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APPOINTMENT OF INSOLVENCY OFFICERS IN RUSSIA AND FOREIGN JURISDICTIONS

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14 bldg. 3 Kadashevskaya Naberezhnaya
Moscow, 119017, Russia
+7 495 640 65 65
info@iclrc.ru www.iclrc.ru

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ABBREVIATIONS

AGS	The Association for the management of employee claims (*Association pour la gestion du regime de Garantie des creances des Salaries*)
Bankruptcy Code	The United States Bankruptcy Code
Bankruptcy Law	The Federal Law No. 127-FL of 26.10.2002 "On insolvency (bankruptcy)"
Bankruptcy Rules	The US Rules and Forms of Practice and Procedure in Bankruptcy
BGH	The Federal Court of Justice in Germany (*Bundesgerichshof*)
BVerfG	The Federal Constitutional Court of Germany (*Bundesverfassungsgeright*)
CNAJMJ	The National Council of Court-Appointed Administrators and Court-Appointed Liquidators (*Conseil national des administrateurs judiciaires et des mandataires judiciaires*)
Commercial Code	The Commercial Code of the French Republic (*Code de commerce*)
Enterprise Bankruptcy Law	Enterprise Bankruptcy Law of the People's Republic of China
Fedresurs	The Unified Federal Register of Information on the Facts of Legal Entities' Activities
GOI	Principles of Proper Bankruptcy Administration (*Grundsatze ordnungsgemaßer Insolvenzverwaltung*)
InsO	Insolvency Statute of Germany (*Insolvenzordnun*g)

IO	The Federal Law on Insolvency Proceedings of Austria (*Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung)*)
Regulation on remuneration	Regulation "On consideration of cases on bankruptcy of enterprises and determination of the remuneration of the insolvency officer in bankruptcy in China"
Regulation on the appointment	Regulation "On the appointment of arbitration managing directors in affairs about bankruptcy of the enterprise in China"
Rosreestr	The Federal Service for State Registration, Cadastre and Cartography
SAC RF	The Supreme Arbitrazh (Federal) Court of the Russian Federation
SC RF	The Supreme Court of the Russian Federation
VID	The Registered Association of Insolvency Administrators of Germany (*Verband Insolvenzver walter Deutschlands*)

INTRODUCTION

The insolvency officer has a special place among the participants in the bankruptcy case. In many ways, he or she is the central figure of any procedure, whose conclusions, decisions, and actions significantly affect the debtor and related persons, creditors, as well as other persons involved in the bankruptcy process.

Insolvency officer's status in Russian law is constantly changing. This is largely due to the search for the best ways to ensure the independence of insolvency officers, including, for example, clarifying the approaches to disclosure of information[1] related to the debtor by third parties at the request of insolvency officers, or ensuring sufficient funding for ongoing procedures, which is widely discussed in the professional community.

The draft Federal Law "On amendments to the Federal Law 'On insolvency (bankruptcy)' and certain acts of the Russian Federation"[2] published in March 2020 by the Ministry of Economic Development of the Russian Federation proposed changes to the model for appointing insolvency officers in bankruptcy cases, where the discretion of the arbitration court gives way to random selection in combination with a number of additional factors. The proposed model, as the authors of the draft law note, is due to the need to eliminate the frequent dependence of the insolvency officer on the creditor who has proposed him or her.

The purpose of this study is a comparative legal analysis of current models for appointing insolvency officers in bankruptcy cases of legal entities in Russia, France, Austria, Germany, the United States, and China in the context of ensuring the independence of insolvency officers from participants in bankruptcy proceedings.

However, the appointment of insolvency officers in bankruptcy cases cannot be properly disclosed without understanding the status of the insolvency officer in general, since the independence of the insolvency officer is influenced by a large number of factors: from the threshold for entering the profession to stable financing of bankruptcy proceedings.

In this regard, the objectives of the study include a wide range of issues, including the status of the insolvency officer in general:

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[1] See, for example: Federal Law No. 482-FZ of 12.29.2014 "On amendments to the Federal Law 'On insolvency (bankruptcy)' and the Code of Administrative Offences of the Russian Federation".

[2] Draft Federal Law "On amendments to the Federal Law 'On insolvency (bankruptcy)' and certain acts of the Russian Federation". URL: https://regulation.gov.ru/projects#npa=100272 (the date of access: 05.01.2020).

- description of the main elements of the status of an insolvency officer in each of the selected jurisdictions;

- description of the model for appointing insolvency officers in bankruptcy cases in Russia, identification of tools and mechanisms that limit the independence of insolvency officers;

- description of models for appointing insolvency officers in bankruptcy cases in France, Austria, Germany, the United States, and China;

- identification of common features and differences in the described models for appointing insolvency officers in bankruptcy cases;

- description of the advantages and disadvantages of the analyzed models in the light of the implementation of the principle of independence of insolvency officers;

- description of the risks of accepting a particular model for appointing insolvency officers or its individual elements in bankruptcy cases in Russia.

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EXECUTIVE SUMMARY

1. Models for appointing insolvency officers in Russia, France, Austria, Germany, the United States, and China have both common features and clear differences.

2. Common features of all the models studied are:

- recognition of the role of the insolvency officer as central to any bankruptcy case **(paras. 183, 355, 433-436 of the Analytical Report)**;

- the special functions of the bankruptcy court in terms of appointing an insolvency officer and determining the scope of his or her powers in a particular bankruptcy case in accordance with applicable law;

- universal recognition of public-law elements of the status of an insolvency officer so far as insolvency officers assist courts in resolving economic and social conflicts that have arisen in connection with the loss of debtors' ability to pay **(paras. 44, 161, 243, 324, 355, 469 of the Analytical Report)**;

- the criteria for obtaining the status of an insolvency officer; to a large extent, these criteria are based on confirmation of the candidate's integrity, reliability, qualifications, and financial well-being. At the same time, in foreign jurisdictions the candidate's criminal history is taken into consideration regardless of the period of criminal record **(paras. 122, 307, 364, 365, 464 of the Analytical Report)**;

- striving to ensure the independence of insolvency officers from the influence of persons interested in the bankruptcy case outcome.

3. The independence of the insolvency officer is ensured in various ways, but all countries have common approaches to solving this problem: fixed and proportional remuneration, the right to unconditional and free assistance, and the inadmissibility of arbitrary replacement of the insolvency officer in a bankruptcy case.

4. French legislation sets rather high requirements for entering the profession of an insolvency officer **(paras. 118-139 of the Analytical Report)**, determining that such a profession becomes the main one for a person **(paras. 145 of the Analytical Report)**. At the same time, the French legislator consistently increases the role of the Prosecutor's office in appointing insolvency officers **(paras. 109, 113, 142, 152, 168-170, 173 of the Analytical Report)** and the role of the sole association of insolvency officers in overseeing

their activities **(paras. 120, 124, 131, 152 of the Analytical Report)**. In addition, the court has the broadest discretion in choosing the insolvency officer who is best suited to work in a particular case, in the opinion of the court **(paras. 161, 169-175 of the Analytical Report)**.

5. The Austrian and German models for appointing insolvency officers are also based on granting the court the right to choose the most appropriate insolvency officers for specific cases **(paras. 243, 298, 324, 326 of the Analytical Report)**. At the same time, the independence of the insolvency officer is achieved by forming general lists of candidates **(paras. 221-225, 298 of the Analytical Report)**, from which the court then determines the best candidate at its discretion. In addition, the independence of insolvency officers is ensured by the possibility of entering the profession for any person who meets the clearly defined general criteria **(paras. 216, 297-312 of the Analytical Report)**. Also, as in France **(para. 122 of the Analytical Report)**, much attention is paid to business reputation as a key condition for obtaining the opportunity to be appointed as an insolvency officer **(paras. 207, 300-308 of the Analytical Report)**.

6. In the U.S. model, the independence of the insolvency officer is achieved by randomly selecting a suitable candidate from a small number of practicing insolvency officers **(para. 386 of the Analytical Report)**. At the same time, the court does not have to perform the function of choosing among several unknown persons, which is not typical for justice, and is not responsible for choosing an unsuitable candidate. An important guarantee of access to the profession of responsible persons and a subsequent incentive to conduct a bankruptcy case in good faith is the providing of a surety guarantee by the insolvency officer to pay for possible future claims to the officer's work **(paras. 369-372 of the Analytical Report)**.

7. In the People's Republic of China, the court does not simply approve a candidate submitted to it by creditors or an authorized body, but performs the function of producing lists of candidates, organizing the selection of the candidate (**in most cases, randomly in order of the draw or lottery**, in special situations, through contest or direct appointment), and approving of the candidate as an insolvency officer **(paras. 460-463, 479-489 of the Analytical Report)**. At the same time, the people's court has serious powers to control the activities of insolvency officers, assess their compliance with the requirements, and determine the position of insolvency officers in the court lists from which candidates are selected for approval in specific cases **(para. 476 of the Analytical Report)**. The influence of participants in the competitive process on such a choice is usually excluded.

8. Regardless of the applicable model of appointment, legislators in all jurisdictions proceed from the need to control the activities of insolvency officers by both courts and executive authorities **(paras. 61-64, 152-157, 232-242, 319-323, 418-426, 476-478 of the Analytical Report)**. **The ability to control insolvency officers depends on the**

exercising of powers to appoint them: if a system of a random selection of a candidate is used, the executive authority gets strong control powers, and if an insolvency officer is appointed by a court, the control is exercised mostly by the court.

9. The Russian model **(para. 78 of the Analytical Report)** shows that arbitrazh (federal) courts are bound by petitions of the bankruptcy case participants. The Russian model is similar to the French model on insolvency officers' access to the profession, but it differs from all models by legally limited (and actually near-zero) court's discretion to appoint a particular insolvency officer.

10. None of these models, however, can be fully accepted by the Russian legal system:

- all European models in general — due to the broad discretion that is given to judges when choosing a suitable candidate, due to the low level of confidence in the Russian courts;

- the French model — due to excessively strict requirements for entering the profession, which the modern Russian community of insolvency officers seems to be neither psychologically nor economically ready for;

- the Chinese model — because of the control over the activities of insolvency officers by the audit board of the court, as well as due to the use of a lottery procedure for appointing mostly collective insolvency officers — companies;

- the Austrian, German, and Chinese models — due to the implementation of functions that are not typical for Russian arbitrazh courts to compile lists of insolvency officers.

11. In this regard, the U.S. model seems to be the most promising, since it excludes the possibility of influencing the choice of an insolvency officer by any persons other than the insolvency officers themselves. However, in Russian conditions, the use of such a model is difficult for several reasons, including:

- uneven distribution of a large number of insolvency officers across the country;

- the concentration of bankruptcy cases in arbitrazh courts of several subjects of the Russian Federation;

- the almost unconditional right of the insolvency officer to withdraw from the authority in any case, which negatively affects motivation and provides opportunities for unscrupulous persons to access the competition process;

- in general, the legal culture has formed an idea of the importance of having a loyal insolvency officer;

- the unwillingness of the Russian legal system to radically change the model of appointing an insolvency officer, as evidenced by the unsuccessful experience of introducing a random choice of a self-regulatory organization in cases involving bankruptcy on the debtors' applications **(paras. 66-68 of the Analytical Report)**.

12. It seems that the automated selection model is acceptable only in the case of initial strict admission to the profession with subsequent control of the insolvency officers' activities by a state body similar to the Prosecutor in France or the US Trustee, while completely random selection will not allow taking into account the specifics of a particular bankruptcy case. The implementation of such a proposal will require a deep reform of the Russian bankruptcy legislation and will affect a whole range of issues related, for example, to the financing of the authorized state body, the existence of self-regulatory organizations of insolvency officers, determining the limit of the control function of the court in relation to insolvency officers.

13. The following measures seem reasonable to implement in order to modify the Russian model of appointment of insolvency officers in bankruptcy cases:

- increasing the prestige of the profession by collecting, analyzing, and systematizing information about the knowledge, practical experience, skills, abilities, and business reputation of persons who want to be appointed as insolvency officers (for example, in the form of a public register from which arbitrazh courts and participants in the process could receive information about the performance of a particular insolvency officer and cases of his or her illegal or unfair behavior), and establishing objective criteria for access of insolvency officers to certain categories of cases based on the collected data;

- reducing the number of bankruptcy procedures: the majority of foreign countries show that each of the two goals of bankruptcy — restoration of its solvency and repayment of debt or fair distribution of property among creditors — can and should correspond to only one procedure: financial rehabilitation (reorganization) of the debtor or its liquidation **(paras. 184, 280, 354, 431 of the Analytical Report)**;

- establishment of systems for certification and evaluation of bankruptcy procedures for analyzing the economic results of the work of insolvency officers based on the experience of Germany — to stimulate the professional growth of insolvency officers and their lawful behavior **(paras. 158, 335, 336 of the Analytical Report)**;

- selection of a closed (exhaustive) list of criteria and cases for which judges of arbitrazh courts could form shortlists of suitable candidates, among which a random selection would then be made;

- the experiment to introduce a random selection of insolvency officer in a bankruptcy case prior to real reform legislation (testing different models: from a fully automated choice of the insolvency officer to providing the arbitrazh court of discretionary authority) **(para. 77 of the Analytical Report)**;

- reducing the role of self-regulatory organizations in the appointment of insolvency officers **(paras. 66, 70-73 of the Analytical Report)**, since the management of the debtor's assets is the individual work of the insolvency officer;

- extension of the status of an insolvency officer to legal entities, taking into account the fact that the legal services market has already formed teams that specialize exclusively in supporting bankruptcy cases **(paras. 208-215, 357, 453 of the Analytical Report)**;

- establishing the right of an insolvency officer to withdraw from a bankruptcy case only under the condition of extraordinary, irremediable, and valid circumstances verified by the arbitrazh court **(paras. 178, 275, 349 of the Analytical Report)**.

I. THE INSOLVENCY OFFICERS APPOINTING MODEL IN BANKRUPTCY CASES IN RUSSIA

1. A Brief Overview of Regulation in Bankruptcy Cases

a. Sources of Bankruptcy Law

14. The main document regulating bankruptcy issues in Russia is Bankruptcy Law,[3] and all key questions about the course of the procedure fall within the competence of the arbitrazh court. In addition to federal laws, some bankruptcy issues are regulated at the level of bylaws.[4] An extraordinary influence on the practice of application of bankruptcy legislation is provided by general resolutions of the SAC RF, the SC RF, and their judicial acts, issued on specific cases.

15. In relation to the purpose and objectives of this study, the main source regulating the appointment of insolvency officers in bankruptcy cases is the Bankruptcy Law. If it is necessary to describe individual elements of the status of an insolvency officer, the other legal acts and relevant court practice are provided.

b. The Types of Procedures Used in Bankruptcy Cases and the Functions of the Insolvency Officer in Such Procedures

16. In Bankruptcy Law of Russia, there are five types of bankruptcy procedures for legal entities: supervision **(paras. 17-24 of the Analytical Report)**, financial rehabilitation **(paras. 27-29 of the Analytical Report)**, external administration **(paras. 30-35 of the Analytical Report)**, liquidation procedure **(paras. 36-38 of the Analytical Report)**, the

[3] Certain issues related to bankruptcy are also regulated in The Civil Code of the Russian Federation (article 65), Federal Law No. 96-FL of 07.29.2004 "On payments of the Bank of Russia on deposits of individuals in banks recognized as bankrupt that do not participate in the mandatory deposit insurance system in banks of the Russian Federation", Federal Law No. 68-FL of 05.13.2008 "On centers of historical heritage of presidents" (part 7 of article 2), Federal Law No. 174-FL of 10.16.2012 "On the Foundation for advanced research" (part 4 of article 4), Federal Law No. 291-FL of 11.02.2013 "On the Russian scientific foundation and amendments to certain legislative acts of the Russian Federation" (part 17 of article 2), Federal Law No. 154-FL of 06.29.2015 "On regulation of insolvency (bankruptcy) in the territories of the Republic of Crimea and the Federal city of Sevastopol and on amendments to certain legislative acts of the Russian Federation", Federal Law No. 218-FL of 07.29.2017 "On a public law company for the protection of the rights of citizens participating in shared-equity construction in the event of insolvency (bankruptcy) of developers and on amendments to certain legislative acts of the Russian Federation", The Arbitrazh Procedure Code of the Russian Federation.

[4] See, for example: Resolution of the Government of the Russian Federation of 05.29.2004 No. 257 "On ensuring the interests of the Russian Federation as a creditor in bankruptcy proceedings and in the procedures applied in bankruptcy proceedings".

settlement agreement **(para. 39 of the Analytical Report)**[5] and three — for individuals: the debt restructuring, the sale of property, the settlement agreement **(paras. 39-40 of the Analytical Report)**. The insolvency officer is involved in each of the above procedures.

17. **Supervision** is defined as a procedure aimed at ensuring the safety of the debtor's property, conducting an analysis of the debtor's financial condition, compiling a register of creditors' claims, and holding the first creditors' meeting which is exclusively responsible for deciding on further procedures applied in a bankruptcy case.[6] The insolvency officer in the supervision receives the name of the **temporary officer**. The term of supervision may not exceed seven months from the date of receipt of the bankruptcy application by the court.

18. During the course of supervision, the debtor continues its activities with some restrictions.[7] In particular, only with the written consent of the temporary officer, it is possible to make dispositive transactions with the debtor's property which is more than five percent of the book value of the debtor's assets as of the date of initiation of supervision, as well as deals related to financial transactions and provision of security on behalf of the debtor. The duties of the head of the debtor are to transfer to the temporary officer the documents necessary for preparing an analysis of the financial condition of the debtor, as well as informing the temporary officer of changes in the composition of the debtor's property on a monthly basis.[8]

19. During the supervision, the court tries creditors' claims for monetary obligations and for payment of mandatory payments and includes them in the register of creditors' claims or refuses to include them. The temporary officer is not required to raise objections to creditors' claims submitted to the court,[9] although the declared level

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[5] In 2019, out of 26,580 judicial acts concerning the initiation of a particular bankruptcy procedure in respect of debtors, in 19 cases decrees of the court on the initiation of financial rehabilitation were issued, in 209 cases — on the initiation of external administration, while bankruptcy proceedings were opened in 12,401 cases, and supervision was initiated, respectively, in 10,134. See: statistical Bulletin of the EFRSB. December 31, 2019. P. 6, 15-16. URL: https://bit.ly/2X4pa4i (the date of access: 05.01.2020). Statistics from 2019 and previous years show that supervision in most cases is an intermediate state between the moment when the debtor was filed for bankruptcy and the debtor was declared bankrupt. Many members of the professional community consider this procedure impractical.

[6] Paragraph 13 of article 2, paragraph 2 of article 12, paragraph 1 of article 73 of the Bankruptcy Law.

[7] Ibid., article 64.

[8] In practice, temporary officer does not always get access to the debtor's documents and information about its activities from the debtor's managers. Until June 2012, applications for the recovery of documents from debtors' managers were considered in accordance with article 60 of the Bankruptcy Law, which provided for a court session and the possibility of appealing the adopted judicial act in appeal and cassation, as well as its review by supervision. After June 22, 2012, court practice allows temporary officer (as well as other insolvency officers in other bankruptcy procedures) to obtain documents and material assets of the debtor by applying to the court to call for the evidence, which was considered without holding a meeting and without a possibility to appeal the adopted judicial act (Decision of the Plenum of the SAC RF of 06.22.2012 No. 35 "On certain issues related to consideration of bankruptcy cases"), which greatly facilitated the work of insolvency officers. However, in December 2017, the SC RF canceled general resolutions of the SAC RF and returned the arbitrazh courts to practice which existed before June 2012, again making it difficult for insolvency officers.

[9] Paragraph 3 of the point 1 of article 66 of the Bankruptcy Law.

of access of the temporary officer to documents and information about the debtor's activities makes it possible to consider an independent temporary officer as a strong participant in the bankruptcy process.[10]

20. The main duties of the temporary officer are to ensure the safety of the debtor's property and analyze the financial condition of the latter.

21. To perform the task of ensuring the safety of the debtor's property, the temporary officer has the right to challenge a small number of transactions that go beyond the established restrictions and were made during the supervision,[11] as well as to demand the removal of the debtor's manager from the operation.[12] The latter power implies the transfer of the functions of the debtor's manager to one of the debtor's employees (and never to the temporary officer), as well as the possible restriction of the new head of the debtor in making certain transactions based on a court ruling issued at the request of the temporary officer. Despite the fact that the temporary officer has the right to challenge certain transactions of the debtor and to apply to the court for the removal of the debtor's manager from his or her duties, the exercise of such powers is ineffective and, as a rule, due to the specifics of bankruptcy cases, it remains beyond the supervision period.

22. Preparation of an analysis of the debtor's financial condition is carried out by the temporary officer in accordance with the procedure established by the Government of the Russian Federation.[13] Together with this analysis, the temporary officer prepares a conclusion on the presence or absence of signs of fraudulent or deliberate bankruptcy.[14] The quality of preparation of such documents is often subject to reasonable criticism during public discussions.

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[10] Moreover, when the temporary officer acts independently or when the balance of interests is shifted in favor of independent creditors whose candidate has been approved as temporary officer, such creditors get more opportunities in the field of evidence. In particular, at the request of the temporary officer, any person must provide information and documents free of charge within seven days from the date of receipt of the request (paragraph 1 of article 20.3 of the Bankruptcy Law). The mechanism provided by the procedural legislation for requesting evidence in separate disputes takes much more time, and its application in practice largely depends on the discretion of the court.

[11] Paragraph 2 of point 1of article 66, articles 63-64 of the Bankruptcy Law.

[12] Ibid., article 69.

[13] Resolution of the Government of the Russian Federation of 06.25.2003 No. 367 "On approval of the Rules for conducting financial analysis by an insolvency officer".

[14] Resolution of the Government of the Russian Federation No. 855 of 12.27.2004 "On approval of the Provisional rules for checking by an insolvency officer for signs of fictitious and deliberate bankruptcy".

23. If the signs of deliberate or fraudulent bankruptcy are detected, the temporary officer is obliged to send his or her conclusions along with documents to law enforcement agencies.[15]

24. The supervision ends with the first meeting of creditors, at which the temporary officer presents to creditors the conclusions regarding the financial condition of the debtor and proposals on the future of the latter, and the creditors must decide the fate of the debtor in accordance with the broad powers granted to them by the Bankruptcy Law. Based on the decision of the first meeting of creditors, the court either issues a ruling on the initiation of financial rehabilitation or external administration of the debtor, or decides to open a liquidation procedure, or approves a settlement agreement and terminates the proceedings.

25. The expediency of supervision has long been questioned by a significant number of specialists involved in the competition process. From the moment of "single sign-on" into the bankruptcy procedure, a significant amount of time passes through the filing of a bankruptcy application and the initiation of supervision to resolve the issue of financial rehabilitation or a liquidation procedure. During this time, the obvious shortcomings of supervision related to the delay in the competitive process are revealed:

- the risk of reducing the value of the debtor's business due to existing costs increases or even occurs;
- the risk of impossibility to make a quick decision about changing business processes occurs (in fact, there is a ban on active recovery of the debtor);
- the debtor's management retains its authority and, as a result, multiplies previously committed errors;
- the management of the debtor comes into conflict with the temporary officer on issues of disclosure of material information, transfer of documents, and explanation of the circumstances that have led to the current situation of the organization;
- due to the payment of remuneration to the temporary officer and the persons engaged by him or her, the debtor's costs increase (but it should be noted that the amount of these costs is relatively small).

[15] Paragraph 15 of the Provisional rules for checking by an insolvency officer for signs of fictitious and deliberate bankruptcy approved by Resolution of the Government of the Russian Federation No. 855 of 12.27.2004.

26. In the legislation of foreign states, the issue of the need for "single sign-on" into bankruptcy (in fact, the question of whether the supervision is appropriate) was decided in favor of the direct application of rehabilitation or liquidation proceedings **(paras. 98, 184, 280, 354, 431 of the Analytical Report)**, and, in some cases, the initiation of the analog to supervision at the time of institution of bankruptcy proceedings with a "strong" insolvency officer **(para. 283 of the Analytical Report)**. The insolvency officer takes part in the process immediately after the bankruptcy case is initiated, unlike in Russia, where it can take up to two years[16] between filing an application for declaring the debtor bankrupt before supervision is initiated and the temporary officer takes office.

27. **Financial rehabilitation** is aimed at restoring the debtor's solvency and paying off the debt in accordance with the schedule.[17] Financial rehabilitation may be opened by the court[18] after supervision on the basis of a decision of the creditors' meeting issued in connection with the application of the founders (participants) of the debtor, or the body authorized by the owner of the debtor's property — state-owned unitary enterprise, or any third party (in agreement with the debtor).

28. The head of the debtor in financial rehabilitation continues to perform his or her work. The role of the insolvency officer (at this stage referred to as the **administrative officer**) is limited to reviewing reports on the progress of the debt repayment schedule and the financial rehabilitation plan,[19] monitoring the debtor's performance of current obligations and the debt repayment schedule, approving certain transactions (obtaining loans, assignment of claims, transfer of debt, as well as dispositive transactions with the debtor's property (except for transactions in the normal course of business) and transactions which increase the amount of creditors' claims included in the register by more than five percent) and their challenge.

29. Termination of financial rehabilitation occurs due to:

- termination of proceedings in the case of repayment of creditors' claims;

[16] This lack of promptness in approving a temporary officer and introducing supervision is an anomaly. Paragraph 3 of article 62 and article 51 of the Bankruptcy Law provide that there should be no more than seven months from the time of institution of bankruptcy proceedings until the end of supervision. However, the arbitrazh courts are not bound by these terms, which is primarily due to the specifics of consideration of creditors' claims.

[17] Paragraph 14 of article 2 of the Bankruptcy Law.

[18] The court's decision on initiation of financial rehabilitation should contain an indication of the period of application of this procedure, debt repayment schedule, information about the enforcement of obligations of the debtor (item 3 of article 80 of the Bankruptcy Law). The period of financial recovery may not exceed two years.

[19] Ibid., article 84.

- initiation of external administration if it is possible to restore the debtor's solvency;

- opening of a liquidation procedure in case it is not possible to restore the debtor's solvency.

30. **External administration** is a procedure used to restore the debtor's solvency.[20] The initiation of external administration, as well as other procedures, is within the competence of the court.

31. In external administration, the powers of the debtor's manager are transferred to the insolvency officer, who in this procedure is referred to as the **external officer**.

32. The external officer, acting on behalf of the debtor, actually determines its further economic activity: he or she has the right to dispose of the debtor's property, to the repudiation of the debtor's existing contracts that are burdensome for it, and to challenge a wide range of transactions of the debtor.

33. No later than one month from the date of initiation of external administration, the external officer is obliged to develop and submit to the creditors' meeting an external administration plan with the justification of the time frames and the possibility of restoring the debtor's solvency.[21] Failure to agree on the external administration plan may be the basis for the creditors' meeting to take a decision to remove the external officer from office or to apply to the court to open a liquidation procedure against the debtor.

34. The external officer, acting as the head of the debtor and having broad powers to dispose of its property, is under the control of the court and the creditors' meeting (committee).

35. The Bankruptcy Law provides that, based on the results of external administration activities, bankruptcy proceedings may be terminated upon the restoration of the debtor's solvency or the repayment of the claims of all creditors, and a liquidation procedure may also be opened.

36. The opening of **a liquidation procedure** means that it is impossible to restore the debtor's solvency and that the value of all the debtor's existing assets is subject to

[20] Ibid., paragraph 15 of article 2.

[21] The external administration plan may provide for a number of measures to restore the debtor's solvency, for example, re-profiling of proceedings, closing unprofitable proceedings, collection of receivables, sale of part of the property, assignment of the claim rights, fulfillment of the debtor's obligations by any third parties, increase of the authorized capital due to contributions from participants and third parties, placement of additional ordinary shares, sale of the business, replacement of the assets (article 109 of the Bankruptcy Law).

distribution among its creditors.[22] During the liquidation procedure, the debtor's existing assets are sold and the money supply is formed which is subsequently channeled to the maximum possible and fair repayment of creditors' claims in accordance with the established order.

37. The liquidation procedure ends, as a rule, with the exclusion of the debtor from the Unified State Register of Legal Entities, although the Bankruptcy Law provides for conditions for transition to external administration or termination of a bankruptcy proceeding, for example, due to the full repayment of creditors' claims.[23]

38. During the liquidation procedure, the powers of **the insolvency (liquidation) officer** become significantly expanded: he or she gets the competence of the debtor's manager; it is presumed that the debtor's assets come under the control of the liquidation officer for subsequent distribution (evaluation, sale, transfer to creditors, use to finance procedures, etc.); he or she has the right (and the duty as well) to challenge a wide range of the debtor's transactions. The amount of repayment of creditors' claims largely depends on the activity of the liquidation officer. It is this bankruptcy procedure that accounts for the largest number of complaints against insolvency officers related to evasion from challenging suspicious transactions of the debtor, improper spending of the debtor's limited monetary resource, and unprofitable sale of expensive assets for creditors.[24]

39. **A settlement agreement** as a procedure in a bankruptcy case can be applied at any stage of the case and is an agreement between the debtor and creditors regarding the satisfaction of the latter's claims,[25] approved by the court.[26] It is important to note that in external administration and a liquidation procedure, the decision to enter into a settlement agreement on behalf of the debtor is made by the external officer and the liquidation officer, respectively. This procedure can be applied in bankruptcy of both legal entities and individuals.[27]

40. **The individual's debt restructuring** is a procedure that is aimed at restoring the solvency of an individual and paying off the resulting debt in accordance with the debt restructuring plan approved by the court.[28] This procedure is very similar to the financial rehabilitation of legal entities. **The sale of an individual's property** is an analog of a liquidation procedure.[29] The participation of the insolvency officer in both procedures is

[22] Paragraph 16 of article 2 of the Bankruptcy Law.
[23] Resolution of the Presidium of the SAC RF No. 8457/13 of 02.18.2014.
[24] Information letter of the Presidium of the SAC RF No. 150 of 05.22.2012 "Review of the practice of consideration by arbitrazh courts of disputes related to the removal of insolvency officers".
[25] Paragraph 19 of article 2 of the Bankruptcy Law.
[26] Ibid., article 150, paragraph 4.
[27] Ibid., article 213.2.
[28] Ibid., paragraph 17 of article 2.
[29] Ibid., paragraph 18 of article 2.

mandatory, he or she is referred to as the **financial officer** and has, depending on the procedure, the same powers as the administrative officer and the liquidation officer.

41. In recent years, there have been changes in court practice aimed, on the one hand, to strengthen the responsibility of the insolvency officer, and, on the other hand, to increase the ability of the insolvency officer to influence the formation of the bankruptcy assets, for example:

- if the insolvency officer does not enforce the decision of the creditors' meeting (committee) to apply to the court to challenge the debtor's transaction, the person authorized by the creditors' meeting (committee) may apply to the court without the participation of the insolvency officer;[30]

- the ideas of subordination of claims of creditors affiliated with the debtor are being actively developed in judicial practice;[31]

- approaches to challenging the debtor's transactions and bringing controlling persons to subsidiary liability are being simplified.

2. The Insolvency Officer Status

a. Criteria for Obtaining the Status of the Insolvency Officer

42. As of December 31, 2019, there are 10,129 insolvency officers registered in Russia.[32]

43. There are no special studies that would explain such a large number of insolvency officers in Russia compared to other countries **(paras. 151, 221 of the Analytical Report)**. It can be assumed that this number is due to the relative ease of obtaining the appropriate status, minor requirements for maintenance, absence of the institute of business reputation of the insolvency officer, formalized, for example, in the unified rankings, or a court list, or the registry, loyal attitude of arbitrazh courts to violations committed by insolvency officers, as well as the possibilities of building with

[30] Point 7 of article 7 of Federal Law No. 432-FZ of 12.22.2014 "On amendments to certain legislative acts of the Russian Federation and invalidation of certain legislative acts (provisions of legislative acts) of the Russian Federation".
[31] For more information, see: review of judicial practice in resolving disputes related to establishing claims of controlling debtors and their affiliates in bankruptcy proceedings (approved by the Presidium of the SC RF on 01.29.2020).
[32] ERSB Statistical Bulletin. December 31, 2019. P. 3. URL: https://bit.ly/2X4pa4i (the date of access: 05.01.2020).

the debtor or creditors of such relations, in which insolvency officers receive additional funding for their activities in circumvention of the law.

44. The figure of the insolvency officer is important because of the special public law nature of its individual powers,[33] although the public law status of the insolvency officer is denied by some researchers.[34] However, a number of functions of the insolvency officer are judicial by their very essence. E.g., in all bankruptcy procedures, the insolvency officer has the right to receive information on the activities of the debtor and related persons unconditionally and for free,[35] he or she has the responsibility to analyze the financial condition of the debtor and to submit his or her professional opinion to the arbitrazh court[36]. Moreover, conclusions of the insolvency officer on activities of the debtor, under certain conditions, are sent to law enforcement agencies to check for signs of crime.[37]

45. In general, to obtain the status of an insolvency officer, a person must meet the following requirements:[38]

- to be a citizen of the Russian Federation;
- to be a member of one of the self-regulatory organizations of insolvency officers.

46. In turn, the self-regulatory organization of insolvency officers also establishes the following mandatory conditions for membership in this organization:

- higher education;
- at least one year of experience in management positions and at least two years of internship as an assistant to an insolvency officer in a bankruptcy

[33] Point 3 of The resolution of the Constitutional Court of the Russian Federation of 12.19.2005 No. 12-P "On the case of verification of constitutionality of the eighth paragraph of point 1 of article 20 of the Federal Law 'On insolvency (bankruptcy)' in connection with the complaint of the citizen A. G. Mezhentsev".
[34] *Belikova K. M., Gabov A.V., Gavrilov D. A.* and others. Coordination of economic activity in the Russian legal space: monograph / ed. by Yegorova A. M.: Justicinform, 2015. P. 404. At the same time, for Russia, the recognition of the public law nature of the activity of an insolvency officer has its natural historical basis in the activity of a sworn trustee, whose figure first appeared in the Commercial Insolvency Charter of 1832. See *Mikhailova V. I.* Corporate insolvency officer: introduction of the plurality of persons construction as an alternative way to improve the efficiency of insolvency management in bankruptcy proceedings (collection of articles, ed. by Karelina S. A., Frolova I. V.). M.: Justicinform, 2020.
[35] Paragraph 1 of article 20.3 of the Bankruptcy Law.
[36] Paragraph 2 of article 20.3 of the Bankruptcy Law.
[37] Point 15 of the Provisional rules for verification by the insolvency officer of the presence of signs of fictitious and deliberate bankruptcy, approved by Decree of the Government of the Russian Federation No. 855 of 12.27.2004.
[38] Article 20 of the Bankruptcy Law.

case, unless more stringent requirements are provided by the relevant self-regulatory organization;

- passing a theoretical exam in the program of training of insolvency officers (preparation for the exam can be carried out both in the framework of organized training and in the form of an external course)[39];

- the absence of penalty in the form of disqualification for committing an administrative offense or in the form of deprivation of the right to hold certain positions or engage in certain activities for committing a crime;

- no unexpunged or outstanding conviction for committing an intentional crime;

- absence of the fact of exclusion from such a self-regulatory organization due to violation of the Bankruptcy Law and other mandatory requirements within three years prior to applying to a self-regulatory organization to join it;

- having a contract of compulsory insurance of professional responsibility;

- fulfillment of other obligations stipulated by the requirements of a self-regulatory organization, including making mandatory payments (contributions).

b. Examination for Obtaining the Status of the Insolvency Officer

47. Organization and conducting the theoretical exam for future insolvency officers is carried out by commissions where employees of the Rosreestr and the educational organization that has trained the insolvency officer are present on terms of equal representation. On submission of the national association of self-regulatory organizations of insolvency officers, the commission also includes a representative of such association.

48. The commission may not consist of less than six members and must include specialists with a degree in Economics or Law or at least three years of experience in the field of crisis management, as well as civil servants (who are not required to have academic degrees or relevant work experience). Decisions of the commission are made by a simple majority of votes with at least seventy percent of the total number of

[39] It is noteworthy that in the Rules for conducting and passing the theoretical examination of unified program of insolvency officers training, approved by Decree of the Government of the Russian Federation of 05.28.2003 No. 308, Federal Service for State Registration, Cadastre and Cartography, despite the acquisition of new titles in late 2008, is still called the Federal registration service.

commission members participating in the commission meeting. The theoretical exam for future insolvency officers is conducted orally.

49. A rule of the Bankruptcy Law for the candidate to have higher education in order to acquire the status of insolvency officer is concretized at the level of by-laws, so that the candidate should either have a higher economic or legal education or higher education in anti-crisis management or perform in the past duties of the insolvency officer for no less than one year in the aggregate, except for the time of the execution of such obligations in respect of the absent debtor. Interestingly, this specific requirement contradicts both article 20 of the Bankruptcy Law (directly) and paragraph 3 of article 20.2 of the Bankruptcy Law (within the meaning) which defines that having a higher legal or economic education may be an additional requirement for the candidacy of an insolvency officer in a particular bankruptcy case.

50. If the insolvency officer has been disqualified for one year and more or has not performed the duties of the insolvency officer in a bankruptcy case for more than three consecutive years, a second theoretical exam is required for further work.

c. Specifics of Guarantees of the Insolvency Officer Status

51. **The first noteworthy guarantee of the independence of the insolvency officer** is the rule of guaranteed remuneration for the exercise of the powers of the insolvency officer in the bankruptcy case, as well as the possibility of priority receipt of funds at the expense of the debtor's bankruptcy assets, and, in some cases, at the expense of the applicant in the bankruptcy case.

52. The insolvency officer's remuneration consists of a fixed part and interest.

53. The fixed amount of such remuneration is for:

- temporary officer — ₽ 30,000 per month;
- administrative officer — ₽ 15,000 per month;
- external officer — ₽ 45,000 per month;
- liquidation officer — ₽ 30,000 per month;
- financial officer — ₽ 25,000 at a time for conducting a procedure in a bankruptcy case.

54. The interest depends on:

- the book value of the debtor's assets (in supervision and financial rehabilitation);

- amounts used to repay creditors' claims or the amount of increase in the value of the debtor's net assets (under external administration);

- amount of satisfied creditors' claims (in a liquidation procedure and individual's debt restructuring);

- amount of revenue from the sale of the individual's property and funds received as a result of active actions of the financial officer (when selling an individual's property).

55. Remuneration is paid, as a rule, at the expense of the debtor's funds.

56. Also, under certain conditions, the insolvency officer has the right and sometimes is obliged to attract additional specialists, whose remuneration is also paid at the expense of the debtor's funds. Payment for the services of involved specialists depends on the book value of the debtor's assets (as a general rule) and can be challenged both in terms of the amount and in terms of the relevance of attracting additional resources.

57. The Bankruptcy Law also provides that if the debtor does not have sufficient funds to cover the costs of financing bankruptcy proceedings, the applicant in the case must pay such costs at his or her own expense. This rule does not apply to the amount of insolvency officer's interest on the remuneration.

58. In practice, courts often require applicants in a case to deposit funds to the court's deposit account in the amount necessary to finance bankruptcy proceedings, both in terms of paying remuneration to the insolvency officer and in terms of incurring the costs of performing certain actions (for example, publishing mandatory communications).

59. At the same time, more than thirty percent of the total number of bankruptcy cases considered by the courts are terminated due to the lack of sources of financing the procedures.[40]

60. **The second important guarantee of the status of the insolvency officer** is a rule that in all bankruptcy procedures the insolvency officer has the right to receive information on the activities of the debtor and related persons unconditionally and for free.[41] This right is secured by sanctions for obstructing the activities of the insolvency officer specified in the Bankruptcy Law, the Code of Administrative Offences of the

[40] *Yukhnin A.V.* Bankruptcy procedures: Fedresurs statistics. p. 8. URL: https://bit.ly/3dGVf8K (the date of access: 05.01.2020).
[41] Point 1 of article 20.3 of the Bankruptcy Law.

Russian Federation, the Criminal Code of the Russian Federation.[42] The practical application of such sanctions requires a separate discussion.

d. Liability of the Insolvency Officer

61. After approval in a particular bankruptcy case, the number of persons with whom the insolvency officer interacts significantly expands. The number of such persons, in particular, includes the court considering the case, the debtor, creditors, the control body represented by Rosreestr, the self-regulatory organization of insolvency officers. All these persons have varying degrees of control over the activities of the insolvency officer: indirect for creditors, the debtor, and the Federal register, as their complaints about the actions of the insolvency officer are considered in court, and direct for the court,[43] since the control function of the court in bankruptcy cases is dominant.

62. Failure to perform or improper performance by an insolvency officer of his or her duties in a specific bankruptcy case or in relations with a self-regulatory organization where he or she is a member may result in the following sanctions:

- reduction of the amount of remuneration by the court;
- removal from duty by the court;[44]
- imposition of an administrative fine;
- disqualification;
- compensation of losses to participants in the process;
- compensation of losses to members of a self-regulatory organization in cases defined by the law;
- exclusion from the membership of a self-regulatory organization (as a result, a person is deprived of the right to acquire the status of an insolvency officer for the next three years).

63. Exclusion from the membership of a self-regulatory organization is a rarely used measure. According to Rosreestr, in 2019, this measure was applied to 325 people

[42] They provide for liability not only for refusal to provide information.
[43] *Yukhnin A.V.* Bankruptcy procedures: Fedresurs Statistics. P. 1-18. URL: https://bit.ly/3dGVf8K (the date of access: 05.01.2020).
[44] Recognition of the removal from duty as illegal in higher instances does not entail the restoration of the insolvency officer in the relevant status in a particular case.

(with the total of 9,759 insolvency officers in Russia),[45] in 2018 — 453,[46] in 2017 — 279 people.[47] The unpopularity of this measure is due to the fact that a self-regulatory organization is interested in retaining its members: they pay regular membership fees and contributions to the compensation fund. In addition, a self-regulatory organization needs a certain number of members to maintain its status.[48]

64. Over the past five years, there has been an almost fifty percent increase in the number of complaints about the actions or omissions of insolvency officers considered in bankruptcy cases, as well as an almost twofold increase in the absolute number of complaints resolved. The percentage of complaints resolved remains unchanged.[49]

3. The Procedure for Approving the Insolvency Officer in a Bankruptcy Case

65. Bankruptcy proceedings may be initiated on the basis of an application from a debtor, or a creditor, or authorized bodies, or employees, including former ones, who have claims for severance payments and (or) salary,[50] and as a general rule requires prior posting of a notice of intent to apply to the court for bankruptcy on a special Internet resource — Fedresurs.[51]

66. In November 2016, the Bankruptcy Law was amended, and the debtor lost the right to indicate in the application a specific insolvency officer or a self-regulatory organization, from among the members of which the debtor requests the court to

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[45] Information about the activities of the Federal Service for State Registration, Cadastre and Cartography in maintaining registers of self-regulatory organizations, the consolidated state register of insolvency officers, the state register of cadastral engineers and the consolidated register of members of self-regulatory organizations of appraisers for 2019. URL: https://rosreestr.ru/upload/Doc/06-upr/9011_001_1912%20%D1%81%D0%B2.xls (the date of access 08.26.2020).

[46] Information about the activities of the Federal Service for State Registration, Cadastre and Cartography in maintaining registers of self-regulatory organizations, the consolidated state register of insolvency officers, the state register of cadastral engineers and the consolidated register of members of self-regulatory organizations of appraisers for 2018. URL: https://rosreestr.ru/upload/Doc/18-upr/1107_001_1812_%D0%BD%D0%B0%20%D1%81%D0%B0%D0%B9%D1%82.xls (the date of access 08.26.2020).

[47] Information about the activities of the Federal Service for State Registration, Cadastre and Cartography in maintaining registers of self-regulatory organizations, the consolidated state register of insolvency officers, the state register of cadastral engineers and the consolidated register of members of self-regulatory organizations of appraisers for 2017. URL: https://rosreestr.ru/upload/Doc/18-upr/9011_001_1712.xls (the date of access: 08.26.2020).

[48] *Andreev V. K., Laptev V. A.* Corporate law of modern Russia: monograph. 2nd ed., reprint. and add. M.: Prospect, 2017. P. 290.

[49] ERSB Statistical Bulletin. December 31, 2019. P. 21. URL: https://bit.ly/2X4pa4i (the date of access: 05.01.2020).

[50] Articles 2 and 7 of the Bankruptcy Law.

[51] Unified federal register of information about the activities of legal entities. URL: https://fedresurs.ru (the date of access: 05.02.2020).

approve the insolvency officer.[52] The new regulation provides that at the time of publication of the debtor's statement of intent to apply to the court with a statement of its bankruptcy on the Fedresurs, the self-regulatory organization should be automatically selected. Upon applying to the court, the debtor should specify this automatically selected self-regulatory organization. Since the **Ministry of Economic Development of the Russian Federation has not yet established the procedure for random selection of a self-regulatory organization**, the right to determine a self-regulatory organization is temporarily assigned to the exclusive competence of the bankruptcy court.[53]

67. The courts have interpreted the authority provided to them differently. In some regions, courts have developed their own rules for random selection. In others, due to the absence of clear guidelines, candidates proposed by debtors were approved as insolvency officers.[54]

68. Creditors in the liquidation procedure and other persons reserve the right to propose a specific candidate for the insolvency officer or a **self-regulatory organization, from among members of which the insolvency officer will be subsequently approved**. Using this rule, individual debtors, in an attempt to gain control over bankruptcy procedures, initiated proceedings based on applications from such creditors affiliated with the debtor. This practice was recognized as illegal and corrected by the SC RF using the analogy of the law.[55]

69. At the SC RF level, there has been formed the practice of retaining the insolvency officer proposed by the first applicant in a case, the claims of which have been fully or partially repaid or transferred by way of singular succession.[56] This practice may be justified in situations when persons related to the debtor or the debtor itself, in order to intercept control over the bankruptcy procedure, repay or redeem the claims of the first applicant in an attempt to replace the candidacy of the insolvency officer. However, this explanation does not prevent the specified persons from obtaining the refusal of a particular insolvency officer from participating in the bankruptcy proceedings after the

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[52] See Federal Law No. 360-FZ of 07.03.2016 "On amendments to certain legislative acts of the Russian Federation".

[53] Parts 5 and 6 of article 4 of Federal Law No. 482-FZ of 12.29.2014 "On amendments to the Federal Law 'On insolvency (bankruptcy)' and the Code of Administrative Offences of the Russian Federation".

[54] Resolution of the Arbitrazh court of the Moscow district of 06.20.2017 No. F05-7695/2017 in the case No. A40-180937/2016.

[55] See, for example: item 27.1 of the Overview of court practice on issues connected with the participation of authorized bodies in bankruptcy cases and applied in these cases bankruptcy proceedings (approved by the Presidium of the SC RF on 12.20.2016), Definition of Judicial Chamber for Economic Disputes of the SC RF 10.28.2019 No. 301-ЭС19-12957 in the case No. A31-8779/2018, paragraph 21 of the Overview of court practice of the SC RF No. 4 (2019) (approved by the Presidium of the SC RF on 12.25.2019).

[56] Point 27 of the review of judicial practice on issues related to the participation of authorized bodies in bankruptcy cases and applied in these cases bankruptcy proceedings (approved by the Presidium of the SC RF on 12.20.2016).

first applicant's claims are settled and finding a loyal insolvency officer from among the members of the same self-regulatory organization.

70. An application for declaring a debtor bankrupt may specify additional requirements for the candidacy of an insolvency officer, the validity of which and the compliance of the submitted candidacy with which is in any case checked by the court considering the bankruptcy case.

71. The procedure for approving an insolvency officer is generally defined in article 45 of the Bankruptcy Law and provides for consistent development of events:

1) the court's decision to initiate bankruptcy proceedings (in cases already initiated, the protocol of the creditors' meeting) is sent to the self-regulatory organization, from among members of which it is proposed to approve the insolvency officer in the bankruptcy case;

2) a particular insolvency officer may be directly specified in the application of the creditor, authorized body, or employee, in the protocol of the creditors' meeting, or may be determined on a collegial basis by a self-regulatory organization that is requested for approval of the insolvency officer from among its members;

3) a self-regulatory organization is obliged to ensure free access of interested parties to the procedure for selecting a candidate for an insolvency officer;

4) a self-regulatory organization, from among the members of which it is proposed to approve an insolvency officer, must send to the court information on the compliance of the proposed candidate with the requirements of articles 20 and 20.2 of the Bankruptcy Law and additional requirements;

5) the court reviews the submitted candidacy and documents confirming candidate's compliance with all the requirements and then can pass one of the judiciary acts: approval of the insolvency officer, refusal in approval of the insolvency officer, termination of the bankruptcy case.[57]

72. If the applicant's file does not specify information on the insolvency officer or self-regulatory organization has not submitted the requested information (including the candidacy of the insolvency officer), the court must consider applications from other involved persons in chronological order. In other words, priority is always given to the applicant who first submitted to the court his or her proposal for the candidacy of the

[57] Occurs in cases when the candidacy for the insolvency officer is not submitted to the court within three months from the date when the insolvency officer should be approved in the bankruptcy case.

insolvency officer. The rule on the priority of the first applicant's candidate is also applied in a situation when several applications for bankruptcy of the debtor are filed with the court.

73. It is also allowed to replace the candidacy of the insolvency officer or a self-regulatory organization, but only before the court sends to the declared self-regulatory organization a ruling on the initiation of a bankruptcy case or the protocol of the creditors' meeting on the choice of an insolvency officer.

74. The Bankruptcy Law requires a candidate for insolvency officer in a particular case to meet the following criteria:

- absence of interest in relation to the debtor, creditors;
- absence of non-reimbursed losses caused to the debtor, creditors, or other persons in previous procedures;
- non-application of bankruptcy procedures in relation to the candidate;
- no disqualification or punishment in the form of deprivation of the right to hold manager's positions and (or) carry out the activities of the insolvency officer;
- liability insurance contract for damages to persons involved in a bankruptcy case;
- security clearance (if required);
- absence of a court act that has entered into legal force on the suspension of the duties of the insolvency officer due to improper performance of duties that has caused losses to the debtor or its creditors;[58]
- compliance with the additional requirements submitted by the applicants in the bankruptcy case;
- written personal consent to participate in the bankruptcy case.

75. From the above list, as well as the specifics of the perception of procedural rules by the courts, it follows that the probability of the court examining additional circumstances related to the possible interest of the insolvency officer is low. As judicial

[58] If such a judicial act did take place in the past, it is not taken into account if more than one year has passed since its issuance, or if such a judicial act has been appealed to the court of cassation and a final decision has not been made on it, or the time limit for filing a cassation appeal against such a judicial act has not expired.

practice shows, the depth of research on the interest of the insolvency officer is small, and the relationship with the persons involved in the case is recognized by the courts only in obvious cases. E.g., in one of the cases, the courts refused to approve the wife of an advocate who previously represented the interests of one of the creditors in the case as an insolvency officer. An additional argument of the courts in refusing to approve the insolvency officer was the fact that the specified creditor together with the group of other creditors are affiliated with the debtor and dominate the register of creditors' claims.[59]

76. Under certain circumstances, an insolvency officer approved in a bankruptcy case, may be suspended or relieved of his or her duties.[60] In such situations, creditors have the opportunity to determine a new candidate without taking into account the membership of the self-regulatory organization of which the previous insolvency officer was a member. The same possibility exists for creditors when moving from one bankruptcy procedure to another, since the Bankruptcy Law explicitly refers the decision of this issue to the exclusive competence of the creditors' meeting.[61]

77. For debtors that are financial organizations the duties of the insolvency officer are performed by the state Corporation "Deposit Insurance Agency",[62] but this issue is not covered in this research. It should be noted that the choice of an insolvency officer or a self-regulatory organization of insolvency officers is carried out relatively randomly — from the lists formed, the control body selects the candidate who is in the first place. The candidate's place in the list is determined by the date of receipt of the application by the control body for inclusion in the list.[63]

78. Thus, the model used in Russia for approving an insolvency officer in a bankruptcy case is based on:

- legally limited and absent in practice (although theoretically existing) discretion of the court in approving the insolvency officer in a bankruptcy case;

- broad opportunities for the applicants in the bankruptcy cases to influence the process of approval of a loyal candidate;

[59] Resolution of the Arbitrazh court of the Ural district of 05.27.2015 No. F09-2734/2015 in the case No. A71-54/2013.
[60] See, for example, articles 20.5, 144, 145 of the Bankruptcy Law.
[61] Point 2 of article 12 of the Bankruptcy Law.
[62] Articles 2, 180, 187.8, 189.68 of the Bankruptcy Law.
[63] Order of the Ministry of Economic Development of the Russian Federation of 06.13.2012 No. 332 "On the Procedure of selecting a control body on the candidacy of the insolvency officer or self-regulatory organization, from the members of which an insolvency officer in bankruptcy cases of the financial organization is approved". The Russian newspaper. No. 200. 2012.

- non-transparent procedure for self-regulatory organizations to determine the candidates they submit to the court for approval as insolvency officers in specific cases **(paras. 68, 70-73 of the Analytical Report)**;

- relatively simple entry of individuals into the profession of an insolvency officer.

II. THE INSOLVENCY OFFICERS APPOINTING MODEL IN BANKRUPTCY CASES IN FRANCE

1. A Brief Overview of Regulation in Bankruptcy Cases

a. Sources of Bankruptcy Law

79. The issues of French bankruptcy law are regulated in more detail in the Commercial Code (*Code de commerce*) — for legal entities,[64] as well as in the Consumer Code (*La Code de la consommation*) — for individuals.[65] The status of insolvency officers, which is the subject of this study, is defined in Book VIII ("On certain regulated professions"), Title I ("On judicial administrators, on judicial representatives and on experts in the diagnosis of enterprises"), Chapter II ("On judicial representatives") of the Commercial Code.

80. At the level below, the sources of French bankruptcy law also include judicial practice and government regulations that determine the status of participants in bankruptcy proceedings, including insolvency officers.

b. The Types of Procedures Used in Bankruptcy Cases and the Functions of the Insolvency Officer in Such Procedures

81. Hearing of bankruptcy cases falls within the competence of commercial courts. Judges who can hear bankruptcy cases are appointed annually by the president of the commercial court.

82. The judge in a particular bankruptcy case is appointed by decision of the court which is opening bankruptcy proceedings. The appointed judge has broad powers to conduct bankruptcy proceedings and approve insolvency officers. The designated authorities of the bankruptcy report to the judge in the bankruptcy case. The same judge makes a decision on the transition from one procedure to another, on the sale of the debtor's assets.

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[64] Code de commerce. URL: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379 (the date of access: 05.02.2020).

[65] Code de la consommation. URL: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069565 (the date of access: 05.02.2020).

83. The participation of the prosecutor in bankruptcy cases is mandatory and is intended to protect the public interest. The prosecutor may participate in the appointment, replacement, or removal of the judicial administrator **(paras. 109, 113, 142, 152, 168-170, 176 of the Analytical Report)**.

84. The basis for initiating bankruptcy procedures in French law is the termination of payments (*cessation des paiements*). The Commercial Code defines that the debtor is in a situation of termination of payments if it is unable to fulfill its monetary obligations (*passif exigible*) with its cash assets (*actif disponible*).[66]

85. In French bankruptcy law, there **are two large groups of procedures**: (conditionally) out-of-court, related to the amicable settlement of disputes between the debtor and creditors, and judicial, which are considered to be bankruptcy itself.

86. **Non-judicial procedures include *ad hoc* management (*ad hoc mandate*) and mediation (*procédure de conciliation*)**. The main task of these procedures is to organize and conduct negotiations between the debtor and its creditors on such issues as setting a schedule for debt repayment, reducing the size of claims, and providing compensation. Some researchers do not consider these procedures as bankruptcy itself due to their lack of collective nature, as well as due to the flexibility of approaches used to resolve problem debt.

87. Since these procedures **(paras. 86 of the Analytical Report)** are confidential, they entail the risk of causing damage to the interests of creditors who are not involved in private agreements with the debtor. In this regard, **both the *ad hoc* management and mediation are under increased control by the court.**

88. **An *ad hoc* attorney** is appointed by the president of the commercial court at the request of the debtor to provide the latter with professional assistance by a person who acts as an independent negotiator to restore trust between the debtor and its creditors. The functions of an *ad hoc* attorney are determined by the debtor itself and usually consist of:

- conducting negotiations with major creditors, settling obligations through deferred payment of debt, providing a discount on overdue obligations;
- analysis of the debtor's financial condition and identification of the company's growth points;
- interaction with the debtor's shareholders.

[66] Code de commerce, art. L. 631-1.

89. Any person with the necessary knowledge and practical experience can be an *ad hoc* attorney. As a rule, an *ad hoc* attorney is appointed by a person from among the judicial representative **(paras. 100, 102, 107, 112, 118 of the Analytical Report)**.

90. An agreement reached between the debtor and creditors is not subject to approval by the court but is a private law transaction to which the provisions of French contract law apply.

91. **Mediation** (*de la procedure de conciliation*) is the second contractual method of debt settlement. Mediation is also not a collective procedure (there is no need for all creditors to participate).

92. Mediation is opened if the debtor has or anticipates legal, economic, or financial difficulties and there are no monetary obligations that are overdue for more than 45 days.

93. With sufficient validity for the debtor to apply to the court for the opening of the mediation the court enters such procedure for a period not exceeding four months (with the possibility of extension for up to one month upon reasonable request of the intermediary) and claims **intermediary** in negotiations between the debtor and its main creditors.

94. The intermediary's role is reduced mainly to the organization of negotiations between the debtor and the creditors. An agreement concluded in the framework of mediation should lead to the restoration of the debtor's financial position and not cause any fears for its future, either for its creditors or for the court. In practice, the terms of the agreements concluded are quite flexible (from installments for the fulfillment of monetary obligations to the replacement of monetary claims with the debtor's shares, or a condition under which, when certain indicators are reached, the debtor is obliged to repay the discounts previously granted to it).

95. Generally, there are three possible outcomes of mediation: failure to reach an agreement between the debtor and creditors, reaching an agreement and stating the fact of its conclusion by the court, reaching an agreement and its approval by the court. The parties to the agreement choose the most convenient option for them.

96. As a rule, a person from among the judicial representatives is appointed as an intermediary in a mediation **(paras. 100, 102, 107, 112, 118 of the Analytical Report)**.

97. The above procedures **(paras. 86-96 of the Analytical Report)** are based on the principles of confidentiality, consensus, and voluntariness.

98. **The bankruptcy procedures in French law include the following**:[67]

- financial rehabilitation, or preservation procedure (*procédure de sauvegarde*);
- external administration, or judicial recovery (*redressement judiciaire*);
- liquidation proceedings, or judicial liquidation (*liquidation judiciaire*).[68]

99. **Financial rehabilitation**[69] is a collective preventive procedure that is not mandatory for a debtor who requests the opening of a procedure before suspending payments on its obligations, and is aimed at avoiding insurmountable difficulties that the company will face in the absence of preventive measures. In other words, **financial rehabilitation is applied if there are no signs of bankruptcy** (termination of payments). In financial rehabilitation, the debtor is prohibited from making any transactions that go beyond its normal business activities, except for those that are resolved on the basis of a court order at the request of the debtor.

100. In this procedure, the **insolvency officer, referred to as the judicial representative** (*mandataire judiciaire*), represents the collective interests of creditors.[70] **The mission related to providing assistance to the debtor and protecting its interests is assigned to another person — the judicial administrator** (*administrateur judiciaire*). The appointment of a judicial administrator is mandatory only for companies that are considered large (have at least 20 employees or an annual turnover of goods of at least € 3,000,000 before taxes).[71] This approach to maintaining control over the debtor for its manager is based on the assumption that the debtor's manager was professional enough to anticipate signs of impending difficulties and report them to the court on time.

101. When appointing a judicial administrator, the court may assign him or her the duty to monitor the debtor or to assist in all or certain transactions. When monitoring the debtor, the judicial administrator receives a report on the debtor's activities and does not affect the conclusion, modification, performance, or termination of any transactions.

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[67] Code de commerce, art. L. 620-1 s.

[68] Over the past five years, there has been a downward trend in the number of insolvency cases. The share of financial recovery is extremely small: for example, out of 52,002 bankruptcy cases in 2019, only in 971 cases financial rehabilitation was introduced (1.9% of the total number of cases). Liquidation proceedings were opened in 67.6% of cases, and external administration – in 30.5%. The ratio of rehabilitation and liquidation procedures over the past ten years remains approximately the same (Defaillances et sauvegardes d'entreprises en France. Bilan 2019. P. 4, 11. URL: https://www.altares.com/wp-content/uploads/dlm_uploads/downloads/etude-defaillance-bilan-2019-print.pdf (the date of access: 05.02.2020)).

[69] Ibid., art. L. 622-20.

[70] Ibid, art. L. 631-14.

[71] Ibid, art. L. 641-1 s.

When providing assistance to the debtor, the latter's transactions must be agreed upon and signed by the judicial administrator along with the debtor's manager.

102. The judicial representative acts in all procedures of financial rehabilitation and external administration without exception **(para. 106 of the Analytical Report)**. His or her tasks include drawing up a list of creditors, accepting proposals on debt settlement issues, monitoring the actions of the judicial administrator, and representing creditors in challenging decisions taken during financial rehabilitation (or external administration).

103. Based on the results of financial rehabilitation, the debtor is obliged to prepare a plan for the preservation of the enterprise, which, if approved by the court, releases the debtor from the control of the court and the judicial administrator and requires strict execution.

104. **Control over the implementation of the enterprise conservation plan is carried out by a person specially appointed by the court — the commissioner for the implementation of the plan**, who annually distributes the amount of money received from the debtor to all creditors in a single tranche. The commissioner is also responsible for preparing a report on the implementation of the enterprise conservation plan. The commissioner's powers terminate when financial rehabilitation is terminated or when the bankruptcy procedure is changed. **As a rule, the commissioner is appointed by the person who previously performed the functions of a judicial representative.**

105. Failure to implement or agree upon the plan entails the initiation of external administration or liquidation proceedings against the debtor.

106. **External administration** is initiated as soon as the debtor suspends payments.[72] In this case, the debtor must apply to the court for the initiation of external administration within 45 days from the date of termination of payments, otherwise, this may entail both property liability of the debtor's management and subsequent liability in the form of a ban on holding leading positions in other organizations. Creditors and the prosecutor can also apply to the court for the initiation of external administration. The court may also initiate external administration on its own initiative.

107. **In the course of external administration, the insolvency officer is also referred to as a judicial representative** (*mandataire judiciaire*) and represents the collective interests of creditors. **Assistance to the debtor and protection of its interests is provided, as in the case of financial rehabilitation, by another person — a judicial administrator** (*administrateur judiciaire*). The appointment of a judicial administrator is mandatory

[72] Code de commerce, art. L. 641-4.

only for companies that are considered large (have at least 20 employees or an annual turnover of at least € 3,000,000 before taxes).[73]

108. As in the case of financial rehabilitation, external administration is aimed at enabling the company to continue its activities, provide employment for employees and fulfill its obligations. These goals are achieved **through the implementation of a business continuation plan (*plan de continuation*) or a plan for the transfer of rights and sale of property (*plan de cession*).**[74]

109. **The prosecutor's proposals regarding the candidacies for the judicial administrator and the judicial representative for external administration are given priority.**

110. The judicial administrator is obliged to prepare a draft plan for continuing operations or a plan for the transfer of rights and sale of the debtor's property, and the head of the debtor may be removed from performing his or her duties. In the course of external administration, the judicial administrator may at any time come to the conclusion that it is impossible to continue operations and that it is advisable to sell the company. In order to facilitate the task of determining the fate of the debtor, third parties are allowed, from the moment of initiation of external administration, to transmit their proposals for the acquisition of the debtor's assets to the judicial administrator, so that the judicial administrator could justify his or her application for the sale of the enterprise before the court.[75]

111. **Liquidation proceedings** are applied to debtors who have stopped their payments and whose position precludes solvency restoration.[76] Liquidation proceedings are aimed at the complete termination of the company's activities and the sale of the debtor's assets as a whole or in separate lots. The purpose of the procedure is to continue the functioning of the enterprise as a property complex in the hands of third parties.

112. **The powers of the insolvency officer, who is named liquidator (*liquidateur*) in this procedure**, are significantly expanded: in addition to protecting the collective interests of creditors through the restoration and sale of the debtor's assets, the liquidator must take into account the interests of the debtor who is excluded from independent business management.[77] The liquidator can only be an insolvency officer who has the status of a judicial representative **(paras. 100, 102, 107, 112, 118 of the Analytical Report)**.

[73] Code de commerce, art. L. 645-7.
[74] Ibid., art. L. 645-1 s.
[75] Ibid., art. L. 631-13.
[76] Ibid., art. L. 640-1.
[77] Ibid., art. R. 621-11.

113. Candidacies for one or more liquidators to be approved by the court in liquidation proceedings may be proposed by the prosecutor. If the court, using its right, appoints several liquidators, it defines specific powers for each of them, but the main powers (for example, accepting statements of creditors' claims against the debtor) can be exercised by any of the appointed liquidators.

114. If the liquidated enterprise is considered large (has at least 20 employees or an annual turnover of at least € 3,000,000 before taxes), the court may divide the functions of the insolvency officer and entrust the management of the enterprise to the judicial administrator.

115. In the course of judicial liquidation, the debtor's assets are sold with the participation of both the commercial court (when selling assets as a single enterprise) and the liquidator (when selling assets as separate lots).[78]

116. In liquidation proceedings, **professional recovery** (*retablissement professionnel*) stands out particularly. It is applied when there is no need to sell the debtor's assets due to the absence of such assets. The insolvency officer acts here as a judicial representative (*mandataire judiciaire*) and plays a less significant role than in liquidation proceedings, since his or her tasks are mainly to ensure the interests of the debtor and inform creditors about the progress and results of the procedure.

117. The French legislation provides for specific features of certain individuals' bankruptcy:

- bankruptcy of individuals regulated in the Consumer Code **(para. 79 of the Analytical Report)**, in which the appointment of an insolvency officer is necessary only in the case of the sale of a citizen's property, and the role of the insolvency officer can be performed by a bailiff;[79]

- bankruptcy procedures designed specifically for syndicates experiencing financial difficulties; the insolvency officer in such procedures has the status of a **temporary officer** and does not necessarily have to carry out his or her activities on a professional basis;[80]

- bank bankruptcy regulated in the Monetary and Financial Code with references to the Commercial Code. Special rules are provided for such procedures, and the insolvency officer, who is appointed as a liquidator

[78] Ibid, art. L. 642-5, 642-10.
[79] Code de la consommation, art. L. 711-1 s, art. L. 742-4, art. R. 742-5.
[80] Loi nº 65-557 du 10 juillet 1965 fixant le statut de la corpopriete des immeubles batis, art. 29-1 s. URL: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068256 (the date of access: 05.02.2020).

(*liquidateur*), receives managerial and representative powers in relation to the insolvent bank;[81]

- bankruptcy of insurance companies[82] and investment funds;[83] however, the status of insolvency officers in such cases, except for certain regulated operations, is still determined by the Commercial Code.

2. The Insolvency Officer Status

a. Criteria for Obtaining the Status of the Insolvency Officer

118. French bankruptcy law is characterized by the "duality" of the profession of an insolvency officer: **there are judicial administrators (*administrateur judiciaire*) and judicial representatives (*mandataire judiciaire*)**.

119. The status of both professions is equal to that of public servants. As a general rule, the judicial administrator is called upon to manage the debtor and monitor the use of its assets, while the judicial representative represents the interests of creditors, with the duties that may include the liquidation of the debtor's property.

120. CNAJMJ was created to protect the interests of representatives of both professions. By law, it must monitor the proper performance of duties by insolvency officers, organize professional training, monitor the professional compliance of insolvency officers, and represent the interests of the professional community in relations with government agencies.[84] **CNAJMJ is an association of which all insolvency officers must be members.**

121. As a general rule, an insolvency officer is not approved by the court to exercise the powers of a judicial representative or a judicial administrator, unless he or she is included in the relevant list established for this purpose by the National Commission for Registration and Discipline of Judicial Administrators and Judicial Representatives — an agency that includes representatives of the court of cassation, judges, teachers of

[81] Code monetaire et financier, art. L. 613-24 s. URL: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072026 (the date of access: 05.02.2020).
[82] Code des assurances, art. L. 326-1 s. URL: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006073984 (the date of access: 05.02.2020).
[83] Code de la mutualite, art. L 212-11 s. URL: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074067 (the date of access: 05.02.2020).
[84] Code de commerce, art. L.814-1.

Law and Economics. There are exceptions to this rule **(paras. 141-144 of the Analytical Report)**.

122. The Commercial Code[85] stipulates that in order to be included in such a list, an insolvency officer must meet the following criteria:

- have an education at least at the BAC+4 level;[86]
- be a citizen of the French Republic, a citizen of the European Union member state, or a native of the European Economic Community member state;
- not to be convicted of a crime related to violation of honor or business reputation;
- not to be brought to disciplinary or administrative responsibility for the same facts in the form of removal from office, deprivation of the status of an advocate, cancellation, annulment of the issuance or revocation of a license;
- not be declared bankrupt personally.

123. If a legal entity is included in the list, the list shall include the names of partners engaged in anti-crisis management and registered as insolvency officers. When the court appoints a legal entity as an insolvency officer, it appoints one or more individuals from its members to represent the legal entity in the course of performing its duties as an insolvency officer.

b. Examination for Obtaining the Status of the Insolvency Officer

124. Obtaining the status of an insolvency officer in the "classical way" requires education at least at the level of BAC+4 and passing the entrance exam for an internship. The exam is organized by CNAJMJ. The composition of the commission and the content of the examination program are established by a decree of the Ministry of Justice. The examination board consists of two judges, one of whom is the chairperson of the jury, a professor or associate professor of Law, a professor or associate professor of Economics or Management, two insolvency officers (if there is a CNAJMJ opinion) and is appointed for a period of three years.

125. The written part of the exam requires from the candidate to know the national insolvency legislation, commercial and insurance law, social security law in the application of collective bankruptcy procedures, procedural law, international legal acts in the field of bankruptcy, accounting. The oral part of the exam consists of a public

[85] Ibid., art. L.812-2, R. 812-3, L.811-5.
[86] Full secondary education diploma (*baccalauréat*) + 4 years of University education.

discussion with the exam board of issues related to the practical work of the insolvency officer.

126. The following persons are exempt from the examination for admission to professional training:

- former insolvency officers with at least three years of experience;
- advocates, notaries, sworn appraisers, bailiffs, secretaries of commercial courts, auditors, accountants-auditors with at least five years of experience;
- individuals who have worked as assistant insolvency officer for at least five years;
- individuals who hold one of the special diplomas (Master of Law, Master of Economics or Management, auditor, accountant-auditor, and a number of others), if they have carried out legal, audit, or financial activities related to restructuring for at least five years.[87]

127. After successfully passing the entrance exam **(paras. 124-126 of the Analytical Report)**, the candidate must complete at least a three-year internship. The internship consists of carrying out activities that allow the candidate to gain the necessary experience in the management of insolvent enterprises, as an assistant to the insolvency officer under the direct supervision of the latter. No more than a third of the internship time can be spent as an assistant to a person engaged in regulated legal activities, or as an auditor, or as an accountant-auditor, or in the legal department of a credit institution. Internships performed under the insolvency officer before passing the exam can be taken into account for half the time of the internship, the decision on this is made by the examination committee.

128. The duration of the internship is reduced to one year for:

- insolvency officers, advocates, notaries, sworn appraisers, bailiffs, commercial court secretaries, auditors, accountants-auditors with at least five years of experience;
- individuals who have one of the special diplomas **(para. 126 of the Analytical Report)**, if they have been engaged in the profession for at least ten years.

[87] Code de commerce, art. R.812-1 – 812-7.

129. The following persons are exempt from the internship:

- former insolvency officers, advocates, notaries, sworn appraisers, bailiffs, commercial court secretaries, auditors, accountants-auditors with at least ten years of experience;

- individuals who have worked as an assistant insolvency officer for at least ten years;

- individuals who have one of the special diplomas **(para. 126 of the Analytical Report)**, if they have been engaged in the profession for at least fifteen years.

130. At the end of the internship, the internship supervisor (the insolvency officer) gives the candidate a characteristic with a detailed description of the functions performed and the candidate's personal qualities. Based on the characteristic, the commission chairperson issues an internship certificate or refuses to issue it. The refusal to issue a certificate may be appealed to the commission by the candidate.

131. The register of internships is maintained by CNAJMJ.

132. Based on the results of the internship, the candidate must pass another professional aptitude test (*Examen d'aptitude a la profession de mandataire judiciaire or Examen d'aptitude a la profession de administrateur judiciaire*) to the same jury **(para. 124 of the Analytical Report)**. This exam also consists of oral and written parts.

133. The oral part consists of:

- ten-minute presentation on the topic of economic and financial culture;

- discussion of the presentation with the exam board;

- test for the knowledge of the presentation;

- discussion of the internship report written by the candidate on the chosen topic in the fields of Economics, Law, Management with the exam board;

- answers to questions on civil procedure and criminal law in the field of commercial activity; questions on social security law, tax law, European law, the status of an insolvency officer.

134. The written part of the exam runs for five hours and consists of work on a question that might be assigned to the insolvency officer in real practice.

135. If the candidate didn't pass the exam the first time, he or she can continue the internship and make a second attempt. If the candidate didn't pass the exam the second time, he or she can no longer qualify for the exam.

136. Representatives of certain professions may be exempt from discussing certain questions on the exam. Thus, advocates are exempt from questions on civil procedure and criminal law in the field of commercial activity, auditors are exempt from passing the exam on managing the office of insolvency officers.

137. Recently, for holders of education on management and liquidation of insolvent companies (*administration et liquidation desentre prisesen difficulte*), who can confirm the completion of an internship for 30 months, an easier way to get into the profession is available.

138. After obtaining the status of an insolvency officer, it is required for insolvency officers to maintain and improve their skills and undergo professional training. The duration of the required professional training may not be less than 20 hours in one calendar year or 40 hours in two consecutive years. Such training should focus on the enhancement of knowledge in legal, economic, financial, accounting, social, ethical aspects and be related to the professional activity of an insolvency officer.

139. The insolvency officer must join a legally established fund (*Caisse de garantie*) created specifically to ensure that the insolvency officers properly perform their duties and insure their professional liability. Membership in the fund is mandatory for every registered insolvency officer. An insolvency officer pays an annual fee to confirm membership in the fund. The amount of contributions is determined annually by the Board of Directors of the fund based on the amount of funds remaining unallocated by December 31 of the previous year. The law provides that in case the funds to cover expenses are insufficient, the fund has the right to require additional contributions from the insolvency officers. The fund's assets cover the civil liability of insolvency officers for their guilty actions or the same actions of their employees in the amount of € 800,000 per year for each claim submitted.[88]

c. Specifics of Guarantees of the Insolvency Officer Status

140. In order to protect the interests of creditors, the judicial representative has the right to apply to the bankruptcy judge with a request to appoint inventory experts, to transfer from financial rehabilitation to external administration, to make a decision on the transition to bankruptcy proceedings, to submit a claim to creditors or shareholders of the debtor for payment or offset of their debt independently, to postpone the date of termination of payments, to file claims for invalidation of contracts, to file applications

[88] Code de commerce, art. L. 814-3, 814-4, R. 814-16.

for the purpose of initiating criminal cases. The courts take such appeals seriously, since a judicial representative is a professional participant in the process and is considered as a person who is familiar with the characteristics of a particular debtor in sufficient depth.

141. As a general rule, insolvency officers have a monopoly on their professional activities. However, there are exceptions to this rule.

142. **The first exception** applies to the appointment of persons as insolvency officer in a particular case on an irregular basis, that is, regardless of their professional affiliation. The court, by a special reasoned decision and after receiving the prosecutor's opinion, may appoint as a judicial representative an individual whose experience or qualifications meet the requirements that apply to registered insolvency officers (*mandataire judiciaire occasionnel*). Such judicial representatives are supervised by the prosecutor's office.

143. **The second exception** allows individuals to participate in bankruptcy procedures on the basis of their profession: bailiffs and those who conduct public auctions (auctioneers, sworn appraisers). Such persons can be appointed as a judicial representative in bankruptcy proceedings of enterprises that do not have employees and whose annual revenue does not exceed € 100,000. Persons who enjoy an exception on the basis of their profession are usually appointed by the court as judicial representatives on a regular basis.

144. In practice, persons who exercise the right to be appointed as judicial representatives on the basis of their profession are subject to the rules on professional compliance and the need to avoid conflicts of interest. Thus, bailiffs and sworn appraisers should not receive remuneration from an individual who is a debtor in bankruptcy proceedings, on any basis, directly or indirectly, during the five years preceding their appointment to the procedure. They should also not receive any remuneration from a person exercising control over the debtor or over businesses over which the debtor exercises control. An additional requirement for bailiffs and auctioneers is the lack of personal interest in the implementation of a specific task.

145. The Commercial Code establishes the incompatibility of the activities of the insolvency officer with any other, in particular commercial. However, the activities of an insolvency officer may be compatible with consulting, teaching, activities of a forensic expert, or a mediator. None of these activities can be carried out as the main one. At the same time, it is possible for judicial representatives to perform the functions of a judicial administrator and *vice versa*.

146. The same person may not perform the functions of a mediator and a judicial representative in relation to the same enterprise until at least one year has elapsed between the performance of these functions.

147. The independence of the insolvency officers is provided with the assurances they receive remuneration. Tariffs for work performed by insolvency officers are defined by the Commercial Code and take into account the cost of services rendered and "reasonable remuneration established on the basis of objective criteria". Tariffs for each type of service are set jointly by the Ministry of Justice and the Ministry of Economy and are reviewed at least once every five years.

148. At the stage of financial rehabilitation, remuneration to insolvency officers is calculated based on the size of the enterprise and its revenue.

149. The minimum guaranteed remuneration is provided at the expense of the Deposit and Loan Fund[89] and is applied in cases when the result of the sale of the debtor's assets does not allow the insolvency officer to receive an amount equal to or greater than € 1,500, while the cost of services rendered exceeds it. In this case, the bankruptcy case is recognized as "moneyless" by a court decision. The same court decision establishes the difference between the actual amount of remuneration received and the amount for services rendered. This difference is paid at the expense of the Deposit and Loan Fund.

150. The insolvency officer must perform the duties assigned to him or her and be responsible for them independently. At the same time, for example, a judicial representative has the right, based on the reasoned permission of the president of the commercial court, to entrust the performance of part of his or her duties to third parties under his or her own responsibility. In such cases, remuneration to the involved persons is paid out of the amount of remuneration received by the judicial representative.

151. As of May 2, 2020, the total number of insolvency officers in France was 466, including 150 judicial representatives and 316 judicial administrators.[90]

d. Liability of the Insolvency Officer

152. The activities of insolvency officers are controlled in different ways by several participants in the process:

- the bankruptcy judge exercises general control over the course of bankruptcy proceedings and compliance with the rights of all persons involved in the process;

[89] For more details, see Organizational structure and features of corporate governance of the Deposit and Consignments Fund of France. URL: https://вэб.рф/common/upload/files/veb/analytics/stru/201309.pdf (the date of access: 05.02.2020).
[90] The CNAJMJ data. URL: https://www.cnajmj.fr/fr/ (the date of access: 05.02.2020).

- the prosecutor exercises control through activity reports, which the insolvency officer is obliged to send to the prosecutor;

- a representative (controller) of creditors (*creancier controleur*) may request the judicial representative to perform his or her duties properly in the event of his or her inaction; if the claim of the creditors' representative remains unanswered within two months from the date of its receipt by the judicial representative, the claim filed by the creditors' representative on behalf of all creditors is subject to consideration, and the creditors' representative may additionally request that the judicial representative be removed from performing his or her duties in a bankruptcy case;

- CNAJMJ also monitors compliance of insolvency officers with professional rules; moreover, at least once every three years, CNAJMJ conducts a collective audit of all the activities of each insolvency officer, the distribution of funds based on the results of bankruptcy proceedings, and the correctness of calculating and receiving remuneration;

- decisions on disciplinary matters are made by the National Commission for the Registration and Discipline of Judicial Administrators and Judicial Representatives.

153. Any violation of the law or by-laws, professional rules, including ethical requirements, may cause the insolvency officer to be brought to disciplinary responsibility in the form of a warning, reprimand, temporary ban on performing activities, or even termination of the status. The National Commission for the Registration and Discipline of Judicial Administrators and Judicial Representatives may, based on a reasoned decision, exclude an insolvency officer from the list of persons who may be appointed to bankruptcy proceedings if it finds that such an insolvency officer cannot perform his or her duties properly.

154. Insolvency officers also bear civil and criminal liability for committing illegal actions. As a rule, claims for damages are filed by debtors or creditors.

155. For example, claims by creditors may arise from improper decisions regarding the continuation of certain contracts that caused a deterioration of the debtor's financial position, due to the insolvency officer's rapid sale of assets of the debtor[91] in respect of

[91] Cour de cassation, civile, Chambre commerciale, 5 fevrier 2020, 18-21.529, Publie au bulletin. URL: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000041585783&fastReqId=1628176415&fastPos=1 (the date of access: 05.02.2020).

which the creditor could and wanted to exercise administrative rights,[92] due to a delay in the sale of the debtor's assets.

156. Claims of debtors are often imposed in connection with charges of the insolvency officer's negligence, entailing a loss of the debtor's ability to obtain funds or of mismanagement of the debtor's assets, which resulted in additional financial burdens.

157. All claims are usually considered during the completion of bankruptcy proceedings when the amount of damage caused to debtors or creditors can be accurately determined.

e. Ratings of Insolvency Officers, Professional Organizations of Insolvency Officers and Their Significance

158. Since 2005, the registries of commercial courts and the court of grand instances,[93] at the end of each semester, have been establishing lists of judicial representatives and judicial administrators appointed by this bankruptcy court for the past period. For each person listed, the cases in which they participated are indicated, as well as information about debtors, such as revenue and the number of employees.

159. The compiled lists are brought to the attention of the Ministry of Justice, as well as the prosecutor's office at the location of the court instance, as well as all bodies responsible for monitoring the activities of insolvency officers.

160. These data are the only information about the activities of insolvency officers that is publicly available.

3. The Procedure for Approving the Insolvency Officer in a Bankruptcy Case

161. When appointing an insolvency officer in a particular case, the court has discretionary powers and is not obliged to observe any balance of interests between the

[92] Cour de cassation, civile, Chambre commerciale, 25 octobre 2017, 16-22.027, Inedit. URL: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035926408&fastReqId=1293667093&fastPos=1 (the date of access: 05.02.2020).

[93] Court of first instance in civil cases where the amount of claims exceeds € 10,000.

insolvency officers. This approach is enshrined in the law and confirmed by judicial practice.[94]

162. As a general requirement, the appointment of a person as an insolvency officer in a particular case is subject to the rules on the prohibition of incompatibility. Such incompatibility may arise due to family ties with the debtor or due to the participation of a particular insolvency officer in the early stages of the bankruptcy of the debtor to which it should be assigned at the time in question.

163. **In the first case**, a relative or a person associated with a relative up to and including the fourth degree of kinship of the debtor-individual or a head of a debtor — legal entity may not be appointed as insolvency officer.[95]

164. **In the second case**, restrictions may be imposed in connection with the exercise by the insolvency officer appointed at the stage of financial rehabilitation, external administration, or liquidation proceedings, of the powers of the *ad hoc* attorney or mediator in the early stages.

165. When appointing an insolvency officer, the court does not take into account geographical criteria, since insolvency officers have the right to conduct their activities throughout the country.

166. Meanwhile, the practice of appointing insolvency officers varies from court to court: some courts appoint insolvency officers randomly, others try to fairly distribute the workload, and others take into account the expertise of insolvency officers in specific areas of knowledge, using, in particular, the ratings compiled **(paras. 158-160 of the Analytical Report)**.

167. A judicial representative is appointed by the court in decisions on opening of financial rehabilitation or external administration. A judicial representative may also be appointed in liquidation proceedings and will be referred to as a liquidator.

168. In order to ensure the independence and impartiality of the bodies involved in the bankruptcy procedure, the prosecutor may object to the appointment as a judicial representative of a person who has previously participated in the debtor's case as an *ad hoc* attorney or mediator in the early stages. Such objections may be raised, for example, if the liquidation proceedings are opened against a debtor who has been subject to *ad hoc* management or mediation within 18 months before the opening of the procedure,

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[94] Cour de Cassation, Chambre civile 2, du 14 decembre 1992, 91-17.274, Publie au bulletin. URL: https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007029825 (the date of access: 05.02.2020).

[95] Code de commerce, art. L.621-5.

and if the judicial representative participated in these proceedings in the respective status.[96]

169. However, the court is not bound by the prosecutor's objections, and following them exclusively when refusing to appoint a person as a judicial representative is qualified as "negative abuse of authority".[97]

170. Since 2008, the prosecutor him or herself has the right to submit to the court candidates for appointment as a judicial representative in a particular case. Refusal to accept a candidate proposed by the prosecutor must be specifically motivated in the court's decision.

171. Since 2008, the debtor has also been granted the right to propose to the court its own candidacies for a judicial representative, but the court has been left with the power to refuse to approve such candidates without any justification. Since 2015, the debtor has received the right to submit comments to the court regarding the candidacy of a judicial representative proposed by the prosecutor, as well as to make a submission on the appointment of several judicial representatives. However, the court is still not bound by the debtor's comments, although it is obliged to investigate them.

172. In 2014, the Commercial Code was also amended with regard to the duty of the court to seek the opinion of the creditor on the appointment of a judicial representative. When making a decision, the court takes into account the opinion of the creditor but is not bound by it. It is noteworthy that the creditor does not have the right to express an opinion at the stage of appointing an insolvency officer.

173. The court may appoint one or more judicial representatives independently or on the recommendation of the prosecutor. The debtor has the right to comment on the appointment of several judicial representatives.

174. The debtor has the right to propose only a candidate for a judicial administrator and only in cases where this is provided for by law **(paras. 100, 107, 114 of the Analytical Report)**, but the final decision always remains with the court.

175. The right to comment on the candidacy of the judicial administrator proposed by the debtor is granted to the AGS, whose function is to guarantee employees the payment of all funds due to them, as well as to the applicant creditor. However, the AGS and the creditor's comments do not bind the court.

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[96] Code de commerce, art. L.621-4.

[97] Cour de cassation, civile, Chambre commercial, 31 janvier 2012, 10-24.019, Publie au bulletin. URL: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025287517&fastReqId=1144051138&fastPos=1 (the date of access: 05.02.2020).

176. The court may independently, on the submission of a bankruptcy judge or a prosecutor, replace a judicial representative or additionally appoint one or more judicial representatives.

177. The creditor and the debtor have the right to apply to the bankruptcy judge with a request to replace the judicial representative or to appoint additional judicial representatives.

178. If a judicial representative applies to a bankruptcy judge with a request to release him or her from the exercise of his or her powers, the judge sends this application to the commercial court. A judicial representative may not refuse to perform his or her duties on any grounds other than incompatibility. However, in practice, there may be other grounds for exemption from the exercise of authority (for example, due to disability).

179. Court decisions on the appointment of a judicial representative (including a liquidator), his or her replacement, or the appointment of additional judicial representatives may be appealed exclusively on the submission of the prosecutor. The appeal interrupts the execution of the court's decision.

180. A cassation complaint can only be filed by the prosecutor.

III. THE INSOLVENCY OFFICERS APPOINTING MODEL IN BANKRUPTCY CASES IN AUSTRIA

1. A Brief Overview of Regulation in Bankruptcy Cases

a. Sources of Bankruptcy Law

181. Insolvency issues in Austrian law, including issues related to the determination of the status of insolvency officer (*Insolvenzerwalter*), are regulated in IO,[98] the number of other federal laws, as well as developed in the practice of Austrian courts.

b. The Types of Procedures Used in Bankruptcy Cases and the Functions of the Insolvency Officer in Such Procedures

182. All bankruptcy procedures applied in Austrian law are under the control of the court, which has broad powers to resolve all key issues related to bankruptcy procedures. However, the strong position of the bankruptcy courts, which corresponds to the general rule on the leading role of the courts in Austrian civil proceedings, does not lead to the dominance of the judge in bankruptcy proceedings.

183. The central figure of the bankruptcy process was, and remains, the insolvency officer. The insolvency officer is responsible for the practical implementation of the bankruptcy procedure[99] and must take into account the interests of all parties in the bankruptcy procedure. The court, in turn, is involved in resolving the most important issues, in particular, individual disputes between the parties to the procedure. In addition, the court still has the power to issue binding instructions to the insolvency officer at any time, while creditors represented by the creditors' committee have no explicit tools to influence the procedure, except for voting on the reorganization plan or debt repayment plan and appealing the insolvency officer's actions.

184. **In the Bankruptcy Law of Austria, there are two bankruptcy procedures: rehabilitation (*Sanierung*) and liquidation proceedings (*Konkursverfahren*)**. In terms of functional orientation, rehabilitation under Austrian law can be compared with financial rehabilitation from the Russian Bankruptcy Law, and liquidation proceedings under IO can be compared with Russian liquidation procedure. For individuals, the analogs of

[98] Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO), StF: RGBl. Nr. 337/1914. URL: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736 (the date of access: 05.03.2020).
[99] Abs. 1, § 80a IO.

these procedures are the debt settlement procedure (*Schuldenregulierungsverfahren*), as well as the debt relief procedure (*Adschopfungsverfahren*). As part of the debt settlement procedure, the debtor retains self-management, and the insolvency officer is not appointed, since his or her tasks are partly assumed by the debtor and partly by the bankruptcy court. The procedure of debt relief can be compared with the Russian procedure of the sale of an individual's property.

185. **In IO, liquidation proceedings and rehabilitation are considered as two forms of a single bankruptcy procedure**. At the same time, rehabilitation can be either an independent procedure or one of the scenarios for conducting liquidation proceedings, when instead of selling assets it becomes possible to approve the debtor's rehabilitation plan. In this (unitarian) approach, **the requirements for insolvency officer are determined by the same legal rules**.

186. **The application for commencement of rehabilitation** can be entitled by the debtor only. Simultaneously with the application for rehabilitation, the debtor must provide the bankruptcy court with a rehabilitation plan (*Sanierungsplan*).[100] The debtor's application for rehabilitation may be considered by the court, provided that bankruptcy proceedings against the debtor are not opened.[101] Rehabilitation is possible with or without retaining self-management (*Eigenverwaltung*) by the debtor.

187. The functions of **the rehabilitation officer** (*Sanierungsverwalter*) differ depending on whether the debtor retains self-management.

188. In case of rehabilitation in which the debtor retains self-management, the rehabilitation officer supervises the debtor,[102] in particular:

- immediately after the initiation of the procedure checks the economic situation of the debtor;
- controls the debtor's management of its own enterprise;
- controls the expenses necessary for the debtor to conduct its business;
- reports within the time limits set by IO on whether the debtor is able to adhere to the financial plan, whether the rehabilitation plan is implemented, and whether there are grounds for termination of self-management;
- gives approval for the debtor to perform a number of legally significant actions (transactions) that are not related to ordinary business activities (*die*

[100] Abs. 1 § 167, § 169 IO.
[101] Ibid., Abs. 2 § 167.
[102] Ibid., § 171-178.

nicht zum gewöhnlichen Unternehmensbetrieb gehören),[103] as well as actions that are prohibited by the bankruptcy court from being performed without the approval of the debtor's manager;[104]

- sets restrictions on the disposal of the debtor's property in urgent cases when there is a threat to the interests of creditors;[105]

- exercises his or her exclusive powers (challenges the debtor's transactions, verifies creditors' claims, and sells the property to which an exclusive right has been established).

189. In relations with third parties, the rehabilitation officer is authorized to perform all transactions and legal actions that relate to his or her duties, except for cases when the bankruptcy court has established respective restrictions for the officer and informed third parties about this by putting information into the Edict **(paras. 221-225 of the Analytical Report)**.

190. If the debtor does not retain self-management, the rehabilitation officer is obliged to perform (with minor exceptions) the same functions as the insolvency officer in liquidation proceedings **(paras. 191-198 of the Analytical Report)**. The sale of the debtor's business, which the insolvency officer is authorized to do in liquidation proceedings, is possible here only if the rehabilitation plan has not been adopted within 90 days from the date of commencement of proceedings at the relevant creditors' meeting (*Sanierungsplantagsatzung*). In this case, the rehabilitation procedure without self-management is literally "subject to renaming" to liquidation proceedings, and the insolvency officer has the authority to implement the debtor's enterprise (*Verwertung des Unternehmens*).[106]

191. **However, bankruptcy proceedings (*Insolvenzverfahren*) can be opened immediately in the form of liquidation proceedings (*Konkursverfahren*)**. The purpose of liquidation proceedings is a proportionate division of the debtor's property between its creditors. The insolvency officer in the framework of liquidation proceedings is called **the bankruptcy assets officer** (*Masseverwalter*). The bankruptcy assets officer's powers are a lot wider than the powers of the rehabilitation officer and can be divided into several parts: collection and verification of information about the debtor, inspection of

[103] In practice, all more or less important decisions of the debtor are subject to the control of the insolvency officer. Moreover, the rehabilitation officer may raise objections to the debtor even regarding the debtor's performance of legal actions related to ordinary business activities (*gewöhnlicher Unternehmensbetrieb*) (Abs. 1 § 171 IO).
[104] Abs. 2 § 172 IO.
[105] Ibid., Abs. 2, §172.
[106] Abs. 2 § 168, Abs. 1 S. 2 § 114c IO.

the possibility to further conduct business activities of the debtor's enterprise and its actual management, sale and distribution of the bankruptcy assets.

192. The performance of the duties of the bankruptcy assets officer is possible provided that he or she has sufficient information about the state of the bankruptcy assets. Based on this, the IO[107] establishes a list of information that the officer must immediately collect and verify from the moment of his or her appointment, regarding the following:

- the economic situation of the debtor;
- management of the debtor, which was carried out before the opening of the bankruptcy procedure;
- reasons for the debtor's bankruptcy;
- the number of jobs that are at risk of being lost due to the initiation of bankruptcy proceedings;
- presence of third-party claims from tort liability;
- other circumstances relevant to creditors.

193. The bankruptcy assets officer is obliged to check whether it is advisable for the debtor's business to continue operating or, if the business is closed, whether it should be reopened.[108] It should be noted that the decision on the future fate of the enterprise in the framework of liquidation proceedings is made by the creditors' meeting, but the arguments for the need to continue the company's activities are developed by the bankruptcy assets officer. If the company is not closed at the time of the initiation of the bankruptcy procedure, then until the creditors' meeting appointed by the court, its activities are managed by the bankruptcy assets officer,[109] except for situations when the insolvency officer suspends the company's activities due to the fact that such activities only increase the losses of creditors. If the debtor enterprise continues to carry out its activities as a result of the decision of the creditors' meeting,[110] the management of the enterprise becomes the task of the bankruptcy assets officer.[111]

194. After the initiation of liquidation proceedings, the bankruptcy assets officer is obliged to immediately establish the state of the bankruptcy assets (*Stand der Masse*),

[107] Ibid., Abs. 1 § 81a.
[108] Ibid., Abs. 3 § 81.
[109] Ibid., Abs. 1 § 114a.
[110] Abs. 2 § 114b IO.
[111] Ibid., Abs. 1 § 114.

to conduct an inventory of the debtor's property, for example.[112] The bankruptcy court provides assistance to the bankruptcy assets officer in the inventory process by issuing certain orders to the debtor or by engaging the enforcement authorities (*Vollstreckungsorgane*) to conduct an inventory of the property and its monetary valuation.

195. The bankruptcy assets officer is obliged to take actions to accumulate the debtor's assets (including by filing claims on behalf of the debtor against third parties) and to ensure their safety (in order to avoid their withdrawal to subsidiaries by the debtor). Such actions of the insolvency officer are aimed at ensuring that the actual assets (*Istmasse*) correspond to the nominal assets (*Sollmasse*).

196. The bankruptcy assets officer takes part in the establishment of debts.[113] For this purpose, the insolvency officer must check the registered claims of creditors at the creditors' review meeting (*Prüfungstagsatzung*) convened for this purpose. For each registered claim, the bankruptcy assets officer must make a specific conclusion: either recognize or challenge the relevant claims.[114]

197. The bankruptcy assets officer acts on behalf of the debtor in respect of creditors' claims. The bankruptcy assets officer is obliged to conduct all legal disputes that fully or partially affect the assets. In addition, the bankruptcy assets officer has a monopoly on challenging certain transactions in the interests of creditors.

198. The bankruptcy assets officer is obliged to sell the bankruptcy assets,[115] as well as distribute the amount from the sale among creditors.[116] The duties of the bankruptcy assets officer in the framework of liquidation proceedings include the distribution of proceeds received from the bankruptcy assets among creditors. Such disposal is possible with the approval of the creditors' committee.

199. **In the individual's debt settling procedure**, the debtor retains self-management. To perform certain actions, the bankruptcy court, at its own discretion, or the request of the creditor, or the request of the debtor, may appoint an insolvency officer with limited powers,[117] for example, for procedural representation. If the insolvency officer is not appointed, the court assumes his or her functions.[118]

200. In bankruptcy proceedings, the control over the activities of the insolvency officer and the debtor is exercised by the creditors' meeting (*Gläubigerversammlung*)

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[112] Ibid., § 96.
[113] Ibid., Abs. 2 § 81a, Abs. 2 § 105.
[114] Ibid., Abs.3, § 105.
[115] Ibid., Abs. 1 S. 1 § 114.
[116] Ibid., § 124.
[117] Abs. 2 § 190 IO.
[118] Ibid., Abs. 3 § 190.

and the creditors' committee (*Gläubigerausschuss*), in addition to the bankruptcy court. At the same time, individual creditors also have the right to appeal against the actions of the insolvency officer and demand his or her removal from the exercise of powers for compelling reasons.

201. In practice (but not in terms of the structure of the debtor's control bodies as defined in the IO), creditors' interests in bankruptcy proceedings may be represented by unions for the protection of creditors (*Gläubigerschutzverbände*). Such non-profit organizations (for example, the Alpine Union of Creditors[119]) collect relevant information about the economic situation of the debtor in order to assist the court in preparing a rehabilitation plan, protect the interests of creditors, and provide representation.

202. For the bankruptcy of individuals, a state-recognized[120] consulting center (*Schuldenberatungstelle*[121]) is involved as a quasi-agency.

203. A **special officer** (*Besonderer Verwalter*[122]) appointed in addition to the insolvency officer in certain cases may be a special quasi-agency. The appointment of a special officer is an exception and occurs only when the scope of tasks related to bankruptcy requires it. In particular, special officers may be appointed to manage the debtor's real estate or to carry out activities that require special professional knowledge and skills that the insolvency officer does not have due to their specifics. In addition, a special officer is appointed in case of noncompliance with the requirement of independence of the insolvency officer in relation to one of the creditors.

204. A representative (*Stellvertreter*[123]) may be appointed to the insolvency officer if the insolvency officer is ill, missing, or absent for any other reason. The representative of the insolvency officer is subject to the same requirements regarding his or her independence, professional and moral qualities as to the insolvency officer.

205. Regarding the bankruptcy of banks, there is a special regulation. The functions of insolvency officers are performed by the state body for regulating financial markets.

206. There is also a special regulation for insurance companies that provides for reserving most of the debtor's assets for payments to beneficiaries under insurance contracts. In such a case, the state body for regulating financial markets appoints a special officer responsible for managing reserved assets. In contrast to the general

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[119] AKV EUROPA – Alpenländischer Kreditorenverband. URL: https://www.akv.at/ (the date of access: 05.03.2020).
[120] § 192 IO.
[121] Webportal der staatlich anerkannten Schuldenberatungen in Osterreich. URL: https://www.schuldenberatung.at/ (the date of access: 05.03.2020).
[122] § 86 IO.
[123] Ibid., § 85.

requirements for insolvency officers **(paras. 207-226 of the Analytical Report)**, for insurance companies, the insolvency officer and his or her representative must be individuals with permanent residence in Austria or another member state of the European Economic Community.

2. The Insolvency Officer Status

a. Criteria for Obtaining the Status of the Insolvency Officer

207. An independent person with an impeccable reputation, who can be trusted (*verlässlich*) and has knowledge of the nature of bankruptcy, as well as experience in conducting such cases, may be appointed as an insolvency officer. These requirements form a "soft" set of conditions for the appointment of an insolvency officer and replace the rigid structure of age, professional and other strict qualifications.

208. Both individuals and legal entities may be appointed as insolvency officers. The latter is usually appointed when large enterprises go bankrupt.[124]

209. In the Austrian Bankruptcy Law, the principle of "monocracy" is applied, based on the requirement of the sole performance by the insolvency officer of his or her functions. In situations when an insolvency officer is appointed to manage several related bankruptcy proceedings, the implementation of the monocratic principle is achieved by the court's careful scrutiny of the existence of indisputable advantages arising from the combination of management in different cases.

210. Restriction of the monocracy principle is allowed in exceptional cases **(para. 203 of the Analytical Report)**.

211. Legal entities that can be designated as insolvency officer[125] include limited liability companies and joint-stock companies, as well as partnerships under Austrian law (*Personengesellshaft*) and associations (*Verein*).

212. There is a direct prohibition on the appointment of private funds as insolvency officers, as private funds are not allowed to carry out professional activities that go beyond their main type of activity. Appointment of a European association for an

[124]Abs. 5 § 80 IO.
[125] Ibid., Abs. 5 § 80.

economic purpose (*Europäische wirtschaftliche Interessenvereinigung*) as an insolvency officer[126] is not allowed.

213. Non-legal entities may not act as insolvency officers. For example, work communities and associations that do not have a legal entity's status cannot be officers. In addition, the so-called civil law companies (*Gesellschafte bürgerlichen Rechts*), i.e. associations of persons that do not form a legal entity (are essentially analogous to a Russian partnership company), cannot be insolvency officers. For example, an open commercial company (*offene Handelsgesellschaft*) or a limited partnership (*Kommanditgesellschaft*) cannot be appointed as an insolvency officer.

214. At the same time, it is permissible to appoint legal entities of public law as insolvency officers. In Austrian law, such persons include, for example, communities in Austria (*Gemeinde*), as well as federal states in Austria and, finally, Austria as the federal republic. The appointment of such public law entities as insolvency officers is rather a theoretically acceptable possibility and is rarely used in practice.

215. A legal entity appointed as an insolvency officer must inform the court what persons will represent it when performing the functions of the insolvency officer.[127] The insolvency officer is obliged to notify the bankruptcy court that puts the relevant information in the Edict **(paras. 221- 225 of the Analytical Report)** about the replacement of an individual who is authorized to represent a legal entity as the insolvency officer,

216. **Austrian law does not provide for special accreditation or certification procedures for obtaining the status of an insolvency officer. Austrian law also does not require special professional liability insurance or membership in a self-regulatory organization.**

217. There is a set of requirements for personal and professional qualities, the fulfillment of which allows a person to declare his or her professional suitability to perform the insolvency officer's function in bankruptcy cases under Austrian law.

218. Special certification and accreditation procedures are applied to specific professions, representatives of which usually perform the functions of insolvency officers. For example, the active involvement of Austrian advocates who have already passed the relevant tests for obtaining professional status as insolvency officers is based on the assumption that the suitability of a particular advocate to perform the

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[126] Article 3 of Council Regulation (EEC) No. 2137/85 of July 25, 1985 on the European Economic Interest Grouping (EEIG). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31985R2137&from=EN (the date of access: 05.03.2020).
[127] Abs. 4 § 80 IO.

functions of the insolvency officer has already been confirmed by the professional community of which he or she is a member.

219. **IO does not contain any restrictions based on profession**. In most cases, the position of an insolvency officer is given to advocates, less often to auditors and tax consultants. The absence of strict professional restrictions also makes belonging to specialized organizations a quasi-optional requirement. From a practical point of view, the advocate registered in the Bar Association of the Federal State of Austria, or the auditor who has passed the required exam and is registered with the chamber of auditors, is more likely to be appointed by the bankruptcy court than the same specialist without special status.

220. **Age limits for individual insolvency officers are not set directly in the IO. However, indirect age restrictions can be noted**. An individual who does not have full legal capacity cannot be appointed as the insolvency officer (which means the general rule is that the candidate for the insolvency officer's position should reach the age of 18). Finally, from the provisions of the IO, where it is established that insolvency officers must have sufficient knowledge of business law, enterprise economics, and experience in economic life, it is obvious that 18-year-olds, who do not have a higher education, have extremely low chances of being appointed as insolvency officers.

221. To qualify for an appointment as an insolvency officer, **a person must be included in an open database named Edict**.[128] As of May 3, 2020, the Edict includes 1,284 people.

222. The Edict provides detailed information on bankruptcy proceedings in Austria. Via this database, the bankruptcy court publishes information for creditors, the debtor, the insolvency officer, and the third parties. Within the Edict, a list of insolvency officers (*Insolvenzverwalterliste*) is maintained, a publicly accessible database with information about particular insolvency officers. The organization of the Edict is entrusted to the Ministry of Justice and is regulated by the Law on the Organization of the Judicial System (§ 89j, 89k *Gerichtsorganisationsgesetz (GOG)*). The list is coordinated by the Supreme Land Court of Linz.[129]

223. Persons interested in a professional activity as insolvency officers enter information about themselves in this list, as well as change it independently by filling out an online profile and specifying information, a detailed list of which is provided in the IO. This information is not required to be entered, however, the less information a candidate provides about him or herself, the less likely he or she is to be appointed by

[128] Insolvenzverwalterlise. URL: https://iv.justiz.gv.at/edikte/welcomereg.nsf/ivl/w0 (the date of access: 05.03.2020).
[129] Abs. 2 § 269 IO.

the bankruptcy court, since the Edict is in fact the only source officially used by the courts for the information about the insolvency officer's compliance with the appointment requirements in a particular case.

224. **The law does not establish a formal procedure for verifying the information that individuals enter about themselves in the Edict. Passing special certification procedures for entering information about the insolvency officer is not required.**

225. If the information is no longer relevant, the Supreme Land Court of Linz deletes such information from the Edict.

226. The bankruptcy court chooses the appropriate person from the list and appoints him or her an insolvency officer. However, the bankruptcy court may appoint a person who is not included in the list of insolvency officers (*Insolvenzvewalterliste*) if he or she is more suitable for this role, which is an organic development of the principle of the supremacy of the court.[130]

b. Specifics of Guarantees of the Insolvency Officer Status

227. The fundamental guarantee of the insolvency officer's status is the establishment of remuneration for conducting a bankruptcy procedure. Remuneration to the insolvency officer is paid at the expense of the debtor's property.

228. The amount of remuneration consists of a number of components that depend on the insolvency officer's performance. IO provides that a fixed part of the remuneration is usually € 3,000, and the rest is paid as a percentage of the value of the debtor's realized assets (with a value of no more than € 22,000 — 20%, € 100,000 — 15%, € 500,000 — 10%, € 1,000,000 — 8%, € 2,000,000 — 4%, € 6,000,000 — 2%), as well as an additional amount of 1% of the value of the debtor's realized assets. The fixed part can be reduced or increased depending on the number of the debtor's employees, the level of complexity of the bankruptcy procedure, and other insolvency officer's performance indicators.

229. **Matters on payment of remuneration are decided at the end of the bankruptcy procedure**. At the same time, a significant number of insolvency officers' appeals to bankruptcy courts are aimed at resolving controversial issues related to the amount of remuneration.

230. Despite the obligation to perform his or her functions personally, the insolvency officer has the right to engage specialists to perform special tasks, such as evaluating the debtor's assets, auditing financial statements, and analyzing the possibility of

[130] Abs. 3 § 80a IO.

preserving the debtor's business. **The involvement of third parties is possible on the basis of a court decision.**

231. Compensation of expenses incurred by the insolvency officer for the involved persons is allowed only if such expenses were approved by the court in advance and they do not entail a significant reduction in the bankruptcy assets.

c. Liability of the Insolvency Officer

232. The bankruptcy court may, regardless of the procedure (rehabilitation or liquidation proceedings), restrict the insolvency officer's powers in certain cases. Restrictions of this kind apply in relations with third parties only to the extent that the bankruptcy court has informed third parties of the relevant restrictions through the Edict.

233. The bankruptcy court must oversee the insolvency officer's activities. It can give written or oral instructions to the insolvency officer, request reports and explanations from him or her, require invoices or other written documents for review. As part of its oversight, the bankruptcy court makes decisions on complaints from a creditor, a member of the creditors' committee, or a debtor regarding certain activities or the insolvency officer's behavior. The decision of the bankruptcy court issued on the complaints of a creditor, a member of the creditors' committee, or a debtor against the insolvency officer cannot be challenged or canceled. The indisputability of the relevant decisions of the bankruptcy court applies both to the bankruptcy of debtors — legal entities, and the bankruptcy of individuals.

234. Another form of control is the insolvency officer's duty to obtain, in certain cases, the consent of the bankruptcy court to perform certain actions. E.g., if the insolvency officer engages a third party to perform specific functions related to the implementation of his or her activities, he or she must obtain the consent of the bankruptcy court. In addition, a number of transactions specified in the law, regardless of their amount, is subject to the joint approval of the creditors' committee and the bankruptcy court. In urgent cases, the bankruptcy court may give the insolvency officer approval to sell the bankruptcy assets without the need to request the debtor's opinion.[131]

235. If the insolvency officer does not perform his or her duties or performs them untimely, the bankruptcy court may force him or her to pay fines.

236. If there are obstacles to the implementation of the insolvency officer's activities, for example, in the situation of kinship with the debtor, and hence the affiliation, a formal

[131]Abs. 2 § 114 IO.

procedure for removing the insolvency officer is necessary, which meets the requirements of legal certainty and protection of civil-law transactions.[132] The removal of the insolvency officer occurs simultaneously with the appointment of the new insolvency officer.

237. It is necessary to distinguish removal of an insolvency officer by the bankruptcy court at its own discretion if there is a serious reason and removal at the request of an authorized person.[133]

238. Removal at the court's discretion is possible if there are important grounds for that (*aus wichtigen Gründen*). E.g., if the court has doubts about certain aspects of the insolvency officer's activities, it must make sure of the advantage of the positive consequences of the insolvency officer's removal and make a decision taking into account the interests of all participants of the bankruptcy procedure.[134] If the bankruptcy court, as a result of investigation of specific circumstances, comes to the conclusion that there are no serious grounds for the insolvency officer's removal, it can always turn to mechanisms of influence on the insolvency officer, for example, by sending him or her instructions within the framework of the duty to exercise judicial control over the insolvency officer's activities.

239. A serious reason for which the court may remove the insolvency officer at its own discretion is his or her non-compliance with the conditions for holding the position[135] which has arisen or has been established by the court after the appointment of the insolvency officer.[136] Thus, removal by the court at its own discretion is possible in the absence of the insolvency officer's independence, integrity, reliability, experience in cases, insufficient professional qualifications, lack of organizational, technical, and time resources.

240. In addition, there may be other reasons for the removal of the insolvency officer by the court, such as representation by proxy or fiduciary relationship with the debtor, or the embezzlement of the debtor's property by the insolvency officer.

241. Removal at the request of the authorized person requires the application of the debtor, creditor, member of the creditors' committee with complaints about the insolvency officer's actions and consideration of such complaints by the bankruptcy court.

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[132] Kommentar zu den Insolvenzgesetzen, hrsg. von Dr. A. Konecny und Dr. G. Schubert, § 80 KO, Rz.6.
[133] Abs. 1 § 87 IO.
[134] ÖsterreichischesInsolvenzrecht. Kommentar, hrsg. Von W. Buchegger, R.Bartsch und R. Pollak, § 87, Rz. 10.
[135] Kommentar zu den Insolvenzgesetzen, hrsg. von Dr. A. Konecny und Dr. G. Schubert, § 80 Rz. 8-9.
[136] OLG Graz AbwB 1958, 5.

242. Improper performance of the insolvency officer's duties may entail the obligation to compensate losses to the persons involved in the case.

3. Procedure for Approving an Insolvency Officer in a Bankruptcy Case

243. The appointment of the insolvency officer takes place at the opening of the bankruptcy procedure. **Only the court has the right to choose and appoint the insolvency officer**. This regulation is the implementation of the principle of the supremacy of the court (*Gerichtsherrschaft*) in bankruptcy proceedings.[137] The exclusive competence of the court is aimed at implementing the requirement of the insolvency officer's independence and preventing the influence of creditors and the debtor. **There is no discussion in the public field about changing the model for assigning insolvency officers and switching, for example, to automatic selection.**

244. The insolvency officer selected by the bankruptcy court is indicated in the decision on opening the bankruptcy procedure (*Eröffnungsbeschluß*). In particular, the name, address, telephone number, fax number, and email address of the insolvency officer must be specified, and if the insolvency officer is a legal entity, the individual who represents such a legal entity when performing the insolvency officer's functions must also be indicated. The decision to open the bankruptcy procedure (with an indication of the specific procedure: a rehabilitation or liquidation proceedings) comes into force from the moment of its publication in the Edict.[138] From this moment on, the insolvency officer officially takes office.

245. The bankruptcy court is responsible for taking measures to enter information about the initiation of a bankruptcy procedure in various public registers. Information about the insolvency officer is entered, in particular, in the firm book (*Firmenbuch*), that is, in the register of legal entities maintained by the courts of the lands. The firm book contains the name of the insolvency officer in liquidation proceedings or rehabilitation, as well as information about the special officer **(para. 203 of the Analytical Report)** if he or she is appointed.

246. The appointment of the new insolvency officer and the removal of the previous one occurs simultaneously through the bankruptcy court's single decision to remove the previous insolvency officer and is also reflected in the Edict.[139]

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[137] Kommentar zu den Insolvenzgesetzen, hrsg. von Dr. A. Konecny und Dr. G. Schubert, § 80 KO, Rz. 2.
[138] Abs. 2 § 1, Abs. 1 § 74 IO.
[139] Ibid., Abs. 1 § 80.

247. The person chosen by the court must immediately inform the court whether he or she is ready to take the position, as well as inform the court about the circumstances which may affect his or her independence, for example, the facts that the candidate:

- carried out or carries out activities on representation or consulting the debtor, a person of his or her close affiliation **(paras. 256-260 of the Analytical Report)**, the body of the debtor within five years preceding the opening of the bankruptcy procedure against the debtor;

- represents or advises, represented or advised a creditor against a debtor within three years preceding the opening of a bankruptcy procedure; a distinction should be made between the representation of the creditor by an insolvency officer against the debtor and against a third party, since the threat to independence in the first case is more obvious; the court also takes into account parameters such as the intensity of consulting and the depth of economic relations between the insolvency officer and those persons he or she advised;

- represents or advises a direct debtor's competitor or a person who has been affected by the bankruptcy procedure.

248. The circumstances above are subject to discussion at the first creditors' meeting if the insolvency officer was nevertheless appointed by the court. If these circumstances are discovered later, in the course of the insolvency officer's activities, and the bankruptcy court is informed of them, a special meeting of creditors is to be convened.[140]

249. The issue of whether the circumstances reported by the insolvency officer threaten his or her independence is subject to discussion at the creditors' meeting. Such a threat exists, for example, when the activity of representing or advising the debtor or creditors by the insolvency officer has reached such intensity that the insolvency officer can no longer be expected to behave objectively.

250. The courts usually send a request to a candidate prior to official appointment as the insolvency officer as to whether he or she is ready to take up the position, therefore the candidate who is considered final is most likely to be already informally agreed. Acceptance of the appointment to the position of the insolvency officer is made through expressed or tacit acceptance of office[141] and is accompanied by the information about

[140] Abs. 4 § 80b IO.
[141] Kommentar zu den Insolvenzgesetzen, hrsg. von Dr. A. Konecny und Dr. G. Schubert, § 80 KO, Rz. 26; OLG Wien ZIK 1996, 31.

him or her in the decision on opening a bankruptcy procedure, as well as the further publication of this information in the Edict.

251. Despite the principle of the supremacy of the court, the principle of independence of the insolvency officer is not violated if the insolvency officer is proposed by the debtor or creditors. **The court, however, is not obliged to consider candidates proposed by the debtor or creditors**. Moreover, the fact that a creditor or debtor offers their own candidacy for the insolvency officer obliges the court to conduct a more thorough verification of the compliance with the principle of independence.[142]

252. The appointment of the insolvency officer may be indirectly influenced by information provided by the debtor in case of opening bankruptcy proceedings on its application. The debtor provides relevant information about the current economic situation and a list of assets. Manipulation of information can influence the court's decision when choosing the insolvency officer.

253. In Austrian law, it is customary to distinguish between **negative conditions** for the appointment of the insolvency officer, such as the requirement of independence, and **positive conditions**, which include requirements for moral and professional qualities.

254. The central requirement for the insolvency officer is his or her **independence** (*Unabhängigkeit*). This rule is considered in a separate section "Independence of the insolvency officer in bankruptcy proceedings" (*Unabhängigkeit des Insolvenzverwalters*)[143] of the IO, which assumes compliance with the following criteria:

- the insolvency officer must be independent of both creditors and the debtor;
- the insolvency officer cannot be a person close to the debtor (*kein Angehöriger*);
- the insolvency officer cannot be the debtor's competitor;
- the insolvency officer cannot be the auditor in the reorganization (*Reorganisationsprüfer*) procedure preceding the bankruptcy.

255. The independence requirement applies to both a legal entity and an individual appointed to the position of insolvency officer. The conflict of interests between the insolvency officer and one of the participants in the bankruptcy procedure that prevents

[142] Österreichisches Insolvenzrecht. Kommentar, hrsg.von W. Buchegger, R.Bartsch und R. Pollak, § 80, Rz. 40.
[143] § 80b IO.

the recognition of the insolvency officer's independence should be specific and should not be the result of abstract assumptions about the possibility of such a conflict in the future.

256. **The prohibition on relations of belonging** (*Angehörigkeit*) suggests that the insolvency officer should not belong to persons close to the debtor, the range of whom is established in law.[144]

257. Persons close to the debtor are spouses, or persons, who are in a direct kinship, or consanguinity, or affinity to the 4th degree on the sideline[145] with the debtor or his or her spouse, as well as adopted children or children in custody who live together with the debtor in extramarital relationship. In this case, extramarital relationship is equal to marital relationship.

258. The range of persons of close affiliation is also defined for legal entities, civil law companies, or other entities that can act as a party in a bankruptcy procedure (*parteifähiges Gebilde*). Persons of close affiliation for debtors — legal entities are:

- members of management or supervision bodies for the legal entity's actions;
- members of a company with unlimited liability for its obligations;
- members of a legal entity.

259. The lack of the insolvency officer's independence due to the relationship of belonging is assessed for not only the time of opening of the bankruptcy procedure but also the period of at least one year before its opening.

260. Relations that are not specified in the law, such as the relationship of the insolvency officer to the general director of the debtor, may create an obstacle to the appointment of the insolvency officer.

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[144] Ibid., Abs. 1 § 32.

[145] Direct, ascending, or descending relatives act as close relatives. These include great-grandparents, grandparents, parents, children, grandchildren, great-grandchildren, etc. Along the lateral line, the relationship of kinship goes up to the fourth degree, sisters (2nd level), uncles, aunts, nephews, nieces (3rd level), sisters of grandmothers (great-aunts), cousins, great-nephews and nieces (4th level), etc. act as persons of close relationship. The nature of personal relationships with such relatives does not matter, nor does the fact that such relatives were born in or out of wedlock.

261. The insolvency officer must not be the debtor's competitor. Relations of competition lead to conflicts of interest and preferential satisfaction of a certain group of creditors.

262. The auditor in reorganization (*Reorganisationsprüfer*) performs the functions of an insolvency officer in a special reorganization procedure in accordance with the Law on Reorganization of the Enterprise (*Unternehmensreorganisationsgesetz (URG)*). **The reorganization is often a procedure for improving the health of an enterprise that precedes bankruptcy and rehabilitation**. A conflict of interest is possible here because the reorganization auditor may already be held liable for the violation of its obligations during the reorganization process as part of the bankruptcy procedure.

263. Positive conditions for the appointment of a manager can be divided into requirements for their moral and professional qualities.

264. When discussing **moral requirements**, it should be pointed out that a perfect, reliable, and experienced person who has knowledge of bankruptcy should be appointed as the insolvency officer.

265. **Perfection** is used in both technical and non-technical terms.[146] When assessing "perfection" in the technical sense (*Unbescholtenheit*),[147] the facts of criminal prosecution of the insolvency officer, the commission of torts and a number of administrative offenses are taken into account. In practice, the court, as a rule, does not conduct a serious examination on the insolvency officer's perfection. A thorough inspection is carried out only if a person appointed to the position of the insolvency officer may be subject to disciplinary measures by certain professional chambers (advocates, auditors, notaries, etc.).[148] When assessing "perfection" in a non-technical sense, the insolvency officer's business reputation is considered as a whole: information about his or her honest, open behavior, and compliance with business ethics.

266. **The reliability** requirement is related to delegating management of other person's property and the protection of other person's property interests to the insolvency officer. Therefore, for example, potential insolvency officers whose assets are subject to a bankruptcy procedure cannot be considered reliable.[149] The criteria for assessing the reliability of the insolvency officer are quite broad, and the court can take into account any facts. For example, although the insolvency officer's liability insurance

[146] Kommentar zu den Insolvenzgesetzen, hrsg. von Dr. A. Konecny und Dr. G. Schubert, § 80 KO, Rz. 21.
[147] Österreichisches Insolvenzrecht. Kommentar, hrsg. von W. Buchegger, R.Bartsch und R. Pollak. § 80, Rz. 19.
[148] Österreichisches Insolvenzrecht. Kommentar, hrsg. von W. Buchegger, R.Bartsch und R. Pollak. § 80, Rz. 20.
[149] OLG Innsbruck ZIK 1996, 64.

is not a condition for his or her activity, the lack of sufficient insurance coverage may be considered by the court as a sign of insufficient reliability, especially if the insolvency officer belongs to one of the high-status professions (for example, advocates). However, information about professional liability insurance is indicated in the Edict by candidates for the position of the insolvency officers in different ways: some indicate detailed data, others include only the name of the insurance company, and others do not indicate information about their liability insurance at all.

267. **The general professional qualities of the insolvency officer** which the court evaluates when appointing a particular case include:

- knowledge of business law (*Wirtschaftsrecht*);
- knowledge of business administration (*Betriebswirtschaft*);
- experience in economic life.

268. IO mentions that it is enough to meet one of the requirements for professional qualities. The bankruptcy court evaluates what is crucial for the debtor in the circumstances of the case: knowledge of law, special knowledge of microeconomics, or experience in economic life — and selects the insolvency officer on this basis.[150]

269. **The requirement for experience in economic life** (*erfahrene Persönlichkeit des Wirtschaftslebens*) implies special professional experience not only as of the insolvency officer. Other activities are also taken into account, for example, representation of the debtor, creditors, associations of creditors (*Gläubigerverband*), experience as a bankruptcy judge. In so-called large-scale bankruptcies,[151] a person with special professional experience is subject to appointment. This is due to the importance of this type of bankruptcy for the debtor's employees and its creditors. A person who has already conducted several successful bankruptcy procedures should be appointed to manage the bankruptcy of large enterprises.[152]

270. The court may turn to **other criteria determining the quality of a professional insolvency officer**.[153] In particular, when choosing the insolvency officer, the judge must,

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[150] Österreichisches Insolvenzrecht. Kommentar, hrsg. von W. Buchegger, R.Bartsch und R. Pollak, § 80, Rz. 24.

[151] In case of bankruptcy of enterprises that meet two of the three criteria: (a) the amount of assets is at least € 6,000,000 after deducting the deficit shown on the asset side within the meaning of section 268(3) of the Austrian Commercial Code (UGB), (b) sales amount is at least € 12,000,000 for the last twelve months before the reporting date, (c) the average number of employees is at least 50.

[152] Kommentar zu den Insolvenzgesetzen, hrsg. von Dr. A. Konecny und Dr. G. Schubert, § 80 KO, Rz. 23.

[153] § 80a IO.

along with general professional criteria (knowledge of business law, business administration, professional experience), focus on the following criteria:

- ability to practically implement the bankruptcy procedure and having a sufficient office size, necessary technical equipment, and time resources;
- special knowledge of business administration, as well as bankruptcy, tax, and labor law;
- past activities of the candidate as an insolvency officer;
- professional experience.

271. In practice, the court checks **whether sufficient resources are available** based on an analysis of the list of insolvency officers (*Insolvenzverwalterliste*) within the Edict. If the information is insufficient, the courts may examine candidates' websites or make special requests for more detailed information. However, due to the fact that most of the appointed insolvency officers are advocates who have special responsibility for providing false information, the courts have high degree of confidence in the information contained in the Edict and, as a rule, do not require additional explanations.

272. **Communication within the professional community is also well developed in Austria**, where judges, legal practitioners, and business representatives intensively exchange experience and knowledge at informal meetings (conferences, seminars), facilitating, inter alia, sharing information about the work of particular insolvency officers, their achievements, workload, technical equipment, and efficiency.

273. After the appointment, the bankruptcy court issues a certificate of appointment (*Bestellungsurkunde*) to the insolvency officer. The purpose of such certificate, which is declarative in nature, is to legitimize the insolvency officer in relations with third parties.[154] The court may also issue certificates of authority to the insolvency officer (*Ermächtigungserkunden*), which, in relations with third parties, serve as evidence that the insolvency officer has the authority to perform transactions or other legal actions.[155]

274. The appointment of the insolvency officer may be challenged by any person authorized to do so. All persons whose rights are affected by the relevant decision (including the debtor[156]), as well as associations of creditors (*Gläubigerschutzverbände*) are entitled to challenge this appointment. A challenge may occur if the appointed insolvency officer does not have sufficient legal personality or legal capacity (if the

[154] Kommentar zu den Insolvenzgesetzen, hrsg. von Dr. A. Konecny und Dr. G. Schubert, § 80 KO, Rz. 27.
[155] Abs. 2 § 83 IO.
[156] OLG Linz 2 R. 178-186, 261, 262/90.

insolvency officer is an individual). The reason for the challenge may be the insolvency officer's lack of the required professional skills (for example, lack of knowledge of business administration or business law), as well as his or her non-compliance with the requirements of perfection or reliability. It is also acceptable to challenge the appointment in a situation where the insolvency officer does not have sufficient organizational, time, and technical resources for the successful implementation of the bankruptcy procedure.

275. The main condition for the implementation of the procedure for challenging the appointment of a person as the insolvency officer is the presence of circumstances that prevent him or her from holding the position of the insolvency officer already at the time of the court's decision on the appointment of the insolvency officer.[157] If the circumstances preventing a particular person from taking the position of insolvency officer arise later, the procedure of removal is applied.[158] Independent withdrawal of the insolvency officer from the procedure is possible only if there are extremely serious reasons and requires justification before the court.

[157] Abs. 2 § 260 IO.
[158] Ibid., § 87.

IV. THE INSOLVENCY OFFICERS APPOINTING MODEL IN BANKRUPTCY CASES IN GERMANY

1. A Brief Overview of Regulation in Bankruptcy Cases

a. Sources of Bankruptcy Law

276. The key legislation regulating bankruptcy in Germany is InsO.

277. Although the explanations of BGH are not binding on lower courts, they are, in fact, of great practical significance in the application and interpretation of substantive law.

278. The decisions of BVerfG also play an important role in the bankruptcy law formation, especially in terms of selecting insolvency officers. German law does not regulate the process of selecting an insolvency officer for appointment to a particular case in detail, which raises very sensitive discussions about the relation between the selection of the insolvency officer and the right to labor. In this regard, the BVerfG decisions form a system of guidelines for courts considering bankruptcy cases to organize a fair selection of an insolvency officer.

279. Some private professional associations of insolvency officers have issued codes of ethics for insolvency officers. Although these rules are not legally binding on all insolvency officers, members of professional associations are required to comply with them. Therefore, for the most complete study of the status of insolvency officers in Germany, it is important to mention GOI, developed by the biggest professional organization — VID.

b. The Types of Procedures Used in Bankruptcy Cases and the Functions of the Insolvency Officer in Such Procedures

280. In Germany, as in Austria **(para. 184 of the Analytical Report)**, there is a single bankruptcy procedure, the purpose of which is to collectively satisfy creditors' claims:

- Either through the sale of the debtor's assets and the distribution of proceeds from their sale among creditors;

- or through the implementation of an insolvency plan (*Insolvenzplan*), the main aim of which is to keep the enterprise alive.[159]

281. **The unified bankruptcy procedure consists of two key procedures: preliminary (*vorlaufiges Verfahren*) and open (*eroffnetes Verfahren*) procedures.**

282. **The preliminary procedure** begins when bankruptcy proceedings are initiated. When a bankruptcy application is submitted to the court, the court must take measures to ensure the safety of the debtor's property until the bankruptcy application is considered on the merits. In particular, the court may appoint a **temporary administrator** to control the debtor's property (*vorlaufiger Insolvenzwalter*). The powers of the temporary administrator depend on whether the court has imposed a general ban on the free disposal of the debtor's property.[160]

283. If such a ban is imposed, the temporary administrator gets the right to manage the debtor and perform administrative transactions with the debtor's property. In this capacity, he or she is also referred to as a **"strong" temporary administrator** (*starkervorlaufiger Insolvenzwalter*) and performs the following duties:[161]

- ensures the safety of the debtor's property;
- manages the debtor's business until the court decides whether to apply an open procedure;
- determines whether the debtor has enough property to cover the costs of bankruptcy proceedings;
- identifies by order of the court (when a "strong" temporary administrator is appointed as an expert) the reasons for the need to initiate an open procedure, for example, lack of liquidity (*Zahlungsunfahigkeit*), impending illiquidity (*drohende Zahlungsunfahigkeit*), excessive growth of accounts payable (*Uberschuldung*).

284. If the court does not impose a ban on the free disposal of the debtor's property, the **temporary administrator is called "weak"** (*schwacher vorlaufiger Insolvenzwalter*), and his or her powers are determined by the court individually, but only within the limits of those powers that can be held by a "strong" temporary administrator.[162] As a rule, the

[159] § 1 InsO.
[160] Ibid., § Sec.21.
[161] Ibid., § 22(1).
[162] Ibid., § 22(2).

temporary administrator is granted the right (and duty) to coordinate the debtor's administrative transactions.

285. The temporary administrator (regardless of additional status) has the right to visit the debtor's premises and conduct inspections there. In this case, the debtor is obliged to provide the temporary administrator with the opportunity to get acquainted with all accounting books, business documentation, as well as provide explanations on all questions of interest to the temporary administrator.

286. After examining the temporary administrator's report on the debtor's financial condition, the court must decide whether to apply an open procedure. **If the court decides to apply an open procedure, the permanent administrator of bankruptcy assets (*Insolvenzmasse*) is appointed,** achieving full control of the debtor and the informal status of "the lord of bankruptcy" (*Herr des Verfahrens*).

287. The scope of the powers of the permanent administrator is defined by law and covers a wide range of actions, the main ones of which are the following:

- taking the decision on rehabilitation or liquidation of an enterprise;
- pro-active submission of an insolvency plan to the court, describing the initial situation, the reasons for the insolvency, and proposing a concept for the recovery of the enterprise from the crisis or its liquidation;[163]
- full management and disposal of the debtor's property;
- formation of the bankruptcy assets;
- challenging the debtor's transactions, rejecting existing contracts;
- payment of salary arrears;
- making a list of creditors, including examining creditors' claims and challenging them (if necessary);
- sale of the bankruptcy assets;
- settlements with creditors;
- holding meetings of creditors.

[163] § 218, 219 InsO.

288. **Issues of repayment of creditors' claims, distribution of the bankruptcy assets, and expediency of bankruptcy proceedings can be resolved in the insolvency plan (*Insolvenzplan*)**. An insolvency plan is an alternative to an open procedure that allows to find a balance between meeting creditors' claims and preserving business.

289. The insolvency plan may be proposed by the permanent administrator and the debtor, but never by creditors. The creditors' meeting has the right to instruct the permanent administrator to prepare the proposal for consideration. The insolvency plan submitted to the creditors' meeting is subject to approval by the creditors (if submitted by the insolvency officer, also by the debtor[164]) and is approved by the court.[165]

290. An insolvency plan is considered accepted if it has been approved by all groups of creditors and a majority has been reached in each group in terms of the number of participants and the amount of claims submitted.[166] **In order to overcome the unlawful actions of creditors** a "prohibition of obstruction" was set, which is a situation where the required majority has not been reached, but the consent of the voters' group is considered received, if: (a) the plan does not put the creditors in a worse position (the principle of obtaining values); (b) the group's creditors take part in the repayment of claims (the principle of equal participation); (c) the majority of the groups have approved the plan.[167]

291. **Once the insolvency plan is approved, the bankruptcy procedure is terminated**. Prior to the termination of the bankruptcy procedure, the permanent administrator must settle all priority claims. After the termination of the bankruptcy procedure, the permanent administrator's powers are also terminated, and the debtor returns to the management of its property. The insolvency officer, however, retains the responsibility to monitor the implementation of the insolvency plan by:

- providing an annual report to the creditors' committee (if present) and the court;[168]
- immediate notification to the creditors' committee (if present) and the court that the insolvency plan is not being implemented and cannot be implemented in the future.[169]

292. **Based on a court decision, the debtor may independently continue to manage its assets under the supervision of an authorized representative (*Sachwalter*), who may be temporary (*vorlaufig*) or permanent (*endgultig*).** Such self-management

[164] § 247 InsO.
[165] § 218, 157 InsO.
[166] § 244 InsO.
[167] § 245 InsO.
[168] Ibid., § 261(2).
[169] Ibid., § 262.

(*Eigenverwaltung*) is possible both in a preliminary and open procedure, as well as in the implementation of an insolvency[170] plan. The grounds for applying self-management are:

- the debtor's application to the court;
- absence of reason to believe that self-management threatens or will create a threat to the property rights of creditors.

293. When the debtor applies for self-management, the court may grant the debtor the status of a "strong" temporary administrator for a period of no more than three months in order for the debtor to prepare an insolvency plan. This three-month period is literally referred to as the "protective umbrella procedure" (*Schultzschirmverfahren*), during which enforcement measures are prohibited. The debtor, however, is under the supervision of an authorized representative during all this time.[171] If the authorized representative finds signs of deterioration of the debtor's position or a threat to the property interests of the creditors, he or she must immediately inform the creditors and the court.[172]

294. In a case of self-management, the debtor is obliged to coordinate transactions that go beyond the normal business activities with the authorized representative.[173] The list of transactions that are subject to approval by the authorized representative may be expanded by a court's decision.[174]

295. The Banking Act (*Kreditwesengesetz*) and the Insurance Act (*Versicherungsaufsichtsgesetz*) provide for special restructuring procedures for banks and insurance companies under the control of authorized bodies. Special reorganization and liquidation procedures for banks are provided by the Law on Reorganization of Credit Organizations (*Gesetz zur Reorganisationvon Kreditinstituten*). Upon that, all these procedures go beyond the general bankruptcy rules and are conducted without the participation of insolvency officers.

296. **If the debtor is an individual, the procedure of debt relief through debt restructuring (*Restschuldefreiung*) may be applied to him or her**. For these purposes, the debtor must grant the insolvency officer the right to dispose of all his or her income for a period of up to six years following the opening of the bankruptcy procedure.[175] The insolvency officer must:

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[170] Ibid., § 270.
[171] Ibid., § 270b.
[172] § 274 InsO.
[173] Ibid., § 275.
[174] Ibid., § 277.
[175] Ibid., § 286, 287(2), 292.

- notify the debtor's employer of obtaining the right to dispose of the debtor's income;

- distribute the collected income of the debtor to its creditors annually;

- with the relevant instructions from the creditors' meeting, monitor the debtor's performance of its obligations (for example, of employment in a place where the income will be sufficient to adequately repay creditors' claims);

- provide the court with a report on his or her activities at the end of the procedure.

2. The Insolvency Officer Status

a. Criteria for Obtaining the Status of the Insolvency Officer

297. InsO stipulates that **the court must appoint an independent individual who best meets the conditions of the particular case from among all persons wishing to assume the powers of the insolvency officer**. A potential insolvency officer must be experienced in business and independent of the debtor and creditors.[176]

298. Since InsO does not contain rules on how a judge considering a bankruptcy case should approach the consideration of suitable candidates, **in theory, it is necessary to distinguish general requirements applied without exception to all persons who wish to perform the duties of insolvency officers and requirements related to the exercise of the insolvency officer's powers in a particular case**. **At the first stage** (when determining general requirements), the courts form lists (*Vorauswahlliste*) which contain data on all candidates who are able to perform the duties of insolvency officers. **At the second stage**, the court, using the generated lists, selects the person most suitable for performing the functions of the insolvency officer in a particular case.

299. InsO defines the general requirements for insolvency officers quite broadly.

300. **The first requirement for any candidate for insolvency officers is professional qualification**. This requirement does not mean that special training or a special exam is required for the status of the insolvency officer. The position of the insolvency officer is open to persons of all professions, although the general requirements for knowledge in the field of bankruptcy, commercial, corporate, tax, and labor law must be met. In addition, the candidate must be familiar with business management, including accounting and financial reporting. According to this criterion, courts usually focus on

[176] § 56 InsO.

advocates, tax consultants, auditors, businessmen, and people from related industries. In practice, advocates hold a dominant position when appointing insolvency officers.

301. Access to court lists may be simplified for individuals who have already had experience working in bankruptcy as insolvency officers, practicing advocates, or assistant insolvency officers.[177] Each court independently determines how a candidate for inclusion in the list must justify having the necessary practical experience. Thus, the title of "special advocate" (*Fachanwalt*) in bankruptcy cases alone is not enough to recognize a candidate's sufficient qualifications.[178]

302. **The second requirement** for any candidate is a set of personal qualities.

303. **The first personal quality is considered to be general independence**. It is impossible to predict what conflicts of interest will arise during the bankruptcy procedure, and therefore the law and practice have developed requirements for general independence. BGH, however, indicated that the candidate for inclusion in the court list must disclose significant economic ties with the main creditor in the case:

- whether the candidate has a significant number of the creditor's shares;
- candidate's involvement in managing the creditor;
- intensive advising the creditor on an ongoing basis.[179]

304. The general independence rule may not apply to the candidate's relations with so-called institutional creditors (*institutionelle Glaubiger*), such as banks, insurance companies, and tax authorities. However, some courts have very strict rules for disclosure of information by candidates for inclusion in court lists: for example, courts use special questionnaires to request information about the ownership of shares in all companies or about professional relations with the debtor and creditors.[180] However, a candidate may not be refused registration solely because of his or her association with a particular creditor, since appointment as the insolvency officer is still possible if the affiliated creditor does not participate in the case.[181]

305. **The second personal quality which is analyzed when including in the court lists is the insolvency officer's ability to perform duties personally.** There is no dispute that any proceedings, especially those involving the bankruptcy of large companies,

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[177] BVerfG, Sechl. v. 19.7.2006 – 1 BvR 1351/06.
[178] BVerfG, Beschl. v. 27.11.2008 – 1 BvR 2032/08.
[179] BGH, Beschl. v. 13.10.2016 – IX ZR 7/15.
[180] The questionnaire of Hanover District Court. URL: https://amtsgericht-hannover.niedersachsen.de/startseite/wir_uber_uns/behordenleitung/behoerdenleitung-63701.html (the date of access: 05.04.2020).
[181] Bork/Thole, Die Verwalterauswahl (2018). P.45.

inevitably involve the assistance of third parties, but the main responsibilities should stay with the insolvency officer. In this regard, the candidate's explicit intention to comply with the rule of personal performance of the insolvency officer's duties is sufficient for inclusion in the court lists.[182] If the court is concerned that the candidate will in the future transfer the performance of duties to unauthorized persons, such candidate may be refused inclusion in the court list, since German bankruptcy law does not welcome the delegation of powers that are subject to personal performance. The court's concerns should be motivated and based, for example, on the previous work experience of a particular candidate, when he or she engaged subcontractors to perform his or her duties. At the same time, the mere fact that a candidate has a significant number of appointments in current bankruptcy cases is not enough to recognize the inability to exercise the insolvency officer's powers in a particular case.[183]

306. **The third personal quality for assessing the suitability of a candidate for inclusion in the court lists is age**. The professional community and scientists do not consider non-attainment of any age as a reason for the refusal to include a candidate in the court lists,[184] although it is obvious that this criterion is applied in the same way as, for example, as in Austria (**para. 220 of the Analytical Report**).

307. **The fourth personal quality indicated is integrity (honesty)**. It appears that the insolvency officer's fiduciary duties for managing the bankruptcy assets should be transferred to a candidate with high moral principles.[185] Thus, persons with a criminal record cannot act as insolvency officers. At the same time, crimes committed in the past and taken into account when refusing a candidate to be included in the court lists may not be related to economic cases. For example, in one of the cases, BGH concluded that it was impossible to include a candidate in the list due to the candidate's crime related to conferring an academic title.[186]

308. **The fifth personal quality of the candidate is a good financial situation.**[187] In order to collect and check information about the candidate's financial status, the court may apply to the authorized bodies.[188]

309. **The third requirement** for a candidate to be included in the court lists is a group of organizational characteristics, which includes the rule on territorial accessibility that has existed until recently and material and technical sufficiency. After a long public

[182] BGH, Beschl. v. 13.10.2016 – IX ZR 7/15; Bork/Thole, Die Verwalterauswahl (2018). P.49.
[183] BGH, Beschl. v. 13.10.2016 – IX ZR 7/15.
[184] Bork/Thole, Die Verwalterauswahl (2018). P.51.
[185] BGH, Beschl. v. 14.7.2016 – IX ZB 52/15.
[186] BGH, Beschl. v. 6.5.2004 – IX ZB 349/02.
[187] This criterion is not taken into account when applying bankruptcy proceedings against the candidate. For example, if self-management is imposed on an individual debtor, the requirements for financial well-being are ignored, since the identity of the manager and the debtor coincide.
[188] OLG Dusseldorf, Beschl. v. 20/1/2011 – I-3 VA 2/10.

discussion, German courts adopted the approach, according to which territorial accessibility is not a determining factor for including candidates in court lists due to the availability and prevalence of modern means of communication, and using such criterion violates the rights of persons who are best suited to conduct a particular case and are not local residents.[189] Material and technical sufficiency is expressed in having technical and human resources allowing the insolvency officer, for example, to properly process the personal data of the debtor's employees, register property rights, and track the performance of obligations.[190]

310. German law does not provide for mandatory membership of insolvency officers in any professional organization. Many of them are members of the VID **(para. 279 of the Analytical Report)**. Such membership is proof of a serious, professional business attitude.

311. The listed persons also have no obligations in respect of the maintenance of their status. At the same time, the bankruptcy court may exclude a person from the list based on information that has become known to the court about the loss of any criteria for compliance with the requirements to be included in the list.

312. The insolvency officer is also not obliged to insure his or her professional liability. However, in practice, when appointing an insolvency officer to a particular case, courts check whether the considered candidate has sufficient financial security to cover the risks associated with improper performance of the duties in a particular case. The minimal insurance coverage must be € 500,000 for individual bankruptcies and € 1,500,000 for small company bankruptcies,[191] VID also requires its members to maintain insurance coverage in the amount of € 2,000,000 for each insurance case, as well as a total annual coverage of € 4,000,000.[192]

b. Specifics of Guarantees of the Insolvency Officer Status

313. Expenses for bankruptcy proceedings are compensated from the bankruptcy assets.[193] A logical consequence of this rule may be the court's refusal to open a bankruptcy procedure due to insufficient bankruptcy assets.[194] However, any of the participants in the bankruptcy case can express their consent to finance the bankruptcy procedure.

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[189] BGH, Beschl. v. 17.3.2016 – IX AR (VZ) 2/15.
[190] Bork/Thole, Die Verwalterauswahl (2018). P.66.
[191] Pape/Graeber, Handbuch der Insolvenzverwalterhaftung, 3. Teil Rn. 1703.
[192] Maxime 16 GOI.
[193] § 54 InsO.
[194] Ibid., § 26.

314. In case of lack of funds for individual bankruptcy, expenses may be deferred (although *de facto* are advanced from the treasury).[195]

315. The insolvency officer is entitled to remuneration for the performance of the duties and compensation for expenses incurred, including for the specialists involved.[196] The amount of the remuneration is determined upon completion of the bankruptcy procedure based on the amount of the bankruptcy assets, as well as the volume and complexity of the work performed. The standard remuneration rates for insolvency officers are set out in the resolution on the remuneration of insolvency officers (*Insolvenzverwaltervergutungsverordnung*) adopted by the Federal Ministry of Justice (*Bundesjustizministerium*).

316. In accordance with this decree, the insolvency officer may, with the consent of the court, receive an advance payment from the bankruptcy assets, provided that the bankruptcy procedure lasts more than six months or there are particularly high costs.

317. The amount of remuneration is determined on a regressive basis. This means that the part of the bankruptcy assets due to the insolvency officer as the remuneration decreases with the increase in the bankruptcy assets. For example, 40% of the first € 10,000 of the bankruptcy assets will be paid as remuneration, while only 0.5% will be paid from the assets of more than € 50,000,000. The amount of remuneration cannot be less than € 1,000.

318. InsO also provides for specifics of the remuneration of the temporary administrator, authorized representative, and administrator in the individual bankruptcy.[197]

c. Liability of the Insolvency Officer

319. The insolvency officer appointed to a particular case is subject to control by the bankruptcy court. The court has the right to request special information or a report on the progress of the bankruptcy procedure at any time.[198]

320. In addition, the activities of the insolvency officer are subject to monitoring by the bodies representing the creditors' interests. The creditors' meeting (*Glaubigerversammlung*) may require special information or a report on the progress of

[195] Ibid., § 4a.
[196] Ibid., § 63 f.
[197] § 293 InsO.
[198] Ibid., § 58(1).

the bankruptcy procedure. In practice, the insolvency officer submits a report on his or her activities to the creditors' meeting at least once every six months.[199]

321. At the end of the bankruptcy procedure, the insolvency officer must submit a final report to the creditors' meeting.[200]

322. If in the course of bankruptcy proceedings it is discovered that the insolvency officer has not performed his or her duties properly, the court may issue a warning against the insolvency officer and then impose an individual fine of up to € 25,000.[201] As an extreme measure, the court may suspend the insolvency officer from performing his or her duties on its own initiative or at the request of the creditors' meeting or the creditors' committee.

323. Participants in a bankruptcy case may demand compensation for damages from the insolvency officer both for actions caused by improper performance of duties (for example, in case of sale of property from the bankruptcy assets at a lower price)[202] and for actions as a result of which claims of the first-priority creditors' cannot be satisfied.[203] Most often in practice, there are claims related to the inability to satisfy claims of the first-priority creditors and incorrect distribution of the bankruptcy assets.

3. The Procedure for Approving an Insolvency Officer in a Bankruptcy Case

324. The insolvency officer in a specific bankruptcy case is **appointed by the bankruptcy court**.[204]

325. As mentioned above **(para. 298 of the Analytical Report)**, the procedure for selecting the insolvency officer is divided into two stages. **The first stage** is necessary for the bankruptcy judge to obtain sufficient information about the facts related to candidates for the position of the insolvency officer in a particular case. The judicial practice has formed a rule according to which the procedure for registering a candidate for inclusion in the court list must be open and free from despotism.[205]

326. Each bankruptcy judge determines the criteria for including candidates in his or her own preliminary list[206] based on the general requirements **(paras. 299-312 of the**

[199] Ibid., § 79.
[200] Ibid., § 66.
[201] § 58(2) InsO.
[202] Ibid., § 60.
[203] Ibid., § 61.
[204] Ibid., § 56(1).
[205] BVerfG, Beschl. v. 23.5.2006 – 1 BvR 2530/04.
[206] BVerfG, Beschl. v. 3.8.2009 – 1 BvR 369/08.

Analytical Report). The process of collecting the necessary information by the bankruptcy judge remains at the full discretion of the judge. In practice, the judge uses a special questionnaire **(para. 304 of the Analytical Report)**. At the same time, in accordance with the constitutional principle of proportionality, a judge has the right to request only information that relates to general requirements for candidates for inclusion in the court lists **(paras. 299-312 of the Analytical Report)**.

327. It is not allowed to set any limit on the number of possible candidates. On the contrary, the law is based on the idea of giving each applicant an equal chance of receiving attention from the court.[207]

328. If the person applying for being included in the court list meets the criteria set forth by the bankruptcy judge, such person is included in the court list. A person who has received a refusal (which must be motivated) may appeal against such refusal in the appeal procedure.[208]

329. When deciding on the appointment of the insolvency officer for a particular case, the bankruptcy judge must select a candidate from the court list in accordance with the assumption that the selected **candidate will best meet the objectives of the bankruptcy case**. In the absence of a selected creditors' committee (*vorlaufiger Glaubigerausschuss*), the bankruptcy judge has broad discretion in selecting a suitable candidate.[209]

330. The selection of the insolvency officer should not be made according to the chronology of the inclusion of a person in the court list. On the contrary, the bankruptcy judge should proceed from the possibility and ability of the appointed insolvency officer to maintain a balance of interests of all parties to the bankruptcy case. Despite the fact that creditors do not have the right to influence the selection of an insolvency officer, **bankruptcy judges are recommended to put a particular candidate[210] up for a discussion.**[211]

331. When appointing the insolvency officer, the judge gets back to considering all the requirements that the insolvency officer must meet when being included in the court list. And if earlier some characteristics of the candidate were recognized as unimportant when including him or her in the court list, they become important later when appointing the insolvency officer. For example, the requirement of geographical (territorial) availability of the insolvency officer becomes important in cases of bankruptcy of

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[207] BVerfG, Beschl. v. 23.5.2006 – 1 BvR 2530/04.
[208] Graf-Schlicker, Insovenzordnung (5. Aufl., 2020), § 56 Rn. 37.
[209] BVerfG, Beschl. v. 23.5.2006 – 1 BvR 2530/04.
[210] The court is not bound by creditors' proposals, but in practice, before appointing an insolvency officer, the court invites creditors to speak on the candidacy of a specific manager the court considers worthy of appointment.
[211] Graf-Schlicker, Insovenzordnung (5. Aufl., 2020), § 56 Rn. 65.

individuals, especially when the debtor needs personal assistance. Other cases require practical experience in a particular industry or (as in the case of cross-border bankruptcies) knowledge of foreign languages and international bankruptcy law.

332. In addition, when appointing the insolvency officer, the bankruptcy judge comes back to the consideration of the insolvency officer's independence from the debtor and creditors in a particular case. InsO provides that the court should not draw conclusions about the insolvency officer's dependence solely on the basis of the fact that the name of the candidate was proposed by the debtor or creditor, or that the candidate previously provided general advice on bankruptcy issues to the debtor.[212] The court pays close attention to proposals of establishing certain requirements for taking the position of the insolvency officer in a particular case put forward by the participants of the case, or the creditor's proposals to provide financing to the debtor, provided that a particular person was approved as insolvency officer.[213] However, the fact that the insolvency plan has been developed jointly with the debtor and (or) creditors prior to the commencement of the bankruptcy procedure does not indicate that the candidate is dependent if the bankruptcy judge determines that the insolvency plan is balanced and takes into account the interests of all parties.

333. In other words, a candidate cannot be considered independent if there is objective evidence which, from the point of view of the debtor or creditor, raises doubt that the insolvency officer will perform his or her duties in the interests of the collective and equal satisfaction of creditors' claims.

334. **The selection of the insolvency officer, therefore, is carried out in a highly competitive environment**. Competition is not manifested in the submission of the best proposals by the insolvency officers, but in the assumption that the bankruptcy judge, being objective and independent, independently determines the candidate who will best achieve the objectives of the bankruptcy procedure.

335. Private organizations have developed several systems of certification and evaluation of bankruptcy procedures in order to track the number of insolvency officers, transparency and economic results of their work in the form of the amount of satisfied creditors' claims. Thus, all VID members are certified according to the DIN EN ISO 9001-2015 rules. The German Institute for Applied Bankruptcy (*Deutsches Institut fur angewandtes Insolvenzrecht*) has developed a certification and evaluation system that tracks the performance of insolvency officers by a number of key indicators.

336. The scientific literature and judicial practice recognize that certification and evaluation systems are based on an analysis of previous achievements of insolvency

[212] § 56(1) InsO.
[213] Graf-Schlicker, Insovenzordnung (5. Aufl., 2020), § 56 Rn. 70.

officers. They can be used both when drawing up court lists and when choosing an insolvency officer for a particular case. However, it is noted that certain parameters taken into account when drawing up ratings and certification are not objective and are not directly dependent on the fair and professional performance of the insolvency officer's duties (such as the amount of identified assets).[214]

337. Participants in a bankruptcy case may have some formal influence on the court's choice of an insolvency officer. All ways of influence are collective and therefore are perceived as the result of a consensus of the participants in the process.

338. In the preliminary procedure, the creditors' committee may propose a specific candidate for the position of a permanent administrator for approval by the court.[215]

339. The creditors' committee in the preliminary procedure appeared in German bankruptcy law with the Law on Further Promotion of Company Restructuring (*Gesetz zur weiteren Erleichterung zur Sanierung von Unternehmen*), the purpose of which was to strengthen the creditor's position in bankruptcy cases. The creditors' committee in the preliminary procedure is a specially created body and can be replaced by the creditors' committee in the open procedure. German law knows three types of creditors' committees in the preliminary procedure:

- appointed by the court on its own initiative;[216]

- mandatory court-appointed (*Pflichausschuss*) if the debtor has any two characteristics from the following list: minimum book value of assets — € 4,840,000; sales revenue for the last reporting period — at least € 9,680,000; average number of employees — at least 50 people;

- appointed by the court at the request of the debtor, temporary administrator, or creditor (*Antragsausschuss*); the applicant is required to provide the court with information about the members of the creditors' committee in the preliminary procedure and their consent to be appointed members of such committee.

340. As a rule, the creditors' committee in the preliminary procedure consists of five members. The bankruptcy judge must ensure that secured creditors, majority and minority creditors, and employees are properly represented in the creditors' committee in the preliminary procedure.[217]

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[214] Graf-Schlicker, Insovenzordnung (5. Aufl., 2020), § 56 Rn. 34.
[215] § 56a InsO.
[216] Ibid., § 21(2).
[217] K. Schmidt, Insolvenzordnung (19.Aufl.2016), §22a, Rn.44.

341. The creditors' committee in the preliminary procedure appointed in accordance with the abovementioned rules **(paras. 337-340 of the Analytical Report)** may propose the candidacy of a permanent administrator to the court. All members of the creditors' committee in the preliminary procedure must vote for one candidate. In this case, the court is generally bound by the proposal submitted. Refusal to approve a candidate proposed by the creditors' committee in the preliminary procedure is possible only on the grounds that such a candidate does not meet the general requirements for insolvency officers.[218]

342. In practice, the creditors' committee is rarely appointed in the preliminary procedure.[219]

343. The first creditors' meeting may also decide by a majority vote to select a candidate for approval as a permanent administrator.[220] In this case, the court is also bound by the taken decision and may refuse to approve the candidate only on general grounds **(paras. 299-312 of the Analytical Report)**.

344. The right of the creditors' meeting to propose the candidacy for the insolvency officer is of little practical significance. **The preliminary procedure takes from two to three months, while the first meeting of creditors cannot be convened earlier than two months from the start of the open procedure**. After four to five months of the entire bankruptcy procedure, the permanent administrator has usually already made or is making significant strategic decisions, and, therefore, his or her replacement can only harm the course of the procedure in most cases.

345. In certain circumstances (when the debtor retains self-management), the debtor has the right to propose the insolvency officer **(para. 292 of the Analytical Report)**. The court may refuse to approve the proposed candidate only in obvious cases when the candidate does not meet the generally accepted requirements. It is important to note that the appointed insolvency officer cannot be the person who has previously advised the debtor on the restructuring of its obligations.

346. In individual bankruptcy, both the debtor and creditors have the right to propose their candidacy for the insolvency officer. However, the court is not bound by the submitted proposals, and therefore the specified right of the debtor and creditors does not have a real impact on the selection of the insolvency officer.

347. Upon completion of the preliminary procedure and transition to an open procedure, the powers of the temporary administrator are terminated. As a rule, the

[218] Sec. 56a InsO.
[219] Kubler/Prutting/Bork, Insolvenzordnung (Stand: 83. EL 2020), §22a, Rn.44.
[220] § 57 InsO.

court appoints the same person who performed the duties of the temporary administrator for the position of the permanent administrator.

348. If the self-management is replaced by the regular procedure,[221] the person who supervised the debtor during the self-management is usually appointed as the insolvency officer.

349. Replacement of the insolvency officer is also possible in case the court finds serious grounds for removing him or her from duties on the complaint of one of the participants of the bankruptcy procedure, as well as if there is a request of the insolvency officer containing the justification of extraordinary circumstances preventing the insolvency officer from performing his or her duties.

[221] Ibid., § 272 InsO.

V. THE INSOLVENCY OFFICERS APPOINTING MODEL IN BANKRUPTCY CASES IN THE UNITED STATES OF AMERICA

1. A Brief Overview of Regulation in Bankruptcy Cases

a. General Information

350. The U.S. Constitution gives Congress the power to pass a uniform bankruptcy law. This law is Bankruptcy Code, which was adopted in 1978 and has reached the present time with certain changes.

351. In addition to the Bankruptcy Code, main procedural aspects are set out in the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules).

352. **Consideration of bankruptcy cases falls within the exclusive competence of the United States bankruptcy courts**. Bankruptcy courts are structural divisions of district courts (94 districts). As a general rule, district courts have the right to hear bankruptcy cases independently, but in practice, such cases are always referred to a specially formed bankruptcy court within the district court. A district court may hear a specific bankruptcy case as a trial court in exceptional cases where the case is complex or the applicable law causes conflicting judgments.

353. The bankruptcy court has jurisdiction over the debtor and its assets, regardless of their location.

354. The majority of bankruptcy cases considered in the United States are those under Chapter 7 of the Bankruptcy Code, which regulates liquidation activities.[222] Also, a significant number of cases are considered under Chapter 13 of the Bankruptcy Code (cases on debt restructuring of individuals with a stable income). Business reorganization cases under Chapter 11 of the Bankruptcy Code account for less than 1% of all bankruptcy cases.

[222] Caseload Statistics Data Tables. Table F2: U.S. Bankruptcy Courts – Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code – During the 12-Month Period Ending March 31, 2019. URL: https://www.uscourts.gov/sites/default/files/bf_f2_0331.2019.pdf (the date of access: 05.10.2020).

b. Insolvency Officers

355. Insolvency officers are often described as the "eyes and ears" of the court. According to the Court of Appeals for the Ninth Circuit, Congress created a "hybrid official" who "performs some functions historically viewed as judicial in nature, and others that are not".[223] In other words, the courts emphasize the mixed legal nature of the institution of insolvency officers. For the same reason, insolvency officers enjoy absolute, conditional, or quasi-judicial immunity from civil liability for damages.[224]

356. For the same reasons, in most liquidation cases (Chapter 7 of the Bankruptcy Code) a judge is never directly involved in the case, which from beginning to end is carried out exclusively by the insolvency officer, starting from the date of filing and ending with the court's final decision (Final Decree) on exemption of the debtor from the obligations and the release of the insolvency officer from his or her duties. The courts thus focus on the administration of justice and the resolution of social conflicts, which is the result of the evolution of the U.S. Bankruptcy Law over several centuries.

357. In the U.S. bankruptcy system, **there are two types of insolvency officers (usually called a trustee)** who enter the case depending on the type of bankruptcy:

- standing trustees **(paras. 358-362 of the Analytical Report)**;
- panel trustees **(para. 363 of the Analytical Report)**.

358. Just as in Austria **(paras. 208-215 of the Analytical Report)**, in the United States, both individuals and legal entities can act as an insolvency officer.

359. **A standing trustee** acts in bankruptcy cases under Chapter 13 of the Bankruptcy Code, which regulates the restructuring of individual debts, and in cases under Chapter 12 of the Bankruptcy Code, which deals with the reorganization of farmers. "Standing" is manifested in the fact that such a trustee is appointed on a permanent basis to conduct all cases under Chapters 12 and 13 of the Bankruptcy Code registered within a specific geographic area.

360. Standing trustees assess the financial position of the debtor, prepare recommendations for the court regarding the approval of the debt restructuring plan, execute the restructuring plan approved by the court by collecting payments from the debtor and transferring its funds to creditors.

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[223] *In re Castillo*, 297 F.3d 940, 951 (9th Cir. 2002).
[224] *Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 1981); *Smallwood v. United States,* 358 F. Supp. 398 (E.D. Mo.) *aff'd*, 486 F.2d 1407 (8th Cir. 1973); *In re Jacksen*, 105 B.R. 542 (9th Cir. BAP 1989).

361. A large amount of work of a standing trustee requires the maintenance of a whole staff of lawyers, financial experts, appraisers, consultants.

362. Standing trustees perform exclusively the functions of an insolvency officer.

363. Cases of liquidation (Chapter 7 of the Bankruptcy Code[225]) and business reorganization (Chapter 11 of the Bankruptcy Code[226]) are conducted by **panel trustees**. The "panel" nature here is based on the fact that trustees perform their functions in a particular district by joining a panel, from among the members of which appointment to a new bankruptcy case is carried out automatically. Panel trustees are few in number, and therefore easily monitored for their conscientious behavior in work and life. For example, in the official list for the State of Delaware, only five trustees are registered.[227]

364. Panels of trustees are formed by the United States Trustee **(paras. 373-375 of the Analytical Report)** from individuals, usually lawyers or accountants, who meet the following general requirements:

- integrity and high moral standards;
- physical and mental ability to properly perform the duties of a trustee;
- courtesy and accessibility for all participants who turn with questions or comments about a particular bankruptcy case;
- freedom from prejudice against any person or organization that might affect the person's unbiased performance of the trustee's duties;
- lack of kinship or proximity to the degree of a first cousin with any of the employees of the United States Trustee **(paras. 373-375 of the Analytical Report)**;
- belonging to one of the following categories: current member of the bar association at the supreme court of a state or District of Columbia, who is not subject to penalties; certified accountant; graduate of an accredited college or university with a degree in a business-related field, or holder of a master's or doctoral degree in a business-related field obtained at an accredited college or university;

[225] Chapter 7 of the Federal Bankruptcy Code. URL: http://www4.law.cornell.edu/uscode/11/ch7.html (the date of access: 05.10.2020).
[226] Chapter 11 of the Federal Bankruptcy Code. URL: http://www4.law.cornell.edu/uscode/11/ch11.html (the date of access: 05.10.2020).
[227] Chapter 7 Panel Trustees Office Locator. The U.S. Department of Justice site. URL: https://www.justice.gov/ust/eo/private_trustee/locator/7.htm#DE (the date of access: 05.10.2020).

- an undergraduate student or candidate for a master's degree in business administration recommended by the dean of the relevant law school or business school, who is mentored by a faculty member of the law school, or a panel trustee, or a member of the local bar association who works with the law students' experience program in law clinics;

- willingness and ability to provide reports at the request of the United States Trustee.

365. Also, in order to obtain the status of a member of the panel a candidate must pass a thorough initial biographical investigation conducted by the Federal Bureau of Investigation.

366. Every five years, the Federal Bureau of Investigation conducts repeated biographical checks of trustees.

367. A special exam for obtaining the status of a trustee is not conducted.

368. The trustee's activity is not exclusive to persons with the corresponding status.

369. The trustee cannot be appointed to the case until he or she provides a guarantee in favor of the United States to ensure the faithful performance of his or her official duties. The United States Trustee may allow the application of a comprehensive insurance guarantee covering several cases or the activities of several trustees. If the court finds that the panel trustee acted within the scope of his or her powers, but, despite this, violated some obligation, the injured party can apply for compensation at the expense of the specified insurance coverage.

370. The trustee acts as the principal for this obligation, and the surety liability insurance company usually requires compensation from him or her for any payments that it is obliged to make in favor of third parties. Since the insurance guarantee only protects the beneficiaries of the bankruptcy assets, but not the trustee him or herself, prudent trustees acquire professional liability insurance for themselves and their employees.

371. The United States Trustee determines the amount and conditions of the insurance guarantee of the panel trustees and the sufficiency of coverage for each case.

372. A claim for the trustee's surety is considered in an adversarial process and may be filed within two years from the date of the trustee's release from duty in the case.

c. The United States Trustee

373. Although **all trustees are independent, their activities are overseen by the US Trustee, a Federal Agency subordinate to the US Department of Justice**.[228] The United States Trustee operates in 48 U.S. states (excluding Alabama and North Carolina, where its functions are performed by bankruptcy administrator[229]) and has 21 regional offices. The United States Trustee is funded by the United States Trustee System Fund, which is formed mainly from contributions from companies applying for debt protection through bankruptcy proceedings.

374. The United States Trustee's mission is to ensure that bankruptcy procedures are open and efficient for the benefit of all interested parties: debtors, creditors, and society as a whole. If the trustees are the "eyes and ears of the court", the United States Trustee is the "bankruptcy court's watchdog".[230]

375. The United States Trustee has the following powers:

- appointing and supervising trustees under the rules of Chapters 7, 12, and 13 of the Bankruptcy Code (in some cases, when trustees are unable or unwilling to perform their duties — performing their functions directly);
- performing legally significant actions to comply with the requirements of the Bankruptcy Code and preventing crimes on this basis;
- transmission of information to law enforcement agencies to conduct criminal investigations (Federal Bureau of Investigation, U.S. Attorney's Office);
- checking the effectiveness of the procedures applied and the reasonableness of remuneration paid to trustees;
- appointment of creditors' committees and convocation of their meetings under the rules of Chapter 11 of the Bankruptcy Code;
- examining disclosure statements;
- popularization of bankruptcy law.

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[228] U.S. Trustee Program. Department of Justice. URL: https://www.justice.gov/ust (the date of access: 05.10.2020).
[229] Trustees and Administrators. United States Courts. URL: https://www.uscourts.gov/services-forms/bankruptcy/trustees-and-administrators (the date of access: 05.10.2020).
[230] House Report No. 989, 95th Cong., 2d Sess. at 88 (reprinted in 1978) U.S. Code Congressional & Admin. News at 5787, 5963, 6049.

2. Consideration of Bankruptcy Cases Under the Rules of Chapter 7 of the Bankruptcy Code

a. General Information on the Procedure

376. Bankruptcy under the rules of Chapter 7 of the Bankruptcy Code is **a liquidation** in which the trustee forms bankruptcy assets, sells the debtor's non-exempt property, and distributes the proceeds to creditors.

377. Liquidation is possible in respect of an individual, partnership, corporation, or other commercial organization.

378. The Bankruptcy Code provides for a very detailed list of documents and information that must be provided by the debtor in order to file a bankruptcy application and make it accepted by the court.

379. Filing an application under the rules of Chapter 7 of the Bankruptcy Code automatically stops most enforcement actions against the debtor's property. As long as this suspension is in effect, creditors are generally unable to initiate or continue legal actions, demand payment of wages, or even make phone calls demanding payments.

380. After filing for bankruptcy, the United States Trustee appoints a trustee to liquidate the debtor's assets, except for those that cannot be foreclosed on.

381. If all the debtor's assets are exempt from foreclosure or are subject to retention in favor of the mortgagee, the trustee, as a rule, submits a report on the absence of assets to the court. Most cases under Chapter 7 of the Bankruptcy Code fall into this category, when the debtor has no assets.

382. The basic role of the trustee in cases under Chapter 7 of the Bankruptcy Code where the debtor still has assets is to sell those assets which are not exempt in such a way as to maximize payments to the debtor's creditors without security for their claims.

383. The trustee has other powers on the formation of the bankruptcy assets for settlements with creditors, for example, the right to manage the business of the debtor, with the consent of the court and provided that such operation of the bankruptcy assets will allow to increase payments, which the creditors will be happy to receive.

384. Completion of the liquidation releases the debtor from the obligations that could not be fulfilled during the bankruptcy.

b. Appointment of the Trustee

385. Panel trustees are appointed to particular cases by the regional office of the United States Trustee in the following cases:

- a court issues a decision on the initiation of protective measures confirming the filing of a bankruptcy application under Chapter 7 of the Bankruptcy Code;
- the transition from one bankruptcy procedure to another under the rules of Chapter 7 of the Bankruptcy Code;
- a court makes a decision on the appointment of a trustee for applications for forced bankruptcy;
- the previous trustee's death, suspension, or withdrawal from the procedure.

386. In its practice, the United States Trustee appoints panel trustees in accordance with the blind rotation system from a list of all collegial trustees in a particular region.[231] This rule may be revised from time to time if there are special reasons:

- unique circumstances of the case;
- the need to ensure equality in the distribution of cases among the members of the panel;
- the trustee has restrictions on the distribution of cases;
- performance of duties by the trustee in a newly opened case or in a case where there was a transition from one procedure to another;
- the geographical inconvenience;
- engagement of the trustee in training new members of the panel.

c. Remuneration (Commission) of the Trustee

387. In most cases considered under Chapter 7 of the Bankruptcy Code, no bankruptcy assets are formed and there are no assets, since all the debtor's small

[231] Handbook for Chapter 7 Trustees. URL: https://www.justice.gov/ust/file/handbook_for_chapter_7_trustees.pdf/download (the date of access: 05.10.2020).

property is protected by law from creditors' claims. In such cases, the insolvency officer receives a fixed administrative fee of $ 60, which is paid out of the fee paid by the debtor for filing for bankruptcy.

388. If there are assets in the case that are not protected from seizure, or the trustee finds the additional property of the debtor, such trustee is paid a commission, the amount of which is based on a sliding scale established by law. The amount of the commission is calculated depending on the amount of payments made by the trustee in favor of creditors.

389. In cases involving assets, the amount of commission that the trustee will receive is based on a sliding scale established by law and is determined as follows:

- 25% of the first $ 5,000 paid;
- 10% of the next $ 45,000;
- 5% of the next $ 950,000;
- 3% of the amount exceeding $ 1,000,000.

390. The reduction coefficient is intended to equalize the position between trustees engaged in cases with insignificant assets (which are the majority) and trustees assigned to large procedures.

391. The trustee must submit an application for payment of remuneration, and all creditors and other interested parties are notified of the requested amounts. After holding a hearing on the submitted objections (if any), the court verifies the trustee's application for payment of remuneration and makes a decision on payment of remuneration in the amount that it considers reasonable.

392. In practice, since the law refers to the trustee's remuneration as a "commission", unless the trustee was too slow in managing the bankruptcy assets or did not perform his or her duties well in a different way, the courts try to award trustees compensation for their work in the maximum amount provided for by law. This practice reflects the tacit recognition that remuneration for cases with assets also covers the work of trustees in a large number of cases without assets to which they are assigned.

393. The trustee can cover expenses from the bankruptcy assets as administrative expenses, but, as with respect to remuneration, this becomes possible only after the trustee submits an application for reimbursement of expenses and it is approved by the court after notifying all interested parties to the bankruptcy case.

3. Consideration of Bankruptcy Cases Under the Rules of Chapter 11 of the Bankruptcy Code

a. General Information About the Procedure

394. The bankruptcy proceedings under Chapter 11 of the Bankruptcy Code start with the debtor's application to the court. The application is submitted at the place of registration of the company or the place of residence of the individual.

395. A bankruptcy application under Chapter 11 of the Bankruptcy Code may be voluntary (filed by the debtor independently) or involuntary (filed by three or more creditors with claims that are not conditional, are not the subject of a *bona fide* dispute, and in total make up to a certain amount, which changes from time to time[232]).

396. After the application is submitted (by the debtor or its creditors), the debtor is automatically assigned the status of debtor in possession. This term means that the debtor retains ownership and control of its assets without appointing a trustee until the reorganization plan is approved, or the application is rejected by the court, or the Bankruptcy Code proceeds to liquidation under Chapter 7, or the trustee is appointed.

397. Chapter 11 of the Bankruptcy Code applies to the reorganization of a business (corporation, individual entrepreneur, partnership). Chapter 11 of the Bankruptcy Code considers as bankruptcy assets: for a corporation — only the property of the corporation, for an individual entrepreneur — all his or her assets, including those that do not participate in the business, for a partnership — the property of the partnership, and in some cases — the personal property of partners.

398. A debtor in possession of its own property exercises fiduciary rights as if it had been assigned a trustee (except for investigative ones): checking the causes of bankruptcy, evaluating the property, checking the validity of creditors' claims, and reporting per established procedure. The debtor may, with the consent of the court, hire advocates, accountants, appraisers, auctioneers, and other specialists to assist in achieving the objectives of the procedure.

399. Control over the debtor's compliance with the obligations of the debtor in possession is carried out by the United States Trustee. The United States Trustee is also responsible for holding meetings of creditors. The United States Trustee and creditors may question the debtor under oath about the state of his or her property and how he or she conducts his or her business.

[232] So, in 2016, the total amount of creditors' claims could not be less than $ 13,475, in 2020 — $ 15,775.

400. The United States Trustee also receives reports from the debtor on its monthly income and operating expenses, opening of new bank accounts, payment of wages and taxes. On a quarterly basis, the United States Trustee receives from the debtor between $ 325 and $ 30,000 in compensation for his or her work until the case is terminated or changed (for example, for Chapter 7 bankruptcy proceedings of the Bankruptcy Code). The amount of remuneration of the United States Trustee is determined depending on the quarterly payments of the debtor.

401. The creditors' committee, appointed by the United States Trustee of seven largest creditors whose claims are unsecured, can play a critical role in Chapter 11 bankruptcy cases. The creditors' committee may advise the creditor on business matters, investigate the debtor's activities and business, and participate in the formation of a reorganization plan. With the consent of the court, the creditors' committee may hire advocates or other specialists to assist in the performance of the functions of the creditors' committee.

402. In practice, often there are cases where the debtor's business is not significant or where the number of creditors is small (small business case). If the debtor's business has obligations of no more than $ 2,566,050, and the creditors' committee is not appointed or determined by the court as insufficiently active, a special bankruptcy procedure is applied under Chapter 11 of the Bankruptcy Code. Under this procedure, visits to the office of the United States Trustee and the court must be carried out by the debtor's management staff in the presence of an adviser (advocate), and the frequency of providing documents to the United States Trustee and the court increases significantly. In other words, the control over the debtor (small business debtor) by the United States Trustee is strengthened. Chapter 11 of the Bankruptcy Code also provides for other features of conducting the procedure in relation to, for example, a debtor with a single asset (single asset real estate debtor).

403. After the opening of a bankruptcy case, all actions aimed at enforcement of the debtor's obligations that arose before the start of the bankruptcy procedure are automatically suspended (with minor exceptions) (automatic stay). Satisfaction of claims becomes possible only with the preliminary permission of the court and after notifying the interested parties and giving them the opportunity to express their objections.

404. The exclusive right to submit a reorganization plan is granted to the debtor (except for certain cases **(para. 402 of the Analytical Report)**), who is obliged to submit such a plan within 120 days from the date of opening the case. The creditor or trustee may submit their reorganization plan no earlier than the specified deadline. The United States Trustee may not propose a reorganization plan.

405. In general terms, in the process of considering an application under Chapter 11 of the Bankruptcy Code, the debtor is required to submit a reorganization plan. The amount of information to be disclosed in this case is determined by the court

independently. The reorganization plan is subject to review by the court in the context of its feasibility and compliance with the formal requirements of the Bankruptcy Code.

406. The approved plan is essentially a new contractual obligation that replaces the contracts that have existed before the debtor's bankruptcy. From the date of approval of the reorganization plan by the court, the debtor is released from all obligations that arose earlier than this date. However, the debtor is bound by the requirements of the plan and must make payments in accordance with it. There are exceptions to the rule of releasing the debtor from obligations. For instance, an individual debtor is not exempt from the obligations specified directly in the Bankruptcy Code.[233]

407. The Bankruptcy Code requires the debtor in possession or trustee to report to the court about the execution of the plan. The executed plan is the basis for the court's final decision (Final Decree) that the bankruptcy assets are released from obligations (fully administered).

b. Appointment of the Trustee

408. Although the appointment of a trustee is rare in Chapter 11 bankruptcy cases, an interested party to the case or the United States Trustee may apply to the court for the appointment of a trustee or examiner.

409. After receiving the relevant request and holding a meeting, the court decides on the appointment of a trustee or examiner in the case. The court's decision must be motivated and may be caused, for example, by fraudulent actions on the part of the debtor, dishonesty, incompetence, or gross mismanagement of the bankruptcy assets. The appointment of a trustee or examiner in a case must be in the interests of creditors, any holders of equity, and the preservation of the bankruptcy assets.

410. The United States Trustee or an interested party may also apply to the court for a decision to appoint a trustee if there are reasonable grounds to believe that any of the parties controlling the debtor participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's financial reporting.

411. If the court decides to appoint a trustee, the United States Trustee appoints a non-interested person, whose candidacy is subject to approval by the court, to serve in this capacity. As a rule, the trustee of a case under Chapter 11 of the Bankruptcy Code is appointed from among the members of the panel trustees working on cases under Chapter 7 of the Bankruptcy Code.

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[233] These obligations include, for example, those for which the first payment is made after the expiration of the three-year period for the implementation of the reorganization plan, as well as certain tax payments.

412. The case trustee is responsible for managing the bankruptcy assets, operating the debtor's business, and, if necessary, submitting a reorganization plan. The Bankruptcy Code requires the trustee to submit the plan as soon as possible, or to submit a report explaining the reasons why the plan will not be submitted, or to recommend that the case is considered under another Chapter of the Bankruptcy Code, or to recommend that the case is dismissed.

413. At the request of an interested party or the United States Trustee, the court may cancel the appointment of a trustee and restore the debtor status of a debtor in possession at any time before approval of the plan of reorganization.

414. The appointment of the examiner on the case is even rarer. The role of the examiner is to act as a trustee in relation to the investigation of the causes of bankruptcy. At the direction of the court, the examiner may also perform other functions of the trustee which the debtor in possession is prohibited from performing. In other words, the powers of the examiner in each case will be determined by the court individually. In the future, the examiner may not be the trustee in the same case.

c. Remuneration (Commission) of the Trustee

415. The trustee receives compensation in the same way as other professional experts involved in the case. After notifying the interested parties and holding a hearing, the court may award the trustee or other professional expert involved in the case reasonable compensation for the services actually rendered and necessary, as well as compensation for the actual and necessary expenses incurred.

416. In determining the amount of reasonable compensation, the court considers the nature, scope, and value of professional services, taking into account all relevant factors, including the following:

- time spent on providing such services;
- stated prices for such services;
- whether the services were necessary for the administration of the case or useful at the time they were provided;
- whether the services were performed within a reasonable period of time, proportionally to the complexity, importance, and substance of the problem, issue, or task for which they were provided;
- whether compensation is reasonable given the amount of compensation usually paid to professionals of this level in non-bankruptcy cases.

417. Payment of compensation to the trustee is limited to the established percentage of all funds paid by the trustee to interested parties in the case (excluding the debtor).

4. Suspension or Exclusion of the Trustee from the Panel by the United States Trustee

418. The United States Trustee has a wide range of rights to suspend and exclude panel trustees. The reasons the United States Trustee may be guided by are provided in a non-exhaustive list and include:

- failure to retain funds and assets or to report on them;
- failure to perform duties in a timely manner and at a consistently satisfactory level;
- failure to comply with the provisions of the Bankruptcy Code, Bankruptcy Rules, and local court regulations;
- non-cooperation and failure to comply with orders, instructions, and guidance of the court or the United States Trustee;
- performance of general duties and management of the flow of cases is lower than that of the other members of the Chapter 7 panel trustees or other standing trustees;
- failure to show proper character in communications with judges, clerks, advocates, creditors, debtors, the United States Trustee, and the public;
- failure to adequately monitor the work of professional experts and other persons engaged by the trustee to assist in the administration of cases;
- failure to submit timely and correct reports, including interim reports, final reports, and final financial reports;
- failure to properly hold or attend the creditors' meeting in person;
- there is a case pending before a court or state licensing agency that calls into question the trustee's competence, financial responsibility, or good faith;
- regular non-acceptance of distributed cases due to conflicts of interest, the trustee's unwillingness or his or her inability to work;

- the United States Trustee's decision that, in the interests of effective case management or due to a decrease in the number of cases, it is necessary to reduce the number of panel or standing trustees.

419. The decision of the United States Trustee to suspend or terminate the distribution of cases to the trustee shall take effect after the deadline for appealing this decision by the managing director to the Director of the United States Trustee or, if the trustee has requested a review in a timely manner, after the approval of the final written decision by the Director of the United States Trustee.

420. The decision of the United States Trustee to suspend or terminate the distribution of cases to the trustee may include or may be subsequently supplemented by a temporary directive, according to which the United States Trustee immediately stops the distribution of cases to the trustee for the period of review of the decision by the Director of the United States Trustee. The United States Trustee may issue such an interim directive if it determines that:

- continuing to distribute cases to the trustee would endanger the security of the bankruptcy assets;

- the trustee has appeared to be unauthorized to work in accordance with the applicable law, rule, or regulation;

- the trustee engages in activities that are dishonest, deceitful, fraudulent, or criminal in their nature;

- the trustee engages in other malicious illegal activities that do not correspond to his or her position as a trustee or violate the trustee's duties.

421. If the United States Trustee issues a temporary directive, the trustee may appeal to the Director of the United States Trustee with a request to suspend its action if he or she has filed a request for revision of the suspension or termination of assignment of cases to the trustee timely. The further procedure for considering the trustee's complaint is regulated in sufficient detail and is not included in the subject of this study.

422. A trustee whose powers have been suspended or terminated may also challenge the decision of the United States Trustee by applying for judicial review.

5. Reasoned Removal of the Trustee by the Court

423. The Bankruptcy Code provides that the bankruptcy court, after notification and hearings, may suspend the trustee from performing his or her duties on a reasoned basis. A bankruptcy court may do so at the request of a party or even in its absence.[234]

424. The law does not define the content of a "motive", but traditionally such motives include fraud, dishonesty, or damage to the interested person. As a general rule, trustees cannot be removed for simple errors within the reasonable exercise of their professional discretion,[235] and the removal of a trustee is an exceptional measure.[236]

6. The Responsibility of Trustees for Crimes in the Field of Bankruptcy

425. The U.S. bankruptcy system at first instance depends on panel trustees who must identify criminal behavior and refer such cases to the U.S. Attorney's Office or other appropriate authorities.

426. A trustee is also subject to criminal liability for crimes in the field of bankruptcy committed during the performance of his or her powers in a particular case.

[234] *Walden v. Walker* (*In re Walker*), 515 F.3d 1204 (11th Cir. 2008) and *Morgan v. Goldman* (*In re Morgan*), 375 B.R. 838 (B.A.P. 8th Cir. 2007).
[235] *In re Haugen Const. Service, Inc.*, 104 B.R. 233, 240 (D. N.D. 1989).
[236] *In re JMW Auto Sales*, 494 B.R. 877, 889 (S.D. Tex. 2013).

VI. THE INSOLVENCY OFFICERS APPOINTING MODEL IN BANKRUPTCY CASES IN CHINA

1. A Brief Overview of Regulation in Bankruptcy Cases

a. Sources of Bankruptcy Law

427. The main legal act on bankruptcy issues in the People's Republic of China is the Enterprise Bankruptcy Law, which entered into force on June 1, 2007. It consists of 136 articles combined in 12 chapters and defines general conditions for declaring a debtor bankrupt, the insolvency officer's powers, types of bankruptcy procedures, the rights and obligations of participants in a bankruptcy process, as well as procedural aspects of consideration of bankruptcy cases.

428. In addition to Enterprise Bankruptcy Law, the Supreme People's Court of the People's Republic of China accepted the regulatory legal provisions, for example, Regulation on remuneration, Regulation on the appointment, Regulation "On certain issues concerning the application of the Enterprise Bankruptcy Law".

429. It should be noted that the Chinese system of bankruptcy law is a conceptual hybrid combining the U.S. concept of debtor in possession and the UK concept of administrator replacement.

b. The Types of Procedures Used in Bankruptcy Cases and the Functions of the Insolvency Officer in Such Procedures

430. The Enterprise Bankruptcy Law assigns consideration of bankruptcy cases to the jurisdiction of the second-level people's court[237] at the location of the debtor.[238]

431. Depending on who of the subjects of the competition process applies to the court with an application for the debtor's bankruptcy, the people's court may initiate one of the following procedures:

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[237] The local second-level people's courts consider cases decisions upon which are made by the first-level people's courts (which in are called "trivial" cases in the Chinese terminology, that is, those that do not require the participation of parties) as a court of appeal, and the most serious cases (which are not authorized to be considered by the first-level courts) as a court of first instance.
[238] Article 3 of the Enterprise Bankruptcy Law.

- at the request of the debtor or a member of the debtor which has at least 1/10 of the share in the debtor's authorized capital — conciliation procedure, financial rehabilitation (in some sources referred to as "reorganization"), or declaration of bankruptcy and liquidation;

- at the request of the creditor — financial rehabilitation or declaration of bankruptcy and liquidation;

- at the request of the insolvency officer — declaration of bankruptcy and liquidation.[239]

432. The Enterprise Bankruptcy Law uses the term "administrator" regardless of the procedure applied to the debtor.

433. The appointment of the administrator is made by the people's court simultaneously with the determination to initiate bankruptcy proceedings.[240] From this moment on, the debtor's activities are controlled by the people's court and the administrator: the debtor continues to operate, but any requirements of the people's court and the administrator become mandatory.

434. At the same time, the administrator receives a wide range of powers to manage the debtor: to control the debtor's property and documents; to analyze its financial condition; to make decisions on the internal management system, of daily and other necessary expenses, on continuing of economic activities; to dispose of the debtor's property; to participate in legal proceedings on its behalf; to challenge transactions within 1 year before the date of acceptance of the bankruptcy application.[241]

435. Officers of the debtor in charge, in the number of which the Enterprise Bankruptcy Law names legal representatives, and (in there is the decision of the people's court) financially responsible persons, and other senior executives, within the specified period are required to properly store the debtor's documents and property, carry out work in accordance with the instructions of the people's court and the administrator, attend creditors' meetings, leave their places of residence only after the permission of the people's court, not to accept the appointment to the position of member of the board of directors, auditor, senior managers in other companies.[242]

436. The administrator has the right to refuse to execute the debtor's contracts or decide to continue their execution.

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[239] Article 7 of the Enterprise Bankruptcy Law.
[240] Article 13 of the Enterprise Bankruptcy Law.
[241] Articles 25, 31, 32 of the Enterprise Bankruptcy Law.
[242] Article 15 of the Enterprise Bankruptcy Law.

437. Before considering the merits of the application for bankruptcy proceedings against the debtor, the people's court publishes a notice of acceptance of the debtor's bankruptcy application for consideration, indicating the date and place of the first creditors' meeting. From the moment the people's court publishes the said notice, creditors are given from 30 days to 3 months to submit their claims.[243]

438. Claims of creditors are considered and included in the register of claims by the administrator. If creditors disagree with the administrator's decisions, they can appeal these decisions to the people's court.[244]

439. A request for **the conciliation procedure**[245] may be filed by the debtor either at the initial application for bankruptcy to the people's court or at any stage before the debtor is declared bankrupt and its liquidation begins. The conciliation procedure is a settlement agreement between the debtor and its creditors, which is subject to approval by the creditors' meeting and the people's court.

440. The administrator does not participate in the conciliation, the functions of publishing information about the beginning of the procedure and convening a creditors' meeting to discuss the draft settlement agreement are performed directly by the people's court.

441. **Financial rehabilitation ("reorganization"[246])** is initiated in relation to the debtor by a ruling of the people's court, taking into account the decision of the creditors' meeting, the exclusive competence of which is to approve the financial rehabilitation plan.

442. Financial rehabilitation helps the debtor who is experiencing temporary difficulties but has clear prospects of overcoming the crisis to continue its activities and restore its ability to pay debts.

443. Financial rehabilitation as a procedure may be voluntary (if the debtor or a member of the debtor with at least 1/10 of the share in the authorized capital applies for the initiation of financial rehabilitation) and forced (if creditors apply for the initiation of financial rehabilitation). At the same time, if the creditor applies to the court for declaring the debtor bankrupt and liquidation, the debtor or its member can avoid the liquidation procedure by applying to the people's court for the initiation of financial rehabilitation at any time before declaring the debtor bankrupt.

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[243] Article 45 of the Enterprise Bankruptcy Law.
[244] Article 58 of the Enterprise Bankruptcy Law.
[245] Articles 95-106 of the Enterprise Bankruptcy Law.
[246] Articles 70-94 of the Enterprise Bankruptcy Law.

444. During the period of financial rehabilitation, the debtor may conduct business under the administrator's supervision and with the permission of the people's court. In this case, the powers of the administrator **(paras. 429, 431, 443 of the Analytical Report)** are exercised by the debtor itself.

445. Within 6 months from the date of initiation of the financial rehabilitation procedure, the debtor (when the debtor manages business independently) or the administrator (when the debtor's business is managed by the administrator) must prepare a draft financial recovery plan. At the application of the person involved in the preparation of the draft plan, the period for preparation may be extended by the people's court for another 3 months.

446. The draft financial rehabilitation plan must contain a significant amount of information: (1) the debtor's business plan, (2) the classification of creditors' claims, (3) the adjustment of the creditors' claims plan, (4) the payment plan for creditors' claims, (5) term of the financial rehabilitation plan, (6) term of monitoring the implementation of the financial rehabilitation plan, (7) other measures taken in the interests of creditors.

447. After receiving the draft financial rehabilitation plan, the people's court convenes a creditors' meeting to vote on the draft plan. The person who has prepared the plan must provide explanations to the creditors' meeting and answer any questions that arise.

448. If the plan is approved by the creditors' meeting, the debtor or the administrator applies to the people's court for approval of the financial rehabilitation plan. If any of the voting groups of creditors has not approved the financial rehabilitation plan, the people's court may still approve the plan at the reasonable request of the debtor or the administrator.

449. Thus, it may take up to 13 months from the moment of applying for the debtor's bankruptcy and to the approval of the reorganization (financial recovery) plan only **(paras. 433, 437, 445 of the Analytical Report)**.

450. From the moment of approval of the financial rehabilitation plan, the debtor is responsible for its implementation, and the role of the administrator is limited to monitoring the implementation of the plan. The monitoring term is determined in the financial rehabilitation plan itself. At the end of the observation, the administrator must submit a report to the people's court. Monitoring of the implementation of the financial rehabilitation plan may be extended on the basis of the people's court's ruling. After the people's court approves the monitoring report, the insolvency officer's powers are terminated.

451. The financial rehabilitation procedure may result either in the restoration of the enterprise's solvency, or termination of the financial rehabilitation plan and declaring the debtor bankrupt.

452. **Declaration of bankruptcy (liquidation procedure[247])** entails the sale and distribution of the debtor's property and subsequent liquidation of the enterprise. The duties of the administrator in this procedure, in addition to the mentioned above **(paras. 434-436 of the Analytical Report)**, include the development of the plan of the bankruptcy assets sale, distribution of assets among creditors, and formalities for the removal of the debtor from the register.

2. The Insolvency Officer Status

a. Criteria for Obtaining the Status of the Insolvency Officer

453. In Chinese bankruptcy law, both individuals and specialized companies referred to as "public intermediary institutions" (legal or accounting firms, companies the main focus of which is bankruptcy, liquidation, etc.) in the Enterprise Bankruptcy Law can act as administrators.[248] As a rule, people's courts prefer public intermediary structures.

454. If a legal entity is appointed as the administrator, the people's court determines a particular individual (a member of the organization) responsible for performing the administrator's duties.

455. Depending on the actual circumstances of the case, the people's court may, after consulting with companies that are professional market participants **(para. 453 of the Analytical Report)**, appoint an employee of such company who has proven professional knowledge and skills as the administrator.

456. The following persons cannot be administrators:

- those who have served their sentences for intentional crimes;
- those whose licenses to conduct professional activities related to the performance of the administrator's duties were revoked;
- those who are personally interested in the outcome of the bankruptcy case;

[247] Article 107 of the Enterprise Bankruptcy Law.
[248] Article 24 of the Enterprise Bankruptcy Law.

- those who, in the opinion of the people's court, cannot exercise the powers of the administrator.

457. If an individual is appointed to the position of administrator by the people's court, the Enterprise Bankruptcy Law requires him or her to insure the professional liability.

458. In practice, individuals are rarely appointed as a sole administrator — usually only in simple cases (with established facts, no difficulties in establishing creditors' claims and receivables, and clear information about the composition of the debtor's property).

459. Chinese law does not require passing a special qualification exam to obtain the status of the administrator. It is assumed that persons who are employees of companies appointed as administrators **(para. 453 of the Analytical Report)** are sufficiently qualified already by virtue of their activities — legal activities, audit, etc. However, the people's court may use additional professional tests to assess the ability of a particular individual to be the administrator in a certain case.

460. Each people's court independently maintains a list (register) of administrators. In order to be included in the court list, a candidate must apply to the people's court and disclose information about his or her professional activities, qualified personnel, experience in bankruptcy cases, and business reputation.

461. Different people's courts use about the same approach towards court lists and appointment of administrators. For example, in Shenzhen, the second-level people's court uses a hierarchical system for managing a list of insolvency officers which is made up of public intermediary institutions. The people's court classifies bankruptcy cases into three categories depending on their complexity: complex,[249] ordinary, and small. In the same way, the people's court classifies administrators: administrators of the first category can conduct cases of any complexity, administrators of the second category — only ordinary and small bankruptcies, administrators of the third category — only small bankruptcies. After the case is accepted, the court usually applies the lottery method to select the administrator from the appropriate category of the list.

462. The second-level people's court in Shenzhen also applies a system for evaluating the professional qualities of administrators. Based on the results of this assessment, the People's Court may raise or lower the category of the administrator or even remove him or her from its list. For the purpose of evaluation, a special audit

[249] Cases involving the bankruptcy of banks, insurance companies, and other financial institutions; companies, the shares of which are listed on the stock exchange; businesses, bankruptcy of which is of public significance within a country, region, or province; cases in which the value of the debtor's property is more than ¥ 100,000,000; and any other cases that the people's court considers complex and important.

commission is established in the people's court, which examines the proper performance of duties in previous cases.

463. In case of unsatisfactory work of the administrator, the audit commission transfers him or her from one category to another (lower). If the work of the administrator of the third category is found unsatisfactory, then he or she is subject to exclusion from the court list.

464. The rules of the second-level people's court in Shenzhen also provide for unconditional grounds for excluding the administrator from the court list:

- conviction for an intentional crime;
- termination of a special professional permit (for example, the status of an advocate);
- punishment for administrative, disciplinary offense received from state bodies or self-regulatory organization and related to dishonest, negligent conduct of business or professional activities;
- bankruptcy procedures applied to the administrator;
- negligent conduct or deliberate actions in any bankruptcy case resulted in losses to creditors;
- evading the control of the court, the creditors' meeting, the creditors' committee, refusing to improve the work after receiving recommendations and having additional training;
- violation of the law or receiving remuneration in circumvention of court procedures;
- failure to take measures to resolve conflicts of interest.

b. Specifics of Guarantees of the Insolvency Officer Status

465. The main person influencing the status of the administrator in China is the people's court. It is the people's court that has the right (and the duty) to form court lists and assign appropriate categories to administrators.

466. The debtors have no supervisory powers in relation to administrators. It is noteworthy that the Enterprise Bankruptcy Law and regulations issued by the Supreme People's Court of the People's Republic of China do not contain any indication of the debtor's ability to challenge the actions of a particular administrator, although article

130 of the Enterprise Bankruptcy Law very briefly mentions that in case of improper performance of the administrator's duties the debtor's losses should be compensated.

467. A certain role in the control over the administrator's activities is played by the creditors' meeting. The administrator reports to the creditors' meeting in the same way as to the people's court and asks the creditors' meeting for approval on most key issues in bankruptcy proceedings. For example, adoption of the debtor's financial rehabilitation plan **(para. 447 of the Analytical Report)** almost always requires approval by the creditors' meeting.

468. Certain powers of the creditors' meeting may be transferred to the creditors' committee, which is formed from representatives of the creditors' meeting and one representative of the debtor's labor collective or trade union.[250]

469. The analysis of the status of the administrator allows to conclude that such special position — being controlled almost exclusively by the People's Court — is the result of recognizing the priority of public law principles in the administrator's activities.

470. The main guarantee of the status of the administrator is a legally established rule on receiving remuneration and compensation of expenses from the bankruptcy assets as a priority in comparison with the claims of other persons.[251]

471. If the debtor does not have funds, remuneration may be paid from special funds formed by the people's court of: funds withheld in other bankruptcy cases; government subsidies, public donations; funds earned by foundations; funds of self-regulatory organizations of insolvency officers; other legal sources. In the city of Chengdu, for example, administrators make deductions to a special fund formed by the people's court from their remuneration in bankruptcy cases in the following amount:

- if the remuneration is less than ¥ 500,000, no deductions are made;
- for remuneration of ¥ 500,000–1,000,000 — 1%;
- for remuneration of ¥ 1,000,000–3,000,000 — 3%;
- if remuneration exceeds ¥ 3,000,000 — 5%.

472. The amount of remuneration paid to the administrator is determined by the people's court based on the amount of creditors' claims repaid and is from 0.5 to 12 percent of the repaid register:

[250] Articles 67-69 of the Enterprise Bankruptcy Law.
[251] Article 43 of the Enterprise Bankruptcy Law.

- if up to ¥ 1,000,000 is repaid to the creditors — up to 12% of the specified amount;
- if ¥ 1,000,000–5,000,000 is repaid — no more than 10%;
- if ¥ 5,000,000–10,000,000 is repaid — no more than 8%;
- if ¥ 10,000,000–50,000,000 is repaid — no more than 6%;
- if ¥ 50,000,000–100,000,000 is repaid — no more than 3%;
- if ¥ 100,000,000–500,000,000 is repaid — no more than 1%;
- if more than ¥ 500,000,000 is repaid — less than 0.5%.[252]

473. The people's court has the right to determine whether remuneration is paid in installments during the entire bankruptcy procedure or at the end of it.[253]

474. The administrator may, with the consent of the people's court, involve individual specialists to assist in the implementation of his or her functions. However, if the involvement of such persons is aimed at disproportionately spending the bankruptcy assets, the administrator must also obtain the approval of the creditors' meeting. Practicing advocates note that they have not encountered such situations.

475. In some regions of China, administrators form self-regulatory organizations where membership is voluntary and which are advisory structures with the purpose of providing methodological assistance to people's courts in bankruptcy cases.

c. Liability of the Insolvency Officer

476. For organizations and separate individuals included in the court lists, the category assigned by the audit commission of the people's court based on the results of evaluating the administrator's activities is important. Thus, the downgrading of the administrator's category or exclusion from the court list (as an extreme measure) for improper work in the bankruptcy case is one of the most important general means of impact: on the one hand, the people's court responds to the administrator's efficiency in the past, on the other hand, it implements a preventive function restricting the offenders' admission to cases.

[252] Article 2 of the Regulation on remuneration.
[253] Article 3 of the Regulation on remuneration.

477. A natural extension of liability measures is the possibility of removing the administrator from conducting a specific case due to committed violations.

478. For violations of the rules of bankruptcy proceedings, the people's court may fine administrators, as well as oblige them to compensate losses caused to the debtor, creditors, and third parties, as provided for in article 130 of the Enterprise Bankruptcy Law.

3. The Procedure for Approving the Insolvency Officer in a Bankruptcy Case

479. In order to avoid manipulation in the appointment of the administrator and conflicts of interest, Chinese bankruptcy law provides people's courts with three methods of a random selection of the administrator from the court lists:

- in order of priority;
- random draw;
- computer approach (lottery).[254]

480. At the same time, the people's court first determines the complexity of the case, forming on its base the list of administrators whose category allows to exercise authority in a particular bankruptcy case, and random selection methods are used only at the third stage.

481. Thus, the influence of the people's court on the selection of a candidate for the position of the administrator is reduced to determining the complexity of the case, the criteria for which are quite strict and transparent **(para. 461 of the Analytical Report)**.

482. For banks, insurance companies, and other financial institutions, as well as companies the bankruptcy of which is of national significance, or in cases with complex legal structure, the people's courts may refer to the lists of administrators of courts of higher instance or the lists of other people's courts.[255]

483. For debtors in this category **(para. 482 of the Analytical Report)**, there is also a rule according to which the people's court may, by public announcement, invite public intermediary institutions included in the court list to participate in the competition for appointment as the administrator. To conduct such competition, it is necessary that at

[254] Article 15 of the Regulation on the appointment.
[255] Articles 20-22 of the Regulation on the appointment.

least three public intermediary institutions respond to the court's announcement. After that, the people's court forms a commission that selects the best candidate based on many factors (the complexity of the case, the expert level of the public mediation institute, etc.). The people's court must determine one or two corporations that will replace the winning candidate as the administrator if it withdraws from the procedure. Chinese law also provides for the direct appointment of a specific candidate for the position of the administrator in cases when such recommendation comes from the supervisory financial authorities.

484. When appointing the administrator, the people's court takes into account the results of the candidate's previous work. If, for example, a candidate's activity in another bankruptcy case has caused harm to creditors, or if the permit to conduct professional activities (such as advocate practice) has been revoked, the people's court has the right to cancel the appointment of the administrator and replace him or her with another candidate.

485. In addition, if the administrator is excluded from the court list after the people's court has assessed his or her professional skills, he or she may be prohibited from conducting bankruptcy proceedings for some time.

486. None of the participants in the bankruptcy process can influence the initial appointment of the administrator. During the bankruptcy case, the creditors' meeting is granted the right to apply to the people's court for replacement of the administrator in case of improper performance of the latter's duties, but so far Chinese law does not clearly describe the abilities of the creditors' meeting, defining this right as a trend for the future. Anyway, the final decision to remove the current administrator and replace him or her with the new one remains with the people's court, the appointment of the new administrator still lays in the field of random selection, which, in a legal sense, minimizes the risk of transition of control over the procedure to particular individuals.

487. It is noteworthy that the people's court has the right to change the administrator in case of improper execution of duties which is independent of appeals of the process participants.

488. The administrator may not refuse the appointment without a valid reason. It is assumed that the very presence in the court list is an unconditional consent to participate in all bankruptcy cases.

489. Similarly, the Chinese legislator blocked the administrator's unmotivated withdrawal from the procedure, providing for the following cases of withdrawal:

- termination of the bankruptcy case;
- replacement of the administrator by the decision of the people's court;

- the occurrence of circumstances that are grounds for exclusion from the court list **(para. 486 of the Analytical Report)**;

- removal of the administrator at the reasoned request of the creditors' meeting.

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