REPORT ON THE REGULATION OF INSOLVENCY OFFICE HOLDERS

INSOL Europe

Insolvency Office Holders Forum (IOHF)

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Authors:

Prof. Marta FLORES (Universidad Autónoma de Madrid)

Drs. Emmanuelle INACIO (Université Lille-Nord-de-France)

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INTRODUCTION

1. The general purport of this review is to provide the Insolvency Office Holders Forum (hereinafter, IOHF) of INSOL Europe a brief high-level review of the responses to the survey conducted over 22 countries in Europe.[1] Said survey dealt with certain aspects of the regulation of Insolvency Office Holders (hereinafter, IOHs).

2. As for the structure and contents of this report, the following aspects must be taken into account:

    a. Although all the responses to the survey are reasonably thorough, their depth and level of detail vary enormously from one to another, which hardens the analysis and comparison. The heterogeneity of the responses hinders on occasions the extraction of conclusions.

    b. The available data for each reporter are also different (*v. gr.*, with regard to the size of the profession). In some cases, no information has been provided.

    c. Some issues (not addressed in the survey conducted by IOHF) are deemed of high interest and relevance and, therefore, further research on them is recommended.

    d. With regard to the insolvency system of the 22 States examined, the information and data that have been taken into account for the elaboration of this report are exclusively and solely the ones provided by IOHF.

    e. The broad number of countries that have been studied (22) make it hard to establish or assess general rules that are valid in all cases. Therefore, the following statements are to be understood on a general and cautious basis, as in most cases there are exceptions. Where possible, subgroups of countries that share common features have been identified. The examples have a mere illustrative purpose and should not be expected to be exhaustive.

[1] For the elaboration of this report, responses regarding the following 22 countries have been examined: Austria – Belgium – Bulgaria – Czech Republic – Denmark – Estonia – France – Germany – Greece – Ireland – Italy – Latvia – Lithuania – Luxembourg – Netherlands – Portugal – Romania – Slovakia – Spain – Sweden – Switzerland – United Kingdom. All countries are Member States of the European Union apart from Switzerland. Therefore, information and data regarding the other 7 Member States, v. gr. Croatia, Cyprus, Finland, Hungary, Malta, Norway, Poland and Slovenia are missing.

f. The structure of this report emulates the structure of the survey it derives from.

g. At least two States (Greece and Spain) are currently expecting a relevant change in the regulation of several key aspects of IOHs.

3. For the purposes of this report, the term "IOH" will be used, as a synonym of the term "insolvency representative" or "insolvency practioner" (generic term used by the EIR Recast[2]), to refer to the person fulfilling the range of functions that may be performed, in a broad sense, in any kind of insolvency proceedings, irrespective of their specific goal (liquidation or reorganisation). Therefore, within the general term "IOH", we will subsume the different titles that are used to refer to the person responsible for administering the insolvency proceedings (such as "administrator", "insolvency administrator", "judicial administrator", "trustee", "examiner", "liquidator", "syndic" "bankruptcy liquidator", "supervisor", "receiver", "curator", "custodian", "official", "debt mediator", "reorganisation advisor", "judicial manager" or "commissioner").

CONTEXT

4. At a European level, with the coming into effect of the EIR on 31 May 2002[3], the European liquidator stepped into the limelight. In the French version of this Regulation all insolvency administrators operating within the European Union are lumped together for the first time under the general term "Syndic", in the German version under the general term "Verwalter" and in the English version under the general term "liquidator". The entry into force of the Regulation triggered a flood of articles, particularly on the stipulated jurisdiction rules. There was very little comment, by contrast, on the consequences of this Regulation for the status of the liquidator. This is surprising; after all, the liquidator is at the centre of cross-border insolvency proceedings and thus enables implementation of the Regulation in the first place. The Regulation moreover defines the term "liquidator" in Article 2(b) as "any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs".

5. INSOL Europe's 2010 Report on "Harmonisation of insolvency law at EU Level"[4], presented to the European Parliament Committee on Legal Affairs,

[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, Article 2 (5).
[3] Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, (OJ L 160 of 30.6.2000, p. 1).
[4] "Harmonisation of Insolvency Law at EU Level", Study of the European Parliament, Directorate General for Internal Policies, Policy Department: Citizens' Rights and Constitutional Affairs, Legal Affairs, Note PE 419.633, May 2010.

identified a number of areas of insolvency law that are apt for substantive harmonisation [5]. However, regarding the qualifications and eligibility for the appointment, licensing, regulation, supervision and professional ethics and conduct of insolvency representatives, because of the substantial differences between EU Member States, harmonisation was not deemed necessary until a further harmonisation of substantive insolvency law and company law has been achieved. It concluded that notwithstanding the different remuneration systems of the office holders, the use of different systems in the EU Member States has not caused any difficulties in practice even though the fact that certain functions are reserved to lawyers admitted to the local court, of course, has put a practical restriction on the free provision of services in the EU.

6. The EIR Recast of 20 May 2015 replaced the liquidator by the insolvency practitioner which is a neutral expression and defined as "any person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii), or (v) supervise the administration of the debtor's affairs".

TYPES OF INSOLVENCY OFFICE HOLDER

7. While some countries exclusively recognise one kind of IOH,[6] most of the examined countries harbour different types of IOH. In general terms, a correlation can be found between having several types of IOHs and having several types of insolvency proceedings.[7]

8. The two main factors that normally distinguish between different insolvency proceedings are (a) the purpose of the proceedings (liquidation or reorganisation) and (b) the nature of the debtor. Those two factors also tend to impact on the types of IOHs that some jurisdictions provide.

[5] Topics that are apt for such harmonisation and for which harmonisation is also important are the following: (i) the rules on the of opening of insolvency proceedings including the eligibility of the debtor; (ii) the rules on the filing and verification of claims; (iii) the rules on the responsibility for the proposal, verification, adoption, modification and contents of reorganization plans; (iv) the rules on the voidness, voidability and unenforceability of detrimental acts; (v) the rules on the termination of contracts and rules on the mandatory performance under contracts; and (vi) the rules on the liabilities of directors, shadow directors, shareholders, lenders and other parties involved with the debtor. Furthermore, rules on the insolvency of groups of companies should be developed. Finally, it is desirable that a central database containing relevant court orders and judgements is made available.

[6] For instance Spain and Greece.

[7] It is the case, for example, of United Kingdom, Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Germany, Ireland, Italy, Lithuania, Romania and The Netherlands.

The Purpose of the Proceedings

9. Broadly speaking, all insolvency proceedings are one of the following: either a "rescue" procedure (aimed at the financial rehabilitation and reorganisation of the debtor) or a "liquidation" procedure (whose purpose is to sell the assets of the debtor and subsequently distribute their proceeds to creditors, and which involves the winding-up of the company). As per the examination of the survey responses, it may be concluded that in many cases, depending on the main goal of the proceedings (rescue or liquidation), different types of IOH arise.

    a. With regard to the functions and powers attributed to the IOH, those depend on the impact or influence that each procedure has on the powers of the debtor. Generally (though not always), in reorganisation procedures, the debtor may administer the insolvent estate under the supervision of the IOH ("debtor-in-possession"[8] situations): in those cases, the IOH will have a merely supervisory function.[9] On the contrary, in liquidation procedures, the general rule is the substitution of the debtor in these powers (the debtor/management or board of directors is dispossessed and the IOH takes over all powers, normally under the supervision of the court). In the jurisdictions where only one type of IOH exists (irrespective of the purpose of the proceedings), the duties and powers of the IOH vary according to said purpose.[10] Moreover, in the jurisdictions where there is only one insolvency procedure ─during the course of which the debtor may be either rescued or liquidated─, normally only one type of IOH exists.[11]

    b. Regarding the qualifications required to be appointed as an IOH (see *infra*), it would seem that, the more intense the effects of the procedure on the powers of the debtor, the more the functions of the IOH, and the higher the qualification requirements for the IOH should be. However, it should be borne in mind that, in occasions, different types of IOHs exist, but the differences between those refer exclusively to the different functions undertaken: in those cases, notwithstanding the diverse roles undertaken, the IOH is always the same kind of

[8] According to the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, Article 2 (3), "debtor in possession" means a debtor in respect of which insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner or the complete transfer of the rights and duties to administer the debtor's assets to an insolvency practitioner and where, therefore, the debtor remains totally or at least partially in control of its assets and affairs.

[9] For example, Austria, United Kingdom.

[10] It is the case of Latvia, Slovakia, Sweden, and Spain.

[11] For example, Spain.

professional.[12] In other jurisdictions, on the contrary, this is not the case and, depending on the purpose of the proceeding, a different type of IOH, subject to specific requirements (qualifications, experience, etc.) will be appointed[13].

c. The level of supervision of the IOH by the court. In some rescue proceedings, there is no court involvement.

The Nature of the Debtor

10. Some countries also provide different types of IOH depending on the nature of the debtor. Differences can be found, firstly, depending on whether the debtor is an individual (natural person) or a corporation (legal entity)[14]. Generally, the requirements for the IOH may be higher if the procedure refers to a corporation.[15]

11. Secondly, different types of IOH also arise depending on whether the debtor performs a business activity or not.

12. Similarly, special circumstances surrounding the debtor also have an impact on the type of IOH to be appointed. This is the case, for example, for banks, insurance companies, especially large or relevant corporations or groups of companies.[16]

13. Naturally, the above conclusions are not valid on a general basis. In some States, indeed, the IOHs are chosen from the same list, irrespective of whether the proceedings refer to a consumer or to a business corporation.[17]

The Nature (Interim or Final) of the Appointment

14. In some countries,[18] an IOH is appointed on an interim basis by the court before insolvency proceedings commence[19]. The powers and functions of that person

[12] For example, Portugal.

[13] For example, France.

[14] In France, the IOH do not deal with personal insolvencies. It is interesting to highlight that Recital 9 of the EIR Recast provides that "This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual."

[15] It is even possible that, in debt-restructuring proceedings for individuals, no IOH is appointed, as happens in Sweden.

[16] It is the case, for instance, in Austria, Bulgaria, Spain and Czech Republic.

[17] For instance United Kingdom and Germany.

may differ slightly from the ones assigned to the final IOH, notwithstanding the fact that, generally, the interim IOH is later appointed as final IOH if the proceedings commence.

15. The main functions of an interim IOH are usually the following:

    a. to assess the financial situation and solvency of the debtor;

    b. to determine the prospect of continuation of the activities of the debtor;

    c. to decide whether grounds exist to open insolvency proceedings or not;

    d. to assess whether there are sufficient funds to cover the costs of the proceedings;

    e. to secure the assets and assist the debtor in operating his/her ongoing business; and

    f. to avoid that mischievous acts are perpetrated before the insolvency proceedings commence.

SIZE OF THE PROFESSION

16. The types of insolvency administration can be classified in accordance with two general models: a public model and a private/professional model. The former is far less common than the latter, although examples of both can be found within the 22 States that have been surveyed.

    a. In a "public" model, IOHs are specialized public servants who are integrated in the country's public administration.[20]

[18] Bulgaria, Czech Republic, Estonia, Germany, Ireland, Portugal, Slovakia.

[19] Recital 15 of the EIR Recast states that "This Regulation should also apply to proceedings that, under the law of some Member States, are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis. Although labelled as 'interim', such proceedings should meet all other requirements of this Regulation."

[20] TIRADO, I., Issues Note on Insolvency Representatives (draft), The World Bank, 2011. A properly designed model of "public" insolvency administration has prima facie the following advantages: (a) a body of technically skilled public professionals can be created by the State, by means of a publicly organized and conducted examination (although this feature is not exclusive to the public model); (b) there would be no (or limited) cost for the insolvency estate; (c) IOHs could benefit from all the information available to public authorities (information gathered through the years by the tax authority, reports on the solvency of debtors held by the central bank, etc.) and avail themselves of public resources (i.e. the infrastructure of State attorneys, etc.); and, finally, (d) the fact that IOHs are civil servants, who get paid from the public budget (or with strict controls as to remuneration from private sources) and are

b. The "private" model can take different shapes. The purely professional model is one consisting of IOHs that are grouped into self-regulatory bodies, that set the requirements for joining them and that organize access to their service according to technical standards. Another variant, also present among the 22 States surveyed, grants access to the insolvency profession to members of pre-existing bodies of lawyers and/or accountants, often by establishing further eligibility requirements. These two models may themselves have further variations. The bodies of IOHs may be private or have a semi-public side[21], and in some jurisdictions the State has assumed the organization or the supervision of a national exam to qualify professionals to act as IOHs.[22]

17. In almost all the States that have been examined, a private model applies. Generally, no restrictions exist on the size of the profession, other than the qualifying requirements. The only exception is Switzerland, where the competence to conduct the main type of insolvency proceedings is vested to the State, and where seldom can private IOHs be appointed.

PRACTISING NORMS

18. In general, in all the States that have been surveyed, the IOHs range from senior partners of the global law and accountancy firms, to sole practitioners who run their own small and micro-businesses. In between these extremes, generally there are many medium-sized firms, either specializing in restructuring and insolvency, or providing such services as part of a range of accountancy, audit and other financial or legal services.

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banned from conducting other professional activity places them in a position where conflicts of interest are more difficult to occur and may be more easily controlled.

The disadvantages of a "public" insolvency administration are also many. The scarce use of public models may be an indication that the costs outweigh the benefits. To the extent that public models imply the use of public funds in private affairs, this constitutes state aid (to the debtor, to its creditors, or to both) and amounts to the pro tanto externalization of the costs of distress resolution, and hence of credit, to the public purse; the model will share the inefficiencies of a country's public sector and the total outcome may be more costly than in a private system with a reasonably functional market; the model may also share other eventual defects of a country's public system, such as – possibly – lack of integrity, excessive bureaucracy, insufficient incentives to engage in continuing professional development, lack of responsiveness to stakeholder needs and absence of effective accountability to them; and, finally, there is a risk that public IOHs, who might be part of the hierarchical system of a given public administration, will take decisions based on political opportunism or on considerations unrelated to the optimal treatment of the insolvent estate (for example, avoiding redundancies even if they would seem reasonably necessary to save the business).

[21] For example, France.

[22] TIRADO, I., Issues Note on Insolvency Representatives (draft), The World Bank, 2011.

19. However, in some countries, there are no large firms specialised in insolvency proceedings, and the market is dominated by sole practitioners and small law firms.[23]

QUALIFICATION, TRAINING AND ENTRY INTO THE PROFESSION

20. One of the key features of any insolvency system are the subjective (i.e. personal) characteristics of the candidates who can be appointed.

21. Within the 22 States surveyed, there are different approaches so as to ensure appropriate qualifications, including, but not limited to the following:

    a. Requirement for certain professional qualifications (a University degree in Law and/or Economics, for instance).

    b. Examinations and certifications.[24]

    c. A licensing system (which may either be administered by a government authority or by a professional body).[25] Obtaining the license may require passing an examination, a special training, or a certain level of experience.

    d. Membership of professional associations.[26]

    e. Requirements for certain levels of experience (generally specified in numbers of years) in relevant areas (finance, accounting and law, for example), as well as experience in the conduct of insolvency proceedings (supervised and/or unsupervised).[27]

    f. A combination of several of the above.

22. It should be noted, however, that the qualifications and training required may vary, within a country, depending on the type of IOH. As stated above (see supra), the role assigned to each type of IOH shall depend on the purpose of the proceedings and on the nature of the debtor. Therefore, the qualification requirements may be different, depending on whether the IOH is to handle (a)

[23] Bulgaria, Austria, Denmark, Latvia.

[24] This is the case for Bulgaria, France, Lithuania, Portugal, and Romania. Where available, the passing rates of these examinations show a highly demanding profile.

[25] France, United Kingdom, Slovakia, Belgium, Bulgaria, Czech Republic, Latvia,

[26] Latvia or Denmark for instance.

[27] United Kingdom, Belgium, Bulgaria, Czech Republic, Estonia,, Germany, Greece, Ireland, Lithuania, Sweden, Spain.

voluntary or compulsory proceedings, (b) liquidation or rescue proceedings, (c) a commercial or a non-commercial debtor, or (d) a corporation or a natural person.[28] In general terms, when the insolvency proceedings concern enterprises, the IOH is expected to have sufficient knowledge of commercial law and business management.[29] Similarly, when the debtor is a natural person without a business activity, the requirements to act as IOH tend to be considerably lower and flexible.[30]

23. As stated above (see supra), IOH may be private individuals or public officials (public servants). The 22 countries reviewed show an outstanding majority of IOH belonging to the private sector. Only Switzerland differs. Although the specific qualification issues discussed here are mainly of interest with regard to IOHs belonging to the private sector, they might also be relevant to the employment of the public official by the government agency.

24. In some of the reviewed countries, specific requirements are set in place in special circumstances. It is the case for insolvency proceedings that concern a business that is of economic importance (with regard to the size, location or complexity); financial institutions; investment companies, etc.[31]

PROFESSIONAL BODIES

25. IOHs are subject to their qualifications often belonging to qualified professions, mainly as lawyers or accountants. Normally, these professionals are by virtue of their original profession members of Professional Bodies, such as Bar Associations or Associations of Accountants/Auditors, which set and enforce minimum professional and ethical standards and guidelines.

26. In some countries, however, specific Professional Bodies exist with regard to IOHs, giving place to a superposition of Professional Bodies. Membership to these bodies may be either voluntary or compulsory.[32] Additionally, these bodies are either public entities[33] or completely private[34].

[28] It is the case for Belgium, Estonia, Germany or Ireland.

[29] Austria.

[30] Estonia.

[31] Austria, Bulgaria, Czech Republic.

[32] Membership is voluntary, for instance, in Czech Republic, Germany, Latvia, Slovakia, and Spain. It is compulsory, for example, in France.

[33] For example The Insolvency Service in the United Kingdom, the Chamber of Bailiffs and Bankruptcy Trustees in Estonia, the National Council of Judicial Administrators and Judicial Liquidators in France,

27. Where they exist, Professional Bodies that are specific for IOHs usually perform the following tasks:

    a. Producing common principles and codes of practice or of ethics, which set out the basic principles and essential procedures that IOHs are expected to comply with. Normally, when membership is voluntary, the principles of proper insolvency administration are binding only for their members.

    b. Monitoring and supervising their IOHs.

    c. Holding disciplinary committees for determining the appropriate sanction.

    d. Defending the joint interests of their members.

    e. Organizing professional training (seminars, conferences, courses) and requiring members to undertake a minimum annual continued professional education.

    f. Ensuring the qualifications of the IOHs (membership acknowledges the proper qualifications and experience required to act as IOH).

    g. Licensing, relicensing, suspending and terminating the licenses (in licensing systems).

    h. Deciding on complaints for IOHs' conduct.

    i. Contributing and participating in the legislative process by providing proposals.

    j. Ensuring fair competition between IOHs.

    k. Ensuring transparency and fair practice standards on insolvency market.

28. It should be noted that the Professional Bodies do not always have regulatory or supervisory powers over IOHs.[35] When they do, they normally comply with the following requirements:[36]

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the State Institution Insolvency Administration in Latvia, the Commission for the Supervision of Court Auxiliaries in Portugal.

[34] Association of Certified Insolvency Administrators of Latvia, for instance.

[35] Professional Bodies with regulatory or supervisory powers can be found in France, United Kingdom, Estonia, Latvia and Portugal.

[36] The World Bank, Principles for Effective Insolvency and Creditor/Debtor Rights Systems.

a. Being independent of individual IOHs;

b. Setting standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency, and accountability; and

c. Having appropriate powers and resources to enable them to discharge their functions, duties, and responsibilities effectively.

CONTINUING PROFESSIONAL EDUCATION (CPE)

29. The purpose of the requirements for ongoing professional education, where they exist, is to ensure familiarity with current developments in relevant areas of law and practice.[37] As pointed out above (see supra), IOHs are expected to be competent to undertake the work for which they are appointed. Thus an IOH should maintain appropriate levels of knowledge of, and experience in, the administration of insolvencies, and to engage on an ongoing basis in continuing professional development.[38]

30. The majority of the 22 States surveyed follow the previous recommendation and take into consideration CPE for IOHs. In some of the reviewed countries, a specific CPE is mandatory for IOHs,[39] and its organisation is carried away either by Professional Bodies and Associations, or by the Government itself.[40] In some countries, CPE is required for lawyers and accountants, but not specifically for IOHs.[41]

31. Where CPE for IOHs is not an obligation, it is normally possible to undertake it on a voluntary basis.[42]

BODY CORPORATE OR INDIVIDUAL

[37] UNCITRAL, Legislative Guide on Insolvency Law, p. 175.

[38] TIRADO, I., Issues Note on Insolvency Representatives (draft), The World Bank, 2011.

[39] United Kingdom, Bulgaria, Czech Republic, Denmark, Estonia, France, Latvia, Lithuania, Portugal, Romania, Slovakia, Sweden, Netherlands.

[40] Bulgaria.

[41] Austria, Belgium, Ireland, Italy, Luxembourg (with the obligation of the CPE to be linked to their practice, i.e. insolvency).

[42] Austria, Germany.

32. In many of the surveyed States, the IOH must be a natural person.[43] However, some States do provide that a legal person may also be eligible for appointment,[44] subject to certain requirements such as:

    a. That the individuals to undertake the work on behalf of the legal person are appropriately qualified;

    b. That the legal person itself is subject to regulation;

    c. That the court has to be informed about the natural person in charge (i.e., the identity of the natural person who will represent the legal entity must be disclosed to the court);

    d. That the shareholders and/or employees need to meet the requirements to be an IOH.

33. In all the countries surveyed, the model of insolvency administration is ordinarily a one-person organ. However, in some countries, it is possible, under some circumstances, to appoint a second member and have, therefore, a two-member administration organ.[45] This is used in special cases, namely very large insolvency proceedings or the insolvency of debtors operating certain type of business (financial, insurance, etc.).[46]

34. When more than one IOH is appointed, in some countries each IOH can bind the estate separately,[47] while in other jurisdictions decisions shall be taken by unanimity and actions have to be undertaken jointly.[48]

SANCTION FOR ACTING AS AN IOH WITHOUT PROPER AUTHORIZATION

35. A unanimous answer in all the countries surveyed is that a person acting as an IOH without proper authorisation is highly unusual and unlikely. The main

[43] United Kingdom, Belgium, Bulgaria, Denmark, Estonia, France, Germany, Ireland, Italy, Latvia, Luxembourg, Portugal, Sweden, Netherlands, France, Greece.

[44] Austria, Czech Republic, Hungary, Slovakia, Spain, Lithuania, Romania, Switzerland.

[45] The appointment of a second IOH is uncommon since it tends to be less efficient and more costly than single-member insolvency administration. TIRADO, I., Issues Note on Insolvency Representatives (draft), The World Bank, 2011.

[46] The appointment of two IOHs is possible, under certain circumstances, in Spain and Denmark, for instance.

[47] Denmark.

[48] Bulgaria.

reasons for the low chances of this situation to happen are (a) the requirements to entry the profession (license, examinations, etc.) and (b) the appointment system, which ordinarily is done by the court by choosing an IOH from a list, or requires the court's approval. It is therefore extremely difficult for a person who is not a properly authorised IOH to successfully hold him/herself as an IOH.

BONDING AND INSURANCE

36. The IOH will have in his/her possession, under his/her control or at his/her direction assets and funds of the debtor on behalf of the creditors. Many of the surveyed countries do not require any kind of arrangement for IOHs to cover those losses of assets of the estate or possible damages as a result of a breach of their duties. However, in those countries, despite the fact that no statutory requirements are set in place for IOHs, in practice the IOHs do have said insurance, generally due to any of the following circumstances:

    a. because insolvency courts require it in order to appoint the IOH;[49]

    b. because the associations of IOHs require it for their members;[50]

    c. because IOHs are a subset of another profession (mainly lawyers or accountants) who are obliged to hold insurance;[51] or

    d. because they do it on a voluntary basis.

    In the end, despite the lack of statutory requirements, holding a bond or insurance has become in those countries a regular practice.

37. In many countries, however, some kind of insurance is specifically required for IOHs. The arrangements to cover the losses caused by the IOH depend on the State, and may be in the form of for example:

    a. personal indemnity insurance, usually with the establishment of a minimum covered amount;[52]

    b. a general or specific bond or guarantee underwritten by an approved insurance company or financial institution;[53]

[49] Belgium, Germany.

[50] Germany.

[51] Germany, Italy, Luxembourg, Sweden, Netherlands, Austria.

[52] United Kingdom, Bulgaria, Czech Republic, Denmark, Estonia, Ireland, Latvia, Lithuania, Portugal, Romania, Slovakia, Spain.

[53] United Kingdom.

c. a compensation fund, financed by annual levies or calls on all IOHs.[54]

38. In some countries, the cost of the bond/insurance is borne by the insolvent estate,[55] although in many others this cost is borne by the IOH him/herself.[56] Uncommonly, the costs are shared between the estate and the IOH.[57]

39. Where specific bonding/insurance requirements are set, the level of the bond and amount of insurance covered is normally established in the insolvency law or by the relevant professional association or regulatory body. As per the information reviewed, this level or amount does not always relate to the book value of the assets of the insolvent estate.

40. The level of insurance required can also depend on the nature of the proceedings (depending, for example, on whether the debtor remains in possession or not)[58] and on the nature of the debtor.[59] Finally, if the model of insolvency administration is public (see supra), and thus IOHs are governmental employees, no bonding or insurance requirements exist, as the State itself is liable for the damage they may cause.[60]

APPOINTMENT OF IOHS

41. Insolvency laws adopt a number of different approaches to selection and appointment of an IOH. The process for the appointment can be divided into three different steps:[61]

a. First step: determining the pool of potential candidates for appointment.

[54] France.

[55] United Kingdom.

[56] Spain for instance.

[57] Denmark.

[58] In Denmark, when the debtor remains in possession, there are no specific insurance requirements.

[59] In Estonia, there are no insurance requirements when the insolvency proceedings affect natural persons.

[60] In Switzerland, the State (Cantons) is liable for damage caused by the official bankruptcy administrators, the private bankruptcy administrators, the trustee and the liquidators. Consequently, there exist no bonding and insurance requirements for IOHs taking appointments.

[61] UNCITRAL, Legislative Guide on Insolvency Law, p. 176.

b. Second step: the selection of an IOH.

c. Third step: the appointment of the selected IOH.

Determination of the pool of potential candidates

42. The determination of the pool of potential candidates is directly related to the qualifications, training and other requirements needed to entry the profession, which has been examined above (see supra).

Selection of an IOH

43. The selection of an IOH for a particular proceeding can be done either by the court, by independent appointing authorities, by the creditors or by the debtor him/herself.

44. In many of the jurisdictions that have been reviewed, the court selects the IOH.[62] The selection may be done (i) either from a list of appropriately qualified professionals at the discretion of the court;[63] or (ii) by reference to a roster or rotation system.

    a. The selection being made from a list of appropriately qualified professionals at the discretion of the court is a common system within the surveyed countries.[64] The appointee's position does not depend on the debtor or its creditors. This system is based on the discretionary decision of the judge,.

[62] Belgium, Denmark, Estonia, Germany.

[63] With regard as to who elaborates these lists, we may find different approaches within the 22 countries surveyed. For example, in Denmark, each bankruptcy court in the major cities has 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. In France, once the qualification and training is complete, the IOHs (depending on the type) are included on lists prepared by institutional national commissions, which are then divided into sections that correspond to the geographical jurisdiction of France. In Germany, candidates have to apply to the insolvency courts to get listed. Some courts have a formal proceeding for this, others do not. In Greece, the bars at the district of each court around the country prepare a list for each calendar year with the attorneys wishing to act like IOHs. In the Netherlands, each individual district court has drawn up a list of persons who are eligible for appointment.

[64] United Kingdom, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Sweden, Netherlands.

b. Other countries, on the contrary, provide that the selection has to be done by reference to a roster or rotation system.[65] In this model, the appointment is automatic, since the IOH is appointed according to a list that has been compiled after a draw. The automatic designation can provide for a sufficient level of technical skills for the appointee when there are strict requirements for joining the list of candidates from the outset.[66] A roster system can either be rigid (so that no exceptions to the random selection are allowed) or flexible (allowing the court, under certain circumstances, to discretionally appoint the IOH, for instance if special skills are required).

45. Other selection systems are based on the initial decision of the petitioning private parties (creditors and debtor).

46. One approach allows creditors to play a role in recommending and selecting the IOH to be appointed.[67]Normally, the creditors' choice is not binding for the court.

47. Finally, also the debtor (or its directors if it is a corporation) is allowed, in some of the surveyed countries, to suggest an IOH. This is generally restricted to voluntary and/or reorganization proceedings.[68] This approach allows the debtor to select an IOH that it considers will be best able to conduct the reorganization. Some countries allow creditors, in appropriate circumstances, to replace the IOH appointed by the debtor.[69]

48. It is possible, in some of the surveyed countries, to appoint the same IOH in several insolvency proceedings, if those refer to companies belonging to the same group.[70]

Appointment of the selected IOH

49. The formal appointment of the IOH is generally carried out by the court.

[65] Czech Republic, Latvia, Lithuania, Portugal, Romania (under certain circumstances) and Spain (in the future).

[66] TIRADO, I., Issues Note on Insolvency Representatives (draft), The World Bank, 2011.

[67] For instance in the United Kingdom (in some insolvency proceedings), Denmark, Austria, Bulgaria, Estonia, Germany (in big cases), Ireland, Luxembourg (only in big cases also), Portugal, Romania.

[68] For example in France, Ireland and Slovakia.

[69] For example, in the United Kingdom, when the nomination of the IOH is made by the debtor, creditors have to ratify it.

[70] France and Spain for instance.

50. Finally, it should be borne in mind that some countries provide a mixed model, according to which the court initially appoints an insolvency representative but later creditors may replace him/her by another individual of their choice,[71] or where a stakeholder (creditor or the debtor's managers or shareholders) make the appointment but other stakeholders have the right to ask the court to appoint a substitute.

Termination of engagement and/or removal of the IOH

51. Nearly no information has been gathered regarding the termination of the engagement and the removal of IOHs, although interesting conclusions could be extracted from a comparison between the States surveyed. Some suggested queries would be, for example, the following:

    a. Which are the justified causes that enable an IOH to voluntary resign (illness, objective or personal reasons)? Since resignation may be harmful for the proceedings, are there any sanctions for unjustified resignations?

    b. In which circumstances can the IOH be removed? Is it possible for the court or the creditors to remove the IOH from office at will (*revocatio at nutum*)?

    c. Who may apply for the IOH's removal? Who taken the ultimate decision regarding the removal?

    d. Who supervises the IOH's performance (the court, the creditors' committee, the professional bodies, etc.)? Are there any specific accounting obligations for IOHs?[72]

    e. What are the consequences of the removal of the IOH regarding his/her remuneration?

    f. Are IOHs often removed from office?

REMUNERATION

Nature of the remuneration system

[71] Austria, Portugal.

[72] As happens in France.

52. We can find within the 22 countries surveyed two main systems: one where fees are freely agreed by the parties (remuneration determined based on market mechanisms) and another where fees are established by a third party (a court or an Agency, normally pre-established by regulation).[73]

53. In some countries, fees can be freely agreed between the debtor and/or the creditors' committee or one (or more) main creditor(s) and the professional, frequently coupled with the subsequent consent of the creditor's meeting (and, sometimes, with the control of the court or an external body).

54. in other countries, fees are regulated; criteria are legally set to limit the amounts payable.

55. With regard to the involvement of creditors, in some States, they are required to play a role in fixing or approving the remuneration (see infra).

Criteria to determine fees

56. The examined jurisdictions have approached the issue of determining an insolvency representative's fees in broadly two different ways, or a combination or variations of them:[74] (i) scale or commission based on the estate (value of assets and/or liabilities or on percentages of assets realized and/or funds distributed), (ii) and/or time spent.

57. **Scale or commission fees** may be set and operated in different ways:

    a. The scale or commission may be set by legislation or code for insolvencies generally,[75] or freely determined in individual insolvencies by the court/creditors.[76]

    b. Fees may be based on a percentage of the assets realized and/or funds distributed;[77]

    c. There may also be a descending scale based on the total value of the assets of the insolvency estate; or a combined scale based on assets and

[73] Examples of free-market determination of fees can be found in Romania and Germany (in some proceedings).

[74] A combination of the different basis can be found, for example, in the United Kingdom and Ireland.

[75] Belgium, Czech Republic, Estonia, France, Germany, Italy, Latvia, Luxembourg, Portugal, Sweden, Spain.

[76] Greece, Lithuania, Bulgaria.

[77] France, Belgium, Czech Republic, Italy, Bulgaria, Estonia and Italy for example.

liabilities.[78] This solution is based on the assumption that the higher the value of the assets and the higher the number of creditors, the more complicated the job.

d. There may be a minimum threshold amount which recognizes the cost of complying in any event with statutory requirements applicable in all cases,[79] and with or without an overriding maximum.[80]

e. All the previous possibilities may be complemented with the consideration of other circumstances that imply a higher (or a lower) degree of difficulty, and that can be used to increase (or decrease) the amounts resulting from the scales.[81] Possible examples of factors that may be taken into consideration are:

- the number of employees;
- the number of creditors;
- the location of productive centres in different countries;
- the assumption of the actual administration of the business (as opposed to a debtor in possession situation), etc.[82]

58. **Fees based on time spent**, are the system in some of the countries reviewed.[83] The various approach are the following:

a. a remuneration can reward value returned to creditors;

b. any claim for remuneration must be justified (nature of the tasks undertaken, grounds to execute the task and the outcome of the task) in some countries;

c. some countries provide that tasks should only be undertaken (and executed in the manner proposed by the IOH) if a reasonably prudent person, faced with the same circumstances regarding her own affairs, would spend her own money and time in doing what has been done (deploying commercial judgement); and

d. records must be kept of what has been done in some countries.

[78] United Kingdom, Austria, Bulgaria, Spain or Germany.

[79] Austria, Germany.

[80] Estonia.

[81] Belgium, Austria, Czech Republic, Germany, Greece, Portugal, Spain.

[82] For example, in Germany.

[83] United Kingdom, Ireland, Netherlands, Belgium and Germany (in some proceedings).

59. Some countries provide for **set amounts** (fixed fees or lump sums) under certain circumstances.[84]

60. Some of the reviewed countries incorporate rules to coordinate the remuneration of an IOH appointed to two or more insolvency proceedings of enterprises belonging to the same group.[85]The remuneration rates for the interim IOH are not the same as for the final IOH in some countries.[86]

Approval and review of the fees

61. Generally, the court is entitled to approve the remuneration.[87]

62. Depending upon the manner in which the IOH's remuneration is fixed, the different jurisdictions provide a review procedure to address dissatisfaction of the IOH him/herself or of creditors.[88]

    a. When the remuneration is fixed by the creditors, the court has normally the power to review the amount at the IOH's request.[89]

    b. When the remuneration is set by the court in the first instance, most laws provide that the IOH can appeal the decision. In some States, also creditors[90] and the debtor him/herself[91] can challenge the remuneration.

Means of payment

[84] For example, in Sweden for small cases.

[85] It happens in Spain.

[86] Germany and Estonia provide a lower remuneration for interim IOHs.

[87] Denmark, France, Germany, Belgium, Romania, Netherlands for instance.

[88] UNCITRAL, Legislative Guide on Insolvency Law, p. 183.

[89] For example, Lithuania.

[90] United Kingdom, Germany, Greece, Denmark, Slovakia, Sweden or Greece.

[91] Denmark, Sweden or Greece.

63. In most of the States surveyed, the insolvent estate must borne the remuneration of the IOH.[92] The most common source of payment are the unencumbered assets of the insolvent estate.[93]

64. Some countries also levy a surcharge on creditors making initial application to commence insolvency proceedings to cover initial costs.[94]

65. Another issue is whether insolvency law recognizes the importance of according priority to payment of the IOH remuneration. This issue is normally addressed by, firstly, granting priority over the claims of the creditors.[95] In some jurisdictions, there is absolute priority. In others, the insolvency practitioners' claim yields to the claims of some secured creditors.[96] However, not all the surveys have provided enough feedback on this respect.

66. This leads to another issue: what happens when there is not enough to pay the IOH's fees? Theoretically, there are several possible answers:[97]

    a. debtor-related person/entities pay;

    b. creditors assume the cost;

    c. the insolvency practitioner loses – totally or partially – his/her right to the fees;

    d. public authorities fund the insolvency representative;[98] or

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[92] United Kingdom, France, Portugal, Romania, Sweden, Netherlands, Spain

[93] For example, in Latvia or Spain. This is detrimental to unsecured creditors because it may result in nothing being left for distribution to those creditors. According to UNCITRAL, the fact that most of the available assets if not all are used to cover the cost of the administration of the proceedings is an important issue. UNCITRAL, Legislative Guide on Insolvency Law, p. 182.

[94] Denmark for instance.

[95] Denmark, Spain.

[96] Spain.

[97] The first two solutions are arguably problematic: shareholders/directors should not personally bear a cost unless there is a general private-law institution whose requirements are met (piercing the corporate veil, negligent misconduct that triggers liability, etc.); and creditors will have already lost their investment and it would make no sense to compound the damage they suffer. The third answer is the factual scenario that occurs in many jurisdictions (all those jurisdictions where there is no specific regulation of the matter). It is not a desirable solution, unless moderated by other types of compensation (for example, in some jurisdictions, IOHs who complete their job and remain unpaid have a better chance of being appointed to other cases with appropriate remuneration in a future moment).

In some countries, the public authorities assume the cost, either by using their own staff or paying a professional. The argument to support this model is twofold: on the one hand, the State may intervene without disrupting a market economy when, in extreme cases, there is a market failure; and, on the other hand, IOHs are – in some cases – court-appointed officers, performing within the framework of a public procedure and they play a role that to some extent can be considered to be of public interest. Finally, the most recent and wide-spread solution is the existence of a contingency fund, normally set up by insolvency practitioners to cover these cases.

e. there is a fund set up to pay in these situations.[99]

f. It also possible that, if the payment of the costs of the proceedings is unlikely since the beginning (because the insolvency estate threats not to be enough to cover the costs of the procedure), the proceedings do not commence at all.[100]

67. Not all the responses provided have addressed this particular issue, which should be deemed of outmost importance.

Reimbursement of expenses

68. Some countries provide for the reimbursement of the proper expenses incurred by the IOH in the course of the proceedings.[101]

PERSONAL LIABILITY OF IOHs

69. The array of duties inherent to the legal position of IOHs stems from different sources: insolvency law creates the vast majority of the duties, but the IOH is also typically bound by duties originating in tax or social security legislation, or, as an officer involved in the administration of a business (as administrator or supervisor or a debtor in possession), duties arise in general civil law (contractual duties, tort law, company law), etc. The breach of each of those different duties is capable of triggering different types of liability. It is therefore normally the case that the regulation of the liability of insolvency representatives involves different laws.

70. IOHs, when – directly or indirectly – administering the insolvent business, act on behalf of the estate. The immediate effect of their actions takes place directly between the debtor's business and the third party with whom a legal relation (contractual or not) is established. In this regard, the IOH, by mandate of the law (independently of who has appointed him/her, as powers derive from the law, not from the appointment) occupies a position typical of those that act for others (similar to agents, trustees or even "organic representatives," such as company directors), and is a third party to the contract/legal act. This explains why IOHs should normally not be made liable to third parties for liabilities incurred by the

[98] Denmark, Sweden.

[99] Romania, Belgium, Spain (in the near future).

[100] Spain.

[101] Austria, Estonia for example.

debtor (even if administered by the IOH) in the ordinary course of business. When the representative enters into a contract on behalf of the insolvent company (openly acting as insolvency administrator of the insolvency company), damages accruing from that relationship should only be compensated by the insolvency estate, not by the IOH.[102] This assertion is only valid as long as the IOH does not voluntarily assume a position that can render him/her personally liable (such as when, for example, the IOH has concealed information from the counterparty, or placed himself in front of the counterparty as guarantor of the obligation). Although something similar may be asserted regarding tortious liability incurred while administering the insolvent business, in the case of torts there is a higher ground to render the representative jointly liable with the estate. However, and in order to protect the market, some States expressly make the IOH liable if, either directly managing the business or, to a lesser extent, supervising administration, s/he enters into new deals when he knew (or is deemed to have known) that compliance would no longer be possible.[103]

71. Generally, the surveyed jurisdictions provide that creditors and other interested parties can be recompensed in the event of intentional damage caused by fraud, defalcation or other malpractice.

72. Additionally, IOHs are generally made accountable for breaching their duty to act with due care (i.e., for negligent performance). With regard to the standard of care to be employed by the IOH, it is important to establish a measure for the care, diligence and skill with which the IOH is to carry his/hers duties and functions. The standard of care may depend on the model of insolvency administration as a whole. If the insolvency representative is a civil servant appointed by the public administration, the general system of liability for the acts of public employees applies.[104] In the vast majority of countries, where the IOH is a private practitioner, s/he is expected to act with a professional standard of care, and his/her acts are to be tested against the general standard of care expected of an average insolvency professional (i.e., an insolvency representative will be deemed to have acted negligently when an average

[102] The main advantage of making the IOH personally liable for obligations incurred in the ordinary course of insolvency proceedings such as those relating to the ongoing operation of the business is that it creates legal certainty for the suppliers of the debtor (UNCITRAL, Legislative Guide on Insolvency Law, p. 184). But it is a disincentive for the IOH if the risk of personal liability may exceed the fees that may be earned. UNCITRAL suggests, as a solution, to make only the assets of the estate liable, rather than the personal assets of the IOH.

[103] Regarding this particular issue, see the cases of United Kingdom, Belgium, Czech Republic, Germany, and Greece.

[104] Switzerland.

insolvency representative acting with care and skill would not have done the act).[105] Normally, liability is triggered by negligence.

73. Finally, when regulating the IOH's liability, some States[106] differentiate between:

    a. liability for damage caused to the estate[107] and

    b. liability for damage directly caused to one of the parties to the insolvency proceedings (or, more generally to other relevant stakeholders, mainly creditors and the debtor him/herself).[108]

74. One aspect of the regulation of the IOH's system of liability is the determination of the court competent to decide the suit. In some countries, jurisdiction is given to the insolvency court that has conducted the entire procedure.[109] Arguably, this solution adds certainty to the system, fosters procedural simplification and leaves the decision in the hands of the court that presumably will be most informed about the sued IOH's performance.[110] However, practice shows that this might not always be the best solution. In those systems where the appointment and control of the IOH is exercised by the court, and where the IOH is not only conceived of as an auxiliary to the court but also has the duty (and the right) to request court-approval before executing certain acts, the

[105] See for example the cases of Germany or The Netherlands. Not enough information has been gathered regarding the standard of prudence that applies to IOHs (in particular, whether this standard should be higher or no more stringent than the one that would apply to the debtor in undertaking its normal business activities in a state of solvency). A reason for imposing a higher level of prudency is that the IOH is not dealing with its own assets, but with assets belonging to another person. However, the World Bank, Principles for Effective Insolvency and Creditor/Debtor Rights Systems, considers that IOHs, where acting as managers, should be held to director and officer standards of accountability.

[106] Spain.

[107] TIRADO, I., Issues Note on Insolvency Representatives (draft), The World Bank, 2011. When the IOH causes damage to the estate and all the other requirements necessary for liability are met, a claim for compensation of damages is automatically originated as an asset of the insolvency estate. The success of the action will imply the payment of the compensation to the insolvency estate, not to the plaintiff. It must be noted that legally assigning the parties (and stakeholders) the standing to sue for damages caused to the estate during the insolvency procedure may create certain risks: on the one hand, it confers on the parties an individualistic instrument to influence the IOH's behavior, which can – and many times is – used improperly to threaten the officer; on the other hand, it is, by itself, an inefficient system of responsibility, for those with the right to resort to it (the debtor, individual creditors, other stakeholders) will only benefit from its success to a limited extent (if they will at all), since the monies payable as compensation would swell the assets of the estate, and they would only receive their share according to their standing in the hierarchy of the insolvency procedure.

[108] When the IOH causes damages directly to a party (for example to a creditor by not safeguarding a secured asset or unduly leaving her out of the creditors' list), the person who suffered the harm may be given a direct action against the officer, and the suit's success would directly compensate the plaintiff.

[109] Spain.

[110] UNCITRAL, Legislative Guide on Insolvency Law, p. 185, states that, to avoid uncertainty and confusion, it may be desirable that it is the same court that appointed the IOH (where the court plays a role in such appointments) is competent to decide the suit.

relationship between the court and the IOH may be too close for a fair decision on liability. The conducted survey has not collected enough information regarding this issue.

75. On a closely related topic, attention must be paid to the cases where the act that caused the damage had previously been authorized by the insolvency court. Further information should maybe be gathered so as to whether an authorisation system (by the court and/or by the creditors) exist in each jurisdiction, and the way it works (for instance, if an authorisation is needed to take certain decisions, or can be requested on a voluntary basis by the IOH).

76. Finally, some countries provide that, in addition to the liability, a disciplinary penalty can be imposed on the mischievous or negligent IOH (such as a fine imposed by the Professional Bodies).[111]

RELEASE OF IOHs FROM LIABILITY

77. The answers to the survey are particularly heterogeneous regarding this issue. While in some cases the release from liability is related to the rendering of accounts at the end of the mandate,[112] some other responses link said release with the statute of limitations,[113] or the circumstances that may exclude liability (see supra);[114] while, in other cases, reference is made to the limitation of the IOH's personal liability by using special clauses in agreements or contracts.[115]

INDEPENDENCE

78. In all the surveyed countries, IOHs are expected to be objective and impartial, acting independently of those involved in or affected by the insolvency. All the 22 States have provisions dealing with issues of objectivity, impartiality and independence (or what may generally be referred to as conflicts of interest[116] and duty) arising from a prior or a continuing business or personal relationship or other involvement with any of the parties.

[111] Estonia.

[112] Bulgaria, United Kingdom, Belgium, Romania.

[113] Denmark, Greece.

[114] Czech Republic.

[115] Germany, Ireland.

[116] As seen before, the new Recital 21 of the EIR Recast states that "insolvency practitioners who are appointed without the involvement of a judicial body should, under national law, be appropriately regulated and authorised to act in insolvency proceedings. The national regulatory framework should provide for proper arrangements to deal with potential conflicts of interest".

79. Generally, the regulation specifies the relationships or involvements which may give rise to an actual or potential conflict. For example:

    a. Prior or existing relationships with the debtor: Normally, threats come from different people, depending on whether IOH is natural person or legal entity.

        i. If the debtor is a natural person:

            - Familial relationships
            - Affective bonds

        ii. If the debtor is a corporation:

            - Prior ownership of the debtor (being a shareholder or partner)
            - Prior engagement as a representative or officer of the debtor
            - Prior engagement as an auditor or accountant of the debtor
            - Prior or existing business relationship with the debtor
            - Prior or existing employee relationship
            - Prior or existing legal advice[117]

    b. Prior or existing relationships with a creditor

    c. Prior or existing relationships with a competitor of the debtor

80. These relationships may not only be present but also may have taken place some time ago (during the 2, 3 or 5 previous years prior to the opening of the insolvency proceedings).

81. These circumstances have implications both with regard to the acceptance of appointments and regarding the termination of the IOHs engagement. Most countries impose an obligation to disclose existing or potential conflicts of interest.

82. Where an issue of potential conflict might still arise, it might be addressed in several ways, depending on the nature of the potential conflict:

[117] See current section 56 InsolvenzOrdnung in Germany.

a. If the conflict is permanent, the normal solution should be not to appoint the person or, if the situation arose after appointment, the person should be removed. An alternative solution which is present within the scope of the survey is the disclosure to all parties of prior or continuing relationships which might give rise to the risk or appearance of conflict, followed by the approval of the appointment in the knowledge of such relationships.[118]

b. If the conflict refers only to a specific situation, it can be tackled by the appointment of one or more "special" IOHs to deal with those aspects of the insolvency where there might be seen to be the risk or appearance of conflict.[119] This may be the best solution in the case of conflicting duties: when one and the same insolvency representative is appointed in two or more procedures and the correct exercise of the duty as insolvency representative in one of them would prejudice the interests defended in the other proceedings. This is particularly the case in the insolvency of enterprise groups.

83. A further issue to be addressed might be whether, in the countries where legal entities can be appointed as IOHs, the same regime of incompatibilities and impediments in order to ensure independence apply. Additionally, it would be interesting to determine whether the incompatibilities and impediments do apply (a) to the legal entity appointed as IOH, (b) to the natural person that represents said legal entity, or (c) to both.

CONCLUSION

In summary, the regulation of IOHs is heterogeneous but it is too early to assess whether the harmonisation of the different status is worthwhile. Further research is required to identify the fundamental questions regarding the regulation of IOH.

[118] The person may still be appointed, provided the conflict of interest is disclosed (the independence will be assessed against the circumstances disclosed) and maybe safeguards are put in place. See the case of United Kingdom.

[119] This is foreseen in Austria and Czech Republic.