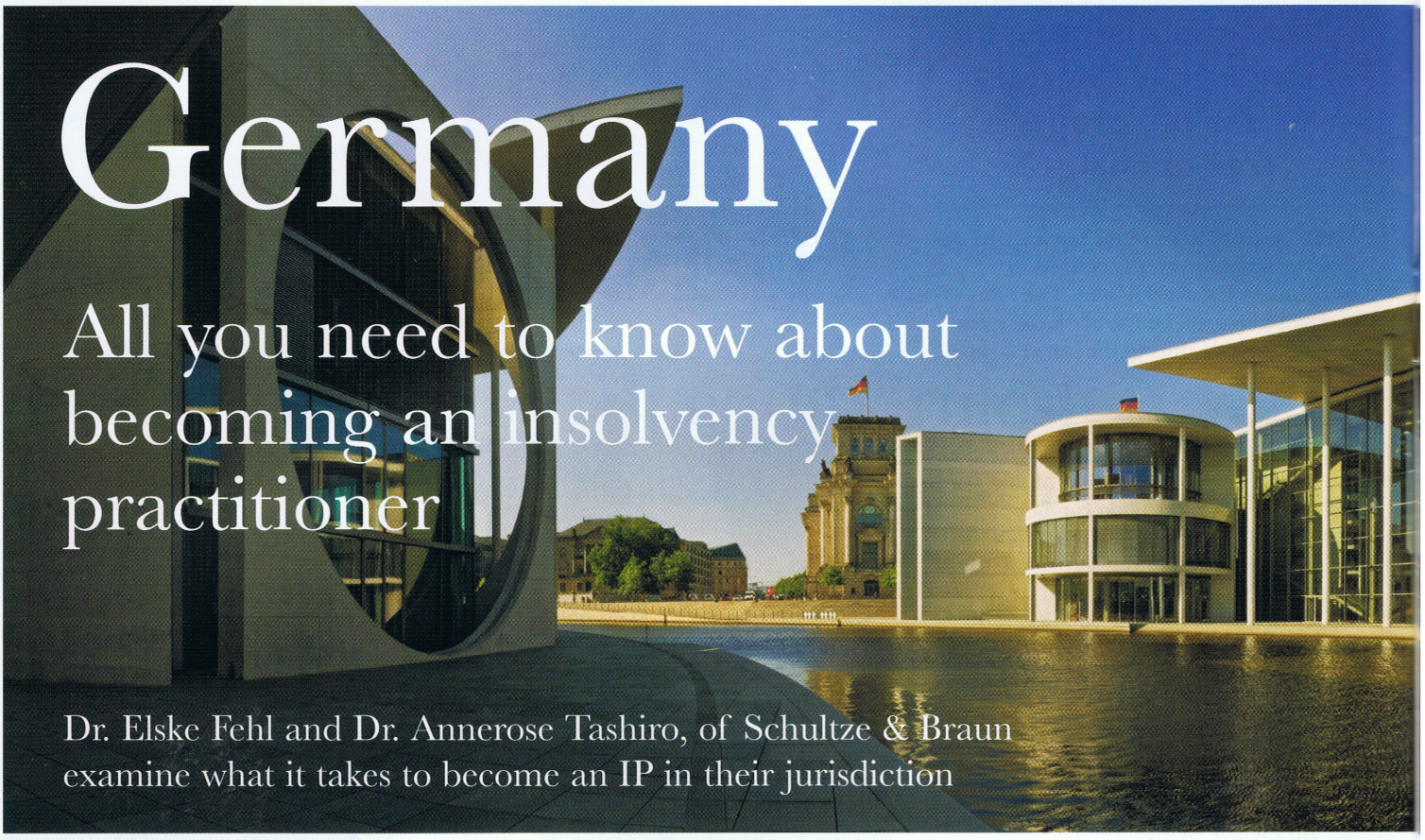
Germany

All you need to know about becoming an insolvency practitioner



Dr. Elske Fehl and Dr. Annerose Tashiro, of Schultze & Braun examine what it takes to become an IP in their jurisdiction

Access to the profession

In Germany, access to working as an Insolvency Administrator (**IP**) is relatively open, as defined by legislation. There is no examination, licence or special training to be completed. Nor is it systematically necessary to have passed any legal (or other) higher education studies in order to work as an insolvency administrator. In practice, however, it will be found that more than 90% of people working as insolvency administrators are lawyers.

Only individual persons can be appointed as insolvency administrators. Law firms, companies or other groups of persons cannot be employed as insolvency administrators even if they consist of people who already work as insolvency administrators or are adequately qualified for the task.

Applicable legislation provides only a few points of reference as to the criteria for the appointment of insolvency administrators. According to §56 of the German Insolvency Act (**"InsO"**), an insolvency court has to appoint a person whose professional experience qualifies him to act in a given instance, and who must be independent of the debtor in insolvency and of the creditors. The selection must be made by the insolvency court from a category of such persons as are prepared to take on the duties of insolvency administration.

Persons who are prepared to take over the duties of insolvency administration are kept on 'selection lists' by most insolvency courts. Since the law provides no more detailed provisions on the subject, the criteria to be fulfilled for acceptance on the list have to be laid down by the courts or by individual insolvency magistrates themselves.

In view of the declining numbers of proceedings, the incorporation of potential candidates as insolvency administrators on the selection list and their selection in an individual case have become the focal point of increasing interest. In 2006, the Federal Constitutional Court (the sovereign instance to be consulted in issues of basic German law) decided that adequately qualified persons were entitled to be included on the court's selection list. Subsequently, though, the criteria for suitability for an individual instance needed further definition. This has not yet been achieved in the form of any legal regulation and is still up to the individual insolvency magistrate.

In order (amongst other things) to standardise the criteria for acceptance on preliminary selection lists kept by courts, a committee was created in early 2007 that comprised not only individual, well-experienced insolvency magistrates, legal specialists and insolvency administrators, but also representatives of unions, banks and other parties from the creditor side. The committee prepared proposed resolutions for consistent court practice, which corresponded in terms of its most important points with professional principles already prepared by one of the three professional organisations of insolvency administrators in Germany, VID (German abbreviation for German Association of Insolvency Administrators).

Accordingly, the most important criteria for incorporation on selection lists are as follows.

- Completion of advanced studies in law or economics;
- Particular insolvency law and industrial knowledge in the legal areas identified in §14 of 'FAO' (German abbreviation for Specialist Lawyer Regulations);
- At least three years of practical work as an insolvency administrator or working in an insolvency administration office on specific insolvency matters;
- Well-organised financial circumstances;
- Office equipment and specialist employees adequate for the task of conducting insolvency proceedings;
- Geographical proximity or accessibility;
- Impartiality;
- Insurance for liability to cover loss of assets in relation to working as an

insolvency administrator, with an adequately high sum insured; and
- No legally effective criminal sentences.

It should be noted that this is not a binding regulation and that the decision as to incorporation on the selection list is still a matter for the individual insolvency magistrate to assess. In practice, however, it can be confirmed that the listed criteria have already been in use by a large number of courts since the aforementioned Federal Constitutional Court decision.

Appointment

Insolvency administrators will be appointed by the insolvency court for specific cases. The insolvency court is a department of the Local Court, the lowest level of legal instances in Germany. The insolvency magistrate chooses administrators suitable for an individual case from the aforementioned selection list (§56 InsO). This decision may, for example, be influenced by the consideration of whether the potential administrator has specific knowledge in the field or the necessary language capabilities, or whether they have experience in helping companies to continue operation.

The administrator should be independent from all parties involved in the individual case, i.e. they must have no holdings in the company or in any related company. Furthermore, neither the insolvency administrator nor any 'person professionally associated with him' should have advised the debtor within the last four years prior to the application for insolvency, nor should they have regularly provided service for any credit corporation involved in the specific proceedings; all this is in order to assure the administrator's impartiality.

In respect of the administrator's impartiality, there is also a discussion of how acceptable it is for a given administrator to be appointed by recommendation from a creditor involved in the proceedings. So far, this has been treated by many courts as grounds for exclusion from appointment. The recommendations for resolutions offered by the aforementioned committee will mean that this no longer constitutes grounds for exclusion. However, since these recommendations are not binding, no magistrate is directly obliged to modify their appointment procedure and can continue to treat an administrator who has been proposed by a creditor as excluded from a given case.

In accordance with the professional rules for insolvency administrators, the selected administrator has to notify the court if they are no longer capable of processing the assigned proceedings with adequate expertise. An instance of this nature would arise if the necessary impartiality were not established, if the candidate's office organisation were not adequate for the order of magnitude of the proceedings involved, or if their capacity were taken up due to heavy loading from other insolvency proceedings.

In the context of the first meeting of creditors, which normally takes place between six and 12 weeks after the institution of insolvency, the insolvency court's appointed administrator may be dismissed. In their place, it is possible for someone else to be appointed as the administrator (§57 InsO). The corresponding decision has to be taken by the majority in the meeting of creditors and the person who has so far covered the duty of insolvency administrator has no legal recourse against that decision. Although there may be concerns that, in particular, the major creditors involved in the proceedings might use this option in many instances to replace an administrator who was not convenient for their purposes with one who was more amenable, in practice it will be found that the dismissal option enshrined in §57 InsO is seldom resorted to.

Control body

Insolvency administrators are subject to the supervision of the insolvency court (§58 InsO).

In addition to the reports to be produced on a half-yearly cycle, the insolvency court may require the insolvency administrator to provide individual items of information or more comprehensive reporting at any time. If the administrator fails to fulfil their process-related obligations, the court may, following a corresponding warning, impose a fine of up to €25,000.00 in any individual case.

Furthermore, the insolvency court may dismiss the insolvency administrator from office for a significant reason (§59 InsO). This may be imposed officially or upon a request from the creditor or from the administrator, but in practice it happens relatively infrequently.

Creditors also have certain rights of examination within the context of insolvency proceedings. Accordingly, the meeting of creditors may require the administrator to produce information concerning their management and the status of the proceedings (§79, Clause 1 InsO). Upon a decision from the meeting of creditors, a creditors' committee may be appointed whose members will monitor the management work done by the insolvency administrator and who can and must investigate financial transactions (§69 InsO). If no creditors' committee is appointed, funds management can also be investigated by the meeting of creditors (§79, clause 2 InsO).

If the insolvency administrator causes losses due to their culpable infringement of the obligations incumbent upon them as an insolvency administrator, they are directly liable for those losses (§60 InsO). A claim is made against the administrator directly by the injured party through the standard legal channels. This does not come under the insolvency court's sphere of competence. In cases of serious and recurrent infringements, the administrator may be excluded from the court's preliminary selection list, which is also an important 'monitoring instrument'.

Remuneration

The insolvency administrator's remuneration is governed in a separate regulation that has been issued by the Federal Ministry of Justice, the 'Insolvency administration fees regulation' (**InsVV**). By contrast with a formal law such as that represented by the German Insolvency Act, there is no regulation that has been approved by the meeting of parliament consisting of national representatives in any formal legislation procedure – in fact, it was issued by the competent ministry.

Given the system of remuneration regulations, the amount of the administrator's remuneration is determined by the magnitude of the insolvency estate. In this context, the insolvency estate to be taken as the basis for remuneration calculations consists mainly of the proceeds of disposal of all uncharged assets of the debtor and any surplus from continuation of the debtor's business.

The issue of consideration of assets covered by a third party right in the form of a preferential creditor right, such as in the case of assets covered by surety or pledging, becomes more complicated. Such cases must be included in the scope of calculation if the administrator was authorised to dispose of the assets, i.e. if they were in their possession upon institution of insolvency proceedings. However, their fee should not rise, by virtue of including such assets, by more than one half of the amount that has flowed into the estate for purposes of the costs of assessment. Since 4% of the proceeds of disposal will regularly flow into the estate for the costs of assessment, depending on the legally envisaged flat rates applied, remuneration may not increase (as the result of incorporation of the assets into the scope of calculation) by more than two per cent of the proceeds of disposal for the preferential creditors' right.

From the correspondingly calculated assets, the insolvency administrator will receive percentage remuneration that is graded according to the amount of the estate. From an estate up to the amount of €25,000.00, the remuneration will amount to 40%, and the amount of the estate over and above that value and up to €50,000.00 will attract remuneration of 25%, whilst in relation to sums in excess of €50,000.00 the remuneration will moderate in further stages from 7% down to 0.5% for sums in excess of €50 million. Accordingly, remuneration is staggered degressively.

A minimum amount of €1,000.00, which must not be fallen short of, is envisaged by law for the insolvency administrator's remuneration. This minimum remuneration is increased, irrespective of the quantity of creditors, if more than 10 creditors report their claims in proceedings in stages of €150.00 (or in stages of €100.00 in the case of a quantity of creditors exceeding 31) for each additional five creditors.

Furthermore, the insolvency administrator may charge supplements on the correspondingly calculated amount of remuneration if certain activities transcending the normal scope of duties were required. Examples of this would be: long-term continuation of the company's existence, the preparation of an insolvency plan, the processing of extensive issues of industrial law etc.

In cases where the circumstances are more straightforward than on average, the standard fees may even be reduced.

In addition to the insolvency administrator's remuneration, they can also claim expenses. In this context they have the option of certifying the expenses at cost or claiming a flat rate of 15% of the standard fee for the first year and 10% of the standard fee for each further year of their brief. However, the annual flat rate for expenses must not exceed €3,000.00.

VAT, currently at 19%, has to be charged both on the remuneration and on expenses.

The insolvency administrator applies for their remuneration on completion of the insolvency proceedings. The remuneration application will be decided upon by the insolvency court as represented by the legal specialist for the insolvency proceedings.

Since the administrator cannot be expected to provide all works in advance of all payments in the context of a long-drawn-out case, they may apply for advance payments of their remuneration for work done so far. This will also be assessed and decided upon by the insolvency court.

DR. ELSKE FEHL
of Schultze & Braun, Nürnberg

DR. ANNEROSE TASHIRO
of Schultze & Braun, Achern & London