



President: Alberto Nuñez-
Lagos (Spain) Deputy
President: Steffen Koch
(Germany) Vice President:

INSOLVENCY OFFICE HOLDERS FORUM

Summary of the survey on the state of affairs of European insolvency office holders and recommendations for minimum standards

*Survey conducted from December 2015 to May 2016 on behalf of and
presented to the European Commission, DG Justice in July 2016 by the*

Co-Chairs of the INSOLVENCY OFFICEHOLDERS FORUM:

**Marc André, France
Daniel F. Fritz, Germany
Stephen Harris, United Kingdom**

„Die Auslese des Verwalters ist die Schicksalsfrage des Konkurses.“

Prof. Ernst Jaeger¹

Introduction:

The survey was conducted amongst selected members of INSOL Europe with relevant practical experience either as insolvency office holder (“IOH”) or professional with broad experience in insolvency and/or restructuring matters. Responses could be collected in the meantime covering 22 European jurisdictions.

The **questionnaire** sent to the respondents is attached hereto as **Annex 1**.

Annex 2 is including a **one page tableau** for easy reference and overview, highlighting the key findings, key observations, but key difference of each jurisdiction reviewed.

Having reviewed the answers and based on their own experience the Co-Chairs of the IOH Forum want to highlight as introduction the following key observations that should always be borne in mind when reviewing or assessing the situation of IOHs across Europe:

- Compared to other similar professionals like lawyers and accountants the profession is quite small but must deal with a wide range of cases ranging from over-indebted consumers ranging to multi-national groups of companies with turnovers of billions of Euros.
- The profession falls largely on individuals, often with close nexus to the court, or exercising quasi judicial functions.
- IOHs are working with entities, entrepreneurs at the cusp of viability, thus, at moments of tension and stress.
- They are tasked with making difficult and far reaching decisions, often in very short time frames.
- They are exposed to personal liability.
- IOHs are practising in many different models, and come from different backgrounds.
- IOHs largely form sophisticated professional bodies, but variations do exist.
- The snapshot of this survey does not and was not intended to capture how the profession works in each jurisdiction, nor the glue that helps it function. Nor the role of the profession nor its direction of travel or evolution in each jurisdiction or economy, either in terms of addressing the NPL issue that is prevalent in certain parts of Europe or as a stepping stone to live side restructuring techniques. Nor in terms of fuelling good practice or effective economic change. Showcasing these important issues would be another task to perform and a vital prerequisite to fully understand the profession before thinking of changes or the introduction of additional rules.

¹ “The choosing of the insolvency administrator is the fateful question of the insolvency proceedings”, Ernst Jaeger, Professor for Civil Procedural Law at University of Leipzig, Emeritus in 1935

As a key result we understand that nevertheless the professions works on various similar standards but always under sensitive circumstances. It must be stressed that even if the same principles are overlapping for certain jurisdictions, they are then again totally differing in other countries reviewed.

RECOMMENDATION 1:

As a consequence the IOH Forum is not deeming the profession fit and ripe for introducing narrow and all too common minimum standards or principles – and this in particular based on the constant changes of the insolvency framework based on law reforms and changes of the market and economic climate overall which is already challenging the profession and therefore the functioning of the insolvency system. It must be understood that in some jurisdiction IOHs can look back on long lasting traditions and evolution lines whereas in other jurisdiction the concept of an IOH not just working as a liquidator and distributor of assets is quite a new phenomenon.

However, the IOH Forum would deem it extremely helpful to **enhance the approximation of the professions by the professionals themselves**. Any assistance to facilitate exchange of knowhow, best practice standards and generally knowledge exchange, e.g. by means of peer reviews and the possibility to earn CPE points not only in the respective home jurisdiction but across the EU would be extremely helpful, indeed welcomed and would automatically lead to the desired harmonization on the long run, but just not on top down approach but by a real bottom up evolution including the affected professionals and not by imposing rules that might even affect the well-functioning of this sensitive area of the whole capital market.

While the survey and this summary report were finalized the IOH forum was provided with the „*Study on a new approach to business failure and insolvency, Comparative legal analysis of the Member States' relevant provisions and practices (Tender No. JUST/2014/JCOO/PR/CIVI/0075)*“ by Leeds University with regards to IOHs making reference to an assessment by the EBRD, namely the “*Assessment of Insolvency Office Holders: Review of the Profession in the EBRD region*” (2014).

As a result the Leeds University study concluded, that „*the European Union could leverage the work of these other organisations with a view to formulating a set of rules for adoption on a pan-European basis. For instance, the principles developed by EBRD could provide a useful starting point for discussion on a common European framework.*“ Therefore, These general principles were promoted not only as such but even given the nature of “rules” by this study. As such these eight “rules” need to be cited here:

“EBRD / Leeds University Rules”

- 1) **Licensing and Registration** - *IPs should hold some form of official authorisation to act.*
- 2) **Regulation, supervision and discipline** - *given the nature of their work and responsibilities, IP should be subject to a regulatory framework with supervisory, monitoring and disciplinary features.*
- 3) **Qualification and training** - *IPs candidates should meet relevant qualification and practical training Standards. Qualified IPs should keep their professional skills updated with regular continuing training.*

- 4) **Appointment system** - there should be a clear system for the appointment of IPs, which reflects debtor and creditor preferences and encourages the appointment of an appropriate IP candidate.
- 5) **Work standards and ethics** - the work of IPs should be guided by a set of specific work standards and ethics for the profession.
- 6) **Legal powers and duties** - IPs should have sufficient legal powers to carry out their duties, including powers aimed at recovery of assets belonging to the debtor's estate.
- 7) IPs should be subject to a duty to keep all stakeholders regularly informed of the progress of the insolvency case.
- 8) **Remuneration** - a statutory framework for IP remuneration should exist to regulate the payment of IP fees and protect stakeholders. The framework should provide ample incentives for IPs to perform well and protection for IP fees in liquidation.

RECOMMENDATION 2:

Based on the IOH forum's own research certain general principles are applicable in all covered jurisdictions and are commonly used for certain topics concerning IOHs. If, what the IOH forum is not fully in agreement with, minimum standards should be imposed on the profession, the diversity must be seen and acknowledged for various other aspects, however.

Therefore, any further assessment of general principles and as a consequence common minimum standards - as far as developed in accordance with the reality of the profession and based on thorough assessments including the affected professionals and organizations duly representing the profession - are highly appreciated. But in any event all such minimum standards must be double checked by the reality, the actual daily work and circumstances of the profession and insofar with respect to the relevant topics they should cover.

Now, while certain of these eight rules as set out above are matching such reality test as well by the observations as set out in the survey undergone by the IOH forum very well, other principles are neglecting relevant facts and are not in compliance with the actual situation in certain European jurisdictions.

Generally supporting harmonization by means of approximation we therefore would recommended to use these rules as minimum standards only in a revised version. For this purpose we have commented and revised these "rules" in **Annex 3** and are recommending to considering the eight rules in this amended version as a potential set of minimum standards as consolidated and set out in **Annex 4 – Minimum Standards as proposed by the IOH-Forum**.

The Co Chairs want to thank the contributors to the survey and Prof. Marta Flores and Emmanuelle Inacio. Without their help this summary would not exist.

EXECUTIVE SUMMARY OF FINDINGS

TYPES OF INSOLVENCY OFFICE HOLDER

Some countries exclusively recognise one kind of IOH.

But most of the examined countries harbour different types of IOH depending on the:

- Purpose of insolvency proceedings (mainly rescue or liquidation);
- The nature of the debtor (but in some States, the IOHs are chosen from the same list, irrespective of whether the proceedings refer to a consumer or to a business corporation);
- In some countries, an IOH is appointed on an interim basis by the court before insolvency proceedings commence. The powers and functions of that person 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.

TYPES AND SIZE OF THE PROFESSION

The types of insolvency administration can be classified in accordance with two general models; a public model and a private/professional model:

- In a “public” model, IOHs are specialized public servants who are integrated in the country’s public administration.
- 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, thereby exercising a monopoly on entry in the profession.
 - Another variant 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, and
- in some jurisdictions the State has assumed the organization or the supervision of a national exam to qualify professionals to act as IOHs.

In almost all the States (except for Switzerland), a private model applies. Generally, no restrictions exist on the size of the profession, other than the qualifying requirements.

PRACTISING NORMS

In general, 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.

QUALIFICATION, TRAINING AND ENTRY INTO THE PROFESSION

There are different approaches so as to ensure appropriate qualifications:

- Requirement for certain professional qualifications (a University degree in Law and/or Economics, for instance);
- Examinations and certifications;
- A licensing system (which may either be administered by a government authority or by a professional body). Obtaining the license may require passing an examination, a special training, or a certain level of experience;
- Membership of professional associations;
- 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;
- A combination of several of the above.

PROFESSIONAL BODIES

- 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.
- In some countries, however, specific Professional Bodies exist with regard to IOHs in this specific regard, giving place to a superposition of Professional Bodies. Membership to these bodies may be either voluntary or compulsory. Additionally, these bodies are either public entities or completely private. It should be noted that the Professional Bodies do not always have regulatory or supervisory powers over IOHs.
- In one country (France), IOHs are specialized and regulated professions members of a Professional Body.

CONTINUING PROFESSIONAL EDUCATION (CPE)

The majority of the 22 States surveyed follow take into consideration CPE for IOHs:

- In some of the reviewed countries, a specific CPE is mandatory for IOHs, and its organisation is carried away either by Professional Bodies and Associations, or by the Government itself.
- In some countries, CPE is required for lawyers and accountants, but not specifically for IOHs.
- Where CPE for IOHs is not an obligation, it is normally possible to undertake it on a voluntary basis.

BODY CORPORATE OR INDIVIDUAL

- In many of the surveyed States, the IOH must be a natural person.
- However, some States do provide that a legal person may also be eligible for appointment, subject to certain requirements such as:
 - That the individuals to undertake the work on behalf of the legal person are appropriately qualified;
 - That the legal person itself is subject to regulation;
 - 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);
 - That the shareholders and/or employees need to meet the requirements to be an IOH.

SANCTION FOR ACTING AS AN IOH WITHOUT PROPER AUTHORIZATION

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

BONDING AND INSURANCE

- Many of the surveyed countries do not require any kind of arrangement for IOHs to cover those losses.
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:
 - because insolvency courts require it in order to appoint the IOH;
 - because the associations of IOHs require it for their members;
 - because IOHs are a subset of another profession (mainly lawyers or accountants) who are obliged to hold insurance; or
 - because they do it on a voluntary basis.
- 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:
 - personal indemnity insurance, usually with the establishment of a minimum covered amount;
 - a general or specific bond or guarantee underwritten by an approved insurance company or financial institution;
 - a compensation fund, financed by annual levies or calls on all IOHs.

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

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.

APPOINTMENT OF IOHS

Determination of the pool of potential candidates

The determination of the pool of potential candidates is directly related to the qualifications, training and other requirements needed to entry the profession.

Selection of an IOH

- In many of the jurisdictions that have been reviewed, the court selects the IOH. The selection may be done:
 - either from a list of appropriately qualified professionals at the discretion of the court;
 - or (ii) by reference to a roster or rotation system.
- Other selection systems are based on the initial decision of the petitioning private parties (creditors and debtor).

Appointment of the selected IOH

- The formal appointment of the IOH is generally carried out by the court.
- But 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, 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.

REMUNERATION

Nature of the remuneration system

In the 22 countries surveyed:

- fees are freely agreed by the parties (remuneration determined based on market mechanisms) or
- established by a third party (a court or an Agency, normally pre-established by regulation).

Criteria to determine fees

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:

- scale or commission based on the estate (value of assets and/or liabilities or on percentages of assets realized and/or funds distributed),
- and/or time spent.

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

- The scale or commission may be set by legislation or code for insolvencies generally, or freely determined in individual insolvencies by the court/creditors.
- Fees may be based on a percentage of the assets realized and/or funds distributed;
- 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 liabilities.
- There may be a minimum threshold amount which recognizes the cost of complying in any event with statutory requirements applicable in all cases, and with or without an overriding maximum.
- 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. 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.

Fees based on time spent, are the system in some of the countries reviewed.

Marginally, some countries provide for **set amounts** (fixed fees or lump sums) under certain circumstances. Those fees are certain, but they may also be arbitrary or require some prior assessment of the work involved in a context where in many, particularly larger, insolvencies there may be many uncertainties.

Approval and review of the fees

Generally, the court is entitled to approve the remuneration:

- When the remuneration is fixed by the creditors, the court has normally the power to review the amount at the IOH's request.
- 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 and the debtor him/herself can challenge the remuneration.

Means of payment

- In most of the States surveyed, the insolvent estate must bear the remuneration of the IOH. The most common source of payment are the unencumbered assets of the insolvent estate.
- Some countries also levy a surcharge on creditors making initial application to commence insolvency proceedings to cover initial costs.

Priority to the payment of the IOH remuneration

There are several situations:

- there is absolute priority to the payment of the IOH remuneration;
- there is priority to the payment of the IOH remuneration over the claims of the creditors.
- the IOHs' claim yields to the claims of some secured creditors.

Impecunious cases

When there is not enough to pay the IOH's fees, there are several possible answers:

- debtor-related person/entities pay;
- creditors assume the cost;
- the insolvency practitioner loses – totally or partially – his/her right to the fees;
- public authorities fund the insolvency representative; or
- there is a fund set up to pay in these situations.
- 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.

Reimbursement of expenses

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

PERSONAL LIABILITY OF IOHs

Creditors and other interested parties can be recompensed in the event of intentional damage caused by fraud, defalcation or other malpractice.

Additionally, IOHs are generally made accountable for breaching their duty to act with due care (i.e., for negligent performance).

Finally, when regulating the IOH's liability, some States differentiate between:

- liability for damage caused to the estate and
- 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).

RELEASE OF IOHs FROM LIABILITY

The release from liability is related to the:

- rendering of accounts at the end of the mandate,
- statute of limitations, or
- circumstances that may exclude liability,
- limitation of the IOH's personal liability by using special clauses in agreements or contracts.

INDEPENDENCE

All the 22 surveyed States have provisions dealing with issues of objectivity, impartiality and independence (or what may generally be referred to as conflicts of interest and duty) arising from a prior or a continuing business or personal relationship or other involvement with any of the parties.

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

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).

Most countries impose an obligation to disclose existing or potential conflicts of interests.

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

- If the conflict is permanent, not to appoint the person or, if the situation arose after appointment, the person should be removed. An alternative 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.
- 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.