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TRI Leiden
TURNAROUND, RESCUE & INSOLVENCY

EUROPEAN PRINCIPLES AND BEST PRACTICES FOR INSOLVENCY OFFICE HOLDERS

**REPORT II: A COMPARATIVE ANALYSIS OF RULES FOR
INSOLVENCY OFFICE HOLDERS IN ELEVEN EUROPEAN
COUNTRIES AS A MEANS TO IDENTIFY ROOM FOR PRINCIPLES
AND BEST PRACTICES**

A PROJECT COMMISSIONED BY INSOL EUROPE

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Confidential

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List of abbreviations

| | |
|----------|---|
| BI | Professional Principles for IOHs (Germany) |
| BSA | Bankruptcy Supervision Agency (Serbia) |
| CNAJMJ | National Council for IOHs (France) |
| EBRD | European Bank for Reconstruction and Development |
| EIR | European Insolvency Regulation |
| GOI | Professional Principles for IOHs (Germany) |
| INSOLAD | Association for Insolvency Lawyers (Dutch) |
| IOH | Insolvency Office Holder |
| LEB | Lithuanian Law on Enterprise Bankruptcy 2001 |
| RPB | Recognized Professional Body (UK) |
| SIP | Statement of Insolvency Practice (UK) |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNPIR | National Union of Insolvency Practitioners of Romania |
| VID | German professional association of IOHs |

Management summary of Report II

Aim of the IOH-project

This project aims to develop a well-founded framework of *Principles and Best Practices* for Insolvency Office Holders (IOHs) all over Europe. These *Principles and Best Practices* will be non-binding rules. They should serve as a sound benchmark to improve efficiency and effectiveness for individual IOHs, professional insolvency practitioners' associations, judges and other public authorities, by introducing, assessing or strengthening existing rules for IOHs. 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.

Organisation

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

- report I, submitted to the INSOL Executive in September 2013, contains a framework and a model, which are subsequently applied on the analysis of regionally and globally established rules for IOHs.
- report II, presented here, contains an analysis based on the framework and model developed in report I, of the rules for IOHs in a number of European countries e.g. France, Germany, Italy, Latvia, Lithuania, the Netherlands, Poland, Romania, Serbia, Spain and the UK. The comparative analysis will show the differences in approach and solution on the various sets of rules. On their turn, those differences will indicate the room for Principles and Best Practices.
- report III will contain the *Principles and Best Practices*.

Principles and Best Practices

The precise meaning of the words 'Principles' and 'Best Practices' will be lingered on in Report III. However, since this report II applies those concepts extensively, an academic approach requires a definition. We define Principles as general standards of behaviour, to be made specific

in a specific situation by the IOH himself.³ Best Practices on the contrary are specific rules of action or performance.⁴ Principles are essentially on proper behaviour. Best Practices are on the efficient achievement of the intended effect of the action.

Outline of Report II

Report I developed a model⁵ for the analysis of a set of rules for IOHs and subsequently analysed 13 concise sets of rules of international origin. Report II uses the model as a diagnostic tool to analyse and assess national rules for IOHs of 11 European countries, members as well as non-members of the EU. These countries have been selected, having in mind that for some countries IOH regulation is generally felt to be not very developed⁶, and aiming at covering a broad spectrum of solutions to Topics presented in the model.

The national rules studied are primarily of a legal nature, i.e. formal law or ministerial regulations based on formal law. However, in order to understand the practical position of the IOH, rules of an 'institutional' nature, i.e. public 'Guidelines' by courts or private 'Regulations' or 'Directives' from professional associations of IOHs, are taken into account as well. Even if the membership of these associations is not mandatory, these rules may be interpreted by a court or by the general public as reflecting proper IOH behaviour. The text of each of the country analyses to be found in Appendix C to this Report II indicates the nature of the rule.

Chapters 1 – 4 of this Report II present a comparative analysis of each of the four Categories of rules discerned in the model, i.e. (1) IOH selection and appointment, (2) Professional and ethical standards, (3) Roles & responsibilities, and (4) Insolvency governance. Each chapter follows the subdivision of the model and concludes on each Topic whether it would benefit from the use of Principles and Best Practices. It should be noted that the analysis as well as the recommendations are restricted to what can be achieved within the present assignment. Therefore, they do not contain legislative texts to be considered for rules of a legal or institutional nature.

Chapter 5 supplies an overview of Topics where Principles and Best Practices could matter, as derived from the Chapters 1 - 4. It is for Report III to analyse and conclude whether it is feasible to formulate Principles and Best Practices on the selected Topics and to actually phrase them.

³ Whether the actual behaviour of an IOH was in compliance with that Principle can be assessed only *ex post* by a judicial or supervisory body.

⁴ We may consider using the word Guideline here, defined by the online Merriam-Webster dictionary as "a rule or instruction that shows or tells how something should be done". See Chapter 6 of this Report II.

⁵ As reprinted in Chapter 5 of this Report II. See for comments on the model: report I, pages 23-27 and Appendix B to Report I. Report I is available at www.tri-leiden.eu.

⁶ E.g. the Netherlands, Belgium and Luxembourg.

Chapter 6 contains an evaluation of the Model presented in Report I, having in mind the experience from the analysis of 11 countries for Report II. Moreover, it discusses whether ‘Best Practices’ is the proper term or that it should be replaced by ‘Guidelines’. Chapter 7 concludes.

11 Countries – numerous differences

In alphabetical order we compared the insolvency systems related to status and power of an IOH of France, Germany, Italy, Latvia, Lithuania, the Netherlands, Poland, Romania, Serbia, Spain and the UK⁷. The insolvency systems of these countries differ largely e.g. in legal origin (e.g. LaPorta⁸ et.al., 1999), in efficiency (e.g. Djankov et. al., 2008⁹), in compliance¹⁰ and in maturity.¹¹ Eastern European countries often have recent and concise insolvency systems, some based on EBRD and World bank studies. Over the last decades most countries have adapted their insolvency systems from purely creditor oriented systems, where liquidation and distribution of the proceeds were its central aims, to a more debtor friendly approach where the rescue of the company receives more attention. Some countries have by far more extended regulations for IOHs than others¹². We took these differences as a given while comparing the rules related to the functioning of IOHs.

Results

We prepared country analyses of 11 countries along the model specified in Report I. These analyses, enclosed to this Report II as Appendix C, show important differences on most Topics. The survey of these differences is laid down in Appendix D, the ‘Topic-by-Topic’ or ‘horizontal’ analysis. For each difference we analysed and indicated whether a Principle or a Best Practice would possibly assist to create a level playing field for IOHs and to improve their performance, transparency and accountability in cross-border insolvency proceedings. Chapter 5 shows the results in Table 2. The formulation of Principles and Best Practices will be the purpose of Report III, expected to be finalised October 2014.

⁷ Wherever we needed to make a choice between rules applicable, our focus was on the laws of England.

⁸ Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Robert Vishny, 2000, *Investor protection and corporate governance*, Journal of Financial Economics Volume 58, Issues 1–2, p.3–27.

⁹ Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, 2008, *The law and Economics of Self-dealing*, Journal of Financial Economics, Volume 88, Issue 3, p. 430–465.

¹⁰ See e.g.: *Commercial Laws of Poland - an Assessment by the EBRD*, 2010, available on www.ebrd.com, showing (p. 8) a medium rate of compliance of Polish insolvency law and a low rate of compliance of IOH related insolvency law. However, compliance is defined as a comparison between international standards and *in casu* Polish law. Moreover, Polish law has been changed since (see the EBRD report, p. 9).

¹¹ E.g.: the original Dutch bankruptcy law is from 1893; Serbian law dates from 2009.

¹² As the British professional organisation for IOHs R3 writes in *The future of Regulation*, 2010, available on www.r3.org.uk: “Insolvency is a very highly regulated profession. There are over 120 pieces of legislation, extending to some 2,000 pages, which govern insolvency practice.”

Table 1 presents a summary report on the detected room for Principles and Best Practices. It shows that we found room for 7 Principles and over 20 Best Practices . Whether we will propose all of these rules or only the ones deemed to most effectively serve the aims of the project, will be discussed with the Academic Advisory Committee, the Review & Advisory Group and INSOL members over the coming months.

Table 1: 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 |

In section 6.2 we reflect on the question whether the term ‘Best Practices’ raises too high expectations since literature connects ‘Best Practices’ with ‘Benchmarking’. Benchmarking is certainly not what we are doing. Instead, we suggest ‘Guidelines’ might be the better term.

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Leiden, 30 April 2014

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Introduction

This Report, henceforth referred to as Report II, is to be read in connection with the previous project Report I dated 19 September 2013. Report II contains a comparative analysis of the IOH position in 11 European countries¹³ along the lines of the model developed and reported in Report I as Figure 2. The model is reprinted in Chapter 5 of this Report II on page 35. Starting from this analysis, the Report II identifies whether and where there would be room for Principles and Best Practices.

Report II is based on a survey of the IOH position in each of the 11 countries: France, Germany, Italy, Latvia, Lithuania, the Netherlands, Poland, Romania, Serbia, Spain and the UK. Appendix C to Report II contains the 11 country analyses.¹⁴ Appendix D presents a shortened ‘Topic-by-Topic analysis’ of the available country information.

For reasons of easy reference, Chapters 1– 4 are numbered identically to the Categories of the model. For each Topic of the Category each Chapter presents a short comparative analysis in a ‘Findings’ section. Subsequently follows a ‘Room for Principles and Best Practices’ section, indicating whether a Principle or a Best Practice is felt desirable on the basis of the preceding analysis. The formulation of the Principles and Best Practices will be the subject of Report III. For now, a definition of the difference between these is important.

We define the difference between Principles and Best Practices in two dimensions: (1) generally or specifically formulated, and (2) behaviour or action oriented. Principles are general standards (Kaplow¹⁵, 1992; Davies¹⁶, 2010) of behaviour, to be made specific in a specific situation by the IOH himself.¹⁷ Best Practices are specific rules of action or performance.¹⁸ Principles are essentially on proper behaviour. Best Practices are on the efficient achievement of the intended effect of the action.¹⁹ Generally, a Principle is suggested in order to contribute to a level playing field on IOHs’ conduct and a Best Practice in order to contribute to a level playing field on IOHs’ performance, transparency and accountability. The proposals will be designed from the perspective of an IOH: what and how would an IOH be able to contribute (1) to more effective

¹³ As per 1 November 2013.

¹⁴ The Appendices A and B are part of Report I.

¹⁵ Louis Kaplow, 1992, *Rules versus Standards, an Economic Analysis*, Duke Law Journal, 42, 557 – 629.

¹⁶ Paul L. Davies, 2010, *Introduction to Company Law*, second edition, Oxford University Press.

¹⁷ Whether the actual behaviour of an IOH was in compliance with that Principle can be assessed only *ex post* by a judicial or supervisory body.

¹⁸ We may consider using the word Guideline here, defined by the online Merriam-Webster dictionary as “a rule or instruction that shows or tells how something should be done”. See Chapter 6 of this Report II.

¹⁹ A comparable approach in: ALI, 2012, *Transnational insolvency: Global Principles for Cooperation in international Insolvency Cases*, p. 37.

and efficient performance of his/her profession and (2) to more trust in the IOH profession on the market? Of course, contrary mandatory national rules will always precede the to be proposed Principles and Best Practises.

Chapter 5 presents the model with two columns added indicating whether the analyses of Chapters 1 - 4 concluded to the formulation of a Principle or Best Practice. Chapter 6 includes a preliminary evaluation of the model in the light of the findings of the national analyses and a discussion on the use of the term Best Practice. Chapter 7 concludes.

1. A comparative analysis of IOH selection and appointment

This Chapter contains a comparative analysis of the first category of rules for an IOH. The model divides the category 'selection and appointment' in three Subcategories and seven Topics. This chapter analyses extensively the licence and registration procedures for an IOH in the countries under review, the establishment of authority e.g. appointment and mandate, and the appointment related issues when insolvency proceedings take place in corporate groups.

The selection and appointment category of rules is set for an IOH, (s)he cannot deviate nor is there much freedom of policy. When the rules of category 1.0 are clear, a reasonable and informed third party should understand (1) what minimal requirements must exist before a nominee IOH would even be considered for appointment as an IOH; and (2) what the basis of his/ her authority is.

1.1 License and registration

This Subcategory concerns the formal requirements and procedures that apply to the profession of IOH. These precede the appointment as an IOH in specific insolvency proceedings.

1.1.1 Requirements and contra-indicators

Description The law or other regulations provides requirements to be met before registration as a nominee IOH is possible e.g. nationality; place of office; education; professional qualification. 'Registration' is about being listed on a roster, usually kept at a court, as a nominee IOH (see 1.1.2). The rules may also provide contra-indicators e.g. personal insolvency; conviction of fraud; conflict of interests.

Findings The requirements vary from a university degree, 'higher education', having passed an exam, more or less extensive on the job training, 'good repute' and combinations of these. Contra-indicators are found in a wide range: from no regulation at all, up to the exact specification of the crime and the number of years of imprisonment that inhibits IOH-ship.

Room for Principles and Best Practices Since from an IOH perspective²⁰ the differences in requirements and contra-indicators cannot be changed as they are mostly in the law, IOHs can only steer on 'higher level' requirements and contra-indicators. IOHs can do so by attaining high standards by themselves and organising themselves in a regional or national association of IOHs. This association is to create an integrated system for training, education, sharing experiences, examination and inter-vision accompanied by a professional and ethical code of conduct and

²⁰ The analysis is from the perspective of an IOH. What can (s)he do to level the difference? Therefore we will not propose to change the law.

binding disciplinary measures including complaints proceedings. Being a member of such an organisation, which should be transparent to the public, would be proof to the court as well as any outsider of a certain standard of quality. A Principle and Best Practice to be proposed. We refer also to Category 2.

1.1.2 Licensing procedures

Description Being licenced to operate as an IOH may be part of the registration procedure. In that case, a candidate usually acquires a licence once a prescribed professional formation trajectory has been passed successfully, consisting e.g. of an internship, education during the licence process and exams. Thereafter or in lieu of a formation trajectory follows often a trajectory for placement on ‘the list’ or roster, out of which courts choose.

Findings Licensing procedures differ largely. Some countries have extended law and/or lower regulations for specific IOH exams, others have licensing regulations which are binding through membership. One finds licensing also without any examination or no licensing at all i.e. every person who fulfills the requirements and who has him/herself put on ‘the list’ of nominee IOHs held by a court or another designated institution, is a potential IOH.

Room for Principles and Best Practices When the law does not recognise a professionally oriented mandatory licensing procedure IOHs should organise themselves in an association of IOHs. See Topic 1.1.1 and Principle and Best Practice over there.

1.2 Establishment of authority

This Subcategory concerns the authority of an IOH. It deals with the method of appointment, the scope of the IOH’s mandate and the degree to which authority and mandate are acknowledged at a domestic level and abroad.

1.2.1 Basis of authority

Description An IOH is usually, but not necessarily, appointed by a court. Appointment by creditors or by the debtor is possible as well.

Findings The basis of authority lies in an appointment, which may have been by the company, by a large or special creditor, by the creditors’ committee or by a court. Some countries explicitly prohibit to actively influence an appointment in a specific insolvency case.

Room for Principles and Best Practices The party responsible for the appointment of an IOH could materially influence the IOH’s actions. Therefore an IOH should clearly inform stakeholders by whom (s)he has been appointed. This is predominantly a communication issue,

a Best Practice to be proposed on Subcategory 3.3. Regarding the ‘influencing to appoint’ issue, a Best Practice is proposed.

1.2.2 Mandate

Description Provisions concerning the IOH’s mandate determine the scope of an IOH’s activities by default. The mandate e.g. preservation, reorganisation, continuation, liquidation, should be read either in the appointment letter, or in the law whereupon the appointment is based. If there is nothing specifically mentioned, the IOH is to apply his/her roles within the boundaries as mentioned in Chapter 3 below.

Findings The mandate is generally given by the law and may be very broad (‘the administrator may do anything necessary and expedient’) or restricted by prior authorisation of the creditors’ committee or a judge. Sometimes the mandate is formulated in the commencement order.

Room for Principles and Best Practices The law determines the IOH’s authority. Differences in mandate e.g. whether the mandate includes liquidation and restructuring or one of both only; or whether an IOH can decide all by him/herself or needs judicial or other authority to act, may cause problems if not clearly communicated. This is predominantly a communication issue, a Best Practice to be proposed on Subcategory 3.3.

1.2.3 (Inter)national recognition

Description Provisions concerning the recognition of foreign proceedings and status and power of foreign IOHs (inbound), as well as domestic proceedings and status and power of domestic IOHs abroad (outbound) .

Findings Within the EU (except for Denmark), international recognition is determined by the EIR, and outside the EU it depends on the national law. Some countries apply the UNCITRAL Model Law on Cross-Border Insolvency (1997), others do not.

Room for Principles and Best Practices Since the law determines, an IOH should concentrate on improving communication and cooperation, either based on the EIR within the EU (less Denmark) or on applicable rules outside the EU. See Subcategory 3.4 below, with Principle and Best Practices to be proposed.

1.3 Corporate groups

1.3.1 Appointment of a single IOH

Description Once an IOH is appointed, the appointee or the appointer may discover a chain of related companies (a group) in financial distress and wonder whether the appointment of only one IOH for efficiency reasons might be feasible and possible. In literature, this option is referred

to as ‘procedural coordination’, ‘procedural consolidation’ or ‘joint administration’. It is for administrative purposes only.

Findings Some countries favour the appointment of a single IOH in such a case, either based on explicit legal provisions, or promoted by practice. Others do not regulate the issue, or prohibit such an appointment.

Room for Principles and Best Practices Countries generally require that the IOH strives to an efficient solution of the insolvency proceedings. Appointing one IOH to the proceedings of a chain of company’s belonging to a group may be such a solution. If there is no legal inhibition, the possibility of appointing only one IOH should be considered by the IOH or by the appointer and requested if necessary, provided there are no upcoming or apparent conflicts of interests. A Best Practice to be proposed.

1.3.2 Administration as one estate

Description Group companies can be clearly separated in e.g. trading companies, manufacturing companies, transporting companies. However, on the road to financial distress the originally clear lines of competence and objective often fade, and accounting and finance policies in lieu determine where debits and credits will fall. When the clear line between the separate group companies has disappeared the option to administer all the bankrupt entities as one estate is to be considered. Literature refers here to ‘substantive consolidation’, meaning that the estates of two or more group members are treated as if they were part of a single insolvency state.

Findings Only some countries have regulations on this issue. Some prohibit, others enable and a few act so in practice. This is an area of much debate and little consensus.

Room for Principles and Best Practices Since the issue touches the heart of a judicial system (the integrity of the legal entity) and consensus on the issue is lacking, we do not propose a Principle or Best Practice here.

2. A comparative analysis of professional standards for IOHs

Assuming an IOH has been appointed, the question arises what qualities one may expect from that appointed IOH. This Chapter concerns the professional standing of an IOH. The professional and ethical standards an IOH adheres to (two Principles to be proposed) should serve as the benchmark as well as the primary quality assurance for the profession. They (1) improve the efficiency and effectiveness of an IOH, and (2) enable a reasonable and informed third party to estimate and benchmark the level of personal professional capacities an IOH is deemed to have. The model divides the professional standards in four Subcategories, i.e. body of education, professional skills, ethical standards and insurance requirements and five Topics. Together these form the professional shell an IOH operates in.

2.1 Education

2.1.1 Recurring training

Description This Topic is about requirements on recurring/continuing training, meaning training once an IOH has passed the licensing procedures. The rules differ largely in nature and may focus e.g. on the organisation, the frequency, the number of hours or the content of the training.

Findings The whole spectrum is present: from voluntary training courses to mandatory presence.

Room for Principles and Best Practices Differences in recurring training requirements can be bridged by professional associations (Principle in category 1.0 to be proposed). Regulations often oblige members to take a minimum number of hours training each year. A Best Practice to be proposed.

2.2 Professional skills

Over and above the licensing requirements, the law may consider other professional skills relevant for specific cases e.g. for companies in the IT, shipping or financial industry. Experience may be one of them, sometimes other qualities are mentioned as well.

2.2.1 Experience

Description Experience relates to various factors e.g. the number of years one is licenced; the number of insolvency proceedings handled; or to having experience in specific industries; in international or European proceedings; or in handling large insolvency proceedings. It may also

regard present experience i.e. the number of hours currently practicing insolvency law on average over a certain time frame.

Findings Only some countries prescribe an annual minimum of hours practice in insolvency. Courts often consider special experience as a factor when deciding on appointment.

Room for Principles and Best Practices The continuous improvement of insolvency craftsmanship of IOHs would be served by requiring an IOH to spend annually a substantial amount of time on insolvency practice. A Best Practice to be proposed.

2.2.2 Other qualities

Description Besides experience, the law or other regulations may consider relevant other qualities e.g. quality and reliability of staff, size of the office, regional coverage; other professional skills e.g. as an auditor, accountant, lawyer, turnaround manager, psychologist; managing experience; working experience in foreign countries; knowledge of foreign judicial systems; the ability to communicate in foreign languages.

Findings The necessity of sufficient expertise for the case is clearly mentioned in a number of countries' rules.

Room for Principles and Best Practices This Topic touches the professional standard Principle, that an IOH should not accept, or even should resign, if (s)he is not capable to handle a case. A related Best Practice to be proposed intends to have the IOH communicate his/her experience and specific qualities on his/her own website or through the availability of a curriculum vitae.

2.3 Professional ethics

2.3.1 Ethical standards

Description This Topic regards the ethical standards guiding and confining the professional conduct of an IOH.

Findings Some countries recognise a separate code holding professional and ethical standards, others mention important ethical norms in the law or in rules of associations of IOHs. Some countries do not explicitly recognise such norms at all. More specifically, often rules refer to conflicts of interests, while leaving the content rather vague.

Room for Principles and Best Practices Since the IOH's conduct is under scrutiny, guidance in the form of a professional Principle (see 2.1 and 2.2) as well as an ethical Principle would be welcome, in order to have a professional and an ethical standard for the IOH's behaviour that

levels the playing field and where all stakeholders can rely on. An ethical Principle to be proposed accompanied by a Best Practice related to the conflicts of interests issue.

2.4 Insurance

2.4.1 Liability insurance

Description This topic concerns the professional liability insurance of the IOH.

Findings In all countries²¹ but one, the law or the associated rules prescribe a minimum insurance cover. However, the amounts differ enormously.

Room for Principles and Best Practices Prescribing higher minimum insurance covers would not be the panacea since any minimum may be too high or too low in a given case. In any new case, and annually for current cases, the IOH should explicitly check if the insurance measures (policy, *casse de garanti*, bonds) are still sufficient. A Best Practice to be proposed.

²¹ 'All countries' meaning all countries that were studied. This does of course not imply that all European countries do indeed have such a regulation

3. A comparative analysis of roles and responsibilities of IOHs

This Chapter analyses the toolkit of the IOH once appointed, duly detailed in four Subcategories and 14 Level III Topics. The IOH (1) administers the estate and may (2) attempt to enlarge the estate by establishing liability and by subsequent litigation. (3) Communication on his/her work and the results to stakeholders and courts is paramount. For an efficient and effective administration, (4) coordination and cooperation with other IOHs and courts, be it in a national or in an international setting, is essential. We conclude that for administration, communication, and coordination and cooperation each a Principle will be proposed.

In exercising his/her roles and responsibilities an IOH has a discretionary power, contained by the insolvency governance requirements to be discussed in Chapter 4. This analysis enables a reasonable and informed third party to estimate and benchmark the IOH's policy and his/her decisions.

3.1 Administration

The Subcategory 'administration' concerns all relevant areas of "day-to-day" practice of an IOH administering insolvency proceedings.

3.1.1 Managing the estate

Description Managing the estate includes general as well as asset related activities. General activities concern the assessment of the feasibility of continuation of the business and – on that same note – whether post-commencement financing can be arranged. If liquidation is the only option, contracts have to be looked into, whether these have to be terminated or whether continuance represents a value for the estate. Record- and bookkeeping requirements have to be complied with. Asset related activities focus on actions an IOH is to perform and measures an IOH is able to call upon in order to protect and preserve the estate including a moratorium or stay.

Findings Logically, the IOH is there to perform what is necessary in the interests of the estate. Consequently, all countries give large discretion to IOHs to do what in their opinion and according to their professional and ethical standards is best, under more or less close scrutiny of e.g. a judge-commissioner or the creditors' meeting. There are differences though. An important one at the beginning of the proceedings concerns the appliance of a moratorium or stay.

Room for Principles and Best Practices Rights and duties on general and asset related activities of an IOH are broad and generally well crystallized. In order to level the IOH's position cross-border, it would be efficient for all IOHs concerned to claim the moratorium or stay whenever

possible/necessary and to decide on the release in a coordinated fashion. This would enable more efficient settlement of the insolvency proceedings. A Best Practice to be proposed.

3.1.2 Reversal of legal acts

Description This Topic concerns the IOH's ability to reverse legal acts performed before commencement of the insolvency proceedings.

Findings All laws recognise the avoidance of certain transactions, often based on the Roman *Actio Paulina*. However, the details and time frames differ.

Room for Principles and Best Practices Whether an IOH is able to reverse legal acts performed before commencement of the insolvency proceedings and within which time frame depends on the law. In the interests of the concerned parties and to avoid expiration of the limitation period an IOH should start this task timely and regularly report to his/her supervisors. A Best Practice to be proposed.

3.1.3 Agreements

Description This Topic concerns the IOH's ability to terminate existing agreements after commencement of the insolvency proceedings.

Findings All laws leave the decision to continue existing agreements after commencement of the proceedings to the IOH and generally specify a time frame therefore.

Room for Principles and Best Practices The decision of the IOH to terminate or to continue should be based on a rational decision process having in mind the interests of the estate. The decision should be communicated expeditiously. A Best Practice to be proposed.

3.1.4 Creditor ranking

Description This Topic relates to rules on seniority of creditors and the different classes of creditors.

Findings All countries clearly describe the different classes of creditors and their position in the insolvency proceedings.

Room for Principles and Best Practices Each legal system describes in appropriate detail the recognition process of creditors and their placement on the creditors list in accordance with their rank. No need for a Principle or Best Practice here.

3.1.5 Liquidation

Description This Topic relates to the liquidation mandate e.g. the involvement of the court; whether and how an auction is to be organised or the conditions for a private sale.

Findings All countries clearly describe the liquidation process including the ways to dispose of the assets and the conditions for a private sale.

Room for Principles and Best Practices Each legal system describes in appropriate detail the liquidation process. Since IOH's conduct, information and coordination related issues are dealt with in Subcategory 3.3 and 3.4, there is no need for a specific Principle or Best Practice here.

3.1.6 Reorganisation

Description This Topic relates to the reorganisation (restructuring or rehabilitation) mandate e.g. the involvement of the creditors and the court; the content of an insolvency plan; dismissal of employees.

Findings Although European insolvency systems used to be predominantly creditor oriented, presently all countries surveyed have some sort of reorganisation procedure. Some are more elaborated than others and despite efforts of legislators to stimulate their application, the effectiveness is still subject of debate.

Room for Principles and Best Practices If the legal system recognises a possibility for reorganisation, the law describes in appropriate detail the reorganisation process. Since IOH's conduct, information and coordination related issues are dealt with elsewhere, there is no need for a special Principle or Best Practice here.

3.2 Liability & litigation

Description This Subcategory is about liability of and litigation against third parties i.e. about claims of the estate on present and former board members and/or other parties. Requirements relating to investigations of criminal offences or IOH assistance to the Public Prosecution on such investigations are included.

3.2.1 Establishing liability

Description Firstly, liability should be established by thoroughly investigating e.g. how the debtor was governed over the past few years; making a root cause-analysis; the occurrence of wrongful and fraudulent trading or other misfeasance; liability of third parties; obligation to inform public authorities on any criminal offenses discovered.

Findings All countries have provisions for liability of e.g. former board members and third parties. Generally, the IOH is exclusively designated to take the initiative.

Room for Principles and Best Practices Each legal system describes in more or less detail the specific provisions for liability. However, these trajectories could linger on for years, which is

stressful for the subjects whose behaviour is under scrutiny and creates uncertainty in the administration of the estate and the adjudication of claims. A Best Practice to be proposed.

3.2.2 Initiation of litigation

Description The second phase in litigation proceedings concerns the decision to litigate e.g. by the IOH, the supervisor, the creditors; whether there is an exclusive competence to litigate for the IOH or also one for the creditors or other third parties; whether the IOH will litigate or a specialized litigator.

Findings Before starting litigation, generally a supervisor has to give authorisation to the IOH e.g. the court, the judge-commissioner or the creditors' meeting.

Room for Principles and Best Practices Each legal system describes in more or less detail the specific provisions for litigation in liability cases. Although in this phase also speed will be desired, the time limits specified in the law have to be guiding.

3.3 Communication

Description This Subcategory is about communication with stakeholders, e.g. the debtor, creditors, court, supervisors, and evaluates the frequency of communication and the way the communication is arranged for.

3.3.1 Communication with creditors, courts and other stakeholders

Description This Topic concerns the rights, obligations and conditions, e.g. respecting confidentiality, that an IOH has to meet regarding the information provision of stakeholders on an individual basis or through the creditors' committee about the debtor's estate or on the progress of the insolvency proceedings.

Findings All countries have provisions about communications to stakeholders. However, these differ in subject and detail.

Room for Principles and Best Practices For creditors and courts communication and transparency are key; just as they are for IOHs. Respect for his/her office and for the quality of his/her work depends to a large extent on these issues. The various legal systems contain provisions on communication, often as a sequel of the tasks of the IOH and not as an important right in itself of stakeholders who lose money due to the proceedings. Therefore we see room for a Principle and a few Best Practices.

3.3.2 Communication protocol

Description This Topic concerns mass communication with creditors e.g. invitations to court proceedings, standard letters to creditors, advertisements, the use of the internet.

Findings Mandatory publication in a newspaper or a gazette used to be the mass-communication protocol. However, more and more, countries prescribe communication through the internet.

Room for Principles and Best Practices Bearing in mind the importance of communication on the one hand, and efficiency on the other, we would stress the urgency of communication through the internet. A Best Practice to be proposed.

3.3.3 Reporting standards

Description These rules concern the frequency and placement of public reports with the emphasis to inform stakeholders.

Findings Some countries have very detailed reporting standards, while others often restrict the duty to provide details to financial information.

Room for Principles and Best Practices Each country has its own standards of public reporting. There is however room for a Best Practice here in order to stress the need of (a) consistency of the reports i.e. one report should connect to the former; (b) transparency i.e. the information should outline which steps and to what goal the IOH has undertaken, while preserving the need for secrecy and confidentiality.

3.4 Coordination and cooperation

While acknowledging that coordination and cooperation are by no means identical concepts, they are discussed under one heading since cooperation involves forms of coordination and vice versa. We discern coordination and cooperation among IOHs in corporate groups (3.4.1), among foreign representatives or IOHs in cross border insolvency proceedings (3.4.2) and with foreign courts in cross border insolvency proceedings. Based on the primary role the present and draft EIR attach to cooperation and coordination, we see room for a Principle and Best Practice here.

3.4.1 Coordination and cooperation among IOHs (in corporate groups)

Description This Topic concerns coordination and cooperation among IOHs in the national context in corporate group insolvency proceedings.

Findings Most countries do not recognise provisions regarding IOH cooperation in corporate groups. However, some do and others have proposals under review.

Room for Principles and Best Practices Since there are only few provisions here, a Best Practice stressing the need to collectively aim to the maximum extent possible at the highest value for the aggregate estates instead of that of the estate in the individual insolvency proceedings only, would be useful.

3.4.2 Coordination & cooperation among foreign representatives (in cross-border insolvency)

Description This Topic concerns coordination and cooperation among IOHs and their representatives in the international context.

Findings The EIR prescribes coordination and cooperation among IOHs in the EU in article 31 in the present and in the draft text. Only some countries recognise provisions on international coordination and cooperation outside the EU.

Room for Principles and Best Practices Since the project is about Europe and not the EU, a Best Practice is to be considered about the inclusion of the Principles and Best Practices for IOHs to be designed, in an agreement or a protocol.

3.4.3 Coordination & cooperation with foreign courts (in cross-border insolvency)

Description This Topic concerns coordination and cooperation between foreign courts and IOHs in the international context.

Findings Countries that have incorporated the UNCITRAL Model Law recognise provisions enabling IOHs to coordinate and cooperate with foreign courts.

Room for Principles and Best Practices In as far not prohibited by national law, IOHs are to cooperate with foreign courts if necessary and if so, to the widest extent. This refers to the general Principle of 3.4.

4. A comparative analysis of insolvency governance systems

Assuming the duly qualified person is appointed as an IOH and is working within the framework of his/her professional and ethical standards to perform his/her roles and responsibilities as described under main category 3.0 above, insolvency governance forms the tail piece of any bankruptcy system. Insolvency governance aims at monitoring the performance of the IOH by various monitoring mechanisms e.g. judge-commissioner, court, creditors, creditors' committees, debtor, the public, the auditor, the insurer, peers, on various levels and from various viewpoints. This chapter discusses four Subcategories of insolvency governance: accountability of the IOH (4.1), approval of payable fees, cost and expenses (4.2), supervision by the competent authority or authorities (4.3), and disciplinary action (4.4). Each Subcategory is divided in two or more Topics.

4.1 Accountability

Accountability covers three Topics: disclosures (4.1.1), mandatory audit (4.1.2) and liability insurance (4.1.3). The principle of accountability is key to strengthening public confidence in the profession, since not only the required transparency and supervision in itself are important, but also – and primarily – the intended effect of improved conduct and performance of an IOH. A Principle to be proposed.

4.1.1 Disclosures

Description This Topic concerns reporting obligations e.g. to whom; details; placements; frequency. While the information meant in 3.3.3 is of an informative nature, here the focus is on accountability to the stakeholders and the supervisors in particular.

Findings The duty to disclose to the supervising authorities e.g. the court, the judge-commissioner, the creditors' committee, regularly through a report as well as on request is a central duty since this is the only way an IOH can be supervised. All countries recognise both requirements.

Room for Principles and Best Practices The level of detail in which the IOH reports differs over the countries. A Best Practice is proposed in order to have the IOH properly document all acts during the proceedings; including the financial facts through proper bookkeeping.

4.1.2 Mandatory audit

Description This Topic concerns the obligation to have the administration of insolvency proceedings audited.

Findings The obligation to have a mandatory audit is found in France (annually), or in Germany (every three years) only.

Room for Principles and Best Practices In order to endorse mutual trust, one could imagine a rule requiring an audit of the administration of the proceedings e.g. if the insolvent company was obliged to have its annual accounts audited. A Best Practice to be proposed.

4.1.3 Liability insurance

Description This Topic concerns obligations to inform the public on the details of the IOH's professional insurance e.g. the name and address of the insurer and the ceiling of the insurance cover.

Findings In some countries these details have to be made available to the court and/or to the creditors' committee.

Room for Principles and Best Practices This information may add to the mutual trust necessary for cooperation. A Best Practice is proposed.

4.2 Remuneration

This subcategory captures provisions on the determination of fees and the payment of fees and expenses. Checking the accounts may be an old but still important governance tool. It gives an important insight as to the reliability, the effectiveness and the efficiency of the IOH.

4.2.1 Fees

Description The determination and actual payment of fees to the IOH forms an essential step of control by the supervisory authorities.

Findings In all countries the determination of fees is extensively arranged for. Generally the court determines the fee. However, a fee that is determined by the collectivity of assets managed by the IOH, may impede sincere cooperation between IOHs.

Room for Principles and Best Practices This Topic is well covered in the laws and regulations of the various countries. For a level playing field, we propose three Best Practices, (1) on time-recording, which is often the basis of the fee; (2) on the four eyes principle for payments to the IOH's practice, and (3) on the 'unreasonable fee' principle. These are key to enlarge trust on the market. Concerning the asset-based fee, a Best Practice is to be proposed in Subcategory 3.4.

4.2.2 Costs & expenses

Description The approval procedure and the actual payment of costs and expenses by the IOH in the proceedings is an essential step of control by the supervisory authorities as well.

Findings In all countries there is some sort of control by supervising authorities either beforehand (e.g. the Netherlands, Poland, Spain) (and/) or afterwards (e.g. Italy, Serbia, UK).

Room for Principles and Best Practices Each country has other specific provisions. The to be proposed Best Practices in 4.2.1 will also be here of added value.

4.3 Supervision

This Subcategory is about competent authority supervision. This may vary from a check on the payment details to a regular evaluation of the IOHs work. It considers the possibility of suspension, removal and dismissal of the IOH.

4.3.1 Competent authority

Description This Topic concerns rules on the supervisory power of competent authority or authorities beyond those who are described in 4.2. This includes rules on suspension, removal, dismissal and rules on the general evaluation of the work of the IOH at the end of the insolvency proceedings.

Findings Often the court supervises, however in the UK the court functions merely as a dispute resolver and in such cases the creditors, often in the form of the creditors' committee, have to take over.

Room for Principles and Best Practices Supervision by competent authorities is only to be delegated by the law. No place for a Principle or Best Practice here.

4.4 Disciplinary action

4.4.1 Investigation

Description This Topic is about investigation in the framework of disciplinary action by any third party.

Findings Some countries recognise legal provisions for disciplinary investigation of an IOH by government bodies or by the mandatory association of IOHs. Others recognise these through the rules of their voluntary professional associations of IOHs. Quite a few countries do not have such associations.

Room for Principles and Best Practices A full grown association of professionals should maintain provisions on disciplinary investigation and action. For medical practitioners,

accountants, auditors and lawyers this is generally arranged for. However an IOH's conduct is not always covered by (other/original) professional rules of conduct. Therefore IOHs should strive at having adopted this by their professional association of IOHs. A Best Practice is proposed.

4.4.2 Disciplinary proceedings

Description This Topic concerns rules on disciplinary proceedings, including complaints proceedings.

Findings We detected disciplinary proceedings of some sort in a majority of countries. However, exclusion as the *ultimum remedium* to expel a fellow professional who crossed a line, is not always provided for.

Room for Principles and Best Practices Exclusion of an IOH in a disciplinary action is an *ultimum remedium* to expel a fellow IOH professional who crossed the line. A Best Practice is proposed to indicate that an IOH should strive to have incorporated such a provision in the rules of their national or regional IOH association.

5. Topics where Principles and Best Practices would matter

This Chapter condenses the findings of Chapters 1 – 4 on the desirability of Principles (P) and Best Practices (BP) on the various Categories, Subcategories and Topics in Table 2 below.

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

Table 2: The model and an indication for room for Principles and Best Practices for IOHs.

Table 2 holds the original model, as presented in Report I to which two columns have been added, indicating whether the previous Chapters concluded on room for a Principle or Best Practice to be proposed. Where the column indicates a P, this could mean a Principle for the Topic or for the Category in general. Best Practices are mentioned for the specific Topic. The underlying reasoning is found in the Chapters 1 – 4. Whether Report III will actually propose such Principles and Best Practices will not only depend on our academic analysis, but also on the advice of practitioners whether the to be proposed rules would indeed contribute to the efficiency and effectiveness of the IOH's work and to the trust of the profession on the market.

6. An evaluation of the model

This Chapter evaluates the experiences we had with the model while preparing Report II. It looks forward to the accomplishment of the assignment by discussing the term ‘Best Practices’.

6.1 Did the model hold?

In Chapter 3 of Report I we described the methodology of our study. The work in Report I resulted in a model, presented on page 24 of Report I and reprinted in Chapter 5 of Report II. The development of the model was based on the analysis of 13 sets of non-binding international rules. We explained that we preferred to do so since these non-binding international rules are designed during the last decade while the national rules are often less coherent, since they are the result of historical, cultural, institutional and legal incidents over the years. The model worked well for the analysis of the 13 sets of rules.

At the outset of the country-analyses presented as Appendix C in this Report II, we hypothesized that our model would hold for national analyses as well. This was based on the preliminary validation described in section 3.3. of report I. Appendix C to this Report II shows that our hypothesis was justified. Indeed, we were able to analyse the IOH system of each of the countries presented by means of the model and the discussion of the Topics as presented on pages 24-26 of Report I, as well as on its Appendix B.

However, while we are able to present 11 country analyses along the lines of the model, two of which drafted by local IOHs, the others prepared by the Leiden Law School Turnaround, Rescue and Insolvency Team and checked by local experts, we did not *expressis verbis* look for provisions or areas in local IOH-related law that would not fit in the model. We did not come across such provisions or areas; but we have to admit we did not actively search for them either. In other words: our research was not intended to – nor did it find reasons to – reject the hypothesis that our model is a complete description of IOH-related rules.

6.2 Best Practices or Guidelines?

Another issue we came across working on this study was the use of the term ‘Best Practices’. The problem is that in literature Best Practices relate to ‘benchmarking’. In the Introduction to both reports we observed that the Principles and Best Practices to be designed should serve as a ‘sound benchmark’ for individual IOHs, professional insolvency practitioners’ associations, judges and other public authorities. This statement needs some reconsideration as to what ‘benchmarking’ really means.

According to Camp²², the founding father of benchmarking theory, “benchmarking is finding and implementing the best business practices” (Camp, 1993, p. 25). According to the British Office of Health Economics²³ (OHE, 2000, p. 11) “benchmarking can be thought of as the comparison of business practices and performance levels between organisations in order to identify opportunities for making improvements”. As Barber²⁴ (2004) indicates, benchmarking reflects ‘what is compared’ and ‘whom it is compared against’.

Thus, if we speak about Best Practices, this may very well be understood as being the benchmark in IOH national or cross-border conduct and performance. However, in order to ‘find’ and ‘compare’ best practices, as the definition of benchmarking requires, such practices should already exist. Indeed, one may argue that such best practices do exist in the EBRD Office Holders Principles 2007 and in the European Communication & Cooperation Guidelines for Cross-Border Insolvency 2007 of INSOL Europe, which have been analysed in Report I. However, neither the EBRD Principles nor the INSOL Europe Guidelines have been formulated in order to set the Best Practice.²⁵ Their aim was to attain a practical level playing field for IOHs in cross-border cases. The same applies to the Principles and Best Practices for IOHs we are currently designing. Generally, a Principle will be suggested in order to contribute to a level playing field of the IOHs’ standards of conduct and a Best Practice in order to contribute to a level playing field of IOHs’ performance where regulations differ between countries. It is not the highest attainable level of practices we try to formulate after comparing all the solutions international organisations as well as national legislators have designed. On the contrary, all we do is contribute to a level playing field of IOHs in cross-border insolvencies, implying that these Principles and Best Practices should be the minimum level of conduct and performance to be applied in national insolvencies as well.

When this line of reasoning is followed, and we admit that neither the word ‘best’ nor the word ‘comparison’ is applicable, we should reconsider the name of the to be proposed rules on performance. Maybe ‘Guidelines’ would be better. The online Merriam-Webster dictionary defines Guidelines by: “a rule or instruction that shows or tells how something should be done”. This is exactly what we try to do in drafting ‘Best Practices’: these are about specific performances. We conclude that using ‘Guidelines’ would be preferable.

²² Robert C. Camp, 1993, *A Bible for Benchmarking*, by Xerox, Financial Executive, Jul/Aug 1993; 9, 4.

²³ OHE, 2000, *Benchmarking and Incentives in the NHS*, London.

²⁴ Elizabeth Barber, 2004, *Benchmarking the management of projects: a review of current thinking*, International Journal of Project Management 22 (2004) 301–307

²⁵ See e.g. INSOL Europe, 2007, European Communication & Cooperation Guidelines for Cross-Border Insolvency, p. 23 (‘as a first step’ and ‘minimum requirements’).

7. Concluding remarks

Report II contains a comparative analysis of the IOH position in 11 European countries along the lines of the model developed and reported in Report I. Starting from this analysis, Report II identifies whether and where there would be room for Principles and Best Practices. A Principle is suggested in order to contribute to a level playing field on IOHs' conduct and a Best Practice in order to contribute to a level playing field on IOHs' performance, transparency and accountability.

Indeed we detected room for 7 Principles and over 20 Best Practices (Tables 1 and 2). In the process to follow, leading to Report III, we shall formulate these Principles and Best Practices, having in mind the international (Report I) and national (Report II) solutions.

This will lead to a draft which subsequently will be discussed with the Academic Advisory Group, the Review and Advisory Group, with INSOL Europe members and on several congresses to come, e.g. in Leiden (April 2014), Barcelona (May 2014) and Istanbul (October 2014).

In the end only those Principles and Best Practices will be proposed which are generally felt to contribute to the efficient and effective work of IOHs and to trust in the profession on the market in the international, and derived from that, as well in the national context.

Finally, we should decide whether we maintain the term 'Best Practices' or whether 'Guidelines' would be more appropriate.