

Hurdles in Corporate Law: Directors Duties – Between Israel's Corporations Act and Insolvency Act

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The newly enacted Insolvency Act, 2018 introduced into Israeli law a new personal liability of CEOs and directors of an insolvent corporation—liability for damages to the creditors due to the CEO and directors' failure to mitigate the scope of the corporate insolvency. Its proponents hope that this duty will encourage directors to address the rights of creditors of an insolvent corporation early on, rather than put off tackling the issue. During the legislation process it was argued that this new liability is nothing but a specific expression of the general corporate law duty of care of directors, and thus does not alter Israel's corporate governance rules. This article suggests otherwise. It shows that the duty to mitigate the scope of insolvency and the duty of care are two different duties, with different codes, different rationales and different beneficiaries. The coexistence of the corporate duty of care and the new duty to mitigate the scope of insolvency creates a confusing and incoherent environment for corporate decision-makers. This is expected to generate inefficient board resolutions. Moreover, I argue that the new duty under the Insolvency Act is expected to deter the directors of financially distressed corporations from deciding on the merits in a manner that maximizes the corporations' value. Rather, the new duty will drive directors to bolt for the safe harbor it provides, that is to file for the commencement of corporate insolvency proceedings. The new provision will likely drive many corporations into formal insolvency proceedings too early. Given the disadvantages of the new duty under the Insolvency Act, I call for its abolishment and recommend reviewing the behavior of directors of financially distressed corporations exclusively under the corporate law duty of care and duty of loyalty. To address the legislature's concern regarding tardy filings for insolvency proceedings, I call for the enactment of a friendlier Debtor-in-Possession insolvency regime in lieu of the appointment of a trustee. This carrot is preferable to the stick of imposing a new basis of liability on the directors' shoulders.