INSOL International

Office-holder Remuneration

Some International Comparisons

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Acknowledgement

INSOL International is very pleased to publish a Special Report titled “Office-holder Remuneration- Some International Comparisons” by Eric Baijal, BBM Solicitors, Scotland with country chapters provided by 14 contributors.

Office-holder remuneration is a topic of great interest to practitioners and stakeholders alike. Whilst practitioners in many countries consider that their remuneration systems work well, this is a view not always shared by stakeholders who frequently criticise levels of remuneration. Most practitioners would acknowledge there is always room for improvement and it is accepted that remuneration has to be fair to office-holder, creditor and debtor alike; it has to be transparent; and it has to be capable of being evidenced as such.

This excellent report analyses and compares the way in which 14 different jurisdictions around the world approach the common issue of office-holder remuneration. It draws on this analysis to find the positive and negatives of each approach, the common difficulties and the features that mark a fair, transparent and robust remuneration system.

The report will no doubt achieve its objective of stimulating discussion and debate with a view to developing better approaches to remuneration in established systems, and also provide helpful practical signposts for further research and consideration in developing systems.

INSOL International sincerely thanks each of the country contributors to this Special Report and Eric Baijal of BBM solicitors, Scotland for leading this technical project and bringing it to a conclusion by providing this excellent Special Report.

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Office-holder Remuneration - Some International Comparisons

By Eric Baijal*
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Introduction

It is perhaps self-evident why practitioners are interested in remuneration! It is a subject that is often talked about at conferences, and written about in articles. However, while it may be a subject dear to the heart of practitioners, the writer's experience in the UK particularly, is that stakeholders frequently criticise office-holders' fees. Headlines are written in relation to hourly rates apparently charged, and global fee figures are often quoted without reference to proper detail as to the complexity or value of a particular case. The genesis of this project finds itself in an apparently innocuous decision by Lord Malcolm, then one of the Scottish insolvency judges, in relation to the remuneration payable to the provisional liquidators of a Scottish private school, St. Margaret's School, Edinburgh, Ltd[1]. As will be seen later, Scotland has a possibly unique system of peer review. However, notwithstanding the clean bill of health given to the remuneration application by the independent reporting insolvency practitioner, Lord Malcolm noted at page 245 as follows:

"…The liquidator is an officer of the court, and it is appropriate that the court should have the ultimate decision on appropriate remuneration. It may be thought that if the advice is all in favour of the claim, there is little left to the court's discretion. In most cases that will be true, but the role of the court provides a safeguard for any case where it is apparent that nonetheless something is amiss".

Lord Malcolm went on to state that it was all very well to say that subsequent fees had been approved by a Liquidation Committee:

"…However, there is a limit to the extent to which creditors, and particularly unsecured creditors, can be relied upon to scrutinise and police such claims.… I am not wholly convinced creditors such as HMRC and the banks can be relied upon to.… "drive down the market rates" …in the case of banks at least, often their debt will be secured with little risk of the liquidators' fees impinging on their recoveries."

This decision was the latest example of a line of Scottish authority questioning the working of the system of office-holder remuneration. In other cases,[2] the Scottish courts have gone further, radically reducing remuneration compared with the amounts applied for by the office-holder.

Against that backdrop it seemed sensible to look for international comparisons with the way other jurisdictions approach the common issue of office-holder remuneration. Answers were sought to a template of questions from country contributors around the world. In analysing the answers from the country contributors it has become clear that the criticism and concerns expressed in the United Kingdom about this subject, and connected difficulties, are seen in other jurisdictions too.

Substantive law can be very different in different jurisdictions and a harmonisation of remuneration systems is not being argued for. However, while this paper benefits from excellent contributions from colleagues across every continent and many types of legal system, this paper is intended to go further than simply provide a summary of remuneration systems across the globe. As will be seen, stakeholders do not necessarily always agree with the view of practitioners that remuneration systems work well. Most practitioners would acknowledge there is always room for improvement. It is commonly accepted amongst the profession that remuneration has to be fair to office-holder, creditor and debtor; it has to be transparent; and it has to be capable of being evidenced as such. This paper therefore seeks to analyse common difficulties and draw lessons from the approaches developed in each jurisdiction.

The format of the paper is as follows: first, the various methods of calculating office-holder fees are considered, and without going into different jurisdictions in detail, the experimental positive and

* The views expressed in this report are the views of the authors and not of INSOL International, London.
[1] [2013] CSOH 4
[2] See for example, Petition by Administrators of Martin Groundland & Co Ltd 2011 G.W.D. 5-137

negatives of each approach are considered; second, the paper describes the different means by which oversight or approval of fees are ensured; and finally, there is a consideration of what lessons may be learned and what features mark a fair, transparent and robust remuneration system. Thereafter the paper contains country specific contributions upon which the general analysis is based. Each reader may form different conclusions about current difficulties and potential solutions. If that happens the paper will have fulfilled its objective of stimulating discussion and debate. It is hoped that debate will not only help develop better approaches to remuneration in established systems, and also provide helpful practical signposts for further research and consideration in developing systems. For example, the contributions from India and Jordan, where nations are still endeavouring to design and implement any type of comprehensive remuneration framework, serve to reinforce why the need to consider remuneration comparatively is a practical necessity rather than an academic indulgence.

Finally, by way of introduction, this paper is intended to be practical rather than providing definitive legal guidance. The writer defers to the knowledge of others in relation to the detail of different systems of remuneration and the detail of the paper should not be relied upon as forming legal advice in any way.

Approaches to remuneration

Looking at the different country responses there are three main approaches that seem to have developed in relation to the manner of remunerating office-holders. They are:

(i) fixed fee;
(ii) hourly rate; and
(iii) percentage of recoveries or distributions

In a number of jurisdictions, it is theoretically possible to elect one of a number of these options at the outset of the appointment. It is also possible in a number of jurisdictions for the fees, hourly rate or percentage of recoveries to be higher if there is a contingent element to the appointment (for example, where the fee or some portion of it will not be payable unless or until some event in the insolvency).

It is worth noting that even in jurisdictions where there is the possibility of choosing from one or more methods of remuneration there is often a cultural norm. For example, in Hong Kong, although there are different remuneration bases available, it will often be the case in liquidations that an hourly rate is applied even though an application for remuneration could for example, be made on the basis of a percentage of recoveries in the case. Cultural norms may prevail because one method or other is seen as better for office-holder or creditor (either because of convenience or financial outcome). Sometimes, however, it appears that norms develop simply because of traditional approaches employed.

Fixed fee

Depending on its level, it is easy to see the attraction of a fixed fee to certain stakeholders. It provides certainty to an unsophisticated creditor. It may also provide economy to any government or regulator paying office-holders' costs. However, of the countries considered, other than in the People's Republic of China (PRC) and save for in certain low value consumer insolvency proceedings (for example, in Canada a trustee in a personal insolvency may draw up to 5,000 CD without audit) fixed fee arrangements are not widely used. In the PRC, it seems prescribed remuneration will usually be applied depending on the value of the estate. The difficulties experienced there are probably instructive of why fixed fee arrangements are not attractive apart from in the lowest value, more straightforward cases. Readers will note, for example, that practitioners in the PRC consider that not only are they not guaranteed to be paid (a quite separate difficulty) there is no incentive "to do a better job" given that a set fee may be paid irrespective of performance or thoroughness. As a result, the cheapest approach may not be the one that ultimately provides best value to creditors. More robust research would be required to establish the correlation if any between fixed fees and lack of return to creditors.

Hourly rate

It would be fair to say that an approach based on time spent is probably the most popular approach to calculating fees, albeit in some cases with a differential based on recoveries. For example, in a UK administration there may be a capped fee agreed with the secured lender based on hourly rates with a contingency element based on recoveries. In theory, at least, this provides an office-holder with fair remuneration, with the debtor's estate bearing the costs depending on the work involved. The hourly rate, however, while approved of by practitioners, is possibly the most criticised approach to remuneration. Critics say it is open to abuse, does not promote efficiency and further gives lack of certainty on outcomes. In response, most practitioners would say that their professional integrity is the bedrock of the system and therefore they should be trusted to do the job as they think professionally appropriate and be properly remunerated for it. There seems to be very limited examples of abuse actually being found. Perhaps the most that could be said is that the hourly rate approach makes abuse possible unless safeguards and other methods of accountability are introduced.

Jurisdictions have therefore introduced safeguards to protect against abuse of time-based billing. For example, in England and Wales, amongst other protections, it is now necessary for practitioners to estimate in advance how much they will charge.[3] A number of jurisdictions, such as the Cayman Islands[4] now set a "*fair and reasonable*" check to be applied by the relevant court or supervisory authority before approving the fee. It does seem sensible that there is some proportionality check with the flexibility for each case to be looked at on its own merits. Fee estimates will, however, bring their own difficulties given the unexpected events that can arise in an insolvency. Remuneration cannot be guaranteed to be fair if in fact an office-holder is bound to an estimate that did not, and could not, cover a genuinely unexpected event.

Percentage of recoveries or distributions

Most common law jurisdictions allow remuneration to be calculated by reference to a percentage of recoveries. However, as observed above, it is rare for percentage of recoveries to be the only basis on which a fee is calculated. It is easy to understand why this is the case; some assets may cost much more in terms of time to realise and recover. Germany is unusual amongst the countries studied as the majority of its office-holder fees are calculated on the basis of a percentage of realisations. As will be seen in the German contribution, the commission system there is seen as superior to a time-based calculation and practitioners seem happy with this approach. There appear to be two reasons for this: (a) "*the current system avoids the administrative efforts of recording and controlling [time] and it incentivises and rewards effective and successful working*"; and (b) "…*The lack of stakeholders' legal influence in the fixation of remuneration avoids the need to bargain and strengthens the office-holder's neutrality*."[5] It is important to observe that the German system does have the flexibility to allow for percentage increases on the basic fee if, for example, there are complex issues to deal with.

Probably the most common objection from practitioners from a common law background to purely recoveries-based fees is that there would be no guarantee of being remunerated properly. This may be to some extent cultural given that German practitioners appear happy with the system. They do appear to accept, however, that like any system it is open to abuse, and inventive calculations can be used to maximise fees (and that abuse may be more successful before less experienced judges and courts).

Another criticism of percentage based fees has been advanced by the Court of Appeal in Singapore which held that:

"…*while Singapore law does not prohibit insolvency practitioners from seeking remuneration on a percentage basis tied to realisation or any additional value enjoyed by the insolvent company as a result of the insolvency practitioner's appointment, the contingency or commission basis of remuneration is considered "unfashionable" and prone to resulting in conflicts of interest*."[6]

[3] Insolvency (Amendment) Rules 2015, SI 2015/443
[4] Rule 10 Insolvency Practitioners Regulations 2008 (as amended)
[5] See page 27
[6] See page 46

An example is given of a scenario in a scheme of arrangement where an office-holder might be overly keen to compromise a particular class of creditor if it gives rise to an increase in fees. In fairness though the management of conflicts is part of the office-holder's general role. He or she must, in any system, surely be trusted to behave with professional integrity (albeit as observed below that integrity should be capable of vindication by some sort of oversight process).
For completeness, it is worth noting that South Africa works on a commission basis system for insolvent winding up cases, but subject to taxation of the court. Importantly there is a minimum fee (as is the case in Germany). However, care must be taken to ensure practitioners are treated fairly (in South African for example, remuneration rates have not increased for the minimum fee for twenty years).

It is instructive that only the contribution from the Cayman Islands mentions the possibility of a percentage of distributions forming part of the basis of calculating fees. It may be that on first consideration such a system would not be attractive to office-holders. For all sorts of practical reasons many cases will have little in the way of distributions through no fault of the office-holder. However, assuming fair and adequate remuneration can be provided on another basis, would it not incentivise office-holders, to the benefit of the general body of creditors if in fact there was a correlation between overall fees and the result say to unsecured creditors? It is perfectly common in business recovery proceedings in the UK for there to be a capped fee plus a percentage of realisations, which in real terms relates to distributions to a secured creditor. Allowing remuneration incentivised by distribution share seems the logical extension of that. The argument against such incentives being offered is simply that as professionals, very often officers of the court, the office-holder should be doing their job without the need for any bonus.

Approval and oversight of remuneration

While one important issue is how a fee is calculated, most jurisdictions seem to accept that equally important is how oversight is exercised over that remuneration. In other words, how is the system is demonstrated to be robust and transparent. The most common methods of ensuring oversight are one or more of the following:

(i) creditor involvement;
(ii) court oversight; and
(iii) peer review.

There are, however, still examples of approaches which are not directly supervised. For example, in South African business rescue proceedings the practitioner will be a regulated person charging regulated rates per hour or day, but his calculation will not be directly supervised.

Creditor involvement

Creditors are often turned to first. In theory, they have a direct interest in the outcome of the case and should therefore be relied upon to only approve reasonable and proportionate remuneration. There are though a number of difficulties with that assumption: firstly, the majority creditors are often secured lenders. Their interests are often different from the general body of unsecured creditors. The secured creditors may not actually be concerned about the level of fee if in fact they are to be repaid in full. Other creditors often include nation states through their revenue collection or exchequer departments. While they ought to have an interest in robust fee oversight, very often budget restrictions will prevent effective participation. Finally, smaller unsecured creditors will often fail to engage in the process, perceiving, possibly from previous experience, that irrespective of the remuneration level set, they are unlikely to receive a substantive dividend. That could mean that particularly in time-based applications the system is open to abuse.

As will be seen many of the common law jurisdictions will variously allow a creditors' committee (sometimes a committee of inspection) to set either the basis of remuneration or on occasion the amount of remuneration[7]. In England, if a creditors' committee cannot be formed it is possible for the remuneration basis to be agreed by a resolution of creditors. A court application is generally the last resort.

[7] See for example contributions from England and Hong Kong

Perhaps recognising some of the difficulties with creditor approval referred to above, a number of jurisdictions have developed a hybrid approach where a committee of creditors or creditors' meeting is required to approve the remuneration, however, ultimate sanction must be given by the court. One example of such an approach is found in the Cayman Islands where following creditor approval, but before sanction by the court, the office-holder can draw a payment on account of up to 80% of remuneration sought.[8]

Finally, there are jurisdictions[9] where if creditors refuse to approve a fee there is a perceived lack of guidance about how a court or other regulator should provide oversight. Such guidance and regulation is vital for the proper functioning of the system.

Court supervision

There is little doubt that court supervision is often pointed to as a way of evidencing a robust process. It is employed not only as the remuneration fixing option of last resort, but in some jurisdictions it is practically the only option[10].

There are real and perceived issues to be faced if a court is to fix the fee of an office-holder. Firstly, it will add to the costs of the case, and could thereby reduce distributions. Jurisdictions have to measure whether that is a price worth paying for transparency and robust oversight. There is also the additional risk of satellite litigation over fees (particularly in jurisdictions where the liquidation committee also have the right to be heard)[11]. While most stakeholders accept that it is necessary to have some kind of court process to fall back upon in the event that creditors cannot approve a fee or there is a challenge, a further legitimate criticism is that court taxation or approval can lead to substantial delays in an officeholder being paid (unlike in a "normal" case where a liquidation committee could approve a fee)[12].

An alternative approach is seen in the USA where the court will only become involved in the event that there is a dispute over a proposed fee, but to a large extent it will be up to a stakeholder to enforce such involvement by the court[13]. However, in a climate where many jurisdictions are seeking to promote further engagement with creditors it may be seen as counter-productive to require them to take positive action (such as the initiation of legal proceedings) if they wish to mount any challenge or criticism of a fee.

Perhaps the biggest difficulty seen in relation to court supervision is that the type of supervision not only varies widely across jurisdictions, but also across courts and judges within jurisdictions. Some courts seem to grant applications without much enquiry. Other masters or judges seem to lack the experience, specialism or training to understand high value and/or complex remuneration applications. That can lead to arbitrary decision making. This has led to jurisdictions such as Australia and the Cayman Islands setting out clear factors to be taken into account by the court when coming to a view about what is a fair and reasonable fee for the work done. This may measure factors such as quality of work, level of risk and responsibility as well as whether the work was actually necessary[14]. That is all to the good and should improve decision making. However, in order for court supervision to work effectively, those supervising must understand the process comprehensively and, to facilitate this, robust training and support must be given.

Peer review

Scotland seems to be unique in its approach to setting fees in insolvent winding up cases. While in common with the rest of the United Kingdom, secured creditors can agree remuneration proposals in administration cases, and while it is legally possible to form a liquidation committee, the majority of fees in Scottish liquidations are approved by the court. Part of the reason for the difference could be

[8] See page 16
[9] See by way of example Hong Kong page 32
[10] See page 13
[11] See page 46
[12] See page 51
[13] See page 56
[14] See page 8

cultural, but it may also be related to the higher incidence of provisional liquidations in Scotland, where the court is required to be involved.

In summary[15] after each accounting period the liquidator applies to the court to be remunerated at a particular level. The court will then generally appoint another independent insolvency practitioner to audit the files of the office-holder. The auditing insolvency practitioner (commonly called "the reporter") then reports to the court on proposed deductions. If someone was cynical they may say that having an insolvency practitioner auditing does not ensure anything. However, there is anecdotal evidence of Scottish insolvency costs being lower than corresponding cases in England and Wales (even allowing for the not insignificant reporter costs). To balance that it must be conceded that overhead costs are lower in Scotland than, for example, in the south east of England.

The writer freely admits home nation bias that may be seen to a greater or lesser degree in the analysis of the contributions to this paper. However, the Scottish system is generally considered to be fair to creditors and office-holders alike. The main criticisms of this approach are probably threefold. First, it is said that the reporting system adds unnecessary cost; could it for example, simply be employed in cases where it is shown to be impossible to obtain creditor support? Second, there is concern about the delay in payment which results from the file audit. An accounting period in a liquidation is 6 months. It can often be at least 3 months after the accounting period finishes before an office-holder has the right to be paid (however, contrasting that with the delays mentioned above in jurisdictions where the court approves directly, that may not be thought to be too bad). The third difficulty arises because of the interaction between the reporter and the court. The court is not bound to accept the report and can fix remuneration at a different level. The reasons for this are sensible, and allows an office-holder a fair hearing if for example a reporter has misunderstood the position. The difficulty that sometimes arises, however, is where the court does not like the reporter's assessment (for example, instinctively thinks that the hourly rate upon which the calculation is based is too high even though the reporter accepts it as being within market ranges). The process is undermined if the expert peer reviewer is disagreed with, without any foundation or proper challenge. However, this final difficulty may be allayed with further judicial training and reporters consistently being seen to be objective and not simply approving fees as proposed.

Lessons to be learned

As set out above the purpose of this paper was not to simply provide a collection of country summaries, or even to provide summaries of common approaches. It was also intended to try to draw some conclusions in order to provoke further discussion and encourage further research. The writer again acknowledges that to a great extent views are subjective based on experience and practitioners can often be biased toward what they know and feel safe with. It is suggested though that the following issues come to the fore when the country summaries are read together:

(a) It is striking that nearly every country contributor thinks that the system for remunerating office-holders in their jurisdictions is working well (certainly in the so called developed jurisdictions). The writer cannot speak for every jurisdiction but knows and reads enough to appreciate that that is not necessarily the view of commercial entities, debtors and other stakeholders in the insolvency process. It is submitted that not only does the system have to be fair, but while professional trust is integral to the matter, it is not enough simply to say that an office-holder ought to be trusted. Whatever is decided in a particular jurisdiction, it seems vital that a clear basis for remuneration is identified to stakeholders at the beginning of a process and that there is some supervision or oversight that can be invoked as necessary.

(b) Fee estimates such as are seen in England and Wales are not without difficulty, but some sort of expectation management is probably helpful in assisting stakeholders to understand likely outcomes. The Singapore approach to "cost scheduling" as now prescribed by the Court of Appeal, to try to prevent "bill shock" is worth considering[16] . Transparency may not be convenient for office-holders but it is vital to evidencing a fair and robust system.

(c) A fixed fee approach is not suitable for anything other than the more simple and straightforward cases. Even if a fixed fee is utilised there must be some manner in which remuneration can be

[15] See page 42
[16] See page 46

increased in exceptional cases. To adopt any other approach is to have to accept that the job may not be carried out thoroughly in some cases.

(d) If remuneration is to be based upon a percentage of recoveries a balance needs to be struck between the calculation being as simple as possible, in order to minimise abuse, with some flexibility so that there are contingency arrangements to provide a greater fee in cases of complexity.

(e) There must be provision for the office-holder to be remunerated in low asset cases, or at the least the office-holder should have the power to decline the appointment or resign if a minimum level of fee cannot be paid. As a matter of policy there are various options to give effect to such a situation. Governments could agree to pay the minimum fee, but in the main will be unlikely to do so. There could be a state liquidator (such as the official receiver in England) who will take on non-remunerative or risky appointments. The PRC suggestion of a levy to be taken from each corporate case to provide a fund to pay for low asset cases is worthy of consideration; but work would presumably be required in each jurisdiction to calculate what size of levy would be required to give practical effect to such a proposal.[17]

(f) Whether the creditors or a court are being asked to approve fees it is important to be able to objectively justify not only the quantum of the fee but also its proportionality. That is likely to include more than simply time records in some cases.

(g) Where creditors will not or cannot approve remuneration it is vital that there is a cogent system of rules and relevant guidance setting out how the appropriate court or regulatory body can exercise oversight of the situation.

(h) In cases where a court is involved in setting fees, the system should be reviewed to make it as easy as possible for creditor voices to be heard (for example, using forms rather than formal pleadings) in abbreviated proceedings wherever possible, preventing lengthy costly satellite litigation. Connected with that is the issue of delays in the system generally (and payments on account of fees to office-holders should probably be explored as referred to in the Cayman Islands example above). One approach is to prescribe, by way of court rules, that the court has to deal with applications within a particular timescale. The difficulty is that insolvency may not be a high priority in many jurisdictions. It seems to the writer that specialist insolvency judges would not only make it more likely that matters could be treated as a priority, but in addition, judicial training would be more cost effective with less judges having to receive the specialist training that is required. Such training is vital because any remuneration system needs certainty. Even with the introduction of statutory or court approved factors there is still too much uncertainty in how some courts will approach the issue of what is reasonable remuneration in a particular case.

(i) While it is appreciated that many jurisdictions would find the Scottish approach cumbersome, consideration could be given to making peer review available in certain cases; for example, if there was a dispute with a creditor over a proposed fee. In relation to questions about which rate was appropriate for the work involved, it is suggested that a qualified independent insolvency specialist is better placed to audit the account than a judge; no matters how good the judicial training is. In such a system, however, the auditing insolvency practitioner must have the power to tax off non-proportionate and unnecessary work (always being careful not to analyse the case as if the office-holder had the benefit of hindsight).

In conclusion, it is hoped that this paper provides a helpful contribution to ongoing debate as to how fair, transparent and robust remuneration systems are developed.

[17] See page 20

Australia

1. The basis of remuneration

In a large corporate insolvent winding up, a liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined (Section 473(3) Corporations Act). If the remuneration is to be determined by the court, factors that the court is to take into account pursuant to Section 473 (10) include some or all of the following:

a) the extent to which the work performed by the liquidator was reasonably necessary;
b) the extent to which the work likely to be performed by the liquidator is likely to be reasonably necessary;
c) the period during which the work was, or is likely to be, performed by the liquidator;
d) the quality of the work performed, or likely to be performed, by the liquidator;
e) the complexity (or otherwise) of the work performed, or likely to be performed, by the liquidator;
f) the extent (if any) to which the liquidator was, or is likely to be, required to deal with extraordinary issues;
g) the extent (if any) to which the liquidator was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
h) the value and nature of any property dealt with, or likely to be dealt with, by the liquidator;
i) whether the liquidator was, or is likely to be, required to deal with:
    i) one or more receivers; or
    ii) one or more receivers and managers;
j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
k) If the remuneration is ascertained, in whole or in part, on a time basis:
    i) The time properly taken, or likely to be properly taken, by the liquidator performing the work; and
    ii) whether the total remuneration payable to the liquidator is to be capped;
l) any other matters.

In personal insolvency, the trustee may, pursuant to Section 161B of the Bankruptcy Act, draw remuneration up to $5,000 without approval. Above this amount the remuneration of the trustee of the estate of the bankrupt may be fixed, from time to time by resolution of the creditors or, if one exists, the Committee of Inspection. A trustee may elect to have the remuneration approved on either a commission basis on recoveries or on a time basis, or a combination of both. If a trustee elects to receive remuneration by commission the commission cannot exceed 10% for the first $30,000 of recoveries, 7.5% for the next $20,000 of recoveries and 5% for any recoveries in excess of $50,000.

Additionally, the Australian Restructuring Insolvency and Turnaround Association (ARITA) sets out in its Code of Professional Practice (COPP) five bases on which a practitioner (whether corporate or personal) may charge remuneration. These are:

a) Time based charging - remuneration calculated by reference to the hourly time or unit rate which is applied to the time spent on necessary work properly performed;
b) Prospective fee approval - determined in advance of the work to be performed (the approved amount must have a Cap limit nominated);
c) Fixed fee - remuneration based on a fixed quoted amount;
d) Percentage - remuneration based on a percentage of a particular factor, usually assets disclosed, or assets realised;
e) Success or contingency fee - remuneration set on the basis that the practitioner will receive a specified bonus, success fee, super-profit or additional percentage as remuneration, in the event that a specified contingent future event occurs or particular circumstances arise.

Whilst ARITA does not recommend any particular basis for charging remuneration the COPP does say that the practitioner should maintain a system that requires staff to record the following:

- the period of time spent;
- the categories of the work performed;
- details of the work being performed; and
- contemporaneously at the time the work is done, in order to maximise accuracy.

Whilst there is not a dictated method of charging remuneration in Australia there is a clear overwhelming preference towards time-based remuneration in all types of insolvency matters.

2. A summary of how remuneration is fixed in an insolvent winding up

In a corporate liquidation, remuneration may be approved in a number of ways. These are by either a Committee of Inspection, the body of creditors or the court. In an official liquidation, the remuneration approval must first go to the Committee of Inspection, if there is one. If the Committee of Inspection fails to approve the remuneration the liquidator may have his/her remuneration approved by a resolution of the creditors or may make an application to the court. If the liquidator makes his remuneration resolution to the creditors and they do not approve the resolution the liquidator may still make an application to the court.

In a creditors' voluntary winding up the liquidator must still have his/her remuneration approved in the first instance by a Committee of Inspection, if one exists, and if one does not exist or no resolution is approved, application must be made to the general body of creditors. There is no direct application to the court if the creditors do not approve the remuneration however it is common practice to have remuneration approved utilising the general powers of the court to determine questions or exercise powers pursuant to Section 511 of the Corporations Act.

A resolution for approval of liquidator's remuneration by a Committee of Inspection or by the general body creditors is determined by a simple majority in number of those attending a physical meeting and voting in person or by proxy. At a creditors' meeting a poll may be called and for the resolution to pass it must be approved by both majority in number and value. The resolution will be lost if a majority in number and value vote against. If a resolution is tied the chairperson may exercise a casting vote but if the chairperson is the liquidator, he/she cannot use the casting vote to approve his/her remuneration. Additionally, the liquidator cannot utilise general proxies in his/her name to vote for a resolution in favour of his/her fees but may cast directed proxies in favour of his/her remuneration.

In personal bankruptcy, a trustee must send an Initial Remuneration Notice (IRN) within 28 days after receipt by the trustee of the bankrupt's Statement of Affairs (SOA). If an SOA is not received within 60 days, then the IRN must be sent within seven days after the end of the 60 day period. The IRN must include a brief explanation of the types of methods that may be used to calculate fees, the trustee's chosen fee calculation method and why it is appropriate, details of the trustee's rates including hourly rates if time spent basis is used and an estimate of the trustee's fees.

When a trustee wishes to call a meeting of the Committee of Inspection or the Creditors to have his remuneration approved he must send at the same time a Remuneration Approval Notice (RAN). An RAN must include a description of the work, including the details of particular tasks undertaken, a description of the work that will be undertaken, the number of hours to be charged, the hourly rates charged by the trustee and their staff, the proposed total amount of fees, a statement that the fees are necessary and reasonable having regard to the value and complexity of the estate, and a report on the work that has been completed, that is in progress and that is yet to be undertaken.

Within 14 days of the fees claimed reaching the approved amount as per the RAN, the fees not reaching the approved amount but a final dividend being declared, or the administration of

the estate is finalised without the declaration of dividend, or when the trustee claims the statutory minimum, the trustee must issue a Remuneration Claim Notice (RCN). The RCN must include the total amount of fees claimed, details of the work performed, the names of the persons who performed the work, the number of hours charged by each person, the hourly rates charged by each person, an explanation of any variation from the RAN, a statement about creditors' rights to have the fees reviewed and details of the receipts and payments for the estate.

If the remuneration of the trustee is decided at a Committee of Inspection meeting it is determined by a simple majority in number, however a majority of the members must be present. If the remuneration of the trustee is determined at a meeting of the estate's creditors it is determined by a poll in a similar manner to that discussed above. However unlike in liquidation the trustee's remuneration can be approved by circular resolution and, as long as one creditor votes for the remuneration and no creditor votes against the resolution, it is taken to have passed. If no resolution is passed approving the trustee's remuneration and he/she wishes to take greater than the statutory minimum an application can be made to the Inspector-General of Bankruptcy.

3. A summary or how remuneration is fixed in rescue proceedings

Formal rescue proceedings are undertaken pursuant to the process of voluntary administration. In voluntary administration there are two meetings of creditors held. The initial creditors' meeting deals with administrative matters such as who is to be the administrator and if the creditors are to form a Committee of Creditors. Following the administration meeting the administrator's remuneration may be approved by either the Committee of Creditors or at the decision meeting generally held five weeks after the appointment of the voluntary administrator.

Remuneration may be proposed on the same basis as in an insolvent winding up and the process is very similar. The administrator must provide a remuneration report which details the method used to calculate the remuneration, a description of the work performed, a calculation of the remuneration, a statement of the remuneration claim and a declaration from the practitioner that he or she has reviewed the remuneration claim and that it is necessary and proper for the conduct of the administration. Additionally, the practitioner must advise whether any third party will meet the remuneration claim.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

At the first instance, all remuneration claims (with the exception of bankruptcy) must be made and a physical meeting held of either the general body of creditors or a committee of creditors (or inspection). Application to a court for approval of remuneration can only be made once it has not been passed at a meeting of creditors.

Generally, for remuneration to be passed at a meeting it can be approved on the voices however, a poll can be demanded by any creditor owed greater than 10% of the total debt, any 2 creditors acting in unison, or by the chair of the meeting. If a poll is demanded, for the remuneration resolution to pass, it must be approved by a majority of those attending the meeting in both number and value. If both number and value vote against the resolution, the remuneration is not passed. Whilst the chairperson does get a casting vote, if the resolution is locked between majorities in value and number, a practitioner is not entitled to vote for their remuneration and it is not considered good practice to use the casting vote to vote for remuneration. Additionally, a practitioner is not entitled to use a general proxy in their name to vote for remuneration they are however allowed to use a special proxy.

Should a creditor not agree with the remuneration as approved by the general body of creditors they can make an application for the court to review the remuneration any time up to the deregistration of the company.

5. Judicial attitudes to remuneration

In Australia, judicial attitudes towards remuneration depend upon which court and which state the remuneration application is made. With the exception of the New South Wales Supreme Court, most courts generally are in favour of time cost as an appropriate basis of calculation of remuneration however, the court must be convinced that the remuneration is appropriate for the complexity of the engagement.

In the New South Wales Supreme Court however there have been a number of recent decisions where the remuneration of the liquidator has been calculated solely on a proportionate basis by the Judge. It should be noted that most recent of these decisions is currently the subject of an appeal to the Court of Appeal.

6. General stakeholder views on remuneration at present

A report was published in September 2010 by the Senate Standing Committee on Economics of the Federal Government which had committed an enquiry into the regulation, registration and remuneration of insolvency practitioners in Australia. The published report commented that 8% of all complaints regarding insolvency practitioners to ASIC in the 2006 to 2010 period related to remuneration. The committee identified specific areas of tension including overcharging through excessive disbursement payments, unnecessarily prolonging appointment and “cross – subsiding” jobs. The committee also observed that there was a fairly weak current incentive for practitioners to become more price competitive, particularly given the security of the priority payment system and the absence of a competitive tendering process. However, it should be noted that the Committee did not make any recommendations towards changing the framework for claiming remuneration.

7. General office-holder views on remuneration processes at present

At present in Australia we are probably guilty of providing too much information to creditors with respect to remuneration. It must be recognised the majority of business failures relate to small to medium companies. Consequently, the creditors affected by the insolvency are also going to be small to medium businesses who will generally be not only time poor but generally relatively unsophisticated in comparison to financial or institutional creditors.

It would be difficult to argue that the remuneration report should not be prepared but a far better outcome would be to provide creditors with an abridged version detailing a summary of tasks completed, time spent and the amount charged with a full report available upon request.

8. Any current proposals for reform

The Insolvency Law Reform Bill was passed by the Federal Government earlier this year and currently commences in the first quarter of 2017. Whist dealing with many other matters, the Act makes some changes to the remuneration regime. There will be going forward a statutory obligation on practitioners to cap prospective fee resolutions. A statutory minimum remuneration will be established that will enable an appointee to draw fees without creditor approval. Additionally, either ASIC or the court will be able to appoint a Costs Assessor to review either all or part of a practitioner’s remuneration. Additionally, liquidators will be able to have remuneration approved by a Circular Resolution.

9. Practical views on what works well and what does not work well with the current system.

The current system generally works well albeit that creditors may be receiving information overload which results in a less informed vote being cast. The reforms that commence this year will cap prospective remuneration, enable remuneration to be taken in small administrations without the costs of calling a meeting and enable remuneration to be reviewed without the cost of a legal case being incurred. They should streamline the process and hopefully reduce any perception that remuneration is being excessively charged.

Brazil

1. The basis of remuneration

Brazilian Bankruptcy Law, Federal Law n. 11,101 which came into effect on 9 February 2005 and amended by Complementary Federal Law n.147 of 7 August 2014 (BBL) does not establish fixed rules regarding the basis upon which office-holder remuneration shall be paid. Therefore, the judge in insolvency proceedings may choose between, for instance, monthly, semi-annual or annual instalments, based upon a percentage of the realisations, total debt subject to the proceeding or market practice in the venue of the proceeding. Fixed fees are most commonly applied by the bankruptcy courts based on a detailed explanation of the hours spent by the professionals involved, the volume and complexity of the work, the debtor company and its payment capability, market standards, relevancy of amounts of debt and other factors (article 24 of BBL). There are legal limitations for maximum amount of fees, depending on certain case factors and parameters such as a percentage of the total amount of credits subject to the reorganisation or proceeds from realisations in liquidations or the size of the company under the insolvency proceeding. The debtor or the bankruptcy estate should bear the costs of the office-holder remuneration.

2. A summary of how remuneration is fixed in insolvent winding up

The total amount paid to the office-holder as fixed by the BBL shall not exceed five percent (5%) of the total amount of the proceeds resulting from the sale of the assets in a bankruptcy (2% in case of micro or small business enterprises). Forty percent (40%) of the amount payable to the office-holder shall be reserved for payment after the assets are appraised and sold and the office-holder has presented its final accounts and its final report (article 24, first and second paragraph of BBL).

3. A summary or how remuneration is fixed in rescue proceedings (if applicable)

The office-holder's remuneration shall not exceed five percent (5%) of the total amount of the credits submitted to judicial reorganisation (article 24, first paragraph of BBL). Also in reorganisations, if the case relates to micro or small business enterprises the legal limitation is reduced to two percent (2%). The payment is usually made in monthly instalments up until the proceeding is finished and/or until the limit amount fixed by the judge is achieved. There is a current debate as to whether the 40% reserve, mentioned in item 2 above, should also be applied in a judicial reorganisation. Some scholars understand that 40% of the fees amount shall not be reserved, others that the said amount should be paid after the judicial reorganisation is finished and dismissed and the office-holder has presented its final report on the judicial reorganisation and fulfilment of the plan after 2 (two) years of its approval and ratification in court. Case law suggests that the remuneration may be paid during the judicial reorganisation proceeding, regardless of any reservation of the 40% amount.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

The bankruptcy court may appoint the judicial administrator from among lawyers, economists, professional managers or accountants, or corporate entities, and name the administrator in court and at the same time it decides the basis upon which the office-holder's remuneration will be paid.

In both types of proceedings, the creditors may present submissions opining on the office-holder's remuneration. Creditors are entitled to file appeals to higher courts against the decision fixing the office-holder remuneration. On a practical level, it is usual that creditors be involved in the discussions regarding the remuneration.

5. Judicial attitudes to remuneration (if applicable)

The judge shall establish the amount and conditions of payment of the office-holder remuneration with due regard for the debtor's payment capacity, the degree of complexity of

the work and the market value of similar duties. The judge shall take into consideration the venue of the proceedings, the number and location of the assets, the number of creditors, the total amount of the debt and the number of debtor entities involved.

The judge may hold informal hearings with the debtor and office-holder in order to discuss the remuneration. Also, the judge may take into consideration any extrajudicial arrangement that may have been executed by the debtor and office-holder regarding the remuneration.
The judge may hear the creditors and the Public Prosecutor´s opinion on the remuneration.

6. General stakeholder views on remuneration at present

A frequent problem occurs in liquidations in which the debtor's assets are insufficient to cover the office-holder's remuneration. Although the law establishes that the remuneration shall be a burden of the bankrupt estate, there is a tendency in case law to oblige the creditor that has filed the winding up petition against the debtor company to pay the office-holder's remuneration in advance, under penalty of having the case dismissed.

Stakeholders sometimes take the view that the remuneration is too high in light of the level of diligence of the office-holder. In relevant judicial reorganisations, the remuneration may reach very high amounts, and in many of those cases the individual recovery of the creditors may be much less than the remuneration of the office-holder.

7. General office-holder views on remuneration processes at present

In liquidations, the lack of relevant assets often forces the office-holder to render its services without receiving the due remuneration.

In large liquidations, the 40% instalment of the remuneration that is reserved to be paid when the liquidation is finished may take many years to be paid. On the other hand, the Brazilian crisis of 2015/2016 has resulted in many companies entering judicial reorganisations and office-holders are having the opportunity to be better remunerated.

8. Any current proposals for reform

There are some proposed amendments to the BBL, but none specifically focused on office-holder remuneration.

9. Practical views on what works well and what does not work well with the current system

As a consequence of the recent Brazilian crisis, it is very common to have winding up cases in which there are insufficient assets or resources to cover the office-holder's remuneration. The creditor may be obliged to pay an office-holder's remuneration, as mentioned in item 6, which is not a fair solution to this and seems to be a negative side of the current system. The rules regarding remuneration seems to be working for restructurings and insolvencies in Brazil.

Canada

1. The basis for remuneration

The basis for remuneration in proceedings may encompass any of the noted options however a fixed fee is rarely used.

Consumer engagements (natural persons with assets or liabilities below a specified threshold) are subject to special rules to reduce administrative steps and the cost associated with those steps. The Bankruptcy and Insolvency Act (BIA) provides a tariff that sets out remuneration based on a base amount plus percentage of recoveries in the estate. This applies to both bankruptcy (liquidation) and consumer proposals (voluntary arrangements) under the BIA.

The BIA also provides an option for a percentage of recovery calculation for business liquidations, however this calculation is most often not used as there are generally not enough assets in a liquidation to provide for a reasonable recovery for the insolvency practitioner (IP). Generally, appointments for other than consumers result in remuneration being calculated with reference to time spent at applicable hourly billing rates. In all situations where the IP is appointed by statute there is a process for either taxation of accounts or approval of accounts by the court with jurisdiction in the matter.

Legal accounts over a minimum threshold amount are always required to be taxed in the court with jurisdiction over the matter. Generally legal accounts are based on time spent at prevailing hourly rates.

2. A summary of how remuneration is fixed in an insolvent winding up

Insolvent companies are generally wound up using the bankruptcy provisions of the BIA. It is possible to liquidate a company under court supervision using the proposal provisions of the BIA or using the provisions of the Company Creditors Arrangements Act (CCAA). A third option is the Winding Up and Restructuring Act (WURA) which is rarely used but is the statute used for winding up banks, insurance companies and railway companies.

In all BIA, CCAA or WURA proceedings the fees of the professionals involved who are paid from the estate are authorised by the court through a taxation or approval process.

Pursuant to the provisions of the BIA the fees of the IP can be set by the creditors. This requires that a meeting of creditors be called and that the creditors voting at the meeting approve the remuneration. At a practical level creditor involvement in BIA proceedings is minimal. The likelihood of getting creditors to attend a meeting at the end of a proceeding is virtually nil.

3. A summary of how remuneration is fixed in rescue proceedings (if applicable)

Under any of the rescue and restructuring options under the BIA (proposal), CCAA, WURA, or the *Canada Business Corporations Act* (CBCA) the materials for fee approval are brought to the Court supported by an affidavit of the IP or lawyer. The affidavit includes detailed descriptions of work done, time spent and the rates of the various professionals. Rates are determined by the professionals but generally have reference to competitive rates in a region, experience and skill.

The concept of premium billing is occasionally put before the Court where the result obtained by the professionals in the file are extraordinary.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

The BIA is described as a businessperson's statute that provides for the liquidation of an insolvent debtor and a fair distribution of assets among the creditors. This original purpose has been extended in recent years to promote retention of economic value and jobs through restructuring processes. The liquidation provisions of the BIA are now almost 70 years old and the nature and result of insolvency proceedings have changed materially since that time however the opportunity for creditor involvement remains. There is mandatory notification to creditors in all proceedings, a mandatory creditors' meeting for voting on a proposal or plan of arrangement and a process of appointing a board of up to five inspectors who are charged with acting in the best interests of all creditors. In a bankruptcy meeting creditors confirm the trustee who is appointed on a preliminary basis prior to the creditors' meeting, or can substitute another trustee in its place, give direction to the trustee and appoint inspectors.

Notwithstanding, at a practical level there is little involvement in BIA proceedings aside from voting on proposals. Creditors are able to vote by proxy or voting letter and few creditors actually attend meetings. In bankruptcy proceedings there is often no expectation of a return to ordinary unsecured creditors after statutory priorities, secured creditors and costs of

administration are paid. Accordingly, it is very rare that creditors attend the meeting of creditors in a bankruptcy. There are statutory provisions for continuing the administration of a proceeding in the event that there is not a quorum of creditors at the first meeting of creditors.

In BIA cases, where concerns are raised regarding fraudulent behaviour of a debtor or regarding the behaviour of an officer of a debtor corporation, there may be more interest. The BIA provides the trustee and creditors with powers to investigate the debtor if funds are available for that purpose. Notwithstanding it is rare that creditors are willing to throw good money after bad by funding a trustee to pursue a fraudulent debtor if there are no funds in the estate to pay the costs.

In a CCAA the file is administered by the court. Groups of creditors may retain counsel, or in some cases counsel may be retained at the expense of the file, which is really the debtor funding the process, to represent their collective interests to the court. There is a voting process on a plan of arrangement submitted under the CCAA and collectively creditors do determine whether the plan is approved or not. Generally, claims officers are appointed to receive and review claims and make determinations on the validity of claims and record the votes of creditors.

CBCA proceedings generally do not involve trade creditors. Companies restructure the capital structure through negotiation under court supervision. Affected creditors usually retain counsel to assist in negotiation however generally there is a negotiated solution.

In general, there is creditor involvement where there is an expectation of a return.

5. Judicial attitudes to remuneration (if applicable)

In the vast majority of proceedings remuneration is approved by judicial officials. There are cases where the fees of professionals have come under scrutiny. A number of the cases where remuneration has been addressed relate to receiverships but the same criteria apply to CCAA proceedings:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the result of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

For BIA proceedings there is a different fee approval methodology and the general criteria to be considered are:

- to allow the trustee fair compensation for his services;
- to prevent unjustifiable payments for fees to the detriment of the estate and the creditors;
- to encourage, rather than to discourage, efficient and conscientious administration of the bankrupt estate (or proposal) for the benefit of the creditors and, so far as the public is concerned, to encourage the proper carrying out of the principles and objectives of the BIA.

There have been a number of high profile commentaries on professional fees, for example in Nortel, and judicial officials are live to the possibility of abuse. On balance the fee approval process is respected by practitioners and judicial officials and the system works well.

6. General stakeholder views on remuneration at present

Stakeholders generally view the remuneration of the office-holder as a necessary evil and will pay reasonable court approved fees. In some cases, institutional creditors will negotiate fees and arrangements with professionals in advance or will negotiate a volume rebate.

There has been some unfavourable commentary on remuneration in the media but in some of those cases files have dragged on, and professional costs increased, when stakeholders who have nothing to lose are opposing a plan or distribution in an attempt to obtain some form of recovery or advantage.

In one reported case, fees were reduced as a result of deficiencies in the administration of a proceeding that warranted a reduction in fees. In another case counsel to a receiver used an hourly rate that was considered high for a given geographic region, and the amount of time spent was greater than that required in the circumstances.

7. General office-holder views on remuneration processes at present

As noted above office-holders and counsel have a clear understanding of what is required to obtain approval of remuneration and are aware of their obligations. Professionals are paid based on their experience, the difficulty of files and their markets.

8. Any current proposals for reform

There are not proposals currently to reform remuneration for corporate rescue proceedings.

9. Practical views on what works well and what does not work well with the current system

The current system of time spent at applicable hourly rates appears to generally work well. There are occasionally calls for changes to the system, usually from guarantors or parties who may be “out of the money” who perceive abuse. As noted above, the vast majority of files proceed through approval or taxation processes unopposed.

Cayman Islands

1. The basis of remuneration

In the Cayman Islands, the requirements for the approval of official liquidators’ remuneration and approved rates are set out in Parts III and IV of the Insolvency Practitioners Regulations, 2008 (as amended) (the Regulations). The Regulations were brought into force as part of a series of new rules which supplement and support amendments to the governing Companies Law (as revised) (CL) and together were designed to provide a framework which allows insolvency practitioners to function within a clearly defined set of procedures with confidence. The bringing into force of the Regulations marked a particularly important policy shift away from the use of the United Kingdom’s Insolvency Rules 1986 and was much needed in light of the fact that the Cayman Islands has become one of the largest offshore financial centres in the world with the vast majority of its liquidations involving multijurisdictional litigation and recovery.

The Regulations introduced a comprehensive code which governs the basis by which an official liquidator may be remunerated. Rule 11(1) (a) – (e) of the Regulations allows for remuneration to be paid by way of any of the following methods (or any combination):

- time spent (which, in practice, is the most common method of remuneration);
- percentage of distributions;
- percentage of realisations (net after deduction of the direct costs of sale);
- fixed fee.

Concerns over excessive compensation are addressed through a combination of (a) in the case of time-based remuneration, prescribed caps and floors for hourly rates, based on levels of experience; (b) in the case of percentage based remuneration, a progressive schedule that caps the amount at between 2 ½ and 10 percent; and (c) approval by the liquidation committee (LC); and (d) supervision and approval by the court (as to which, see further below).

The Regulations apply only to court ordered and court supervised liquidations of corporations and limited partnerships. Remuneration arrangements in voluntary liquidations (which necessarily involve solvent entities) fall outside of the Regulations.

Personal bankruptcy proceedings are rare in the Cayman Islands. As such, in the event that such proceedings are initiated, the Clerk of the Court is the person appointed under Bankruptcy Law (1997 Revision) to be the Trustee in Bankruptcy (the Trustee). With the approval of the court, the Trustee may appoint an agent to assist where the estate is large enough to justify it. This happens so infrequently that no rules have been developed to govern the basis upon which such an agent can be remunerated, beyond the necessity for court approval.

2. A summary of how remuneration is fixed in insolvent winding up

The terms of the official liquidators' remuneration (including the basis on which they are to be paid, and the rates/percentages which apply) must be set out in a remuneration agreement. That agreement must be (a) agreed by the LC; or (b) if there is no LC, approved at a meeting of the members and/or creditors (depending on whether the company is solvent, insolvent or of doubtful solvency); or (c) in the event such approval cannot be obtained, approved by the court.

According to the Regulations, official liquidators are not entitled to receive remuneration out of the assets of a company in provisional or official liquidation without prior approval of the court. However, official liquidators may receive payment on account of up to 80% of their remuneration before seeking approval from the court of all remuneration.

The approval of the LC must be sought before applying to court (see Q4 below) and for that purpose, the LC will typically receive detailed reports as to the liquidators' activities, together with a detailed breakdown of their proposed fees and disbursements (Rule 12(1) (a)). Where there is no LC a meeting of creditors and/or contributories must be convened to approve the proposed remuneration by resolution or in accordance with agreed protocol to the same effect (Rule 12(1)(b) and (c)).

Official liquidators must apply to court for approval of their remuneration. Such an application must be supported by –

a) the report and accounts provided to the liquidation committee or meeting of creditors and/or contributories (as the case may be); and
b) an affidavit stating the outcome of the LC's consideration or the outcome of the creditors and/or contributories' meetings (this will usually be taken into account but may not be conclusive)

Liquidators' disbursements (including attorneys' fees) are not subject to court approval, although the court (and the LC) will routinely take an interest in the levels of those expenses (usually, when considering the liquidators' fees), as part of generally supervising and overseeing the liquidators' activities.

3. A summary of how remuneration is fixed in rescue proceedings (if applicable)

There are no formal "rescue" or reorganisation provisions outside of the Companies Law in the Cayman Islands. In the absence therefore of an equivalent to a UK style administration or the US Chapter 11 type regime, applications made for the appointment of provisional liquidators over Cayman companies have often been utilised as "light touch" measures to give

companies some safety and latitude while they restructure. Such circumstances often include the use of a scheme of arrangement in the context of a provisional liquidation.

The remuneration of a provisional liquidator is fixed by the court on his/her application and in fixing such remuneration the order appointing them often provides for specific reference to the Regulations. In practice this means that a provisional liquidator will often be subject to the bases and rates of remuneration prescribed by the Regulations and expected to report to the court (and sometimes to an equivalent to the LC, usually in the form of a "Stakeholders" or "Creditors" Committee), before applying to have his/her remuneration approved.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

Stakeholders in an official liquidation will have the opportunity to assume a consultative role and act in an advisory capacity to the liquidator regarding strategy and decision-making, through an LC. As described above, that includes, amongst other matters, the approval of remuneration.

Pursuant to Order 9(1) of the Companies Winding Up Rules 2008 (as amended) (CWR), in all court-supervised liquidations, the liquidator is required to attempt to establish an LC. If the company is insolvent the Committee must comprise not less than three and not more than five creditors. In practice this means that any creditor is eligible to nominate himself (unless his debt is secured or wholly rejected) and thus where the number of nominations exceed the maximum number of positions a vote will be cast amongst creditors.

In addition to approving the remuneration agreement at the start of the liquidation, and fees from time to time (as described above), the LC has a significant role to play in the conduct of the liquidation more generally. Although control of the liquidation rests with the liquidator (subject to the court's supervision), the LC is an important sounding board. LC members will typically be privy to confidential and legally privileged information, and to reports prepared for them specifically (they will typically be required to sign a non-disclosure agreement for that purpose). So, in addition to approving (or not approving) fees, the LC may be in a position to influence decisions in the liquidation with a view to managing the overall cost of the process.

The LC has the right to appoint its own lawyers and often does so to advise it on its role in the conduct of the liquidation. As a result, the LC may appear (including through its lawyers) at fee approval and other hearings.

As explained above, in the context of provisional liquidations, very often the scheme which applies to official liquidations is followed; namely, a Stakeholder Committee will be created to adopt a similar role with respect to the remuneration of provisional liquidators prior to and as part of the court approval process.

5. Judicial attitudes to remuneration (if applicable)

Judicial attitudes to liquidators' remuneration much like the facts of the cases with which they are dealing vary widely. A consistent theme however, given that both official liquidators and provisional liquidators alike are appointed by the court is a reluctance to discount too heavily the remuneration sought. That being said, judges approach their role in determining whether to approve liquidators' fees under section 109(2) of the CL and Rule 10 and 13 of the Regulations, by asking themselves whether the remuneration sought was fair and reasonable in all the circumstances.

In the Matter of the Sphinx Group [2012 (2) Note 11] the court set out the criteria it would apply in deciding whether the remuneration sought was "*fair and reasonable*", these included:

(i) the amount of time worked;
(ii) the complexity of the case;
(iii) any exceptional responsibilities required;
(iv) the effectiveness of the liquidators' operation;
(v) the value and nature of the property involved (*In re Bank of Credit & Commerce Intl.*

(Overseas) Ltd., 2007 CILR 300, applied);
(vi) a central issue was the proportionality of the work done to the results achieved (*Brooks* v. *Reid*, [2012] 1 W.L.R. 419, applied); and
(vii) the court would give some latitude to the commercial judgment of the liquidators.

The courts have shown reluctance to vary the basis on which remuneration has been agreed with a LC even once the risk of potential losses and rewards had been realised. *In the Matter of Heriot African Trade Finance Fund Ltd* [2012 (2) CILR Note 5] the court refused a liquidator's application to change the agreed basis from percentage of distribution to time-spent. To do so, it found, would be to place the court in an invidious position allowing liquidators who were to be paid on a percentage distributions basis to wait until the work was complete before applying for approval.

In the case of personal bankruptcy proceedings, the courts have shown their willingness to intervene in the context of taxation proceedings. As explained above (Q1) on occasion agents for the Trustee are appointed in significant cases. *In the matter of Otu* [2013 (2) CILR 128] the Trustee's agents' fees had been significantly taxed down and they appealed. The judge upheld the taxing master's decision finding that the agent had a duty to incur only reasonable expenses and not to charge unreasonable or excessive fees to the trust estate and that the proportionality of the fees to the size and value of the estate could well be a factor in appropriate circumstances in determining the reasonableness of the fees concerned.

6. General stakeholder views on remuneration at present

The views expressed by stakeholders tend to mirror their experiences. In many cases (in fact the majority) there is a recognition that Cayman has a sophisticated and professional insolvency regime which is well served by established and experienced practitioners who work to ensure a cost effective and efficient outcome. Furthermore, it is acknowledged as described above that the system in place has numerous inbuilt checks and balances.

In the larger and more complex liquidations, of which Cayman has had a number over recent years, costs can escalate (and that is, of course, not peculiar to Cayman). The court and those practitioners involved are adept at being conscious of the concerns that this can sometimes cause in LCs. In the vast majority of these types of cases, increased fees are a natural function of the complexity involved; whether that be as a result of the number of jurisdictions concerned or the legal and/or factual complexity presented. Thus to avoid, as far as possible, a conflict arising liquidators are often quick to ensure, through the many ways in which information flows between the parties (meetings and reports), appropriate stakeholders are fully engaged in the process of liquidation. Whilst it is not possible to ensure harmony in every case, Cayman has developed a robust but adaptable regime which is able to allay the disquiets most often expressed by stakeholders.

7. General office-holder views on remuneration processes at present

Feedback from office holders is not uniform but inclines towards suggesting that they view the fee approval process as working well in general. It is considered to be an inclusive process which allows both the relevant stakeholders to provide input on the terms of remunerating the liquidators and for disputes to be resolved through the supervision of the court. Issues that have been specifically raised concern the following:

- The court approved hourly rates for insolvency practitioners should be reviewed more regularly as they quickly move out of step with other commensurate jurisdictions with which Cayman regularly works. The suggestion here is that there be an annual review.
- Formal guidance on the format of fee submissions would be helpful – movement towards a UK style Statement of Insolvency Practice (SIP 9) would avoid the need to produce voluminous narratives which in practice are not being relied upon either by the court or stakeholders.
- Consideration should be given to mirroring any contingent or conditional fee model for lawyers, as explained below (Q.8), in order to ensure that the financial reward matches the commercial risk being taken by practitioners.

8. Any current proposals for reform

There are proposals which are not directly targeted toward the Regulations but might have an impact and lead to changes. In particular, there are proposed legislative reforms to allow attorneys to enter into contingent and conditional fee agreements. If such reforms are indeed brought into force, consideration will need to be given to whether a similar model should be adopted, where appropriate, for insolvency practitioners.

In addition, the professional association here in Cayman, the Restructuring and Insolvency Specialists Association, are currently considering a *pro forma* remuneration agreement to be used, where appropriate, by all insolvency practitioners in the context of official liquidations in the hope of streamlining the court approval process.

9. Practical views on what works well and what does not work well with the current system

As explained above, there is general agreement that the current system works well albeit there are perhaps areas in which the regime could be streamlined and more cost sensitive. There are specific views on what works well and what does not but in general the observations from practitioners and service providers with regard to their practical suggestions are summarised below:

- Judicial or legislative guidance would be welcomed on what does or could amount to a conflict of interest – Rule 6 (2) of the Regulations merely states that a person cannot act as an Official Liquidator of a company if that person or his firm has been the auditor of that company within 3 years preceding the commencement of winding up.
- Further judicial or legislative guidance would be welcomed on what is meant by the "delegation of work" with respect to Rule 11 (2) of the Regulations.
- The "Consultant" staff grade is too ambiguous and therefore open to abuse.
- The rules ought to be more flexible about obtaining LC approval when its members are no longer engaged.

China

1. The basis of remuneration

The remuneration of an office-holder (i.e. bankruptcy administrator or administrator under Chinese law) is generally determined on a percentage value of the debtor's unsecured property that is likely to be realised in accordance with the Provisions of the Supreme People's Court on Determination of the Administrator's Remunerations during the Trial of Enterprise Bankruptcy Cases (Remuneration Rules*)* Promulgated by the People's Republic of China Supreme People's Court 12 April 2007.

2. A summary of how remuneration is fixed in insolvent winding up

Generally, the remuneration of the administrator is determined by the court trying the insolvent case according to the Enterprise Bankruptcy Law of the People's Republic of China. After a court accepts the application for enterprise bankruptcy, it estimates the likely realisable value of unsecured property of the debtor, and the workload of the administrator so as to determine a preliminary remuneration plan for the administrator. The remuneration plan shall include the amount of the administrator's remuneration and its payment schedule.

According to Article 2 of the Remuneration Rules, a court shall, based on the amount of value of the debtor's unsecured property available for realisation, determine the remuneration for the administrator according to the following rules:

(1) Not more than 12 percent if the amount is below RMB1 million (including 1 million);
(2) Not more than 10 percent for the part exceeding RMB1 million and below RMB5 million;
(3) Not more than 8 percent for the part exceeding RMB5 million and below RMB10 million;

(4) Not more than 6 percent for the part exceeding RMB10 million and below RMB50 million;
(5) Not more than 3 percent for the part exceeding RMB50 million and below RMB100 million;
(6) Not more than 1 percent for the part exceeding RMB100 million and below RMB500 million; and
(7) Not more than 0.5 percent for the part exceeding RMB500 million.

The value of secured property for which the secured party has priority to be repaid shall not be included in the amount of the value of the debtor's property for the purposes of calculating the administrator's above mentioned remuneration.

Where the relevant High People's Court deems it necessary, it may, by taking the aforementioned percentages as a reference and within a 30 percent floating range, formulate a restrictive range of percentages regarding the remuneration for the administrator that conforms to the actual situation of the local area, make a public announcement in an influential media, and meanwhile report to the Supreme People's Court for record-filing. In practice, this means that the remuneration can be increased by up to 30 percent or decreased by up to 30 percent depending on the circumstances of the case.

According to Article 13 of the Remuneration Rules, an administrator that contributes reasonable labour to the maintenance, realisation, delivery, and other management work in relation to secured property shall have the right to obtain proper remuneration for such from the secured party. Where the administrator is not able to reach an agreement with the secured party regarding the amount of the aforesaid remuneration, the People's Court shall determine the amount using the method and percentages specified above as a reference but any variation shall not exceed 10 percent.

3. A summary or how remuneration is fixed in rescue proceedings (if applicable)

Generally, there is no additional remuneration for the administrator's work in rescue proceedings. However, according to Article 8 of the Remuneration Rules, the People's Court may make adjustments to the administrator's remuneration according to the actual situation of the bankruptcy case and the administrator's performance of duties, which includes:

(1) The complexity of the bankruptcy case;
(2) The diligence of the administrator;
(3) The contributions actually made by the administrator to the revival and compromise proceedings;
(4) The risks and responsibilities undertaken by the administrator;
(5) The level of disposable income of residents and level of commodity price at the domicile of the debtor;
(6) Other factors which may influence the administrator's remuneration.

Therefore, the administrator's remuneration in rescue proceedings may be a little flexible but subject to the court's discretion upon consideration of the above factors.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

In both types of proceedings, the creditors' meeting has the right to examine the remuneration plan for the administrator. Where the creditors' meeting raises any different opinions on the administrator's remuneration plan, it shall present a specific request and grounds in writing to the court. The resolution of the creditors' meeting opposing the remuneration plan shall be attached to the written request as well.

The court shall notify the administrator within three days upon receipt of the written request from the creditors' meeting. The administrator shall submit an explanation within three days upon receipt of the notice. The court may, if it believes necessary, hold a hearing to obtain the opinions of the parties concerned. The court shall, within ten days upon receipt of the written request from the creditors' meeting, notify the administrator, the creditors' committee, or the chairman of the creditors' meeting as to whether or not to adjust the administrator's remuneration. The court has the final decision on the administrator's remuneration.

Furthermore, the administrator and the creditors' meeting may arrange negotiations for the different opinions on the administrator's remuneration plan. If both parties agree on the contents of the administrator's remuneration plan upon negotiation, the administrator shall file concrete requests and grounds in writing with the People's Court, together with the resolution of the corresponding creditors' meeting. If the People's Court considers upon examination that the requests and grounds are not contrary to the mandatory provisions of any PRC laws or administrative regulations, nor will they impair the legitimate rights and interests of others, it shall adjust the administrator's remuneration plan according to the negotiation result of both parties.

5. Judicial attitudes to remuneration (if applicable)

Generally, the court will respect the result negotiated in relation to the administrator's remuneration by the administrator and the creditors' meeting, provided such result is not contrary to the mandatory provisions of any PRC laws or administrative regulations, nor will it impair the legitimate rights and interests of others.

If no agreement on the administrator's remuneration can be reached between the administrator and the creditors' meeting, the court shall strictly follow the provisions of the Remuneration Rules.

6. General stakeholder views on remuneration at present

According to the remuneration percentage ranges provided by the Remuneration Rules, administrator's remuneration is relatively low compared to the work required for the average bankruptcy case. Therefore, it is not common to see a stakeholder challenge in relation to administrator's remuneration in most cases.

However, in some bankruptcy cases involving high-value assets, some stakeholders (for example unsecured creditors) may challenge an administrator's remuneration and ask for a reduction. If the administrator could not reach agreement on its remuneration with the creditors' meeting, it has to have the remuneration decided or adjusted by the court according to the Remuneration Rules.

Meanwhile, in some cases relating to public listed companies or complicated legal proceedings, such as revival or compromise proceedings, there have been some precedents set in China where the administrator has negotiated with the creditor's meeting for more remuneration than the percentage ranges provided by the Remuneration Rules. Courts generally will respect and approve such an increase provided it is not contrary to the mandatory provisions of any PRC laws or administrative regulations, nor will it impair the legitimate rights and interests of others.

With respect to the scenario where the bankruptcy debtor has no or few assets, to ensure the remuneration interests or control costs, generally the administrator may:

(1) apply to the People's Court to conclude the procedures for bankruptcy for the reason that the debtor's assets are not enough to pay off the bankrupt expenses;
(2) negotiate with relevant shareholder(s) or creditor(s) of the debtor for the voluntary advance of relevant bankrupt expenses; or
(3) apply to the People's Court for reasonable compensation from relevant public or government funds, if any.

7. General office-holder views on remuneration processes at present

Although the percentage ranges of administrator's remuneration are relatively low, most bankruptcy administrators agree that the Remuneration Rules provide fair remuneration processes, as well as rules and reference standards for remuneration negotiation.

8. Any current proposals for reform

There is a current proposal for setting up relevant funds to provide remuneration/reasonable compensation to administrators in those cases where the debtor has no assets or the administrator is unable to realise any assets. It is further proposed that a certain percentage of

the remuneration successfully received by administrators should be contributed to the funds.

Also, in some areas of China, if the court thinks that the debtor may have no assets, the court may request the bankruptcy applicant to advance a payment as a "starting fund" to cover necessary and minimum bankruptcy expenses. If there are assets of the debtor later realised, the advance made by the applicant will be refunded. If no assets of the debtor could be realised, the applicant will bear the loss of the advance. However, such court request is not a mandatory order, so the bankruptcy applicant may freely decide to comply with or refuse the advance request. So far, such practice is still under testing and has not been officially adopted by PRC bankruptcy laws.

9. Practical views on what works well and what does not work well with the current system

In cases where there are bankruptcy assets to allow for reasonable remuneration payment, the provisions of the Remuneration Rules work well. However, in cases where there are no or few bankruptcy assets left, the Remuneration Rules can be unreasonable and unacceptable. If no minimum remuneration can be secured for administrators, it will be difficult to maintain the competition and vitality of the community of administrators as some administrators may fade out for lack of economic resources or expertise training.

Furthermore, after the remuneration is decided by the court, it is not common for the court to increase or decrease it at a later stage; that means no matter how good or bad the administrator's work is, the remuneration is fixed. In other words, the current system lacks incentives for administrators to do a better job to a certain extent.

England

1. The basis of remuneration

Remuneration of administrators, liquidators and trustees in bankruptcy can be fixed as either:

- a percentage charged on the value of the realisations recovered or distributions in an estate;
- on a time cost basis (on hourly rates);
- a set amount; or
- a combination of the above.

Office-holders must provide an estimate of fees to creditors before asking creditors (or the court) to fix the basis of their remuneration on a time cost basis. They must also provide details of the expenses that the insolvency practitioner will incur or considers are likely to be incurred.

That fee estimate must not be exceeded without the prior approval of whoever fixed the basis and gave the original approval (either the creditors or the court) under the Insolvency (Amendment) Rules 2015, SI 2015/443. Any court considering the question of office-holder remuneration will also apply Part Six of the Practice Direction on Insolvency Proceedings (2014) (PD) and so this should also be taken into account by office-holders. Office-holders should also take into consideration Statement of Insolvency Practice 9 (SIP 9), which provides guidelines on the basis of remuneration and suggests what information should be provided to creditors. The guidelines set out, in detail, what information must be kept and provided to creditors on request. Although not legally binding, SIPs are best practice, and failure to follow them could lead to disciplinary action being brought against the office-holder.

The PD lists eight guiding principles which must be considered by the registrar or district judge:

1. the claim must be justified with full particulars provided by the office-holder;

2. if there is doubt, the benefit of the doubt is resolved in favour of the office-holder;

3. professional integrity - weight should be given to the fact that an office-holder is a member of a regulated profession, and may also be an officer of the court;

4. remuneration should reflect the value of the service rendered, not just the reimbursement of the office-holder in respect of time expended and costs incurred;

5. the remuneration should be fair and reasonable for the work undertaken;

6. proportionality - both in relation to the remuneration and the information sought from the office-holder to justify the remuneration;

7. the extent to which the office-holder has complied with his/her professional guidance; and

8. the timing of the application - the court will take into account whether any application should have been made earlier and if so the reasons for any delay in making it

The remuneration of an administrative receiver under a charge deed will usually be agreed between the administrative receiver and the charge holder. However, it is possible for a subsequently appointed liquidator to challenge those fees if excessive under the Insolvency Act 1986 (IA) section 36. Practice Note: Remuneration and expenses of LPA receiver and other receivers.

2. A summary of how remuneration is fixed in insolvent winding up

The creditors' committee is required to decide the basis of remuneration. In reaching its decision the committee (or creditors) must have regard to:

- The complexity of the case;
- Whether the office-holder has to assume any exceptional responsibility;
- How effective the office-holder appears to be or has been in carrying out his/her duties; and
- The value and nature of the property the office-holder has to deal with.

If there is no creditors' committee, remuneration is fixed by a resolution of creditors in a general meeting. If that is not possible, an office-holder may then apply to the court to fix the basis of their remuneration. If there is a material change in circumstances, or a change in office-holder, the office-holder may apply to the court to review the basis of their remuneration, Insolvency Rules 1986 (IR), SI 1986/1925, rr 2.109A-2.109C, 4.131, 6.142A.

If liquidators in a compulsory liquidation are unable to have their remuneration determined by a creditors' committee or creditors generally, or they fail to obtain the approval of either body within 18 months, they are entitled to remuneration on the 'Official Receiver's scale' under IR 1986, Schedule 6.

If liquidators in a voluntary liquidation are unable to have their remuneration determined by a creditors' committee or creditors generally, they must apply to court within 18 months of their appointment.

If office-holders are dissatisfied with the level of remuneration fixed by a creditors' committee, they may request that their remuneration be increased by resolution of the creditors. If this does not resolve the issue, they are entitled to apply to court for their remuneration to be determined.

It should be noted that the remuneration itself is often not fixed or agreed by the creditors. The creditors merely have to approve the basis for the remuneration and not the remuneration itself. This gap in the rules was identified in the 1998 Ferris Report and SIP 9 tried to, but inadequately addressed this.

Remuneration for other office-holders such as court-appointed receivers, special managers or provisional liquidators will be determined by the court.

3. A summary of how remuneration is fixed in rescue proceedings (if applicable)

There are different sets of rules for administrations commenced pre-15 September 2003 (IR 1986, SI 1986/1925, r 2.47) and post-15 September 2003 (IR 1986, SI 1986/1925, r 2.106). This note concentrates on the latest rules.

If an administrator states in his/her proposals that there will be no distribution to unsecured creditors, the remuneration of the administrator can be fixed with the approval of secured creditors or if there are preferential creditors, the secured creditors and the preferential creditors whose debts amount to more than 50% of the company's preferential debts. IR 1986, SI 1986/1925, r 2.106(5A).

If the creditors or the creditors' committee have not approved the basis of remuneration, then the administrators must apply to court for approval within 18 months of their appointment. SI 1986/1925, rr 2.106(6), 4.127(7).

In relation to company voluntary arrangements (CVA) and individual voluntary arrangements (IVA) remuneration is determined by the creditors' meeting approving the proposal. Creditors have the power to modify any of the terms of the proposal, including remuneration. IR 1986, SI 1986/1925, r 1.28 for CVAs and IR 1986, SI 1986/1925, r 5.33 for IVAs. The proposal must contain details of the proposed office-holder's remuneration and expenses. IR 1986, SI 1986/1925, rr 1.3(2)(g)(h), 1.28 and 5.33.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

Following the report into Officer-holders' Remuneration in 2014 by Professor Elaine Kempson, the intention of the insolvency reforms effective from October 2015 aimed to increase the participation of creditors. By providing more detailed information, it is intended that creditors can make a better assessment of the remuneration charged by way of the work undertaken, fees and expenses charged.

Creditors have a direct interest in the level of costs of the office-holder. The office-holder's remuneration will mainly come from the assets of the company or bankrupt over which they are appointed. This is recognised in our legislation, and creditors are allowed to determine the basis of an office-holder's remuneration. IA 1986, Sch B1 para 99(3) IR 1986, SI 1986/1925, rr 4.127–4.128 and 6.138.

Practically, creditors have a right to form a committee with a minimum of three and a maximum of five members (one member has one vote, unlike in general creditor meetings which are by value).

For creditors to be able to determine remuneration, the office-holder must provide them with as much detail as they reasonably require. How much this is will depend on the case, its complexity and its size, and what information it is proportionate to provide in the circumstances of the case. An office-holder is not required to provide all information requested by the creditors, but must provide sufficient information to enable the creditors to make an informed decision.

Creditors may apply to court if they believe that an office-holder's remuneration should be reduced because it is excessive. The application is usually heard before a registrar or district judge, who may make any order they think appropriate, and may ask for the preparation of a report by an assessor or a cost judge (at cost to the estate). There is a time limit of eight weeks to challenge remuneration reported in an annual report or the right to challenge is lost, this time limit is often missed. For a creditor to make an application challenging remuneration they will require the concurrence of at least 10% in value of the creditors. This power is rarely used in practice as the remuneration must be excessive in all circumstances, which can often be hard to prove. It is also likely the creditor will be at risk of paying the costs of the application if it does not succeed in challenging the fees to a significant degree.

5. Judicial attitudes to remuneration (if applicable)

Generally, the specialist courts are realistic about fees whereas the lower and less specialist courts (especially in personal insolvency) can be very harsh. The practice direction should be taken into account however judges assess value with the benefit of hindsight which may lead to time being disallowed which they believe has not provided value, even though at the time the work was done it was reasonably believed value would be given.

6. General stakeholder views on remuneration at present

Most creditors, insofar as it is possible to obtain their input, believe the key issue is the need for meaningful information at an early stage about how much a case is likely to cost. The requirement for IPs to produce this information at the onset of instruction, can provide creditors with a sense of greater control and a focus on value.

7. General office-holder views on remuneration processes at present

One of the main practical concerns of IPs is that, especially in complex cases, it is not always possible to determine what work will be involved until the case progresses or until sufficient investigation has been undertaken. Furthermore, the risk of providing too much detail of intended investigations in claims cases can be counter-productive.

8. Any current proposals for reform

Reforms have been under discussion for many years and there have been changes since the 1998 Ferris Report. However, these reforms have only recently been implemented and are bedding in.

9. Practical views on what works well and what does not work well with the current system

What works well

The 2015 rules aim to provide more creditor engagement. This is particularly helpful for unsecured creditors who may not have regular interaction with insolvent debtors. Creditors are provided with much more information so that they can efficiently and effectively understand the work carried out or the fees and estimates required, especially for understanding IPs' time costs. Previously, creditors would be faced with the complex task of understanding office-holders' fees and estimates with only the hourly rates being known in advance.

- Prior to the new remuneration rules, the main concern expressed by unsecured creditors was that IPs' fees did not represent value for money. It was argued that the previous arrangement for IPs' charging of remuneration allowed for overcharging of fees. The 2015 rules now mitigate such an argument, binding IPs to a much more stringent set of requirements with the aim to reduce the risk of overcharging and to hold IPs to account when providing their fee estimates. The effect of this should increase the efficiency of work carried out and add to the IPs' reputation amongst creditors.

- Former Business Minister Jo Swinson said *"…Insolvency practitioners do important and specialist work realising the assets of failed companies for distribution to suppliers and others owed money. Initial fee estimates, which can only be changed by agreement, will strengthen the position of those owed money to ensure that fees are fair and reasonable."*

  "…Increased transparency is a sensible and practical way to strengthen the hands of those owed money in an insolvency and will give insolvency practitioners the opportunity to demonstrate how their services provide value for money."

Concerns in relation to the new rules

- The new rules have placed a heavy burden on IPs to provide upfront costs information. As the new regime requires office-holders to provide estimates of their work early on, it can place a limit on the fees recoverable unless they obtain further approvals from creditors at a later date. As mentioned earlier, one of the main practical concerns for IPs is providing accurate estimates early on with limited available information. It may be easier to provide estimates in some circumstances such as administrations or for the administrative parts of a case. However, in many liquidations an IP will need to provide an estimate of his fees without very much information or without having started detailed investigation. This increases the risk of IPs overestimating or underestimating their work which can either leave the IPs with a shortfall or alternatively increase the potential of increased charges for creditors.

- It could be possible to defer requesting a fee resolution at the first meeting of creditors until a second meeting and after post-appointment investigations have been carried out. This may be a better alternative to being limited by a pre-approved estimate. However, this would cause a rise in costs, further delays and generally contradict the aim of the 2015 rules. Furthermore, creditors tend to be less engaged further down the timeline.

The Insolvency Rules 2016 effective 6th April 2017

Office-holder may (but does not have to) use new deemed consent procedure unless Insolvency Act 1986 or 2016 Rules require a decision procedure to be used. Deemed consent cannot be used to obtain decisions relating to office-holder's remuneration, including fixing basis of remuneration and approval of quantum of pre-administration costs and remuneration where fixed on time-cost basis (s.246ZF(2) IA 1986).

Germany

1. The basis of remuneration

The legal basis for the remuneration of office-holders in German insolvency proceedings is section 63 of the German Insolvency Code (Insolvenzordnung – InsO), which mainly says that the office-holder is entitled to an adequate remuneration. Details are set out in a federal decree on the remuneration of insolvency office-holders (Insolvenzrechtliche Vergütungsverordnung – InsVV).

Only members of a creditors' committee and insolvency practitioners commissioned by the Insolvency Court to provide an expert opinion (in particular with regard to the preconditions for opening an insolvency proceeding) are paid on a time basis with (more or less) flexible hourly rates which theoretically range up to 95.00 EUR (€) per hour, but may be fixed higher by the Court.

The system for the remuneration of insolvency office-holders is different and not primarily based on the time invested, but – unless the minimum fee applies – on the value of the insolvency estate and deviations from what would be considered as a standard proceeding (without that term being used or defined by the law). The idea of the system is to reward success and compensate for particular complexities and challenges. The value of the insolvency estate is the basis for the calculation of the remuneration. It requires a calculation itself and may differ for different stages of the proceeding. In order to understand that calculation and those differences it is necessary to be aware of some features of German insolvency proceedings.

In principle, there is only one kind of insolvency proceeding, no matter whether the debtor is a company or an individual, whether there is a business to be restructured or wound up, whether this is through an insolvency plan or a sale of the assets and whether the debtor

stays in possession (i.e. self-administration) or not. The title and powers of the office-holder as well as some procedural aspects may differ, but the framework of the proceeding is always the same. That framework provides for the possibility to have a preliminary insolvency proceeding for the time from the application for opening of the proceeding up to the court's decision upon that application, which may be several months. If there is a preliminary insolvency proceeding, the court appoints a preliminary insolvency administrator (or custodian, if self-administration is granted), who is entitled to a separate remuneration. The calculation of the value of the insolvency estate is different for the preliminary insolvency proceeding compared to the calculation for the (final) insolvency proceeding. That may sound a bit odd, but can be explained by the fact that only at the end of the insolvency proceeding is the result clear and the value of the insolvency estate can be calculated according to what is distributed, while at the end of the preliminary proceeding there can only be an estimation of the values administered until then. In addition, the value of some assets may be included in the calculation basis for the preliminary administrator's (or custodian's) remuneration only. In an overview, assets in the debtor's possession are taken into account for the calculation basis of the remuneration as follows:

	Preliminary Proceeding	**Final Proceeding**
Assets belonging to third parties	Maybe*	No
Assets belonging to the debtor but encumbered with security rights	Maybe*	No
Assets (as far as they are) free of third party rights	Yes	Yes
Receivables free of security rights and set off possibilities	Yes	Yes
Surplus of going concern	Yes	Yes
Insolvency related claims (e.g. claw back)	No**	Yes

* The value of these assets may be added to the calculation basis, if they are not subject to a lease contract and the preliminary administrator had to deal with them to a significant extent.

** Insolvency related claims only come into existence with opening of the insolvency proceeding. Therefore, their value cannot be part of the calculation basis for the preliminary proceeding.

The value relevant for the calculation is always what the insolvency administrator was able to realise for each asset (including claims), minus payments on rights to separation or separate satisfaction. Except for expenses related to the continuation of a debtor's business and fees the administrator may claim for special tasks as a lawyer or accountant, costs of the insolvency proceeding and other expenses during the (final) proceeding are not deducted from the result of the realisation of the assets.

An estimation of values is only possible for the preliminary proceeding and if the (final) proceeding ends without realisation of all assets – for instance in case of restructuring the debtor entity through an insolvency plan. If the value estimation for the preliminary proceeding turns out to deviate more than 20% from the values finally realised the remuneration for the preliminary proceeding will be changed retrospectively.

The standard remuneration is calculated as a declining percentage (see below) of the calculation basis explained above. This standard remuneration may be increased or decreased according to whether the proceeding and the office-holder's job was particularly complex or the opposite, compared to a standard proceeding. The remuneration decree (InsVV) lists a number of relevant criteria – like continuation of a business or working out an insolvency plan as increase-factors – and there are plenty of commentaries and court decisions especially dealing with constellations that may increase the remuneration. In the end much depends on the office-holder's dexterity with the presentation in his application for the remuneration and on the court's decision as to what it considers as adequate in the individual case.

Due to the fact that an insolvency proceeding can be initiated in Germany without any assets, if the debtor is an individual, and with only enough assets to cover the costs of the proceeding, if the debtor is a corporate body, the calculation basis for the office-holder's remuneration as shown above may not lead to an adequate remuneration. For these cases – the majority of

consumer insolvency proceedings – the law provides for a minimum remuneration. It is 800 € for consumer insolvency proceedings and 1,000 € for all other insolvency proceedings, for a preliminary insolvency administrator as well as for the (final) insolvency administrator (or custodian). The minimum remuneration is raised according to the number of creditors participating in the proceeding: Starting with the 11th creditor up to the 30th creditor the minimum remuneration is raised by 150 € for every started five creditors and by 100 € starting with the 31st creditor. In case of an individual debtor with no assets at all the treasury may disburse the minimum remuneration.

An individual debtor can obtain a discharge six years after the opening of an insolvency proceeding, and, under certain circumstances, after five or three years. The insolvency proceeding usually does not take that long. For the time between the termination of the insolvency proceeding and the decision upon the discharge the court appoints a trustee, whose (regularly) only task is to collect the debtor's seizable income and distribute it to the creditors once a year. In practice the insolvency administrator will always be appointed as trustee. His remuneration is a percentage of the collected monies (5% up to 25,000 €, 3% out of the next 25,000 € and above that 1%), most of the time, though, it will be the minimum fee of 100 € a year (plus VAT).

2. A summary of how remuneration is fixed in insolvent winding up

Apart from differences regarding the calculation basis for the remuneration (see 1. above) and possible factors for increasing the remuneration whether the debtor's business is wound up or rescued during the insolvency proceeding has no influence on how the remuneration is fixed.

The (preliminary or final) insolvency administrator (or custodian) has to apply to the court to formally fix the remuneration and expenditure. Besides a specified amount claimed as remuneration, the application has to contain a detailed description of the calculation basis (see above 1.) and disclosure of all contracts for particular work and services the administrator has entered into. The court is supposed to decide on the application within a reasonable time, which according to the Federal High Court of Justice is about six weeks. Depending on the court or the responsible judicial officer respectively the decision may take longer in practice – sometimes more than a year – while the administrator is not entitled to interest. Together with the decision the court authorises the administrator to take the fixed remuneration and expenditure from the insolvency estate. The fact that the court has decided upon the remuneration (not its amount) has to be published in order to start the period for appeal for the debtor, creditors and the administrator.

For the standard remuneration the following table applies:

Calculation basis	**Percentage**
Up to 25,000 €	40 %
25,000 to 50,000 €	25 %
50,000 to 250,000 €	7 %
250,000 to 500,000 €	3 %
500,000 to 25,000,000 €	2 %
25,000,000 to 50,000,000 €	1 %
More than 50,000,000 €	0.5 %

In accordance with this table, on a calculation basis of 500,000 € the standard remuneration would be 37,750 €.

An increase or decrease of the standard remuneration has to be granted on the basis of an overall view, but as mentioned before there are a number of factors which are taken into account regularly. A simple example for the calculation of an insolvency administrator's remuneration on the basis of a standard remuneration of 37,750 € could look like this (with more detailed explanation, of course):

Standard remuneration	**37,750.00 €**	
Continuation of business for three months without surplus	+ 25 %	+ 9,437.50 €
Dealing with complex security rights issues	+ 10 %	+ 3,775.00 €
Detection and pursuit of an over-average number of claw-back claims	+ 5 %	+ 1,887.50 €
Facilitation due to work done during preliminary proceeding	- 10 %	- 3,775.00 €
Intermediary result of increase	**+ 30 %**	**11,325.00 €**
Result of overall view (elimination of possible overlap)	**+ 25 %**	**9,437.50 €**

The final remuneration hereafter would be:

Standard remuneration	37,750.00 €
Overall increase (25 %)	+ 9,437.50 €
Total remuneration net	47,187.50 €
VAT (19 %)	+ 8,965.63 €
Total remuneration gross	56,153.13 €

Regarding expenditure, the administrator has the choice to apply for reimbursement of all proven expenditure or for a lump sum which depends on expenditure of time and is capped to the lowest maximum of either 30 % (25 % if the proceeding took less than 2 years and 15 % if it took only one year) of the standard remuneration or 250 € per month of the administrator's (necessary) activities. Given a duration of proceedings of 26 months, the (capped) lump sum expenditures in the example above would be:

26 months x 250 €	6,500.00 €
VAT (19 %)	+ 1,235.00 €
Total expenditures gross	7,735.00 €

Given that the final calculation of the remuneration is only possible at the end of an insolvency proceeding and a proceeding may take several years, the office-holder has the possibility to apply to the court to fix advance payments during the proceeding.

3. A summary or how remuneration is fixed in rescue proceedings (if applicable)

No difference to 2. above.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

In order to ensure and protect the office-holder's independence and neutrality, neither the debtor nor the creditors are involved in the process of fixing the remuneration. Any agreement on the remuneration between the office-holder and another party involved in the insolvency proceeding would be considered unlawful, even agreements between the office-holder and the creditors' committee or the creditors' assembly.

In the case of a reorganisation of the debtor firm by way of an insolvency plan proceeding, there is a practical requirement to include the costs of the insolvency proceeding in the financial budget. In this connection, there is a discussion about whether it is possible to regulate the insolvency administrator's (or custodian's) remuneration in an insolvency plan in order to determine an amount. The prevailing view so far is that this is not possible and only the court may fix the remuneration. However, if the insolvency administrator indicates in an insolvency plan the amount of the remuneration he intends to apply for, he is considered bound not to apply for a higher amount afterwards. On his application, the court may still fix a lower amount.

The only involvement of other participants of the proceeding with regard to the office-holder's remuneration is the already mentioned (see above 2.) possibility to appeal against the court's decision on the remuneration. Besides the office-holder himself, the debtor and the members of a possible creditors' committee are to be notified about the amount the court fixed as remuneration, and the fact that it has been fixed (not the amount) has to be published

(www.insolvenzbekanntmachungen.de). The office-holder, the debtor and any creditor (not members of the creditors' committee who are not creditors) may then appeal against the decision within two weeks of the decision.

5. Judicial attitudes to remuneration (if applicable)

Even though the above description of how the remuneration is calculated is a simplified summary, it may already show that skilful calculation and reasoning can make a considerable difference. Not surprisingly there are examples where such skills are driven to excess and Courts just rubber-stamp. Especially when decisions like this become publicly known – for example after being quashed by an appeal court and published – they provoke bad publicity for office-holders (and insolvency courts) and backlash by other courts.

In case of a complex application it mostly depends on the court or on the deciding judicial officer in the end, whether or to what extent increases of the remuneration are granted or not generally or in a particular case.

Courts – even the Federal High Court of Justice – sometimes argue that office-holders' remuneration has to be seen and fixed in a mixed calculation, meaning that while in some proceedings the remuneration may not cover the expenses, the office-holder may be lucky in other proceedings to get overpaid in relation to his efforts. This argument, though, has never yet been used to establish an increase of the remuneration in underpaid proceedings, but solely to justify cuts.

6. General stakeholder views on remuneration at present

Leaving aside the psychological challenge for stakeholders to appreciate the reduction of the distributable cash through the office-holder's remuneration anyway, their views on it usually depend on several factors.

In proceedings with no or few valuable assets, office-holders' remuneration – in particular the minimum remuneration – is not regularly subject to stakeholders' complaints.

The probability of discussion naturally increases with the amount of the remuneration. Apart from very high remunerations in prominent proceedings that find their way into daily press and public indignation (justified or not), discontent may crop up more easily amongst non-regular participants of insolvency proceedings or participants with less understanding of the office-holder's work. Usual stakeholders (like major banks or credit insurers) are more relaxed and mainly just bothered by excessive calculation artistry regarding the office-holder's application for remuneration and by needless "hidden remuneration". The latter means the misuse of the office-holder's possibility to mandate, for example, his own law firm with legal services, especially litigation, and charge those separately to the insolvency estate.

In general, it may be said that objective stakeholders with an understanding for office-holders' work and the remuneration system are in principle happy with that system, even though they will sometimes not be happy with how it is used in particular cases. What may be on their wish list is a high(er) degree of transparency and predictability and some *a priori* influence on the fixation of the remuneration.

7. General office holder views on remuneration processes at present

In principle office-holders appreciate the system of the remuneration being fixed by the court with regard to value of the estate, efforts and success of the office-holder. Presumably the majority of German office-holders would not want to change to hourly rates and / or negotiations with (a body of) creditors about their remuneration.

There are some points of criticism, however, regarding the actual legal situation and the process:
Firstly, the decree on office-holders' remuneration (InsVV) and especially the rates for the standard remuneration are based on the idea of a standard proceeding and the cost structure

of the nineties (last century) and there has not been an adjustment since with regard to considerably increased requirements for office-holders and their infrastructure or even a compensation for inflation.

Secondly the majority of proceedings – in particular the ones with minimum remuneration (see above 1.) – is at the best cost covering, while according to the idea of the law it should allow some profit.

A third issue is that office-holders face increasing jurisdictional requirements – especially set by the Federal High Court of Justice – regarding the explanations and calculations an application for remuneration has to contain, which makes it very complex and time consuming.

A fourth issue worth pointing out is the already mentioned fact that the fixing of remuneration can be a game of chance with regard to the amount granted and the duration depending on the court or the judicial officer in charge (see above 2.). The uncertainty about the payment date and the fact that – according to the Federal High Court of Justice – office-holders are not entitled to interest for delay are quite unpleasant and can make liquidity planning a guessing game for office-holders.

8. Any current proposals for reform

Especially due to the points of criticism mentioned above (7.) there have been several more or less detailed proposals for reform during the last years, in particular by interested groups like the Association of German Insolvency Administrators (Verband der Insolvenzverwalter Deutschlands eV - VID). All of the proposals aim to facilitate the calculation and most of them support an increase in the remuneration especially in proceedings with no or few valuable assets. Nevertheless, it does not look like the legislator has any concrete plans in this direction for the time being.

9. Practical views on what works well and what does not work well with the current system

As already mentioned, the principles and the idea of the current remuneration system are considered as suitable and in particular superior to a system of billing on the basis of hourly rates, because, compared to a time fee system, the current system avoids the administrative efforts of recording and controlling and it incentivises and rewards effective and successful working. The lack of stakeholders' legal influence in the fixing of remuneration avoids the need to bargain and strengthens the office-holder's neutrality.

The fixing of the remuneration by the court alone can be an advantage or a disadvantage, depending on whether the judicial officer in charge has an understanding of the office-holder's work and decides on the application for remuneration within reasonable time.

The (other) drawbacks of the system are described above (particularly at 7). To summarise, the calculation requirements have become too complicated, which adds to different treatment by different courts, and the system needs some reform, especially with regard to the rates, including compensation for inflation and adjustment to increased complexity of the "standard proceeding" and demands on office-holders.

Hong Kong

1. The basis of remuneration

An insolvency practitioner's (IP) remuneration is almost always based on hourly rates, although it is possible to negotiate alternative remuneration structures with the committee of inspection (the CoI).

IPs in Hong Kong are required to keep very detailed time records. They are required to record their time in 6 minute units. In respect of each unit, there must be a detailed description of the

work undertaken. When submitting a claim for remuneration to the court or to the CoI the liquidators are required to provide schedules detailing the following:

(i) the total amount of time spent on the assignment;
(ii) the time spent by individual members of staff;
(iii) the nature of the work undertaken and the cost thereof;
(iv) any time write-offs and the value of those write-offs; and
(v) the net amount of the claim disclosing both the number of hours charged and the amount of fees.

Disbursements are to be charged at cost with no mark-up.

Since 1997 there has been a set of charge out rates agreed between the Official Receiver's Office (ORO) and the Hong Kong Institute of Certified Public Accountants (HKICPA). These were last reviewed in 2012.

The legislation does provide for remuneration to be based on percentages in some circumstances, but this is a rarely used option.

2. A summary of how remuneration is fixed in insolvent winding up

Creditors' voluntary liquidation (CVL)

Section 244(1) of the Companies (Winding-up and Miscellaneous Provisions) Ordinance (C(WUMP)O) provides that the remuneration of the liquidator in a CVL is to be agreed by the CoI. However, if there is no CoI the liquidator can convene a meeting of creditors for the purpose of agreeing his fees. Alternatively, the fees can be agreed by a resolution passed at the annual general meeting or indeed a resolution passed at the first meeting of creditors.

If the liquidator cannot reach agreement with the CoI or cannot get a resolution passed at the meeting, an application may be made to the court under section 255 for fees to be approved by the court using its inherent jurisdiction.

Court supervised liquidations

Provisional liquidator appointed under section 193

The provisional liquidator's (PL) fees are to be agreed by the court pursuant to the terms of the order appointing the PL. In the *Lehman Brothers* cases[18], due to the size and complexity of the administrations, the court appointed an assessor to assist it in the review process. There were several companies and the court considered that in view of the complexity of their affairs, the assessor, a former partner of an international law firm who had previously undertaken similar work in the UK, would be able to provide valuable assistance to the court.

In the past, PLs often had to wait many months, and sometimes more than a year, for the approval of their fees by the court. However, in the *Lehman Brothers* cases the PLs applied to the court for an interim payment of their fees and for permission to make an interim payment in respect of the fees of their solicitors and agents.

In a landmark judgment the court (Barma J as he was then) approved payments of 75% on account of their fees to the PLs of the various *Lehman Brothers* companies. The payment was subject to an undertaking that if their fees, when subsequently taxed by the court, were lower than the payment on account, the PLs would repay the difference.

The court also allowed the PLs to make payments on account of 90% in respect of fees and 100% of disbursements to their agents, mainly solicitors, employed during the course of the various administrations. The court made it clear that it was the responsibility of the PLs to

[18] Re Lehman Brothers Securities Asia Ltd (No 10 [2010] HKLRD 43, [2009] HKCU 1258
Re Lehman Brothers Securities Asia Ltd (No 2) [2010] HKLRD 58, [2009] HKCU 1281
Re Lehman Brothers Securities Asia Ltd (In Liq) [2011] HKCU 773

critically scrutinise the invoices of their agents before making any payments to them. The court did not require the bills to be subject to taxation.

In a subsequent ruling, however, in the case of *MF Global*[19], the court (this time in a decision handed down by Harris J) modified its approach.

First, the court made it clear that in respect of the PLs' agent's fees, in this case those of their solicitors, they would need to be approved by the Court through the usual taxation process.

Secondly, that any application by PLs for a payment on account of their fees would only be allowed if the amounts involved were material. The wording of the decision seemed to imply that such applications would only be considered in the case of what have been referred to as "*Mega Insolvencies*". The reality is that most provisional liquidations are not mega-insolvencies, which means that provisional liquidators must continue to wait for several months for their fees to be approved by the court.

Provisional liquidator appointed under section 194(1A) – panel "T" appointments

The Ordinance says that a PL appointed under section 194(1A) should be remunerated in accordance with a scale of fees approved by the Official Receiver. This means the scale of charge-out rates agreed by the PL when he submits his tender to the Official Receiver to be appointed to the panel.

Applications for remuneration by a PL appointed under this section must be submitted to the court, rather than to the Official Receiver's Office (ORO) as was previously the practice.

Liquidators

The remuneration of a liquidator in a compulsory liquidation is agreed either by the CoI or, if there is no CoI, by the court. If it is agreed by the CoI, the liquidator will have to satisfy the ORO that he has complied with the Court Guidelines 2004 (see further below) regarding the provision of information to the CoI, before the ORO will agree to funds being drawn down from the Companies Liquidation Account.

Trustees in Bankruptcy

If there is a CoI, it is the role of the CoI to approve the trustees' fees. If there is no CoI the trustees can convene a meeting of creditors for the purpose of agreeing their fees. If there is a CoI, but for some reason it will not agree the trustees' fees, or it is not possible to get a resolution of the creditors, the trustees can apply to the court for it to assess the trustees' fees pursuant to its inherent jurisdiction.

3. A summary of how remuneration is fixed in rescue proceedings

The most common form of corporate rescue in Hong Kong is by way of a scheme of arrangement (Scheme). In a Scheme, the fees are usually agreed between the company and its professional advisers. In many cases, where there is a "white knight" coming in to rescue the company, they will often pay, or at least underwrite, the fees of the professional advisers. There is no court involvement in the agreement of the fees of the scheme administrator although the fees will be disclosed in the Scheme documentation if they are to be paid out of the Scheme assets.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

Creditors can participate through being members of the CoI. If fees need to be agreed at a meeting of creditors they are entitled to attend. In a CVL, if an IP needs to obtain the approval of the court, because he cannot get a resolution approving fees from creditors in general

[19] MF Global Hong Kong Ltd (No 2) [2013] 3 HKLRD 56, [2012] 4 HKC 333

meeting, the court would require the IP to give notice of the hearing to all creditors who would then have the right to attend. It is not clear whether a creditor in a court supervised liquidation has a right to attend a hearing at which the IP's fees are assessed.

5. Judicial attitudes to remuneration

In the past, particularly in the late 1990s and the early part of the last decade, there was some antagonism by certain members of the judiciary towards the fees of IPs. This was most noticeable in the *Peregrine* cases[20] where PLs were appointed in 1998. However, in May 2004 the court brought in a set of guidelines regarding the submission of remuneration claims by IPs which previously had been dealt with on what appeared to an *ad hoc* basis. Remuneration claims are now required to be submitted in a relatively standard format and are handled on a much more timely basis. There now appears to be little friction between the judiciary and IPs.

6. General stakeholder views on remuneration at present

Creditors generally are always seeking what they perceive as "value for money". Whilst financial creditors are much more aware of the complexities of the work undertaken by IPs, trade creditors, particularly those based in China, are much more likely to seek discounts in respect of fees. However, in general, it is rare that an IP is not able to agree his fees with a CoI or with the creditors.

7. General office-holder views on remuneration processes at present

The current process for agreeing the remuneration of IPs appears to work quite well, particularly following the introduction by the court of the 2004 Guidelines. There remain some concerns regarding delays in the process, but they are much less pronounced than previously was the case. However, it is possible that this is because of the recent downturn in insolvency appointments which is likely to have resulted in fewer applications to the court for IPs' fees to be assessed.

8. Any current proposals for reform

At present, there are no proposals for reforming the way in which the remuneration of IPs is agreed or processed by the court.

9. Practical views on what works well and what does not work well with the current system

In general, the procedure for agreeing the remuneration of IPs works quite well. There have, however, been examples of difficulties experienced by IPs when trying to get the court to agree their remuneration where a CoI is either unwilling to agree the remuneration or the CoI has ceased to be operational. The legislation does not cater for these issues and accordingly IPs are required to ask the court to use its "inherent jurisdiction" to agree their remuneration.

India

1. The basis of remuneration

The Insolvency and Bankruptcy Code, 2016 (IBC) was passed by the Parliament on 11 May 2016, received Presidential assent on 28 May 2016 and was notified in the official gazette on the same day.

The IBC provides for the constitution of a new insolvency regulator, the Insolvency and Bankruptcy Board of India (Board) and for insolvency professionals as intermediaries who would play a key role in the efficient working of the bankruptcy process. The IBC contemplates

[20] Peregrine Investment Holdings Ltd (No 1) [1998] 3 HKC 1

insolvency professionals as a class of regulated but private professionals having minimum standards of professional and ethical conduct.

The IBC proposes two independent stages for corporate debtors as follows:

The Insolvency Resolution Process(IRP), during which financial creditors assess whether the debtor's business is viable to continue and the options for its rescue and revival; and

Liquidation, if the insolvency resolution process fails or financial creditors decide to wind down and distribute the assets of the debtor.

In the IRP, the insolvency professional verifies the claims of the creditors, constitutes a creditors' committee, runs the debtor's business during the moratorium period and helps the creditors in reaching a consensus for a revival plan. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee.

No clear guidelines have been given in the Act or rules on the quantum of fees to be paid to the insolvency professional or 'resolution professional' appointed to administer the IRP. As of now the quantum of fees to be paid is fixed between the parties on the basis of the quantum of debt of the company, often 50% of the fees are paid at the outset with the balance payable upon the happening of certain event(s).

In liquidation, the liquidator is entitled to a fee as a percentage of the amount realised net of other liquidation costs.

In relation to remuneration and costs, the Insolvency and Bankruptcy Board (Insolvency Professionals) Regulations, 2016, Regulation 25 provides as follows:

(1) An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.

(2) An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration. The persons fixing the remuneration are those that appoint the insolvency resolution professional such as the financial creditor, operational creditor or the company.

(3) An insolvency professional shall disclose all costs of the insolvency resolution process, all liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are reasonable.

2. A summary of how remuneration is fixed in insolvent winding up

An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board. The Insolvency and Bankruptcy Board (Liquidation Process) Regulations, 2016, regulation 4 provides as follows:

(1) The fee payable to the liquidator shall form part of the liquidation costs.

(2) The liquidator shall be entitled to such fee and in such manner as has been decided by the committee of creditors before a liquidation order is passed under sections 33(1)(a) or 33(2). Section 33 (1) (a) provides that where the Adjudicating before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process or the fast track corporate insolvency resolution process, as the case may be, does not receive a resolution plan; then it shall:

(i) pass an order requiring the corporate debtor to be liquidated;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

Section 33 (2) of IBC provides that where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order.

(3) In all cases other than those covered under sub-regulation (2), above the liquidator shall be entitled to a fee as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, as follows:

Amount of Realisation/Distribution (in rupees)	**Percentage of fees on the amount distributed/realised**			
	In the first six months	In the next six months	In the next one year	Thereafter
Amount of Relisation (exclusive of liquidation costs)				
On the first 1 crore (ten million)	5.00	3.75	2.50	1.88
On the next 9 crore	3.75	2.80	1.88	1.41
On the next 40 crore	2.50	1.88	1.25	0.94
On the next 50 crore	1.25	0.94	0.68	0.51
On further sums realised	0.25	0.19	0.13	0.10

3. A summary or how remuneration is fixed in rescue proceedings (if applicable)

The IRP provides a collective mechanism to lenders to deal with the overall distressed position of a corporate debtor. This is a significant departure from the former legal framework under which the primary onus to initiate a reorganisation process lies with the debtor, and lenders may pursue distinct actions for recovery, security enforcement and debt restructuring.

A financial creditor (for a defaulted financial debt) or an operational creditor (for an unpaid operational debt) can initiate an IRP against a corporate debtor at the National Company Law Tribunal (NCLT).

The defaulting corporate debtor, its shareholders or employees, may also initiate voluntary insolvency proceedings.

The NCLT orders a moratorium on the debtor's operations for the period of the IRP. This operates as a 'calm period' during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the debtor.

The NCLT appoints an insolvency professional or 'Resolution Professional' to administer the IRP. The Resolution Professional's primary function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of a committee of creditors. This is similar to the approach under the UK insolvency laws, but distinct from the "*debtor in possession*" approach under Chapter 11 of the US bankruptcy code. Under the US bankruptcy code, the debtor's management retains control while the bankruptcy professional only oversees the business in order to prevent asset stripping on the part of the promoters.

The Resolution Professional identifies the financial creditors and constitutes a creditors' committee. Operational creditors above a certain threshold are allowed to attend meetings of the committee but do not have voting power. Each decision of the creditors' committee

requires a 75% majority vote. Decisions of the creditors' committee are binding on the corporate debtor and all its creditors.

The creditors' committee considers proposals for the revival of the debtor and must decide whether to proceed with a revival plan or liquidation within a period of 180 days (subject to a one-time extension by 90 days). Anyone can submit a revival proposal, but it must necessarily provide for payment of operational debts to the extent of the liquidation waterfall.

As stated above, no clear guidelines have been given in the legislation on the quantum of fees to be paid to the insolvency professional. Further, in India, the person appointing the insolvency professional (for example, a financial creditor, operational creditor or the corporate debtor) has to first seek approval from the NCLT for appointment of an interim resolution professional whose term shall not exceed thirty days from the date of his appointment.

As of now the quantum of fees to be paid is fixed between the parties on the basis of the quantum of debt of the company, often 50% of the fees are paid at the outset with the balance payable upon the happening of certain event(s).

It is further provided under Regulation 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that the applicant, either the financial creditor, operational creditor or the corporate debtor filing the insolvency petition shall fix the expenses to be incurred by the interim resolution professional.

The Adjudicating Authority shall fix the expenses where the applicant has not fixed expenses.

The applicant, either the financial creditor, operational creditor or the corporate debtor filing the insolvency petition shall bear the expenses which shall be reimbursed by the committee of creditors to the extent it ratifies the same.

The amount of expenses ratified by the committee of creditors shall be treated as the insolvency resolution process costs.

Expenses as given under Regulation 33 means the fees to be paid to the interim resolution professional.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

Section 21 of the IBC provides that the interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

The committee of creditors shall comprise all financial creditors of the corporate debtor.

All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors.

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.

The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

The committee of creditors, may, in the first meeting, by a majority vote of not less than seventy-five per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Further as per section 23 of the IBC, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency process period.

It is further provided under Regulation 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that the applicant, either the Financial creditor, operational creditor or the corporate debtor filing the insolvency petition shall fix the expenses to be incurred by the interim resolution professional.

The Adjudicating Authority shall fix the expenses where the applicant has not fixed expenses.

The applicant, either the financial creditor, operational creditor or the corporate debtor filing the insolvency petition shall bear the expenses which shall be reimbursed by the committee of creditors to the extent it ratifies them.

The amount of expenses ratified by the committee of creditors shall be treated as the insolvency resolution process costs.

Expenses as given under Regulation 33 means the fees to be paid to the interim resolution professional.

Subject to a one time 90-day extension in exceptional cases, the Insolvency Resolution Professional must end in 180 days.

By the end of the 180-day period, the committee of creditors needs to have approved the resolution plan for the debtor, failing which the company goes into liquidation. Approval of the resolution plan requires the vote of 75% in value of the financial creditors (both secured and unsecured).

5. Judicial attitudes to remuneration (if applicable)

As the new legislation has only recently come in to force, there is no precedent as yet as to the attitude of the judiciary to the new rules on remuneration.

In the past office-holder remuneration was never the subject of judicial review as it was decided strictly between the company and the insolvency adviser / consultant appointed by the company to advise in relation to the revival scheme.

Further on a liquidation, an official liquidator was appointed by the government; the liquidator was not paid any fees but was entitled to a government salary, irrespective of how much was realised from the insolvent estate.

6. General stakeholder views on remuneration at present

As the new legislation has only recently come in to force, there is no precedent as yet as to the attitudes of stakeholders to the new rules on remuneration.

Under the old legislation, the revival scheme was prepared by an insolvency adviser /consultant and submitted to the ‘operating agency’, as appointed by the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) which was either a creditor bank or financial institution. The operating agency who would assist the Board in the preparation of the rehabilitation scheme. The fees of the operating agency were fixed by the Board and would be in the range of Rs. 1 lakh to a maximum of 5 lakhs until submission of the scheme.

7. General office-older views on remuneration processes at present

At present since no remuneration is fixed, the interim professional is free to charge any fees as long as it is acceptable to the applicant company or financial creditor or operational creditor.

However, after the appointment this cost can be reimbursed by the applicant to the extent it is ratified by the committee of creditors.

8. Any current proposals for reform

The are no current proposals for reform as new legislation was only recently introduced and effective from December 2016.

9. Practical views on what works well and what does not work well with the current system

As noted in above, under the SICA, the bank or financial institution appointed as the operating agency to prepare the rehabilitation had its fee fixed by the Board at Rs. 1 lakh to Rs. 5 lakh until sanctioning of the scheme. These fees were considered to be too low and further the bank or financial institution had little available time for this work. Under the new Act, it is private individuals who are appointed as insolvency professionals and are paid by the company or financial creditor or operating creditor.

Jordan

1. The basis of remuneration

There are no prescribed rules or regulations for the determination of the basis of office-holder remuneration in Jordan.

Furthermore, there is no one piece of legislation in Jordan that governs the doctrine of bankruptcy in its broader sense. The rules regulating insolvency, bankruptcy and liquidation, are scattered over various laws and regulations; the Commercial Code and the Companies Law are considered the main bodies of legislation for bankruptcy and liquidation, respectively. Moreover, the Jordanian legislation provides for special rules for bankruptcy for certain types of companies, based on their commercial activities, such as banks and insurance companies.

Under the provisions of the Jordanian Company Law No. 22 of 1997 (the Company Law) the legislator organises the provisions related to companies' liquidation, but does not provide unified provisions for the companies.

Article 252/B of the Company Law states the following: "*Liquidation procedures, their regulation, and implementation, and the reports that shall be submitted to the liquidator will be specified in accordance with a special regulation issued for this purpose.*"

To date, the aforementioned regulations have not been issued. The regulations were intended to organise the liquidation procedures and include regulations on matters not included in the Company Law, including on remuneration.

The liquidation proceedings are filed with the Court of First Instance, and the Chief Judge of the court appoints a judge of the Court of First Instance to preside over the case and when the judge appoints a liquidator he determines his fixed fees based on the work involved by the liquidator.

2. A summary of how remuneration is fixed in insolvent winding up

The liquidator in a voluntary solvent liquidation is hired either with the agreement of the partners in general partnerships (where all partners participate to some extent in the day-to-day management of the business) and limited partnerships (that are usually set up by companies that invest money in other businesses or real estate) or with the approval of the extraordinary general assembly of shareholders in general companies. In the event that the general assembly does not reach an agreement, the Jordanian companies' control department hires the liquidator.

In a compulsory insolvent liquidation, the liquidator is hired through a specialist court. Usually in both compulsory and voluntary liquidation the appointment decision includes provision for remuneration. A fixed fee is usually determined for remuneration, the amount is negotiable.

In some cases, the liquidator gets a monthly salary, but in most cases the remuneration issue remains one of the main problems encountered in company liquidation in the current legal system of Jordan.

3. A summary or how remuneration is fixed in rescue proceedings (if applicable)

A restructuring system or reorganising the businesses of insolvent#companies is undefined in the current legal system of Jordan, but the concept of restructuring was entered into the Bill of Restructuring Merchant's Business, Bankruptcy and Liquidation in order to save insolvent companies. The bill will deal with issues such as the following:

(1) The reorganisation of businesses in financial trouble.
(2) Judicial settlement of debt incurred by merchants practising commercial activities.
(3) Bankruptcy of merchants conducting commercial activities.
(4) Optional liquidation of merchants conducting commercial activities.
(5) Compulsory liquidation of merchants conducting commercial activities.
(6) Penalties applicable to the actions carried out in discordance with the provisions of this Draft Law.
(7) Other general provisions applicable to merchants carrying out commercial activities.

However, the bill has not yet been discussed or approved by the Jordanian Parliament.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

One of the main drawbacks of the current legal system of Jordan in relation to companies' liquidation, is that the role of creditors is limited in both compulsory and voluntary liquidation, unlike the legal systems in other jurisdictions that work with the principle of protecting creditors' rights.

In general, creditors may object to some liquidation procedures, including the remuneration of the liquidator. The judge who is responsible for the liquidation case has the decision in this considering the work and time involved by the liquidator, but the role of creditors remains limited. Practically, in a voluntary liquidation it is too difficult to object to the remuneration fixed by the general assembly of the company, the reason behind this is that the liquidator takes the place of the general assembly and management of the company under voluntary liquidation due to the difficulties of gathering all partners and shareholders in the company for general assembly.

5. Judicial attitudes to remuneration (if applicable)

There is no specific judicial attitude to determine remuneration, but as mentioned above, usually judges determine a fixed amount as remuneration.

6. General stakeholder views on remuneration at present

The role of stakeholder in relation to remuneration is limited. In general, stakeholders may object to office-holder remuneration before the courts, but usually their objections do not get any support and get rejected in most cases.

7. General office-holder views on remuneration processes at present

The liquidator has the right to accept or reject the determined remuneration, but still cannot enforce a higher amount for remuneration.

8. Any current proposals for reform

As previously mentioned, a bill for Restructuring Merchant's Business, Bankruptcy and Liquidation has been drafted. The bill is supposed to take the place of the regulation of liquidation by the Company Law, and also take the place of the regulations of bankruptcy in commercial law in Jordan. However, the bill has not yet been discussed or approved by the parliament in Jordan. Moreover, the bill did not include valuable provisions relating to standards and regulations of remuneration, and international standards and modern legal applications were not considered.

9. Practical views on what works well and what does not work well with the current system

According to the modern international standards, the preferred way to determine remuneration is to be based on the efforts made by the liquidator within a clear and fair mechanism. There were many attempts to include this issue in the bill but unfortunately it was not taken into consideration.

Scotland

1. The basis of remuneration

Scottish insolvency procedures have a range of bases upon which remuneration is calculated. This is usually driven by the type of insolvency process but sometimes by the instigator/appointer.

Remuneration is generally determined on the bases as follows:

(a) Insolvent liquidations (compulsory and voluntary) - hourly rates;
(b) Solvent liquidations - fixed fees;
(c) Individual bankruptcies - hourly rates;
(d) Administrations - hourly rates with/without a capped fee (possibly with a percentage of realisations);
(e) Receiverships - hourly rates with/without a capped fee (possibly with a percentage of realisations);
(f) Company Voluntary Arrangements – fixed fee (possibly with a percentage of realisations); and
(g) Trust Deeds – fixed fee (possibly with a percentage of realisations).

Where the office-holder is appointed by a secured lender and particularly where the lender is expected to suffer a shortfall and will essentially meet the costs of the process, fees will almost always be fixed/capped but with an element of incentivised fee, possibly as a percentage of realisations.

2. A summary of how remuneration is fixed in insolvent winding up

In Scotland there are two main types of insolvent winding up process, a creditors' voluntary liquidation (CVL) and a court liquidation (CL).

In a CVL, the office-holder may have a fee approved at the first meeting of creditors in relation to the work undertaken in convening that meeting. In certain smaller cases, this can often be the only fee. For subsequent fees, the office-holder will endeavour to secure the appointment of a committee of creditors to approve his fees, failing which an application is made to court for another insolvency practitioner (IP) to audit the fees in a process known as 'court reporting'.

In a CL, the court reporting process is followed from the commencement of the process unless a committee of creditors can be constituted. Even where a committee can be formed, if the IP is appointed a 'provisional liquidator' at the outset (whose role is principally to safeguard assets pending a full winding up order being granted) then fees incurred for that period of time have to be approved by the court reporter.

In cases where there are insufficient funds to meet the office-holder's costs, in either a CL or CVL, it used to be common practice to apply for an 'early dissolution' where funds in hand were simply applied against outstanding costs. This would typically happen in those cases where the costs were less than £10,000 on the basis that it was not cost effective to appoint a court reporter to audit the costs. However, increasingly the courts are wary about proceeding upon this basis automatically unless (a) The dissolution is genuinely early; and (b) It is satisfied that it is not cost effective for a reporter to be appointed.

The court reporting process in Scotland is unique within the UK insolvency regime. The liquidator will sometimes be able to nominate another IP but often the court will choose another IP from a panel listed in the local court. There is no scope for the liquidator to object unless, for example, there is a genuine conflict of interest.

Once appointed, that IP is, like the office-holder, an officer of the court. The court will stipulate the scope of work to be audited, this is usually pre-determined by the original application by the office-holder. The court reporter will then obtain the liquidator's records (case and time records) and audit the work. It is often the case that the office-holder's fees are approved but they can be subject to deductions where the court reporter considers the fees and/or outlays to be excessive.

3. A summary of how remuneration is fixed in rescue proceedings

In non-formal procedures, there are no set parameters / legislation / rules for the fixing of remuneration. For some turnaround experts, remuneration can be linked to the future success of the business in the form of equity or similar.

It should be noted that the process for approval of fees in company voluntary arrangements (CVA), receiverships and administrations in Scotland are largely the same as in the rest of the UK, subject to different legislative references arising from Scottish Rules being applied.

In a CVA, the office-holder's remuneration is included in the original proposal issued to creditors which are then subsequently approved at a meeting of creditors whereby at least 75% in value of those attending in person or proxy need to approve them.

In an administration, the office-holder's fee is approved by a creditors' committee failing which a meeting of creditors. A meeting can be held by correspondence, a route that may also be used to pass a resolution to approve the office-holder's remuneration. Where ordinary creditors are unlikely to receive a distribution in an administration, the office-holder requires the approval of the secured creditor and, where preferential creditors will receive a distribution, also the preferential creditors whose debts amount to more than 50% of the preferential debts. Office-holders may apply to the court if they cannot obtain approval of their fee at what is considered a reasonable level.

In a receivership, the office-holder's fees are approved by the appointer without recourse to ordinary creditors. It is open to any liquidator appointed later to challenge the actions of a receiver which would include the level of fees. This is, however, uncommon.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

Creditors have become increasingly involved in trust deed fees over the last ten years. Trust deeds are the equivalent to an individual voluntary arrangement (IVA) under English

insolvency legislation and have evolved over the years to follow the IVA model on remuneration. Creditor involvement has largely been driven by creditor representatives acting for multiple large consumer creditors such as banks, credit card companies and other financial institutions.

Elsewhere, creditors are largely apathetic and conclude that where there is an insolvency they are unlikely to receive anything. There are exceptions, particularly where there is animosity between the debtor and the creditor or where the case is high profile and the fees regarded as excessive. HM Revenue & Customs are often the largest ordinary creditor in smaller cases but generally only take an interest where there is serious non-compliance or fraud.

In winding up and administration proceedings there is usually an opportunity for creditors to participate in the approval of remuneration by joining a creditors' committee. This also allows them to be involved in wider strategic decisions in the case. This relies upon creditors either attending an initial meeting of creditors and agreeing to act on such a committee or volunteering independently of a creditors' meeting. There are no statistics available to say what proportion of cases have committees but many office-holders prefer to have a creditors' committee as it often makes fee approval quicker and less costly, thus maximising the funds available to creditors. It is not easy to persuade creditors to join a committee where they consider the responsibility to be onerous or where there is unlikely to be any specific benefit to them.

If a creditors' committee is not appointed in liquidations a court reporting process is followed. Creditor participation takes place at the end of that process. The court reporter firstly concludes its work, the court then issues an Interlocutor approving the fee (usually in line with the reporter's recommendation) and the office-holder then provides notice to creditors of the fee being requested. Creditors typically have 14 days to appeal to the court failing which the office-holder can take their fee.

The only exception to the above is what is referred to as a Section 98 fee, where the office-holder has a fee approved at the first meeting of creditors in a CVL for their work in convening that meeting.

Where assets are being realised for secured creditors who are suffering a shortfall, the office-holder will generally agree a fee with that creditor without further recourse to the preferential or ordinary creditors.

In non-formal rescue proceedings any fee arrangement is likely to be confidential in the absence of creditors being compromised.

In administrations and receiverships creditor involvement is typically similar to liquidations although in these processes secured creditors will often be in a position to practically determine the fees to be taken.

5. Judicial attitudes to remuneration

In recent years, the courts in Scotland have taken an increasing interest in the remuneration of liquidators.

In particular, the courts are resisting applications for early dissolution referred to in the answer to question 2 above and overriding the opinion of the reporter where the court believes remuneration to be excessive.

Section 204 of the Insolvency Act 1986 provides the route to apply for early dissolution and offers a cost effective way to apply to court for funds in hand to be applied against costs

without further sanction needed. In the cases of *Callanish Ltd (In Liquidation)*[21] and *21 Nine Advertising & Design Ltd (In Liquidation) (unreported)* the office-holders sought to apply this section and met resistance from the court. A practice had evolved whereby liquidators had not presented regular accounts to court on the basis that this was not economic and, in any event, the liquidator was not seeking approval of costs at that point. Later, sometimes many years later, the liquidator would seek to submit a final account covering all the missed periods and generally the courts accepted this practice. These recent cases, amongst others, however mean that office-holders now need to proactively extend accounting periods at the commencement of the case if they anticipate not asking the court to approve costs until later. The court will no longer necessarily approve a delayed early dissolution application or the approval of fees of many accounting periods together.

In another well-known Scottish case, *St Margaret's School*, Edinburgh, Ltd[22] the Judge opined that while the reporter's view "*will always carry great weight, the decision remains for the court and the court alone* …" while also saying that "*I am not wholly convinced creditors such as HMRC and the banks can be relied upon to drive down market rates* ….". In light of this case it has become apparent that the courts are prepared to override the opinion of a court reporter, particularly where large firms are appointed and hourly rates and overall costs appear excessive. This was seen in the administration of *Martin Groundland & Company Ltd* [23] where a large firm had charged time in half hour units. Although the court reporter supported the basis of the administrator's claim the Judge ultimately reduced their fee by almost £77,000 on the basis that the office-holder could not satisfy the court that the high level of time costs was properly incurred.

6. General stakeholder views on remuneration at present

Active stakeholders continue to be restricted to secured creditors in the main. There are exceptions in the personal insolvency market where large creditor representatives act for financial institutions, mainly in relation to consumer type debt.

Where we see wider interest tends to be in the high profile insolvencies where the insolvent entity is well known and the insolvency process attracts a lot of press coverage. At the same time, these tend to be dealt with by the larger firms with a London bias (notwithstanding the Scottish element) and where fees and hourly rates are very high they can be subject to some degree of criticism.

There continues to be a lack of understanding by stakeholders of the commercial risks undertaken by the office-holders.

7. General office-holder views on remuneration processes at present

In Scotland, we generally believe we have a robust system that produces a fair outcome for the office- holder and creditors alike. This was supported by the Kempson Report in 2013 which stated "…*Its primary focus is on the situation in England and Wales, although it has drawn lessons from Scotland*". Professor Kempson went on to say "*It is, of course, possible that the very existence of the court reporters and Accountant in Bankruptcy audits exert a moderating influence on all fees. It was not possible within the resources of this review to measure this. But staff in a major unsecured creditor said that, in their experience, fees in Scotland are generally in the region of 15 to 20 per cent lower than in England and Wales*."

[21] [2012] G.W.D 34-698
[22] [2013] CSOH 4
[23] [2011] G.W.D. 5-137

8. Any current proposals for reform

At present Scotland is not adopting revisions to the Statement of Insolvency Practice 9 which provides for best practice in fee approvals. Changes made in England & Wales now require office-holders to provide estimates of fees up front, the view being that these changes are addressing potential abuses elsewhere in the UK and the existing system in Scotland, as identified in the Kempson report, is sufficient to address these already.

9. Practical views on what works well and what does not work well with the current system

The court reporting process does work well and, combined with the need for creditor approval thereafter and the appeals process, provides a robust and fair system.

The challenges presented by the courts have required the profession to adjust current practices but it remains a challenge to anticipate the judicial approach as there remain inconsistencies between different courts and even within the same courts, by different Judges or Sheriffs. In addition, the panel system operated for court reporters in Glasgow Sheriff Court often comes under criticism for not having been refreshed in nearly ten years of operation.

Arguably, the office-holders and the courts would benefit from a consistent approach applied across the board with clear guidelines as to what is acceptable and with the opportunity for the profession to meet with judicial representatives to educate them on the commercial realities of the work undertaken.

Singapore

1. The basis of remuneration

Court appointed insolvency practitioners (liquidators, provisional or otherwise, court appointed receivers and judicial managers) usually compute their remuneration according to the following methods:

(a) by reference to the hourly rates of various grades of professionals assisting the insolvency practitioner and the insolvency practitioner;

(b) on a fixed fee basis;

(c) by a percentage or commission basis where the insolvency practitioner may claim remuneration based on a percentage of an agreed factor;

(d) by way of a contingency fee dependent on pre-defined successes or “super-profits”; or

(e) by way of a combination of the above methods.

In terms of legislation governing liquidation proceedings, Section 268 of the Companies Act (Cap. 50) provides that a liquidator of an insolvent company may be remunerated by way of percentage or otherwise as determined[24] by:

(a) an agreement with the Committee of Inspection[25]; or

(b) failing such agreement or where no Committee of Inspection has been constituted, a resolution passed at a creditors’ meeting[26] by a majority of 75% by value and 50% in number of the creditors present in person or by proxy; or

[24] Pursuant to Section 268 of the Companies Act, Cap. 50
[25] Appointed pursuant to Section 298 of the Companies Act
[26] Summoned pursuant to Sections 295 or 296 of the Companies Act

(c) failing the agreement with the Committee of Inspection and/or absent a resolution of the creditors' meeting, by court by way of an application to the High Court of Singapore.

Court appointed receivers, often appointed for the preservation of the insolvent company's assets, are appointed subject to such terms and conditions as the court thinks just or convenient pursuant to Section 4(10) of the Civil Law Act (Cap. 43). The Court therefore has a wide discretion to address and determine the remuneration of receivers at the outset and during the course of the receivership of the company.

Unfortunately, there are no legislative provisions which directly govern the remuneration of judicial managers. Nevertheless, the courts are quick to investigate disputes as to the remuneration of judicial managers and are likely ready to offer guidance or exert influence where necessary to ensure that the remuneration of judicial managers remain within reasonable bounds.

Even where a liquidator's remuneration is determined by agreement with the Committee of Inspection or by a resolution of a creditors' meeting of the insolvent company, Section 268[27] also provides that the remuneration may still be subject to review before the High Court upon the application of the Official Receiver or members whose aggregate shareholding is not less than 10% of the total shareholding of the insolvent company.

In practice, it would appear that insolvency practitioners prefer to compute their remuneration by reference to hourly rates and time spent in the course of the insolvency engagement. However, the time-based method of computing the insolvency practitioner's remuneration has recently come under scrutiny from the courts. In *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn*[28] ("*Linda Kao*"), the High Court undertook a detailed survey of the applicable principles governing the remuneration of insolvency practitioners and focused on the value added to the insolvency process from the work performed rather than merely the hours clocked (*see below*). Simultaneously, while Singapore law does not prohibit insolvency practitioners from seeking remuneration on a percentage basis tied to realisation or any additional value enjoyed by the insolvent company as a result of the insolvency practitioner's appointment, the contingency or commission bases of remuneration is considered "*unfashionable*"[29] and prone to resulting in conflicts of interest[30].

2. A summary of how remuneration is fixed in insolvent winding up

While Singapore law provides that the remuneration of insolvency practitioners (in cases of disagreement) shall be fixed by the High Court, the court does not scrutinise the minutiae of the insolvency practitioner's bill of costs. Instead, the court seeks to ensure that the insolvency practitioner is allowed proper remuneration that is, holistically, "a fair, reasonable and proportionate reflection of the value of the services rendered" or the "difference" the insolvency professional has made to the insolvency process. Insolvency practitioners must "demonstrate that the cost of paying them for their service can be justified by the benefits that have accrued for the [insolvent] company" by reference to creditors' recovery or "assessed in relation to the purpose of the [insolvency practitioner's] appointment" and if the "objectives of the [insolvency engagement] have been attained".[31] Remuneration awarded should therefore be commensurate with the nature, urgency, complexity and extent of the work undertaken by the insolvency practitioner.
Accordingly, the court determines the insolvency practitioner's remuneration on a broad-brush approach by first determining a provisional working or reference amount (often determined according to the time costs of the insolvency practitioner). The insolvency practitioner must establish a *prima facie* entitlement to the provisional working amount (e.g. the hourly rates

[27] Section 303 of the Companies Act provides that in the case of any voluntary winding up, any member, creditor or the liquidator may at any time before the dissolution of the insolvent company review the remuneration of the liquidator
[28] *Supra,* fn8
[29] *Re Econ Corp Ltd (in provisional liquidation)* [2004] 2 SLR(R) 264
[30] In *The Royal Bank of Scotland NV & Ors v TT International Ltd* [2012] 4 SLR 1182, the Court of Appeal opined that remunerating a scheme manager based on a percentage of the debts compromised placed the scheme manager in conflict of his duties to the scheme creditors and incentivised him to impose larger haircuts on scheme creditors to maximise his remuneration
[31] *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn & Ors* [2016] 1 SLR 21

charged by the insolvency practitioner must be acceptable by reference to other market players and that the work undertaken must have been performed by a reasonable number of persons of appropriate seniority and completed within a reasonable duration). Recognising that the insolvency practitioner's time costs represent instead the insolvency practitioner's cost of rendering his services (or alternatively the insolvency practitioner's profitability target), the court then adjusts this provisional working amount subject to the objections of the insolvent's creditors and the value added in the course of the proceedings / winding up / corporate rescue by the appointment of the insolvency practitioner. The court will also take into consideration the scope of the duties of other professionals (e.g. solicitors or external accountants) engaged by the liquidators to assist in the insolvency proceedings and will guard against the duplication of work by the liquidators.[32]

Following *Linda Kao*[33], the High Court has, in consultation with the Insolvency Practitioners Association of Singapore, suggested a system of cost scheduling in order to afford greater transparency and manage the expectations of creditors and contributories at an early stage of insolvency proceedings. Cost scheduling is simultaneously expected to impose cost controls on insolvency practitioners in view of the apparent concern amongst commercial men that insolvency practitioners are paid out of an "*open unguarded pocket…* [and are] *careless of the consequences for unsecured creditors and others*" and obviate "*bill shock*" amongst creditors at the time the final bill is presented[34].

Court appointed insolvency practitioners should submit a cost schedule to the Committee of Inspection or creditors' meeting or to the High Court (as the case may be) in all cases where the insolvency practitioners' fees are expected to exceed S$200,000, within one (1) month of their appointment.

A cost schedule should contain:

(a) Details of the work likely to be undertaken and its necessity for or value contributed towards the smooth conduct of the insolvency proceedings;

(b) The anticipated time taken by and estimated cost of the work (in view of the seniority of the insolvency practitioner likely to undertake the work) and an overall fee estimate for a period of six months to one year (as it may not be possible to estimate the overall scope of works necessary and cost of the same for the entire duration of the insolvency proceedings);

(c) The expected size of the team of insolvency practitioners, briefly setting out the seniority of each team member, their qualifications and their areas of responsibility;

(d) The proposed basis of remuneration and the reason why it is thought that the proposed basis would be the most suitable method of computing the insolvency practitioners' remuneration. The more unusual the fee arrangement, the greater the creditors' and court's interest in the fee arrangement being disclosed and the reasons for such a fee arrangement;

(e) Hourly rates charged by the insolvency practitioners in previous similar appointments and if such rates were approved in the past;

(f) The fees already incurred by the insolvent company for the work done by the insolvency practitioners in their first month of appointment or where the insolvency practitioners had been engaged prior to the company commencing the insolvency proceedings;

[32] *Ibid*; *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd (in compulsory liquidation)* [2015] 4 SLR 955
[33] *Supra,* fn5
[34] Gary Lightman, "The Challenges Ahead: Address to the Insolvency Lawyers' Association" [1996] JBL 113

(g) A list of anticipated disbursements and out-of-pocket costs likely to be incurred by the insolvency practitioners in the course of their appointment;

(h) Cost estimates for anticipated milestones in the insolvency proceedings; and

(i) Whether any other professionals have been or are likely to be engaged by the company in the course of the insolvency proceedings and the division of responsibility between the insolvency practitioners and the other professionals.

Upon approval of the cost schedule by the Committee of Inspection or creditors' meeting or to the High Court, the insolvency practitioners should be permitted to draw interim payments on account up to the approved amount. The insolvency practitioners should also be quick to amend and re-submit cost schedules as soon as it evident to them that their costs are likely to exceed any approved sums by 15%. The insolvency practitioners should explain (1) why their costs are likely to exceed their previous estimates, (2) if they intend to undertake any additional work and the expected costs of the same and (3) the persons likely to undertake the additional work and their rates.

The insolvency practitioners will nonetheless require retrospective validation of the costs schedule from the court for their remuneration to be determined within the meaning of the Companies Act. While it is not expected that the court will scrutinise the insolvency practitioners' bill of costs upon an application for their remuneration to be determined if the bill of costs is within 15% of costs estimated in the costs schedules, the insolvency practitioners may be obliged to refund the difference in their remuneration as finally determined if overdrawn[35].

3. A summary or how remuneration is fixed in rescue proceedings (if applicable)

Rescue proceedings in Singapore are undertaken by way of schemes of arrangement (which must obtain sanction from a meeting of creditors and ultimately receive the court's sanction) or by way of judicial management (which is similar to the English method of placing a company in administration).

Such practitioners would often have negotiated their fees privately with their appointing party prior to their appointment. However, courts have insisted that such arrangements be transparent and that the full extent of remuneration extended to such practitioners be made known to all parties.

In *The Royal Bank of Scotland NV & Ors v TT International Ltd*[36], the Court of Appeal held that companies seeking court sanction to enter a scheme of arrangement under Section 210 of the Companies Act had a duty of good faith not to mislead scheme creditors and were obliged to disclose all material information relating to the commercial viability of the scheme (and the relative attractiveness to creditors of the scheme as opposed to the liquidation of the company). While scheme managers may be reasonably remunerated, companies seeking entry into a scheme and scheme managers owed a duty to scheme creditors to disclose all forms of (direct and indirect) remuneration the scheme manager would come to enjoy as a result of his appointment. The company was not permitted to omit disclosure of the scheme manager's indirect income through a financial consultancy owned by him on the basis that the financial consultancy was not a scheme creditor and that the financial consultancy's fees had been privately negotiated.

The court has through judicial developments extended supervision over the scheme managers' remuneration as the court is likely to consider the manner of the scheme managers' remuneration before ordering a meeting of creditors or sanctioning the scheme of arrangement.

[35] In formulating the costs schedule, Justice Steven Chong in *Kao's* case surveyed the systems used in England, Wales, Australia and New Zealand for determining the remuneration of insolvency practitioners and the cost scheduling system that the court finally settled on was drawn heavily from similar systems used in Australia and England

[36] [2012] 4 SLR 1182

In *Linda Kao*[37], the High Court recommended that cost scheduling be implemented in all insolvency proceedings where the office-holder owes fiduciary duties to the insolvent company, including cases of schemes of arrangement and judicial management.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

Creditor involvement with regard to the remuneration of court appointed insolvency practitioners is an essential and ingrained element of insolvency proceedings in Singapore. As mentioned above, the remuneration of liquidators is initially subject to creditor approval (either in the form of the Committee of Inspection or the creditors' meeting) and finally subject to court sanction. Courts, while eager to guard against the capriciousness of creditors' post fact complaints, give due heed to creditors' concerns have been ready to improve the manner of determining the remuneration of insolvency practitioners. The latest proposed reforms of the cost schedule only further increases the extent of, and improves the quality of creditor involvement.

5. Judicial attitudes to remuneration (if applicable)

Singapore courts have been trying to find a balance between commercial concerns that creditors end up paying for work which they are unable to oversee at uncommercial rates (because of the lack of direct cost accountability) and the fair remuneration of insolvency practitioners by requiring cost schedules in insolvency engagements[38]. It is argued that cost scheduling enables both insolvency practitioners and creditors to engage one another at early stages of insolvency proceedings. Cost schedules enable insolvency practitioners to operate conscious of their costs and also confident of receiving remuneration as (or close to the amounts) scheduled without undue worry of the capriciousness of unsatisfied creditors of the insolvent company.

Separately, the judiciary understands the importance of a strong corps of insolvency practitioners who must not be deterred from accepting appointments, specifically in the context of liquidations. The courts have, apart from confirming the importance of adequately remunerating insolvency practitioners, also recently confirmed the liquidator's rights against creditors, including the lien over the insolvent company's assets and documents in order secure the liquidator's remuneration[39].

6. General stakeholder & office-holder views on remuneration at present

In *Linda Kao*[40], both creditors and members of the insolvent company (stakeholders) and office-holders were given the opportunity to give full vent to concerns relating to the remuneration of insolvency practitioners, from both sides of the aisle. The learned Justice Steven Chong (who was also Singapore's immediate past Attorney-General) thus did not limit himself to solely determining the remuneration of the receivers in question, but instead delved deeper into the principles which ought to govern the remuneration of insolvency practitioners generally.

The latest judicial reforms proposed are designed to ameliorate "bill shock" by requiring creditors and insolvency practitioners to address the remuneration of insolvency practitioners at early stages of insolvency proceedings. The previous method of determining an insolvency practitioner's remuneration was most recently criticised as simultaneously capricious and arbitrary towards insolvency practitioner's expectations but without regard for the consequence suffered by unsecured creditors.

[37] [2016] 1 SLR 21
[38] *Supra,* fn5
[39] *Re International Formwork & Scaffolding Pte Ltd* [2014] 1 SLR 205
[40] [2016] 1 SLR 21

It would appear, at this early stage, that recent reforms to determining insolvency practitioners' remuneration represents a compromise acceptable to the commercial community at large and insolvency practitioners.

7. Any current proposals for reform

The method of cost scheduling, proposed by Justice Steven Chong (with the assistance of the views of the Insolvency Practitioners Association of Singapore) in *Linda Kao*[41] has been recommended to the Chief Justice for further study and for possible incorporation into new Practice Directions or amendments to the Rules of Court. Pending such amendment, Justice Steven Chong extended a clear and strong invitation to all insolvency practitioners (and members of the insolvency bar) to adopt the practice of submitting cost schedules according to the procedure set out in *Linda Kao*[42].

8. Practical views on what works well and what does not work well with the current system

In view of the very recent reforms to the method of determining an insolvency practitioner's remuneration in October 2015, it may be too soon to comment on the efficacy of the amendments. It also remains possible that committees tasked with drafting new Practice Directions or amending the Rules of Court may incorporate further reforms which may be the subject of on-going discussions. However, it may appear at the outset that insolvency practitioners should be afforded more time than the one (1) month (from the date of appointment) as presently provided for in *Linda Kao*[43].

Remuneration of insolvency practitioners has emerged as an increasingly contentious issue in nearly every jurisdiction. With the latest reforms in Singapore, substantial time will have to be spent by insolvency practitioners in preparing their schedules of costs, by creditors studying the same and with follow-on negotiations between the two. Separately, insolvency practitioners may be prone to taking an overly-cautious approach to costs scheduling and may anticipate more work, of greater scope, prior to submitting their cost schedules. Such conservatism may negate the cost savings enjoyed by stakeholders.

Despite this added cost and time spent away from the efficient administration of the insolvency, open communication is arguably a step in the right direction. In the meanwhile, the court, insolvency practitioners and the insolvency bar in Singapore remain receptive to improvements for better costs management and principles of remuneration for insolvency practitioners.

South Africa

Introduction to the different office-holders:

Trustee

Personal insolvencies are legislated by the Insolvency Act dating back to 1936 (the Insolvency Act)[44] and the individual appointed to administer the affairs of an insolvent estate of a natural person is referred to as a **t**rustee*.*

[41] *Ibid*
[42] *Ibid*
[43] *Ibid*
[44] Insolvency Act, Act 24 of 1936

Liquidator

Corporate insolvencies, or as they are referred to in South Africa "liquidations", remain regulated by Chapter 14 of the Companies Act of 1973[45] (the Old Companies Act)[46], and the individual appointed to administer the affairs of a liquidated entity is referred to as a liquidator.

Business Rescue Practitioner

The Companies Act of 2008[47], (the New Companies Act) dedicates an entire chapter, Chapter 6, to a rescue process referred to as Business Rescue, providing a viable alternative for financially distressed companies to re-arrange their financial affairs and avoid liquidation. The individual appointed to administer this process is referred to as a BRP.

1. The basis of remuneration of office-holders

A trustee is entitled to a reasonable remuneration for his services[48], subject to the taxation of the Master of the High Court (the master), a functionary of the Department of Justice. The taxation is carried out in accordance with the guidelines of Tariff B in the Second Schedule to the Insolvency Act (Tariff B).

Tariff B provides for remuneration based on a percentage of the gross proceeds of differing classes of assets. Essentially a commission based remuneration system.

The remuneration of a liquidator is governed by the provisions of the Old Companies Act[49], which in turn renders the tariff of remuneration of trustees applicable. All of the principles, guidelines and legal authority regarding the remuneration of a trustee, therefore, also apply to a liquidator.

Unlike a trustee and a liquidator, the basic remuneration of a BRP is time based[50]. A BRP is further entitled to be reimbursed for the actual costs and any disbursements made[51], In addition to the prescribed time based fee, a BRP may also propose an agreement with the company involved providing for a further remuneration on the basis of contingency.

2. A summary of how remuneration is fixed in insolvent winding up

Tariff B provides for the remuneration of trustees and liquidators as follows:

- 10% on the gross proceeds of movable property;
- 3% on the gross proceeds of immovable property;
- 1% on money found and the gross proceeds of amounts standing to the credit in any bank account;
- 6% on the gross proceeds of any trading activities; and
- A seldom used mechanism in the Insolvency Act, allows for a creditor who has a preferential right in respect of certain movable assets, to retain possession of those assets (and following notice to the trustee or liquidator) to realise these specific assets and then to account to the trustee or liquidator. In such instances the trustee or liquidator will only be entitled to a fee of 5% on the value at which such movable property was realised by the secured creditors.

Although the provisions of Tariff B are applied in almost all instances, the courts have held that Tariff B is merely a guide[52] to the master when taxing the remuneration of a trustee or

[45] Companies Act, Act 61 of 1973
[46] The only Chapter of the Old Companies Act that was not repealed with the promulgation of the New Companies Act
[47] Companies Act, Act 71 of 2008
[48] Section 63(1) of the Insolvency Act
[49] Section 384(1) read with Regulation 24 of the Winding-up regulations
[50] Section 143 read with Regulation 128 of the New Companies Act
[51] Regulation 128(3)
[52] *Rennie NO v the Master 1980 (2) SA 600 (C)*

liquidator. The master may, for good cause, either reduce or increase and even wholly or in part disallow the remuneration of a liquidator or trustee[53].

3. A summary of how remuneration is fixed in rescue proceedings

The hourly rate of remuneration of a BRP is dependent on whether the company was, at the commencement of business rescue proceedings, determined to be either a small, medium or large company[54]. The regulated rate of remuneration for a BRP is as follows:

- R1 250 per hour, to a maximum of R15 625 per day in respect of a small company;
- R1 500 per hour, to a maximum of R18 750 per day in respect of a medium sized company; and
- R2 000 per hour, to a maximum of R25 000 per day in respect of a large company[55].

The regulation[56] in terms of which a BRP is to be reimbursed for his expenses provides that a BRP is entitled to be reimbursed for the actual cost of any disbursement made or expenses incurred by the BRP to the extent reasonably necessary to carry out his functions and facilitate the business rescue proceedings.

In addition to the prescribed fee, a BRP may further propose an agreement with the company for further remuneration based on the contingency of the adoption of a rescue plan or the attainment of any particular result during business rescue proceedings.

Such contingency arrangement is intended as an incentive for the adoption and implementation of a successful rescue plan and requires the approval of the majority of the creditors' voting interests.

4. How creditors in both types of proceedings can engage in the process and the extent of creditor involvement in the process on a practical level

The remuneration of trustees and liquidators is clearly regulated and places the burden of taxing such remuneration on the office of the master.

As such, creditors have very limited input in determining the remuneration of a trustee or liquidator, other than making representations to the master, when taxing such fees. Any creditor aggrieved by the outcome of such taxation by the master, may seek to review the decision by way of a court application.

The New Companies Act makes no provision for the remuneration or the expenses incurred by a BRP to be taxed and although the regulations are clear on the hourly rates applicable there is no mechanism available for creditors to involve themselves in the scrutiny of a BRP's remuneration or expenses.

The one clear exception is the requirement for creditor approval of any proposed contingency arrangement by a BRP[57]. Not only does such additional remuneration require the creditors' consent, it actually requires the BRP to convene a meeting of creditors to consider the proposal. The proposed contingency agreement will become finally binding on the company and its creditors if the creditors holding the majority voting interest, present and voting at such meeting, approve of the agreement[58].

[53] Section 63(1) of the Insolvency Act
[54] Regulation 128(1) of the New Companies Act
[55] Rand vs Dollar exchange rate as at June 2016 $1 = R15
[56] Regulation 128(3)
[57] Section 143(3) of the New Companies Act
[58] Section 143(3)(a) of the New Companies Act

5. Judicial attitudes to remuneration

As stated above, the remuneration of both a trustee and a liquidator is clearly regulated by the provisions of Tariff B and the master is required to tax such remuneration having regard to Tariff B. The ultimate proviso however, is that any remuneration must be reasonable. The master, therefore, has the discretion to adjust the remuneration by either increasing or reducing the remuneration. As with any other statutory body the exercise of the Master's discretion is always subject to review by the court[59].

The courts have over time given clear direction on the requirements for the master to consider when exercising its discretion to either increase [60] or reduce[61] such remuneration.

The Supreme Court of Appeal has held that the discretion vested in the master[62] is unfettered and that in taxing the remuneration of a trustee or liquidator the master has a duty to satisfy itself as to the reasonableness of the remuneration arrived at by application of the tariff and that there has to be "good cause" for departing from Tariff B[63].

The lack of any provision in the New Companies Act to tax the fees of a BRP has on occasion been considered by the courts in instances where it had to decide to either liquidate or place a company in business rescue. It is often argued that in large corporate failures the commission based fee of a liquidator, based on Tariff B, would always exceed that of a BRP's time based remuneration. Although our courts have not rejected this view, they have questioned the generality of this supposition, clearly indicating that the facts of each and every individual matter would be determinative[64].

Without clear wording on what constitutes the expenses of a BRP[65] or the ability for such expenses to be taxed the courts have on occasion been required to determine what expenses a BRP may be reimbursed for. The courts have held that it cannot be expected of a BRP to attend to all that is required during business rescue proceedings himself and as a consequence a BRP is entitled to be reimbursed for all expenses and disbursements reasonably necessary incurred in order to carry out his functions[66].

An interesting recent development relates to the status of any unpaid fees of a BRP if business rescue proceedings fail and the subject company is subsequently liquidated. Although the New Companies Act clearly intended for such unpaid remuneration to enjoy some form of super preference[67], a comparison with the provisions of the Insolvency Act[68] is by no means a model of clarity on the nature and status of such unpaid remuneration.

In an unreported judgement[69], locally referred to as the Diener judgment, the question arose as to whether a BRP of a company subsequently placed in liquidation was required to prove a claim for unpaid remuneration as a creditor in the subsequent liquidation of the company or whether this unpaid remuneration should be dealt with as a cost of the administration of the liquidated estate. The court was required to consider the seemingly incompatible wording of the relevant sections of the Insolvency Act and the New Companies Act. The court held that such outstanding remuneration did not enjoy the status of costs in the administration of the liquidated estate and by implication confirmed that such unpaid fees are to be submitted to proof similar to those of all other claims of creditors.

Conflicting judgements out of our lower courts, in various jurisdictions, have added to the uncertainty regarding the preferential status of such unpaid remuneration of the BRP and whether it may be charged against secured assets.

[59] Section 151 of the Insolvency Act
[60] *Klopper v the Master of the High Court (2009) 2 All SA 39 (SCA)*
[61] *Nel and Another NNO v The Master 2005 (1) SA 276 SCA*
[62] Section 384(2) of the Old Companies Act
[63] The Nel judgement *supra*
[64] Oakdene Square properties (Pty) Ltd & Others v Farm Bothasfontien (Kyalami) Ltd (609/2012)[2013] ZASCA 68
[65] Section 142(1) and Regulation 128(3) of the New Companies Act
[66] Murgatroyd v Van den Heever NO & Others [2014] 4 All SA 89
[67] Sections 135(4) and 143 of the New Companies Act
[68] Sections 89(1) and 97 of the Insolvency Act
[69] Ludwig W Diener NO vs The Minister of Justice Case no 30123/2015, High Court of SA Gauteng Div, Pretoria

The uncertainty will shortly be addressed as the issue will now come before the Supreme Court of Appeal, it having agreed to hear an appeal of the Diener judgment.

6. General stakeholder views on remuneration at present

As stated above, the remuneration of trustees and liquidators is well regulated and the courts have given clear direction as to the requirements to deviate from the provisions of Tariff B. As a result, the instances of discourse regarding the remuneration of trustees and liquidators are few and far between.

The lack of any legislation providing for the taxation of the remuneration of a BRP is currently a hot topic of discussion between creditors, academics and other stakeholders. There is no doubt that the absence of regulated taxation of the fees and disbursements of a BRP has resulted in instances of abuse by some practitioners and until this *lacuna* in our legislation is addressed it will continue to be a source of concern for all stakeholders**.**

7. General office-holder views on remuneration processes at present

The certainty of the commission based structure of Tariff B adds to the comfort trustees and liquidators have regarding their remuneration. The only concern remains around the statutory minimum fee of only R2 500 which has not been adjusted for almost two decades.

Considering that most BRPs come from either the legal or accounting professions, their regulated hourly rates[70] are not comparable to those of their peers in these professions. To compensate for this disparity, practitioners are increasingly availing themselves of the provisions allowing for increases in their remuneration based on agreed outcomes[71]**.**

Such contingency arrangements initially assist by not burdening the distressed businesses with unnecessarily onerous claims for remuneration and thereafter, provide the BRP with the comfort that he will be reasonably remunerated in the event that his efforts to save the business are successful.

8. Any current proposals for reform

A Uniform Bankruptcy Act has been sought by insolvency practitioners, academics and other stakeholders for almost 30 years. The furtherance of the Uniform Bankruptcy Bill through the various stages of our parliamentary system has however not enjoyed the required political support and if, or when this process is to progress remains uncertain.

Considering that the New Companies Act was only promulgated in June 2011, the legislative environment of business rescue and in particular the provisions that relate to the remuneration of a BRP, is highly unlikely to change in the immediate future**.**

9. Practical views on what works well and what does not work well with the current system

The commission based system regulated in Tariff B provides the requisite clarity, while the taxation by the master provides certainty regarding the remuneration of trustees and liquidators**.**

The only negative factor is that trustees and liquidators are not entitled to remuneration until such time as the master has taxed their fees often resulting in substantial delays, often in excess of 18 months, between the time when the work is actually conducted and eventual payment**.**

[70] Regulation 128 of the New Companies Act
[71] Section 143(2) read with Regulation 128 of the New Companies Act

As a result of the lack of any form of taxation of the remuneration of a BRP and the obvious abuse by some practitioners, many BRPs have sought to self-regulate by way of detailed time keeping and full disclosure to creditors regarding the extent of their remuneration**.**

USA

1. The basis of remuneration

The United States Bankruptcy Code (the Code) governs remuneration. The Code lays out the framework for bankruptcy proceedings, including office-holder remuneration. Chapter 7 of the Code governs liquidations. Chapter 11 of the Code governs reorganisations.

The Code provides that the "officer-holders" who administer the affairs of a debtor are either a trustee, as is the case in a Chapter 7 liquidation, or the company itself as a "debtor-in-possession", as is typical in a Chapter 11 reorganisation[72].

A trustee's remuneration in Chapter 7 liquidation is typically a percentage of what he or she collects and disburses. A trustee's remuneration is governed by the Code. In particular, section 326 of the Code provides that the Bankruptcy Court (the Court) may allow "reasonable compensation" for a trustee's services, with a ceiling on the maximum remuneration based on a percentage of the total funds disbursed by the trustee. An amount set by section 326 of the Code must be reasonable under section 330 of the Code. "Disbursement" is defined as the money distributed by the trustee to creditors. Under the Code, a trustee may apply to the bankruptcy court for remuneration. The Court will determine the timing and reasonableness of the amount requested.

In a Chapter 11 bankruptcy case where the company is a debtor-in-possession, the enterprise is run by management. Management in place at the time of the bankruptcy filing does not have to have its remuneration approved by the court going forward. If a senior manager is hired during the pendency of a bankruptcy case, while not always necessary the company may seek advance approval of the senior manager's remuneration. Typically, remuneration has a salary, bonus and benefit component. Such remuneration is usually based on what is typically paid in the applicable industry. The amount of remuneration may also be based in part on the risk associated with getting paid in the bankruptcy case. During the pendency of a bankruptcy case the company may also seek approval of a program to incentivise key employees, including management, to remain with the company. Remuneration for such a program generally is based on paying a fixed incentive amount to remain for a period of time.

Both a trustee in a Chapter 7 and a debtor-in-possession in a Chapter 11 will typically hire professionals to assist them with administering the bankruptcy case. The professionals' retention and remuneration are governed by sections 327, 328 and 330 of the Code. The Federal bankruptcy rules and the local rules of each Court additionally will govern the retention and remuneration of professionals. The guidelines for professional retention and remuneration promulgated by the United States Trustee, a government body that oversees bankruptcy cases, also should be considered. Local bankruptcy court rules may exist for professionals to be remunerated on an interim basis during the pendency of the case. Attorneys are generally compensated as professionals on an hourly rate basis. Financial advisers and accountants also may be compensated as professionals on an hour rate basis. Investment bankers as well as some financial advisers are compensated as professionals by a combination of monthly flat fee along with success fee.

2. A summary of how remuneration is fixed in insolvent winding up

Winding up of insolvent companies may occur under Chapter 7 or Chapter 11 of the Code. In a Chapter 7, after notice is given to the creditors, to any other interested parties, and the court, the trustee may make an application to the court for an amount of remuneration for

[72] Under the Code, a Trustee may be appointed to administer a Chapter 11 case which is atypical. Typically, the company remains in possession of its assets as a debtor-in-possession and administers the affairs in a Chapter 11 case.

winding up the affairs of the company. Section 326 of the Code expressly and specifically provides that the court may allow reasonable compensation, not to exceed 25% of the first $5,000 or less, 10% on any amount in excess of $5,000 but not in excess of $50,000, 5% on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3% of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding to holders of secured claims. On a jurisdiction by jurisdiction basis, it may be possible for a trustee to seek interim compensation.

Again, a Chapter 7 trustee may hire professionals to assist him or her in winding up the affairs of the company. The remuneration of professionals again is fixed as described above. In a Chapter 7, after notice is given to the creditors, to any other interest parties, and the Court, professionals may make an application to the Court for payment of remuneration. Once the Court approves the application remuneration may be paid. On a jurisdiction by jurisdiction basis, it may be possible for the professional to seek interim compensation.

In a Chapter 11 case, once the company exits bankruptcy assets may still be left in the bankruptcy estate to be wound up and distributed. Under the plan voted on by creditors and approved by the court a trustee, administrator, or similar party (a “liquidator”) may be appointed to wind up the affairs and liquidate the remaining assets as well as claims, and distribute the proceeds to creditors. The liquidator often hires professionals to assist with the wind down. The remuneration to be paid to the liquidator for winding up the affairs of the company and the professionals he or she hires is generally governed by the terms of the plan. An oversight body may be established by the plan, to among other things, oversee the payment of remuneration. The Court generally will not be involved in the payment of remuneration unless a dispute arises. Usually the liquidator’s remuneration is set by the terms of the plan and is based on a percentage of recoveries distributed to creditors. Sometimes it is on an hourly basis, or a combination of hourly rates and the percentage of recoveries distributed to creditors. Professionals assisting the liquidator are compensation based on the hourly rate or fixed fee arrangement agreed to between them and the liquidator. No application is required to be filed by the professional to be paid.

3. A summary or how remuneration is fixed in rescue proceedings (if applicable)

Rescue proceedings are handled under Chapter 11 of the bankruptcy code which covers reorganisations.

In reorganisation, depending on the company and its preparations, there is a great deal of flexibility as to how a bankruptcy case is administered.

Generally, the company can self-manage the bankruptcy case as a “debtor-in-possession.” The debtor-in-possession maintains control of all assets during the bankruptcy proceeding. In debtor-in-possession cases, companies may choose to have their current management and board handle the reorganisation or to hire outside specialists to assist them such as a “Chief Restructuring Officer” (CRO) to shepherd the company through the reorganisation process. The CRO’s remuneration is normally fixed by contract between the company and the CRO. A CRO or other officer’s employment will have to be approved by the Court. The CRO’s or other officer’s compensation may be subject to the objection of creditors or the US Trustee’s office. Again, the constraints of “reasonableness” tested under section 330 of the Code will apply to any such remuneration. Courts have generally adopted a “market-driven” approach to determining the reasonableness of CRO remuneration, which considers other comparable remuneration packages in addition to hourly rates.

Again, as is discussed above a debtor-in-possession may retain and compensate professionals to assist it in administering a Chapter 11. The retention and remuneration of these professionals on both an interim and final basis is governed by the Code, the Federal Bankruptcy Rules, and any applicable local Court rules. The United States Trustee Guidelines regarding remuneration will also be considered.

4. How creditors in both types of proceedings can engage in the process, and the extent of creditor involvement in the process on a practical level

Compensation or remuneration is treated as a claim made on the estate of the debtor, and as such is subject to notice, hearing and court approval. Creditors may object to compensation at the time of retention or when application is made for such compensation. After notice to creditors and other parties in interest, the Court will likely hold a hearing to determine the validity of an objection if the parties cannot settle the objection in advance of the hearing. Creditors thus have the opportunity to engage in the remuneration process, because of the application process under the Code.

5. Judicial attitudes to remuneration (if applicable)

Judicial attitudes can vary from district to district throughout the country, and even from judge to judge. Some judges are more understanding than others when it comes to the costs of compensating office-holders and other professionals. It is important to look at the decisions made by the particular judge in the past when considering and drafting remuneration requests. Also local counsel will have insights on the ability to be remunerated by a particular Court. It should also be noted that recently the Supreme Court decided, in *Baker Botts v. Asarco LLC*, 2015 that bankruptcy fee contests are subject to the "American rule" that each party pays its own litigation costs. The time and expense of preparing and filing applications for remuneration can typically be recovered, but the costs of defending against objections to an application for remuneration may not be recoverable.

6. General stakeholder views on remuneration at present

Stakeholders' views on remuneration generally will depend on their priority in a bankruptcy case. Generally, stakeholders view every dollar paid to a professional as one less possible dollar that stakeholders might receive. Yet, the majority of stakeholders understand that the purpose of office-holders and the professionals they hire is to achieve a return to the stakeholders, and while not always understanding of the cost of the bankruptcy process, stakeholders generally accept it and work within its bounds.

7. General office-holder views on remuneration processes at present

Office-holders generally understand the purpose behind the various Code and related rules and guidelines for remuneration and accept that it is part of the process of being involved and compensated in a bankruptcy case or distressed company situations. Again, while the process for applying for compensation may not always be simple, generally office-holders do appreciate its necessity.

8. Any current proposals for reform

The United States Trustee has guidelines for compensation of professionals in bankruptcy cases, including recently amended guidelines regarding compensation of attorneys in large cases. The guidelines seek to maintain the goals of accountability, judicial efficiency, transparency, market-driven fees, and maintaining public confidence in the bankruptcy process.

The amended attorney compensation guidelines recommend that a budget and a staffing plan is put in place and followed throughout the pendency of the case, with any large deviations from the budget justified specifically in an application for remuneration where the deviation has occurred. Professional firms are encouraged to provide electronic billing data used internally, to the court as part of their applications for remuneration. Professionals are to inform clients of any rate increases if the client has not previously agreed to future rate increases. Retaining co-counsel that may be able to bill routine work at lower rates is encouraged. Copies of the United States Trustee guidelines can be accessed at the Justice Department website[73].

[73] Fee Guidelines and proposed changes available at https://www.justice.gov/ust/fee-guidelines

9. Practical views on what works well and what does not work well with the current system

The best practices are to first understand the applicable Code provisions and rules, along with the other guidelines that govern remuneration. Second is to have good forms and staff to assist in the preparation of applications for remuneration. Third, and obviously, good record keeping on time and other costs is critical for ensuring a chance to be properly remunerated for all efforts. Finally, one should always presume that all applications for remuneration will be thoroughly reviewed and the applicant must be prepared to address any questions or concerns regarding remuneration. Following these basic best practices results in a smoother application process, including being compensated faster.

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Allen & Overy LLP
Alvarez & Marsal
Baker & McKenzie LLP
BDO
BTG Global Advisory
Chadbourne & Parke LLP
Clayton Utz
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
Conyers Dill & Pearman
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