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EUROPEAN PRINCIPLES AND BEST PRACTICES FOR INSOLVENCY OFFICE HOLDERS

**REPORT I: AN ANALYSIS OF GLOBALLY AND REGIONALLY
ESTABLISHED RULES FOR INSOLVENCY OFFICE HOLDERS**

A PROJECT COMMISSIONED BY INSOL EUROPE

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List of abbreviations

ALI	American Law institute
ALI-C	ALI Global Guidelines Applicable to Court-to-Court Communications in Cross Border Cases (2000)
ALI-P	ALI Global Principles of Cooperation among the NAFTA countries (2000)
ASD	Asian Development Bank: Good Practice Standards for Insolvency Law (2000)
AUS	Australian Government proposal paper: A modernization and harmonization of the regulatory framework applying to insolvency practitioners in Australia (2011)
CoCo Guidelines	INSOL Europe's European Communication & Cooperation Guidelines for Cross-Border Insolvency (2007)
EBRD	European Bank for Reconstruction and Development
EBRD Core	European Bank for Reconstruction and Development: Core Principles for an Insolvency Law Regime (2004)
EBRD IOH	European Bank for Reconstruction and Development: Office Holders Principles (2007)
EC	European Commission
EIR	European Insolvency Regulation
EP	European Parliament
EU	European Union
Global Principles	American Law Institute and the International Law Institute: Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases (2012)
IBA	International Bar Association (also: the IBA International Principles on Conduct for the Legal Profession, 2011)
IESBA	International Ethics Standards Board for Accountants of the International Federation of Accountants
IFAC	International Federation of Accountants (also: the IFAC Handbook of the Code of Ethics for Professional Accountants, 2012)
INSOLAD	Dutch association of insolvency lawyers (also: Dutch Rules of Practice for Liquidators, 2011)
III	International Insolvency Institute
IIS Prot	International Insolvency Institute: Prospective Model International Cross-Border Insolvency Protocol
Model Law	UNCITRAL Model Law on Cross-border Insolvency (1997)
PEIL	Principles of European Insolvency Law (2003)
TMA	Turnaround Management Association: Code of Ethics (2013)
UNCITRAL	United Nations Commission on International Trade Law
UN-Leg Guide	UNCITRAL: Legislative Guide on Insolvency Law (2004)
UN-Leg Guide-3	UNCITRAL: Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency (2010)
WBCIS	World Bank: 2011 Draft Principles for Effective Insolvency and Creditor/Debtor Regimes

Introduction and management summary

Aim

This project aims to develop a well-founded framework of *Principles and Best Practices* for Insolvency Office Holders (IOHs) all over Europe¹. These *Principles and Best Practices* will be non-binding rules. They should serve as a sound benchmark for individual IOHs, professional insolvency practitioners' associations, judges and other public authorities, to introduce, assess or strengthen existing rules for IOHs on licensing and registration, on professional and ethical standards, on roles and responsibilities in insolvency proceedings, and finally on insolvency governance. Moreover, the *Principles and Best Practices* could serve as a means to establish or strengthen public confidence in IOHs, in the quality of their work and in the way they are monitored and supervised. Finally, since they serve in national as well as international insolvency cases, the *Principles and Best Practices* could play a significant role in the debate and determination of possible future binding rules for IOHs on a European level.

Organization

This project is commissioned by INSOL Europe to Leiden Law School. The output of the project will be three reports:

- report I contains a framework and a model, which are subsequently applied on the analysis of regionally and globally established rules for IOHs.
- report II contains an analysis, based on the same framework and model, of the rules for IOHs in a number of European countries e.g. England, France, Germany, Italy, Latvia, Lithuania, Poland, Serbia and Spain. This report discusses the value of the model for the analysis in retrospect as well as for the formulation of the *Principles and Best Practices*.
- report III will contain the *Principles and Best Practices*.

Before presenting to the executive of INSOL Europe, each report will in a draft-form be reviewed by an academic advisory committee and a project review & advisory group. Only after this thorough review, the report will be presented to INSOL Europe.

The process from a draft version of the *Principles and Best Practices* to the final report III will be thoroughly coordinated with INSOL Europe. The submission of a questionnaire to a selection of

¹ We consider Europe and not the EU in order to be consistent with INSOL Europe's European broad mission.

IOHs who are a member of INSOL Europe will be discussed with the executive. As in other areas of European insolvency law the EC seems to support a bottom-up approach. Broad involvement and support from a large group of practitioners who in future will or may be the subject of the Principles and Best Practices will serve as a token for its success.

Management summary

A well founded preparation of Principles and Best Practices for IOHs should start with an analysis of existing sets of rules on the position of the IOH. Therefore we developed a framework (figure 1), which we subsequently expanded and refined into a model (figure 2).

Based on this model we analysed 13 international sets of non-binding rules for IOHs. In addition we validated the model by benchmarking it against (the analysis of) 5 other sets of rules, three by professional organizations and two by randomly chosen countries. The results of this analysis indicate that the model – for the moment i.e. September 2013 – covers all relevant issues and proves to be an adequate and helpful basis for the formulation of Principles and Best Practices for IOHs (report III).

We would like to express our gratitude to the members of the academic advisory committee and those of the project review & advisory group for their comments and their dedication to the project. Moreover we would like to thank Matthijs Snijder and Iris Hoekstra at Leiden Law School for their research assistance in the preparation of this report. The responsibility of this report remains ours. We welcome comments of readers on this report on IOH@law.leidenuniv.nl.

Leiden, 19 September 2013

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1. Background

1.1 Global business and its financial markets

Within a global society that throughout recent history has shown increased reliance on the concept of credit for all kinds of purposes, it is of no surprise to see that the importance of insolvency proceedings has increased alongside. More and more, financial distress and insolvency have become a part of everyday life. People and businesses have started to become aware of the way insolvency can affect the economic and social fabric of society at large. Improper treatment of insolvencies can have an impact on creditors' willingness to facilitate business in general, which in turn can have an impact on the real economy. As a result a need for solid insolvency measures was recognized over time, which has led to a shift in insolvency practice. Nowadays it is no longer the mere liquidation of assets and dissolution of companies that drives insolvency proceedings. The prevention of a bankruptcy, or – when bankruptcy is inevitable – a controlled default combined with a reorganization in order to minimize damage for all stakeholders has increasingly become a legitimate aim. Efficiently working global financial markets as well as the possibility of cross-border mergers facilitate such 'soft landings' since these have multiplied the number of possible investors. Consequently, European insolvency office holders (IOHs) are more and more confronted with international issues e.g. foreign investors, foreign subsidiaries and foreign trade creditors. Efforts to reinforce insolvency proceedings on a national basis only, shall therefore not be sufficient.

1.2 International insolvency law

Insolvency regimes vary for each country. Nevertheless, over time insolvency law more and more seems to have outgrown its national roots, not in the least due to the circumstances mentioned above. Although an international approach to insolvency law is still relatively new, several associative bodies representing the profession as well as supranational organizations have committed to suggest on how some level of uniformity could be achieved. Both legislators as well as the business community itself have definitely picked up on this development. An evident achievement in the area of international insolvency law is the UNCITRAL Model Law on Cross-border Insolvency 1997 which has currently been introduced in the law of several countries. A more recent example are the Global Principles for Cooperation in International Insolvency Cases of the American Law Institute (ALI) and the International Insolvency Institute (III), issued in 2012. Section 3.1 and the Appendices A and B to this report cover 13 of these international sets of rules.²

² However, none of these contain a 'Principles and Best Practices' approach specifically for IOHs, as is our assignment (see section 2).

1.3 Insolvency law in the EU

Similar to supranational initiatives as the UNCITRAL Model Law, the European Insolvency Regulation (EIR)³, applicable in the EU since May 2002, can be seen as a clear drive towards harmonization of cross-border matters, such as the recognition of insolvency judgments and insolvency related judgments, rules applicable to cross-border cases and the duty for liquidators in cross-border cases to cooperate with each other. With regard to national insolvency laws it is premature to speak of true harmonization, but a clear tendency towards convergence and approximation as far as international insolvency regimes are concerned, can be observed.⁴ However, regardless of progressive convergence, the EU is still a long way from a truly harmonized framework on insolvency law. The very lengthy negotiation process that preceded the creation of the EU Insolvency Regulation is considered to be symptomatic for, or at least an indication of, the speed and success that can be expected from efforts in order to create a substantive body of insolvency law at EU level. Nevertheless, in 2011 the European Parliament (EP) came to realize that there are certain areas of insolvency law where harmonization is worthwhile and is likely to be achieved more easily.⁵ In a motion, the EP recommends legislative action “on the harmonization of general aspects of the requirements for the qualification and work of liquidators”. The motion further states that: “the liquidator must be competent and qualified to assess the situation of the debtor’s entity and to take over management duties of the company”.

Moreover, in December 2012⁶ the European Commission (EC) submitted a report on the application of the EIR, as required by article 46 EIR, to the 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 Proposal⁷ 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:

³ (EC) No 1346/2000.

⁴ Bob Wessels, Bruce A. Markell, Jason Kilborn, 2009, ‘International cooperation in bankruptcy and insolvency matters’, *Oxford University Press*, p.167-192; Bob Wessels and Ian F. Fletcher, 2012, *Harmonization of Insolvency Law in Europe*, Report 2012 for the Netherlands Association for Civil Law, *Deventer: Kluwer*.

⁵ 2011/2006(INI), procedure file, ‘Draft report from the European Parliament, with recommendations to the Commission on insolvency proceedings in the context of EU company law.’

⁶ 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}.

⁷ http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm

“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 and to proposed changes in article 31 EIR and 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.

Apparently, transparency on procedures, qualification and skills and the improvement of communication and cooperation are the topics on EU discussions on insolvency law.

1.4 Insolvency Office Holder

Liquidator, administrator, *curator*, receiver, trustee, *Insolvenzverwalter*, *administrateur judiciaire*: these are just a few titles used around the world to designate professionals appointed to administer insolvency proceedings. Annex C of the EIR⁸ contains the complete list of nearly hundred of such people. Following EBRD⁹ and other recent publications¹⁰, this report applies the neutral term Insolvency Office Holder (IOH) as the overarching term for the various national designations. The definition of IOH is aligned with that of a liquidator as referred to in the EIR¹¹: “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.” It is important to note that an IOH can be a natural person as well as a legal entity.

1.5 Concluding remarks

The Cork report of over thirty years ago has been of great significance for the insolvency system in England and Wales. As the Cork report stated in 1982, “The success of any insolvency system (..) is very largely dependent upon those who administer it. If they do not have the confidence and respect, not only of the courts and of the creditors and debtors, but also of the general public, then complaints will multiply and, if remedial action is not taken, the system will fall into disrepute and disuse”¹². This remains true and even more so in international insolvency cases, where *terra incognita* is still large. Communication and cooperation are key here, as well as transparency on licensing procedures, professional skills and insolvency governance in order to

⁸ (EC) No 1346/2000, Annex C, ‘Liquidators referred to in Article 2(b)’; as later adapted.

⁹ EBRD Insolvency Office Holder Principles, June 2007.

¹⁰ E.g. Statement of Insolvency Practice (UK) 9; Van Meenen, M., 2009, “ The Insolvency Office Holder in Belgium”, in Paul J. Omar and Bob Wessels (eds), *Crossing (Dutch) Borders in Insolvency*, INSOL Europe Technical Series Publications, INSOL Europe, Nottingham, 2009, p. 19-30.

¹¹ (EC) No 1346/200, Article 2 (b).

¹² Cork Report, *Insolvency Law and Practice – Report of the Review Committee*, London, at para 732 (quoted from Bob Wessels, *De onafhankelijkheid van de faillissementscurator*, Preadvies CJV 2013, p. 11).

know what can be expected of an IOH. Reliance on professional conduct and ethical behaviour by IOHs should follow the basis of the EIR in which recognition of each other's insolvency judgments is based on mutual trust. Mutual trust in itself can only be achieved if liquidators can rely on mutual conduct according to the same Principles and according to some minimum Best Practices. In recent years, several sets of rules have been developed in various regions and countries in order to contribute to these aims. This *report I* sets out to develop a model for the analysis of these sets of rules, and subsequently analyse them, in order to cover the ground for the formulation of Principles and Best Practice for Insolvency Office Holders in Europe.

2. Assignment

In view of the developments described in the previous section, INSOL Europe granted Leiden Law School in 2012 the assignment:

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

In order to gather sufficient support under IOHs, such a set of Principles and Best Practices cannot be designed without sufficient regard to and analysis of existing sets of rules on the subject. Therefore, before being able to design the set of Principles and Best Practices, *report I* addresses the following research questions :

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

The present *report I* focuses on these questions. Section 3 deals with some methodological issues. Section 4 describes and reviews the results. The concluding remarks in section 5 contain the answers to the research questions.

Report II will contain an analysis based on the same model of rules for IOHs in a number of European countries e.g. England, France, Germany, Italy, Latvia, Lithuania, Poland, Serbia and Spain. *Report II* will discuss the value of the model for the analysis in retrospect, as well as for the formulation of the Principles and Best Practices.

Report III will contain the *Principles and Best Practices*.

3. Methodology

This section justifies (1) the choice for a comparative methodology, starting with international sets of rules; (2) the research framework applied; and (3) the necessity of preliminary validation.

3.1 Comparison

We have chosen a *comparative methodology* i.e. by comparing existing sets of rules for IOHs we set out to find common ground for the creation of a set of Principles and Best Practices later on in this project. We decided to start with an analysis of existing non-binding international rules. These rules are newly designed and supposedly follow a concept agreed upon by the commissioners or the designers. National rules however, are largely influenced and determined by historical, cultural, institutional and legal incidents over the years. They often lack a certain logic for a foreigner and are therefore, generally speaking, less apt for testing the validity of an abstract analytical framework and expanding it. After the analysis of the international rules in *report I*, follows an analysis of national rules for IOHs in *report II*.

Thirteen different sets of international non-binding rules for IOHs have been analyzed in order to establish the common ground necessary to build upon the Principles and Best Practices for IOHs which is the aim of this project. Similarities across existing sets of rules serve as input for their drafting (*report III*). By doing so the Principles and, to a certain extent, the Best Practices will be the “expression” of common ground to begin with. The results of the analysis are categorized and arranged systematically in order to achieve a comprehensive matrix that will allow for further study.

The documents that are the subject of this comparative study¹³ are:

1. UNCITRAL: Model Law on Cross-border Insolvency 1997 (UNML);
2. American Law Institute: Global Principles of Cooperation among the NAFTA Countries 2000 (ALIP);
3. American Law Institute: Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2000 (ALIC);
4. American Law Institute and International Insolvency Institute : Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases 2012 (ALI-III)
5. Asian Development Bank: Good Practice Standards for Insolvency Law 2000 (ASD);

¹³ The abbreviations mentioned in the list are used for reference in Appendix B only.

6. World Bank: 2011 Principles for Effective Insolvency and Creditor/Debtor Regimes (WBCIS);
7. Principles of European Insolvency Law 2003 (PEIL);
8. European Bank for Reconstruction and Development: Core Principles for an Insolvency Law Regime 2004 (EBRD Core);
9. European Bank for Reconstruction and Development: Office Holders Principles 2007 (EBRD IOH);
10. INSOL Europe's European Communication & Cooperation Guidelines for Cross-Border Insolvency 2007 (ECCG);
11. International Insolvency Institute: Prospective Model International Cross-Border Insolvency Protocol (IIS Prot);
12. UNCITRAL: Legislative Guide on Insolvency Law 2004 (UNLG);
13. UNCITRAL: Legislative Guide on Insolvency Law, Part Three: "Treatment of enterprise groups in insolvency" 2010 (UNLG3);

and for benchmarking purposes:

14. International Bar Association – International Principles on Conduct for the Legal Profession 2011 (IBA)
15. The International Federation of Accountants – The International Ethics Standards Board for Accountants (IESBA), Handbook of the Code of Ethics for Professional Accountants 2012 (IFAC)
16. Turnaround Management Association – Code of Ethics 2013 (TMA)
17. INSOLAD (the Netherlands) Rules of Practice of Liquidators 2011 (INSOLAD);
18. Australian Government proposals paper: A modernization and harmonization of the regulatory framework applying to insolvency practitioners in Australia, December 2011 (AUS).

A few remarks with regard to the documents listed above. Initially three additional sets of non-binding rules were in scope of the analysis. It concerns: *American Law Institute/UNIDROIT: Principles of Transnational Civil Procedure 2004*, *UNCITRAL: Practice Guide on Cross-Border Insolvency Cooperation 2009* ("*UNCITRAL Practice Guide*") and *Model Law on Cross-Border Insolvency: the Judicial Perspective (July 2011)* ("*UNCITRAL Judicial Perspective*"). These sets of rules have not been included in the analysis since they do not contain provisions specifically aimed at requirements for or on the work of IOHs. On the other hand, the analysis of number 12. *UNCITRAL: Legislative Guide on Insolvency Law 2004* has been split into two. This has everything to do with the circumstance that a Part Three was added in 2010, dealing with enterprise groups

specifically. The fact that both documents are of considerable size, differ in scope and are separated by quite a lengthy period of time, adds to the conviction that it is best to treat them separately for the purpose of the analysis.

The sets of rules of IBA, IFAC, TMA, the Netherlands and Australia are drawn into the analysis to preliminary benchmark the model. The idea is to make a preliminary check whether the model fits as well for the analysis of sets of rules of other than international origin, e.g. sets specifically designed for the general professional group of lawyers, accountants and turnaround advisors, from which IOHs are normally chosen, or from countries. For the latter, *report II* will go into deeper detail.

3.2 Framework

Since a *framework* for the analysis of rules for IOHs did not exist, our first task was to create a uniform framework for the analysis. From a tentative analysis of a few sets of international rules, 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.

These categories form the framework on which our analysis is based. Figure 1 depicts this framework. Anyone willing to become an IOH should normally pass a selection procedure 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.

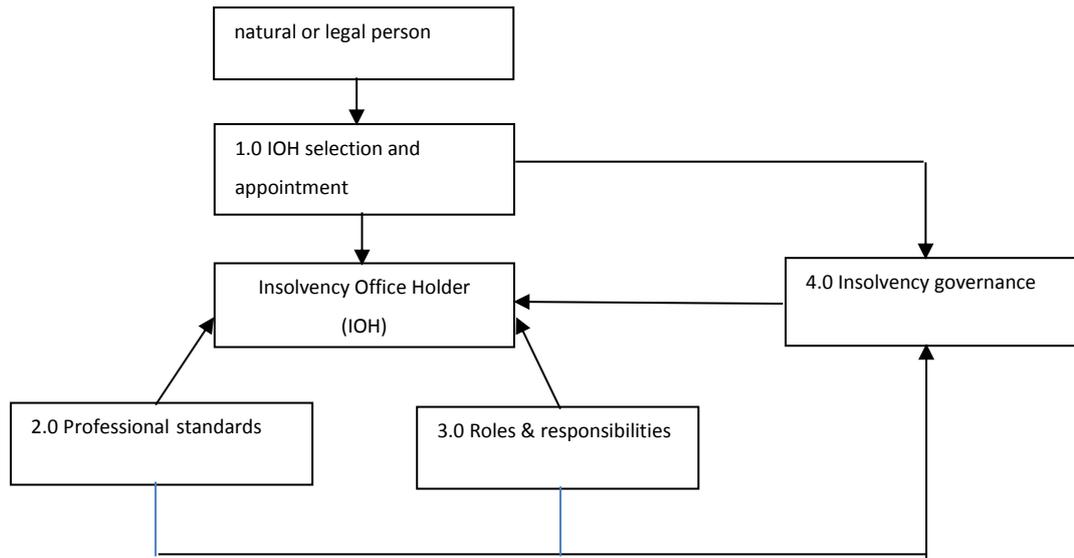


Figure 1: a framework to compare rules for IOHs.

3.3 Validation

In order to check (1) whether the results from the analysis of the international non-binding rules stand a good chance to hold for professional rules as well as for national rules; and (2) whether the model could be considered as a *benchmark* for the analysis of rules for IOHs, we performed a preliminary comparison with three sets of rules of international professional organisations and two arbitrarily chosen countries. This is preliminary, since report II will go into an analysis of the national rules for IOHs.

4. Results

This section contains the results of our work for *report I*. It starts with the document-by-document analysis which resulted, through expansion and refinement of the framework, in a model. The model enabled construction of a matrix. The section ends with an analysis of that matrix.

4.1 Document-by-document analysis

The analysis of all documents cited above is to be found in **Appendix A** to this report. Every analysis of a set of non-binding international rules is preceded by a general introduction and a brief description of the background of the set of rules. The introduction (a) describes the organization(s) that initiated the production of the rules; (b) refers to the applicable legal framework (if any); (c) provides a definition of the term IOH for the purpose of this particular document; (d) provides information about the targeted audience which is important to put the provisions into a proper context; and (e) refers when applicable to specific provisions of the relevant sets of rules.

4.2 Model

Based on the elementary framework of figure 1 (section 3.2), we started the analysis of the international sets of rules. Gradually, the framework developed during the analysis into a sufficiently detailed model with two new levels of expansion and refinement, as shows figure 2. The framework presented in figure 1 was expanded with 15 Level II provisions ('Subcategories') and refined to 34 Level III provisions ('Topics') in order to enable categorization into the framework of all relevant provisions. 'Subcategories' divide the categories into specific areas of attention. 'Topics' are the operational issues in those areas of attention. Figure 2 presents this expanded and refined framework for the detailed analysis of rules for IOHs to which we will now refer as 'the model'.

<i>Level I Categories</i>	<i>Level II Subcategories</i>	<i>Level III Topics</i>
<i>1.0 IOH selection and appointment</i>	<i>1.1 License and registration</i>	<i>1.1.1 Requirements & contra indicators</i>
		<i>1.1.2 Licensing procedures</i>
	<i>1.2 Establishment of authority</i>	<i>1.2.1 Basis of authority</i>
		<i>1.2.2 Mandate</i>
		<i>1.2.3 (Inter)national recognition</i>
	<i>1.3 Corporate groups</i>	<i>1.3.1 Appointment of a single IOH</i>
		<i>1.3.2 Administration as one estate</i>
<i>2.0 Professional standards</i>	<i>2.1 Education</i>	<i>2.1.1 Recurring training</i>
	<i>2.2 Professional skills</i>	<i>2.2.1 Experience</i>
		<i>2.2.2 Other qualities</i>
	<i>2.3 Professional ethics</i>	<i>2.3.1 Ethical standards</i>
<i>2.4 Insurance</i>	<i>2.4.1 Liability insurance</i>	
<i>3.0 Roles & responsibilities</i>	<i>3.1 Administration</i>	<i>3.1.1 Managing the estate</i>
		<i>3.1.2 Reversal of legal acts</i>
		<i>3.1.3 Agreements</i>
		<i>3.1.4 Creditor ranking</i>
		<i>3.1.5 Liquidation</i>
		<i>3.1.6 Reorganization</i>
	<i>3.2 Liability & litigation</i>	<i>3.2.1 Establishing liability</i>
		<i>3.2.2 Initiation of litigation</i>
	<i>3.3 Communication</i>	<i>3.3.1 Communication with creditors, courts and other stakeholders</i>
		<i>3.3.2 Communication protocol</i>
		<i>3.3.3 Reporting standards</i>
	<i>3.4 Coordination and cooperation</i>	<i>3.4.1 Coordination and cooperation among IOHs (in corporate groups)</i>
		<i>3.4.2 Coordination & cooperation among foreign representatives (in cross-border insolvency)</i>
<i>3.4.3 Coordination & cooperation with foreign courts (in cross-border insolvency)</i>		
<i>4.0 Insolvency governance</i>	<i>4.1 Accountability</i>	<i>4.1.1 Disclosures</i>
		<i>4.1.2 Mandatory audit</i>
		<i>4.1.3 Liability insurance</i>
	<i>4.2 Remuneration</i>	<i>4.2.1 Fees</i>
		<i>4.2.2 Costs & expenses</i>
	<i>4.3 Supervision</i>	<i>4.3.1 Competent authority</i>
		<i>4.4.1 Investigation</i>
	<i>4.4 Disciplinary action</i>	<i>4.4.2 Disciplinary proceedings</i>

Figure 2: Model for the analysis of a set of rules for IOHs.

Category 1.0 depicts the trajectory of the IOH selection and appointment. It consists of:

- 1.1 License and registration (how to become a nominee IOH)
 - 1.1.1 Requirements & contra indicators (e.g. nationality; office location; education; professional qualification as an auditor, lawyer or other professional; and absence of contra indicators e.g. conviction of fraud; personal insolvency)
 - 1.1.2 Licensing procedures (e.g. exams, including program content of education during the license process; internship; how to be placed on 'the' list, if any).
- 1.2. Establishment of authority (how to become an IOH)

- 1.2.1 Basis of authority (court decision; creditor decision; debtor decision)
- 1.2.2 Mandate (preservation, reorganization, continuation, liquidation)
- 1.2.3 (Inter)national recognition (status and power of an IOH abroad).
- 1.3 Corporate groups
 - 1.3.1 Appointment of a single IOH (arranged for; allowed?)
 - 1.3.2 Administration of the insolvency proceedings of several corporate group bankruptcies as one estate? (since these decisions touch the elements of 1.2, they belong to Category 1.0).

These rules are set for the IOH, he or she cannot deviate nor is there much freedom of policy. When the rules of this category 1.0 are clear, a reasonable and informed third party should understand (1) what the minimal requirements are a nominee IOH actually has to comply with before he or she would even be considered for appointment as an IOH; and (2) what the basis of his or her authority is.

Category 2.0 – professional standards – consists of rules on:

- 2.1 Education
 - 2.1.1 Recurring training (requirements once an IOH has passed the licensing procedures)
- 2.2 Professional skills
 - 2.2.1 Experience (e.g. in number of years or number of insolvency proceedings handled; in specific branches; or in handling large or specific bankruptcies)
 - 2.2.2 Qualities (size of the office, regional coverage; other professional skills e.g. as an auditor, lawyer, turnaround manager, psychologist)
- 2.3 Professional ethics
 - 2.3.1 Ethical standards an IOH has to adhere to e.g. impartiality, independence and objectivity;
- 2.4 Insurance
 - 2.4.1 Liability insurance (rules on professional liability insurance of the IOH) .

These rules concern the professional surroundings an IOH operates in. They enable a reasonable and informed third party to estimate and benchmark the level of personal professional capacities an IOH is deemed to have. What can be expected of the knowhow, experience, capabilities, ethical conduct and finally – when things turn out wrong – of the financial ‘cushion’ of the IOH?

Category 3.0 – the roles & responsibilities of the IOH – consists of:

- 3.1 Administration
 - 3.1.1 Managing the estate (how to manage the estate; safeguarding and preservation of assets , post-commencement financing; solving the reorganization/liquidation question; record- and bookkeeping)
 - 3.1.2 Reversal of legal acts (ability to reverse legal acts; conditions)
 - 3.1.3 Agreements (continuation or termination of agreements in bankruptcy)
 - 3.1.4 Creditor ranking (rules on seniority of creditors; different classes of creditors)

- 3.1.5 Liquidation (how to liquidate e.g. involvement of the court; public/private execution)
- 3.1.6 Reorganization (how to reorganize the debtor; dismissal of employees)
- 3.2 Liability & litigation
 - 3.2.1 Establishing liability (e.g. preliminary research of how the debtor was governed; cause-analysis; wrongful and fraudulent trading analysis; liability of third parties; obligation to inform public authorities on any criminal offenses discovered)
 - 3.2.2 Initiation of litigation (e.g. who decides; who litigates, the IOH or another professional)
- 3.3 Communication
 - 3.3.1 Communication with creditors, courts, other stakeholders (communication with individuals and creditors' committee; confidentiality)
 - 3.3.2 Communication protocol (mass communication with creditors)
 - 3.3.3 Reporting standards (rules on frequency and placement of public reports. See also 4.1.1; here we focus on the informative aspect of reporting)
- 3.4 Coordination and cooperation
 - 3.4.1 among IOHs in corporate groups
 - 3.4.2 among foreign representatives/ IOHs in cross border insolvency proceedings
 - 3.4.3 with foreign courts in cross border insolvency proceedings.

These are the main categories of roles and responsibilities of an IOH once appointed, duly detailed in Level III Topics. An IOH has an area of freedom of policy or discretion here. Note that Subcategory 3.2 is about Liability & litigation of third parties i.e. about claims of the estate.

Category 4.0 - insolvency governance - is essentially about accountability to stakeholders in the insolvency proceedings. It consists of:

- 4.1 Accountability
 - 4.1.1 Disclosures (rules on reporting obligations; to whom; details; placements; frequency; information in 3.3.3 is of an informative nature, here the focus is on accountability)
 - 4.1.2 Mandatory audit (rules on a mandatory audit of the IOH administration; give details)
 - 4.1.3 Liability insurance (obligation of the IOH to inform the public about e.g. his insurer, the ceiling of his insurance, the address of the insurer)
- 4.2 Remuneration
 - 4.2.1 Fees (the determination and actual payment of fees to the IOH forms an essential step of control by the competent authority or authorities)
 - 4.2.2 Costs & expenses (*idem*)
- 4.3 Supervision
 - 4.3.1 Competent authority supervision (rules on supervision power of competent authority or authorities beyond described in 4.2; rules on suspension, removal, dismissal; general evaluation of the work of the IOH at the end of the insolvency proceedings)
- 4.4 Disciplinary action
 - 4.4.1 Investigation (investigation possibilities of any third party on the role of an IOH excluding the competent authority, already disclosed in 4.3.1)
 - 4.4.2 Disciplinary proceedings (rules on disciplinary action to be taken by any third party, e.g. an Ombudsman, a creditor or an association of IOHs; disclose the nature of the rule); including complaints proceedings.

These insolvency governance rules are the tail piece of a bankruptcy system: control of the IOH's work by means of various monitoring mechanisms (the public, the auditor, the insurer, the court, creditors or the creditors' committee, peers).

4.3 Matrix

The analysis along the model could result in a description of a maximum of 34 Topics for each set of rules. For the total analysis of 18 sets of rules (13 international non-binding rules and 5 sets for benchmarking purposes) this creates a total of maximum 612 observations. All this information has been processed into a matrix with a short description if there was any information, and with 'Not Applicable (N/A)' if there was none on the specific subject. Each column is in fact a summary of the information gathered in Appendix A – the analysis by set of rules. This is a 'document-by-document' analysis. Each row of the matrix, found in some detail in Appendix B, describes and summarizes for each of the 34 Topics the relevant information from all sets of rules under research. This is a 'topic-by-topic' analysis.

4.4 Analysis of the matrix

This section analyses the matrix from three viewpoints: two are quantitative and one is qualitative.

4.4.1 Majority

We started the analysis by counting. Contrary to our expectations, only a few subcategories can claim actual majority. If the notion of absolute majority were to be applied for the purpose of establishing common ground, there would hardly be any common ground provisions. Level III Topics within subcategories such as 1.2 *Establishment of authority* and 3.1 *Administration* are the exception, since these subcategories are one of the few areas that show a majority. However, a similar nature among provisions does not imply similarity in content too. Often provisions are not compatible due to the fact that each aims to achieve a different goal or due to a different level of detail. For instance, based on absolute majority, common ground could be established for the adoption of a provision with regard to 3.1.1 *Managing the estate*. The majority of sets of rules contain a provision in that area. However, the content of those provisions varies widely at some points. For example, whereas the World Bank Creditor Rights and Insolvency Standard consists of an array of provisions ranging from post-commencement finance to the disposal of assets, the Good Practice Standards of the Asian Development Bank call for "swift action". This demonstrates that for some provisions – although in the same area of attention – comparison is extremely difficult. An apparent majority will be affected by taking such differences in content into account. As a result virtually no provision would qualify for common ground based on the absolute majority criterion.

4.4.2 Targeted audience or regional focus

Another method to analyze the matrix is from the viewpoint of the targeted audience of the set of rules (IOHs, legislators or judges). One could imagine that a similar targeted audience would deliver comparable rules. However, this assumption proved to be wrong. The analysis of the matrix based on targeted audience showed that no such relationship exists¹⁴. Actually, some sets of rules with different targeted audiences have more in common than sets of rules with a similar targeted audience. An approach of analysis along regional origin or focus e.g. American or European, did not turn out to be fruitful as well.

4.4.3 Completeness

However, on one matter we are confident: the analyses of 18 sets of rules has resulted in a model (figure 2) which almost certainly covers all relevant Topics of the IOH profession. Although the country analysis could necessitate to incorporate new Topics, as *report II* might show in due course, a preliminary conclusion of our research is that model 2 covers all relevant Topics for IOHs.

¹⁴ The documents 1, 7, 8, 9, 12 and 13 target on legislators mainly. The documents 2, 3, 4, 5, 6, 10 target on legislators, courts and IOHs.

5. Concluding remarks

In section 2 we determined the following questions to be answered in this *report I*:

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

Indeed we are able to answer these questions by now.

Framework

In figure 1 (section 3.2) it proved to be possible to develop a framework for a uniform analysis. Figure 2 (section 4.2) subsequently presented an expanded and refined version of this framework, which we call 'the model'.

Rules to be analysed

Section 3.1 justifies the choice to start with the analysis of 13 international sets of non-binding rules for IOHs. In addition we validated the resulting model 2 (section 4.2) by benchmarking it against the analysis of 5 other sets of rules, three of professional organizations and two arbitrarily chosen countries. *Report II* will present an analysis of eight or nine national sets of rules for IOHs.

Support to the design of Principles and Best Practices

Do the results of this report support the idea of there being a common ground for rules for IOHs in Europe, or do they not? This *report I* showed that it is possible to analyse different sets of rules along one model. The model covers 15 Subcategories ('areas of attention') and 34 Topics ('operational issues'). The model was able to categorize all forthcoming issues. However, on almost any Topic a majority approach does not seem feasible. This should not give rise to deep concern, since legal work is essentially qualitative and not quantitative work.

Our challenge for developing the set of Principles and Best Practices will be to create a common understanding and agreement among INSOL Europe members on high level provisions, relevant and applicable for the day-to-day work, which are obvious for some by now, and will be obvious for all in the future. The formulation of the set of Principles and Best Practices will be based on the matrices developed in this *report I* and in *report II*, as well as on a thorough debate between INSOL Europe members to be organised in the second part of 2013 and the first part of 2014.