insolvency and the purpose of such omission is to gain financial benefit. Illegal distributions by the company may give rise to criminal liability pursuant to the Finnish Companies Act.

FINLAND

Definition of Management

The management of a Finnish limited liability company (osakeyhtiö, Oy) is defined in Chapter 8 of the Companies Act (29.9.1978/734) as the board of directors, the supervisory board and the managing director. In addition to management defined in Chapter 8, the auditors are regarded as directors to some extent.

It is worth mentioning that the scope of management may be wider than the registration information implies. Liability may be extended to persons who in practice make decisions on behalf of the company. The so-called shadow directors may include, *inter alia*, representatives of the creditors with influence on the decision-making in the company, and the owner of a company, both lacking the formal status of a director. Middle management may also be held liable for their acts as shadow directors.

Different Forms of Liability

A. Obligation to File for Bankruptcy.

The management of the company does not have any general obligation to apply for restructuring proceedings or file for bankruptcy. The Companies Act merely obliges the management to place the company in liquidation under certain preconditions, and, an eventual liquidator to file for bankruptcy if the company in liquidation is unable to pay its debts with its assets. The latter provision is obviously vague.

The management may become liable towards the creditors prior to bankruptcy. If a company's equity has decreased below half of its share capital, the management of the company has to convene a general meeting of the shareholders to consider placing the company into liquidation. If the meeting decides not to commence the liquidation process, another general shareholders' meeting shall be held within twelve months of the previous. If the equity by the time of the latter meeting does not equal at least half of the company's share capital and the meeting refuses to place the company into liquidation, it is the board of directors' responsibility to apply to a court to have the company placed in liquidation. In the event that the board does not fulfill this responsibility, the company shall

operate on the personal responsibility of the board of directors i.e. the creditors of the company may collect any claims that have arisen after the obligation to initiate the liquidation, and which the company has not been able to pay. Of course these cases are considered on a case-by-case basis in the court. An individual director may avoid such liability if he is able to show that the failure was not due to negligence on his part.

B. General Liability of Management

According to Chapter 8 of the Companies Act, the board of directors is responsible for the management and the proper arrangement of the operations of the company whereas the managing director is in charge of the day-to-day management of the company in accordance of the instructions and orders given by the board of directors. Acts which, considering the scope and nature of the operations of the company, are unusual or extensive, m ay be undertaken by the managing director only when authorized by the board of directors, or when the act cannot be postponed until a decision of the board of directors can be obtained without causing essential damage to the operations of the company. In the latter case, the board of directors should be notified immediately.

The board of directors is responsible for the proper supervision of the book keeping and the control of the financial matters of the company. It is the duty of the managing director to see to that the book keeping of the company complies with the law and that the financial matters are being handled in a reliable manner.

The Bankruptcy Act contains no provisions regarding the management's liability. The Companies Act regulates the management's general responsibilities and liability for damages in public and private limited liability companies. The provisions of the Companies' Act cover the whole existence of a company and there are not any special provisions concerning liability in bankruptcy.

The most important principle concerns the liability for damages caused. Other provisions concerning liability are commercial liability, the possibility of using sanctions and the bearing of risks.

According to Chapter 15 of the Companies Act, if, in the course of their duties, the directors or auditors negligently or deliberately cause loss or damage to the company, they will be liable to pay damages. Such liability may also arise if the loss or damage is caused to shareholders and other parties including the company's creditors.

"A founder, a member of the Board of Directors and the Managing Director shall be liable for compensating all damages caused to the company in office either willfully or negligently. The same shall apply to damage caused to a shareholder or a third party by an act infringing this Act or the Articles of Association."

The liability of directors is always preconditioned on negligence. The damage is therefore only to be compensated if it is caused with intent or through negligence. Negligence is defined as an undue practice that can be gross or slight. Using the term negligence alone, the meaning of the term widens to include slight negligence as well. There are several decisions of the Supreme Court where operations against the law or the Articles of Association have been regarded as negligent. However, it should be noticed that the liability towards third parties such as creditors requires that the act infringe either the provisions of the Companies Act or the provisions of the Articles of Association.

Proceedings against a director as a result of a decision or act during a particular financial year must be instigated no later than three months from the annual general meeting of shareholders that decided to release the directors or auditors from liability or that otherwise decided not to hold the directors or auditors liable.

C. The So-Called Business Judgment Rule

When evaluating the operation of directors the business judgment rule must be taken into consideration. The business judgment rule offers a guideline in evaluating the scope of negligence according to the above-mentioned provision of Chapter 15 of the Companies Act. Consequently, misjudgments causing damages must be accepted to a certain extent. A diligent and careful director could have acted in the same manner in the same situation as the director who caused the damage. The borderline between acceptable and negligent actions must be seen as a relevant factor in considering the scope of negligence. The exact definition of negligence is very difficult to present. At the end of the day, it is a task for the courts to decide.

D. Liability of a Shareholder

A shareholder of a company may become liable if he deliberately or through gross negligence causes loss or damages to the company, any other shareholder or other party by virtue of his involvement in an act contrary to the Companies Act or the company's articles of association. Furthermore, if the distribution of a dividend to a shareholder is made contrary to the provisions of the Companies Act, the recipient will be liable to repay what he receives provided that he did not have reasonable cause to assume that the payment constituted a lawful distribution of profit.

E. Criminal Sanctions

If the management of the company intentionally acts to the detriment of the interests of creditors, the Criminal Code (19.12.1889) calls for prosecution. According to Chapter 39 of the Criminal Code, a debtor, who knows on the basis of existing or alleged financial difficulties that his action will be to the detriment of the financial interest of his creditor if he destroys his property, donates or otherwise assigns his property without an acceptable reason, transfers his property abroad in order to make it unreachable to the creditors or irrevocably increases the amount of his obligations and thus causes his insolvency or fundamentally aggravates it, shall be sentenced for dishonesty of a debtor to a fine or imprisonment for the maximum period of two years. A company itself cannot naturally perpetrate any of the above. The conditions and premises for piercing the corporate veil have lately been actively discussed in Finland.

Other Possible Consequences of Insolvency

A. Injunction Against Practicing Business

The prerequisites for an injunction based on wrongful trading are that the director has indicated gross negligence against the creditors or in another manner grossly failed to fulfill his or hers obligations concerning the conduction of business. A person who repeatedly has been involved in bankruptcies and thus indicated negligence in business practice may also be placed under an injunction. If a director is placed under an injunction, he or she is not allowed, in Finland, to practice business liable for public accounting, act as personally liable partner or a member of board of directors, a vice member, a managing director or hold a similar office in a corporation or foundation. The injunction is placed for a period of at least two years and for five years at the most.

B. Practical Consequences

There are, of course, also some de facto consequences for management in a bankrupt company. The bankruptcy will be registered in the Trade Register and the personal data of the management in a bankrupt company may also be seen from the register extract. Nowadays, with efficient search engines and database services it is easy to retrieve the history of a specific person's involvement in the management of various companies.

GERMANY

The concept of legal entities (stock corporations, limited companies) in Germany is strongly characterized by the distinction of the liability of the company itself and the personal liability of the directors/officers. The directors/officers principally only have duties to and are principally liable only towards the company and not towards third parties (creditors, government, etc.). Only in case they commit a tort they are also responsible towards third parties, e.g. if they deliberately cause a damage to creditors or if they fail to institute insolvency proceedings on time. In other cases, third parties only can take action against the company itself.

If the company becomes financially distressed, there is in general no change to this rule. Yet, the duties of the directors/officers to the company are changing and are becoming stricter in some aspects. Particularly they are obliged to observe very carefully the financial situation of the company and have to draw up a special kind of asset and liability statement that follows its own rules (in order to determine whether the company is over indebted) as well as a financial budget (to determine the liquidity of the company). If over indebtedness responsible illiquidity occurs, the directors are obliged to immediately, at the latest (for example if there are promising negotiations with creditors) three weeks after the occurrence of over indebtedness/illiquidity to file for insolvency at the competent insolvency court. If they fail to do so, they have civil as well as criminal exposure.

GREECE

Representative cases applying pertinent legislation:

1. Decision of the Athens Court of Appeals, no. 4704/98: officers and directors of a company are not personally liable towards third parties, save for acts or omissions constituting torts.
2. Decision of the Pireaus Administrative court of First Instance no 1/93: liability of the managing director of a company is not prejudiced by the termination of its office or the placement of the company under bankruptcy status.
3. Decision of the Supreme Court no. 249/98: liability of the officers for company debts towards the Greek State and state entities is not prejudiced by the placement of the company under bankruptcy status.
4. Decision of the Athens Court of First Instance no. 4831/92: Only the company may seek restitution of its damages against officers and directors in case of mismanagement, while individual shareholders are not directly entitled to sue the latter.
5. Decision of the Supreme Court no. 14/99: individual shareholders may request the restitution of their damages caused by the reduction of the intrinsic value of their shares due to mismanagement of officers or directors.

HUNGARY

Criminal proceedings have been used where the director acted negligently though not fraudulently. This is a throwback to the days when everything was owned by the State and negligent behavior resulted in a loss of State moneys.

Both our Bankruptcy Act and the Companies Act have been modified many times in the past 10 years. Some of the issues mentioned in this questionnaire are slated to be dealt with by one of these laws in some future revision.

INDONESIA

The Indonesian Company Law, Law No. 1 of 1995 regarding Limited Liability Companies (the "Company Law") contains several articles stipulating the duties and responsibilities of the Board of Directors. Pursuant to Article 82 of the Company Law, the primary duty of the Board of Directors (the "BOD") is the management of the company. In performing their management duties, Directors are jointly and severally empowered to represent the company in its external relations, including before the courts, unless specifically restricted by the company's articles of association in the event of a conflict of interest.

Article 85 of the Company Law provides that the BOD is responsible for the good conduct of the business of the company. They are not personally liable to third parties for acts performed by them on behalf of the company, provided that such acts are within the limits of their authority as prescribed in the articles of association. Conversely, directors may be liable to the company's shareholders and creditors for *ultra vires* acts, acts of negligence and acts of bad faith in the discharge of their responsibilities.

Article 85(3) of the Company Law allows shareholders and creditors to sue directors and commissioners for losses suffered by such creditors or shareholders. Shareholders may bring an action against directors or commissioners, when the shareholders have suffered a loss as a result of a director's or commissioner's negligence or error, provided that the Shareholder owns at least ten percent of the company's issued share capital. The directors shall also be severally and jointly liable when the shareholders have suffered losses from the company's failure to follow proper procedures in the repurchase of shares from existing shareholders (Article 30 (2 and 3) of the Company Law).

Furthermore, the Company Law provides that a third party has a statutory right of action if the third party is a creditor of the company, against a director whose negligence or mistake caused the bankruptcy of the company, where the company's assets are inadequate to provide relief to such creditor. Each member of the BOD may be jointly liable if the BOD's negligence causes the bankruptcy of the company, unless it can be proven otherwise (Article 90 (2) of the Company Law).

Pursuant to Article 23 of the Company Law, the BOD of a company is also severally and jointly liable for any company commitments made during the interim period between the Minister of Justice's approval of the company's article of association and the date the company's deed of establishment containing such articles is announced in the Indonesian State Gazette.

Although the Company Law provides several articles on the duties and responsibilities of the BOD, it does not stipulate any guideline to give legal sanctions or legal penalties, nor the guideline for misconduct by BOD and the standard of due care of members of the BOD.

Moreover, the Bankruptcy Law does not contain provisions on the right and duties and responsibilities of the directors and commissioners of a bankrupt company, nor does the Bankruptcy Law stipulate any penal sanctions. We note, however, there are criminal law provisions for nonpayment of debts that leads to a company's insolvency.

Article 90(2) of the Company Law provides that where the bankruptcy occurs due to the mistake or negligence of the BOD and the company's assets are inadequate to cover the losses caused by such bankruptcy, each member of the BOD is jointly responsible of such losses. However, if a member of the BOD can prove that the bankruptcy was not due to his mistake or negligence, he is not jointly responsible for the losses. Article 85(2) of the Company Law provides that each member of the BOD of a company will be held personally liable if he has committed a wrongful act or is negligent in conducting his duties with good faith and with full responsibility for the interests and business of the company.

Furthermore, pursuant to Article 79(3) and Article 96 of the Company Law, members of the BOD or the Board of Commissioners who are responsible for the bankruptcy of a company are not eligible to be appointed as members of the BOD or Board of Commissioners of any company for a minimum period of five years.

Article 100(3) of the Company Law imposes the same standard of care on Commissioners as Directors, and Commissioners can be held liable as Directors if they assume a management role.

The above provisions of the Company Law are not easy to apply because there is no clear guidance on the procedure and requirements as to when and how a director or commissioner can be held personally liable for actions causing the company to go bankrupt. If

possible, it would be helpful to have clear implementing regulations for this matter, if the interest in flexibility and business judgment can be appropriately balanced with the need for greater clarity and certainly in the application of these rules.

INDONESIA

1. Please note that the Law No. 1 of 1995 concerning Limited Liability Companies (the "Indonesian Company Law") does not recognize the concept of "directors" and "officers" under the common law systems. The Company Law recognizes the two-tier management of company, where the Board of Directors has a management function and the Board of Commissioners has a supervisory function. Therefore, we interpret the term "officers and directors" in the questionnaire as the directors which are members of the Board of Directors.

   We interpret the term "financial distress" in general as the financial difficulties encountered by a company, which should not necessarily lead the company to any bankruptcy or restructuring scheme provided by the Bankruptcy Law or the Company Law.

   The shareholders mentioned in A.1. and A.2. above shall be interpreted as the General Meeting of Shareholder ("GMS") as referred to in Article 56 of the Company Law, and the duty mentioned in A.1. and A.2. above shall be interpreted as the obligation of the Board of Directors to prepare an annual report to be submitted to the GMS, which report must at least contain the following information:

   a. the annual financial report consisting of a year end balance sheet of the proceeding year and the profit and loss statement of the same proceeding year with explanations thereto;

   b. the consolidated balance sheets of companies in the same group, besides the respective balance sheets of each company of the same group;

   c. a report on the management and operations of the company and results achieved;

   d. the main line of activities of the company and deviations thereto during the relevant financial year;

   e. details of problems arising during the financial year that affected the company's activities;

   f. the names of members of the boards of directors and the commissioners; and

   g. the salary and other remuneration for members of the board of directors and the commissioners.

2. With regard to Items A.3, A.4, and B3, Article 85 section (3) of the Company Law provides that on behalf of the company, the shareholders representing at least 1/10 (one tenth) of the total shares having valid voting rights may file a lawsuit at the district court against members of the board of directors who have caused losses to the company due to their fault or negligence. Further, Article 90 section (2) of The Company Law provides the possible joint liability of each members of the Board of Directors if the company's bankruptcy resulted from the fault or negligence of the Board of Directors and in which case the company's assets are insufficient to cover losses incurred as a result of such bankruptcy.

3. For Items B1 and B2, Article 398 of the Criminal Code provides, *inter alia*, criminal sanction to any director or any commissioner of a company which has been declared bankrupt or of which the judicial settlement has been ordered, of one year and four months:

   - first, if he has participated in or has given his permission to acts to the contrary to the articles of association to which the losses suffered by the company;

   - secondly, if he with the intention to delay the bankruptcy or the judicial settlement of the company, knowing that the bankruptcy or the judicial settlement could not thereby be avoided, has participated or has given his permission to borrow money under onerous conditions;

   - thirdly, if he does not properly produce or keep books and documents which are required to be kept and produced.

4. With respect to Item B.4, please note that the Bankruptcy Law provides a different test for the requirement to file petition for insolvency (termed as bankruptcy in the Bankruptcy Law) and restructuring (termed as suspension of payments in the Bankruptcy Law).

The test for bankruptcy petition is whether a debtor has two or more creditors and has failed to pay one or more debts that are due and payable.

In the suspension of payments, there is no substantial requirement (other than formalities) for the debtor to file a petition for suspension of payments in order to commence the restructuring process. However, the debtor requires the approval of the unsecured creditors on the proposed composition plan, which may include a restructuring proposal, as well as ratification by the Court, in order to commence the restructuring process.

In both procedures, bankruptcy petition (voluntarily filed) and suspension of payments petition require the approval of the GMS, so that the members of the Board of Directors can file bankruptcy or suspension of payments only upon obtaining the approval and meeting the above requirements.

5. With respect to item B.6, Article 91 of the Company Law provides that a director may resign upon the approval of the GMS, which in practice, a release and discharge of liability may be granted by the GMS to the resigned directors.

6. With respect to item C.1, Articles 79 and 96 of the Company Law stipulate that those who are eligible to be appointed as directors and commissioners are individuals who are capable of carrying out legal actions and who have never been declared bankrupt or who have not been the members of the board of directors or the commissioners which have been declared to be at fault causing a company to be declared bankrupt, or who have never been punished due to criminal actions which cause loss to the state funds within 5 (five) years prior to their nomination.

KUWAIT

The law governing commercial companies in Kuwait is Law No. 15 of 1960 ("CCL"). Although there are various types of companies that may be formed under the said law, most large companies take the form of a Kuwaiti Joint Stock Company. The management of Kuwaiti Joint Stock Companies is governed by Articles 138 – 153 of the CCL. The following is a brief summary of the duties and responsibilities of the directors of a company:

- The chairman and directors of a company are required to act in the best interest of the company and of the body of shareholders as a whole. The chairman and directors must ensure sound management to further the objects of the company and to refrain from performing any act that would adversely affect or cause harm to the company. The chairman and the directors may not have any direct or indirect interest in contracts and transactions which are concluded with or for the company. (Articles 146(1), 148(1) and 151 of CCL).

- The chairman and the directors may not participate in the management of a company similar or competitive to the company. (Article 151 of CCL).

- The chairman and directors may not take advantage of any information obtained by reason of their office, in order to obtain a benefit for himself or another. Information obtained in the course of the performance of a directors duties may not be disclosed. (Articles 140(2) and 148(1) of CCL).

- The chairman and directors have a duty to disclose information about the various dealings of the company at the Annual General Meeting. Any shareholder may request information regarding any particular dealing of the company. (Articles 157(a) and (f) of CCL).

- The chairman, directors and shareholders are to carry on all activities required for the management of the company according to its objects and the Articles of Association or resolutions passed by the General Meeting. (Articles 132 & 146(1) of CCL).

- The chairman and directors have a duty to act in accordance with customs prevailing and with the rules of equity, with due consideration of the nature of dealings and the requirements of good faith and of honorable dealing. (Article 195 of Civil Code).

The duties of the directors do not change as a result of the company facing financial difficulties. The only additional duty placed on the Board of Directors is by virtue of Article 171 of the CCL. Article 171 states that if the company looses three quarters of its capital, the Board of Directors must hold an extraordinary general meeting to decide whether the situation necessitates the liquidation of the company, the reduction of capital or the adoption of other appropriate measures.

The Chairman and members of the Board may be held liable to the company, the shareholders and third parties for all acts of cheating, misuse of powers and fault in the management. Where a resolution has been held to be null and where it is impossible for either party to reinstate the other party to that which existed at the time of the contract, he may be adjudged to pay an equivalent (fair)

compensation. The liability shall either be against a specific director or against all directors jointly. (Articles 148(1) and 149(1) of CCL).

Criminal liability may arise in the event that the Chairman, Director or Board of Directors commit a breach of trust vested in them by virtue of their office. (Articles 240 of Law No 16/1960 Promulgating the Penal Code).

Article 575 of the Law of Commerce, Law No. 68 of 1980 (Commercial Code) provides that once an individual has been declared bankrupt he may not be a director or a chairman in any company until such time as he regains his rights in accordance with law.

Article 789 of the Commercial Code provides that any of the members of the Board of Directors of a bankrupt company may be imprisoned for a period not exceeding 5 years if it is proved that they have committed any of the following acts after cessation of payment by the company:

1. Conceal, destroy or change the company's books.

2. Embezzle or conceal part of the company's property.

3. Admit debts not due by the company.

4. Commit any act of fraud in respect of the company.

5. Declare inaccurate facts in respect of the prescribed or paid up capital, declare and distribute unearned profits or receive bonuses more than the amount prescribed by law or the Articles of Association of the company.

MONACO

Directors and Officers must act in the best interests of their Company, and, while, generally, they are not personally liable for their actions when performed reasonably and in good faith, they can be personally liable for their actions when they breach a duty they owe to the Company, its shareholders, or its creditors.

Monaco, similar to most civil and common-law countries, affords insolvent corporations the opportunity to reorganize without going into liquidation, through a mechanism so-called "cessation de paiement" which can be initiated either by the Company's creditors or the Company's directors. Cessation de paiement, if granted, leads to a reorganization plan (in French "Concordat"), which must be approved by the creditors and the tribunal to be valid.

The reorganization plan may grant a delay of up to three years for payments and, sometimes, may also eliminate part of the creditors' claims. Reorganization plans are generally approved only when the tribunal sees a reasonable possibility for the Company to reestablish its financial well-being.

Directors and Officers do not lose their powers or their ability to function during the "cessation de paiement." Officers and Directors must remain shareholders of their Company during a cessation de paiement unless authorized by the Court. If they terminate their shareholding with court approval, they nevertheless remain liable to the Company for one year for any malfeasance.

Under Article 560 of the Code of Commerce, once a reorganization plan has been approved, should it appear the assets of the Company are not sufficient to accomplish the plan, the Tribunal can order that the Company's debt will be paid, in part or fully, jointly or severally, out of the Directors' personal assets, unless the court finds that the Directors have acted in the best interests of the Company and used all the reasonable diligence while administering the Company.

Monaco law does not protect a Company that does not adhere to its reorganization plan. If a Company does not abide by the approved reorganization plan, the Company is subject to liquidation. The tribunal can order liquidation upon a creditor's petition or the request of the administrative receiver whenever the tribunal finds the Company is insolvent and not able to meet its obligations under the plan.

As an incident to liquidation of a Company, if the court finds the directors have mismanaged the Company, committed malfeasance, or acted in bad faith, the Court can declare them personally responsible ("faillite personnelle") for the Company's debts. the Court can also ban them from acting as Officers or Directors in any other Company, either permanently or for a specified term. In addition, the Court can order the sale of their shares in the Company and direct that the proceeds be used to pay the Company's debts. In a more serious case, the Directors can be declared bankrupt and imprisoned for a maximum of three years. When the bankruptcy is found to be fraudulent the imprisonment can be up to ten years.

Regarding the impact of a liability insurance to protect Directors and Officers while acting for a financially distressed Company, Monaco law is silent about such insurance. Technically, such insurance policies are permitted but, in practice, they are very rarely used.

PORTUGAL

The Portuguese Insolvency legislation was recently altered. In fact, on the 18 March, 2004, was published the new Code, named, Insolvency and Companies Recover Portuguese Code (Decree-Law number 53/2004, 18 March) which will be enforceable within 180 days from its publication. Therefore the present questionnaire is already answered according with the new framework.

This new Code aims to obtain the most efficient and immediate payment of the creditors as well as harmonize Portuguese Insolvency Law with the UE Law.

The new framework foresees the unification of the different proceedings in a single and residual insolvency proceeding, based on the debtor patrimony liquidation. However the new law also grants the creditors the possibility to approve a specific plan in order to promote the company's liquidation in a different way or in order to promote the recovery of the company.

ROMANIA

A.1.a. Generally, creditors do not have duties directly to the creditors but there are cases when they may be held liable further to actions filed against them by creditors. Such a case vin incident with respect to Romanian stock companies constituted by public subscription, where the first directors are liable jointly with the founders, towards the creditors as concerns the full subscription of the social capital and the full payment of the contributions, the existence of the in-kind contributions and the authenticity of the publications made for the registration of the company, starting with the moment of the registration of the company.

Directors and officers that have performed activities on behalf of a company in the process of being incorporated are jointly and unlimitedly liable towards third parties for those acts concluded on behalf of the company with such third parties, except the company undertakes all these acts after acquiring legal personality.

Creditors may file an opposition against the decision of the directors (either sole director or Board of Directors) concerning the modification of the constitutive act of the company where the law allows the possibility of modifying the constitutive act by such decision.

A.1.c. Under the Romanian law, directors and officers have duties towards the company as a legal subject, the legal relationship being established with the company and not with the shareholders individually.

Still, the liability of directors may be engaged directly towards certain shareholders with respect to:

- the directors' failure to immediately convoke the general meeting of the shareholders upon the request of the shareholders representing 10% of the social capital or a lower quota (if provided by the constitutive act) and if the request contains issues that fall under the competence of the general meeting of the shareholders;

or towards the company rather than towards the shareholders individually with respect to:

- the accuracy of their reports as presented at the general meeting of the shareholders;
- their management;
- existence of the paid-in social capital contributions made by shareholders;
- the concrete existence of the paid dividends;
- the existence of the records required by the law and their accurate keeping;
- the precise fulfillment of the resolutions of the meetings of the general shareholders;
- the actions of the officers and employees in case it is proven that the damage would have not occurred if the directors had monitored them;

- the participation to deliberations involving issues on which the director has directly or indirectly interests contrary to those of the company and the failure to inform the other directors or censors about this circumstance;

- the transfer or acquisition of assets having a value higher than 10% of the net assets of the company without the approval of the extraordinary general meeting of the shareholders; etc.

A.1.d. The obligations towards the Government usually take the form of paying taxes and different contributions which actually lie on the company as a distinct legal subject and not directly on the directors or officers (directors have the obligation to submit the annual financial statements of the company to the financial authorities and to the Trade Registry). A direct obligation towards the Government (i.e. State) is incumbent on a director if he/she is at the same time member of more than three boards of directors. In such a case, the respective director shall have to pay to the State a certain amount of money representing the consideration and the other benefits he/she is entitled to.

A.2. Romanian law does not provide for a special regime in case a company is financially distressed, which is understood to be as a poor financial status of the company but not necessarily insolvency that leads to commencement of reorganization bankruptcy procedure. The moment that triggers the application of a special legal regime is connected to the incidence of insolvency followed by the commencement of the reorganization or bankruptcy procedure.

A.3. Creditors and shareholders may engage, under the general applicable principles of civil law, the liability of directors or officers in tort. However, below are presented only the cases regulated by the special provisions of law and to which reference was made above.

In this respect, prior to the commencement of an insolvency/reorganization procedure the creditors may sue the first directors of a Romanian stock company constituted by way of public subscription with respect to the full subscription of the social capital and the full payment of the contributions, the existence of the in-kind contributions and the authenticity of the publications made for the registration of the company.

Prior to the commencement of an insolvency/reorganization procedure the shareholders representing 10% of the social capital or a lower quota whose request addressed to the directors to convoke the general meeting of the shareholders was not fulfilled may sue in their name and not in the name of the company the directors who failed to make the convocation; otherwise the decision to sue and the designation of the person to file an action in this respect belongs to the general meeting of the shareholders.

A.4. Creditors may file action for the engagement of the directors' liability in case the company is facing the bankruptcy procedure.

To be noted that the judge running the reorganization/bankruptcy procedure of the company in insolvency may decide that a part of the debt of the respective stock company, limited liability company or cooperative organization has to be covered by the management (e.g. directors, officers, censors) who contributed to the insolvency of the company through any of the following: (a) utilization of company's assets or credits in their or other company's interest; (b) performing trade operations in their interest by using the company; (c) continuing, in their interest, the performance of an activity that clearly led to the insolvency of the company; (d) keeping a fictive accountancy, making disappear certain accountancy documents or not keeping the accountancy in accordance with the law; (e) using assets of the company for purposes different from the ones of the company or hiding the assets of the company or increasing, fictively, its debt; (f) using ruinous means to procure funds for the company, in order to delay the occurrence of insolvency; (g) paying or deciding to be paid with preference a creditor, prejudicing the other creditors, during the month preceding the month of the declaration of insolvency.

In case of credit institutions facing insolvency, the liability of the directors or officers (who run the respective credit institution during 3 years preceding the commencement of the reorganization/bankruptcy procedure) may be upheld by court decision for all the activities previously mentioned and in addition for (a) granting credits by infringing the prudential requirements and the internal regulations; (b) making financial statements, other accountancy statements or submissions by infringing the legal provisions in force; (c) failure to identify and report the facts that led to fraud and mismanagement of the patrimony, by breaching their professional duties.

B.1. The criminal liability of directors or officers may be engaged under certain circumstances expressly provided by the law. Among such circumstances expressly provided by the law, are to be found the following: (a) forging, stealing or destroying the records of the company or hiding a part of the assets of the company, presenting non-existent debts or presenting in the records of the company, in other documents or in the financial statements certain undue amounts, each of these actions being intended to apparently diminish the value of the assets; (b) transferring, to the damage of the creditors, a material part of the company' assets in case of the company being involved in the bankruptcy procedure; (c) applying the resolutions of the general meeting of the shareholders regarding the change of the status of the company, the merger/division of the company or the decrease of the social capital of the company, before the expiry of the terms provided by the law; or (d) applying the resolutions of the general meeting of the shareholders regarding the decrease of the social capital of the company (i) without having enforced the obligation of the shareholders to pay their contributions or (ii) in the absence of a resolution of the general meeting of the shareholders exonerating the shareholders of their obligations to pay the

subsequent contributions; (e) performing their duties although they have been declared by law as not having the capacity to undertake obligations or have been sentenced for mismanagement, embezzlement, fraud, breach of trust, forgery, use of forgery, false testimony, bribery or acceptance of bribery; (f) breaching, through simulated acts the obligation to disclose if he/she has interests contrary to those of the company in the respective transaction; (g) failing to convoke the general meeting of shareholders as required by law; (h) starting to conclude operations on behalf of a limited liability company, before the full payment of the contributions to the social capital; (i) issuing negotiable titles representing social parts of a limited liability company; (j) acquiring shares of a stock company whose director he/she is, in such company's account, in those circumstances prohibited by law.

B.2. Director or officers may be subject to imprisonment in case of being found liable for the actions mentioned above, the duration of the period of imprisonment lasting from one month to twelve years.

B. 3. Groups mentioned at item A.1 and A.2. may file civil claims concerning the liability in tort of the directors or officers of a company.

B.4. Having in view that the directors or officers may be found, for instance, to have committed fraudulent bankruptcy and sentenced to imprisonment for a period from 3 to 12 years in case of transferring a material parts of assets prejudicing this way the creditors in case of the company facing bankruptcy procedure, such may play as a factor in deciding when and if to put the company in a formal insolvency/reorganization procedure. However, such procedure may be initiated not only by the directors as the representatives of the company but by other parties as well, such the creditors of the company or the Trade Registry officials.

B.5. Insurance is not frequently used as a regular tool to protect officers and directors from claims that arise while operating a financially distressed company. However, within the civil liability insurance coverage, certain insurance companies exclude only the claims for damages deriving in any way from the status as director, associate or shareholders of the prejudiced person. Additionally, the law regarding the judicial reorganization and bankruptcy procedure provides that the administrator designated to run the reorganization procedure in case of a company facing insolvency is required to bring evidence that has concluded an insurance policy for professional liability in order to cover the eventual damages caused by the failure to fulfill his duties.

B.6. Generally, directors or officers are not prohibited to resign once the company becomes financially distressed by facing personal or civil exposure, as their liability may be engaged civilly and criminally with respect to the breach of their professional duties even after resigning their positions.

B.7. Romanian law does not recognize the institution of "trustees". Among "the other parties" referred to in the question, creditors are the ones who sue officers and directors for violation of their duties after the commencement of an insolvency/reorganization procedure, but not as a matter of frequent practice.

B.8. The Romanian case law does not provide for a constant approach in this respect and accordingly it cannot be straightly affirmed that suits against officers and directors are successful. Such depends on the nature of the claim and the means of evidence.

C.1. An officer or a director is legally restricted to act as an officer or director in another company only in case he has been declared by law as not having the capacity to undertake obligations or has been sentenced for mismanagement, embezzlement, breach of trust, fraud, forgery, use of forgery, false testimony, bribery or acceptance of bribery.

C.2. Romanian law recognizes the personally insolvency only when it comes to traders as individuals. With respect to the theoretical situation (as it does not usually occur in practice) whereas an individual is as the same time a trader and also acts as an officer or director of his/her current company or another company, the Romanian law does not provide expressly for a prohibition of such individual to perform his/her duties as an officer or director if he/she becomes personally insolvent.

C.3. The relevant provisions of the Romanian law do not provide for an express restriction upon an officer or director of an insolvent company from obtaining credit as a promoter of a second company. However, it is a question of a prudential approach that it is incumbent upon the credit institutions when granting credits.

C.4. As mentioned above, the respective legal restriction is imposed when the officer or director has been found to have committed mismanagement, embezzlement, breach of trust, fraud, forgery, use of forgery, false testimony, bribery or acceptance of bribery.

C.5. Please refer to the answer C.4 above.

SCOTLAND

A. In the UK the officers and directors of a company have a duty which is primarily to the company (understood to be the present and potential future shareholders of the company) while the company is solvent. By statute there is a requirement that the directors should have regards to the interests of employees but this is not enforceable. The general view is that this

means that the directors cannot be criticized for having regard to the interests of employees but are in fact safe from any form of action if they fail to do so. When the company becomes insolvent or close to it the law provides that the duty owed by the directors and officers transfers to the creditors of the company in that there is a responsibility to manage the assets of the company for the benefit of the creditors.

In terms of your Questions 3 and 4, Shareholders can sue the officers and directors for alleged violation of the duties owed to them in respect of violations occurring prior to commencement of an insolvency/re-organization procedure and such action can be commenced prior to or after commencement of such procedure.

Generally speaking the rights of creditors are enforced by legal action brought by the administrator/liquidator appointed to manage the affairs of the business after it has entered into an insolvency/organization procedure. There are some instances where creditors can enforce rights personally but this is much more common in Scotland than in England due to slight differences in the relevant statutory provisions. Creditors/liquidators/administrators etc can only raise actions after the commencement of an insolvency/re-organization procedure but they may do so in respect of breach of duties which have occurred before or after commencement of such procedures.

B. Criminal exposure for directors and officers is extremely rare. There are certain provisions of companies legislation which provide for criminal penalties – generally fines – for their breach but most of these are administrative matters and are seldom enforced. Criminality generally only becomes a serious issue where there is a serious breach of health and safety legislation resulting in serious injury or death or where there are issues of fraud or dishonesty. In the specific context of insolvency, criminal consequences are not applicable unless the conduct in question goes beyond breach of the duty and equates to a criminal act of fraud or dishonesty or false accounting.

There is considerable scope for exposure to civil liability. The UK insolvency regime specifically provides for civil liability on the part of directors who are found to have indulged in "wrongful trading" or fraudulent trading. Wrongful trading is broadly allowing the business in question to continue to trade when it has become clear that it will become insolvent and the measure of the civil penalty is generally held to be the amount by which the creditors exposure can be shown to have increased from the date on which the directors should have realized that insolvency was inevitable and cease trading or take other appropriate action. In the case of fraudulent trading the court has discretion as to the contribution which the director in question should be required to make to the company's assets for the benefit of creditors. Fraudulent trading is carrying on a business with actual intent to defraud creditors or for any fraudulent purpose. It is extremely rare for an action on this basis to succeed and such actions are in fact seldom brought.

It is also possible for proceedings to be brought at common law alleging breach of duty whether fiduciary duty or duty of care. The exposure of the directors in those cases will be determined by the courts analysis of the loss which can be seen to be attributable to the breach of duty if it is established.

Generally speaking, it is concern over being seen to be trading wrongfully and thus potentially incurring personal liability that forces directors of companies to consider entering into insolvency or restructuring procedures voluntarily (ie on those occasions where they are not in fact forced to do so by their funders).

Directors and officers liability insurance is becoming ever more expensive and many policies exclude liability arising from wrongful trading and other insolvency related issues.

It is the general view in the UK that a director cannot escape liability for wrongful trading by simply identifying that there is an issue and resigning. This is very much the case where the director is the sole director or one of the most influential directors on the board of a company. The general view is that a director must take the appropriate action and in a situation where the director is not able to cause that to happen on his own it is his duty to raise the issue at the board and propose the appropriate course of action. If the board then refuses to take that action the view is that the director at that stage can safely resign.

C. Although there is a specific statute dealing with the disqualification of directors this creates a regime where action can be taken against directors to have them disqualified by the Court if it can be demonstrated that their conduct has been such as to render them unfit to hold office. There is no automatic disqualification by virtue of having been the director or officer of a company which has become insolvent or gone into a particular insolvency regime. It is the duty of the office holder in the formal insolvency regimes to prepare a report on the conduct of directors which is submitted to a government department which then considers whether an application should be made to have a director disqualified. There is however an automatic prohibition on the director of a company which has gone into insolvent liquidation being involved in any way in the management of another company with the same or a substantially similar name as any name used by the company in question in the 12 month period prior to liquidation.

In terms of UK law, personal insolvency gives rise to a prohibition on holding office as a director.

SINGAPORE

Companies Act:

157. (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

(2) An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

(3) An officer or agent who commits a breach of any of the provisions of this section shall be –
(a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions; and
(b) guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year.

(4) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

(5) In this section –
"officer" includes a person who at any time has been an officer of the company;
"agent" includes a banker, solicitor or auditor of the company and any person who at any time has been a banker, solicitor or auditor of the company.

149. (1) The Court may --
(a) on the application of the Minister or the Official Receiver as provided for in subsection (9)(a); and
(b) on being satisfied as to the matters referred to in subsection (2), make an order disqualifying a person specified in the order from being a director or in any way, whether directly or indirectly, being concerned in, or take part in, the management of a company during such period not exceeding 5 years after the date of the order as is specified in the order (referred to in this section as a disqualification order).

(2) The Court shall make a disqualification order under subsection (1) if it is satisfied that --
(a) the person against whom the order is sought has been given not less than 14 days' notice of the application; and
(b) the person --
(i) is or has been a director of a company which has at any time gone into liquidation (whether while he was a director or within 3 years of his ceasing to be a director) and was insolvent at that time; and

(ii) that his conduct as director of that company either taken alone or taken together with his conduct as a director of any other company or companies makes him unfit to be a director of or in any way, whether directly or indirectly, to be concerned in, or take part in, the management of a company.

(3) If in the case of a person who is or has been a director of a company which is --
(a) being wound up by the Court, it appears to the Official Receiver or to the liquidator, if he is not the Official Receiver;
(b) being wound up otherwise than as mentioned in paragraph *(a)*, it appears to the liquidator, that the conditions mentioned in subsection (2) *(b)* are satisfied as respects that person, the Official Receiver or the liquidator, as the case may be, shall forthwith report the matter to the Minister.

(4) The Minister may require the Official Receiver or the liquidator or the former liquidator of a company --
(a) to furnish him with such information with respect to any person's conduct as a director of the company; and
(b) to produce and permit inspection of such books, papers and other records relevant to that person's conduct as such a director,
as the Minister may reasonably require for the purpose of determining whether to exercise, or of exercising, any of his functions under this section; and if default is made in complying with the requirement the Court may, on the application of the Minister, make an order requiring that person to make good the default within such time as specified in the order.

(5) For the purposes of this section ---
(a) a company has gone into liquidation --
(i) if it is wound up by the Court, on the date of the presentation of the winding up petition;
(ii) where a provisional liquidator was appointed under section 291 (1), at the time when the declaration made under that subsection was lodged with the Registrar; and

(iii) in any other case, on the date of the passing of the resolution for the voluntary winding up; and
(b) a company was insolvent at the time it has gone into liquidation if it was unable to pay its debts, within the meaning of that expression in section 254 (2), and references in this section to a person's conduct as a director of any company or companies include, where any of those companies have become insolvent, references to that person's conduct in relation to any matter connected with or arising out of the insolvency of that company.

(6) In deciding whether a person's conduct as a director of any particular company or companies make him unfit to be concerned in, or take part in, the management of a company as is mentioned in subsection (2) *(b)*, the Court shall in relation to his conduct as a director of that company or, as the case may be, each of those companies have regard, generally to the matters referred to in paragraph *(a)*, and, in particular, to the matters referred to in paragraph *(b)*, notwithstanding that the director has not been convicted or may be criminally liable in respect of any of these matters --
(a) (i) as to whether there has been any misfeasance or breach of any fiduciary or other duty by the director in relation to the company;
(ii) as to whether there has been any misapplication or retention by the director of, or any conduct by the director giving rise to an obligation to account for, any money or other property of the company;
(iii) as to the extent of the director's responsibility for any failure by the company to comply with sections 138, 190, 191, 197, 199 and 201; and
(b) (i) as to the extent of the director's responsibility for the causes of the company becoming insolvent;
(ii) as to the extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part);
(iii) as to the extent of the director's responsibility for the company entering into any transaction liable to be set aside under section 259;
(iv) as to whether the causes of the company becoming insolvent are attributable to its carrying on business in a particular industry where the risk of insolvency is generally recognised to be higher.

(7) The Minister may, by notification in the *Gazette*, add to, vary or amend the matters referred to in subsection (6) and that notification may contain such transitional provisions as may appear to the Minister to be necessary or expedient.

(8) In this section --
"company" includes a corporation and a foreign company but does not include a partnership or association to which Division 5 of Part X applies;

(9) (a) In the case of a person who is or has been a director of a company which has gone into liquidation and is being wound up by the Court, an application under this section shall be made by the Official Receiver but in any other case an application shall be made by the Minister.
(b) On hearing of an application under this section --
(i) the Minister or the Official Receiver, as the case may be, shall appear and call the attention of the Court to any matter which appears to him to be relevant (and for this purpose the Minister may be represented) and may give evidence or call witnesses; and
(ii) the person against whom an order is sought may appear and himself give evidence or call witnesses.

(10) This section shall not apply unless the company mentioned in subsection (2) *(b)* has gone into insolvent liquidation on or after 15th August 1984 and the conduct to which the Court shall have regard shall not include conduct as a director of a company that has gone into liquidation before that date.

(11) A person who acts as judicial manager, receiver or receiver manager shall not be liable to have a disqualification order made against him in respect of acts done in his capacity as judicial manager, receiver or receiver manager, as the case may be.

(12) Any person who acts in contravention of a disqualification order made under this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.

(13) Nothing in this section shall prevent a person who is disqualified pursuant to an order made under subsection (1) from applying for leave of the Court to be concerned in or take part in the management of a company.

(14) On the hearing of an application made under subsection (13) or (15), the Minister or the Official Receiver shall appear (and for this purpose the Minister may be represented) and call attention of the Court to any matter which appears to him to be relevant to the application and may himself give evidence or call witnesses.

(15) Any right to apply for leave of the Court to be concerned or take part in the management of a company that was subsisting immediately before 23rd March 1990 shall, after that date, be treated as subsisting by virtue of the corresponding provision made under this section.

SLOVENIA

Comment on C: According to the provision of the Article 246/4 of "Law on Commercial Companies", a member of the executive management cannot be a person who was convicted of a criminal offense committed against the economy, against labor relations and social security, against legal traffic, against the management of socially owned resources and natural resources, or against public or private property, who shall not be eligible for management within five years from the final verdict and not before a period of two years has elapsed after he has served a prison term.

The relevant provisions are the provisions 4 – 22 of "Financial Operations of Companies Act" published in Official Gazette of the Republic of Slovenia (No. 54-2543/1999 and 110-5162/1999). The provisions 27/4, 25/5 (related to the shareholders responsible for the obligations of the companies) and 36 of the Act were annulled by the decision of the Constitutional Court No. U-I-135/00-77 (October 9, 2002) published in Official Gazette of the Republic of Slovenia (No. 93-4672/2002).

SWEDEN

Under the Swedish Companies Act, company directors are personally liable for debts arising after a balance sheet for liquidation purposes ought to have been drawn up, i.e. when less than 50% of the company's share capital remains. Personal liability is also possible for debts arising a certain time after a point when the annual report should have been filed with the Patent and Registration Office. Participation in unlawful dividends could also lead to personal liability, as could certain trading when the company is insolvent. Example: The company enters into a contract when the company is insolvent and unable to fulfill the contract and the directors are aware of the circumstances. Further, the directors may be personally liable for unpaid taxes.

TURKS & CAICOS ISLANDS

The duties of officers and directors are foremost to the company and its shareholders. The duty is a general duty at common law, which requires officers and directors to act in good faith and in the interest of the company and its shareholders. The duty extends to both creditors and employees. In addition to the general duty, officers and directors owe a fiduciary duty to the company. They are also under a duty to disclose any interest that they may have in any company doing business with the company with whom they are directors or officers. The duties and responsibility do not change when the company becomes financially distressed, except that there is a duty on the officers and directors not to allow the company to continue to operate when financially distressed.

There is full civil and criminal exposure that exist for officers and directors who violate their duties and responsibilities. The arms of the courts cover many areas in the corporate area including insolvency. Directors and officers can expect to face both civil and criminal exposure in the event that they violate their duties and responsibilities. They can expect to face jail, fines an dismissal, among other things.

UNITED STATES

In the United States, the State of Delaware is generally recognized as having the most developed body of corporate law. Accordingly, this survey focuses on Delaware law, which will be binding for most US companies and will be persuasive for most other jurisdictions. However, citations to authority from certain other jurisdictions are added, as well.

A corporate board of directors has well-established fiduciary duties to the corporation and its shareholders. The core element of these duties, wherever articulated, is a requirement to abstain from self-interested behavior. *See Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). The basic responsibility of directors is to exercise their business judgment to act in a manner they reasonably believe to be in the best interests of the company and its shareholders. In discharging these obligations, directors are entitled to rely on management and the advice of the company's outside advisors and auditors. *See generally Smith v. Gorkom*, 488 A2d 858 (Del. 1985). Directors should not be expected to be guarantors that nothing will go wrong on their watch, nor should they (as opposed to management) be expected to certify the accuracy and completeness of the company's financial statements. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985). Directors are monitors and gatekeepers charged with the duty of installing competent managers who they reasonably believe will serve the best interests of their institutions and diligently monitoring their conduct. *See Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). In discharging their obligations, corporate directors must satisfy certain fiduciary duties – the duty of care and the duty of loyalty –which them to act in the best interests of the corporation and its stockholders when making business decisions. *See* Model Bus. Corp. § 8.30(a) (1991).

When a company is insolvent, however, "it creates fiduciary duties for directors for the benefit of creditors." *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 787 (Del. Ch. 1992); *see also Odyssey Partners, L.P. v. Fleming Cos.*, 735 A.2d 386, 417-20 (Del. Ch. 1999); *Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808, 812 (Del. 1944) ("The fact which creates the trust [in favor of creditors] is the insolvency [of the corporation], and when that fact is established, the trust arises, and the legality of the acts thereafter performed [by directors] will be decided by very different principles than in the case of solvency."); *In re Ben Franklin Retail Stores, Inc.*, 225 B.R. 646, 649 (Bankr. N.D. Ill.), ("[T]he Defendants, as officers and directors of the Debtors while the Debtors were 'in the vicinity of

insolvency,' owed fiduciary duties of care to creditors.") *aff'd in relevant part, rev'd in part*, 2000 WL 28266 (N.D. Ill. 1988); *Randall & Neder Lumber Co. v. Randall*, 202 Ga. App. 497 (1992) (suit successfully brought by creditors of insolvent corporation against its directors for improper distributions to themselves).

Indeed, Delaware courts have extended this standard to companies near or approaching insolvency. *See Credit Lyonnais Bank Nederland, N.V. v. Pathe Comm. Corp.*, 1991 Del. Ch. LEXIS 215, at *108 (Del. Ch., December 30, 1991) ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise."). Thus, duties to creditors arise when a corporation is "insolvent in fact," meaning "unable to pay its debts as they fall due in the usual course of business" or "when it has liabilities in excess of a reasonable market value of assets held." Geyer, 621 A.2d at 789 (citing *Webster's Ninth New Collegiate Dictionary* at 626 (1988)).

A corporate director typically has the right to resign without incurring any liability or breaching any fiduciary duty. *See Frantz Manufacturing Co. et al. v. EAC Industries*, 1985 Del. LEXIS 598, at *22 (Del. 1985). Indeed, certain courts have held that a director's resignation does not, in and of itself, breach any duty of loyalty or fiduciary duty to the corporation or its shareholders. *See In re Telesport Inc.*, 22 B.R. 527 (Bankr. E.D. Ark. 1982).

As stated in *Telesport*, "[c]orporate officers'[are] entitled to resign ... for a good reason, a bad reason or no reason at all, and are entitled to pursue their chosen field of endeavor in direct competition with [the corporation] so long as there is no breach of a confidential relationship with [it]." *Telesport*, 22 B.R. at 532-33, fn. 8.

On the other hand, certain courts have held that a director's fiduciary duties include duties that prevent resignation, and extend after resignation for breaches that occurred or began before resignation. Thus, a director's ability to resign may be limited, and may not prevent liability after resignation.

Several courts have held that a director cannot resign if the director's resignation will cause immediate harm or allow harm to occur to the corporation or leave corporate assets unprotected. For example, in *Gerdes v. Reynolds*, 28 N.Y.S. 2d 622 (N.Y. S. Ct. 1941), the court describes the tension between the right to resign versus the duty to stay because, under certain circumstances, an individual may be required to continue as a director, despite the right to resign. *Gerdes* at 649-50. Consequently, "officers and directors ... cannot terminate their agency or accept the resignation of others if the immediate consequence would be to leave the interests of the company without proper care and protection." *Gerdes* at 651.

This tension, though apparently contradictory in terms, rejects the defense dubbed as the "Geronimo theory." The defense would allow a director to freely resign at any time and absolve him or herself of liability knowing that a transaction dangerous to the corporation is about to occur. The Fifth Circuit has rejected this defense and held that a director cannot absolve him or herself of liability by resigning because it is the same as "if a commercial airline pilot were to negligently aim his airplane full of passengers at a mountain, bail out before impact, and not be liable because he was not at the controls when the crash occurred." *Xerox Corp. v. Genmoora Corp*. et al., 888 F.2d 345, 355 (fn. 60-1) (5th Cir. 1989) (citing Gerdes); *see also DePinto v. Landoe et al.*, 411 F.2d 297 (9th Cir. 1969) (applying Arizona law, a director cannot resign and not oppose a wrongful act of a raid on corporate assets); *COR Marketing & Sales Inc. v. Greyhawk Corp. et al.*, 994 F.Supp. 437, 442 (W.D.N.Y. 1998) ("directors cannot resign 'if the immediate consequence would be to leave the interests of the corporation without proper care and protection'); *Sebastian v. Zuromski*, 1993 U.S. Dist. LEXIS 2008, *15-18 (N.D. Ill. 1993) (ordinarily a director may resign, but "[T]he wrong complained of here is the resignation itself. It is not inconceivable that fiduciary duties may obligate a person not to abandon a venture such as a partnership or close corporation."); *FDIC v. Barton et al.*, 1998 U.S. Dist. LEXIS 5203, *19-*21 (E.D. La. 1998) (rejection of a rule that resignation terminates fiduciary duties, when a director fails to prevent a transaction dangerous to the corporation or to make an objection known).

Thus, if a director's resignation would cause or allow harm to the corporation or leave the interests of the corporation unprotected, the director is not free to resign. Resignation at such an inopportune time may therefore result in a breach of fiduciary duty. Regardless of timing, liability may accrue after resignation.

After all, directors are responsible for losses resulting from their own neglect of duty before resignation, and resignation does not absolve him or her for breach of a duty. *See FDIC v. Wheat et al.*, 970 F.2d 124, 128 (5th Cir. 1992); District 65, *UAW, et al. v. Harper & Row Publishers*, et al., 576 F. Supp. 1468 (S.D.N.Y. 1983) (liable for breaches of duty if the breach was committed while a fiduciary); *Sandage v. Planned Investment Corp.*, et al., 160 Ariz. 287, 772 P.2d 1140, 1144 (Ariz. Ct. App. 1988) ("... when a transaction has its inception while the fiduciary relationship is in existence, an employee, by resigning and not disclosing all he knows about the negotiations, cannot subsequently continue and consummate the transaction in a manner in violation of his fiduciary duty ...").

Similarly, resignation does not free a director of all fiduciary obligations. *See Quark Inc. v. Harley*, 1998 U.S. App. LEXIS 3864, *23 (10th Cir. 1998) (a director has a duty to maintain corporate confidences acquired before resignation); *T.A. Pelsue Co. v. Grand Enterprises Inc. et al.*, 782 F. Supp. 1476 (D. Colo. 1991) (former director breaches fiduciary duty if he or she engages in transactions that had inception before termination of relationship or were based on information obtained during that relationship); *E.J. McKernan*

Co. et al. v. Gregory et al., 252 Ill. App. 3d 514, 623 N.E.2d 981 (Ill. App. Ct. 1993) (resignation of an officer will not sever liability for a transaction completed after termination that began during the relationship or based on information gained during the relationship); *C&Y Corp. et al. v. General Biometrics Inc.*, 896 P.2d 47 (Utah Ct. App. 1995) (fiduciary duties only extend after resignation if the transaction had its inception while the fiduciary relationship existed).

URUGUAY

We would like to summarize the major legal issues dealing with the liability of officers and directors of stock companies in Uruguay.

1. Civil and commercial liability: As per Uruguayan Company's Law 16.060 directors and officers must comply with (i) a duty of care (following the rule of a "good and sounded businessman" which is similar to the "business judgment rule" under U.S. law); (ii) a duty of loyalty with respect to the company (in this case directors and officers may enter in business with the company but on an arm's length basis).

2. Criminal liability: As per Uruguayan Law 14.095 directors and officers may be held criminally liable in case of fraudulent insolvency of the company (assets being sold not at market prices prior to the bankruptcy declaration or accounting books evidence non-existent assets or liabilities which are not real). Directors and officers may also be held liable if they or the company has incurred in swindle acts.

TURKEY

Turkish Laws relating to bankruptcy and insolvency proceedings, the duties and responsibilities of the officers and directors of a company are fairly extensive.

A summary is presented hereby as to the rights and liabilities of persons qualifying as chairman and members of the board of directors considering that board members of joint stock companies, in general, assume liabilities during their office term as stipulated by law and that certain rights have been recognized thereto for the fulfillment of such liabilities.

The duties burdened and authorities recognized by the Turkish Commercial Law (TCL) to boards of directors, be as a board or be individually, should be separated into 2 sections:

Duties and Authorities as a Board. Pursuant to Article 317 of the TCL, a "joint stock company" is administered and represented by the board of directors. As per Article 321/1 of the TCL, persons empowered as representative are entitled to perform on behalf of the company all kinds of business and legal transactions that fall within the corporate scope. As a principle, the right of representation may not be restricted. Restrictions notwithstanding such interdiction are not enforceable on third persons of good faith. As a principle, the ordinary and extraordinary General Assemblies are called by the board of directors. Such power of the board of directors includes the preparation of the agenda and arrangements pertaining to the exercise of rights of the attendees thereof. Bookkeeping required for a joint stock company appear among duties of the board of directors. (Article 325 of the TCL) At least once a year and within three months as from the end of each accounting period, the board of directors is also charged with the issuance of the balance sheet, profit/loss statement and annual activity report as well as a proposal for presentation to the general assembly as to how to distribute the net profit (TCL Art. 362). If the appointment and dismissal of company employees are not left to the discretion of the general assembly by the articles of incorporation, such authority pertains to the board of directors. Pursuant to Article 324 of the TCL, if the most recent annual balance sheet reveals that half of the stock capital has been spent off, the board of directors must immediately convene and inform the general assembly accordingly. Pursuant to the TCL, Art. 441, unless a liquidator is assigned by the articles of incorporation or by resolution of the general assembly, liquidation shall be carried out by the board of directors.

Individual Duties, Powers and Responsibilities of Board Members. Pursuant to Article 308 of the TCL, members of the board are obliged to investigate whether any unlawfulness has occurred during incorporation of the company and are jointly and severally responsible for any neglect at that end. However, it may be deliberated that this provision rather concerns board members taking office at the initial years of the company. Newly elected board members are "obliged to inform the auditors of any apparent unlawfulness" of those having held the same office previously. Pursuant to law, members who fail to comply are deemed to have participated to the responsibilities of such previous members. Pursuant to Article 320 of the TCL, board members are obliged to exercise due diligence as an "attorney" for company affairs. Due to the reference made by the article, damage and loss caused by the lack of due diligence of board members are indemnified thereby pursuant to Art. 528/2 of the Law of Obligations. Pursuant to Art. 334 of the TCL, board members may not engage directly or indirectly, individually or on behalf of any third person in any transaction with the company or any commercial transaction relating to the corporate field of activities, unless the permission of the general assembly is obtained. Otherwise, the company may claim such transactions to be "null and void". Unless the permission of the general assembly is obtained, any board member may neither engage directly or on behalf of any others in any transaction similar to those of the corporate field of activities nor be associated with any company dealing with the same commercial business as a partner without restrictions in terms of power (TCL, Art. 335) Although the company is responsible for the tort of the board members during their term of office, the company may have recourse to the board member for the obligation of indemnity that may arise.

Issues Which Burden Board Members With Joint and Several Responsibility. Pursuant to Art. 336/1 of the TCL, board members are jointly and severally responsible if and when the total or part of the principal amount of shares are shown as paid though such amount is not de facto paid. Article 469/1 of the TCL has provided that "no profit share may be distributed unless legal and optional reserves and other monies are set aside out of the net profit, pursuant to law". Any action in violation thereof results in the inaccuracy of the profit share and consequent responsibility. The "non-existence or informal keeping" of books to be kept in compliance with law results in joint and several liability pursuant to Art. 336/2 of the TCL. Another issue that causes joint and several liability is the non-performance of resolutions of the general assembly without a valid reason (TCL, 336/4). Art. 336/5 has provided that "non-performance in bad faith or neglect of other duties assigned both by law and the articles of incorporation" accounts for the joint and several liability of the board of directors. The "bad faith" or "neglect" must be ruled by a court.

Pursuant to Article 324 of the TCL, if the most recent annual balance sheet reveals that the assets of the Company is not sufficient to cover the credits of the Company, then the board of directors must immediately notify the relevant court and the court takes necessary precautions for the arrangement of inventory book or appointment of a possible trustee for the protection of the company goods.

Article 339 of the Commercial Code states that the members of the board of directors, who mislead third parties by means of causing incorrect impressions or by making false declarations in any way whatsoever regarding the current position of the company, shall be personally responsible for all losses that have been caused.

Article 342 of the Commercial Code states that the members of the board of directors shall not be liable for the losses caused by the managers. However, the members of the board of directors shall be responsible towards the company for the possible losses arising from the actions of the managers who are incapable of performing their duties.

It is stated in the Article 331 and 333a of the Execution and Bankruptcy Law (Law No. 2004) that the individuals, who engage in fraudulent transactions with the purpose of causing loss to the creditors, before or after bankruptcy, are subject to imprisonment. In the event such fraudulent transaction is made after the execution proceeding is filed against the company or within 2 years before the commencement date of the execution proceeding, a imprisonment of 6 months to 3 years in addition to a fine amounting to TL 1.000.000.000.- to TL 100.000.000.000.-TL shall be applicable. The individuals who involve to such fraudulent transactions are also subject to the same punishment. In the event the fraudulent transaction is made by the directors and-or officers of a company, then such are subject to an imprisonment of 6 months to 2 years and a fine of TL 4.000.000.000.-TL to 400.000.000.000.-

In the event the action of the director is evaluated as a crime of misuse of trust, then an imprisonment of 2 months 2 years shall be considered.

There are three ways of bankruptcy: (a) ordinary execution by way of bankruptcy (Articles 155-166 of the Execution and Bankruptcy Law); (b) special bankruptcy proceedings for negotiable instruments (Articles 167, 171-176 of the Execution and Bankruptcy Law); and (c) direct bankruptcy (Articles 177-181 of the Execution and Bankruptcy Law).

Since ordinary bankruptcy is not based upon bankrupt's fault, ordinary bankrupt is not subject to penalty, but certain jobs are forbidden for him. Criminal court decides on the negligent and fraudulent bankruptcy and in these cases the bankrupt shall be subject to penalty. Limited reasons for negligent bankruptcy are stated in Law. The person, who engages in fraudulent transactions with the purpose of causing loss to his creditors, before or after bankruptcy, is considered as fraudulent bankrupt.

The following may be given as examples of abuse of duties assigned by law: Appointment of a non-qualified executives (TCL, Art. 346), taking of an action in bad faith by a board member against resolutions of the general assembly (TCL, Art. 384), illegal transactions during increase of the stock capital (TCL, Art. 392) or issuance of share certificates in violation of law (TCL, Art. 399)

The creditors may file a suit of nullity in order to cancel the fraudulent dispositions and donations made by debtor. Every creditor who could not collect his claim from debtor's property may file a suit of nullity. Except for ordinary gifts, all gratuitous dispositions and donations made within a period of 2 years prior to commencement of bankruptcy are subject to nullity.

VENEZUELA

Administrators and Officers are only obliged to respond for the obligations imposed by law, and no personal obligation shall result because of the Company's business. They are not allowed to execute other operations different from those established in the Bylaws of the Company and the Commercial Code; in case of violations they will be held personally liable, before third parties as well as the society, under Article 243 of the Venezuelan Code of Commerce.

Officers and Directors have civil responsibilities before the Society, Shareholders, and Creditors, if they should exceed on their attributions or violate their duties. In this sense they must compensate all damages caused.

If a company is declared bankrupt, its Officers and Directors will be sanctioned as "Quebrado Culpable" (Culpable Bankrupt) as a result of their failure to comply with certain specific formalities established in the Commercial Code or if being directly responsible for such bankruptcy (Imprisonment from 6 months to 3 years).

Also, the Officers and Directors will be sanctioned as "Quiebra Fraudulenta" (Fraudulent Bankrupt) when they:

1. Deceitfully omit the publication of the Social Contract as established by the Law.

2. Wrongly declared the capital subscribed or entered.

3. Have paid inexistent year-end dividends.

4. Deceitfully take accounts greater than those assigned under the social contract.

5. As a result of deceitful practices or fraudulent operations, lead the company to bankruptcy.

In these cases the sanction will be imprisonment from 3 to 5 years.