



# General Assembly

Distr.: Limited  
13 April 2010

Original: English

---

**United Nations Commission on  
International Trade Law  
Working Group V (Insolvency Law)  
Thirty-eighth session  
New York, 19-23 April 2010**

## **Insolvency Law: possible future work**

### **Addendum**

#### **Proposal by INSOL International: Directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases\***

1. The efficient operation of insolvency proceedings relies on the timely commencement of such proceedings. This is true whether the nature of the insolvency proceedings is a liquidation of the debtor's assets or the commencement of reorganization proceedings aimed at restoring the debtor to solvency. Far too often, it is left to creditors to commence these proceedings because the directors have failed to act on a timely basis, notwithstanding that many insolvency laws purport to impose an obligation on the directors to commence insolvency proceedings within a certain period of the commencement of insolvency.
2. Obligations such as these are seldom enforced even though research may show that this is an obligation that is breached more often than acted in compliance with. There are several reasons for these obligations not being enforced but frequently it is necessary to prove that the director's actions were fraudulent. The absence of such theoretical obligations not being enforced is that there is a lack of credible threat obliging directors to commence proceedings on a timely basis.
3. The importance of commencing proceedings at an early stage cannot be overestimated. Financial decline typically occurs more rapidly than many parties would believe and as the financial position of an enterprise worsens, the options available for a viable restructuring also rapidly diminish. Therefore, while there has been an appropriate refocusing of insolvency laws in many countries to increase the

---

\* This document was submitted as soon as possible following receipt of the proposal.



options for restructuring and rescue of enterprises, there has not been the incentive on the directors and officers to use these procedures. For these reasons, the proportion of businesses for which liquidation is the only option continues to be far too high in many parts of the world. The result of this is that businesses are destroyed, jobs are lost, investments are wasted and the pace of economic recovery is slower than it needs to be.

4. This need not be a lost cause. In some jurisdictions the use of reorganization procedures has been encouraged by the expedient of replacing the old “fraudulent trading” test with a more modern “wrongful trading” test whereby directors are vulnerable to criticism and financial penalty if they continue trading beyond the point where they knew or should have known that the company would be unable to avoid insolvent liquidation.

5. In addition to encouraging the earlier commencement of insolvency proceedings, effective provisions for the roles and duties of directors and officers will promote good corporate governance. In many countries, statutory provisions providing standards of duty of care and skill by directors do not exist although courts in some countries follow the common law rule of directors and officers duty of reasonable diligence in the discharge of the duties. Accountability provisions in law for negligence, default, misfeasance and breach of duty or trust are inadequate. Extensive research has been undertaken by INSOL international into the roles and duties of directors and officers in the period prior to financial collapse and this work could be made available to a working group of UNCITRAL.

6. A clear view on the liabilities of directors and officers could also lead to a more predictable legal position of such directors and thus limit risks for directors that insolvency practitioners will litigate against them. The more clearly the responsibilities are defined, the more predictable the legal position will be. In addition the more experienced managers, that may not want to participate in management of a company due to the risks related to that position in case of failure, will more likely be willing to participate in that management. Thus also the good captains will join the fleet.