

Principles and best practices for Insolvency Office Holders

Bernard Santen, Jan Adriaanse and Iris Wuisman are leading a major project for INSOL Europe to design a set of Principles and Best Practices for Insolvency Office Holders (IOHs) in Europe. This article summarises some of the findings thus far, followed by the second public draft of the Principles.



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In December 2012¹ the European Commission (EC) submitted a report on the application of the European Insolvency Regulation (EIR) to the European Parliament (EP), the Council and the Economic and Social Committee.

In accordance with article 46 EIR, this report was accompanied by a proposal to adapt the Regulation. The focus of the EC Proposal² is on (a) enhanced restructuring possibilities, and (b) intensification of communication and cooperation between liquidators, between courts, and between each other.

On the intensification of communication and cooperation, the last line of Recital 20 of the Proposed EIR reads:

“In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law.”

We could also refer to the newly proposed recital 20a, to proposed changes in article 31 EIR and to the newly proposed article 31b EIR, all aimed at improving and facilitating communication and cooperation in cross-border cases amongst liquidators and courts, and between liquidators and courts.

The assignment

The call for *“principles and guidelines on communication and cooperation adopted by European*

and international associations active in the area of insolvency law” as quoted in Recital 20 of the Proposal challenged INSOL Europe to have such principles and Guidelines for IOHs drafted. Early 2013 INSOL Europe granted Leiden Law School the assignment:

“to design a set of Principles and Best Practices for Insolvency Office Holders (IOHs) in Europe.”

The idea is that by designing this set of Principles and Best Practices the general quality of IOHs in Europe would improve and the mutual trust between IOHs as well as the trust in the IOHs’ work by the general public would be enhanced. Consequently IOHs would be able to work more efficiently, which once again would enhance the trust in the IOH profession on the market.

INSOL Europe and Leiden Law School decided to divide the work over three phases. Report I focuses on the existing international rules and addresses the following research questions:

- Would it be possible to develop a framework for the uniform analysis of the existing rules for IOHs?
- Would the results of the analysis of existing international rules be supportive to the design of Principles and Best Practices for IOHs?

Report II analyses the sets of rules applicable to IOHs in 11 European countries. Here the main questions read:

- Would the results of the analysis of existing national rules in 11 European countries be supportive to the

design of Principles and Best Practices for IOHs?

- Which topics in IOHs related rules would be served by creating Principles and/or Best Practices?

Report III delivers the Principles and Best Practices for IOHs in Europe including comments, and will be final in October 2014 after the INSOL Europe Annual Congress.

Framework

Since a framework for the analysis of rules for IOHs did not exist, we set out to create such a uniform framework. From a tentative analysis we induced four main categories of subjects:

- 1.0 IOH selection and appointment: answers the question how to become an IOH.
- 2.0 Professional standards: focuses on the professional and ethical standards for the IOH.
- 3.0 Roles & responsibilities: relates to what an IOH should do once appointed.
- 4.0 Insolvency governance: discusses the various monitoring functions on the IOH’s work.

Anyone willing to become an IOH should pass a selection procedure of some sort and should subsequently be appointed (Category 1.0 of the framework). Once an IOH, the IOH should adhere to professional and ethical standards (Category 2.0) and should act according to certain roles and responsibilities (Category 3.0). Finally, a governance system (Category 4.0) is necessary in order to ascertain a minimum quality of work and to avoid carelessness or abuse.



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Figure 1: Model for the analysis of a set of rules for IOHs

Level I Categories	Level II Subcategories	Level III Topics	
1.0 IOH selection and appointment	1.1 License and registration	1.1.1 Requirements & contra indicators	
		1.1.2 Licensing procedures	
	1.2 Establishment of authority	1.2.1 Basis of authority	
		1.2.2 Mandate	
		1.2.3 (Inter)national recognition	
	1.3 Corporate groups	1.3.1 Appointment of a single IOH	
1.3.2 Administration as one estate			
2.0 Professional standards	2.1 Education	2.1.1 Recurring training	
	2.2 Professional skills	2.2.1 Experience	
		2.2.2 Other qualities	
	2.3 Professional ethics	2.3.1 Ethical standards	
3.0 Roles & responsibilities	3.1 Administration	3.1.1 Managing the estate	
		3.1.2 Reversal of legal acts	
		3.1.3 Agreements	
		3.1.4 Creditor ranking	
		3.1.5 Liquidation	
		3.1.6 Reorganisation	
	3.2 Liability & litigation	3.2.1 Establishing liability	
		3.2.2 Initiation of litigation	
	3.3 Communication	3.3.1 Communication with creditors, courts and other stakeholders	
		3.3.2 Communication protocol	
		3.3.3 Reporting standards	
	3.4 Coordination and cooperation	3.4.1 Coordination and cooperation among IOHs (in corporate groups)	
		3.4.2 Coordination & cooperation among foreign representatives (in cross-border insolvency)	
		3.4.3 Coordination & cooperation with foreign courts (in cross-border insolvency)	
	4.0 Insolvency governance	4.1 Accountability	4.1.1 Disclosures
			4.1.2 Mandatory audit
4.1.3 Liability insurance			
4.2 Remuneration		4.2.1 Fees	
		4.2.2 Costs & expenses	
4.3 Supervision		4.3.1 Competent authority	
4.4 Disciplinary action		4.4.1 Investigation	
		4.4.2 Disciplinary proceedings	

During the analysis we expanded and refined the elementary framework with 15 Level II provisions (“Subcategories”) and 34 Level III provisions (“Topics”). This enabled us to categorize all relevant provisions into the framework. Table 1 presents this expanded and refined framework to which we will now refer as ‘the model’.

Findings

Report I shows that the international sets of rules we analysed, 13 in all, neatly fitted into the model. Report II studied whether national rules would fit in

as well. It appears that the model does not need any changes and is capable of analysing national sets of rules for IOHs. Our detailed analysis of these rules shows that whilst in some areas e.g. administration or remuneration, identical solutions are found in several countries, in others the countries do not have any similar rules or lack rules at all. Where a level playing field for IOHs was lacking, we decided that the draft Principles and Best Practices were to create one.

When to use a Principle, and when a Best Practice? We opted for a Principle when aiming to

contribute to a level playing field of the IOHs’ standards of conduct and for a Best Practice when aiming on a level playing field of the IOHs’ specific performance. In company law this divergence is known as that between standards and rules. Compliance with standards is in the end decided upon by courts, since they are of an abstract nature, whilst compliance with rules is easier to establish since these contain specific provisions i.e. to do or to leave aside an act.

We deducted from the country analysis, that levelling the playing field would require seven

Principles and 22 Best Practices to be divided over the various categories of IOH related rules as presented in figure 2 below.

Progress

Report III, to be presented and discussed at the annual meeting in Istanbul next October, contains these Principles and Best Practices including comments. Before these will be presented at the meeting, INSOL Europe members will be offered the opportunity to respond to a questionnaire holding the draft text.

2: Summary findings on room for Principles and Best Practices		
Categories	Principles	Best Practices
IOH selection & appointment	1	3
Professional Standards	2	5
Roles & Responsibilities	3	9
Insolvency governance	1	5
Total	7	22

Principles For IOHs in Europe: A sneak preview

To show you where we are and what we are working on, you will find below the second public draft of the Principles. You may regard this as a teaser since in July INSOL Europe will open a questionnaire and give all members the opportunity to comment on the entire set of Principles and Best Practices. These (non-binding!) Principles describe your attitude and conduct as an IOH. Every Principle is followed by a short comment. The final text will contain a more detailed comment.

Principles

Principle 1. Insolvency Office Holder

1.1 An Insolvency Office Holder ('IOH') is any person or body appointed either in corporate rescue-oriented or in liquidation proceedings ('proceedings'), whose function is to administer or liquidate

assets of which the debtor has been divested or to supervise the administration of his/her affairs.

- 1.2 In performing his/her duties an IOH is bound by the law including case law and other regulations that apply in the country of appointment, as well as by regulations and guidelines set by a widely recognised national or regional professional association of IOHs in that country.
- 1.3 An IOH is guided by this non-binding Statement of Principles and Best Practices ('Statement') unless and insofar as they contravene the aforementioned rules.

Principle 1. defines an IOH and the place of the Statement in the national legal system. A new aspect is found in 1.2 that includes "regulations and guidelines set by a widely recognised national or regional professional association of IOHs in that country" as rules an IOH is bound to. This is because these rules tend to be interpreted by society as generally accepted IOH principles for that country.

Principle 2. Professional standards

- 2.1 An IOH performs his/her tasks according to the state of the art in insolvency practice, uses competent and trained personnel, occupies appropriate office space and applies adequate office equipment.
- 2.2 An IOH behaves diligently, with courtesy and consideration towards all parties involved, and avoids behaviour discrediting the profession.
- 2.3 When accepting the appointment and regularly afterwards, an IOH evaluates critically whether (s)he is able to cope with the requirements of the specific insolvency proceedings.
- 2.4 An IOH does not accept an appointment which (s)he is not capable to handle, or takes appropriate steps to manage the situation and/or the assignment if it appears

that the appointment exceeds his/her capabilities.

Various countries we analysed have similar rules as these formulated in Principle 2. These define the professional standards of an IOH.

Principle 3. Ethical standards

- An IOH performs with
- (a) integrity, meaning that an IOH is straightforward, honest and guided by the interests of the estate;
 - (b) objectivity, including impartiality and independence, meaning that an IOH does not allow bias, conflict of interests or undue influence of others to override professional or business judgments;
 - (c) confidentiality, meaning that an IOH respects the confidentiality of information acquired as a result of the appointment and avoids confidential information being used for the personal advantage of the IOH or other parties.

These ethical standards have been derived from IFAC/IESBA standards and those of the British SIP 1. Few countries have a separate code of ethics/conduct for IOHs; some do have special provisions that partly cover the subject; and others have nothing at all. The ethical subcategory of the model is best served with a principle of its own. Having a principle on ethics in a Statement like this is not only important to influence the IOH's conduct, it is essential to enhance trust in the market.

Principle 4. Administration of the estate

- 4.1 An IOH is responsible to determine and to continuously adapt the adequate strategy for the administration of the specific insolvency proceedings (s)he is appointed on and carefully evaluates the various options the law provides.
- 4.2 In administering an IOH acts expeditiously, efficiently and transparently. (S)he



THESE (NON-BINDING!) PRINCIPLES DESCRIBE YOUR ATTITUDE AND CONDUCT AS AN INSOLVENCY OFFICE HOLDER



continuously keeps in mind the overriding duty to protect and preserve the estate and to act in its best interests, while taking into account the effects of his/her decisions on the legitimate interests of all parties involved.

An IOH is the manager of the estate and since there is a lot to do, reflecting about the strategy to perform the job is quite often overlooked or receives low priority. However, an IOH should in any proceedings consider all possibilities the law and the economic reality offer, before taking irreversible actions, e.g. closing of factories, selling supplies or firing employees. When taking decisions the best interests of the estate precede, but other interests e.g. those of employees should be taken in account.

Principle 5. Communication

- 5.1 An IOH recognises the importance of swift, timely, proper, clear and open communication and communicates accordingly with all parties involved, unless (s)he considers such communication incompatible with the interests of the estate or other parties.
- 5.2 An IOH refuses to provide information only if disclosure would clearly harm the interests of the estate or other parties.

The European Insolvency Regulation (EIR) requires IOHs to communicate and inform each other. Moreover, the aim to enhance the trust in the profession on the market requires that an IOH performs as transparently as reasonably possible, given the interest of the estate and other parties he has to comply with. A favourable attitude to open communication therefore is essential. This should start by simply replying expeditiously to requests, even if that would be by denying someone an answer. In principle, IOHs should inform parties in the proceedings to the fullest extent unless disclosure would clearly harm the interests

of the estate or other parties e.g. an answer is not possible or available; it would take too much time and therefore be too costly; it would contain confidential information or information which may possibly harm the interests of other parties concerned in the proceedings.

Principle 6. Coordination and cooperation

IOHs coordinate their actions and cooperate to the maximum extent possible with each other and with courts involved in the insolvency proceedings, in order to

- (a) promote the orderly, effective, efficient, and timely administration of the proceedings;
- (b) provide for timesaving procedures to avoid unnecessary court proceedings; and
- (c) enlarge the collectivity of assets.

Cooperation is the second pillar of the present EIR duties to liquidators. It implies coordination of actions and strategy. Coordination and cooperation by IOHs involved in related insolvency proceedings is key to achieve the efficiency and effectiveness goals of Principle 6 any IOH would in principle subscribe to. This does not mean that any estate should rank its interest below those of others. It does mean however, that IOHs in related proceedings have a sincere obligation to negotiate to the maximum extent possible in order to make the necessary coordination and cooperation truly happen in the interests of, finally, all parties concerned.

Principle 7. Insolvency governance

An IOH recognises the utmost importance of insolvency governance for the benefit of the professional quality, the profession's prestige, as well as the profession's trust on the market and therefore gives priority to all insolvency governance related activities.

The acceptance of the profession on the market finally depends on the governance of

IOHs. Which checks and balances are in place to secure that IOHs play by the rules? Generally, this task is assigned to courts or supervisory judges and creditors' committees. We argue, that in order to maintain trust in the profession on the market, IOHs should recognise the importance of any insolvency governance related activity, whether it is e.g. answering requests of courts or maintaining the internet address containing the public information on the proceedings.

Conclusion

This project will change the insolvency practice for IOHs. Although the Statement offers non-binding Principles and Best Practices, they may eventually be considered as a Statement containing the minimal acceptable level of behaviour and performance of IOHs in Europe. Given the developments in the EU insolvency law, there appears no way to stop this. We therefore encourage all readers to fill in the questionnaire which will shortly be made available to all INSOL Europe members electronically. ■

Footnotes

- 1 Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 346/2000 on insolvency proceedings, {SWD(2012) 416 final}, {SWD(2012) 417 final}.
- 2 http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm.
- 3 Paul L. Davies, Introduction to Company Law, Clarendon Law series, OUP, 2010.



THIS PROJECT WILL CHANGE THE INSOLVENCY PRACTICE FOR INSOLVENCY OFFICE HOLDERS



Share your views!

