INSOL Europe

Survey

on

Insolvency Office Holders in Germany

provided by

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Introduction

This Note was put together upon request of and based on a questionnaire prepared by INSOL Europe´s Insolvency Office Holders Forum in order to allow for comparison of the profession of insolvency office holders in Europe.

As far as reference is made to the German Insolvency Code (Insolvenzordnung "InsO") it is available in English on the website of the German Federal Ministry of Justice:

www.gesetze-im-internet.de/englisch_inso/

1. Types of Insolvency Office Holder

1.1. Preliminary Insolvency Administrators in regular insolvency proceeding with no debtor-in–possession (Regelverfahren).

When a debtor files for insolvency he does this at the local court. The court has to decide if (a) there is a reason to open insolvency proceedings, i.e. whether the debtor is insolvent (Sec. 16 InsO) because of illiquidity (Sec. 17 InsO), imminent illiquidity (Sec.18 InsO) or overindebtedness (Sec.19 InsO) and (b) if there are sufficient funds to cover the costs of the proceeding. If the court cannot answer that question itself, it regularly appoints one of the court listed administrators as an expert to examine the issue and give his opinion. If in the meantime assets need to be secured or if the debtor is running an ongoing business the court also appoints this person as the preliminary administrator (Sec. 21 and 22 InsO). This court decision is made once in the proceeding and the appointed person regularly will also be appointed as the administrator when the insolvency proceeding is finally opened. So the once selected person remains the administrator throughout the whole proceeding, unless the creditors decide to elect someone else (Sec. 56 a III, 57 InsO) or the administrator is dismissed by the court for an important reason.

In principle, the duty of the preliminary administrator is to secure the assets and to assist the debtor in operating his ongoing business. According to what may be useful and necessary, he can be given a variety of powers that may even be as strong as the powers of the final administrator. During the preliminary administration the salaries of the debtor's employees are secured / guaranteed by the employment agencies for a maximum period of three months and various measures can be taken to stabilise the ongoing business and to prepare and even begin to restructure the debtor´s enterprise.

1.2. Insolvency Administrators in regular insolvency proceeding with no debtor-in–possession (Regelverfahren).

Sec. 27 InsO:

"If insolvency proceedings are opened, the insolvency court shall designate an insolvency administrator."

Sec. § 56 InsO:

"From among all those persons prepared to take on insolvency administration work the insolvency court shall select and appoint as insolvency administrator an independent natural person who is suited to the case at hand, who is particularly experienced in business affairs and independent of the creditors and of the debtor. The willingness to take on insolvency administration work may be restricted to certain proceedings. The requisite independence shall not already be ruled out on account of the fact that

1. *the person's name was put forward by the debtor or by a creditor,*
2. *the person in question had given the debtor advice of a general nature on the course and consequences of the insolvency proceedings prior to the request for the opening of insolvency proceedings being filed."*

Appointment by the court: In practice the judges in the insolvency courts that appoint administrators list the relevant persons who apply for taking administrations. Regularly these persons have a university degree in either law or business administration and are admitted lawyers or admitted tax advisors or certified accountants. Most of them work in firms specialised in this field of work. When they start working as administrators they begin with small cases with no or small businesses and with appointments in consumer insolvencies. Step by step and depending on their skills and success and their firm´s capacities they get appointed for bigger cases. This is one of the reasons why administrators are very much interested in successful restructuring and in a high quota for creditors as this will lead to better cases.

Creditors´ involvement: In bigger cases, before the appointment of the administrator a preliminary creditors' committee has to be put in place which has the right to propose an administrator. In principle such proposal is binding on the court, if the committee's decision is unanimous, Sec. 56 a InsO.

In the first creditors' meeting in court (regularly 1 to 3 months after opening of the proceeding) the creditors can elect another administrator, Sec. 57 InsO.

Powers: the administrator has the sole power and duty to represent the estate. He has for example every right to sell assets, to collect debts, to cancel contracts or to dismiss employees. With little exemptions he can act without permission of the court or the creditors' committee.

Control: He is subject to supervision by the court, Sec. 58 InsO. He can be dismissed by the court for important reasons, Sec. 59 InsO.

Liability: the administrator can be held liable following the provisions of Sec. 60 and 61 InsO (see below 12.).

1.3. Preliminary custodian and custodian in debtor in possession proceeding (Sec. 270 a and 270 b German Insolvency Code "InsO"),

When a debtor files for insolvency under self-administration / debtor-in-possession and the legal requirements of either Sec. 270 a InsO (*"no circumstances are known which lead to the expectation that the order will place the creditors at a disadvantage"*) or Sec. 270 b InsO (no illiquidity but only imminent illiquidity or overindebtedness at the moment of the filing; intended restructuring does not manifestly lack the prospect of success) are fulfilled, the court shall in the opening proceedings refrain from imposing on the debtor a general prohibition on making dispositions or ordering that all of the debtors dispositions are effective only with the consent of a preliminary insolvency administrator. Instead the court shall appoint a preliminary custodian. If Sec. 270 b InsO applies, i.e. the debtor is not illiquid and wants to restructure his business in a plan proceeding, the debtor can propose the (preliminary) custodian who shall be appointed by the court unless this *"person is manifestly not suited to taking on the office"*, Sec. 270 b InsO. Lack of independence is a reason not to appoint the proposed person.

In practice the custodians are the same persons that are listed as administrators at court.

This court decision is only made once in the proceeding and the appointed person regularly will also be appointed as the custodian when the insolvency proceeding in self administration is finally opened, Sec. 270 c InsO. So the once selected person remains the custodian throughout the whole proceeding unless the creditors decide to elect another person (Sec. 56 a III, Sec.57 InsO) or the custodian is dismissed by the court for an important reason. Most of the provisions regarding the creditors' involvement in the process of the appointment of the custodian, the control by the court and the custodian's liability are the same as for the administrator, Sec. 274 InsO. The powers of the (preliminary) custodian are limited. He just has to assist and control the self-administrating debtor and has duties to report to the creditors and the court, which, as ultima ratio, can lead to the termination of the self administration. Some decisions of the debtor can only be taken with the consent of the custodian and the custodian is exclusively in charge for pursuing claw back claims and certain liability claims.

1.4. Insolvency Administrators in consumer insolvency proceedings

In consumer insolvencies (Sec.304 et seq. InsO) with the application filed prior to 1. July 2014 the court appointed a trustee ("Treuhänder"). Compared to an insolvency administrator such trustee had limited powers, in particular no authority to dispose of secured collateral and pursue claw back claims, Sec. 313 InsO.

As a result of the reform effective for proceedings applied for after 30. June 2014 the court appoints an insolvency administrator in consumer insolvencies as well with the same

powers as in regular proceedings, even though consumer insolvency proceedings are still leaner in process and less demanding for the administrator.

Regarding the appointment decision by the court, there is no difference between consumer and regular insolvency proceedings. Except that candidates apply for one kind of proceeding only, trustees / insolvency administrators were and are chosen by the judge from the same list.

1.5. Trustee for the debtor in discharge period

If the debtor is a natural person and has applied for a discharge of his remaining debts (which can either be a regular proceeding, if the debtor did or does run a business, or can be a consumer insolvency proceeding, if the latter is not the case) there is a discharge period directly following the insolvency proceeding, Sec. 286 et seq. InsO.

With the duty to control the debtor's obligations towards the creditors and to make distributions and to report to the court a trustee is appointed during this period. This person is appointed by the insolvency court and proposals can be made by the creditors or the debtor, Sec. 288 InsO. In practice the person who was appointed as administrator during the insolvency proceeding is being appointed as well for this very last part of the proceeding.

2. Size of the Profession

No official statistics exist. Statistics from a publishing house (InDat Statistik Bund 2015, and InDat Report 02-2016, S. 50) for the year 2015 show that there are 3410 administrators for all kind of proceedings in Germany, among these only 1456 take appointments for corporations.

Roughly 500 administrators are highly professionalised and get several appointments each year.

The statistics for the year 2015 show that 284 administrators have taken more than 10 appointments in 2015 in corporate insolvency cases.

Sec. 56 InsO provides that the administrator has to be an "independent natural person who is suited to the case at hand, who is particularly experienced in business affairs and independent of the creditors and of the debtor".

German administrators are either specialised lawyers (appx. 95 % of all administrators) in the field of insolvency and business law or certified accountants or belong to other professions with a university degree (appx. 5 % of all administrators). Insolvency Administrator is a separate and acknowledged profession. Almost all administrators are either partners or employees in law firms or accountant firms. As the independence of the

administrator is of essence, most administrators work in law firms highly specialised in this field of work and only in some exceptions in big firms with a broader range of specialisation and clients. Most administrators work in small or midsized firms with several lawyers and one to five offices.

Statistics from a publishing house (InDat Statistik Bund 2015) for the year 2015 show that in order to be listed among the top 30 firms the administrators of these firms together needed 53 appointments in insolvency cases of insolvent corporations. The administrators of the top firm together had 284 cases. There were 11 firms with more than 100 appointments.

Currently, there are about 30 to 50 firms that take a significant portion of all administrations in Germany.

3. Practising Norms

Except for the German Insolvency Code ("InsO") itself and judgements related to specific obligations and cases, binding Practising Norms for all administrators are not existing. The professional association VID (Verband Insolvenzverwalter Deutschland e.V.) in 2013 introduced the GOI (Grundsätze Ordnungsgemäßer Insolvenzverwaltung / Principles of Proper Insolvency Administration (available in the web http://www.vid.de/en/quality-standards/goi.html). These are binding for VID members (professionals with more than five years of experience in this field). Becoming a member is not obligatory for practitioners but courts tend more and more to ask if the administrators are VID members. Members get an obligatory third party certification every two years and it is also surveyed whether they adhere to the regulations of the GOI.

Apart from this, most administrators are either members of professional chambers for lawyers or accountants. These chambers regulate these professions but do not provide specific regulations regarding the work of administrators.

4. Qualification Training and Entry into the Profession

To get appointments, candidates have to apply for appointments at one or more of the local insolvency courts to get listed. Some courts have a formal proceeding for this, others do not. In practice, someone who wishes to work as administrator in Germany normally starts by working in one of the firms working in this field to get the necessary knowledge, practice and experience. After about 3 to 10 years he can then apply to get own appointments. Many courts demand that the applicant is a specialised lawyer ("Fachanwalt") or at least can prove that he has been trained to be a specialised lawyer. To get cases of corporations in insolvency one has to prove that one works in a firm with several employees that are at least specialized in the field of insolvency law, labour law, corporate law and tax.

5. Professional Bodies

No professional bodies exist for administrators only. Apart from this, most administrators are either members of the chambers for lawyers ("BRAK") or tax advisors ("BStBK"), German Bar Association ("DAV") or the Chamber of chartered accountants ("WPK"). These chambers and associations regulate these professions but do not provide specific regulations regarding the work of administrators.

6. Continuing Professional Education

As there is no legal requirement for licencing of IOHs there are no statutory provisions as well regarding CPE. On a voluntary basis however insolvency practitioners may enter into a position in which they accept an obligation to CPE:

The German Bar Association allows lawyers, who passed a course on insolvency law and demonstrated certain practical experience to use a title which translates as 'lawyer specialized in insolveny law' ("Fachanwalt für Insolvenzrecht"). In order to keep this title the lawyer has to demonstrate to the Bar Association at least 10 hours a year of professional education by way of publishing and/or participating in seminars as speaker or listener.

VID-members submit to the 'Principles of Proper Insolvency Administration' ("GOI", see above 3.), which require a yearly professional education of at least 30 hours by way of publishing and/or participating in seminars as speaker or listener. Members of the VID also guarantee that their assistants in charge pass at least one full day of professional education a year by way of external or internal training courses.

7. Body Corporate or Individual

Sec. 56 InsO explicitly states that only individuals can be appointed as IOH (see above 1.2.). That regulation was challenged just lately. The German Federal Constitutional Court confirmed that the limitation to individuals does not collide with the German Constitution (BVerfG 12.01.2016 – 1 BvR 3102/13) which is binding for insolvency courts. Still there is a widespread view that Corporates have to be admitted as IOHs due to the EU service directive. Insofar, the service directive may be taken into account for the interpretation of Art. 102a EGInsO (abbreviation for Introductory Act to the Insolvency Code):

"Article 102a
Insolvency Administrators from other Member States of the European Union

Nationals of another Member State of the European Union or of Contracting Parties to the Agreement on the European Economic Area and persons who have their registered business establishment in one of these states may complete the procedure for inclusion in a preselection list for insolvency administrators kept by the insolvency court via a single office according to the provisions of the Administrative Procedure Act

(Verwaltungsverfahrensgesetz). In such cases a decision regarding requests for inclusion in a preselection list must be taken within three months. Section 42a subsection (2), second to fourth sentences, of the Administrative Procedure Act shall apply mutatis mutandis."

8. Sanction for Acting as an IOH without proper Authorisation

The only authorization of an IOH is the appointment by the Insolvency Court. Therefore acting as an IOH without authorization is hardly possible.

In case the IOH cheated about his qualification – in particular by criminally pretending an academic title – the Court may dismiss him and he may be held criminally liable.

Someone who wrongfully pretends to act as an appointed IOH may be held for damages and fraud.

9. Bonding and Insurance

There are no statutory requirements for surety and/or indemnity insurance of IOHs. Factual however, IOHs will regularly maintain professional indemnity insurance due to the following reasons:

- In Germany most IOHs are lawyers and/or accountants (see above 2.). Both lawyers and accountants are obliged to maintain professional indemnity insurance with a minimum sum insured of 250,000 Euro per insured event.

- VID members submit to the obligation to maintain professional indemnity insurance especially for insolvency administration with a minimum sum insured of 2.0 Mio. Euro per insured event and 4.0 Mio. Euro per year.

- Insolvency Courts regularly ask persons applying for an appointment as IOH to provide proof for professional indemnity insurance.

- In insolvency proceedings with considerable risks of liability IOHs – as well as members of the creditors' committee – will regularly effect an insurance especially for the particular proceeding.

All major German insurance companies offer general professional indemnity insurance as well as special insurances for IOHs. Additionally there are several insurance brokers specialized on professional indemnity insurance for IOHs. There has not been any particular insurance self-syndicated by an IOH-association, but individual insurance companies may grant discounts to VID members (due to their regular quality check through biannual certification).

10. Appointment of IOHs

The general methods of selection and criteria for appointment are already set out above (in particular under 1.).

11. Remuneration

For each class of IOH the remuneration is regulated in the federal statute on insolvency office holders remuneration (Insolvenzrechtliche Vergütungsordnung, „**InsVV**"). In this law the remuneration is set out for all court-appointed IOHs and the different types of appointments.

As far as debtor-in–possession proceedings are concerned, professionals who sometimes usually may be appointed as IOH, take regularly position as Chief Restructuring Officer ("CRO") or as Chief Insolvency Officer ("CInsO"), such person usually will be appointed as member of the managing board of the company/debtor or is vested with full power of attorney. In any event, the remuneration of such CRO or CInsO is subject to a contractual agreement and they are normally remunerated by the hour or by working day and thus not subject to insolvency or other laws.

As far as formal appointments are concerned, the InsVV distinguishes between the following types of Insolvency Office Holders:

1. Insolvency Administrators (Sec.1 to Sec. 9 InsVV)
2. Preliminary Insolvency Administrators (Sec. 11 InsVV)
3. Custodian in debtor-in-possession proceedings (Sec. 12 InsVV)
4. Insolvency Administrators in consumer insolvency proceedings (Sec. 13 InsVV)
5. Trustee for the debt discharge period (Sec. 14 InsVV)

11.1 Remuneration of insolvency administrators

The remuneration of insolvency administrators is calculated on the value of the insolvency estate at the end of the proceeding (insofar related to the final accounts of the proceedings). In order to define this basis for the calculation of the remuneration, following exceptions need to be considered:

Assets serving as security/collateral for secured claims, will only be taken into consideration if the insolvency administrator has sold or liquidated such assets. However, not the full amount is taken into consideration, but more or less only the proceeds distributable to the insolvency estate as fee for handling and realizing the security assets.

In case of a set off only the prevailing amount is taken into consideration.

The costs of insolvency proceedings (remuneration of insolvency administrators and costs of the courts) will not be deducted from the basis of the calculation, same applies for preferential claims (i.e. claims based on activities and contracts of the insolvency administrator after commencement of proceedings). However, in case the insolvency administrator has paid himself an extra remuneration for special tasks he provided the estate, for instance as lawyer (Sec. 5 InsVV), this amount will be deducted (see below for more details of this case).

In addition, in case of the continuation of the business of the debtor only the surplus (profit) of the continuation period will be taken into consideration. Any pre-payment of a third party provided to the insolvency estate in order to cover costs of the insolvency proceedings shall not be reflected in the remuneration as well.

The regular remuneration is set out in Sec. 2 InsVV. Insofar, the following table applies:

up to 25 k€	40 %
up to 50 k€:	25 %
up to 250 k€:	7 %
up to 500 k€:	3 %
up to 25 mio. €:	2 %
up to 50 mio. €:	1 %
more than 50 mio. €:	0,5 %

In any case the minimum remuneration is fixed at 1,000 Euro (in case of not more than ten creditors), in cases of 11 up to 30 participating creditors to this amount extra 150 Euro will be added for every 5 creditors. For more than 31 participating creditors the extra amount for every 5 creditors is reduced to 100 Euro.

However, this general remuneration is more or less never taking place. It is only granted for the fictional and theoretical case of a totally normal insolvency proceeding. Insofar, Sec. 3 InsVV foresees examples allowing to grant a higher or a lower remuneration. As a result, the basis of the normal remuneration according to Sec. 2 InsVV will be modified by a certain percentage (see following example). The following examples are foreseen for a higher remuneration:

1. Dealing with securities causes significant efforts and such effort is not already mirrored in the base for the calculation.
2. The insolvency administrator has continued the operations of the business or administered a real estate portfolio, but the insolvency estate as basis for the calculation of his remuneration was not increased accordingly.

3. There was a large insolvency estate and the normal remuneration was because of the degression in the regular fee applicable for the normal case not suitable taking into account all the efforts of the administrator.
4. The insolvency administrator had to deal with employment issues and faced significant efforts.
5. The insolvency administrator has elaborated an insolvency plan.

In contrast to this, a decrease of the normal remuneration is possible for the following circumstances:

1. The insolvency administrator was already appointed as preliminary administrator.
2. The estate was already realized or distributed to a certain extend when the administrator took the appointment.
3. The insolvency proceeding or the appointment of the administrator ended ahead of schedule.
4. The insolvency estate was of a high value, but the administration of low requirements.
5. The affairs of the debtors were of an easy manageable size and the number of the creditors and the amount of liabilities were small.

Example 1:

The basis for the calculation is 500,000 Euro. Insofar the general remuneration amounts to 37,750 Euro.

The administrator handled a couple of serious and complex employment issues. Therefore he receives an award of an extra 15 %. In addition the administrator laid out an insolvency plan for which he may be granted an additional award of 25 %. Both awards summing up to 40 %.

However, the administrator was already in charge as preliminary administrator. Here, a reduction of 10 % is deemed as reasonable, this sums up to a final remuneration of 130 % of the normal remuneration (=37,750 Euro), totalling up to 49,075 Euro.

The remuneration is an award for the insolvency administrator as well as covering his ordinary business costs. This includes all the efforts for his office (e.g. rent, wages of his employees as well as only working for certain proceeding and the general costs of a

professional liability insurance – at least 2.0 Mio. Euro coverage being the industry´s standard).

However, the administrator is allowed to enter (with third parties) into service related to certain services to be provided for the insolvency estate. This may cover archiving the debtor's files, tax or legal advice.

As most of the German insolvency administrators are lawyers, an administrator can also work as lawyer in his own proceedings or engage affiliated or associated lawyers. However, in such case the remuneration has to be limited by the statutory amount according to the German law on lawyers remuneration ("Rechtsanwaltsvergütungsgesetz", "RVG"). If the insolvency administrator is hiring a third party counsel from another firm, the costs may be even higher, but in any way the costs of counsel have to be appropriate (see Sec. 4 and 5 InsVV). When an insolvency administrator provides the insolvency estate with legal services (but of course only where acceptable and necessary) the fee paid from the insolvency estate has to be deducted for the basis of the regular remuneration (see above). Same applies, if the administrator engages lawyers or tax advisors from his own firm.

The remuneration is subject to an application of the administrator to the insolvency court. The court has to publish its decision on the remuneration. The administrator as well as the debtor and every creditor my lodge a complaint. As insolvency proceedings may take some time, and the remuneration is generally only due at the end of the proceedings, the insolvency administrator may ask for installment payments in the course of the proceedings.

11.2 Preliminary Administrator

The basis for the calculation of the preliminary insolvency administrator's remuneration is set out in Sec. 11 InsVV. Here generally the value of all assets administered by the preliminary insolvency administrator has to be taken into consideration. Even assets with third party rights add to the basis of calculation, if the preliminary insolvency administrator dealt with them to significant extent. Insofar, the basis of the calculation is in most of the cases higher in preliminary proceedings to the calculation basis for the remuneration of the (final) insolvency administrator. However, generally the preliminary administrator only receives 25 % of the remuneration that would be applicable on the final insolvency administrator.

Example 2:

Same basis for the calculation with 500,000 Euro Insofar the remuneration would be calculated as follows:

- *Basis 25% of 37,750 Euro = 9,437.50 Euro*
- *Extra awards 30% of 37,750 = 11,325.00 Euro*

Total Remuneration = 20,762.50 Euro

11.3 Custodian

The custodian in debtor-in-possession-proceedings only receives 60 % of the remuneration applicable on an insolvency administrator. The duties of the custodian are very limited compared to the duties of the regular insolvency administrator (see above 1.3). There is generally not much room for additional awards for special activities. However, in such proceedings the costs of the administration as well include the costs of the CRO and other internal counsels of the debtor. As a result, debtor in possession proceedings may even be more cost-intensive than regular insolvency proceedings, although the custodian's remuneration is lower than the remuneration in ordinary proceedings.

11.4 Insolvency administrators in consumer proceedings

In consumer insolvencies generally the same remuneration rules apply as for regular proceedings. However, in cases in which the minimum remuneration is applicable, the minimum remuneration is only amounting to 800 Euros.

11.5 Supervision in the discharge period

Here again the remuneration is based on the amount the debtor distributed to the creditors (5 % for the first 25.000 Euros, 4 % for the amount up to 50 k€ and 1 % for any amount above 50 k€). However, these amounts are generally not met, insofar, the minimum remuneration of 100 Euro per year applies in most of the cases with a maximum of five creditors. For every 5 creditors exceeding 5 creditors the minimum remuneration is increased by 50 Euros.

12. Personal Liability of IOHs

The personal liability of insolvency office holders is set out in Sec. 60 and Sec. 61 InsO.

According to Sec. 61 (1) InsO the insolvency administrator shall be held liable to damages for all parties to the proceeding, if he wrongfully violates the duties incumbent on him under this statute. He shall ensure the careful action of a proper and diligent insolvency administrator. The aforementioned last sentence sets the level of diligence for the insolvency

administrator. This is comparable to other levels of diligence, e.g. the diligence of a prudent business man or merchant in corporate and commercial law.

The insolvency administrator is liable to all stakeholders in the proceedings. This includes the debtor, the insolvency creditors, the preferred creditors and/or secured creditors. If he violates a so-called insolvency specific duty, such violation of a specific duty must have caused a damage, and only if this damage is attributable to actions of the insolvency administrator, the administrator shall be liable for the relevant damage. Insofar, the insolvency administrator is according to this legal concept not liable for all violations, but only for violation of insolvency specific duties.

> *Example 3:*
> *The administrator shall be held liable if he does not pursue legal claim in time and if the claim as an asset of the insolvency estate becomes time-barred. In case the insolvency debtor is a natural person, the insolvency administrator may be liable towards the debtor, if he sells an asset (under value) that belongs to the debtor and is exempt from seizure.*
>
> *As stated above insolvency administrators in Germany are de facto obliged to be insured for professional misconduct, but the insurance only covers normal negligence but not gross negligence and intent. Insofar, and as far as the insolvency administrator is personally appointed and thus personally liable, avoiding personal liability is one of the key issues for German insolvency administrators. This crystalizes in particular in case of litigation matters, where the insolvency administrator has to be extremely careful. In case he starts litigation against former management and/or shareholders he can be blamed for initiating such litigation, if he looses the law suits and just caused or produced costs thereby. On the other hand he can be held liable, if he does not start promising litigation and therefore may held liable if e.g. any such claim becomes time-barred.*

Besides this, Sec. 61 InsO deals with the non-performance of debts incumbent on the estate by actions of the insolvency administrator. Sec. 61 reads: "*If a debt incumbent on this date created by a legal transaction of insolvency administrator cannot be fully satisfied from the insolvency estate, the administrator shall be held liable to damage for the referential creditor. This shall not apply, if the administrator in creating such a debt could not be aware of the probable insufficiency of the insolvency estate for performance*". This generally applies to situations where the business of the debtor is continued by the insolvency administrator after commencement of proceedings. The administrator has to be very careful and to control the affairs of the debtor, in particular his financial and liquidity situation like a true

business man. He cannot order goods or enter into contracts on behalf of insolvency estate, if he has not made sure that he will be able later on to meet such obligations.

In cases, in which the insolvency estate becomes nevertheless insufficient to meet such referential claims the only way to defend the insolvency administrator successfully, is to be in a position to proove that at the point of time when the obligation was entered into, the administrator was by diligent measures, e.g. based on a prudent liquidity planning, not able to foresee that the debtor will not be able to meet such obligations in the future when they become due.

13. Release Of IOHs from Liability

German insolvency law does not provide any means for releasing the IOH from liability (as far as not included in the laws ruling on his liability as set out above already). Therefore, German IOHs try to limit their personal liability using special clauses in agreements or contracts.

A standard clause in contracts with German insolvency administrators, in particular in insolvency related M&A transactions is e.g., that the other party waves any claims it may have against the insolvency administrator (except gross negligence and intent) and limits its claim only to funds available in the insolvency estate at the point in time when the claim will be raised. This typical limitation language covers generally the general liability under Sec. 60 InsO and the special liability for non-performance of debt incumbent on the estate according to Sec. 61 InsO (as explained above).

14. Independence

Insolvency administrators have to be independent. Insofar, Sec. 56 InsO states that an appointment of an insolvency administrator requires that he is independent. In particular the law reads:

> *"The requisite independence shall not already be ruled out on account of the fact the person's name was put forward by the debtor or by a creditor, the person in question had given the debtor advise of a general nature on the course and consequences of the insolvency proceedings prior to the request for the opening of insolvency proceedings being filed."*

These specific rules just have been introduced together with the insolvency law reform related to allowing easier access to debtor-in-possession proceedings ("ESUG"). Prior to that reform the appointment of the insolvency administrator was only up to the insolvency judges. Judges were more or less quite strict and sometimes just refused to appoint an

otherwise suitable insolvency administrator, only because he had been suggested by the applicant, may it be the debtor or a creditor.

Other judges considered insolvency administrators not sufficiently independent, who occasionally gave advice to insolvency creditors and/or debtors, even if the IOH just provided such advice in other cases which had nothing to do at all with the case the appointment was about.

Through the recent reform of the insolvency law however, creditors where granted more influence when it comes to the appointment and identification of a suitable insolvency administrator. As an upside for a debtor filing in time, i.e. in case of only imminent illiquidity, the debtor in possession proceedings allow the debtor to chose the administrator himself, which can only be denied for specific reasons. Insofar, the mere proposal of a specific administrator by the debtor or creditors is no longer an issue generally prohibiting an administrator to take an appointment in a specific case. However, despite of this, a more relaxed approach to insolvency administrators, who had given specific advice to a creditor or the debtor in that particular case, is still missing. If the IOH for example assisted as advisor to the debtor, its management or its creditors he will be deemed in any event as not being independent and cannot take an appointment by the court. This is still looked after very strict by courts. Most German insolvency courts ask applicants for an appointment to sign a declaration that they are indeed independent in this sense in the specific case before they get their actual appointment.