Corporate insolvency practitioners: ethics and fiduciary duties
Research handbook on corporate restructuring
Corporate insolvency practitioners: ethics and fiduciary duties
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1. INTRODUCTION

…it is pointless to describe a person…as being [a] fiduciary unless at the same time it is said for the purposes of which particular rules and principles that definition is being used. These rules are everything. The description 'fiduciary', nothing.[1]

It is an undeniable fact that the insolvency practitioner (IP) is a key role player in an insolvency procedure. The success and outcome of the procedure will to a large extent depend on his/her attributes, qualifications and experience. They are the self-styled experts in the administration of estates and restructuring strategy. These expert qualities will, however, not be of much use to any debtor or to society if the practitioner lacks integrity, ethics and basic morality. To this end, many jurisdictions have imposed fiduciary norms to govern the conduct of IPs. The word 'fiduciary' is, however, not definitive of a single class of relationships to which a fixed set of rules and principles apply. It is necessary to determine the rules that govern each class of fiduciary relationship.[2]

Jurisdictions have divergent approaches in regard to these rules: the duties and obligations that IPs owe. Moreover, jurisdictions have different ideas as to the exact nature of the IP's role in different types of insolvency proceedings. This inevitably leads to some confusion as to the role of the profession. IPs, of course, have their own thoughts regarding their role and given the fact that they are appointed from the ranks of several different other professions, such as lawyers, accountants, auditors and business managers, the further inevitability of even more confusion is a certainty. The latter is also evident from the vast amount of jurisprudence across the globe seeking to explain and analyse the role of the Corporate Insolvency Practitioner (CIP) and his/her duties in relation to the debtor and other interested parties.

The role of the rescue professional is particularly complex as it involves the consideration of issues that involve corporate and company law as well as insolvency law. There are scholars who equate the role of director and rescue professional,[3] in my opinion this cannot be the position in practice due to the fact that the circumstances prevailing during a rescue differ too substantially from the circumstances that would prevail under normal management conditions; this precludes measuring the conduct by the holders of these two offices in the same way.[4]

The aim of this chapter is to provide a general overview of the role and duties of CIPs without focusing on any one jurisdiction specifically. The particular focus will be on the fiduciary nature of the office and the underlying ethical considerations. It therefore aims to provide an understanding of the CIP profession in its most basic form. In accordance with theme of this *Handbook*, more emphasis will be placed on the restructuring or turnaround professional.

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[1] P Finn, *The Fiduciary Obligation* (Law Book Co 1977) 1 as quoted by J Glover and J Duns, 'Insolvency Administrations at General Law: Fiduciary Obligations of Company Receivers, Voluntary Administrators and Liquidators' (2001) 9 *Insolv LJ* 134.

[2] M Havenga, *Fiduciary Duties of Company Directors with specific regard to Corporate Opportunities* (Transactions of the Centre for Business Law, University of the Free State 1998) 10.

[3] D Hahn, 'Concentrated Ownership and the Control of Corporate Reorganisations' (2004) 4 J*CLS* 1, 117. Hahn opines that a practitioner might be viewed as an *ex officio* director of the company and is therefore a member of the board of directors.

[4] R Nimmer and R Feinberg, 'Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity' (1989) 6 *Bankr. Dev* J 1, 34. 'However, a fiduciary's role is dependent upon the relationship of the fiduciary to its subject matter. It leads to widely different business or policy choices depending on how the fiduciary exercises its powers and acts on its obligations.'

2. THE CORPORATE INSOLVENCY PRACTITIONER

IPs are appointed to administer estates in cases of personal bankruptcy as well as corporate insolvency. It is important that both types of insolvency professionals comply with their fiduciary duties and conduct themselves in an ethical manner. However, in the case of corporate insolvency, the number of stakeholders and parties that will be affected by the company's demise is increased.[5] This chapter will, therefore, focus primarily on those IPs that undertake appointments in corporate insolvency cases, thereby qualifying as Corporate Insolvency Practitioners or CIPs. It is also accepted that in some jurisdictions no such distinction is made and that any reference to provisions pertaining to CIPs will also pertain to IPs.

A further distinction is possible in the case of CIPs, that is between CIPs that take appointments concerned with the restructuring, reorganisation, turnaround or rescue of a corporate entity known as 'Turnaround or Rescue Practitioners', and CIPs that take appointments concerned with the realisation of a corporate debtor's assets and the distribution of the proceeds to the creditors in a formal winding-up or liquidation proceeding, known as 'Liquidators'. Evidently, these practitioners have vastly differing objectives to achieve in the exercise of their duties. Moreover, the beneficiaries of the exercise of their powers are also not necessarily similar.

3. THE CIP AS FIDUCIARY[6]

A fiduciary is largely accepted to be a person i) who undertakes to act on behalf of another, and ii) who has discretion and power over the interests of the other.[7] A further element of vulnerability is sometimes added as an indicator for the existence of a fiduciary relationship.[8] It is, therefore, not surprising that CIPs are often regarded as fiduciaries.[9] Depending on the type of appointment, whether it is a turnaround/rescue or liquidation, the CIP enters onto the

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[5] The definition of stakeholders in this context should also lend itself to a very broad interpretation. See the Cork Report on Insolvency Law and Practice Cmnd 8558 [1982]: 56 para 204:

We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.

See also J Dickfos and C Anderson, 'The Sovereign Voluntary Administrator. Position of the Voluntary Administrator vis a vis the Company Stakeholders' (2008) http://www98.griffith.edu.au/dspace/handle/10072/24030 accessed 8 November 2018: 'The stakeholders in a corporation are the individuals and constituencies that contribute, either voluntarily to its wealth-creating capabilities and activities, and that are therefore potential beneficiaries and/or risk bearers.'

[6] Parts of the discussion under sections 3 and 4 forms part of the INSOL International Funded Project report: Corporate insolvency practitioners, ethics and remuneration: Not a case of Moral Bankruptcy? Published as a Special Report 2020.

[7] Nimmer and Feinberg (n 4) 34: 'The idea of treating one person as a fiduciary of another thus rests on the fact that the discretionary judgment of the one controls the destiny of the other.'; R Valsan, 'Fiduciary Duties, Conflict of Interest and Proper Exercise of Judgment' (2016) 62 *McGill LJ* 1, 7. See also J Velasco 'Delimiting Fiduciary Status' in D Smith and A Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar Publishing 2018) 78: 'It is fair to say that power, trust, and vulnerability are the key terms used to describe fiduciary relationships generally.'; J Glover and J Duns, 'Insolvency Administrations at General Law: Fiduciary Obligations of Company Receivers, Voluntary Administrators and Liquidators' (2001) 9 *Insolv LJ* 137: 'Are voluntary administrators fiduciaries? In the scheme of pt 5.3A, administrators are acting for the benefit of others and the powers and discretions that they possess are held in representative capacities. These are standard indicia of fiduciary status.'

[8] Valsan (n 7) 7.

[9] Glover and Duns (n 1) 137; D Milman, *Governance of Distressed Firms* (Edward Elgar Publishing 2013): 'can office-holders be classed as fiduciaries? The answer to this in all cases (whether or not 'officer of the court' status applies) would appear to be in the affirmative'.

scene and usually takes over control of the affairs and business of the debtor company.[10] In many jurisdictions the CIP becomes an 'officer' of the company and is also required to adhere to the duties and obligations that are normally attributed to company officers.[11] Moreover, in many jurisdictions the CIP will be regarded as an officer of the court.[12] These combine to create a complex web of fiduciary responsibilities.

Insolvency or threatening insolvency creates a difficult situation for all those involved. A multitude of interested parties face financial loss and also possible loss of employment, with each of these interested parties being left vulnerable to some extent. This adds to the stress of an already difficult environment – an environment that has to be managed by the CIP. To this end, insolvency laws entrust the CIP with numerous powers to achieve a given procedure's objectives whilst at the same time creating a framework that is designed to ensure CIP accountability towards those with an interest in the outcome of proceedings.

Fiduciary relationships have frequently been described as relationships of trust.[13] Given the nature of his/her appointment, as set out in the preceding paragraphs, it is not easy to reconcile the idea of a trust relationship in the context of an insolvency appointment. Almost every stakeholder involved in a restructuring procedure will be apprehensive and distrustful towards the CIP. It can, therefore, not technically be described as a trust relationship. Does this influence the fiduciary nature of the relationship or in some way negate the existence thereof? This dichotomy can best be addressed by referring to the work of Harding.[14] The type of trust that stakeholders in insolvency proceedings will manifest might be described as reliance,[15] in the sense of allowing the CIP to affect their interests.[16] The reliance will be based on the fiduciary norms incorporated into the insolvency procedure. The fiduciary norms will help to facilitate trusting relationships. Put more plainly, the stakeholders will rely on the CIP to act in their interests because he/she has strict fiduciary norms to adhere to that will guide his/her actions. It can therefore be said that fiduciary duties bring about the relationship characterised by reliance on discretion, even in circumstances where trust is absent. Harding persuasively points out that fiduciary law works best when it enables people to cooperate whether or not they trust.[17] It can thus be said that there is still a fiduciary relationship in an insolvency context despite the apparent lack of trust in the restructuring CIP as fiduciary. 'The assignment of fiduciary liability is the device we employ to ensure that our expectation will be met.'[18]

Interestingly, the duties owed by CIPs, whether in a restructuring/rescue or a liquidation, are largely the same and also familiar in a corporate office context.[19] It is to whom these duties are owed that creates the important distinction between the two office-holders.

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[10] Bearing the distinction between debtor-in-possession and practitioner-in-possession in mind, this statement refers to instances where a form of management displacement does take place.

[11] The UK and Australia are good examples here.

[12] Examples: South Africa, Scotland, England and Wales (limited instances), Canada, Australia and Germany.

[13] R Flannigan, 'The Fiduciary Obligation' (1989) 9 *Oxf J Leg Studies* 285, 286.

[14] M Harding, 'Fiduciary Relationships, Fiduciary Law and Trust' in D Smith and A Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar Publishing 2018).

[15] Ibid., 61.

[16] Flannigan (n 13) 286:

It is a 'deferential' kind of trust in the sense that the trusting person will defer to the judgment of the trusted person. The deference may be total, or it may be only partial or situational. It is accompanied, in some cases, by elements of necessity, dependence or submission.

[17] Harding (n 14) 75:

Given these facts, fiduciary law has a difficult balancing act to perform. On the one hand, it should facilitate trust and trustworthiness in fiduciary settings; on the other hand, it should facilitate cooperative action in the absence of trust and trustworthiness.

[18] Flannigan (n 13) 909.

[19] They do, however, find specific application in an insolvency appointment context.

There might be cases where the appointed CIP will not be regarded as a fiduciary and will, therefore, not owe any fiduciary duties. In the case of restructuring CIPs, fiduciary status will often only be ascribed to those CIPs that displace management of the debtor company. A number of jurisdictions do allow for various forms of schemes of arrangement where the CIP will merely oversee the process.[20] That does not mean that the ethical considerations that underpin most fiduciary duties do not apply to these CIPs.

Whether a jurisdiction has a civil law or common law system would also have an impact on any discussion regarding fiduciary duties and principles. In many civil law jurisdictions, fiduciary duties are mainly derived from the principles of agency law, whereas most common law jurisdictions developed their fiduciary duties and principles from trust law.[21] In civil law jurisdictions the fiduciary duties tend to be codified as opposed to most common law jurisdictions, in which fiduciary duties are largely uncodified.[22] The nature and extent of fiduciary duties in these systems, therefore, vary. According to Gerner-Beuerle and Schuster, the difference between common law and civil law seems to have lost much of its relevance as corporate law reforms benefit from mutual learning and the diffusion of legal concepts internationally.[23] To further strengthen this argument, it is useful to note that all legal systems, regardless of the extent of codification, draw on principles of general contract law, tort law or fiduciary principles to enhance law-specific rules and amplify fiduciary duties.[24]

It is acknowledged that each jurisdiction will have unique fiduciary principles in relation to CIPs but it should be noted that there is a significant overlap of principles between jurisdictions and that many of these principles, regardless of how they are named, are very similar in nature. Moreover, the duties of fiduciaries will vary in accordance with the situation from which the duty arises.[25] From this a number of key fiduciary duties for restructuring CIPs can be extrapolated:

The duty to act with good faith;[26]

The 'best interest' duty; and[27]

The duty to exercise one's powers in an independent and impartial manner.

In addition, there is a duty which is not fiduciary in nature: the duty of care, skill and diligence. As mentioned earlier, these key duties are usually owed by both turnaround/rescue practitioners and liquidators, but it is to whom they are owed that differs. The next section endeavours to provide a general overview of the beneficiaries of fiduciary duties in different insolvency processes with a focus on restructuring proceedings.

4. BENEFICIARIES OF CIP' FIDUCIARY DUTIES

Beneficiaries in this sense might refer to the modern term of 'stakeholders'.[28] It is a term that includes shareholders but also goes beyond that. Creditors, employees, suppliers and local communities can all be regarded as stakeholders, or at the very least parties with the potential

[20] This scenario refers to instances where a debtor-in-possession system is present and the management displacement usually brought about by a practitioner-in-possession system is absent.

[21] C Gerner-Beuerle and EP Schuster, 'The Evolving Structure of Directors' Duties in Europe' (2014) 15 *EBOR* 191, 196.

[22] Ibid.

[23] Ibid.,198.

[24] Ibid.

[25] C Anderson, 'Miracle Workers or Ambulance Chasers? The Role of Administrators in the Part 5.3A Process' (2004) 12 *Insolv LJ* 238, 248.

[26] 'Good faith is at the heart of all fiduciary duties…' J Johnston, 'Natural Law and the Fiduciary Duties of Business Managers' (2005) 8 *Journal for Markets and Morality* 27, 37. This duty requires honesty and fair dealing.

[27] The duty to act in the best interest of the beneficiary of the fiduciary duty. Who the beneficiaries are will depend on the process and the relevant circumstances. Also known as the duty of loyalty, this duty requires that the fiduciary refrains from placing his own or another's interest ahead of the beneficiaries' interests.

[28] Milman (n 9) 21.

to be stakeholders in a corporation and its downfall. In order to determine who the beneficiaries of the CIP's fiduciary duties in a given insolvency procedure are, consideration needs to be given to the extent of financial difficulty of the corporation, the procedure entered into,[29] the rights afforded to stakeholders and also the theories underpinning corporate and insolvency law.

It is accepted that for a company to undergo a reorganisation, turnaround or rescue, it would by implication be suffering from some form of financial difficulty. The difficulty experienced by companies in these proceedings can range from mild financial struggles, like cash-flow issues, to actual insolvency that would satisfy the jurisdictional legal tests for insolvency. This can be attributed to the varying extent of financial woes and the range of entry requirements to formal corporate rescue proceedings. Moreover, the global move towards incorporating early warning tools and mechanisms in corporate rescue regimes and encouragement toward early intervention in general mean that more solvent companies could ultimately undergo corporate rescue proceedings.[30] The importance of this consideration lies in the fact that during a company's solvency it is widely accepted that the interests of the shareholders of the company are paramount, whereas when the zone of insolvency or the 'twilight zone' is approached a shift takes place towards the protection of creditors' interests as is normally the case during the liquidation process.[31] Evidently, determining the beneficiaries of a CIP's fiduciary duties in restructuring proceedings is not a straightforward task.[32] It is a discussion that builds on the ever-growing literature surrounding the question about in whose interests company law should be formulated. Moreover, these approaches to the protection of interests during the company's solvency now enter the realm of discussions and theories as to who should benefit from insolvency procedures.

4.1 Beneficiaries: The Role of Insolvency and Corporate Law Theory

The most dominant insolvency theories ought to be considered, although no attempt will be made to engage with them at any great length. Insolvency theories can broadly be divided into two categories; first, theories that are centred on the creditors and secondly, theories that place an emphasis on inclusivity of other stakeholders such as employees, suppliers and the community.

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[29] Ibid., 92.

[30] Directive of the European Union and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, (2019/1023 EU) advocates for early warning mechanisms to incentivise debtors to take early action and for tools to be available for directors to address difficulties as soon as they become aware of it. In the UK the Government's response on the Consultation regarding Insolvency and Corporate Governance highlighted the importance of strengthening corporate governance in pre-insolvency situations including the taking of professional advice on entering insolvency proceedings earlier. The Consultation on insolvency and corporate governance: Government response can be accessed here: https://www.gov.uk/government/consultations/insolvency-and-corporate-governance. On the African Continent the move towards early intervention can be seen in the broadening of Directors' Duties to take action when insolvency is imminent or even just foreseeable in the next six months see in this regard South Africa's Companies Act 71 of 2008 sec 128(1)(f) and Zimbabwean Insolvency Act 7 of 2018 sec 121(1)(f).

[31] N Hawke, 'Creditors' Interest in Solvent and Insolvent Companies' (1989) *JBL* 54, 56. 'Conversely, where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of the existing creditors alone.' See also A Keay, 'The Director's Duty to Take into Account the Interests of the Company Creditors: When is it Triggered?' (2001) 25 *Melb UL Rev* 315, 317 and 322. 'It is almost non-contentious to say that directors have a duty to take account of the interests of creditors when the company is insolvent.'; Hahn (n 3) 129. 'Consequently, in reorganisation the fiduciary duties of the controlling person are no longer owed exclusively to the shareholders of the corporation, but to the various groups of creditors as well.'

[32] Milman (n 9) 92: '…not free from confusion…'.

The Contractarian theory is generally based on wealth maximisation and the idea that the law should maximise the collective return to creditors.[33] The theory is also in line with the Proceduralist approach to insolvency which contends that insolvency law should address issues that only arise out of insolvency and believe that non-insolvency claims and entitlements should not be protected by the insolvency law unless this would result in a greater return for creditors.[34] A recognised branch of the Contractarian theory is the Creditors' Bargain theory (CBT).[35] CBT is based on the premise that creditors enter into a bargain with the debtor company during negotiations for credit and thereby establish their position and possible remedies upon default by the company, such as on insolvency.[36] Upon the debtor company's insolvency the creditors with interest will try to recover their debt and will enter into a frenzied race with other creditors to enforce their private contractual agreements with the company. This could cause depreciation in value of the business assets creating uncertainty of returns for all creditors. The CBT proposes to solve this problem by replacing individual enforcement rights with a collective right to share in the proceeds of the insolvency proceeding giving rise to the Collectivist approach.[37] The CBT does not support redistribution in insolvency.[38]

Another Contractarian theory can be found in the Team Production Theory (TPT) of Corporate Law.[39] This theory is based on a social contract and is much more inclusive in nature than the wealth maximisation ideals of the CBT. The theory further developed by LoPucki builds on the ideology that shareholders are not the only party that contributes to the production process of a company, but other parties such as trade suppliers and the workforce all contribute to achieve the end product.[40] The TPT, therefore, promotes inclusivity of all team members during insolvency proceedings and supports the idea of redistribution of some of the interests of one stakeholder (team member) to another.[41] The problem with the TPT might be that it is too wide and includes too many team members who cannot realistically nor economically always benefit from the insolvency proceeding.[42]

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[33] P Walton, 'When is Pre-packaged Administration Appropriate? – A Theoretical Consideration' (2011) 20 *Nottingham LJ* 1, 3–4.

[34] D Baird, 'Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren' (1987) 54 *U Chi L Rev* 815; H Nsubuga, 'Corporate Insolvency and Employment Protection: A Theoretical Perspective' (2016) 4(1) *NIBLeJ* para 2.

[35] The CBT was developed by Jackson in the early 1980s Walton (n 33); Nsubuga, ibid., para 58.

[36] Nsubuga, ibid. Walton is of the opinion that one of the shortcomings of the CBT is the fact that it only considers 'hypothetical contract creditors'. Walton (n 33) 5.

[37] E Warren, 'Bankruptcy Policy' (1987) 54 *U Chi L Rev* 775, 797-799. The Collectivists believe the single justification for bankruptcy to be the enhancement of the collective return to the creditors. See also Nsubuga (n 34) para 61; Walton (n 33) 5.

[38] L LoPucki, 'A Team Production Theory of Bankruptcy Reorganization' (2004) 57 *Vand L Rev* 741, 748: '…the Creditors' Bargain was essentially a bargain that in the event of bankruptcy, the creditors would get everything'.

[39] Ibid.,744; Nsubuga (n 34) para 72.

[40] LoPucki (n 38) 749:

The team members include all who make firm-specific investments but are unable to protect those investments by direct contracting, personal trust or reputation. Team members may include stockholders, creditors, executives, other employees, suppliers, customers, local governments, regulatory agencies, and others.

Nsubuga (n 34) para 73; M Blair and L Stout 'A Team Production Theory of Corporate Law' (1999) 85 *Va L Rev* 247, 250: 'Executives, rank-and-file employees, and even creditors or the local community may also make essential contributions and have an interest in as enterprise's success.'

[41] Nsubuga (n 34) para 77: 'The TPT being an inclusive theory, advocates honouring all team members' interests on the insolvency of the company, whether in terms of financial gain or losses.'

[42] LoPucki contends that TPT entitlements are entitlements to 'rents and surpluses' and it goes without saying much that there will not be a lot of surplus in the case of insolvency. This theory closely resembles some of the Traditionalist theories on insolvency.

The Traditionalists are against the idea that insolvency law should exist only to serve creditors' interest and are, consequently, also inclusive in nature.[43] Communitarianism looks to balance a wide range of different stakeholders in the insolvency of the debtor and even to consider the welfare of the community at large.[44] It 'considers limiting the rights of high ranking creditors to give way to some extent to others including the community at large'.[45] It subscribes to the notion of redistribution, i.e., to redistribute the consequences of the debtor's default.[46] Communitarian theorists seek to focus on the fact that those involved in, and dealing with, companies are humans and corporate law should not be de-personalised.[47] The Cork Report also seemed to validate at least some aspects of the Communitarian Theory.[48] The criticism levelled against this theory relates to the difficulty of defining the community and determining how far it may stretch is cumbersome.[49] Moreover, articulating the community's needs in legislative form may prove problematic.[50] The Communitarian theory has a lot in common with Warren's Multi Value Approach or Eclectic Approach.[51] In a corporate insolvency context this approach requires recognition of those who are not directly 'creditors'.[52] Warren refers to the notion that it was intended that insolvency law address concerns that are broader than just the debtor's immediate problems and that of its creditors.[53] It should involve considering other internal or external stakeholders such as employees, suppliers or tax authorities, and in some instances to 'protect interests that have no other protection'.[54] It is, however, criticised as 'too widely expressed to be much specific assistance in developing a policy'.[55] It does not provide enough guidance as to the weight that has to be afforded to each of the interests and priorities that come into play in an insolvency context. 'It is not clear which principles are to be seen as core and which are of peripheral relevance.'[56] Baird criticises Warren's approach by asking the reasonable question of why stakeholders should be given special rights in insolvency if they don't have the same rights outside of insolvency.[57]

Obviously, the theories on insolvency contribute to the complexity of the situation. This brief discussion also does not do any real justice to the vast amount of literature on theories and the intricacy with which they have been articulated and argued but it does provide a sufficient overview that warrants consideration in the discussion to follow.

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[43] J Wood, 'Corporate Rescue: A Critical Analysis of its Fundamentals and Existence' (PhD thesis, University of Leeds 2013) 88: 'Contrary to proceduralists, traditionalists believe that insolvency law is not a tool solely reserved for the creditors in which they can pursue their own interests'; Nsubuga (n 34) para 3.

[44] Walton (n 33) 7; D Millon, 'New Directions in Corporate Law Communitarians, Contractarians, And the Crisis in Corporate Law' (1993) 50(4) *Wash & Lee L Rev* 1373, 1379: 'Communitarians also differ from contractarians in emphasizing the broad social effects of corporate activity.'

[45] Walton (n 33) 7.

[46] Warren (n 37) 777.

[47] A Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 29 *Sydney L Rev* 577, 586.

[48] Cork Report on Insolvency Law and Practice Cmnd 8558 (1982) 56 para 204: 'The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.'

[49] Walton (n 33) 7; Millon (n 44) 1388.

[50] Walton (n 33) 9.

[51] Ibid., 10.

[52] Warren (n 37) 775; Walton (n 33) 10.

[53] Warren (n 37) 788.

[54] ibid.; Walton (n 33) 10.

[55] Walton (n 33) 11.

[56] Ibid.

[57] Baird (n 34) 817, 822: 'Whenever we must have a legal rule to distribute losses in bankruptcy, we must also have a legal rule that distributes the same loss outside of bankruptcy.'

Insolvency theory leads to a consideration of the disadvantageous position of the company's creditors and their associated risk of financial loss in insolvency against the socio-economic impact of the demise of the company on all stakeholders and not just the creditors. It would also not come as a surprise that CIPs do not have the time to consider Insolvency theory in the execution of their duties.[58]

4.2 Beneficiaries: A Balancing Act

It is extremely challenging for the CIP to balance the interests of all these stakeholders, as each person or group involved in the restructuring proceedings have their own ideas as to how the company's risks should be dealt with.[59] Moreover, insolvency proceedings are often regarded as a zero-sum game where 'more for me is less for you'.[60] Such an outlook on insolvency proceedings adds fuel to the flames with regard to competing stakeholder' interests during insolvency proceedings. As part of this balancing exercise, it might be useful for the CIP to consider the ability of stakeholders to influence the restructuring procedure. Moreover, it might become necessary to sacrifice the interests of some for the benefit of others in this balancing exercise.[61]

The ultimate control of the undertaking in solvent circumstances lies with the shareholders.[62] A corporate law theory that does not focus on the shareholders' interest will run into problems despite any moral underpinning to have a stakeholder-inclusive approach. This would also be true of an insolvency theory that places great emphasis on the protection of stakeholders' interests within a creditor-controlled insolvency system. It is a common element in many jurisdictions' insolvency proceedings (both rescue and liquidation) to place power and control of the direction of the proceedings in the hands of the creditors.[63] Consequently, the interests of creditors need to be protected. They need to be the beneficiaries of office holders' duties as their cooperation in the insolvency process is essential to its success (especially in the case of a rescue or turnaround):

Creditor participation in rescue models is indispensable. Without creditor participation and support, it is almost inevitable that any proposed rescue plan by the company will fail. It is therefore not surprising that all of the rescue models that we consider make provision for

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[58] Comment made by Professor Christopher Symes form the University of Adelaide, Australia at the Academics' Colloquium of the INSOL Singapore Conference 1–2 April 2019.

[59] V Finch, 'Corporate Insolvency Law: Perspectives and Principles' (Cambridge University Press 2002) 192–3: Shareholders and directors will tend to favour ensuring that the company continues to operate for as long as possible. The former are residual claimants in insolvency and have little to lose by trading on. Both shareholders and directors will thus tend to gamble on further business activity since they will enjoy whatever gains will result. Employees, again, will tend to favour continuing trading in the hope of securing their jobs and in the knowledge that further losses will be borne by other parties.

[60] M Harner, 'The Search for an Unbiased Fiduciary in Corporate Reorganizations' (2011) 86(2) *Notre Dame L Rev* 469, 493. See also Warren (n 37) 789:

By definition, the distributional issues arising in bankruptcy involve costs to some and benefits to others. Enforcing the state law collection rights of secured creditors often comes at the cost of defeating the state law collection rights of unsecured creditors whose claims are discharged without payment. A priority payment to one unsecured creditor necessarily leaves less for the remaining creditors. The debtor's estate – and thus its creditors – profits from assigning a favorable lease, but this costs the landlord whose lease specifically provided for no assignments. The benefits reaped by employees or suppliers relying on the continuation of a business are purchased at the expense of every creditor who gives up valuable state collection rights as part of the plan to allow the debtor business a second chance at success.

[61] Nimmer and Feinberg (n 4) 32: 'Actions that benefit the one may harm the other. As a fiduciary to both, the operating officers must inevitably make choices in cases where the interests of one require sacrificing the interests of the other.'

[62] Keay (n 48).

[63] Milman (n 10) 21 on the role of creditors in insolvency: 'Indeed, as the company degenerates, they become *the* dominant stakeholders. Accordingly, their consent will be required for any sort of restructuring…'.

varying degrees of creditor participation from full-blown creditor committees to creditor representatives.[64]
In most circumstances it would not be advisable that a restructuring CIP exercise his/her duties in the interest of creditors exclusively.[65] Corporate restructuring proceedings are complex, involving more than just the enforcement of private rights because the success or failure of the business will affect the livelihood of individuals and communities alike.[66]
For this reason, it is suggested that a restructuring CIP should be required to treat creditors' interests as paramount. This approach would be conforming to the statutory fiduciary duties of CIPs in several jurisdictions.[67] Despite the emphasis on creditors, the interests of other stakeholders ought not to be forgotten. This can be described as the 'Enlightened Creditor Value' (ECV) approach.[68] The ECV can be seen as a compromise between the creditor theories and stakeholder theories of insolvency. The CIP should be encouraged to achieve the best outcome for creditors by taking account of all the relevant considerations for that purpose and this involves the taking of a proper balanced view of the short and long term, including the interests of the shareholders and employees, customers, suppliers, financiers and others as well as to consider the impact of the company's possible demise on the community. This can be further qualified by stating that the extent to which a CIP would have to consider the interests of other stakeholder in the exercise of his/her duties would depend on the nature of the proceedings and the scope of the financial difficulty the debtor company is facing. Essentially a CIP could be expected to consider a wider group of stakeholders in a rescue proceeding. If the financial difficulty of the debtor has not reached the stage of 'doubtful solvency' as Hawke states,[69] then the CIP should take greater care to consider the interests of the company and its shareholders.[70] Where the company is, however, beyond that point and has entered the 'twilight zone' the CIP should keep the interests of the creditors at the fore.[71] Where the CIP is appointed as the liquidator of the company he or she owes fiduciary duties to the creditors of the company but also to the company itself.[72] Liquidators, therefore exercise their duties for the benefit of the creditors in the first instance and then for the benefit of the shareholders. There is also much to be said about the competing interests of creditors but that is beyond the scope of this chapter.[73] Ultimately, the basic position is that CIPs are required to treat creditors' interests as paramount. The interests of employees or other

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64 A Smits, 'Corporate Administration': A Proposed Model' (1999) 32(1) *De Jure* 80, 90.
65 Dickfos and Anderson (n 5): 'In resolving this it is likely that the creditors' interest is paramount but it cannot be said that they are the only stakeholders in companies that are potentially salvageable.'
66 O Brupbacher, 'Functional Analysis of Corporate Rescue Procedures: A Proposal from an Anglo-Swiss Perspective' (2005) 5 *J Corp L Stud* 105, 106.
67 See Anderson (n 25) 247: '…it will be necessary to interpret the obligation to discharge their duties in the best interests of the corporation, as largely being directed at the interests of creditors'. In relation to the duties of voluntary administrators in Australia.
68 L Jacobs, INSOL International Funded Project report: Corporate insolvency practitioners, ethics and remuneration: Not a case of Moral Bankruptcy? Published as a Special Report 2020.
69 Hawke (n 31) 59.
70 Ibid 59: '…as long as the company remains on the right side of "doubtful solvency," any consideration for creditors' interests need only be minimal'.
71 Milman (n 9) 21.
72 A Keay and P Walton, *Insolvency Law Corporate and Personal* (4th edn, Sweet & Maxwell 2017) 298, 299.
73 Harner (n 60) 494: 'Creditors are not benevolent by nature. Rather, they endeavor to maximise their individual returns';
Whether a creditor is seeking a larger return or control of the corporation, it tries to influence or control the restructuring process to achieve its objectives. The creditor's objective and pursuit of control in turn might conflict with the debtor's restructuring plan or the efforts of other creditors or shareholders to influence the process.

stakeholders should be considered in performing these duties – but only where this would be in the creditors' interest.

5. THE DUTIES AND THE ISSUES

The United Nations Commission on International Trade Law's Legislative Guide on Insolvency Law confirmed the importance of the ethical conduct of IPs and highlighted the attributes of integrity, independence, impartiality and requisite and relevant knowledge and experience.[74] It can, therefore, be deduced that the guidance suggests that provisions relating to these attributes be included in the insolvency frameworks of jurisdictions. In this regard, it should be mentioned that some jurisdictions include CIPs under provisions relating to the duties of the directors of the company.[75] This is not ideal as the duties and circumstances between the office of director and CIP differ vastly, moreover, it is not the same type of fiduciary relationship. The fiduciary duties owed by the CIP during the course of the insolvency proceedings are, however, familiar in a corporate setup (and reminiscent of those owed by directors), hence comparable threats to compliance with regard to these duties arise. However, the fiduciary obligation of a CIP needs to be defined by the rules that are required in order to maintain the integrity of this unique relationship.[76]

This section will entail a brief introduction and discussion of the key fiduciary duties in the context of a CIP and will highlight some of the main issues that give rise to threats regarding non-compliance.

5.1 The Duty to Act with Good Faith

The CIP is deemed to act in good faith if he acts with honesty, integrity and confidentiality. On account of his membership of a particular profession,[77] the CIP is in most instances already required to demonstrate impeccable probity and honesty.

The beneficiaries in the insolvency proceedings are at 'at the mercy of' of the CIP's discretionary powers;[78] they have to trust and/or rely on the CIP to protect their interests. This reliance and trust in the practitioner demands honesty, truthfulness and transparency on the part of the CIP. It is crucial for the CIP to be honest and truthful with the beneficiaries and act with integrity towards them at all times. Honesty implies that he/she should refrain from lying while truthfulness means that he/she should not conceal any facts from parties with an interest in the outcome of the insolvency. Honesty further implies that the CIP should be open and transparent in his decision-making and should not conceal or misrepresent any information. The CIP should be honest and truthful when negotiating on behalf of the beneficiaries as well as when reporting on his/her acts and dealings.

The CIP must refrain from misleading a creditor, employee or shareholder of the company through any act or omission. Honesty and frankness by the CIP may also help neutralise any negative emotions during the insolvency proceeding. An honest and transparent approach to the procedure would instil confidence among beneficiaries and the public, and facilitate better cooperation. In restructuring proceedings this duty will include honesty and truthfulness as to the prospects of success.

Another element to the duty of good faith is confidentiality. The CIP will acquire a vast amount of sensitive information, sometimes even before being formally appointed. Client

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[74] UNCITRAL Legislative Guide on Insolvency Law 2004 available online at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (hereafter UNCITRAL Guide) 188, para 115: 'The insolvency law should specify the qualifications and qualities required for appointment as an insolvency representative, including integrity, independence, impartiality, requisite knowledge of relevant commercial law and experience in commercial and business matters.'

[75] Australia and South Africa.

[76] Flannigan (n 13) 311.

[77] Lawyers, Accountants, Auditors.

[78] F Cassim *et al*, *Contemporary Company Law* (2nd edn, Juta 2012) 512: 'Typically, in fiduciary relationships, one party is vulnerable to, or is at the mercy of, another party's discretion.'

lists, trade secrets, confidential business discussions and internal financial statements constitute examples of information and sources of information that will be disclosed to the CIP. The fact that corporate information is nowadays regarded as one of the company's most valuable commodities makes confidentiality a significant obligation of the restructuring CIP in the context of a struggling company.[79] The CIP must, therefore, be careful not to disclose (even inadvertently) any confidential information to third parties. A CIP may also not use any information gleaned from his/her position as fiduciary to facilitate a personal benefit or benefit for a person related to the CIP and should be careful not to be guilty of insider trading or using information to compete with the company. It is also essential that CIP refrains from divulging sensitive information lest it could damage the goodwill and reputation of the company. Clearly, therefore, the CIP's duty to good faith has a significant impact on the success of the insolvency proceedings. The duty to act in the best interest of the beneficiaries When obligated to act in the best interests of beneficiaries, a normal commitment would be to avoid any conflicts of interest. In terms of the 'no profit' rule, the CIP may not earn any profits on account of his/her position as fiduciary. Likewise, the 'no conflict' rule provides that the CIP may not put himself/herself in a position where the beneficiaries' interests are in conflict with his/her own. Conflicts of interest may cause a lack of independence and impartiality on the part of the practitioner. 'The rationale of both the "no-conflict" and the "no-profit" rule is to underpin the fiduciary's duty of undivided loyalty to his or her beneficiary.'[80]

When a practitioner is approached to serve as a CIP, the first steps should be to identify any potential conflict of interest with the company or other stakeholder. If such a conflict of interest is discovered and appears to be material, the CIP should decline the appointment. On the other hand, where the conflict is immaterial, and the practitioner is convinced that he/she would be able to remain impartial, the informed consent of the beneficiaries would be necessary to continue. Any material information, as well as the general nature of the interest will have to be disclosed to the beneficiaries.

In most insolvency proceedings there is an inevitability that assets of the company will be disposed of in order to generate funds. This could pose as one of the most conspicuous ways in which a conflict of interest may arise between the CIP and the beneficiaries; when the CIP decides to contract with the company (or other beneficiaries) in a personal capacity. This could in effect place the CIP at both ends of the contract, which may cause a strong suspicion that the practitioner, being a fiduciary, is serving his own interests instead of the beneficiaries'.[81] There are also a number of ways in which the CIP would be able to manipulate such a transaction for his/her benefit, for example, fixing an advantageous price, as the CIP would have knowledge of the bare minimum the company would accept, and drafting (or having an input in drafting of) a contract with favourable clauses.[82]

In order to preserve the loyalty and independence of the CIP it is strongly recommended that the CIP refrains from entering into contract with the company in his personal capacity. Some

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[79] J Shepherd, *The Law of Fiduciaries* (Carswell 1981) 326–7:

Like other intellectual property, information must be treated as property because it exhibits so many of the characteristics of property. Money is spent to acquire it, and both the possessors and those who want it consider it very valuable. Like other assets, information is bought, sold, and protected in many of the same ways.

Cassim (n 78) 554.

[80] Cassim (n 78) 512.

[81] Shepherd (n 79) 157:

Put another way, the rule could be expressed: there is a heavy presumption that a person who has acted on both sides of a transaction, on one side as a fiduciary and on the other side in his individual capacity, has used his fiduciary powers to benefit himself.

[82] Shepherd, ibid.

jurisdictions widen the scope of the term 'personal' to include close friends and family of the CIP in order to avoid an indirect acquisition or benefit.[83]

5.2 The Duty to Exercise one's Powers in an Independent and Impartial Manner

The CIP will only be able to exercise his discretion and powers in the best interest of the beneficiaries if he is independent and impartial. This is especially true given the balancing act he/she has to perform in considering and dealing with the competing interests of the stakeholders.[84]

The call to independence and impartiality of the CIP aims to ensure that the CIP does not allow bias, a conflicting interest, or the undue influence of others to override professional and/or business judgments in the execution of his duties and obligations, and many jurisdictions have strict legislative provisions to deal with this.[85]

Independence is twofold. CIPs must be independent in fact, and seen or perceived to be independent. Independence in fact requires that the CIP be factually free from any influences that could compromise his/her judgement. CIPs must, therefore, avoid all personal and professional relationships and direct or indirect interests that will adversely influence, impair or threaten their integrity and ability to make decisions. Independence in perception, on the other hand, includes the avoidance of circumstances that would lead a reasonably informed third party to conclude that the CIP's integrity, independence and impartiality have been compromised.

Being seen or perceived to be independent and impartial is of extreme importance in the context of insolvency proceedings. If the stakeholders involved in the proceedings perceive the CIP to be biased or to lack independence (even though it might be untrue) it would negate the trust and reliance that they have placed in him/her. Without the trust and reliance, the stakeholders and beneficiaries will no longer believe that the CIP is bound to act in their best interest,[86] which could lead to a discontinuance of their cooperation with the CIP and the process. This could be particularly cumbersome in rescue proceedings where the cooperation of certain parties is essential to the success of implementing a rescue plan or strategy. In other words, a perceived lack of independence could undermine the success of an entire rescue proceeding.

In the pursuit of ensuring the independence of CIPs, jurisdictions usually identify certain personal and professional relationships or situations that might give rise to a lack of independence. These might include any professional or personal association with the company or a company director,[87] a company shareholder, a company employee, company

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[83] In Australia, the sixth principle of the ARITA Code of Professional Practice provides that: 'A Practitioner must not acquire directly or indirectly any assets under the administration of the Practitioner.'

[84] Anderson (n 25) 241: 'The clear legal duty is, of course, to remain independent in the sense of not favouring particular interests.'

[85] Australia in particular has extensive provisions dealing with the independence and impartiality of CIPs. See sec 448C of the Corporations Act 50/2001 and the Australian Restructuring, Insolvency and Turnaround Association (ARITA) Code of Professional Practice. Australia's firm approach to independence and impartiality stems from the well-known Harmer Report (Australian Law Reform Commission General Insolvency Inquiry Report No 45 (1988)) that emphasised that impartiality is one of the nine fundamental principles for an efficient insolvency regime: 'An insolvency administration should be impartial, efficient and expeditious.'

[86] *Bovis Lend Lease Pty Ltd v Wily* [2003] 45 ACSR 612: 139.

[87] *Commonwealth Bank of Australia v Irving* [1996] 65 FCR 291. In this case the appointed CIP had previously acted as an accountant for the company and was also engaged in the same charity and sporting events as a director of the company and who had known one another for 16 years. These circumstances led to an application for the removal of a CIP based on a perceived lack of independence; *Bovis Lend Lease Pty Ltd v Wily* [2003] 45 ACSR 612. In this case the CIP had previously acted as an adviser to one of the company's directors; *African Banking Corporation of Botswana v Kariba Furniture Manufacturers and others (228/2014)* [2015] ZASCA 69; 2015 (5) SA 192 (SCA0; [2015] 3 All SA 10 (SCA). In this case the CIP had previously acted as an attorney for the company.

business partners, other firms or entities controlled by the company, either secured or unsecured company creditors, company debtors, or even the relatives of company officials. As the aforementioned list does not purport to be a *numerus clausus* of relationships, each instance of alleged lack of independence would have to be assessed against the prevailing circumstances.

The following elements of the insolvency proceedings are particularly thorny and often give rise to threats to the independence and impartiality of the CIP:

(i) Pre-appointment contact – In practice, prior consultations often occur between the CIP and the company or stakeholders. These consultations may also create the impression of a lack of independence and impartiality on the part of the CIP. Yet the prior consultations need not result in the disqualification of that person as practitioner, and may in fact constitute a crucial part of the insolvency process. Thus, not all forms of contact between the CIP and stakeholder parties prior to the practitioner's appointment would necessarily result in a lack of independence. Nevertheless, there should be limits to what would be deemed acceptable engagement during such consultations. Should the consultation involve material engagement by any of the stakeholder parties, the CIP would no longer be independent and should therefore not be appointed as practitioner. The advice provided by the practitioner in the prior consultation should be limited to the company's financial position, the company's solvency, the effects of potential insolvency, and any alternatives to insolvency. It would also make sense for the CIP to set out the nature and extent of prior consultations in a disclosure statement. This would facilitate improved transparency and help prevent accusations of a lack of independence.

(ii) Appointment – In many jurisdictions the CIP can be appointed by either the board of directors or a stakeholder (usually a shareholder or creditor). This may lead the appointee to expect that the practitioner would prioritise their interests. In some instances, these persons, being the 'principal', even believe that it is within their power to influence the CIP. Thus, it is vitally important for the CIP to be aware of his responsibilities in this regard. The practitioner should not make any promises to those who appointed him, and should make it very clear that he is expected to act in the interests of all affected persons. The duty of independence also obliges the CIP to scrutinise each given situation prior to accepting an appointment. Such scrutiny would include reasonable steps to determine any possible association or conflict of interest with any stakeholder.

(iii) Subsequent Appointments – In some jurisdictions, like England and Wales, CIPs are allowed to be appointed in different capacities in relation to the same debtor company in subsequent proceedings.[88] This could, of course, pose a risk of actual bias as well as self-interest threats. An unethical CIP could be tempted to not affect a successful corporate rescue in the hopes of being appointed as the liquidator of the company and gain the additional fees for the subsequent appointment.

There is an argument in favour of the disclosure of relationships and declaration of independence by the CIP as a possible solution to the issue.[89] However, the mere disclosure of any such relationships as a solution is flawed. No disclosure serves as a guarantee of impartial and objective conduct. Instead, the declaration by the CIP should be seen as a disclosure of those relationships that do not pose any risk to the practitioner's independence.

5.3 The Duty of Care, Skill and Diligence

[88] In South Africa this is prohibited by law.

[89] In England and Wales, Australia and South Africa some form of declaration of independence is required.

Looking at matters in the round and with one eye on professional discipline, it can now be asserted with some confidence that IPs should display reasonable care when discharging their office or else face the possibility of a claim in negligence.[90]

When a company is in financial distress, it is extremely important that the person who is appointed as CIP does not act recklessly with regard to the affairs and property of the company. It is possible that the objectives of the insolvency proceedings (to protect the interests of stakeholders) can be frustrated through the incompetence and carelessness of the practitioner and that this could prove fatal in rescue/restructuring proceedings. The stressful circumstances and vulnerability of the stakeholders leave no room for any mistakes, as the smallest misstep can mean the end of the company. Probably the biggest difference between normal management and management in financial distress or difficulty is that the latter will endure far higher levels of stress. On the other hand, it is these same circumstances that will inevitably be something that will heavily influence the CIP's conduct and decisions.

In this regard it could be useful to utilise the recognised twofold test in relation to the duty of care skill and diligence.[91] The CIP's conduct should be measured against that of a reasonable CIP.[92] This implies that it should be established whether he acted with the same degree of care, skill and diligence that may reasonably be expected of a reasonable practitioner in the same circumstances, having regard also to his personal attributes and qualifications.

A CIP can, however, be regarded as an expert in insolvency practice as a result of his/her experience and training and hence an even higher standard is to be met with regard to the subjective test. As an expert, a CIP should to a certain extent be able to be subjected to the test of a reasonable expert.[93] Due to the fact that CIPs will have varying degrees of experience and training, the subjective elements of the test are important and ought to be applied on a case-by-case basis in order to determine whether there was any breach in duty. This approach seems to be aligned with the guidance provided by UNCITRAL:

One approach may be to require the insolvency representative to observe a standard no more stringent than would be expected to apply to the debtor in undertaking its normal business activities in a state of solvency, that of a prudent person in that position. Some States, however, may require a higher standard of prudence in such a case because the insolvency representative is not dealing with its own assets, but with assets belonging to another person.[94]

A professionally competent CIP will act with the necessary care, should obtain an adequate degree of understanding of the nature of the company's business in order to understand how the business functions and exactly what is expected of him/her.[95] The CIP should also acquire knowledge of the industry in which the company operates.

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[90] Milman (n 9) 92.

[91] An objective test is to be applied in order to determine what the reasonable person would have done in the same situation as well as a subjective test which take into account the general knowledge, skill and experience of the specific person.

[92] *Re Charnley Davies Ltd* 1990 BCC 605: 618:

An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company's assets is, therefore, a complaint of professional negligence and in my judgment the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession but by those of an ordinary, skilled practitioner. In order to succeed the claimant must establish that the administrator has made an error which a reasonably skilled and careful insolvency practitioner would not have made.

[93] R Bradstreet, 'The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Le4ders' Willingness and Growth of the Economy' (2010) 22 *SAMLJ* 195, 209.

[94] UNCITRAL Guide (n 75) 184, para 61.

[95] R Mokal and J Armour, 'The New UK Corporate Rescue Procedure – The Administrator's Duty to Act Rationally' (2004) 1 *International Corporate Rescue* 1, 6:

6. CONCLUSION AND PROPOSALS FOR BETTER COMPLIANCE

The profession of the CIP in its most basic form requires that the CIP acts in good faith and in the best interest of the beneficiaries with the necessary care and skill at all times. The sheer extent of the practitioner's fiduciary duties calls for well-defined guidelines to enable the practitioner to navigate his/her responsibilities and perform the duties and functions of the office in the best interests of all beneficiaries and the company. The finer nuances of these duties will differ in various jurisdictions but can be summarised as above.

CIPs are often in breach of their fiduciary duties not because they are unethical but because they do not understand the extent of what is expected of them in the role of CIP. One way in which an attempt can be made to remedy this, is the drafting of a code of professional conduct specifically aimed at CIPs. This will provide CIPs with the opportunity to examine the nature and goals of their work, it also offers information to others (the stakeholders and general public) about what can be expected from members of the insolvency profession. To this end INSOL International[96] has endeavoured to compile a set of Ethical Principles for Insolvency Professionals as best practice guidance to be incorporated by member organisations across the globe. The Principles were published in June 2019 and address the issues regarding the behaviour of the generic professional insolvency practitioner.[97]

The issue concerning the question of to whom the CIP owes duties is not free from confusion and is dependent on the type of office-holder, the type of proceedings, the extent of financial difficulty and the stakeholders involved. The opinion expressed in this chapter regarding who the beneficiaries of a CIP's duties are, is one of many and is open to debate and meant to stimulate further thought and research.

The precise scope of their duties can be of particular concern to CIPs taking appointments in rescue/restructuring proceedings. This is due to the fact that many of the professionals appointed to this office come from the ranks of professions other than the legal profession. A framework which provides these CIPs with more certainty as to what can be expected of them would benefit the entire corporate rescue system of a jurisdiction.

In the end the aim is enlightenment. A person who accepts the office of CIP of a particular company undertakes the responsibility of ensuring that he or she understands the nature of the duty a CIP is called upon to perform.[98]

So for example, not to take into account reasonably discoverable factors relevant to determining whether the continuation of the company as a going concern (by preserving for its benefit the specific skills and knowledge of the local market of its pre-distress shareholder-managers, say) would result in better expected returns for its creditors than if the company's business were to be sold off to another company (with little knowledge of and enjoying no goodwill in market), would be to ignore considerations relevant to serving the creditors' interests, and would thus constitute a breach of duty.

[96] INSOL International is a world-wide federation of national associations of accountants and lawyers who specialise in turnaround and insolvency. There are currently over 44 Member Associations with over 10 500 professionals participating as members of INSOL International.

[97] For more information regarding the INSOL Principles, contact Dr Sonali Abeyratne (Technical Director INSOL International) at Sonali@insol.ision.co.uk.

[98] *Daniels v Anderson* [1995] 13 ACLC 614.