

- **INSOL EUROPE
INSOLVENCY OFFICEHOLDERS FORUM**

HORTEN

SURVEY OF CERTAIN REGULATION FOR INSOLVENCY OFFICEHOLDERS:

DENMARK

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1. INTRODUCTION

The appointment and the duties of an IOH are governed by the Danish Bankruptcy Act as to some extent the Companies Act.

2. TYPES OF INSOLVENCY OFFICEHOLDER

There are the following "roles" for insolvency practitioners in in-court insolvency proceedings:

- Administrator (trustee) of a bankruptcy estate (comprising both individual and corporate bankruptcies), hereafter "**Trustee**". All powers to dispose of the assets of the debtor are vested in the Trustee when a bankruptcy order is issued.
- Supervisor (in Danish "rekonstruktør") in an in-court restructuring process, hereafter "**Supervisor**". The debtor retains possession during the restructuring period – actions taken must be endorsed by the Supervisor. During the restructuring period a general stay is imposed on all enforcement. The debtor shall prepare a proposal for either a composition, a sale of the business or a combination of both and this proposal is put to vote amongst the creditors. If the proposal is not presented or is rejected the debtor is automatically declared bankrupt.
- Administrator (assistant to the Bankruptcy Court) in a debt-rescheduling of an individual, hereafter "**Administrator**". The administrator gathers information regarding the size of the debt, the reasons that the debtor has incurred this debt, the debtor's current assets, the debtor's income and expenses and draws up a proposal for rescheduling of the debt which the Bankruptcy Court shall decide
- Liquidator of limited companies that are under compulsory liquidation, hereafter "**Liquidator**". If a limited company fails to meet the requirements laid down in the Company Act, eg. submission of annual financial reports, registered management etc. the Danish Business Authority will request the Bankruptcy Court to compulsory liquidate the company. If the Bankruptcy Court considers it necessary to perform investigations concerning the company the Court may appoint a Liquidator to make these investigations. If the company is insolvent the company will subsequently be declared bankrupt.

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3. SIZE OF THE PROFESSION

As there are no formal qualifications for an IOH, see 5. below any person can theoretically be appointed as an IOH.

In practice an attorney ("advokat") is appointed as an IOH.

In Denmark approx. 6,000 attorneys are admitted to the bar.

4. PRACTISING NORMS

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Attorneys who are appointed as IOH's range from senior partners in the major lawfirms to practitioners who run their own businesses.

There are no lawfirms that exclusively specialize in restructuring and insolvency work. This field of work requires insight and practice in other legal areas (employment law, tax law etc.). Furthermore the entry to major appointments often is through other clients of the law firm in question, mainly financial clients.

Thus restructuring and insolvency is not considered to be viable as a stand-alone business.

5. QUALIFICATION TRAINING AND ENTRY INTO THE PROFESSION

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There are no formal qualifications required to receive appointment as an IOH.

Accordingly, the IOH is not required to hold a legal or other academic education or to have passed a specific exam.

In practice however it is always an attorney ("advokat") who is appointed as an IOH.

The private organization, The Association of Danish Insolvency Practitioners, (see 6.2. below) has set up a certification scheme under which attorneys that have expertise in restructuring and insolvency may apply to become a Certified Insolvency Practitioner. 158 attorneys have been certified as of February 2016.

However it should be noted that certification is not prerequisite for receiving appointments as an IOH.

6. PROFESSIONAL BODIES

6.1 Official Body

As there are no formal requirements as to whom may receive appointments as an IOH, there are no official bodies for IOH's in Denmark.

The work of the IOH is overseen by the Bankruptcy Court and is also subject to the general ethical guidelines for attorneys that are monitored by the Danish Bar Association ("Advokatsamfundet").

6.2 Private Associations

Each Bankruptcy Court in the major cities in Denmark have made a list of the attorneys who are specialized in restructuring and insolvency and who are appointed as IOH's if no creditors nominate another attorney as IOH.

There is no statutory framework for the creation of these lists and therefore this is a matter solely subject to the discretion of each Bankruptcy Court.

The attorneys who are admitted to the "list" of the respective Bankruptcy Courts have formed their own associations. The most established association is the Association of Permanent Trustees ("Kuratorforeningen"), whose 21 members are the attorneys appointed as permanent Trustees at the Bankruptcy Division of the Maritime and Commercial High Court, which covers all insolvency proceedings in the Greater Copenhagen Area and thus a large number of the insolvency proceedings in Denmark.

In addition, there is the Association of Danish Insolvency Practitioners ("Danske Insolvensadvokater"). Membership of this association provides that the attorney has demonstrated expertise in restructuring and insolvency.

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7. CONTINUING PROFESSIONAL EDUCATION ("CPE")

All attorneys are required to undergo a minimum of 54 units (each of 45 minutes) of continuing education over a three-year period. Training courses, seminars, and teaching within legal topics qualify as such CPE.

For Certified Insolvency Practitioners there is an additional requirement that at least half of the abovementioned CPE is within the field of restructuring and insolvency.

8. BODY CORPORATE OR INDIVIDUAL

Only individuals can be appointed as an IOH. Law firms, other firms or groups of persons cannot be appointed.

The IOH may be a partner or employee of a corporate entity or a partnership. There is no requirement that all the tasks as Trustee, Supervisor or Liquidator are performed by the appointed IOH personally; these may be performed by partner colleagues and employees.

However the Bankruptcy Courts require that most tasks as Administrator are carried out by the appointed Administrator personally, especially the meetings in the Court.

9. SANCTION FOR ACTING AS AN IOH WITHOUT PROPER AUTHORISATION

As there is no authorisation or license system no sanctions can be imposed.

10. BONDING AND INSURANCE

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It is a requirement that the Trustee takes out a professional indemnity insurance. All attorneys are required to hold such an insurance and will fulfill this requirement. If the appointed Trustee is not an attorney the Trustee is required to take out such a similar indemnity insurance immediately after the appointment is made. The costs of the indemnity insurance shall be borne by the Trustee personally.

In addition hereto the Trustee is required to take out an insurance that compensates the estate for any losses caused by the fraud or dishonesty by the Trustee as such losses are not covered by the general indemnity insurance. The insured amount shall equal the total assets of the estate and the amount is set by the Bankruptcy Court. The costs of this insurance shall be borne by the estate.

There is no similar requirements for Supervisors and Administrators as the debtor remains in possession during in-court restructuring and debt-re-scheduling process.

As regards compulsory liquidations, the Liquidator replaces the management of the company and therefore the Liquidator is subject to the rules for management of a limited company contained in the Companies Act. There is no special requirement that the Liquidator is covered by a specific insurance.

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11. APPOINTMENT OF IOH'S

11.1 Appointment of Trustee

Appointments are made by the individual Bankruptcy Court. The Bankruptcy Court is generally free to appoint any person. However, regard must be had to the scope and nature of the bankruptcy estate, and the Bankruptcy Court must appoint a Trustee in whom the creditors have confidence as the administration of the estate is primarily conducted in the interest of the creditors.

Before appointing a Trustee, the Bankruptcy Court may consult the creditors of the bankruptcy estate, but the creditors' nominations are not binding on the Bankruptcy Court.

The Trustee is appointed immediately upon the issuing of the bankruptcy order. If the bankruptcy order is issued on the basis of a bankruptcy petition filed by a creditor, only the creditor and the debtor are typically present. The Bankruptcy Court will usually appoint the Trustee nominated by the creditor.

If the bankruptcy order is issued on the basis of a bankruptcy petition filed by the debtor, no creditors are typically present to nominate a Trustee. The Bankruptcy Court will often appoint the lawyer nominated by the debtor as Trustee. The debtor's own lawyer will seldom be appointed as Trustee as he/she will not satisfy the impartiality requirement in section 238 of the Bankruptcy Act.

If the Bankruptcy Court considers it necessary, it may appoint two Trustees. This may be the case for large and complicated estates. In such case, the two Trustees will bind the estate separately.

As mentioned above the major Bankruptcy Courts in Denmark have a number of "permanent trustees" attached. These are attorneys specialised in insolvency law who have been admitted to the "list" by the individual Bankruptcy Court. In cases where the Treasury guarantees the costs of administering the bankruptcy estate, the Bankruptcy Court will often appoint one of the permanent trustees. A permanent trustee may also be appointed where a creditor or debtor has petitioned for bankruptcy and no suitable attorney has been nominated as Trustee.

In all events the Trustee is required to declare prior to the appointment that he/she fulfils the impartiality requirements in sections 238 of the Bankruptcy Act.

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11.2 **Election of Trustee**

The appointed Trustee or a creditor of the estate can request the Bankruptcy Court to convene a meeting of creditors to elect a Trustee. If such request is made, the Bankruptcy Court is obligated to convene a meeting.

The Bankruptcy Court can also convene a meeting of creditors of its own motion to elect a Trustee. For example, in the cases where the Bankruptcy Court expects that a creditor will submit a request or if the Bankruptcy Court finds it necessary due to the size of the estate.

The debtor cannot request the Bankruptcy Court to convene a meeting of creditors to elect a Trustee. However, the Bankruptcy Court may take the debtor's wish into account when exercising the Bankruptcy Court's own right to convene a meeting.

A request for a meeting of creditors to elect a Trustee must in any case be made in writing within three weeks of the bankruptcy order and be held within three weeks of the receipt of the request.

Vote for a Trustee requires that at least one third of the known creditors are represented at the meeting. It is the size of the creditor's claim that is decisive for the calculation of whether one third of the known creditors are represented. Therefore, the number of creditors represented at the meeting is irrelevant.

However, not all creditors are entitled to vote at the meeting. If a creditor's claim obtains full or no coverage, the claim does not bear any right to vote.

If it appears that the meeting of creditors is not quorate, the appointment made by the Bankruptcy Court when issuing the bankruptcy order is final as the Bankruptcy Court cannot reverse the appointment.

11.3 **Appointment of Supervisor**

A petition for restructuring a company must contain a nomination of one or more Supervisors. This is the case in a petition filed by a debtor as well as a

petition filed by a creditor. Furthermore, the petition must be accompanied by a declaration from the nominated Supervisor stating his/her willingness to be appointed as Supervisor and that he/she fulfils the impartiality requirements in section 238 of the Bankruptcy Act. If the petition does not meet these requirements, the petition is without effect. The Bankruptcy Court is however not committed to appoint the nominated Supervisor but will most often do so.

If the petition is filed by a debtor the Bankruptcy Court will immediately open restructuring proceedings and appoint a Supervisor.

If the petition is filed by a creditor the Bankruptcy Court will only open the restructuring proceedings and appoint a Supervisor if the debtor agrees hereto. In the case that the debtor does not agree, the Bankruptcy Court will call for a meeting with the debtor where the petition is discussed and where the Bankruptcy Court will decide on whether restructuring proceedings shall be opened. If this is the case, the Bankruptcy Court will appoint one or more Supervisors.

Normally the Bankruptcy Court will only appoint more than one Supervisor in large and complicated companies.

11.4 **Appointment of Administrator**

The role of the Administrator in a debt-rescheduling of an individual is to act as an auxiliary arm to the Bankruptcy Court. The Administrator gathers information and prepares the documents that form the basis of the Court's decision as to whether a debt-rescheduling shall be granted.

The Administrator is appointed by the Bankruptcy Court – most often from a list of attorneys specialized in debt-rescheduling compiled by the Bankruptcy Court in question.

11.5 **Appointment of Liquidator**

The Bankruptcy Court appoints the Liquidator of a limited company that the Danish Business Authority request is compulsory liquidated.

The Liquidator is usually selected from the Bankruptcy Court's list of insolvency practitioners.

12. **REMUNERATION**

12.1 **Approval of fee**

The Bankruptcy Court approves all fees to the Trustee, the Supervisor, and the Administrator. Fees to the Trustee and the Supervisor are paid by the estate/the debtor as preferential claims prior to any other claims. Fees to the Administrator are paid by the Treasury.

If the company that is in compulsory liquidation is solvent the fees to the Liquidator are approved by the shareholders and paid by the company. If the company is insolvent and subsequently is declared bankrupt the fees are approved by the Trustee if the estate can cover this claim. If the fees cannot be covered by the estate the Treasury will cover the fees within the guarantee provided by the Treasury (in most cases DKK 10,000 or approx. EUR 1,400) and in this case the fees are approved by the Bankruptcy Court.

The IOH must send a fee recommendation to the Bankruptcy Court with information as to what tasks have been performed, the time spent on the individual tasks and when the tasks were performed. The Bankruptcy Court will then assess the work performed, with due regard to the scope of the work and the nature of the estate, the responsibility undertaken in the work and the results obtained under the prevailing circumstances.

Any third party with legal interest (typically the IOH, the creditors and the debtor) has the right to appeal the decision of the Bankruptcy Court regarding the fees. Third parties may also raise objections to the fee recommendation prior to the decision made by the Bankruptcy Court and such objections will often be taken into account. However it is very seldom that creditors raise objections to fee recommendations or appeal such decisions. The reason may be that there is no legal requirement that the IOH sends the fee recommendation to others than the Bankruptcy Court. Thus the only information that the creditors receive as to the recommended fees is a figure in the accounts for the administration of the estate or a figure in the proposal for a composition in case of in-court restructuring.

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12.2 **Security for the costs – bankruptcy**

The issuing of the bankruptcy order is generally conditional on the party filing for bankruptcy providing security for the costs. The Bankruptcy Court determines the amount of security, which is normally DKK 30,000 (approx. EUR 4,000). This requirement applies to a creditor petitioning for bankruptcy as well as the debtor.

In cases where a floating company charge is registered on the debtor's assets, the holder of the floating company charge is obligated to pay a security of DKK 50,000 (approx. EUR 6,700). This obligation is unconditional and thus not conditional on the holder having filed for bankruptcy. This security is subordinated to the security mentioned above. If the holder of a floating company charge provides security, the Bankruptcy Court will typically reduce the security from DKK 30,000 to DKK 15,000 (approx. EUR 2,000).

The security is set to cover the Trustee's costs of administrating the estate if the proceeds from realisation of the assets of the bankruptcy estate are not sufficient to cover the costs.

If there are sufficient proceeds in the estate, the Trustee's fee is covered by the estate and the security is repaid to the creditor who paid the security.

If the petition for bankruptcy is filed by an employee on the basis of a wage claim and if the petition is filed by the court appointed Liquidator of a company in compulsory liquidation the cost of administering the estate will be covered by the Treasury, if the proceeds in the estate cannot cover the costs.

does not have sufficient funds itself. The guarantee provided by the Treasury is usually DKK 30,000 (approx. EUR 4,000).

12.3 **Security for the costs - restructuring**

As mentioned above the Supervisor's fee is to be paid by the debtor and therefore no security is required by law for the cost of the restructuring process.

However, in the case where the restructuring process is initiated by a creditor without prior consent from the debtor, the creditor who has requested the restructuring process shall provide security for the costs of the restructuring process. The size of the security is equal to the security required for a bankruptcy, DKK 30,000 (approx. EUR 4,000).

In all cases – irrespective of whether it is the debtor or a creditor who has filed for the restructuring – an additional security must be provided for potential bankruptcy proceedings. The reason being that the restructuring process will automatically conclude with a bankruptcy if the restructuring fails. The size of the security is usually also DKK 30,000 (approx. EUR 4,000).

However, in cases where a floating company charge is registered on the debtor's assets, the security is reduced by half, i.e. normally DKK 15,000 (approx. EUR 2,000).

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13. **PERSONAL LIABILITIES OF IOH'S**

13.1 **Trustees**

The Trustee is personally appointed and replaces the management, in cases where the debtor is a company. Where the debtor is an individual all powers to dispose of the assets of the debtor are vested in the Trustee.

The Trustee acts on behalf of the bankruptcy estate and the liabilities that are incurred by the Trustee's actions are preferential claims in the estate and rank on the same level as others expenses of administration of the estate, including fees to the Trustee.

In the event the proceeds in the estate are unable to cover all preferential claims the Trustee may be held personally liable for such loss inflicted on third parties. However Trustees act generally cautiously in order to avoid such situations, so such claims are rarely seen.

13.2 **Supervisors**

Supervisors during an in-court restructuring do not have any powers to bind the debtor as the debtor remains in possession. However all significant actions, including continuation of trading, have to be approved by the Supervisor.

The Supervisor may be held personally liable for debts that accrue during the restructuring period and that cannot be paid, if the Supervisor has not

taken adequate measures to ensure that the continued trading or other actions would not incur loss. The Supervisor is especially at risk of being held personally liable in the following two scenarios:

The debtor has the right to receive loans from the Employees Guarantee Fund to cover net payments of wages (ie. less withholding tax) to the employees for three months. If the debtor – with approval from the Supervisor – has received such loans but is unable to repay the loans and the withholding tax, the Supervisor may be held personally liable if the Supervisor has not ensured that the continued trading was based on reasonable cash-flow forecasts and/or there are other circumstances supporting that the continued trading was not anticipated to be loss-making.

Likewise the Supervisor may be held personally liable if VAT liabilities incurred by continued operations cannot be paid.

13.3 **Administrators**

There is little risk of Administrators incurring personal liability when performing their duties, as the task of Administrators mainly are of a "fact finding" nature. Administrators do not have any powers to bind the debtor.

13.4 **Liquidators**

Liquidators take over the role as management of the limited company. By far most of the companies that are compulsory liquidated have discontinued operations long before the appointment of Liquidator. Therefore Liquidators generally face little risk of incurring personal liability.

14. **RELEASE OF IOH'S FROM LIABILITY**

There are no statutory mechanisms for release of IOH's from liability. Such claims against IOH's are subject to the general statute of limitation which is three years from the time the loss was incurred.

15. **INDEPENDANCE**

The Bankruptcy Act requires that Trustees, Supervisors and Administrators satisfy statutory impartiality requirements. These IOH's may not be connected persons or dependent of the debtor, and there must be no doubt as to the IOH's interest in the outcome of the case or any other doubt as to their impartiality.

In addition hereto, the interpretative notes to the Bankruptcy Act state that the Trustee and the Supervisor must be reliable and financially responsible.

The Danish Companies Act requires that the appointed Liquidator must fulfil the same impartiality requirement as those which are required of the

management of the company. Thus, a liquidator must not have any interests, which can interfere with the interests of the company.

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Copenhagen, 10 January 2016
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