Insolvency Office Holder Regulation
- the benefit of experience

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The nature of insolvency practice - experience teaches us

- One of the pillars that make the insolvency law work
- Widespread reforms over last 30 years have been achieved
- These have changed the role from mortician to veterinarian
- Nevertheless, IPs remain the target of abuse by creditors, employees, politicians and management when businesses have to close
The role of the modern office holder

- Evaluate options - restructure or liquidate
- Need to communicate with creditors effectively
- Facilitate restructurings, raising of finance, packaging assets
- Liquidating assets in manner which does not attract criticism
- Pursuing complex legal actions
- Distribute estate in cost effective manner
Practical dilemmas facing insolvency practitioners

- Ethical issues which challenge requirement for independance
  - self review
  - conflicts of interest
  - confidentiality
- Remuneration which seems excessive to small traders, civil servants
- Financial complexity of modern trading groups
- Resourcing major assignments where matters require urgent attention
- Cost effective pursuit of converted assets
Above all else some things remain the same ...

- Criteria as to who may act as IPs should be objective, clearly established, and publicly available
- IPs must be competent to undertake the assignments and exercise their powers
- IPs must act with integrity, impartiality and independence
- IPs acting as managers should be held to D&O standards of accountability, and be subject to removal for incompetence, negligence, fraud, or other wrongful conduct
Why do we need IP regulation?

- Minimise opportunities for fraud on creditors
- Give confidence in the integrity of legal system
- Support security transactions regime on which the provision of credit depends
- Reflect need for significant elements of professions to be regulated and accountable
IP regulation - summary

• Absence of effective regulation indicates pre-transition economy
• Regulation including both state and profession tends to be more dependable with greatest prospect of widespread recognition
• Extensiveness of regulation and other enacting regulation must also be considered
• Effect of regulation is enhanced where IPs are also regulated as lawyers or accountants
• Essential that complementary aspects of regulation work in harmony
Options for IP regulation

• By state through specialist agency (Canada, Serbia)
• By state through agency regulating various professions, unions and other agencies (Kenya)
• Self-regulation within framework determined by state (UK or Russia)
• Self-regulation determined solely by the profession
• Only by appointing court on particular assignment (USA)
• No imposed regulation - ‘self regulation’ (South Africa)
Options for IP regulation - what works best?

It works

- By state through specialist agency (Canada, Serbia)
- Self-regulation within framework determined by state (UK or Russia)

Depends on circumstances

- Self-regulation determined solely by the profession
- Only by appointing court on particular assignment (USA)

It does not really work

- By state through agency regulating various professions, unions and other agencies (Kenya)
- No imposed regulation - ‘self regulation’ (South Africa)
The Regulatory or Supervisory Bodies responsible for regulating or supervising insolvency representatives should:

- be independent of individual representatives;
- set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency, and accountability; and
- have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively.

The system should ensure the Competence and Integrity of Insolvency Administrators

- criteria as to who may be an insolvency representative should be objective, clearly established and publicly available;
- insolvency representatives be competent to undertake the work to which they are appointed and to exercise the powers given to them;
- insolvency representatives act with integrity, impartiality and independence; and
- insolvency representatives, where acting as managers, be held to director and officer standards of accountability, and be subject to removal for incompetence, negligence, fraud or other wrongful conduct.
What are the key aspects of the International Standards?

UNCITRAL legislative guide

Insolvency representative qualifications

• The insolvency law should specify the qualifications and qualities required for appointment as an insolvency representative, including integrity, independence, impartiality, requisite knowledge of relevant commercial law and experience in commercial and business matters.

• The insolvency law should specify the grounds upon which a proposed insolvency representative may be disqualified from appointment.
What are the key aspects of the International Standards?

EBRD office holder principles

- **Principle 1** - Qualifications and licensing generally
- **Principle 2** - Appointment in an insolvency case
- **Principle 3** - Review of office holder appointment
- **Principle 4** - Removal, resignation and death of office holder
- **Principle 5** - Replacement of office holder
- **Principle 6** - Standards of professional and commercial conduct
- **Principle 7** - Reporting and supervision
- **Principle 8** - Regulatory and disciplinary functions
- **Principle 9** - Remuneration
- **Principle 10** - Release of office holder
- **Principle 11** - Insurance and bonding
- **Principle 12** - Code of ethics
Experience introducing National Standards

Challenges of sme insolvencies

- Cost effective processing
- Realization of assets
- Recovery of relatively small amounts
- Problems disproportionate to value of estate
- Determining a fair process of remuneration
Experience introducing National Standards
Proposed Russian professional standards

- Federal Standard on Ethics of Insolvency Administrators
- Federal Standard on Education and Training of Insolvency Administrators
- Federal Standard on Information Disclosure During the Conduct of an Insolvency Case
- Federal Standard on Insolvency Administrator’s Duties and Responsibilities for the Elaboration and Approval of a Plan of External Management
- Federal Standard on Financial Analysis by Insolvency Administrators in Bankruptcy Procedures
- Federal Standard on the Activity of an Insolvency Administrator Regarding the Identification and Reporting of Signs of Deliberate or Fictitious Cases of Bankruptcy
- Note on Federal Standard on Sale of Property
Experience introducing National Standards

Serbian experience - starting position

• Original national standards & ethical code were in secondary legislation
• A mixture of repeated primary legislation, training, guidance and standards
• Originally drafted in English with ambiguous translations
• Result was that they were not usable as standards for regulatory purposes
• Indeed, most guidance had limited relevance to local circumstances
Experience introducing National Standards

Serbian experience - national standards

• Close working relationship with Bankruptcy Supervisory Agency (BSA)
• Stage one was identification of needs
• Review of standards of other national associations - UK, Canada, Australia
• Stripping out standards by which conduct could be assessed
• Meetings with Working Group of IPs, Judges and BSA
• Some reluctance to change - lack of enforceability is no always seen as a bad thing
• Explanation as to why revised standards were required
Experience introducing National Standards

Serbian experience

- Revised standards drafted in English and translated into Serbian
- Both versions discussed with Working Group
- Agreed final versions retranslated to check original intentions achieved
- Final versions issued in secondary legislation
- Drafting to law about 3 years including change of personnel at BSA
Experience introducing National Standards

Serbian technical guidance manual

• Guidance manual was needed to assist IPs understand how to apply the law
• Collaboration between Bankruptcy Supervisory Agency and Ministry of Economic Development of Serbia with European Bank for Reconstruction & Development
• Part of programme of training by BSA
• Drafted and discussions with Working Group
• Published in two languages, Serbian and English, and free issued to licensed IPs
• accessible on BSA web portal for IPs; first rate Electronic Reporting System
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