



**Universiteit
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GUIDELINES FOR OUT-OF-COURT RESTRUCTURING AND TURNAROUND PROFESSIONALS

**REPORT II: GUIDELINES FOR OUT-OF-COURT RESTRUCTURING
AND TURNAROUND PROFESSIONALS – THE PROCESS, THE TEXT,
THE COMMENTS, THE CRITICISMS AND THE
RECOMMENDATIONS**

A PROJECT COMMISSIONED BY INSOL EUROPE

Final Draft 30 October 2015

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Confidential

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List of Abbreviations

CEO	Chief Executive Officer
CRO	Chief Restructuring Officer
EIR	European Insolvency Regulation (EU)
IOH	Insolvency Office Holder
LLS	Leiden Law School
RTP	Restructuring and Turnaround Professional
R&A	Review & Advisory Group to the project
TRI-Leiden	Turnaround, rescue and insolvency team, LLS
TW Guidelines	INSOL Europe Turnaround Wing Guidelines

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1. Introduction and management summary

During the annual conference in Istanbul in October 2014 and on request of its Turnaround Wing INSOL Europe decided to commission a project to Leiden Law School (LLS) to design 'guidelines for out-of-court turnaround professionals'. By setting professional and ethical standards for the profession in Europe, the guidelines aim (a) to offer leadership to turnaround practice in Europe, (b) to promote out-of-court restructuring rather than liquidation, (c) to provide the basis for a long-term sustainable future for the business by ascertaining the quality of turnaround professionals, and (d) to enhance the trust in the profession on the market. The guidelines explicitly target out-of-court turnaround professionals.

The Leiden Law School team working on the project – the 'TRI-Leiden team', an abbreviation of turnaround, rescue and insolvency - consists of Professor Jan Adriaanse and Senior Researcher dr. Bernard Santen along with Researcher Gert-Jan Boon, master thesis students and interns.

The project is divided in two phases. The first, the research and analysis phase, culminated in the delivery of Report I, presented to the Executive of INSOL Europe early May 2015. The second, the design phase, is to deliver draft Principles and Guidelines for the Turnaround Wing. The present Report II discusses in Chapter 2 the process of the second phase of the project. It relates the process leading to the replacement of the original extensive 'Principles and Guidelines design' to a 'Guidelines only' approach. The actual Guidelines, six in all, are presented in Chapter 3. The introduction to the INSOL Europe Turnaround Wing Guidelines (TW Guidelines) defines what turnaround and restructuring mean. Guideline 1 describes when the TW Guidelines apply, i.e. only in out-of-court assignments. Guideline 2 is on Professional Attitude, Guideline 3 on the Ethical Attitude of the Restructuring and Turnaround Professional (RTP). The essentials on Communication with the Client, Communication with Stakeholders and on Governance are covered by Guidelines 4 – 6.

Chapter 4 contains the text of the Guidelines accompanied by Comments, being a clarification and explanation on the rules wherever deemed necessary by the authors of the report. The results of the member questionnaire held in the Summer of 2015 are shown in Chapter 5. Out of 117 respondents, 75% agreed with the TW Guidelines of which 21% strongly. Moreover, 18 respondents suggested improvements of the text, which resulted in two changes on the Guidelines and a number of additions on the Comments.

Chapter 6 surveys the main criticisms received during the process. Representing a minority of 6% who (strongly) disagree, essentially they are on the one hand that the TW Guidelines are not 'daring' enough and should have been more directive, and on the other that they are inflexible. Since these criticisms are not so easy to reconcile, the TRI-Leiden team in accordance with the Chair of the Review & Advisory Group (the Chair) decided to a 'Guidelines only' approach. Chapter 7 contains recommendations in order (1) to have the TW Guidelines accepted by INSOL Europe; (2) to encourage application by the INSOL Europe membership in practice; (3) to have this application monitored by a monitoring committee; and (4) to adapt and expand the TW Guidelines gradually according to the findings of the monitoring committee. It lists a number of issues that may have to be dealt with in the next phase of the project, to which we will refer in this report as 'TW Guidelines 2.0'.

We would like to acknowledge the members of the Review and Advisory Group (R&A) for their continuous support of the project in the various phases, for participating in conference calls and for commenting on the various versions. A special word of thanks goes to the Chair whose keen and constant interest in and enthusiasm for the project was key to get the involvement of the R&A as well as that of the members. However, the authors remain responsible for the content of this report.

Leiden, 30 October 2015

Professor Jan Adriaanse

dr. Bernard Santen

2. The process of the second phase of the project

Although the assignment concerns ‘to design guidelines for out-of-court turnaround professionals’, in Report I¹ the TRI-Leiden team suggested to the Turnaround Wing to design Principles as well as Guidelines. This in order to allow a distinction between abstract (Principles) and more specific (Guidelines) norms, a distinction that can be found elsewhere in literature and practice.

However, when mid-May the first non-public version of the Principles was sent out for commentaries to the Review and Advisory Group to the project (R&A), it turned out that it would be difficult to agree on a text already at that level of abstraction. Quite some R&A members thought the drafted Principles too directive and inflexible.

Therefore the TRI-Leiden team decided in accordance with the Chair to revert to the original track, being to design Guidelines only. It would be better to have a basic text which would be acceptable for the large majority of the membership, it was felt, than one with more provisions, but only acceptable to a small majority or even a minority. A basic text would be the ‘common ground’ to build on in the future, which was felt more valuable than a text that would not be adopted in the end. Moreover, the word ‘Principles’ was deemed too severe a concept by some R&A members, whilst ‘Guidelines’ were interpreted as a more flexible concept.

Having made this decision, the team redrafted the former Principles. This second non-public draft of the then Guidelines was sent to the R&A for commentaries by mid-June. By the end of June a conference call with the R&A was held. In that call and in other reactions received this new text gained major support in the R&A although some opposition remained.

The TRI-Leiden team subsequently reworked the text with the commentaries received from the R&A in mind. A survey of commentaries received over the process and how the team dealt with these is available as Chapter 6. By mid-July the first public version was ready. By 20 July this first public version was sent to the Executive, the Council and the Turnaround Wing members for commentaries in a first questionnaire, asking their opinion on the Guidelines, whether they would have text amendments, and whether they would suggest missing issues. Due to a technical miscommunication, they had only 8 days for a reply. Five members reacted.

Early August 2015, essentially the same text with some slight alterations (second public draft) was sent to all INSOL Europe members. A large majority voiced to agree with the draft text. Chapter 5 surveys the results of that questionnaire.²

By mid-September, the text of the TW Guidelines was lightly revised based on the commentaries received from the members (third public draft). These changes have been discussed in a conference call with the R&A in September. The third public draft (‘congress draft’) was presented to the INSOL Europe annual conference in Berlin on 2 October 2015 by dr. Bernard Santen of LLS and is included in this report as ‘final draft’.

¹ Report I, p.13 and 14.

² Which includes the 5 reactions received on the first public draft. The questionnaire was closed on 14 September 2015, at 24.00 hrs.

3. The TW Guidelines

The process described in Chapter 2 delivered the following Guidelines.

INSOL EUROPE TURNAROUND WING GUIDELINES FOR RESTRUCTURING AND TURNAROUND PROFESSIONALS ('TW GUIDELINES')

Final draft 30 October 2015

INTRODUCTION

The INSOL Europe Turnaround Wing Guidelines for restructuring and turnaround professionals ('TW Guidelines') aim (a) to offer leadership to the turnaround practice in Europe, (b) to promote out-of-court restructuring rather than liquidation, (c) to provide the basis for a long-term sustainable future for the business by ascertaining the quality of turnaround professionals, and (d) to enhance the trust in the profession on the market. *Restructuring* means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity.³ *Turnaround* means the recovery of a firm's economic performance following a threatening decline.⁴

The TW Guidelines apply to out-of-court assignments only. They should be interpreted and applied with regard to the specific context of the case e.g. the role of the professional in the process; the variety of stakeholders and interests involved; the complexity as well as the emergency aspects of restructuring/turnaround situations; the particularities of the communication which requires the appropriate balance between confidentiality and the need to provide necessary disclosure.

GUIDELINE 1: Assignment of an RTP

- 1.1 A Restructuring and Turnaround Professional ('RTP') is any person or body entrusted out-of-court to restructure or turnaround a company, a part of a company, or a group of companies or any other entity.
- 1.2 An RTP considers the entrusting person, body or company his/her client, unless otherwise agreed upon in writing.
- 1.3 An RTP is guided by these non-binding TW Guidelines except to the extent they contravene the law, contracts or other binding rules or regulations. These TW Guidelines do not apply in insolvency proceedings mentioned in an Annex to the European Insolvency Regulation (EIR)

³ European Commission Recommendation 'New Approach to Business Failure and Insolvency' of 12 March 2014, Article II.5(b).

⁴ Pandit, N.R., Some Recommendations for Improved Research on Corporate Turnaround, *Management*, Vol. 3, No. 2, 2000.

nor in any other legal reorganisation or restructuring proceedings which arranges for court involvement.

- 1.4 Before commencing work an RTP requests a written contract or an engagement letter, containing at least the scope of the assignment, the position of the RTP in the organisation and his/her competences, and a description of the fee.

GUIDELINE 2: Professional Attitude

- 2.1 An RTP performs his/her tasks with due care, expertly, effectively and efficiently.
- 2.2 An RTP behaves with courtesy and consideration towards all parties involved and avoids behaviour discrediting the profession.
- 2.3 An RTP has the capacity to manage complex situations. Before commencement and regularly thereafter, (s)he evaluates whether (s)he is capable to handle the assignment properly.

GUIDELINE 3: Ethical Attitude

An RTP:

- (a) performs with integrity, meaning that an RTP is straightforward, honest and fair;
- (b) maintains appropriate and relevant confidentiality of information acquired as a result of the assignment;
- (c) avoids identification with the client, in order to provide the best performance in any situation;
- (d) avoids bias, conflict of interests or undue influence of others to influence or override his/her professional judgments;
- (e) performs the assignment ultimately guided by the interests of the client and in doing so has due regard to the interests of the other stakeholders.

GUIDELINE 4: Communication with the Client

- 4.1 An RTP owes his/her primary duty to the client.
- 4.2 An RTP is accountable to the client.
- 4.3 An RTP communicates regularly, timely, and in a transparent and trust-based way with the client and informs the client completely and truthfully.
- 4.4 An RTP informs the client speedily on any relevant external contacts (s)he has had regarding the assignment.
- 4.5 An RTP considers immediate termination of the assignment in case (s)he is misled by the client or lacks sufficient support by the client. In case of termination, the RTP duly informs the client.
- 4.6 Any deviation from the aforementioned Guidelines is to be agreed upon in writing.

GUIDELINE 5: Communication with Stakeholders

- 5.1 An RTP communicates externally only if the interests of the client so require.
- 5.2 An RTP communicates clearly with the stakeholders (s)he comes in contact with, who the client is and what his/her assignment essentially concerns.

GUIDELINE 6: RTP Governance

- 6.1 An RTP enables parties to complain and handles complaints made according to the Guidelines 2 and 3 of the TW Guidelines.
- 6.2 An RTP organises his/her own governance through the membership of a professional organisation or otherwise.
- 6.3 An RTP fully cooperates with any governance mechanisms (s)he comes across in the course of the assignment.

4. The TRI-Leiden team Comments to the TW Guidelines

The TRI-Leiden team drafted as well Comments on the TW Guidelines, in order to inform the reader on their origin, meaning or related issues. Since each of these Comments belongs to a Guideline, the Guidelines are shown below again, each Guideline followed by its Comments. These Comments are not a part of the TW Guidelines. They do merely show the opinion of the authors.

INSOL EUROPE TURNAROUND WING GUIDELINES FOR RESTRUCTURING AND TURNAROUND PROFESSIONALS ('TW GUIDELINES')

Final draft 30 October 2015

INTRODUCTION

The INSOL Europe Turnaround Wing Guidelines for restructuring and turnaround professionals ('TW Guidelines') aim (a) to offer leadership to the turnaround practice in Europe, (b) to promote out-of-court restructuring rather than liquidation, (c) to provide the basis for a long-term sustainable future for the business by ascertaining the quality of turnaround professionals, and (d) to enhance the trust in the profession on the market. *Restructuring* means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity.⁵ *Turnaround* means the recovery of a firm's economic performance following a threatening decline.⁶

The TW Guidelines apply to out-of-court assignments only. They should be interpreted and applied with regard to the specific context of the case e.g. the role of the professional in the process; the variety of stakeholders and interests involved; the complexity as well as the emergency aspects of restructuring/turnaround situations; the particularities of the communication which requires the appropriate balance between confidentiality and the need to provide necessary disclosure.

GUIDELINE 1: Assignment of an RTP

1.5 A Restructuring and Turnaround Professional ('RTP') is any person or body entrusted out-of-court to restructure or turnaround a company, a part of a company, or a group of companies or any other entity.

⁵ European Commission Recommendation 'New Approach to Business Failure and Insolvency' of 12 March 2014, Article II.5(b).

⁶ Pandit, N.R., Some Recommendations for Improved Research on Corporate Turnaround, *Management*, Vol. 3, No. 2, 2000.

- 1.6 An RTP considers the entrusting person, body or company his/her client, unless otherwise agreed upon in writing.
- 1.7 An RTP is guided by these non-binding TW Guidelines except to the extent they contravene the law, contracts or other binding rules or regulations. These TW Guidelines do not apply in insolvency proceedings mentioned in an Annex to the European Insolvency Regulation (EIR) nor in any other legal reorganisation or restructuring proceedings which arranges for court involvement.
- 1.8 Before commencing work an RTP requests a written contract or an engagement letter, containing at least the scope of the assignment, the position of the RTP in the organisation and his/her competences, and a description of the fee.

Comment 1

The introduction and Guideline 1.1 define what a restructuring and turnaround professional (RTP) is.⁷ *Restructuring* is defined in the introduction in accordance with Article II. 5 (b) of the EU Recommendation⁸ as: changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity. For *turnaround* we start with Pandit's (2000) definition 'as the recovery of a firm's economic performance following an existence-threatening decline'.⁹ However, it is suggested to soften this definition by taking out 'existence' from the definition, since turnaround professionals often are working on restructurings of parts of organisations which may indeed suffer a threatening decline, but not an existence-threatening decline as suggested in Pandit's definition.

The assignment can take various forms e.g. strategic, organisational, financial restructuring or turnaround, and various positions, e.g. that of a consultant, an interim-manager, a member of the board (Chief Restructuring Officer, CRO) or that of the Chief Executive Officer (CEO). The Guidelines should be interpreted according to their spirit in the specific situation.

Comment 2

The TW Guidelines are non-binding in nature provides Guideline 1.3. They are to be interpreted as a common goal the members of the Turnaround Wing of INSOL Europe are working towards over the coming years. However, as we have seen in the past¹⁰, such Guidelines may play a role

⁷ See page 13 of Report I of this project.

⁸ European Commission Recommendation 'New Approach to Business Failure and Insolvency' of 12 March 2014.

⁹ Pandit, N.R., Some Recommendations for Improved Research on Corporate Turnaround, *Management*, Vol. 3, No. 2, 2000.

¹⁰ See for the ALI-III Global Guidelines and Global Guidelines (2012): referrals by the Supreme Court of The United Kingdom (Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others) [2012] UKSC 46 (24), that supported its arguments that '... the modern approach ... which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties) ...' by referring to the 2012 Global Guidelines report. And by the United States Court of Appeals for the Third Circuit (in Re ABC Learning Centres) on 23 August 2013 that has made references to Global Guideline 1, and cites that '... the overriding objective [is to] enable courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the

in court proceedings. In the future, and depending whether there would exist differences of opinion on the specific issue in case law and literature, their character may evolve into that of a 'comply or explain' nature.

Guideline 1.3 ensures that if the TW Guidelines contravene any law or other binding regulation, the law prevails. By ascertaining this obvious Guideline, there can be no misunderstanding as to the character and the place of the TW Guidelines in the legal order.

Comment 3

Moreover, according to Guideline 1.3 these TW Guidelines do not apply in insolvency proceedings mentioned in an Annex to the European Insolvency Regulation (EIR).¹¹ For these proceedings exists the (draft) Statement of Principles and Guidelines for Insolvency Office Holders in Europe of INSOL Europe (2014).

Nor do they apply in any other legal reorganisation or restructuring proceedings which arranges for court involvement e.g. the British Scheme of Arrangement, or the French *mandat ad hoc* or *conciliation* proceedings. A commentator asked: "Why not? In my view, an RTP can very well and will likely be involved on the side of the debtor, also in in court proceedings. Either when the restructuring goes into such proceedings, or even with the specific goal of guiding through/assisting with such proceedings." At this stage the Turnaround Wing wanted specific Guidelines for out-of-court entrusted restructuring and turnaround assignments without any court involvement only. Fine tuning these with legal requirements in numerous proceedings over all member States or describing in which situations specifically the TW Guidelines would be valid would have needed more time for study and discussion. This remains for the agenda for 'TW Guidelines 2.0', i.e. the project to adapt and expand the TW Guidelines over the years to come.¹²

Comment 4

According to Guideline 1.1 the TW Guidelines apply to assignments to restructure or turnaround a company, a part of a company, or a group of companies. They apply as well as to such assignments related to any other legal entity e.g. associations, co-operatives, foundations, trusts.

debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding.' Another part of the Global Guidelines report is cited too: '[t]he emphasis must be on ensuring that the insolvency administrator, appointed in that proceeding, is accorded every possible assistance to take control of all assets of the debtor that are located in other jurisdictions. Id. at cmt. to Global Guideline 24.' (From: Cross-Border Insolvency law, International Instruments and Commentary, 2015, Eds: Bob Wessels and Gert-Jan Boon, Wolters Kluwer (forthcoming).)

¹¹ EIR: EU Regulation No 1346/2000 respectively EIR Recast: Regulation (EU) 2015/848.

¹² Since Guideline 1.1 states 'entrusted out-of-court' it is conceivable to drop the last part of Guideline 1.3 ('nor in any legal reorganization or restructuring proceedings which arranges for court involvement.') in order to bring under the TW Guidelines those procedures that only require court involvement at the end of a restructuring or turnaround process and that are not in an Annex to the EIR. It is conceivable as well to add in Guideline 1.3 after 'apply': 'to Insolvency Office Holders (IOHs)' in order to include RTPs working on a reorganisation assignment during insolvency.

Since the TW Guidelines only apply to out-of-court assignments, the ‘entrusting person, body or company’ as mentioned in Guideline 1.2 can never be a court. As Comment 5 will show, it can be e.g. the debtor, a creditor, a majority shareholder, the board.

Comment 5

To have a clear view who the client is as Guideline 1.2 requires, appears very important also in the light of other issues mentioned further on, e.g. the conflict of interests issue. Undeniably, there are many stakeholders in a restructuring and turnaround process. It is impossible to fulfil all their wishes. Certainly, as some commentators argue, an RTP must be looking to compromise with e.g. creditors and shareholders and so need to balance between stakeholders to achieve a win/win. However, it is important to ascertain and disclose whose priorities are highest in rank since they will ultimately govern the scope and aim of the RTP’s activities. The other stakeholders’ interests will be dealt with at least on a ‘have regard to’ basis as meant *m.m.* in Article 172 UK Companies Act and in the ‘enlightened shareholder vision’.¹³ At all times an RTP is to be clear about what duties (s)he owes to whom.

Priorities in the process are to be determined according to the assignment. The client may be the bank or a group of financial creditors, who want more securities, a new strategic focus, a financial restructuring or the preparation of the company for a sale. The client may be the majority shareholder, for the same reasons or others, e.g. the sustainability and the profitability of the group of companies (s)he is interested in or that of the specific company itself. The client may be the company itself (through its executive board), willing e.g. to enhance efficiency, strategic focus, marketability of its products or services, or restructuring of e.g. the balance sheet by a debt for equity swap, new shareholder capital. Finally, the client may be the supervisory board, in need of an opinion of an RTP on these and other questions regarding to the company they supervise; or even the executive board, in need of such an opinion when it has to decide on shareholders suggestions concerning restructuring and turnaround. In all situations however, an RTP owes his/her primary duty to the client (Guideline 4.1).

Comment 6

Many legal systems and international rules provide that a professional complies with the law and respects fundamental human rights.¹⁴ Compliance to the law and legally embedded fundamental human rights is covered in Guideline 1.3. ‘The law’ implies (1) national law; (2) supranational law, and (3) international treaties as far as they provide rights direct binding for citizens. National law includes case law wherever applicable as well as ‘any other binding rules or regulations’. The latter include binding regulations and rules from professional organisations.

Comment 7

¹³ See also: J.A.A. Adriaanse, 2005, *Restructuring in the Shadow of the Law*, p. 92.

¹⁴ E.g. Guideline 2 of the Japan Association of Turnaround Professionals Ethical Code.

In a cross-border case it will not always be clear which legal system applies. It may very well be that the legal systems of two or more countries are to be complied with. This may even regard the professional rules an RTP has to comply with, e.g. that of a chartered accountant or a lawyer. An RTP should be vigilant to these issues.

Comment 8

Restructuring and turnaround situations are often hectic. Therefore Guideline 1.4 urges the RTP not to start with his/her work before a written contract or at least an engagement letter, duly signed has been concluded. Without that, misunderstandings as to the aim and competences of the RTP are looming. Since the position of an RTP may be that of a consultant or, at the other end of the spectrum, that of a CRO, the Guideline requires that a contract or an engagement letter should be clear on the position in the organisation as well. Finally, the fee or the fee structure should be clear for all parties concerned. Any addendum to be concluded later on should be conducted in writing and duly signed.

GUIDELINE 2: Professional Attitude

- 2.4 An RTP performs his/her tasks with due care, expertly, effectively and efficiently.
- 2.5 An RTP behaves with courtesy and consideration towards all parties involved and avoids behaviour discrediting the profession.
- 2.6 An RTP has the capacity to manage complex situations. Before commencement and regularly thereafter, (s)he evaluates whether (s)he is capable to handle the assignment properly.

Comment 9

As a professional, an RTP should perform as such. The concepts of due care, of being an expert, and dealing 'effectively and efficiently' (the latter are also key in the EIR, see Recital 2) are used to clarify how a professional should operate. Part of being effective is being pragmatic. According to Finch¹⁵, 'the rationales of efficiency, expertise, accountability¹⁶ and fairness¹⁷ provide benchmarks with which to evaluate both current and proposed arrangements.' In her book, to which we refer, she elaborates on these four concepts.

One commentator suggests to add a provision like 'the RTP has to bring documents relating his or her professional insurance for given tasks'. Indeed, we would have provided for such a rule if the suggested model of Principles and Guidelines as outlined in Report I would have been followed. However, as explained in Chapter 2 of this report, the TRI-Leiden team refrained from filling in such professional rules as this would have given more room for disagreement. This will be a task for 'TW Guidelines 2.0'.

¹⁵ V. Finch, *Corporate Insolvency law, Perspectives and Principles*, Cambridge University Press, 2002, chapter 2, especially p. 56.

¹⁶ See Guideline 4.2.

¹⁷ See Guideline 3(a).

Comment 10

Notwithstanding the requirements of Guideline 2.1, Guideline 2.2 requires a correct if not somewhat emphatic attitude to the stakeholders involved. An RTP often needs to draft and execute far-reaching proposals that heavily influence others' lives and financial situations. An open attitude to understand other stakeholders' feelings and situations is important.

Comment 11

Guideline 2.3 requires that an RTP has the capacity to manage complex situations. This 'capacity' implies personal as well as organisational abilities. Personally, an RTP must have a strong, stress proof personality. Moreover, (s)he must be knowledgeable and continuously, state-of-the-art trained and educated. From an organisational perspective, an RTP must be able to organise complex and often simultaneous processes requiring qualified manpower.

What initially may have seemed to be a doable assignment may turn out to be a very complicated one. For these instances, the Guideline prescribes regular evaluation by the RTP whether (s)he is still the right person to handle the assignment properly. Properly means in accordance with the legal and professional requirements, as set forward e.g. in the TW Guidelines. Clearly, but not explicitly provided for in the Guideline, if an RTP comes to the conclusion that the task has grown too complicated for him/her, (s)he should resign or take appropriate steps to manage the situation.

GUIDELINE 3: Ethical Attitude

An RTP:

- (f) performs with integrity, meaning that an RTP is straightforward, honest and fair;
- (g) maintains appropriate and relevant confidentiality of information acquired as a result of the assignment;
- (h) avoids identification with the client, in order to provide the best performance in any situation;
- (i) avoids bias, conflict of interests or undue influence of others to influence or override his/her professional judgments;
- (j) performs the assignment ultimately guided by the interests of the client and in doing so has due regard to the interests of the other stakeholders.

Comment 12

Every professional has some freedom of judgement and performance. Professional organisations generally guide their members on using this freedom. Some have specific codes of ethics.¹⁸

¹⁸ E.g.: for accountants: the IESBA Handbook; for insolvency practitioners in the UK: The code of Ethics; for TMA members: The Code of Ethics.

Guideline 3 surveys the essential ethical characteristics for RTPs. An RTP should have very strong arguments, which (s)he preferably should share with a colleague in advance and which (s)he would be prepared to defend in court, to deviate from these ethical Guidelines.

One often finds in codes of ethics for professionals the concepts of ‘objectivity’, ‘impartiality’ and ‘independence’. These are omitted in the TW Guidelines. Since an RTP is chosen and paid by someone, (s)he cannot be expected to be objective to, impartial and independent from that someone.¹⁹ What should be expected though is that an RTP, once assigned, attempts to find the best solution (admittedly, ultimately from the client’s perspective) for the problem at hand according to his/her state-of-the-art professional knowledge (Guideline 2.1). However, while doing so, an RTP should avoid identification with the client and his/her situation and maintain a distance in order to provide unbiased advice to the client (Guideline 3(c)). Moreover (s)he should take into account (or at least have due regard to) the interests of other stakeholders (Guideline 3(e)). ‘Due’ is added here to underline these other interests should sincerely be concerned in the decision taking in *any* role of the RTP, but even more so when (s)he is a member of the board. In times of financial distress, national law often prescribes to board members how to perform in order to avoid liability. These provisions of course precede the TW Guidelines. ‘Other stakeholders’ means outside the client and may include employees, financial institutions and other creditors, shareholders, pensioners, consumers, neighbours, the local community or a region, and even in some cases society at large.

Comment 13

Guideline 3(a) attempts to operationalise the meaning of ‘integrity’, a concept that always comes by in Codes of Ethics, as being straightforward, honest and fair. Although these words cover ‘integrity’ for a large part, there remain subtle elements unwritten. For example: an RTP should believe the assignment is worth the effort and money to be spent, and should otherwise refrain from accepting or continuing the assignment. Therefore, an RTP should regularly challenge him/herself whether his/her conduct is in conformity to the requirements of integrity.

A judge-commentator added: “there is always the possibility that a restructuring, or some element of it, will involve a court proceeding at some stage. I personally would add a guideline as to the duty of an RTP to behave with complete integrity towards the court should that eventuality occur.” We feel this is covered by the general notion of Guideline 3(a).

Comment 14

Guideline 3(b) requires an RTP to maintain confidentiality wherever appropriate and relevant. This applies to him/herself and to his/her employees and collaborators as well. Moreover an RTP should use the state-of-the-art measures to reasonably avoid that parties involved abuse confidential information.

¹⁹ We acknowledge not everybody will agree. As one ‘strongly agree’ respondent wrote: ‘(..) the RTP has to be really and totally independent towards the company.’ However, we feel that the characteristics the respondent is looking for when stating that the RTP has to be independent are adequately covered by all requirements mentioned in the Guidelines 2 and 3.

Comment 15

Guideline 3(d) focusses on the risk that professional judgements are overridden by other arguments that are not relevant to the case. An RTP should be sensitive to avoid bias, conflict of interests or undue influence. There is always a risk that interests of large personal clients, large clients of colleagues in the office, friends, schoolmates or (even distantly related) family members are in conflict with the interests of the client or stakeholders in the case. Transparency and accountability (see Guideline 4) are means to assist avoiding that such conflict influences one's decision.

One commentator suggests to add an obligation that 'the RTP must inform the client (and other parties?) of any former personal or professional link with any involved party'. Indeed it must be acknowledged that the 'bias' and 'conflict of interests' clauses could be posed more operational. Another commentator suggested a new Guideline 3(f).²⁰ It is precisely this call for more explicit rules which make clear how complicated it can be to create common ground and why we have abstained from too much details. Specification of 'bias' and 'conflict of interests' and centralization of 'the interests of the company' would provoke fierce debate. This again should be a task for 'TW Guidelines 2.0'.

GUIDELINE 4: Communication with the Client

4.7 An RTP owes his/her primary duty to the client.

4.8 An RTP is accountable to the client.

4.9 An RTP communicates regularly, timely, and in a transparent and trust-based way with the client and informs the client completely and truthfully.

4.10 An RTP informs the client speedily on any relevant external contacts (s)he has had regarding the assignment.

4.11 An RTP considers immediate termination of the assignment in case (s)he is misled by the client or lacks sufficient support by the client. In case of termination, the RTP duly informs the client.

4.12 Any deviation from the aforementioned Guidelines is to be agreed upon in writing.

Comment 16

Guideline 4 regards the communication with the client. In order to succeed in his/her assignment, an RTP first and foremost needs a trust based relationship with the client. This Guideline envisages designing the necessary framework to create that trust. However, an RTP

²⁰ 'makes, at any point in time and without regard to past actions and own fee considerations, his decision as to whether to pursue an out-of-court or an in-court restructuring solely from the viewpoint of the company and what is in its best interest in pursuing a long-term, viable competitive position.'

and the client remain free to deviate from these Guidelines and to make other arrangements provided this deviation and the new arrangements are agreed upon in writing (Guideline 4.6).

One commentator commented that ‘The rules in relation to client communication set forth in Guideline 4 are the market standard for any professional (not only for professionals subject to regulation) when it comes to rendering the contracted services.’

Comment 17

Guideline 4.1 guarantees that the primary duty is owed to the client. As considered elsewhere in the comments as well as in Guideline 3(e) an RTP often balances between the various interests related to the case in order to find a win/win based solution. Therefore, an RTP often has a mediating role in the process. However, it goes without saying that ultimately the client’s interests are paramount, albeit only from the perspective that any upcoming or existing conflict should be solved in order to realise the restructuring or turnaround desired by the client.

Comment 18

An RTP is accountable to the client (Guideline 4.2). Since the client pays the RTP, (s)he must be able to explain what (s)he did and why (s)he did it. This does not mean that every act an RTP performs on the case should have direct or positive effect to the client’s interests. However, ultimately, the activities of an RTP should contribute to the best feasible solution (from the client’s perspective).

Comment 19

In order to create a trust based relationship, communication should be complete and truthful. A client should trust an RTP to inform him/her regularly, timely, and transparently on all relevant developments (Guideline 4.4). However, commentators stressed that this is not always what clients want, since such knowledge may impose trading restrictions. Therefore Guideline 4.6 provides for a deviation possibility to be agreed upon in writing either in the contract or afterwards.

Comment 20

Since an RTP works out-of-court, some form of secrecy surrounds his/her activities. However, it should be avoided that a client is confronted with e.g. a supplier, telling him that the RTP has asked for his cooperation in the solution of the company’s financial difficulties, without the client knowing of this contact. Therefore, Guideline 4.4 requires an RTP to speedily inform his/her client on any *relevant* external contacts (s)he has had regarding the client. This regards external contacts only, since it is understood that internally an RTP will move in close connection with

the client. 'Relevant' implies that only contacts with a potential impact on the client should be mentioned.

Comment 21

Trust should exist mutually. An RTP should be able to confide in the reliability of data (s)he receives from the client. Guideline 4.5 refers to the situation that a client has misled an RTP, that the management turns out to be fraudulent, or that the management does not support the RTP sufficiently. If an RTP considers the misleading or the lack of support a serious erosion of the basis of trust, (s)he should consider immediate termination of the assignment. However, if (s)he does not deem the misleading or lack of support seriously enough to terminate, or the client is able to recover the trust, an RTP is not obliged to terminate the assignment. The judgement of the RTP is decisive. If an RTP terminates, (s)he should disclose his/her motives. After termination, the client is obliged to pay an RTP for all his/her activities up to the moment of termination unless otherwise agreed upon in writing.

GUIDELINE 5: Communication with Stakeholders

5.3 An RTP communicates externally only if the interests of the client so require.

5.4 An RTP communicates clearly with the stakeholders (s)he comes in contact with, who the client is and what his/her assignment essentially concerns.

Comment 22

Guideline 5.1 expresses that an RTP should be careful in external communication. The essence of the restructuring and turnaround process may even be that reputational damage is avoided as much as possible. An RTP should be conscious of the risk that one word too much to the wrong person may cause the whole effort of silent reorganisation to end in a failure. One commentator suggested adding here "except to the extent required by law, the courts, or professional rules of conduct" since she felt a risk of opposing obligations. However, Guideline 1.4 covers this. This Guideline is to be read jointly with Guideline 4.4.

Comment 23

When communicating externally, an RTP should be clear on his/her position. For example, a creditor should not be left with the idea that an RTP works for the creditors, if the company is the client. There is no need to go in detail but it facilitates communication when one knows what the position of an RTP in the organisation is, e.g. advisor or CRO, and where an RTP is ultimately aiming at e.g. reorganisation, sale, closing down. As one commentator added: "While I agree with the guideline, I would add that transparency with stakeholders (while not compromising the client's rights) often enhances the professional's credibility, ultimately adding value for the

client.” And another one remarked: “I have not marked “strongly agree” because in one respect (in my opinion) the guidelines do not go far enough. In communications with stakeholders the RTP should also be obliged to be accurate and truthful. Best wishes for this useful project.”

This transparency may not always be permitted. As one commentator argued: “(..) the terms of an assignment may be strictly confidential or you may not be permitted to disclose your client.” In that case the contract precedes according to Guideline 1.3.

Comment 24

Although not formulated as an explicit requirement, it follows from Guideline 3.1 that an RTP should be *truthful* to all stakeholders. An RTP is *not* required to make *complete* disclosure to all stakeholders. However, if questioned on specific matters (s)he does not want to share with stakeholders for e.g. confidentiality reasons, the requirement of ‘clear communication’ may require an RTP depending on the situation to inform the stakeholder that (s)he cannot share all relevant information with him/her.

Originally, a Guideline was suggested which provided that equally ranked creditors should be treated equally unless specific circumstances occurred. This proposal was dropped since R&A members differed on the issue. However, we feel that this is an important issue for the trust of the profession on the market and therefore an issue for ‘TW Guidelines 2.0’.

One commentator required ‘more recommendations in relation to how to deal with stakeholders.’ As stated earlier, getting agreement on such provisions is not easy given the different legal cultures and history of the INSOL Europe membership. We certainly acknowledge room for this in the ‘TW Guidelines 2.0’.

GUIDELINE 6: RTP Governance

- 6.4 An RTP enables parties to complain and handles complaints made according to the Guidelines 2 and 3 of the TW Guidelines.
- 6.5 An RTP organises his/her own governance through the membership of a professional organisation or otherwise.
- 6.6 An RTP fully cooperates with any governance mechanisms (s)he comes across in the course of the assignment.

Comment 25

This Guideline regards governance issues an RTP may come across. Any professional needs from time to time feedback on his/her conduct and performance. Feedback offers a chance to grow in professional and ethical attitude. Any chance to get feedback should therefore be taken seriously.

Comment 26

Guideline 6.1 requires an RTP to handle complaints according to the professional and ethical guidelines of the TW Guidelines. Any complaint should be taken seriously and be dealt with accordingly, no matter how small the issue. One commentator wondered: 'Who is meant by "parties"?' ; 'Should they both have a right to complain?', and 'Is the RTP really the proper instance to deal with complaints against his own conduct?'

In law in general, the word 'party' is ambiguous since it depends on the situation. It is used in this way in these Guidelines. In our view everybody who feels to be a party which is not necessarily restricted to the client and the stakeholders, should have the possibility to complain. An explanation, a conversation or an apology from an RTP may avoid long lasting court or disciplinary cases. However, parties remain free to abstain from this possibility and sue an RTP in court or to pursue disciplinary measures if they prefer.

Comment 27

An RTP should organise his/her own governance, says Guideline 6.2. This may be on an associative level, where a professional association organises such mechanisms, often enforced by disciplinary measures. Associations of lawyers and accountants, often endorsed by the law and/or legal regulations usually provide for such governance. Membership of such an association should suffice for the purpose of this Guideline. It may be arranged otherwise for those who are not a member of an association or those who are a member of an association without governance mechanisms, on an individual level e.g. through inter-vision, inter collegial review, regular training.

Comment 28

During his/her assignment, an RTP may come across governance mechanisms in or outside the company itself.²¹ Guideline 6.3 urges RTPs to fully cooperate with these governance mechanisms, in order to get broad support for restructuring measures (to be) proposed and to avoid disinterested or even annoyed stakeholders afterwards. These governance mechanisms may be a supervisory board, an audit committee, a works council or even e.g. tax- and competition authorities or other government established market supervisory bodies.

Comment 29

In order to maintain quality, a disciplinary system of some sort will be essential. What to do with a member who violates the TW Guidelines? Or a member who is disciplinarily expelled from a national professional association? This again would be an issue for the 'TW Guidelines 2.0'.

²¹ See for a survey and description of governance mechanisms: B.P.A. Santen,(2011), *On the Role of Monitoring near Financial Distress*, diss. Erasmus University, Rotterdam, pp. 101 ff.

5. The members' questionnaire

After having discussed two non-public versions of the Guidelines with the R&A Group and the subsequent first public version with the Turnaround Wing²², a questionnaire was opened for the members on the second public draft.²³ Since previous experience showed that the longer the questionnaire, the lower the response rate, it was decided in accordance with the Chair to draft a very short questionnaire. It contained one question:

I. What do you think of the Guidelines? (put an 'x' between the brackets of your choice)

- Strongly disagree
- Disagree
- Neutral
- Agree
- Strongly agree

Deliberately we offered no explicit opportunity to offer commentaries, since we intended to claim the member's time as little as possible, in order to get a higher response rate. By operating this way, we anticipated that some people would send their commentaries anyway.²⁴

The questionnaire was set up in a way that a reply mail would only be necessary. It was open from 4 August up to 15 September 2015. A request and two reminders were sent by INSOL Europe to the membership.

We received 117 reactions in all. Out of these nine (8%) conveyed some comments only, which will be discussed in the next chapter, and no judgement. Seven (6%) disagreed with the Guidelines, half of them strongly. Thirteen respondents were neutral (11%). Three quarters of the respondents agreed with the Guidelines, of which 21% strongly. Of those who scored the questionnaire, another 10 added some comments. Table 1 summarises these results.

table 1: results of the members' questionnaire of INSOL Europe on the TW Guidelines.

respondents	total	commentaries only	strongly disagree	disagree	neutral	agree	strongly agree
number	117	9	3	4	13	63	25
percentage	100	8	3	3	11	54	21

The results are the more interesting, since the respondents cover 26 countries, as shows table 2.

²² We have sent this first public version to the Executive members, to the Council members and to the Turnaround Wing members. They were invited to give their opinion as well as their commentaries on the Guidelines. Due to a miscommunication they had only one week to react. We received 5 reactions, one commenting the method only, three (strongly) agreeing and one strongly disagreeing. Given this low number of reactions, it was decided to simplify the questionnaire. We added these results to the members' questionnaire.

²³ Due to the originally low number of reactions, see previous footnote, we decided to make only minor lay-out and grammatical changes on the first public draft for the second public draft.

²⁴ As one commentator wrote: "Thanks very much for the draft guidelines and the opportunity to pitch in!"

table 2: the members' questionnaire of INSOL Europe, respondents divided by country.

country	respondents	country	respondents	country	respondents
Belgium	1	Greece	2	Romania	4
Cyprus	2	Hungary	2	Russia	2
Czech Republic	2	Italy	8	Slovenia	1
Denmark	4	Jersey	1	Sweden	2
Ireland	2	Lithuania	1	Switzerland	3
Spain	5	Luxemburg	2	UK	17
Finland	1	Netherlands	13	USA	1
France	5	Poland	6	South Africa	1
Germany	24	Portugal	5	TOTAL	117

Germany, the Netherlands and the UK are responsible for 46% of the response, which implies that the majority of the reactions came from elsewhere. Quite encouraging for the project and a sign that INSOL Europe is really a lively association, supported by a diverse membership.

6. Criticisms and commentaries

This chapter provides a survey of the main criticisms and commentaries received during the process and the way the TRI-Leiden team dealt with these. Since the R&A was very active in the various stages of the project as described in Chapter 2 and the INSOL Europe members added commentaries in the questionnaire stage as well, it is impossible to address each and every commentary or suggestion received. Instead we chose for an analytical approach. By doing so, we will not convey the numerous text proposals which we received and partially adopted. These contributed as well enormously to the present text. Nor do we state the emails of encouragement and praise we received over the process, which by far outnumbered the critical ones.

1. The Guidelines lack ambition

On the final version of Report I we received from one of the R&A members this comment: “ (...) there is no real difference between the duties that apply to many of the professionals which act as RTP (in relation to, inter alia, conflict of interest, care, confidentiality, objectivity and independence) and those that should apply to RTPs. In this context, we believe that the regulation of RTP activities might not be particularly essential.’ Similar remarks were repeated in subsequent phases by a small minority. Recently by another commentator: ‘It is stating the most obvious. Who is it for? Most of our members, likely 90 % plus, are of regulated professions. As such they are subject to comprehensive laws, rules and guidelines with regard to ethics, code of conduct, confidentiality, etc. These are far more comprehensive and have ultimate priority. Thus the draft adds little to nothing.’ And another pointed out on the second version: ‘This leads to the conclusion, that Principles and Guidelines might be relevant and required for those restructuring professionals, who are not members of the aforementioned professional chambers.’ One came close to the point as he remarked: “My only comment is that these guidelines could be improved by providing guidance in certain practical and very critical situations a RTP often is required to advise the client, with respect to liabilities that the management can incur in taking decisions on the shadow of insolvency and compelled by the need to preserve the business as a going concern. Perhaps this was not the intended focus of the TW guidelines, however.”

It was not intended indeed, and we received as well reactions such as: “I think we have to remember just how wide is the variety of activities that exists for RTPs across Europe. Trust was described in the first report as a key issue to (be) addressed and I think it is worth considering carefully the extent to which trust is earned by setting up rule structures and the extent it is earned through the integrity and professionalism of individuals.” Another commentator said: “Therefore, in general, and in line with (X)’ more detailed comments, we agree with having more widely-worded Principles, for a greater variety of RTPs to be covered.’ The same point came along in a conference call with the R&A on 30 June 2015: ‘He is of the opinion that the merit of the TW Guidelines should be to understand the key points of the profession and to start to use them as guidelines in practice. They should be as short as possible. Any additional text may instead of strengthen, in fact weaken the authority of the TW Guidelines.’ Another one-liner: ‘Too much prescription stops RTPs succeeding.’

Clearly we had to move between the Scylla of ambitious members aiming at strengthening INSOL Europe and the Charybdis of others who would rather avoid too much central involvement. We decided with the Chair to go for a document that should be acceptable to the membership and be apt to build on over the years to come, just like the building up of the Governance Codes in company law. If the members feel comfortable with the document presented, it will be easier for them to adapt it later on with farther reaching texts on important issues. If there is no such common ground, one will never even get there.

The advantage of adopting the present document would be to have one set of Guidelines which INSOL Europe can apply on the market as well as in the relations between the RTPs themselves. Rules for auditors and lawyers, as well as their cultures, differ over the countries and between the professions. The rule books are sometimes thumb thick. Now there is one set of rules of less than three pages to begin with. It may provide clarity to the client, the other parties an RTP has to deal with and to the RTP him/herself. Moreover, there is common ground to build on and gradually expand these rules to have an even better and more fundamentally based profession.

Mostly we received positive feedback on this issue. “The initiative is great and you have our backup. Most of the presented rules are rather obvious, if you have a background as a professional advocate admitted to the bar. However, not all RTP’s have that background. That is why I am putting only Agree, and not Strongly agree.” And another: “Thank you for this work. It is very closed of the accountant professional ‘s rules. ;)” . Another wrote: ‘ As INSOL International Insolvency Mediator I found the Guidelines particularly interesting’. Or a member outside the EU: ‘I agree with the draft Guidelines as they may serve as a very efficient instrument of out-of-court restructuring.’ Or a judge: ‘I agree that the 6 Guidelines for out-of-court restructuring and turnaround professionals can become a powerful instrument for the professionals and not only.’

2. The Guidelines’ definition of ‘out-of-court’ is too rigid.

One of the commentators advised us to insert the Scheme of Arrangement into the Guidelines. Another raised whether the activities in a Company Voluntary arrangement (CVA) are ‘out-of-court’ or ‘in-court’? Or that of a *mandataire ad hoc* in France?

We chose for a strict distinction. As Guideline 1.1. states: ‘An RTP is any person or body entrusted out-of-court (..)’. Moreover, if the proceedings are mentioned in an Annex to the EIR or if court involvement is arranged for in the reorganisation proceedings, the TW Guidelines do not apply (Guideline 1.3). For starters, this is the best approach, since everybody knows where (s)he stands. However, exemptions in certain legal procedures and specific situations such as being an advisor to a company in distress would be conceivable, but the effects should be studied in depth first.²⁵

3. The Guidelines are too directive, too detailed and too inflexible.

One mentioned: ‘Too much prescription stops RTPs succeeding.’ And another: ‘I also concur with the remark on principle 5.3 – it is rather too detailed –’. On flexibility: ‘There should be flexibility

²⁵ See Comment 3 and footnote 10 for possible solutions.

for the RTP and the client (in particular, if the client is the debtor) to offer creditors of the same rank different deals.’ One commentator voiced: ‘(..) avoid making it ‘over-definitive’ and to tie down too much the position to the client and the duties to the client. We should be very cautious there. The text might prove too restrictive.’

4. There is nothing new

As one commentator puts it: ‘The TW Guidelines could have been approached differently from the beginning and not only deal with the professionals, but gone a step forward by including a framework of actions that are usually involved in restructurings to be used by RTPs as a guide when executing a restructuring engagement. For instance, TW Guidelines could have addressed, among other, the following situations that RTPs constantly face within restructurings: (i) execution of standstill or waiver agreements with creditors while negotiating / implementing a restructuring, (ii) treatment of different creditors (or classes of creditors) when structuring and implementing a restructuring, (iii) discussion of restructuring alternatives with relevant creditors, (iv) dealing with dissenting creditors, (v) involvement of other stakeholders in the restructuring, (vi) relevance and requirements of a restructuring / business plan, (vii) involvement of other professionals (e.g. independent experts). In a nutshell: to create a new framework for out of court restructuring of the type of the London Approach.’

Another commentator even designed an Additional Guideline.²⁶ While his attempt is highly appreciated by the team, it is clear the skill and experiences required in that Guideline would not easily find a majority among the members.

However, these attempts are important seeds for the ‘TW Guidelines 2.0’ project which should be started by INSOL Europe after adopting the present document in order to modernize, adapt and enhance the present draft. These TW Guidelines are not a static document, but they show the status of a dynamic process at a point in time.

²⁶ **GUIDELINE 7: RTP skills and experience**

- 7.1 An RTP has a minimum professional experience of [10] years and at least [5] years working in turnarounds and restructurings
- 7.2 An RTP has gained a university or comparable degree, ideally in business administration, and has enjoyed some formal training or gained a qualification in accounting, insolvency and company law or tax
- 7.3 An RTP has gained significant experience in the following fields enabling him to make informed decisions
 - 7.3.1 Accounting
 - 7.3.2 Valuation and corporate finance
 - 7.3.3 Financial management
 - 7.3.4 Tax, applicable to turnaround situations
 - 7.3.5 Insolvency and company law
 - 7.3.6 Operational management
- 7.4 An RTP has the skills and experience to lead teams and groups of decision makers
- 7.5 An RTP, through his knowledge and experience, has the ability to communicate with external stakeholders, in particular financial creditors, professionally, knowledgably and with gravitas
- 7.6 An RTP has gained international experience in the field of turnaround and management of international financial creditors, where the situation of the company in distress so requires
- 7.7 An RTP must have sufficient knowledge and experience in the applicable insolvency environment should an out-of-court restructuring not be feasible

5. The Guidelines are too client oriented.

As one commentator puts it: “The guidelines seem to assume that the RTP is engaged by the debtor. We often see that major stakeholders, eg. a bank “suggests/instructs” the debtor to retain the services of a RTP pointed out by the bank. And very often the bank retains counsel and demands that the debtor pays the fees of the counsel as part of the costs of upholding the loans granted. In such cases it would be rather unclear where the RTP’s loyalty lies.”

Another: “The definition is too broad – the entrusting person, body or company can be anyone, i.e. the company subject to turn-around, its shareholders or lenders. I think that the basic principle should be that the engagement should be taken from the company subject to the restructuring (to whom – i.e. to whose stakeholders in general – the RTP then owes his fiduciary duties). Taking an engagement from the lenders or shareholders should be an exception and it should be clarified, when and under what conditions it is appropriate.”

We feel it is crucial for the trust of the RTP on the market to clarify where his/her primary duty lies. There must not be any doubt that the primary duty must be to the one who pays i.e. generally the client, unless otherwise agreed upon in writing. So: there are no special duties to the bank or other financial creditors, even if they have been involved in one way or another in assigning the task to the RTP, unless clearly put in writing (Guideline 4.6) or required by the law. Certainly not the client’s interests alone matter. But while navigating the ship, going hence and forth to search for calmer waters, the RTP should have a clear compass. And that the RTP’s primary duty is to the client, would in our view be that compass.

6. Together with the Comments, they are too long.

There was a conference call with the R&A members on 30 June 2015. At that moment, the large majority of the audience agreed with the text of the Guidelines. One R&A member remarked on the Comments: ‘He sees different kinds of comments (some give the rationale of a decision, others explain the text). He is of the opinion that the merit of the TW Guidelines should be to understand the key points of the profession and to start to use them as guidelines in practice. They should be as short as possible. Any additional text may instead of strengthen, in fact weaken the authority of the TW Guidelines.’

As a reaction, the Chair has decided that the Guidelines will be the text only, and that the Comments will be part of the report by TRI-Leiden, but not of the Guidelines to be adopted. However, these Comments will be made available on-line.

7. Recommendations

The TW Guidelines will only then be a success once they are accepted by INSOL Europe, applied by the members, monitored and subsequently adapted and expanded.

acceptance

Firstly, INSOL Europe or its Turnaround Wing should decide to accept the TW Guidelines as a part of the organisational environment.

application

These guidelines are meant to signal to the market: This is what we are, this is how we operate. It should be shown to the market that the TW Guidelines exist, by INSOL Europe as well as by the membership. When contracting, INSOL Europe members should consider to refer to the TW Guidelines. Moreover, members should consider to express their membership of INSOL Europe in letters and mails.

monitoring

Once applied, members will certainly voice proposals to change the TW Guidelines and to add new Guidelines. The Turnaround Wing should consider to establish a monitoring committee which should collect these proposals and opinions, should report annually to the Turnaround Wing on the effect of the TW Guidelines, and should propose every two or three year a proposal to adapt the guidelines to the experiences communicated, new situations and new needs.

expansion

Originally the concept was to draft a Principle/Guidelines system of rules, the former being rules of general conduct, the latter directives of what to do in specific situations. When expanding the present TW Guidelines, e.g. as has been proposed by two members and discussed in Chapter 6, the monitoring committee should decide whether such a system will be created, which may as well be called a 'Guidelines-Best Practices' system in the current situation, or to maintain a Guidelines system only.

Since these Guidelines are not a static document, but the mere reflection of the status of a dynamic process at a point in time they should be updated regularly. This Report II shows numerous ideas for expansion. In the Comments they are referred to as the 'TW Guidelines 2.0' project. We recall:

- a redefinition of 'out-of-court' such that the TW Guidelines would apply as well in e.g. the British Scheme of Arrangement or for non-IOHs performing during insolvency (Guideline 1, Comment 3 and footnote 10)
- a more specific description of the requirements for RTPs (Guideline 2, example given in Chapter 6 footnote 24)

- a more specific description of the method an RTP has to apply (Guideline 2, indication given in Chapter 6 sub 4)
- a provision relating to professional insurance (Guideline 2, Comment 9)
- an operationalisation of 'bias' and 'conflict of interests' (Guideline 3, Comment 15)
- a provision whether equally ranked creditors should be treated equally and under which circumstances an RTP could derive from this rule (Guideline 5, Comment 24)
- more recommendations in relation to how to deal with stakeholders (Guideline 5, Comment 24)
- whether INSOL Europe would like to establish a centralised system of checks on education, experience and quality
- whether INSOL Europe would like to establish a form of disciplinary action (Guideline 6, Comment 29).