INSOL International

Corporate insolvency practitioners, ethics and remuneration: Not a case of moral bankruptcy?

August 2020

INSOL SPECIAL REPORT

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Contents

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Foreword

In early 2018 the idea for a research project was formed while discussing a recent judgment in relation to insolvency practitioner remuneration with a practitioner friend. As we contemplated the consequences of this judgment, the potential negative impact thereof on the behaviour of insolvency practitioners (IPs) in that specific jurisdiction were highlighted. Too often practitioners are unfairly criticised for what is perceived as unethical behaviour for acting in accordance with rules and regulations that seemingly encourage, or perhaps allow for, dubious conduct on the part of IPs. From this the research question for the project was synthesised: Do the provisions pertaining to remuneration and disbursements in insolvency proceedings encourage ethical behaviour and high standards of moral conduct from IPs, or do they deter ethical behaviour and compliance with fiduciary duties?

Due to the intense scrutiny faced by IPs, especially those who undertake corporate insolvency appointments, the research focused on all aspects relating to the remuneration of corporate insolvency practitioners (CIPs). This report investigates how remuneration and disbursement provisions can influence the CIP's ethical behaviour, whether it be for better or for worse.

The report found that the insolvency profession prides itself on being ethical and, as such, insolvency practitioners realise that they carry a heavy burden in upholding the trust, confidence and integrity of the profession. An inherent lack of the ability to distinguish between right and wrong on the part of the CIP was found to exist on only the rarest of occasions. It can therefore be categorically stated that unethical behaviour by CIPs in relation to remuneration is not due to a case of moral bankruptcy. More often than not, the behaviour can be linked to shortcomings in the insolvency regime's remuneration framework. The report culminates in suggested best practice guidelines for provisions relating to the remuneration and disbursements of CIPs. Moreover, it identifies possible safeguards for preventing any unethical behaviour by CIPs in relation to remuneration.

I am most grateful to INSOL International for their support in funding this research and for actively prioritising measures to promote confidence in the insolvency profession.
It would be remiss of me not to acknowledge the contribution of the many people who provided helpful information and which has been incorporated into this report. They are acknowledged in the introduction.

Undertaking research on a contentious issue such as insolvency practitioner remuneration is not without hazard or difficulty, but I have found it to be a most rewarding experience. Areas for further research have been identified and I am looking forward to losing myself in this theme again in the not too distant future.

Finally, I would like to extend a word of gratitude to my friend, colleague and mentor Professor Peter Walton, for his support and encouragement and for sharing his expert insight with me on various relevant issues. As always, any errors and / or omissions are my own.

This report reflects the law as at 16 June 2020.

Dr Lézelle Jacobs
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Executive Summary

In order to provide the reader with a bird's eye view, the following main points can be identified as the key findings of this comprehensive report:

- Corporate Insolvency Practitioners (CIPs) are fiduciaries and as such are held to a high ethical standard in relation to the exercise of their duties.
- CIPs owe fiduciary duties to the creditors of the company but should also consider wider stakeholder interests during corporate rescue proceedings.
- The remuneration of CIPs is an area that creates an obvious conflict between his interests and those of the creditors.
- Every insolvency regime should address the information-asymmetry with regard to insolvency practice and CIP duties and obligations.
- Remuneration frameworks should encourage ethical behaviour and compliance with fiduciary duties.
- There is no perfect method for calculating the quantum of remuneration. Jurisdictions should, however, take notice of the ethical pitfalls linked to each method and ensure proper safeguarding measures are in place.
- The review of remuneration claimed should be conducted by an independent, knowledgeable third party in an efficient manner so as to not create uncertainty thereby encouraging CIPs to take matters into their own hands.
- A CIP's interest should never be placed in a conflicting or competing position with those of his beneficiaries and, therefore, the payment of CIP remuneration should enjoy a priority ranking.
- A CIP should incur disbursements and expenses in a manner that reflects his concern for the wealth of the estate. He should negotiate fiercely and scrutinise each bill with fervour.
- There should not be any aspect of an insolvency regime that can be interpreted as an incentive to fail. Subsequent appointments should be considered with caution.

Corporate insolvency practitioners, ethics and remuneration: Not a case of moral bankruptcy?[*]

By Dr Lézelle Jacobs, Wolverhampton School of Law, University of Wolverhampton, United Kingdom[**]

> "*It is the area of remuneration that the most obvious conflict between the commercial interests of the practitioner and his or her firm, and the interests of the creditors and the wider public interest manifest.*"[1]

1. Introduction

The role of the Corporate Insolvency Practitioner (CIP) is one of great importance. CIPs play a "significant role in lubricating the wheels of commerce".[2] The success and outcome of an insolvency procedure will to a large extent depend on his attributes, qualifications and experience; and of course his ethics and morals. The trust and confidence that the stakeholders in an insolvency proceeding (and the public at large) place in the CIP, are equally important. A lack of trust and confidence in the profession erodes its efficacy in bringing about successful rescues and / or ensuring that returns to creditors for failed companies can be maximised.

Possibly the biggest culprit in reducing the public's confidence and trust in the insolvency profession, is the issue of remuneration.[3] This is exacerbated by the media and others placing an emphasis on seemingly excessive remuneration claims by CIPs. For example, shortly after the collapse of the English construction giant Carillion, the right honourable Frank Field MP, the Chair of the UK House of Commons' Work and Pensions Committee, commented on the GBP 44.2 million to be paid in fees to Price Waterhouse Coopers in relation to one year's Insolvency work on Carillion, as "milking the cash cow".[4]

Reports such as these highlight the important role that remuneration plays in the public perception of the CIP.[5] It does not, however, take into consideration that CIPs require a fair and reasonable amount of remuneration to perform their

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[*] The views expressed in this Special Report are those of the author and do not necessarily represent the views of INSOL International or any of its affiliates.

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[1] D Brown and C Symes "Submission to Senate Inquiry into Liquidators and Administrators" [2009] 1-7. Permission for citation obtained.

[2] *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 266 [Singapore].

[3] D Brown and C Symes "Submission to Senate Inquiry into Liquidators and Administrators" [2009] 1-7; J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration" (2016) 25, *Int Insolv Rev*, 56, 57. Even in 1998, when the seminal remuneration case of *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England] was decided, Ferris J noted that "In recent years there has been a good deal of concern as the result of a fairly general perception that costs in insolvency cases have reached an unacceptably high level."

[4] The Times, 7 February 2019. Referring to the Insolvency practitioners' fees he commented: "In this they are ably assisted by a merry little bank of advisors and auditors, conflicted at every turn and with every incentive to milk the cash cow dry." There are many more examples of global headlines casting CIPs in a very dim light, eg "Rangers liquidators rack up £5m fees as creditors offered 3p in the pound", Daily Record, 27 January 2020 – https://www.dailyrecord.co.uk/news/scottish-news/rangers-liquidators-rack-up-5m-21366070.

[5] J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration", (2016) 25 *Int Insolv Rev* 56, 57.

duties as effectively and competently as possible. Moreover, it does not take into consideration what these duties are, or the risk involved in taking an insolvency appointment.

CIPs operate in difficult and daunting circumstances, involving distressed parties, competing demands, strict deadlines and complex legal, financial and factual issues. Their tasks are therefore not only overwhelming at times, but also involve a great deal of responsibility. They are fiduciaries and as such have duties to the stakeholders involved, chief among them the creditors of the company. CIPs are legally entitled to be remunerated for the work they do. The question does, however, arise: do the provisions pertaining to remuneration and disbursements in insolvency proceedings encourage ethical behaviour and high standards of moral conduct from CIPs, or do they deter ethical behaviour and compliance with fiduciary duties?[6] Moral Bankruptcy is a colloquial term often used to describe a person who lacks the inherent ability to distinguish between right and wrong. The title of this report indirectly asks whether issues relating to the remuneration of CIPs can be ascribed to the lack of morality on the part of CIPs, or whether there might be other reasons to consider in relation to these issues.

This report therefore considers various aspects relating to the CIP's remuneration and disbursements. In relation to each aspect, the propensity towards a possible breach in fiduciary duty or unethical behaviour is evaluated. These aspects include, inter alia: the method of calculating the remuneration; the possibility of contingency fees being paid; the method employed for the approval of remuneration; the ranking of the CIP's claim for remuneration; procedures and rules relating to disbursements and expenses; and the availability of a procedure to review the remuneration and disbursements claimed by a CIP. Selected examples of these aspects as applied in various jurisdictions across the globe are examined and evaluated.

At a very early stage of the research for this report, various academics and practitioners contributed specific jurisdictional issues pertaining to remuneration; as such, the examples and case law identified in these jurisdictions form the basis of this report.[7] It follows that this report does not constitute a global investigation; however, the diversity portrayed by these jurisdictions enables an adequate understanding of the concepts considered. The CIP as fiduciary and the beneficiaries of these duties are also considered, while applying theoretical ideologies to the issues at hand. Stated differently, this report considers a familiar theme but from a new angle.

As a starting point, international best practice in relation to the remuneration and disbursements of CIPs is consulted. This includes the UNCITRAL Legislative Guide on Insolvency Law, the World Bank Principles for effective insolvency and creditor / debtor regimes,[8] the Principles of the International Association of Insolvency Regulators (IAIR), and the INSOL International Ethical Principles for

6 Fiduciary duties are meant to have a broad definition in order to include duties of a similar nature in civil law jurisdictions. Please see the discussion in para 4 below.

7 I would like to extend a special thank you to the following colleagues who assisted in identifying specific and interesting examples from different jurisdictions: Donna McKenzie-Skene (University of Aberdeen); Ilya Kokorin (University of Leiden); Virginia Torrie (University of Manitoba); Anna Lund (University of Alberta); Mark Wellard (University of Technology Sydney); Michael Murray; Wilson Zhu. All views expressed in regard to these examples, are my own.

8 UNCITRAL and the World Bank are the joint international standard-setting bodies for insolvency. It is therefore not surprising that their guidance is aligned on matters pertaining to insolvency.

Insolvency Professionals. These sources have been utilised as the basis for elaborating on thematic issues relating to the remuneration of CIPs.

This report investigates how remuneration and disbursement provisions can influence the CIP's ethical behaviour, whether it be for better or for worse. The objective is to develop draft best practice guidelines for provisions relating to remuneration and disbursements and to identify possible safeguards to prevent a breach of duty by CIPs. Its contention is that transparency and consistency in regard to remuneration and disbursements would lead to greater trust and confidence in CIPs and the insolvency system in general.

While this report considers examples and case law from various jurisdictions around the world, an acknowledged limitation of the report is that it lacks examples from Europe and America; however, this provides for a future opportunity to examine CIP remuneration on these continents, especially in light of their unique approaches to insolvency in general and the role of the European Union. CIP remuneration in group insolvencies were also not considered in this report and future research into this area will prove interesting and insightful given the added complexities for practitioners involved in these cases.

2. Guidance on remuneration and ethics

2.1 UNCITRAL Legislative Guide on Insolvency Law

The purpose of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Guide or the Guide) is to aid in establishing an efficient and effective legal framework to address the financial difficulty of debtors.[9] It is intended to act as a point of reference for national authorities and legislative bodies when preparing new insolvency laws and regulations or for the purpose of reviewing the adequacy of existing insolvency laws and regulations.[10] To this end, the UNCITRAL Guide provides guidance on the role of the insolvency practitioner (IP), his tasks and rights and duties. It provides specific guidance on the remuneration of IPs and disbursements made by them and, to a certain extent, points out advantages and disadvantages and issues that might arise with regard to the different remuneration systems available. The Guide also affirms the importance of ethical behaviour by IPs in the performance of their duties but, unfortunately, fails to link these ethical duties to the guidance on remuneration of IPs in a significant way.

The term "[a]dministrative claim or expense" is defined as follows:

> "…claims that include costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor, debts arising from the exercise of the insolvency representative's functions and powers, costs arising from continuing contractual and legal obligations and costs of proceedings;"[11]

9 UNCITRAL Legislative Guide on Insolvency Law 2004, available online at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf, p 1, para 1.
10 *Ibid*.
11 *Idem*, p 4, a. The "insolvency representative" in this quote refers to the IP.

According to the Guide, IPs are entitled to receive remuneration for their services.[12] The remuneration should be proportionate to the IPs qualifications and the tasks to be performed and should ideally achieve a balance between risk and reward in order to attract appropriately qualified professionals.[13] This appears to suggest that better qualified IPs and IPs who have a more difficult task to perform, should receive more remuneration than an IP who is less qualified or has an easier task to perform in relation to the administration of the estate. It also implies that the remuneration should act as an incentive for practitioners to become involved in the administration of insolvent estates.

The various methods set out in the UNCITRAL Guide for calculating the remuneration of an IP are:

(a) A fee that is fixed by reference to an approved scale that was set by a government agency or professional association;

(b) A fee determined by the general body of creditors, the court or other administrative body or tribunal;

(c) A fee based on time properly spent by the IP (including his staff) on the administration of the estate; and

(d) A fee that could be based on a percentage of the quantum of the assets of the estate that are realised or distributed (or a combination) to be calculated at the end of the procedure. The percentage may be fixed.[14]

The Guide suggests that in each of the methods used, the law generally makes provision for further investigation upon the application of either an interested party or the IP himself, depending on the method used.[15] This approach is to ensure transparency in the remuneration system.[16]

The Guide does not distinguish between rescue or turnaround practitioners and liquidators in its guidance on the determination of the quantum of remuneration. This begs the question as to whether the same method of calculating the remuneration is suitable for practitioners performing tasks with ultimately differing objectives?

The Guide then provides a brief discussion on some of the different systems mentioned, each of which are dealt with separately below.

2.1.1 Determination of quantum

Regarding time-based systems, the Guide submits that this method or system provides for a fair compensation for work done regardless of the complexity of the administration due to the fact that there might be a high level of uncertainty at the outset of the process as to how complex and resource-intensive a particular administration may be.[17] Accordingly, it also encourages a very

12 *Idem*, p 180 to 181, para 53.
13 *Idem*, p 181, para 53.
14 *Ibid*.
15 *Ibid*.
16 *Ibid*.
17 *Idem*, p 181, para 54.

thorough administration.[18] On the other hand, this system might operate to incentivise time spent on the administration without necessarily achieving any outcome.[19] It is also possible that this method of calculating remuneration might not be reflective of the actual work done by the IP.[20]

A commission-based system might be advantageous from the creditors' perspective as it assures them that at least some, if not a substantial proportion, of the assets recovered will be distributed to them.[21] An IP might, however, find this to be an uncertain method to calculate remuneration, as the amount of work involved in the administration will not necessarily be in proportion to the value of the distributable assets.[22] This in turn means that the possibility exists that the IP will do more work than what he will be remunerated for. This approach may also encourage "maximum return for minimum cost", leading IPs to focus on tasks such as realising assets instead of performing other tasks that are not directly related to increasing returns to creditors, for example investigating the debtor's affairs and possible misconduct by management.[23]

The Guide states that where creditors are to be involved in the fixing or the approval of the remuneration of the IP, it is sensible to provide factors to consider when doing so.[24] These factors include: the complexity of the case, the nature and degree of the responsibilities of the IP and the effectiveness with which these have been discharged, as well as the value and nature of the assets of the estate.[25]

The Guide suggests that the involvement of creditors may aid in reaching an agreement regarding remuneration and help to overcome certain difficulties in this regard, as creditors would be more aware of the issues involved in the administration and have the opportunity to participate in remuneration-setting and approval.[26] This method could also be used to periodically review the remuneration during the course of the proceedings and to address and resolve any problems as they arise, perhaps by arbitration or some other form of dispute resolution between the IP and the creditors.[27] The idea is that if the system is more inclusive, creditors will be more content with the result. The Guide recommends that proper safeguards should be in place to avoid a situation where the right of final determination enables one party to unduly influence the conduct of the proceedings.[28] This implies that care should be taken not to give certain creditors too much power in the decision-making process.

Having a clear and transparent mechanism for fixing IP remuneration is highly desirable, will greatly curb disputes over the issue and promote a higher level of certainty as to the costs of the proceedings.[29]

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18 *Ibid*.
19 *Ibid*.
20 This implies that a practitioner might receive more, or less, than what he deserves in terms of performance.
21 UNCITRAL Guide: p 181, para 55.
22 *Ibid*.
23 *Ibid*.
24 *Idem*, p 182, para 56.
25 *Ibid*.
26 *Ibid*.
27 *Ibid*.
28 *Ibid*.
29 *Idem*, p 182, para 57.

Whatever method is applied in determining remuneration, it is also desirable that an insolvency law recognise the importance of according priority to payment of the IP's remuneration.[30] If the professional is not sure of being remunerated for the performance of the tasks in relation to the administration of the estate, why would he agree to an insolvency appointment?

2.1.2 Means of payment

According to the Guide, the means of payment of the IP's remuneration is often a source of complaint from unsecured creditors, the reason being that the most common source of available funds is often the unencumbered assets and payment of the remuneration may result in nothing being left for distribution to those creditors.[31]

The Guide states that while it would be unfair to draw the conclusion that the costs of administration were excessive simply because they exceeded the value of the unencumbered assets available to pay them, the occurrence of unsecured creditors seeing most if not all of the available assets being used to cover the costs of the administration, and perceptions of unfairness relating to the total cost of administration compared to the value of assets recovered, do point to the need to give this issue careful consideration.[32]

The Guide sets out various options and different approaches that can be taken in order to pay the IP. For example, where these are included in the insolvency estate, remuneration could be paid from unencumbered assets; a surcharge could be levied against assets to pay for the administration or sale of those assets where the administration or sale would be of benefit to the creditors; a surcharge also could be levied on creditors making an application to commence insolvency proceedings to cover at least the initial costs and the performance of basic administrative functions; or encumbered assets may be made subject to the payment of a proportionate or defined share of remuneration.[33]

Another approach is to pay the IP from a fund maintained for that purpose by the State, an approach that may be particularly relevant in the case of debtors with insufficient assets to pay for the administration of the estate.[34] This would, however, not be a feasible option for jurisdictions that suffer a lack of proper governance of state departments.

2.1.3 Review mechanisms

The Guide emphasises the importance of a review mechanism with regard to the remuneration of IPs in order to address the dissatisfaction of the IP himself, or of creditors.[35] This would also depend on the method used for fixing the IP's remuneration. Creditors cannot, for example, be responsible for reviewing the remuneration of the IP if they were responsible for determining the quantum in the first place. The Guide therefore suggests that where the remuneration is fixed by creditors, the court would generally review the remuneration on

30 *Ibid*.
31 *Ibid*.
32 *Idem*, p 182, para 58.
33 *Ibid*.
34 *Idem*, p 182-183, para 58.
35 *Idem*, p 183, para 59.

application by the IP.[36] If, however, the court was responsible for the fixing of the remuneration in the first instance, different approaches can be taken; some laws permit the IP to appeal that decision, other laws do not. Where the IP is required to be a member of a professional organisation, or to be licensed, the professional organisation or the licensing authority may also have powers with respect to a review of the fees charged by their members and may provide informal dispute resolution mechanisms.[37]

2.1.4 Disbursements and expenses

The Guide further provides guidance on disbursements and other expenses. It is noted that the assistance of professionals is sometimes required during insolvency proceedings. The IP is one of these professionals, but other advisors to the debtor and the IP may also be required.[38] It is also envisaged that other expenses may be incurred during the insolvency proceeding, for example running the business of the debtor, including many or all post-commencement debts such as employee claims, lease costs and other similar claims and expenses in otherwise carrying out the proceedings.[39]

Although it is the remuneration of IPs that usually garners the most attention, the Guide recognises the potentially significant impact that administrative expenses can have on the insolvency estate.[40] It is desirable that the design of an insolvency law should aim to minimise the extent of the impact of these types of administrative claims. The Guide suggests that the law could provide, for example, precise but flexible criteria relating to the allowance of such expenses.[41] The criteria may include the allowance of expenses based on the usefulness of the expense to increase the value of the estate for the benefit of all the stakeholders, or on the basis that they are reasonable, necessary and consistent with the main objectives of the procedure.[42]

There are different approaches to be taken in order to assess whether the expenses ought to be allowed. One such approach suggested by the Guide entails prior court authorisation for all expenses falling outside the scope of the ordinary course of business.[43] It is also possible to require creditors to make such an assessment in order to aid in the transparency of the proceedings.[44] The latter approach could also be subject to recourse to the court in the event that the creditors' assessment is disputed.[45]

These administrative expenses are usually paid from the unencumbered assets. The Guide does, however, state that it would be reasonable to recover expenses relating to the maintenance of the value of encumbered assets (as administrative expenses) from the amount that would otherwise be paid in priority to the secured creditor from the proceeds of the sale of the asset.[46]

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36 *Ibid*.
37 *Ibid*.
38 *Idem*, p 261, para 45.
39 *Ibid*.
40 *Idem*, p 261-262, para 46.
41 *Idem*, p 262, para 46.
42 *Ibid*.
43 *Idem*, p 262, para 47.
44 *Ibid*.
45 *Ibid*.
46 *Idem*, p 270, para 65.

2.1.5 Ranking or priority

As stated earlier, it is also desirable that an insolvency law recognises the importance of according priority to the payment of the IP's remuneration.[47] On the establishment of priority, the Guide states the following: "Administrative priority creditors do not rank ahead of a secured creditor with respect to its security interest, but generally are afforded a first priority that ranks ahead of ordinary unsecured creditors and any statutory priorities, for example, taxes or social security claims."[48]

The administrative expenses relating to the insolvency proceeding usually have priority over unsecured claims and are generally accorded that priority to ensure proper payment for the parties acting on behalf of the insolvency estate.[49] These expenses would generally include the remuneration of the IP and any professionals employed by the IP (or, in some cases, by the debtor); debts arising from the proper exercise of the IP's functions and powers; etcetera.[50]

The Guide recommends that the insolvency law should specify that administrative costs and expenses rank ahead of all other claims other than secured claims.[51] The priority afforded to claims in insolvency is an important facet of the insolvency system. Rankings are normally based upon commercial and legal relationships between the debtor and its creditors, but distribution policies also very often reflect choices that recognise important public interests (such as the protection of employment), the desirability of ensuring the orderly and effective conduct of the insolvency proceedings (providing priority for the remuneration of IPs and the expenses of the insolvency administration) and promoting the continuation of the business and its reorganisation.[52] It is due to this competition between the broader public interests and private interests that a distortion of normal commercial incentives arise.[53] Stated more plainly, it is the interests of the IP competing with the interests of the creditors that give rise to a distortion of what is normal practice.

It is desirable that the insolvency law clearly state the policy reasons for establishing a priority for these public interests where equality of treatment based upon the ranking of claims, is not observed.[54] In the absence of equality of treatment, this approach will at least provide an element of transparency and predictability in the area of claims, distribution and the establishment of creditor classes under a reorganisation plan.[55]

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47 *Idem*, p 182, para 57.
48 *Idem*, p 116, para 101.
49 *Idem*, p 270, para 66.
50 *Idem*, p 270, para 66. Other expenses might include: costs arising from continuing contractual obligations (eg, labour and lease agreements); costs of the proceedings (eg, court fees); and, under some insolvency laws, the remuneration of any professionals employed by a committee of creditors.
51 *Idem*, p 275, para 189. "The insolvency law should specify that claims other than secured claims, are ranked in the following order: (a) Administrative costs and expenses; (b) Claims with priority; (c) Ordinary unsecured claims; (d) Deferred claims or claims subordinated under the law."
52 *Idem*, p 267, para 53.
53 *Ibid*.
54 *Ibid*.
55 *Ibid*.

2.1.6 Contingency fees

The only element regarding the remuneration of IPs that is not covered by the UNCITRAL Guide, is the possibility of arranging for a contingency fee that is above and beyond the agreed or fixed amount of the remuneration. The ethical issues that surround a contingency fee arrangement lie in the fact that it creates a "self-interest threat" for the IP, meaning that his own financial interests enter the equation in a scenario where the best interest of others are supposed to be the focal point. It therefore poses a threat to the impartiality of the IP. This does not, however, preclude the payment of a contingency fee for a truly remarkable and / or extraordinary achievement by the IP in the administration of the estate. This aspect will be discussed in more detail below.

2.2 The World Bank Principles

The World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems,[56] much like the UNCITRAL Legislative Guide, are to be used to guide system reform and benchmarking. The principles and guidelines are a distillation of international best practice on the design aspects of insolvency systems. The principles touch on a wide array of important aspects regarding the insolvency process, but unfortunately do not provide any guidance on IP remuneration and fees.

Although the principles might not provide specific guidance on remuneration, there are other principles that are noteworthy and which may by implication prove useful in a discussion about IP remuneration and ethics.

Principle 33 refers to the integrity of participants in the insolvency system. It provides that rules should be provided to prevent abuse of the insolvency system and that these rules in turn instil public confidence in the insolvency system.[57] Even though the principles do not mention IPs specifically, they are included by implication as one of the main participants in the proceedings. This principle highlights (by implication) the integrity of the IP and touches on the prevention of abuse of the insolvency system, which could also by inference refer to the remuneration provisions contained in the system.

Principle 34 refers to the role of regulatory and supervisory bodies and provides that these bodies should regulate the profession, be independent of individual insolvency administrators (IPs) and set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability.[58] This principle further elaborates on the need for rules for the sanctioning of payments and the fixing of remuneration and fees of the IP by the creditors or the court, as the case may be.[59] It does not, however, refer to any form of overview or regulation of IP remuneration and fees. One can, again by implication, infer that the expectation of transparency and accountability of IPs referred to in this principle also applies to the IP's remuneration and fees.

Principle 35 refers to the competence and integrity of insolvency administrators and provides that IPs should be competent to exercise the powers given to them

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56 World Bank. Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. April 2001 (hereinafter referred to as the World Bank Principles).
57 World Bank Principles, p 60, paras 220-221.
58 *Idem*, para 222.
59 *Idem*, p 61, para 226.

and should act with integrity, impartiality and independence.[60] This principle states that those who administer insolvencies are given powers over debtors and their assets and have a duty to protect them and their value.[61] An IP will not be able to comply with this duty if his own interests are, due to the remuneration framework applicable, in conflict with those of whom he seeks to protect.

2.3 Principles of the International Association of Insolvency Regulators (IAIR)

The International Association of Insolvency Regulators (IAIR) recently published its "Regulatory Regime for Insolvency Practitioners: The IAIR Principles" in October 2018.[62] These principles aim to assist national policymakers seeking to create or strengthen the regulation of insolvency practitioners in their jurisdiction.[63] As a result, the principles were drafted from a regulatory point of view and elaborate on guidance already found in the UNCITRAL Guide and the World Bank principles but with the regulation of the IP profession in mind. Consequently, it incorporates the UNCITRAL guidance on the remuneration framework (but without commentary on the ethical issues that might arise). Principle 11.5 states that an insolvency regime should empower the court to require an authorised person (IP) to repay monies they ought not to have received (interestingly, none of the other principles or guidance articulate this as clearly).[64] This is an interesting development in the sense that it requires real enforcement power to be added to a review mechanism and also places that review mechanism in the hands of the court. Whether it is a task best suited to the court will be considered below.[65]

2.4 INSOL International Ethical Principles for Insolvency Professionals

In June 2019, INSOL International published a set of ethical principles for IPs. These Principles were drafted by a working group consisting of IPs from different jurisdictions; representatives from recognised professional bodies and academia. The aim of the Principles is to provide a guide to best practice for INSOL International's members while allowing for differing approaches by national (domestic) legislation and practice. The Principles were therefore drafted to be generic in nature.[66]

The INSOL Principles make an important contribution by providing generic, accessible, best practice guidance from the practitioner's point of view and will influence IP engagement with ethical issues in a substantial way.

One of the issues addressed in the INSOL Principles is the remuneration of the IP. The principle itself is set out and also contains commentary on the principle by including ethical considerations pertaining to IP remuneration. The Principle reads as follows:

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60 *Ibid*.
61 *Idem*, par 227.
62 The International Association of Insolvency Regulators (IAIR). Regulatory Regime for Insolvency Practitioners: The IAIR Principles (hereafter the IAIR Principles). October 2018. www.insolvencyreg.org.
63 IAIR Principles, p 7.
64 *Idem*, p 19.
65 See the discussion under paras 6 and 6.1 below in this regard.
66 International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL International). Ethical Principles for Insolvency Professionals, p 1 "…the Principles attempt to establish broad standards of practice that can be applied to every situation - instead of specific, limited rules that might be erroneously construed to encourage and / or prohibit the actions clearly defined therein."

> "Members are entitled to remuneration for their work (necessary or beneficial, and properly performed). Members should maintain and provide sufficient information to the body approving such remuneration (where applicable) in order to allow an informed decision on whether the remuneration is reasonable. Remuneration should only be drawn in accordance with the approval obtained (if applicable)."[67]

This approach clearly confirms the entitlement to remuneration but also stresses the need for efficiency, reasonableness and transparency.

The commentary on the issue of remuneration emphasises the sensitivity surrounding IP remuneration. It makes a clear connection between possible ethical conundrums and a lack of clear guidance and regulation regarding the calculation, approval and payment of remuneration. This confirms that where less guidance and regulation (or unclear and ambiguous guidance) is present in a jurisdiction's remuneration framework, the more the likelihood of unethical behaviour.

Similar guidance as can be found in the UNCITRAL Guide on appropriate calculation methods, is included.[68] The commentary elaborates on the controversial contingency fee arrangement and states that the terms of such an arrangement should be transparent, objectively measurable and, if applicable, agreed or approved by the proper authority or stakeholders.

Furthermore, the commentary advocates for accountability in claims made by IPs by suggesting that IPs should at all times be able to justify the work performed by demonstrating how and why it is required, or that the work is reasonable in the light of certain factors.[69] The factors are similar to those expressed in the UNCITRAL Guide.

Commentary on the issue of disbursements confirms the need for a distinction to be made between disbursements, remuneration and third-party costs billed to the estate.[70] The nature and beneficiaries of these categories are not the same and therefore separate rules should exist for dealing with them.

3. The corporate insolvency practitioner (CIP)

IPs take appointments to administer estates in cases of both personal bankruptcy and corporate insolvency. The remuneration provisions for both types of insolvency proceedings are important, but it is fair to state that there are usually more stakeholders involved in cases of corporate insolvency.[71] The

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67 INSOL Principles, Principle 5, p 6.

68 The methods mentioned are: fixed fee; percentage of value of assets or distributions; hourly, based on time properly spent; contingent fee arrangements; and a possible combination of these methods.

69 INSOL Principles, Principle 5, p 7.

70 *Ibid*.

71 The definition of "stakeholders" in this context should also lend itself to a very broad interpretation. See the Cork Report on Insolvency Law and Practice, Cmnd 8558 [1982], p 56 par 204. "We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked." See also J Dickfos and C Anderson, "The Sovereign Voluntary Administrator. Position of the voluntary Administrator *vis-à-vis* the company stakeholders", (2008) http://www98.griffith.edu.au/dspace/handle/10072/24030 accessed on 8

research undertaken in this report will, therefore, focus primarily on IPs that take appointments in corporate insolvency cases, thereby qualifying as Corporate Insolvency Practitioners or CIPs. It is also accepted that in some jurisdictions no such distinction is made and that any reference to provisions pertaining to CIPs will also pertain to IPs generally.

As far as CIPs are concerned, a further distinction is possible; that is, between CIPs that take appointments concerned with the restructuring, reorganisation, turnaround or rescue of a corporate entity (turnaround or rescue practitioners) and CIPs that take appointments concerned with the realisation of a corporate debtor's assets and the distribution of the proceeds to the creditors in a formal winding-up or liquidation proceeding (liquidators). Evidently, these practitioners have vastly differing objectives in the exercise of their duties. The beneficiaries of the exercise of their powers are also not necessarily the same or similar.

As already stated, the UNCITRAL guidance on provisions pertaining to remuneration frameworks does not distinguish between turnaround / rescue practitioners and liquidators. This lack of distinction begs the question as to whether the use of the same remuneration provisions is suitable for practitioners performing tasks with ultimately differing objectives and for the benefit of different stakeholders.

4. CIPs as fiduciaries

A fiduciary is largely accepted to be a person who i) undertakes to act on behalf of another and ii) has discretion and power over the interests of the other.[72] A further element of vulnerability is sometimes added as an indicator for the existence of a fiduciary relationship.[73] It therefore comes as no surprise that CIPs are often regarded as fiduciaries.[74] Depending on the type of appointment, whether it is a turnaround / rescue or liquidation, the CIP enters the scene and usually takes control over the affairs and business of the debtor company.[75] In many jurisdictions the CIP becomes an "officer" of the company and is also required to adhere to the duties and obligations that are normally attributed to company officers.[76] These combine to create a complex web of fiduciary responsibilities.

November 2018. "The stakeholders in a corporation are the individuals and constituencies that contribute, either voluntarily to its wealth-creating capabilities and activities, and that are therefore potential beneficiaries and / or risk bearers."

72 R Nimmer and R Feinberg, "Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity", (1989) 6 *Bankr Dev J* 1, 34. "The idea of treating one person as a fiduciary of another thus rests on the fact that the discretionary judgment of the one controls the destiny of the other."; R Valsan, "Fiduciary Duties, Conflict of Interest and Proper Exercise of Judgment" (2016) 62 *McGill LJ* 1, 7.

73 R Valsan, "Fiduciary Duties, Conflict of Interest and Proper Exercise of Judgment", (2016) 62 *McGill LJ* 1, 7.

74 J Glover and J Duns, "Insolvency Administrations at General Law: Fiduciary Obligations of Company Receivers, Voluntary Administrators and Liquidators", (2001) 9 *Insolv LJ* 137; D Milman, *Governance of Distressed Firms* (Edward Elgar 2013): "…can office-holders be classed as fiduciaries? The answer to this in all cases (whether or not 'officer of the court' status applies) would appear to be in the affirmative." *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England]; *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 443 [Australia]; *Re Roslea Path Ltd* [2013] 1 NZLR 207 (HC) at 209 [New Zealand]; *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, [21] [Singapore].

75 Bearing the distinction between "debtor-in-possession" and "practitioner-in-possession" in mind, this statement refers to instances where a form of management displacement does take place.

76 The UK and Australia are good examples of this.

Moreover, insolvency creates a difficult situation for those involved. A multitude of interested parties face financial loss and also a possible loss of employment, with each of these interested parties being left vulnerable to some extent. This adds to the stress of an already difficult environment; an environment that has to be managed by the CIP. To this end, insolvency laws entrust the CIP with numerous powers to achieve the given procedure's objectives whilst at the same time creating a framework that is designed to ensure CIP accountability towards those with an interest in the outcome of the proceedings.

Interestingly, the duties owed by CIPs, whether in a turnaround / rescue or a liquidation, are largely the same, it is to whom these duties are owed that creates the important distinction between the two officeholders.

There may be cases where the appointed CIP will not be regarded as a fiduciary and will, therefore, not owe any fiduciary duties. A number of jurisdictions allow for various forms of schemes of arrangement where the CIP will merely oversee the process. This scenario refers to instances where a debtor-in-possession system is present and the management displacement usually brought about by a practitioner-in-possession system is absent.[77]

Whether a jurisdiction has a civil law or common law system will also have an impact on any discussion regarding fiduciary duties and principles. In many civil law jurisdictions fiduciary duties are mainly derived from the principles of agency law, whereas most common law jurisdictions developed their fiduciary duties and principles from trust law.[78] In civil law jurisdictions the fiduciary duties tend to be codified, as opposed to most common law jurisdictions where fiduciary duties are largely uncodified.[79] The nature and extent of fiduciary duties in these systems therefore vary. There is much to be said in favour of the view of Gerner-Beuerle and Schuster, that the differences between common law and civil law jurisdictions seem to have lost much of their relevance as corporate law reforms benefit from mutual learning and the diffusion of legal concepts internationally.[80] To further strengthen this argument, it is useful to note that all legal systems, regardless of the extent of codification, draw on principles of general contract law, tort law or fiduciary principles to enhance law-specific rules and to amplify fiduciary duties.[81]

Each jurisdiction will have unique fiduciary principles in relation to CIPs but there is a significant overlap of principles between jurisdictions and many of these principles, regardless of what they are called, are very similar in nature. From this a number of key fiduciary duties for CIPs can be extrapolated:

- The duty to act with good faith;[82]
- The "best interest" duty;[83]

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77 See para 4.2 below.

78 C Gerner-Beuerle and EP Schuster, "The Evolving Structure of Directors' Duties in Europe", (2014) 15 *EBOR* 191, 196.

79 *Ibid*.

80 *Idem*, 198.

81 *Ibid*.

82 "Good faith is at the heart of all fiduciary duties…" – J Johnston, "Natural Law and the Fiduciary Duties of Business Managers", (2005) 8 *Journal for Markets and Morality* 27, 37. This duty requires honesty and fair dealing.

83 The duty to act in the best interest of the beneficiary of the fiduciary duty. Who the beneficiaries are will depend on the process and the relevant circumstances. Also known as the duty of loyalty, this duty

- The duty to exercise one's powers in an independent and impartial manner.

And a duty that is not fiduciary in nature:

- The duty of care, skill and diligence.[84]

The discussion of how remuneration frameworks have an impact on the duties of CIPs will focus largely on these key fiduciary duties.

As mentioned earlier, these key duties are usually owed by both turnaround / rescue practitioners and liquidators but it is to whom they are owed that differs. The next section provides a general overview of the beneficiaries of fiduciary duties in different insolvency processes.

4.1 Overview of the relevant theoretical considerations and the beneficiaries of the CIP's fiduciary duties

In order to determine who the beneficiaries of the CIP's fiduciary duties are, one needs to consider the extent of financial difficulty of the debtor, the procedure entered into and the theories underpinning corporate and insolvency law.

It is accepted that for a company to undergo a reorganisation, turnaround or rescue, it is by implication suffering from some form of financial difficulty or distress. The difficulty experienced by companies in these proceedings can range from mild financial struggles, such as cash-flow issues, to actual insolvency that satisfy the jurisdictional legal tests for insolvency. The divergence in the extent of distress can be attributed to the varying extent of financial woes and the range of entry requirements to formal corporate rescue proceedings. Moreover, the global move towards incorporating early-warning tools and mechanisms in corporate rescue regimes (and encouragement toward early intervention in general) means that more solvent companies could ultimately undergo corporate rescue proceedings.[85] The importance of this consideration lies in the fact that during a company's solvency it is widely accepted that the interests of the shareholders of the company are paramount, whereas when the zone of insolvency or the "twilight zone" is approached, a shift takes place towards the protection of creditors' interests (as is the case

requires that the fiduciary refrains from placing his own or another's interest ahead of the beneficiaries' interests.

84 *Re Charnley Davies Ltd (No.2)* [1990] BCC 605 [England]; *Brewer v Iqbal* [2019] EWHC 182 (Ch); [2019] BCC 746 [England]; D French, *Mayson, French & Ryan on Company Law* (2019-2020 ed, OUP 2019) 485.

85 Directive of the European Union and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt (2019/1023 EU), advocates for early warning mechanisms to incentivise debtors to take early action and for tools to be available for directors to address difficulties as soon as they become aware of it. In the United Kingdom, the Government's response on the Consultation regarding Insolvency and Corporate Governance highlighted the importance of strengthening corporate governance in pre-insolvency situations including the taking of professional advice on entering insolvency proceedings earlier. The Consultation on insolvency and corporate governance: Government response can be accessed here: https://www.gov.uk/government/consultations/insolvency-and-corporate-governance. On the African Continent the move towards early intervention can be seen in the broadening of directors' duties to take action when insolvency is imminent, or even just foreseeable, in the next six months. See in this regard South Africa's Companies Act 71 of 2008, s 128(1)(f) and Zimbabwean Insolvency Act 7 of 2018, s 121(1)(f).

during the liquidation process).[86] Determining the beneficiaries of a CIP's fiduciary duties is, therefore, not a straightforward task.

This is a discussion that builds on the ever-growing literature surrounding the question of in whose interests company law should be formulated. In addition, these approaches to the protection of interests during the company's solvency now enter the realm of discussions and theories regarding who should benefit from the insolvency procedure.

The most dominant insolvency theories ought to be considered. These theories can broadly be divided into two categories; firstly, creditor-centred theories and, secondly, theories that place an emphasis on the inclusivity of other stakeholders.

4.1.1 Contractarian theories

The Contractarian Theory is generally based on wealth maximisation and the idea that the law should maximise the collective return to creditors.[87] This theory is also in line with the Proceduralist approach to insolvency which contends that insolvency law should address issues that only arise out of insolvency and believe that non-insolvency claims and entitlements should not be protected by the insolvency law unless this would result in a greater return for creditors.[88] A recognised branch of the Contractarian Theory is the Creditors' Bargain Theory (CBT), developed by Jackson in the early 1980s.[89] CBT is based on the premise that creditors enter into a bargain with the debtor company during negotiations for credit and thereby establish their position and possible remedies upon default by the company, such as insolvency.[90] Upon the debtor company's insolvency, the creditors with an interest will try to recover their debt and will enter into a frenzied race with other creditors to enforce their private contractual agreements with the company. This could cause depreciation in value of the business assets, creating uncertainty of returns for all creditors. The CBT proposes to solve this problem by replacing individual enforcement rights with a collective right to share in the proceeds of the insolvency proceeding, giving rise to the Collectivist approach.[91] "…the Creditors' Bargain was essentially a

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86 N Hawke, "Creditors' Interest in Solvent and Insolvent Companies", [1989] *JBL* 54, 56. "Conversely, where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of the existing creditors alone." See also A Keay, "The Director's Duty to Take Into Account the Interests of the Company Creditors: When is it Triggered?' (2001) 25 *Melb UL Rev*, 315, 317 and 322. "It is almost non-contentious to say that directors have a duty to take account of the interests of creditors when the company is insolvent."

87 P Walton, "When is Pre-packaged Administration appropriate? – A Theoretical Consideration" (2011) 20 *Nottingham LJ* 1, 3-4.

88 D Baird, "Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren", (1987) 54 *U Chi L Rev* 54, 815; H Nsubuga, "Corporate Insolvency and Employment protection: A Theoretical Perspective", (2016) 4(1) *NIBLeJ*, par 2.

89 P Walton, "When is Pre-packaged Administration appropriate? – A Theoretical Consideration", (2011) 20 *Nottingham LJ* 1, 4; H Nsubuga, "Corporate Insolvency and Employment protection: A Theoretical Perspective", 4(1) *NIBLeJ* 4 (2016), par 58.

90 H Nsubuga, "Corporate Insolvency and Employment protection: A Theoretical Perspective", (2016) 4(1) *NIBLeJ* 4, par 58. Walton is of the opinion that one of the shortcomings of the CBT is the fact that it only considers "hypothetical contract creditors" - . P Walton, "When is Pre-packaged Administration appropriate? – A Theoretical Consideration", ' (2011) 20 *Nottingham LJ* 1, 5.

91 E Warren, "Bankruptcy Policy", (1987) 54 *U Chi L Rev* 775, 797-799. The Collectivists believe the single justification for bankruptcy to be the enhancement of the collective return to the creditors. See also H Nsubuga, "Corporate Insolvency and Employment protection: A Theoretical Perspective", (2016) 4(1) *NIBLeJ* 4, par 61; P Walton, "When is Pre-packaged Administration appropriate? – A Theoretical Consideration", (2011) 20 *Nottingham LJ* 1, 5.

bargain that in the event of bankruptcy, the creditors would get everything."[92] The CBT therefore does not support any redistribution of wealth or consequences in insolvency.[93]

Another Contractarian Theory can be found in the Team Production Theory (TPT) of corporate law.[94] This theory is based on social contract and is much more inclusive in nature than the wealth maximisation ideals of the CBT. This theory builds on the ideology that shareholders are not the only party that contribute to the production process of a company. Other parties, such as trade suppliers and the workforce, all contribute towards the end product.[95] The TPT, therefore, promotes the inclusivity of all stakeholders during insolvency proceedings and supports the idea of redistribution of some of the interest of one stakeholder (team member) to another.[96] The problem with the TPT may be that it is too wide and includes too many stakeholders (team members) who cannot realistically nor economically always benefit from the insolvency proceeding.[97] This theory closely resembles some of the Traditionalist theories on insolvency.

4.1.2 Traditionalist theories

Traditionalist theories on insolvency law are against the idea that the law should exist only to serve creditors' interests and are consequently also inclusive in nature.[98] Communitarianism looks to balance a wide range of different stakeholder interests in the insolvency of the debtor and even to consider the welfare of the community at large.[99] It "considers limiting the rights of high ranking creditors to give way to some extent to others including the community at large."[100] It subscribes to the notion of redistribution, that is, to redistribute the consequences of the debtor's default.[101] Communitarian theorists seek to focus on the fact that those involved in and dealing with companies are humans and corporate law should not be de-personalised.[102] The Cork Report also seems to

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92 L LoPucki, "A Team Production Theory of Bankruptcy Reorganization", (2004) 57 *Vand L Rev* 741, 748.
93 *Ibid*.
94 L LoPucki, "A Team Production Theory of Bankruptcy Reorganization'", (2004) 57 *Vand L Rev* 741, 744; H Nsubuga, "Corporate Insolvency and Employment protection: A Theoretical Perspective" par 72.
95 L LoPucki, "A Team Production Theory of Bankruptcy Reorganization",' (2004) 57 *Vand L Rev* 741, 749: "The team members include all who make firm-specific investments but are unable to protect those investments by direct contracting, personal trust or reputation. Team members may include stockholders, creditors, executives, other employees, suppliers, customers, local governments, regulatory agencies, and others." See also H Nsubuga, "Corporate Insolvency and Employment protection: A Theoretical Perspective", (2016) 4(1) *NIBLeJ* 4, par 73.
96 H Nsubuga, "Corporate Insolvency and Employment protection: A Theoretical Perspective", (2016) 4(1) *NIBLeJ* 4, par 77: "The TPT being an inclusive theory, advocates honouring all team members' interests on the insolvency of the company, whether in terms of financial gain or losses."
97 LoPucki contends that TPT entitlements are entitlements to "rents and surpluses" and it goes without saying that there will not be a lot of surplus in the case of insolvency.
98 J Wood, "Corporate Rescue: A Critical Analysis of its Fundamentals and Existence" (PhD thesis, University of Leeds 2013): "Contrary to proceduralists, traditionalists believe that insolvency law is not a tool solely reserved for the creditors in which they can pursue their own interests." (at 88); H Nsubuga, "Corporate Insolvency and Employment protection: A Theoretical Perspective", (2016) 4(1) *NIBLeJ* 4, par 3.
99 P. Walton, '"When is Pre-packaged Administration appropriate? – A Theoretical Consideration", (2011) 20 *Nottingham LJ* 1, 7.
100 *Ibid*.
101 E Warren, "Bankruptcy Policy", (1987) 54 *U Chi L Rev* 775, 777.
102 A Keay, "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'", (2007) 29 *Sydney L Rev* 577, 586.

validate at least some aspects of the Communitarian Theory. [103] Criticism levelled against this theory relates to the difficulty of defining the community and determining how far it may stretch and is cumbersome.[104] Also, articulating the community's needs in legislative form may prove to be problematic.[105] The Communitarian Theory has a lot in common with Warren's Multi Value Approach, or Eclectic Approach.[106] In a corporate insolvency context this approach requires recognition of those who are not directly "creditors".[107] Warren refers to the notion that it was intended that insolvency law address concerns that are broader than just the debtor's immediate problems and that of its creditors.[108] It should involve considering other internal or external stakeholders such as employees, suppliers or tax authorities and, in some instances, to "protect interests that have no other protection".[109] It is, however, criticised as "too widely expressed to be [of] much specific assistance in developing a policy."[110] It does not provide enough guidance as to the weight that has to be afforded to each of the interests and priorities that come into play in an insolvency context. As Walton states, "[i]t is not clear which principles are to be seen as core and which are of peripheral relevance."[111] Baird criticises Warren's approach by asking the reasonable question of why stakeholders should be given special rights in insolvency if they don't have the same rights outside of insolvency?[112]

These theories on insolvency clearly contribute to the complexity of the situation. The brief discussion above does not do any real justice to the vast amount of literature available on these theories and the intricacy with which they have been articulated and argued, but it does provide a sufficient overview for the discussion to follow.

Since none of the existing theories referred to above aid in determining who the beneficiaries of the CIP's fiduciary duties are, a new theory is suggested. The disadvantageous position of the company's creditors and their associated risk of financial loss in insolvency, need to be considered against the socio-economic impact of the demise of the company on all stakeholders and not just the creditors. It would be challenging for the CIP to balance the interests of all these stakeholders, as each person or group involved in the proceedings would have their own ideas as to how the company's risks should be dealt with.[113] Moreover,

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[103] Cork Report on Insolvency Law and Practice, Cmnd 8558 [1982]: p 56 par 204: "The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked."

[104] P Walton, "When is Pre-packaged Administration appropriate? – A Theoretical Consideration", (2011) 20 *Nottingham LJ* 1, 7.

[105] *Idem*, 9.

[106] *Idem*, 10.

[107] E Warren, "Bankruptcy Policy", (1987) 54 *U Chi L Rev* 775, 775; P Walton, "When is Pre-packaged Administration appropriate? – A Theoretical Consideration", (2011) 20 *Nottingham LJ* 1, 10.

[108] E Warren, "Bankruptcy Policy", (1987) 54 *U Chi L Rev* 775, 788.

[109] E Warren, "Bankruptcy Policy", (1987) 54 *U Chi L Rev* 775, 788; P Walton, "When is Pre-packaged Administration appropriate? – A Theoretical Consideration", (2011) 20 *Nottingham LJ* 1, 10.

[110] P Walton, "When is Pre-packaged Administration appropriate? – A Theoretical Consideration", (2011) 20 *Nottingham LJ* 1, 11.

[111] *Ibid*.

[112] D Baird, "Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren", (1987) 54 *U Chi L Rev* 54, 817-818. "Whenever we must have a legal rule to distribute losses in bankruptcy, we must also have a legal rule that distributes the same loss outside of bankruptcy." – at 822.

[113] V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2002, Cambridge University Press), p 192-193: "Shareholders and directors will tend to favour ensuring that the company continues to operate for as long as possible. The former are residual claimants in insolvency and have little to lose by trading on. Both shareholders and directors will thus tend to gamble on further business activity

insolvency proceedings are often regarded as a zero-sum game where "more for me is less for you."[114] Evidently, this only adds fuel to the flames with regard to competing stakeholder' interests during Insolvency proceedings.

Baird is correct when he says:

> "The world is a messy and complicated place, where justice is often hard to find. But that does not follow that bankruptcy policy should be vague and mysterious…"[115]

Hence the suggestion of a theory that is reminiscent of that of company directors, though not similar. If during a company's solvency the directors are obliged to exercise their duties for the benefit of the company and shareholders collectively whilst giving consideration to other stakeholders' interest, why not formulate a theory that reflects that but with an emphasis on the creditor?

The corporate law theory of the Enlightened Shareholder Value (ESV) emerged as an answer or compromise between the two conflicting theories on corporate law theory, that is, the Shareholder Value approach and the Pluralist approach. Keay eloquently made reference to it as follows:

> "… ('ESV') and which it felt would better achieve wealth generation and competitiveness for the benefit of all. This approach was clearly based on shareholder value and involved directors having to act in the collective best interests of shareholders, but it eschewed an 'exclusive focus on the short-term financial bottom line' and sought a more inclusive approach that valued the building of long-term relationships. It involved 'striking a balance between the competing interests of different stakeholders in order to benefit the shareholders in the long run.'"[116]

The ultimate control of the undertaking in solvent circumstances lies with the shareholders;[117] a corporate law theory that is, therefore, not focused on the shareholders' interest will run into problems despite any moral underpinning to have a stakeholder-inclusive approach. The same can be said of an insolvency theory that places greater emphasis on the protection of stakeholders' interests

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since they will enjoy whatever gains will result. Employees, again, will tend to favour continuing trading in the hope of securing their jobs and in the knowledge that further losses will be borne by other parties."

[114] M Harner, "The search for an unbiased fiduciary in corporate reorganizations", (2011) 86(2) *Notre Dame L Rev* 496, 493. See also E Warren, "Bankruptcy Policy" (1987) 54 *U Chi L Rev* 775, 789: "By definition, the distributional issues arising in bankruptcy involve costs to some and benefits to others. Enforcing the state law collection rights of secured creditors often comes at the cost of defeating the state law collection rights of unsecured creditors whose claims are discharged without payment. A priority payment to one unsecured creditor necessarily leaves less for the remaining creditors. The debtor's estate – and thus its creditors – profits from assigning a favorable lease, but this costs the landlord whose lease specifically provided for no assignments. The benefits reaped by employees or suppliers relying on the continuation of a business are purchased at the expense of every creditor who gives up valuable state collection rights as part of the plan to allow the debtor business a second chance at success."

[115] D Baird, "Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren", (1987) 54 *U Chi L Rev* 54, 837.

[116] A Keay, "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'", (2007) 29 *Sydney L Rev* 577, 590.

[117] *Idem*, 589.

within a creditor-controlled insolvency system. It is a common element in many jurisdictions' insolvency proceedings (both rescue and liquidation) to place the power and control of the direction of the proceedings in the hands of the creditors. Consequently, the interests of creditors need to be protected; they need to be the beneficiaries of officeholders' duties, as their co-operation in the insolvency process is essential to its success (especially in the case of a rescue or turnaround):

> "Creditor participation in rescue models is indispensable. Without creditor participation and support, it is almost inevitable that any proposed rescue plan by the company will fail. It is therefore not surprising that all of the rescue models that we consider make provision for varying degrees of creditor participation from full-blown creditor committees to creditor representatives."[118]

The CIP cannot, however, exercise his duties in the interest of creditors exclusively.[119] Corporate insolvency proceedings are complex; they involve more than just the enforcement of private rights because the success or failure of the business will affect the livelihood of individuals and communities alike.[120]

4.1.3 The Enlightened Creditor Value approach

The theory suggested is that of the Enlightened Creditor Value (ECV) approach. Like its solvent brother, the ESV approach, the ECV sets out to strike a balance between the competing interests of differing stakeholders in order to benefit creditors in the long run.[121] It can be seen as a compromise between the creditor theories and stakeholder theories.

This theory encourages the CIP to achieve the best outcome for creditors by taking into account all the relevant considerations for that purpose and this involves the taking of a proper balanced view of the short and long term; the interests of the shareholders and employees, customers, suppliers, financiers and others, as well as to consider the impact of the company's possible demise on the community. The basic position is that CIPs are required to treat creditors' interests as paramount, that is, "creditors first" not "creditors only". The interests of employees, or other stakeholders, should be considered in performing these duties – but only where this would be in the creditors' interest. A practical example of the theory could be something along the following lines: If a CIP faces the decision of whether or not to lay-off the employees of the company during rescue proceedings, the decision to delay termination of their employment contracts, at least to some extent, would involve a consideration of the employees' interests but ultimately should hold a benefit for the creditors in that the employees' continuous employment will contribute to the generation of

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118 A Smits, "Corporate Administration: A proposed model", (1999) 32 *De Jure* 1 80, 90.

119 J Dickfos and C Anderson, "The Sovereign Voluntary Administrator. Position of the voluntary Administrator *vis-à-vis* the company stakeholders", (2008) http://www98.griffith.edu.au/dspace/handle/10072/24030, accessed on 8 November 2018: "In resolving this it is likely that the creditors' interest is paramount but it cannot be said that they are the only stakeholders in companies that are potentially salvageable."

120 O Brupbacher, "Functional Analysis of Corporate Rescue Procedures: A proposal from an Anglo-Swiss Perspective", (2005) 5 *J Corp L Stud* 105, 106.

121 A Keay, "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'", (2007) 29 *Sydney L Rev* 577, 590.

revenue or the retention of goodwill that will lead to a better outcome for creditors in the long run.

This approach can be further qualified by stating that the extent to which a CIP would have to exercise his duties for the benefit of other stakeholders should depend on the nature of the proceedings and the scope of the financial difficulty the debtor company is facing:

(a) During rescue proceedings the CIP, having regard to the financial situation of the debtor, ought to weigh up the competing interests of the stakeholders involved. If the financial difficulty of the debtor has not reached the stage of "doubtful solvency", as Hawke states,[122] then the CIP should take greater care to act in the interests of the company and its shareholders.[123] Where the company is, however, beyond that point and where it conversely enters the "twilight zone", the CIP should keep the interests of the creditors at the fore.

(b) Where the CIP is appointed as the liquidator of the company, he or she owes fiduciary duties to the creditors of the company but also to the company itself.[124] Liquidators, therefore, exercise their duties for the benefit of the creditors in the first instance and then for the benefit of the shareholders.

When considering whether the CIP has complied with his fiduciary duties in claiming remuneration and disbursements, the effect of any potential breach of the duties on the creditors should be at the fore.

4.2 Other officeholders

It is important to note that not all insolvency appointments are taken by CIPs. In many jurisdictions other officeholders are appointed to oversee the administration of the estate. These appointments might include the practitioners who oversee insolvency proceedings but who are not regarded as fiduciaries.[125]

Although the behaviour of these officeholders fall beyond the scope of this report, it is submitted that even if they are not fiduciaries the ethical principles underlying a fiduciary appointment would still apply to them.

5. Determination of quantum

A great deal of guidance exists to assist jurisdictions in formulating a method for the calculation of the amount of remuneration to be paid to CIPs. The guidance also includes factors to consider when the quantum is determined and by whom it should be approved.

Regardless of the method chosen for determining the amount of remuneration due to the CIP, certain factors need to be taken into account to ensure that the remuneration is fair, reasonable and appropriate. Most jurisdictions, therefore,

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122 N Hawke, "Creditors' Interest in Solvent and Insolvent Companies", [1989] *JBL* 54, 59.

123 *Ibid* – "…as long as the company remains on the right side of 'doubtful solvency,' any consideration for creditors' interests need only be minimal."

124 A Keay and P Walton, *Insolvency Law Corporate and Personal* (4th ed, LexisNexis, 2017), 299.

125 A nominee and supervisor in terms of a Company Voluntary Arrangement in the UK are not regarded as fiduciaries.

have included these factors in their remuneration frameworks (or a version thereof).

In England and Wales, the Insolvency Rules 2016 provide that the following need to be taken into account when fixing the remuneration of the officeholder: the complexity of the case; whether any aspects of the case creates any responsibility of an exceptional kind or degree for the officeholder; the effectiveness with which the officeholder carried out the duties of the office; and the value and nature of the property with which the officeholder had to deal.[126]

This section examines the various methods for determining quantum and the approval thereof as identified by the UNCITRAL Guide and using examples of the various methods as applied in individual jurisdictions. The ethical issues pertaining to each of the themes will be considered and examples of breaches of ethical or fiduciary duties that have occurred in relation to these methods, will be highlighted.

5.1 Time-based

Perhaps one of the most contentious ethical issues in relation to the remuneration of CIPs is the profession's partiality for charging on the basis of time. Despite the contentiousness of the issue, it remains the preferred method for calculating the remuneration of CIPs in many jurisdictions as it is believed to provide for a fair compensation for work done.[127]

It is accepted that CIPs making use of this calculation method are to be remunerated only for "time properly spent on attending to the case".[128]

The rate for calculation on which the remuneration is to be based could be the CIP's own hourly or daily rate or a rate prescribed by legislation or the profession to which the CIP belongs.

The UNCITRAL Guide submits that this system might operate to incentivise time spent on the administration without necessarily achieving any outcome.[129] Moreover, that it is also possible that this method of calculating remuneration might not be reflective of actual work done by the IP.[130]

Both of the issues identified by the Guide speak to the notion of time versus value. This was considered in the seminal case of *Mirror Group Newspapers plc v Maxwell (No 2)*,[131] where Ferris J stated three important principles in relation to time-based costing. He stated that: i) time spent represents the cost of rendering services, not the value of the service rendered; ii) time spent should be only one of a number of relevant factors to assess value; and iii) it follows from the first two that the real task is to assess value and not cost.[132] However, it will only be possible to make an assessment regarding the value of the services

126 The Insolvency (England and Wales) Rules 2016 No 1024, at 18.16(9), p 391; S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts", (2018) 13 *AsJCL* 141, 145.
127 UNCITRAL Guide, p 181, par 54.
128 Principle 5, INSOL Principles, p 7.
129 UNCITRAL Guide, p 181, par 54.
130 This implies that a practitioner might be getting more or less than what he deserves in terms of performance.
131 [1998] I BCLC 638 [England].
132 *Idem*, 652.

ex post facto.[133] This case also addressed the issue of time-based costing not being reflective of work that was performed.[134] This is especially true of prescribed fees. It is quite possible for a CIP to do more work than what the prescribed hourly / daily rate allows; equally so, it might be the case that a CIP is remunerated for more than what he actually did. CIPs often criticise the amount prescribed for hourly rates as they believe it does not clearly represent the full account of the costs of running the insolvency procedure.

In Australia the court in *Korda*[135] stated that "an hourly fee creates an incentive to run up hours, to do too much work in relation to the stakes of the case".[136] The court also elaborated on how this is done, by stating practitioners working on time-costing engage in practices such as: "Spending time on speculative investigations and recovery possibilities which would not be contemplated if funds were more limited; Assigning either too many or too highly qualified staff to tasks; and taking too long to perform tasks".[137] This quote succinctly highlights the key ethical issues for the behaviour of CIPs in relation to time-based costing.

In Singapore the court criticised time-based costing by stating that the hourly rates charged by CIPs were a function of their internal profitability targets and did not reflect the value of their services, thereby making it a poor measure of proper remuneration.[138] The court stated that time-based costing assumes three things (which might not always be true): "(a) that the time spent on a particular task was necessarily and properly spent by a person of the appropriate seniority and experience; (b) that the hourly rates charged reflect the true cost of performing that activity; and (c) that the hours charged were all productively spent."[139] CIPs should take care to charge rates that reflect the knowledge, skill and experience of the person performing the task. CIPs should not inflate the cost of performing certain tasks and they should take care not to charge for time spent unproductively.

In Australia, the court confirmed some of the issues and shortcomings of time-based costing in *Re AAA Financial intelligence Ltd.*[140] Brereton J considered time-based costing as an unreliable measurement of liquidator remuneration, particularly in smaller cases.[141] This was mainly due to the fact that the hourly rates of the liquidators in this case caused them to be the main beneficiary of the liquidation, which is an absurd result, given the fiduciary nature of their office.

Taking the CIPs' reservations about prescribed fees and the issue regarding the size of the debtor into consideration, South Africa has developed a unique scale for business rescue practitioners' fees in this regard. Section 143 of the Companies Act provides that the practitioner is entitled to charge remuneration

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133 See in this regard the discussion on assessing value during the review of remuneration in para 6.1.2.
134 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 652 [England].
135 *Re Korda: in the matter of Stockford Ltd* (2004) 140 FCR 424 [Australia].
136 *Re Korda: in the matter of Stockford Ltd* (2004) 140 FCR 424, 439 [Australia].
137 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 441 [Australia].
138 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 23 [Singapore].
139 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 4, 149 [Singapore].
140 *Re AAA Financial intelligence Ltd (in liq) (No2)* [2014] NSWSC 1270; 32 ACLC 14052 [Australia].
141 *Re AAA Financial intelligence Ltd (in liq) (No2)* [2014] NSWSC 1270; 32 ACLC 14052, 37 [Australia]; J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration", (2016) 25 *Int Insolv Rev* 56, 63.

in accordance with the regulations issued by the Minister in terms of the Act.[142] The regulations stipulate that the company itself or the court should determine the practitioner's basic remuneration at the time of his appointment, which remuneration is limited to certain amounts depending on the size of the company.[143] For a small company, the practitioner's fee may not exceed ZAR 1,250 per hour, up to a maximum of ZAR 15,625 per day,[144] while a medium-sized company may be charged up to ZAR 1,500 per hour, with a maximum of ZAR 18,750 per day.[145] For a large or state-owned company, the practitioner's remuneration may not exceed ZAR 2,000 per hour, up to a maximum of ZAR 25,000 per day.[146] The appointment to the company in question further depends on the experience and seniority of the practitioners, for example only allowing senior business rescue practitioners to be appointed as CIPs for large and state-owned companies.[147] This approach seems to address the threat of disproportionality in a reasonably sensible way. It allows for large and complex cases to be taken on by the most experienced practitioners who are then remunerated at the highest level of the scale. It does, however, work from the unsubstantiated assumption that smaller companies are easier to rescue and that the issues encountered will be simpler.

In New Zealand the possible unethical behaviour of CIPs due to time-based costing was reviewed in *Re Medforce*.[148] It was stated that although time costing could constitute an efficient way to measure the extent of effort and tasks undertaken by CIPs, it could also lead to rewarding delay and inefficiency.[149] This view clearly highlights the possibility of a CIP breaching his fiduciary duties to the creditors by not working as swiftly and efficiently as possible, in order to bring about a benefit for his own interest. It is also possible for a CIP to claim fees unethically under the guise of being careful and prudent by over-servicing.

In order to provide a greater amount of certainty when making use of time-costing to determine remuneration,[150] CIPs in England and Wales are required to provide creditors with a fees estimate prior to approval of the remuneration.[151] The estimate must include: details of the work that the CIP will expected to perform, the hourly rate or rates he and his staff propose to charge, the time he expects each part of the work will take,[152] whether the CIP anticipates that it will be necessary to seek further approval of fees and, if so, why it would be necessary.[153] He should also provide details of the expenses that he considers likely to be incurred.[154] Providing a fees estimate helps creditors to understand what to expect regarding fees and also aids in educating them around the tasks

142 Companies Act 71 of 2008, s 143(1) and (6) [South Africa].
143 Regulations to the Companies Act 71 of 2008, reg 128(1) [South Africa].
144 *Idem*, reg 128(1)(a).
145 *Idem*, reg 128(1)(b).
146 *Idem*, reg 128(1)(c).
147 *Idem*, reg 127(4).
148 *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145 (HC) at 153 [New Zealand].
149 *Ibid*.
150 Including when time-costing will be used in combination with other methods for determining quantum. T Robinson and P Walton, *Kerr &Hunter on Receivers and Administrators* (20th ed, Sweet & Maxwell 2018), 354.
151 Insolvency Rules 2016, r 18.16(2)(b) [England and Wales].
152 Statement of Insolvency Practice 9, par 12 [England and Wales]. SIP 9 recommends that the CIP breaks down the different tasks and provides a narrative explanation on each.
153 Insolvency Rules 2016, r 18.16 [England and Wales]; T Robinson and P Walton, *Kerr &Hunter on Receivers and Administrators*, (20th ed Sweet & Maxwell 2018), 354.
154 Insolvency Rules 2016, r 18.16(7) [England and Wales].

involved. A CIP is not allowed to draw more than what is set out in the fees estimate without the permission of the creditors.[155]

As time-based costing is still the preferred method for calculating remuneration in the insolvency profession,[156] it is extremely important that CIPs as fiduciaries are aware of any threats to the beneficiaries that can result in choosing this method. CIPs are to take extra care and be meticulous in their practice management to be sure to conduct the procedure and tasks relating thereto as efficiently and effectively as possible within a reasonable amount of time.[157] The quality of the CIP's work should also play a role in his remuneration claim. If the practitioner needs to redo work due to his own negligence or carelessness (or that of a member of his staff), he should not claim for that time. His time should add value. The practitioner should be honest and thorough in his invoicing. The fees estimate provisions in England and Wales provide a sensible approach that encourages the CIP to be truthful about the nature of the tasks he is to perform and the likely costs involved. It also provides for a sensible way of educating creditors and involving them in the procedure. Creditors are less likely to oppose the remuneration claims of CIPs if they have a better understanding of what his tasks are, how long it usually takes to perform them and the cost involved.

Jurisdictions wishing to use a time-based costing method for the calculation of remuneration should ensure that there are proper safeguarding measures in place to make sure that CIPs are not tempted to exploit the system by virtually having a "licence to print money".[158] These safeguards can be found in introducing the idea of a fees estimate, effective remuneration review mechanisms,[159] and requiring the utmost honesty and truthfulness in transparency from the CIP as fiduciary.

5.2 Commission-based

In comparison to the use of time-base costing, there is the argument that a fee structure based on a percentage is to be favoured (especially by creditors) as it means the remuneration is calculated according to results achieved.[160] The UNCITRAL Guide confirms the view that creditors might find this method advantageous as it is believed to assure a distribution to them.[161] This argument

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155 T Robinson and P Walton, *Kerr &Hunter on Receivers and Administrators* (20th ed, Sweet & Maxwell 2018) 355, 357.

156 The Australian Restructuring, Insolvency and Turnaround Association (ARITA) submitted in the *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38, [47] [Australia] case that "time-based methodology is the best method of calculating reasonable remuneration…".

157 Principle 6, INSOL Principles, p 7. "Members should endeavour to perform their duties in a timely fashion, respecting legislative time limits."

158 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 442 [Australia]. Finkelstein J refers here to a quote from a lecture by Ferris J (*Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England]) to the Insolvency Lawyers Association: "A moment's thought will show that charging by reference only to time spent measured in units of whatever duration, whether minutes or hours or days, is capable of being exploited as virtually a licence to print money. The person charging has complete control over the amount of time spent. He can work at whatever rate he chooses or of which he is capable. He is subject to no control save that of his own conscience which ensures that the work done is proportionate to the difficulty or importance of the task in the context in which it needs to be performed."

159 In this regard see para 6 below for a discussion on review mechanisms.

160 *Re Medforce Healthcare Services Ltd (in liq) (No 2)* [2001] 3 NZLR 145 (HC), NOTE by Master Gambrill at 162 [New Zealand].

161 UNCITRAL Guide, p 181, par 55.

is also commensurate with the arguments regarding the value added by the services rendered on a time-based method.

The commission-based system can be subdivided into determining the remuneration based on either a percentage of realisations of assets, or a percentage of distributions to creditors. Both these methods are aimed at trying to incentivise a CIP to maximise returns to creditors.

An important consideration in relation to the percentage-based system is who is responsible for determining the percentage to be applied. It could be the parties responsible for approving the remuneration, which is usually the creditors; or perhaps the insolvency regime allows for the CIP to determine the percentage himself, or the remuneration framework could provide for prescribed set percentages.

Unfortunately, creditors suffer an information asymmetry regarding certain practical aspects of insolvency appointments.[162] Creditors do not therefore possess the knowledge and insight to be able to suggest percentages for the calculation of the remuneration. Allowing CIPs to suggest the percentages to apply in determining their remuneration would allow for competition in the industry, but might also be open to abuse, especially given the fact that creditors as the approving parties might not be able to spot disproportionate or unreasonable rates. The suggestion would be that the most sensible way to determine percentages for calculating the amount of remuneration would be for the percentages to be set and fixed by legislation, regulations or professional bodies. It would furthermore be sensible to fix these percentages subject to the possibility of alteration where this is warranted.

The biggest critique against a percentage-based approach relates to proportionality. The UNCITRAL Guide states that CIPs often find this to be an uncertain method to calculate remuneration, as the amount of work involved in the administration will not necessarily be in proportion to the value of the distributable assets.[163] This again means that the possibility exists that the IP would do more work than what he will be remunerated for.

This view was confirmed in the Australian *Sanderson* case, where the Australian Restructuring, Insolvency and Turnaround Association (ARITA) submitted to court that “percentage based methods based on monetary outcomes do not provide proportionality in the true sense of reward for reasonably necessary work properly performed”.[164]

Also in Australia, the court in *Korda* stated that when making use of a percentage-based calculation method, each case should be assessed on a case by case basis.[165] Furthermore, the court suggested that a percentage rate could be fixed on a sliding scale of the assets to be distributed.[166]

Examples of commission or percentage-based methods will now be evaluated.

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[162] J Dickfos, “The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration”, (2016) 25 *Int Insolv Rev* 56, 60.
[163] UNCITRAL Guide, p 181, par 55.
[164] *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38, [44] [Australia].
[165] *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 440 [Australia].
[166] *Ibid*.

5.2.1 *Realisations*

A CIP can be remunerated based on a percentage of the proceeds of realising the property of the estate. The calculation can be based on the gross income of the sales or allow for a deduction of the direct costs of the sale. This method is regarded as one that optimises creditor wealth maximisation and would be preferred to a percentage based on distributions by CIPs, as the likelihood of a greater fee would increase.

An example of this method being used to calculate CIP remuneration can be found in South Africa where the liquidator's fees are calculated based on a percentage of the gross proceeds of different classes of assets. The Second Schedule to the Insolvency Act (Tariff B) provides that a liquidator is entitled to 10% on the gross proceeds of movable property;[167] 3% on the gross proceeds of immovable property;[168] and 1% on the money found and the gross proceeds of amounts standing to the credit of the debtor in any bank account.[169] The highest percentage is allocated to those assets that might prove hardest to realise, clearly incentivising effort on the part of the CIP. Like most percentage-based systems, it is often criticised as being disproportionate to the actual work done by the CIP. For this reason, the South African insolvency system makes use of a taxation system allowing for the percentages to be used as guidance by the Master of the High Court.[170] This means that the Master is able to reduce or increase remuneration where it is disproportionate to the tasks performed by the CIP. An effective taxation or review system could therefore be utilised as a safeguard against disproportionate percentage-based calculations.

5.2.2 *Distributions*

A CIP could also be remunerated based on a percentage of the amount that is available for distribution to creditors. This approach seems to reflect recognition of the fiduciary nature of a CIP's office to act in the best interests of his beneficiaries, the creditors, as his remuneration will be directly linked to maximisation of the return to creditors. The more they get, the more he gets.

In Russia, a commendable and unique approach is followed using a percentage-based system in relation to distributions to creditors to determine the amount of the CIP's remuneration. Russia provides for fixed percentages that are linked to the level of distribution to the creditors. In the event that more than seventy per cent of the creditors' claims are satisfied, a Russian CIP would be able to claim 7% of the amount. If more than 50% of the claims were satisfied, the CIP would be entitled to only 6% of the amount, if more than 25% were satisfied, 4½% and in the event of less than 25% of the claims were satisfied, only 3%.[171] The less the amount available for distribution, the smaller the percentage that would apply to calculate the amount of remuneration for the CIP. It is clear that maximum effort to act in the best interest of the creditors is rewarded by this scheme.

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167 Insolvency Act 24 of 1936, Sch 2, Tariff B (1) [South Africa].
168 *Idem*, Tariff B (2) [South Africa].
169 *Idem*, Tariff B (3) [South Africa].
170 *Idem*, s 63. [South Africa]. INSOL International, Special Report, *Office-holder Remuneration, Some International Comparisons*, March 2017, 52.
171 Federal Law No 127-FZ On Insolvency (Bankruptcy) 2002, art 20.6. [Russia]. It should be noted that these percentages apply in combination with a fixed fee. The fee may also be reduced by the court on application.

As this calculation method is based on the nett amount available for distribution to creditors, it would not often be an attractive option for CIPs.[172] This is due to the nature of insolvency and the fact that it often happens that there is little by way of distribution to creditors. The reason for a meagre distribution might not have anything to do with the way in which the CIP conducted himself, which would make this method of calculation unfair if it is not used in conjunction or in combination with another method.[173]

One potential issue with this method of calculation relates to the purpose of the proceeding and consequently the objectives of the CIP's appointment. In liquidation proceedings the most important measure of success would be the amount distributed to creditors. The same, however, cannot be said of a rescue or turnaround procedure where the interests of other stakeholders should also be considered and the main aim of the procedure is not necessarily to maximise the return to creditors.[174] This method should therefore be used with caution in calculating the remuneration of rescue or turnaround practitioners.

5.3 Fixed fee

Although the Legislative Guide mentions that CIP remuneration might be fixed, it does not elaborate or provide further guidance on how this could be incorporated into the insolvency law.[175] In most jurisdictions that allow for a fixed fee to be charged, it can be (or is) used in combination with other methods of calculating the fee.

In Russia, such a combination is possible with the fixed fee element of the CIP's remuneration to be found in article 20 of the Insolvency Act.[176] The article provides detailed rules on the remuneration of CIPs in different insolvency proceedings. It provides for a fixed amount of RUB 25,000 for financial rehabilitation appointments (once-off for the whole proceeding) and RUB 45,000 per month in the case of an external administration.[177] In the case of liquidation proceedings, the fixed amount is RUB 30,000 per month. Where the CIP has not properly performed his tasks, the remuneration (including the fixed amount) may be reduced by the court.[178]

An issue with a fixed fee element awarded to a CIP in relation to work carried out in the performance of his duties, is that it might not be representative of the value of the work done. It is possible for a CIP to receive remuneration based on this method of calculation, but it may turn out that he invested more time and resources to complete the work than is reflected by the fee and, therefore, his remuneration will not be commensurate with his efforts and the work he performed. On the other hand, a CIP might do very little work and be paid the same amount. The Australian court in *Korda* confirmed that "[a] fixed fee creates the incentive to shirk; a lawyer paid a lump sum, win or lose, may no longer

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172 INSOL International, Special Report, *Office-holder Remuneration, Some International Comparisons*. March 2017, 4.
173 *Ibid*.
174 This would be commensurate with the approach advocated for by the Enlightened Creditor Value theory.
175 UNCITRAL Guide, p 181, par 53. "It may be fixed by reference to an approved scale of fees set by a government agency or professional association;"
176 Federal Law No 127-FZ On Insolvency (Bankruptcy) 2002, art 20.6. [Russia].
177 *Ibid*.
178 Resolution of the Plenum of the Supreme Commercial (*Arbitrazhnyi*) Court of Russia, No 97, dated December 2013 "On some issues related to remuneration of insolvency practitioners" [Russia].

work hard enough to present his client's case."[179] A fixed fee cannot be said to represent a fair method of calculating remuneration, unless the remuneration framework allows for the adjustment of the fee in cases where it proves necessary. This safeguarded approach to fixed fees could motivate CIPs to perform their duties in accordance to what is expected of them. It would encourage proper record-keeping and transparency of their efforts in order to prove that they deserve the amount received, or alternatively that an adjustment would have to be made to allow for an increase.

5.4 Contingency fees

Contingency fee arrangements have long been a bone of contention in the insolvency world. These arrangements are also known as success fees, or, in some jurisdictions, as conditional fees. As the name suggests, these are fee arrangements which determine that the CIP would be entitled to receive remuneration based on a specific outcome or condition being met. The outcome or condition usually pertains to a favourable outcome for stakeholders. One reason for the controversy surrounding contingency fee arrangements is that the conditions and outcomes on which the fee is payable are arguably conditions and outcomes that CIPs, as fiduciaries, should aspire to anyway and would therefore form part of their normal remit. Another issue can be found in the diversion of a CIP's focus to a singular task that will benefit his fee arrangement, instead of allowing his approach to be holistic. An example of each type of issue will be considered.

In South Africa, a business rescue practitioner may propose an agreement with the debtor company that provides for the payment of further remuneration (other than the normal remuneration during such an appointment), to be calculated on the basis of a contingency related to i) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of a particular matter in the plan;[180] or ii) the attainment of any particular result or combination of results in relation to the proceedings.[181] Such an agreement will be considered binding on the parties if a majority of the creditors approve it.[182] It can be argued that drafting a rescue plan swiftly and ensuring its adoption form part of the practitioner's fiduciary duties. Therefore, the question arises as to whether the practitioner should receive additional remuneration for something he is in any event expected to do. In my view, the practitioner should not receive additional remuneration in relation to tasks that are normally expected in terms of his appointment; this should perhaps be limited to an incentive in truly exceptional circumstances. The use of a contingency fee structure may give rise to a self-interest threat in terms of objectivity.[183] From the practitioner's perspective, if he is expected to draft the rescue plan within record time and finalise the rescue as soon as possible, he might not demonstrate the required objectivity so as to act in the interests of all the stakeholders. Consequently, if the practitioner tries to rush through his work simply to secure additional remuneration, it could result in

[179] *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 439 [Australia].
[180] Companies Act 71 of 2008, s 143(2)(a) [South Africa].
[181] *Idem*, s 143(2)(b) [South Africa].
[182] *Idem*, s 143(3) [South Africa].
[183] A self-interest threat refers to a situation where the interests of the CIP might inappropriately influence his judgement or behaviour: ICAEW Insolvency Code of Ethics, 2114.1 A4(a). See also the INSOL Principles, p 10 for a definition of self-interest: "A situation in which a Member has, or is perceived to have, a direct interest in obtaining a particular outcome: for example, where such Member (or a close associate) is also a creditor or shareholder of the insolvent estate."

failure of his duty of care and may also affect his impartiality, being more concerned about his own interests than those of the beneficiaries.

The issue of contingency fees enjoyed some attention in the previous edition of the Code of Professional Practice (3rd edition) of the Australian Restructuring, Insolvency and Turnaround Association (ARITA) before it launched the 4th edition of the code in December 2019 (to be effective from 1 January 2020). The 3rd edition of the ARITA code contained ethical considerations regarding contingency fee arrangements that could still shed light on this topic. According to the old ARITA code, an administrator should refrain from claiming remuneration on the basis of certain contingencies that may result in a conflict of interest, or may cause his independence to be challenged.[184] This statement is based on the following principles: i) no additional remuneration or incentive should be offered for work that the administrator is in any event expected to perform; ii) a contingency fee structure may compromise the administrator's independence and objectivity; iii) the agreement on contingency fees must not be inconsistent with the administrator's fiduciary duties.[185] These provisions in the old code correspond with the argument that a CIP who acts in good faith and with the necessary care would at any rate ensure that he completes those tasks expected of him as quickly and efficiently as possible, as this would be in the interests of his beneficiaries.

In addressing the second issue of diverting the CIP's attention, an example of a fee arrangement in this regard can be found in Russia. In 2017 Russia amended their Insolvency Act to provide for a success fee (stimulation reward) to an IP. This reward or fee is to be calculated as 30% of the funds that are actually received by the debtor company as a result of a successful director's liability claim.[186] When considering how the rest of the CIP's remuneration is calculated in Russia, there seems to be a disproportionate emphasis on rewarding the successful institution of a claim against directors of the company.[187] This particular fee arrangement could encourage the CIP to spend a vast amount of time investigating and taking action against directors of the company, as a successful claim would most definitely benefit him personally. However, spending a disproportionate amount of time on these tasks might not be in the best interests of creditors.

The inclusion of contingency fee arrangements in the remuneration framework of jurisdictions should enjoy careful consideration. The fee arrangement should not be drafted in a manner which places the CIP's financial interests in a conflicting position with the interests of the creditors. A contingency fee arrangement should not encourage the CIP to spend a disproportionate amount of time on certain tasks and thereby inadvertently cause him to neglect other tasks and duties. A contingency fee should only be payable in extraordinary circumstances for a truly remarkable achievement by the CIP in the administration of the estate and should not reward him for performing tasks that were part of his remit as a fiduciary in the first place. Moreover, where a

184 ARITA Code of Professional Practice, 3rd Edition 2014, 77 [Australia].
185 *Ibid*.
186 Federal Law No 266-FZ On Insolvency (Bankruptcy) 2017 [Russia].
187 Other percentages in relation to distribution and realisation within the framework fall below the 10% range.

jurisdiction allows for contingency fees to be paid to CIPs, the terms of the arrangement should be transparent and objectively measurable.[188]

5.5 Combination

Many jurisdictions allow for a combination of the abovementioned methods to be utilised in the determination of the quantum of CIP remuneration.[189] Each of the methods have advantages as well as disadvantages. Allowing for a combination of methods provides the opportunity to utilise the best of each whilst the drawbacks, in as far as ethical behaviour is concerned, can be avoided. However, it appears that the decision regarding how the fee should be constituted lies mostly with the CIP.[190] Some critical questions arise in this regard: what would the CIP base his decision on?; would the CIP be expected to identify, disclose and explore alternative combinations with the approving party?; does this power create a conflict of interest for the CIP?

In compiling his proposal for remuneration, the CIP should most certainly consider the financial woes of the company. He should take into account whether the debtor has many valuable assets (and any security over them), how the debtor receives income and, ultimately, which elements of the possible determination methods fit best with the financial situation of the debtor to ultimately determine which combination would suit his remuneration. It is therefore almost exclusively a task that involves the weighing up of his interests against those of the beneficiaries.

In considering the situation of the debtor and the best combination of methods to determine his remuneration, the CIP will probably arrive at more than one possible combination. It seems sensible that the CIP should, when seeking approval for his remuneration, disclose the alternative combinations that he discarded. He should also provide an explanation as to why he ultimately decided on a specific combination.

The power to choose the combination of methods to determine his remuneration does create a conflict of interest. It is at this juncture where his decision-making is based on his personal financial interests. A self-interest threat refers to a situation where the interests of the CIP might inappropriately influence his judgement or behaviour.[191] To minimise the risks involved, the proper disclosure and transparency of all the options considered should be shared, along with the reasoning behind the choice made.

5.6 Approval of quantum

Approval for the amount determined as remuneration for the CIP is usually conducted by the creditors of the estate or the court. Accordingly, all of the above-mentioned rules, criteria and considerations would need to be applied by the party responsible for the approval of the CIP's remuneration.

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[188] Principle 5, INSOL Principles, p 7. "The terms of any contingent fee arrangement (including remuneration based on realised value) should be transparent, objectively measurable, and if applicable agreed or approved by the proper authority or stakeholders."

[189] Australia, England and Wales, Russia.

[190] In Russia, however, the combination is predetermined.

[191] ICAEW Insolvency Code of Ethics, 2114.1 A4(a). See also the INSOL Principles, p 10 for a definition of self-interest: "A situation in which a Member has, or is perceived to have, a direct interest in obtaining a particular outcome: for example, where such Member (or a close associate) is also a creditor or shareholder of the insolvent estate."

The issues that need to be addressed in this regard pertain to the competency of the parties responsible for the approval of the remuneration, as well as possible issues relating to independence and impartiality. These issues will now be considered.

5.6.1 Creditor involvement

Most jurisdictions follow the UNCITRAL guidance by providing for the approval of the CIP's remuneration by the stakeholders most affected by it, namely the creditors.[192] In some cases, creditors form creditors' committees to consider and decide on remuneration applications by the CIP on behalf of the entire body of creditors.

The factors provided by the UNCITRAL Guide and incorporated into a jurisdiction's remuneration framework would also be utilised by creditors. The factors are, as stated earlier, relied upon to aid their decision-making process and provide context as to what is being asked for by the CIP.

The uncertainty surrounding what will in actual fact transpire in the administration of the estate, coupled with the creditors' lack of knowledge[193] and understanding regarding insolvency practice, makes for a rather tenuous start to the relationship between these parties.

In an article discussing the insolvency reform initiatives regarding CIP remuneration in Australia, Dickfos refers to the issue of information asymmetry.[194] She notes that they suffer a lack of practical knowledge, experience and judgement to make informed decisions regarding remuneration.[195] Dickfos also notes that often the expectations of stakeholders (including creditors) in the process are unrealistic.[196] They have unrealistic views as to what the CIP has to do and what the outcomes of the procedure will be. The CIP could make use of the application process as an opportunity to educate creditors as to the tasks to be performed in order to minimise disputes at a later stage.[197] Such an approach would correspond with the UNCITRAL Guide suggestion that the involvement of creditors in this process might help to overcome certain difficulties in this regard, as creditors would be more aware of the issues involved in the administration and have the opportunity to participate in remuneration-setting and approval.[198] However, it would only aid if the CIPs are transparent and truthful in their disclosure to the creditors.

The UNCITRAL Guide warns of situations in regard to the approval of remuneration that are to be avoided. This would be where the right of final determination regarding the remuneration enables one party to unduly influence

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192 It is typical for creditors to be involved in the determination of remuneration due to the fact that the amount of remuneration payable will have a direct financial bearing on their recovery rate.

193 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 65, [A.25] [Singapore]. "…creditors are extremely leery of forking out sums (albeit indirectly) for work whose scope they do not fully understand."

194 J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration", (2016) 25 *Int Insolv Rev*, 56.

195 *Idem*, 60.

196 *Idem*, 61.

197 Evidence of this can be found in the fee estimate procedure in England and Wales.

198 UNCITRAL Guide, p 182, par 56. *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 65, [A 26] [Singapore]. "Interested stakeholders want to have a clear indication of the anticipated fees and costs in dealing with the insolvency from the outset."

conduct of the proceedings.[199] Unfortunately, the Guide does not elaborate as to how a situation like this might play out in practice.

A practical issue that this report identifies relates to "agency problems".[200] Armour, Hansmann and Kraakman provide a description of an "agency problem", stating that in the most general sense of the term it refers to a situation that "arises whenever one party termed 'the principal,' relies upon actions taken by another party, termed the 'agent,' which will affect the principal's welfare. The problem lies in motivating the agent to act in the principal's interest rather than simply in the agent's own interest."[201] They recognise that this description is very broad and goes beyond what the legal fraternity would regard as an agency relationship.[202] Almost any contractual relationship where one party agrees to perform in the interest or on behalf of another could potentially be subject to an agency problem. It would be a fair assertion to make that a fiduciary relationship such as the one between the CIP and his beneficiaries, the creditors, would fall within the scope of this broad description. Agency problems could, therefore, arise during insolvency appointments.

The relevance of this to creditor involvement in the approval of CIP remuneration and the UNCITRAL Guide's warning, is that a creditor who manages to get the upper hand during the approval process might deem themselves as the "principal" and the CIP as their "agent". The creditor will accordingly wish for the CIP to act on their behalf.[203] This is a scenario that can be translated as follows: "We brought about your remuneration package; we took care of you and, therefore, our interests should be regarded as paramount." Unfortunately, this is a situation that can cut both ways; CIPs might feel a sense of obligation towards these creditors, specifically causing a lack of impartiality to arise.

A practical example of a situation that might lead to the scenario described above can be found in Russia. In Russia the remuneration of the CIP is a predetermined combination. It is, however, possible for the practitioner to be paid additional remuneration.[204] The additional remuneration of the practitioner is at the expense of the creditors who approved the additional remuneration.[205] This brings about a scenario where the funds for the CIP's remuneration are not an expense of the estate (and therefore indirectly of the creditors). However, it is a direct expense to certain creditors. The agency problems discussed above have an even greater likelihood of affecting the parties in the example of a Russian CIP's additional remuneration.

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199 UNCITRAL Guide, p 182, par 56.

200 Agency problems as raised by the economic and management agency theory.

201 J Armour, H Hansmann and R Kraakman, *Agency problems, Legal strategies and Enforcement* (July 20, 2009). Oxford Legal Studies Research Paper No 21/2009; Yale Law, Economics & Public Policy Research Paper No 388; Harvard Law and Economics Research Paper Series No 644 ; European Corporate Governance Institute (ECGI) - Law Working Paper No 135/2009. Available at SSRN: https://ssrn.com/abstract=1436555, 29.

202 *Ibid*. "Viewed in these broad terms, agency problems arise in a broad range of contexts that go well beyond those that would formally be classified as agency relationships by lawyers."

203 L Bebchuck and J Fried, "Executive Compensation and an Agency Problem", (2003) 17 *JEP* 3, 71, 75. The idea that creditors will have an incentive to go along with the CIP's fee arrangement, which is dear to his heart, in the hopes that he will take care of their interests.

204 Federal Law No 127-FZ On Insolvency (Bankruptcy) 2002, art 20.7. [Russia].

205 *Idem*, art 20.8. [Russia]. It may be deducted from their claims.

In the English *Cambridge Analytica* case,[206] Norris J was confronted with a similar issue. A significant creditor in the case guaranteed the fees of the CIPs unconditionally. The CIPs were accused of a lack of candour due to "belatedly" disclosing the amount and funding of their fees.[207] Norris J succinctly captured the issue as follows:

> "44. Emerdata is the major creditor and the holding company. In the absence of any statutory scheme for funding administrations the situation in which a major creditor underwrites the cost of an administration in order to obtain the best recovery is by no means unusual. (In the present case, according to the solicitors for the Joint Administrators, funds for the administration have been raised by Emerdata directly from independent investors for that purpose). The situation in which a holding company underwrites the costs of the administration of its subsidiaries (rather than cutting the subsidiaries and their creditors adrift and bringing about unfunded stagnant administrations) is more rarely encountered but may be thought to be a matter for commendation rather than criticism. I can understand why experienced and senior joint administrators would not regard it as a material matter.
>
> 45. But *proposed administrators must appreciate that they are not the sole judges of "materiality" and should where necessary be prepared to expose their own judgement to consideration by others* (including the Court). This the Joint Administrators "belatedly" did (as Hildyard J described it) with the same consequence as if they had made earlier disclosure. *I do not consider that it demonstrates a lack of candour on the part of the Joint Administrators* (any more than did Hildyard J when he appointed them), *though I do think it was a misjudgement not to have volunteered the information earlier*."[208] (Emphasis added)

Although Norris J is of the opinion that this practice is more commendable than it is worth critiquing, one cannot simply think the possible consequences of such arrangements away. There is a risk of an agency problem and there is a risk for lack of impartiality.

In South Africa, the Supreme Court of Appeal in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*[209] had to consider whether a contingency / success fee arrangement between the CIPs (business rescue practitioners) and a creditor of the debtor company was contrary to public policy and the codified fiduciary duties of the CIPs. The creditor refused to pay the agreed success fee to the CIPs, giving rise to the matter before the court. The creditor's main contentions were that paying the success fee was illegal, contrary to public policy and

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206 *Green v Group Ltd & Others* [2019] EWHC 954 (Ch) [England].
207 *Green v Group Ltd & Others* [2019] EWHC 954 (Ch) at 43 [England].
208 *Green v Group Ltd & Others* [2019] EWHC 954 (Ch), Norris J at 44 - 45 [England].
209 [2020] ZASCA 17 [South Africa]. The creditor in question also held an indirect controlling interest in the group of companies of which the debtor was a member.

contrary to the fiduciary and other statutory duties of the CIPs. In considering the statutory legality and public policy defences of the creditor, the court focused its attention on whether a success fee was permitted in terms of the legislation and disregarded the identity of the parties to the agreement. The court, rather short-sightedly in my opinion, determined that because the legislation was silent about success fees being paid by third parties, it must be permissible.[210] The court's approach ignored the fact that the agreement has the potential to create a perception of bias amongst the other stakeholders and that a South African business rescue practitioner should not have a relationship with the company, or another person who has a relationship with the company, which would lead a reasonable and informed party to conclude that the integrity, impartiality or objectivity of the business rescue practitioner has been compromised by that relationship.[211] Instead the court reduced the creditor's argument to one that implied that an agreement such as the one between the parties was "some sort of bribery or collusive behaviour between the practitioner and the creditor".[212] There is much to be said about the creditor's intent and *bona fides* in this case and the fact that the creditor merely used these arguments in an attempt to repudiate his obligations in terms of the agreement. However, the court missed an opportunity to bring about clarity in this area of South African corporate rescue law. It can be argued that the court could have interpreted the sections dealing with the independence and impartiality of the CIP in a way that is more reflective of the intent regarding the purpose of those provisions. Although no bribery or collusion was involved, a relationship existed which could easily lead parties involved in the insolvency proceeding to believe that the CIPs' impartiality was affected.

A possible safeguard mentioned in the *Cambridge Analytica* case against the issues raised in relation to agency problems, could be full and proper disclosure and transparency regarding the fee arrangement. However, it is a well-known fact that a lack of independence and impartiality cannot necessarily be cured by disclosure.[213] The resulting perception of a lack of impartiality that can be caused by such a set of circumstances, will erode the trust and confidence of other stakeholders in the CIP's integrity.

A jurisdiction's remuneration provisions should not give rise to even the slightest possibility of a lack of impartiality due to the party involved in the approval and payment of the CIP's remuneration. CIPs should exercise their powers and functions fairly and objectively in relation to the beneficiaries involved.

5.6.2 Court approval

The court may be involved in prospectively approving the quantum of the CIP's remuneration in cases where there is a lack of creditor participation in the administration of the estate, or where a CIP wishes to increase the approved amount of remuneration. Prospective applications apply in cases where CIPs wish to have the level of remuneration approved in advance of the undertaking of the work that will be the subject of the remuneration.[214] However, in many

[210] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17, at 13 [South Africa].
[211] Companies Act 71 of 2008, s 138(1)(d)-(e) [South Africa].
[212] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17 at 25 [South Africa].
[213] Principle 2, INSOL Principles, p 3.
[214] *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145 (HC) at 152 [New Zealand].

jurisdictions the court retains the right to fix the final remuneration at the time the insolvency proceedings are finalised.[215]

When receiving an application for the approval of fees prospectively, the court will apply the different methods of determining quantum in that jurisdiction and also apply the factors to be taken into account by that jurisdiction.[216]

By way of example, in England and Wales the Insolvency Rules 2016 provide that the following need to be taken into account when fixing the remuneration of the officeholder: the complexity of the case; whether any aspects of the case creates any responsibility of an exceptional kind or degree for the officeholder; the effectiveness with which the officeholder carried out the duties of the office; and the value and nature of the property with which the officeholder had to deal.[217]

One issue that has been raised in relation to the prospective approval of remuneration is the critical issue of proportionality.[218] The court would have to ensure that the assets of the company are not unduly depleted by approving remuneration which might later prove disproportionate to the benefits received by creditors. Moreover, the court would not at the stage of the application be able to make a determination as to whether the CIP has added any value.[219] It follows that it would be easier for a court reviewing a CIP's remuneration claim after the fact regarding the value his services added to the administration of the estate.

Another important aspect regarding the court's involvement, is its admitted lack of time and practical knowledge to ascertain whether remuneration posed by the CIP would in fact be fair and reasonable.[220]

5.7 Means of payment

The issues that arise in relation to the means of payment generally concern unsecured creditors. This is because many jurisdictions provide for CIP remuneration to be paid from funds raised from the realisation of unencumbered assets, which also happens to be the source for distribution to unsecured creditors. The issue is usually that the unsecured creditors see most, if not all, of the available assets being used to cover the costs of the administration of the estate, resulting in the source from which they are to be paid being depleted.[221]

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215 *Re Roslea Path Ltd* [2013] 1 NZLR 207 (HC) 242 [New Zealand].

216 It is interesting to note that jurisdictions usually provide for the same factors to be taken into account whether the application is prospective or retrospective.

217 The Insolvency (England and Wales) Rules 2016, No 1024 at 18.16(9), p 391; S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts", (2018) 13 *AsJCL*, 141, 145.

218 *Re Roslea Path Ltd* [2013] 1 NZLR 207 (HC) 242 [New Zealand].

219 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England]. Ferris J stated that too much emphasis is placed on the time spent on rendering services and that it ought to be the value of the services that should be rewarded and not the cost of rendering them.

220 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 654 [England]. "…I must say that, as a judge, I feel singularly ill-equipped, whether by training or experience to carry out the task which is involved in the appraisal of the receivers' claim for remuneration. I do not suppose that I am alone among my brethren in this view." Ferris J, *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 38 [41] [Singapore].

221 UNCITRAL Guide, p 182, par 58.

It is evident that situations such as the one described above have a profound effect on the interests of unsecured creditors. As CIPs owe their fiduciary duties to all the creditors and not merely the secured creditors or those with a preferential status, one could ask if a CIP would be in breach of his duties to these unsecured creditors should his remuneration and expenses deplete the source of their payment completely. It is accepted that the principle of *pari passu* (as well as the exceptions thereto) is part and parcel of most insolvency systems, but should this include remuneration payments to the detriment of a beneficiary of the CIP's fiduciary duty?

The UNCITRAL Guide suggests solutions to this problem, for example, remuneration could be paid from unencumbered assets; a surcharge could be levied against assets to pay for the administration or sale of those assets where the administration or sale would be of benefit to the creditors; a surcharge could also be levied on creditors making an application to commence insolvency proceedings to cover at least the initial costs and the performance of basic administrative functions; or encumbered assets may be made subject to the payment of a proportionate or defined share of remuneration.[222]

A unique practical example of one such solution aimed at protecting the interests of the unsecured creditors can be found in the provisions relating to the prescribed part in England and Wales. The prescribed part entails the setting aside of funds from the proceeds of assets subject to a floating charge for the payment of unsecured creditors. After the payment of preferential creditors, floating charge holders are usually paid from the surplus. However, the CIP first has to consider the application of section 176A of the Insolvency Act.[223] This section applies to companies in liquidation or administration with floating charges that were created on or after 15 September 2003. The CIP has a duty to set aside the prescribed part of the company's net property for the satisfaction of unsecured debts. The prescribed sums are: i) where the company's net property does not exceed GBP 10,000 in value, the prescribed part is 50% of that amount;[224] ii) where the company's net property exceeds GBP 10,000 in value, the prescribed part is 50% of the first GBP 10,000[225] in value and 20% of the excess in value above GBP 10,000,[226] subject to the maximum prescribed part.[227] Although the "…prescribed part fund only yielded marginal fruits for this class of insolvency claimants",[228] it did deliver a dividend in cases where these creditors would otherwise have received nothing.

A fair and equitable remuneration framework would not single out one group of creditors as the beneficiaries of the CIP's fiduciary duties to bear the brunt of the adverse impact because of the payment of his remuneration. The framework should take care to distribute the burden in a fair manner, even allowing for secured creditors to contribute towards the payment of administration costs.

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222 *Idem*, p 182, par 58. The Guide sets out various options and different approaches that can be taken in order to pay the IP.
223 Insolvency Act 1986, s 176A [England and Wales].
224 Insolvency Act 1986, (Prescribed Part) Order 2003, art 3(1)(a) [England and Wales].
225 *Idem*, art 3(1)(b)(i) [England and Wales].
226 *Idem*, art 3(1)(b)(ii) [England and Wales].
227 *Idem*, art 3(2) [England and Wales]. The value of the prescribed part of the company's net property to be made available for the satisfaction of unsecured debts of the company pursuant to section 176A shall not exceed £600,000.
228 K Akintola, "The prescribed part for unsecured creditors: a further review", (2019) 32(2*) Insolv Int* 67, 67.

5.8 Summarising remarks on determination of quantum

After careful consideration of all the calculation methods, it is evident that no single method can be isolated as being the best or most appropriate method to determine the amount of remuneration. Each method discussed has its benefits and its drawbacks. However, when considering these methods in relation to their own remuneration frameworks, it is imperative that jurisdictions are acutely aware of the threats to ethical behaviour that every method poses. Armed with this knowledge, it is possible to draft a remuneration framework that allows for a method of calculation that is best suited to each case and type of proceeding, with proper safeguarding measures to ensure ethical behaviour on the part of CIPs.

In this regard the use of a combination method (as used in most jurisdictions) seems sensible as it allows for the best elements of each calculation method to be used. In this regard it is important that the choice be explained in a transparent manner to the approving party.

There are real issues in regard to the use of contingency fee arrangements. These arrangements can create self-interest threats that reward CIPs for performing tasks that they, as fiduciaries, should be performing as efficiently as possible in any event. Contingency fee arrangements should be limited to instances of truly extraordinary performance by a CIP.

The party responsible for approving the remuneration should be in possession of sufficient information to be able to make an informed decision. It is also important that the insolvency regime recognises the possible threat in relation to agency-problems. The CIP is required to perform his duties in the interests of all creditors and there should be no scope for a situation to arise where a creditor feels that he is owed some kind of allegiance. Independence and impartiality are of paramount importance.

6. Review mechanisms

Due to the contentiousness of the issue and the "common global concern"[229] regarding the level of fees charged by CIPs, it is commonplace to have a mechanism in place by which said fees and the method of calculation can be reviewed. The review mechanism often depends on the method used for approval.[230] Where the creditors are responsible for setting and approving the fees, the court would generally be responsible for the review thereof, if required. Review is not usually an automatic occurrence and is commonly triggered by an application by one of the parties involved. CIPs as well as other stakeholders might be dissatisfied by the remuneration and would be in need of an avenue for review to resolve disputes. It has to be noted that the task of reviewing remuneration will "be a formidable one for whoever undertakes it."[231]

The importance of effective review mechanisms was also highlighted in the discussion regarding the determination of quantum, as it was established that in many instances a review mechanism would be the only safeguarding measure to ensure ethical behaviour by the CIP.

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229 S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts", (2018) 13 *AsJCL* 141, 142.

230 See para 1.1 above.

231 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 655 [England].

It seems that in many jurisdictions the courts have traditionally been responsible for resolving disputes regarding CIP remuneration.[232] However, in more recent times the view has been expressed (even by the courts themselves) that courts are no longer perceived as being best placed to resolve remuneration disputes.[233] Constrained resources and limited institutional competence has led to the judiciary having to resort to being "expensively educated" by experts in evidence on the matter of remuneration.[234] This leads to a "peer review" system whereby another IP conducts a detailed investigation of the remuneration sought by the CIP in a particular case and then reports back to the court.[235] This could also see the costs of the procedure rise dramatically, as both the cost of counsel and fees relating to the peer reviewer will have to be paid.

Some jurisdictions rely on the body responsible for licensing the CIP to also oversee disputes arising from remuneration claimed by a CIP under its regulation.

This section will consider the various review mechanisms and the possible effects that they might have on a CIP's behaviour and the possible resultant effect on stakeholders.

6.1 Court review

Instances where the judiciary are involved in approving and setting the remuneration should be distinguished from cases where their involvement is to evaluate and express an opinion on the remuneration claimed and thereby reviewing it after the fact. Review by the court may take place at the conclusion of the proceedings or during the proceedings.[236] It is important to note that remuneration issues before the courts do not necessarily arise from disputes (although this is often the catalyst)[237] and might be required due to creditor disengagement,[238] or for some technical legal reason.[239] The discussion that follows will focus only on the court's involvement as the reviewing party, although it is important to note that the courts follow largely the same principles

[232] Australia, Russia, South Africa, Singapore, Scotland, United Kingdom.

[233] D Brown and C Symes "Submission to Senate Inquiry into Liquidators and Administrators" [2009] 6-7. S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts", (2018) 13 *AsJCL* 141, 142; S Steele, V Chen and I Ramsay, "An empirical study of Australian judicial decisions relating to insolvency practitioner remuneration", (2016) 24 *Insolv LJ* 165; *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, [41] [Singapore].

[234] *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, [41] [Singapore].

[235] Please see discussion on peer review in para 6.2 below.

[236] *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145 (HC) at 154 [New Zealand]. "A retrospective application may be made at the conclusion of a liquidation. It may also be made part-way through a liquidation for approval of fees charged up until that time."

[237] *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145 (HC) at 154 [New Zealand]. S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts", (2018) 13 *AsJCL* 141, 142. "Traditionally, courts have been at the forefront of resolving formal disputes about insolvency practitioner remuneration,…"

[238] S Steele, V Chen and I Ramsay, "An empirical study of Australian judicial decisions relating to insolvency practitioner remuneration", (2016) 24 *Insolv LJ* 165, 173, 175. The empirical research conducted by the authors showed that there are cases in Australia where CIPs are required to approach the court to obtain payment due to lack of action or refusal to take a decision by the creditors involved. "The lack of creditor engagement in insolvency proceedings and misunderstandings about the proper role of the insolvency practitioner are well documented and not confined to Australia."

[239] *Idem*,167.

in setting the fees as in reviewing them, but in a different way.[240] The role of the court, the approach taken by the court and common issues experienced in the review process, will be considered.

It is clear from the jurisdictions considered that the role of the court in the review process is generally the same. As the reviewing party, the task before the court is to determine whether the remuneration and expenses claimed by the CIP are fair, reasonable and proportionate. This determination has to be made in accordance with the factors used in a specific jurisdiction to determine and approve the quantum of the claims and to thereby establish the reasonableness of what is actually claimed.[241]

6.1.1 Factors

It is sensible to point out at this stage that the factors used by courts in reviewing remuneration in different jurisdictions are largely similar and reminiscent of the factors recommended in the various guidance documents discussed at the start of the report, and also to those factors usually used in approving remuneration. It is also useful to point out that many of the factors that jurisdictions have incorporated are reflective of the best practice guidance.

In England and Wales the Insolvency Rules 2016 provide that the following need to be taken into account when fixing the remuneration of the officeholder: the complexity of the case; whether any aspects of the case creates any responsibility of an exceptional kind or degree for the officeholder; the effectiveness with which the officeholder carried out the duties of the office; and the value and nature of the property with which the officeholder had to deal.[242] These factors, along with others, will also be considered during the review process. It is clear that it would be a much easier task to consider these factors during a review as opposed to doing so prospectively. During the review process the court will further consider whether the remuneration reflects the value of the services rendered and whether it represents fair and reasonable remuneration for the work properly undertaken.[243] This determination requires the court to evaluate whether the remuneration sought is in actual fact commensurate with the work done.

In Australia, the court, in reviewing the remuneration sought, will consider whether the remuneration claimed is reasonable, taking into account the following factors: the extent to which the tasks performed by the IP were reasonably necessary; the period of time during which the work was undertaken; the complexity and quality of the work; the actual time it took to do the work; any extraordinary issues; the level of risk or responsibility undertaken; the value and nature of the property of the estate; and the number, behaviour and attributes of

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240 *Re Roslea Path Ltd* [2013] 1 NZLR 207 (HC) 208 [New Zealand]. "In an application to fix the liquidator's remuneration retrospectively, discriminating use had to be made of principles applied to fix remuneration…"

241 See in this regard the discussion under para 4; *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145 (HC) at 187 [New Zealand] – "reasonable in the circumstances"; *Fann and Guofan v Norrie as liquidator in Rayland Investment Limited (in liq)* [2017] NZHC 2019 [New Zealand]; *Re Roslea Path Ltd* [2013] 1 NZLR 207 (HC) [New Zealand].

242 The Insolvency (England and Wales) Rules 2016, No 1024 at 18.16(9), p 391; S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts" (2018) 13 *AsJCL* 141, 145.

243 Statement of Insolvency Practice 9 [England and Wales].

creditors.[244] The courts in Australia clearly consider far more factors than the courts in England and Wales. This might make the review fairer in that more variables are taken into account.

Apart from these factors, the courts in Australia and New Zealand have expressed the view that the public interest and the interests of the wider economy and consumers also need to be considered when reviewing and setting the remuneration of IPs.[245] One of the reasons provided for having said this, includes the fact that the costs incurred in the private sector in this industry are ultimately passed on to consumers, that is, the creditors.[246]

From the above it can be gleaned that the general / key considerations in reviewing CIP remuneration before the courts are: reasonableness and proportionality, complexity of the case and size of the estate, time spent and value added, with some jurisdictions considering more factors than others. These factors all seem reasonable and it is difficult to see how the application of any of them could have an influence on how ethically the CIP conducts the administration of the estate. The approach of the courts in considering and applying these factors should, therefore, be scrutinised.

6.1.2 Approach

It seems that the problems faced by the courts in reviewing the remuneration of CIPs have their roots in time constraints and a lack of practical knowledge.[247] Reviewing all the factors listed above necessitates a detailed investigation and evaluation of the *minutiae* of the bills provided by CIPs. This requires adequate time to meticulously comb through supporting evidence and adequate knowledge as to what the administration of estates practically entails. Consequently, it cannot be said that it is the role of the court to scrutinise the *minutiae* of the bill, purely because it does not have the time or the knowledge to do so properly. Moreover, in some jurisdictions the task of reviewing remuneration is not seen to be part of the judicial role and is viewed as more of a quasi-administrative exercise that could be performed by court masters or registrars.[248] The statements regarding the ability of the courts do, however, need to be qualified: they do not ring true for specialised bankruptcy courts;[249] and courts in various jurisdictions are not deterred by a lack of time or practical knowledge in reviewing remuneration.

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244 Corporations Act 2001 (Schedule 2) as amended, Insolvency Practice Schedule (Corporations) s 60-12; S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts", (2018) 13 AsJCL 141,152. See also *Deputy Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in Liq), in the matter of ACN 154 520 199 Pty Ltd (In Liq)* [2020] FCA 134 [Australia].

245 S Steele, V Chen and I Ramsay, "An empirical study of Australian judicial decisions relating to insolvency practitioner remuneration", (2016) 24 *Insolv LJ*, 165, 167.

246 *Ibid*.

247 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 654 [England]. "…I must say that, as a judge, I feel singularly ill-equipped, whether by training or experience to carry out the task which is involved in the appraisal of the receivers' claim for remuneration. I do not suppose that I am alone among my brethren in this view." Ferris J in *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 38 [41] [Singapore].

248 See D Brown and C Symes "Submission to Senate Inquiry into Liquidators and Administrators", [2009] 6-7 about the role of the court in Australia.

249 As these courts deal only with matters relating to insolvency, it would be a reasonable assessment that they would have more time to devote to evaluating bills of fees claimed and that the judges would have a better understanding of practical insolvency.

One issue that follows from a court's lack of time and knowledge, is the perception that the approach taken seems to be one that is arbitrary in slashing down fees without proper consideration of the challenges facing the CIP.[250]

In the seminal case of *Mirror Group Newspapers plc v Maxwell*,[251] Ferris J laid down a test to determine whether officeholders have acted properly in undertaking tasks at a particular cost. The test is one of reasonableness; whether a reasonably prudent man, in the same circumstances, would have taken the same steps as the officeholder. Moreover, it is stated that officeholders are expected to deploy commercial judgement and not to act regardless of expense.[252] This test, of course, requires that the person making the determination should be able to understand the circumstances faced by the CIP. It requires that the person also consider the commercial judgement exercised by the CIP. One of the ways in which the courts in various jurisdictions try to overcome these obstacles, is to make use of expert evidence in the form of other CIPs (peer review).[253]

In order to determine whether the remuneration being claimed by the CIP is reasonable, the necessity of the tasks ought to be considered. The question whether work was reasonably necessary to perform will depend at the very least on whether it was required by legislation or even practice direction / professional obligations.[254] In this regard it is submitted that not all tasks required to be performed by the CIP will augment recovery or distribution.[255] CIPs should be entitled to be remunerated for work that is required by legislation or practice directives. The tasks set out in these sources are drafted with the protection of interested parties (stakeholders) in mind and, therefore, disallowing claims in this regard would endanger the protection of their interests.

This leads to the issue of time versus value. The issue of value was first highlighted in the *Mirror Group* case by Ferris J[256] and subsequently confirmed and cited in several cases pertaining to remuneration in several other jurisdictions.[257] Ferris J stated that too much emphasis is placed on the time spent on rendering services and that it ought to be the value of the services that should be rewarded and not the cost of rendering them.[258] This issue is of special importance when reviewing remuneration sought by a CIP retrospectively, as "value added" can only be determined after the fact. Even though this notion has shaped the view on the approach by courts to reviewing

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250 This has been remarked of courts in Australia and Singapore. *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 26 [4] [Singapore]: "It is profoundly unsatisfactory that the conventional response is simply to slash down the quantum sought…"; S Steele, V Chen and I Ramsay, "An empirical study of Australian judicial decisions relating to insolvency practitioner remuneration", (2016) 24 *Insolv LJ* 165, 173. See also *Re Hazelview Investments Pty Ltd (in liq)* [2014] FCA 866 [Australia].

251 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England].

252 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638,649 [England].

253 Please see full discussion on peer review below (para 6.2).

254 *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38, [41] [Australia].

255 *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38, [41], [57] [Australia].

256 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England].

257 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424 [Australia]; *Conlan v Adams* [2008] WASCA 61 [44] [Australia]; *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145 (HC) at 187; *Re Roslea Path Ltd* [2013] 1 NZLR 207 (HC) [New Zealand]; *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264 [Singapore]; *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21 [Singapore].

258 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 639 [England].

remuneration, it is important to highlight some aspects that should not be lost sight of.

The first question that arises is how is "value" to be determined? According to Singapore's Rajah JC, this question ought first to be considered in light of the purpose of the CIP's appointment.[259] Did the CIP manage to attain the objectives of the procedure in which he was appointed?[260] With the differing objectives of rescue proceedings in relation to liquidation proceedings in mind, it is envisaged that the remit of the inquiry of "value" added by CIPs will have to be determined by casting a wider net depending on the circumstances. Whether the objectives of a particular procedure have been met will invariably depend on the identity and position of the party asked to make the determination. For example, certain creditors who did not receive as big a dividend as expected might view the procedure as a failure; whilst the CIP in the same case might believe that he has done exactly what was expected of him.[261] Moreover, should a rescue attempt end in liquidation and the ultimate demise of the company, most stakeholders will believe the procedure has been a failure and its objectives not met. Does this mean that the CIP appointed should not be reasonably remunerated for the time spent on the rescue effort?[262] I agree with the view expressed in the Singaporean *Dovechem* case which stated that it is about the difference the CIP has made to the matter and not just the outcome achieved by the CIP.[263]

The next issue regarding "value" pertains to work done that benefits the company but was not necessary to perform. CIPs might perform work that benefit the interests of the stakeholders, but the work done falls outside the strict remit of the CIP's appointment. An example of a situation like this can be found in the Australian *Venetian Nominees* case, where a liquidator's remuneration in relation to preparing the company's statutory returns were disallowed based on the fact that although it was of benefit to the company, it was the directors' duty to prepare the returns and not that of the liquidator.[264] I would argue that a CIP, as a professional, ought to be aware of the actions that would fall outside the scope of his powers. A CIP, in adhering to the proper purpose doctrine and the duty of care, would be mindful of the limitations placed on the powers of his office. Therefore, if a CIP is aware of the fact that a proposed beneficial action does not fall within his remit, approval or direction could be sought from either

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259 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 283 [50] [Singapore].

260 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, [33] [Singapore]; See also *Re Roslea Path Ltd* [2013] 1 NZLR 207 (HC) [40] [New Zealand]: "…measured against the work undertaken and the result achieved."

261 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 283 [50] [Singapore]. See also *Deputy Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in Liq), in the matter of ACN 154 520 199 Pty Ltd (In Liq)* [2020] FCA 134 at [3] [Australia]: "The 'value' of a liquidator's work can include the benefit of resolving the position of creditors and beneficiaries; the benefit to the community of not permitting assets to remain unproductively in the hands of the defunct company for a long period and work that was required but did not result in a return to creditors." See also [26] where it is stated that the fact that work did not increase the funds available for distribution to creditors did not mean that the CIP is not entitled to be remunerated for it.

262 See in this regard also *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 649 [England]: "This is not to say that a transaction carried out at a high cost in relation to the benefit received, or even an expensive failure, will automatically result in the disallowance of expenses or remuneration."

263 *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd* [2015] 4 SLR 955, [33] [Singapore].

264 *Venetian Nominees Pty Ltd v Conlan* [1998] WASCA 273 [Australia]. See also *Ide v Ide* [2004] NSWSC 751 [Australia]; *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21 [Singapore].

the court or perhaps the creditors, depending on the circumstances. If, however, a CIP unwittingly (but in good faith) acts outside the ambit of his remit, should remuneration claimed for this be disallowed? It is my contention that this question should be answered with reference to the benefit the action has for the company and / or the stakeholders. If the benefit is negligible, should the CIP have utilised time and resources in pursuing the course of action? Arguably not. If the benefit is not negligible and truly constitutes a significant improvement in a given situation, it could be argued that a CIP should be allowed to be remunerated for work in relation to the relevant course of action. The remuneration in this case should, however, be determined on a *quantum meruit* basis and should not be based on the regular method for the calculation of remuneration. Moreover, it is submitted that the complex nature of insolvency appointments often set CIPs up with the difficult task of trying to ascertain what needs to be done in unpredictable circumstances and that might lead to work being undertaken that later proves to be unnecessary. To this extent I agree with the statement by Chong J in *Kao*: "There is something perverse and capricious about a system that expects persons to work without a precise definition of their scope of their responsibilities (and without the assurance or security of payment) and then denies them remuneration for the work that is performed on the basis that the work done was unnecessary or too expensive and ought not to have been done."[265]

A further issue that relates to value and reasonableness, is proportionality.[266] The remuneration sought would be considered reasonable if it is proportionate to the size of the estate and its assets, the benefit obtained from the work, as well as the difficulty and importance of the task.[267] It is a reasonable inference to draw that as a fiduciary, a CIP acting in good faith and in the best interest of his beneficiaries ought not to claim fees that are exorbitant when weighed against the factors set out above. It cannot be said that reasonable remuneration has been claimed if the work done was complex and for a large corporation with various stakeholders, but the remuneration and expenses claimed have depleted most of the funds available for distribution to creditors.[268] In *Mirror Group Newspapers plc v Maxwell,*[269] the disproportionality of the CIPs claims for remuneration was clearly evident. The practitioners succeeded in realising assets in the amount of £1.6m. However, they claimed GBP 745,000 and GBP 705,000 in professional fees and disbursements and expenses respectively, leaving a mere GBP 43,428 available for distribution. Proportionality should, however, not receive a disproportionate amount of focus in determining the reasonableness of the remuneration claimed.[270] Where a court focuses solely on the issue of proportionality, it could lead to considerations of actual work done not being taken into account which could in turn create an unfair approach to reviewing remuneration. This was the case in the Australian *Sanderson* case, where the judge in the first instance court slashed the remuneration claimed by

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265 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 65, [A 27] [Singapore].

266 *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38, [55] [Australia]: "…the question of proportionality is a well recognised factor in considering the question of reasonableness…"; *Deputy Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in Liq), in the matter of ACN 154 520 199 Pty Ltd (In Liq)* [2020] FCA 134.

267 *Conlan v Adams* [2008] WASCA 61 [47] [Australia]; *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38, [55] [Australia].

268 M Murray and J Harris, *Keay's Insolvency Personal and Corporate Law and Practice* (10th ed, Thomson Reuters 2018), 433; *Re On Q Group Ltd* (in liquidation) [2014] NSWSC 1428.

269 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England].

270 *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38, [64] [Australia].

the liquidator for work done after a distribution to creditors had already been made. The additional work that the liquidator had claimed for, resulted in a contributory being identified and being able to share in the surplus. He was therefore complying with his fiduciary duties. The judge lowered the amount claimed by the liquidator for the additional work from AUD 63,577.80 to AUD 20,000. There was no explanation given as to how the judge arrived at this amount and no consideration was given to the work actually performed by the liquidator. The liquidator was granted leave to appeal.

In this regard I agree with the following statement by Rajah J:

> "Professionalism is essentially an attitude and not merely about discharging duties. Professionals should not wield a hammer to attack every nail in sight. By this, I mean, that proportionality and the rendering of value are integral to professionalism."[271]

Reference has been made to the fact that at various points in several jurisdictions the opinion was expressed that the courts lack the necessary guidance to apply the factors and criteria / principles developed in relation to remuneration.

The Australian court in the well-known *Korda*[272] judgment noted that at that time there was a lack of legislative criteria to assist in determining whether remuneration is reasonable in a particular case. Finkelstein J took the opportunity to lay down guidelines, which are still regarded and referred to. Issues related to determining the reasonableness of the remuneration claimed mainly reflect a lack of guidance in a jurisdiction's insolvency framework. Invariably, a lack of clear guidance on how to deal with remuneration matters leads to inconsistent approaches.

Australian courts have also attempted to express guidance as to what would not represent time reasonably expended at a reasonable rate.[273] Based on McLure's non-exhaustive list provided in *Conlan*,[274] this could include the following: i) work that is beyond the power of the CIP; ii) conduct that is negligent (whether it be in undertaking or performing work); unnecessary work; iii) work undertaken by persons of inappropriate seniority; and iv) work undertaken at inappropriate hourly rates.

In the Singaporean *Kao* case, the need to avoid any influence due to hindsight bias by judges who do not have the requisite knowledge and experience to make a determination on necessity or effectiveness of the work conducted by an officeholder, was highlighted. It appears that the court was suggesting that a way to overcome this would be to appoint an assessor.[275] The argument is that CIPs should not be penalised in the courtroom for having made urgent decisions that later proved to be unnecessary or ineffective:[276] "…one should not expect a receiver caught up in the flurry of activity in the marketplace to have the same luxury of calm and dispassionate analysis that is afforded to those called on to

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271 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 293 [75] [Singapore].
272 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424 [Australia].
273 *Conlan v Adams* [2008] WASCA 61 [44] [Australia].
274 *Conlan v Adams* [2008] WASCA 61 [44] [Australia].
275 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, [45, 46] [Australia]: "…particularly where the bill is very large and the issues very complex."
276 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 36 [35] [Singapore].

assess his acts *ex post facto* in the confines of the courtroom."[277] This should, however, also be borne in mind by the assessor if one is to be appointed.

In *Mirror Group Newspapers plc v Maxwell,*[278] Ferris J laid down certain principles to be considered by the courts in remuneration cases. Some of these principles were later incorporated into the Insolvency Practice Statement on remuneration and provides guidance to courts in England and Wales in order to achieve a consistent and predictable approach.[279]

The principles in this Practice statement that I would like to highlight, are:

"**Justification**" – it is for the CIP who seeks to be remunerated to justify their claim. They are responsible for preparing and providing full particulars of the basis for and nature of the claim.[280] This principle is based on the views expressed by Ferris J in the *Mirror Group* case that a CIP, as fiduciary, has a duty to account.[281] Transparency is a key component to ethical behaviour by the CIP.[282]

"**The benefit of the doubt**" – if after having regard to the evidence and guiding principles there remains any doubt as to the appropriateness, fairness and reasonableness of the remuneration sought, the court should resolve the matter against the IP.[283] At first blush a reading of the title of the principle creates the impression that the benefit accrues to the CIP. However, this principle is rather tough on a CIP as his remuneration would be reduced if he has not proven beyond a doubt that the remuneration he claimed is reasonable and appropriate. The benefit of the doubt is, therefore, not in his favour. The principle embodies the statement by Ferris J in *Mirror Group Newspapers plc v Maxwell*, that those officeholders whose records are inadequate often find themselves liable that doubts as to whether they should be remunerated as claimed are resolved against them because they are unable to fulfil their duty to account.[284]

"**Professional integrity**" – the court should give weight to the fact that the CIP is a member of a regulated profession and an officer of the court.[285] This is especially relevant in cases where the complaint against the CIP relates to seemingly unnecessary tasks or tasks performed with excessive diligence.[286] This principle would appear to protect the CIP from any loss for performing tasks associated with exercising his statutory and other duties, including duties of a fiduciary nature, which again might not augment recovery or distribution.

"**The value of the service rendered**" – the CIP's remuneration should reflect the value of the service rendered, not simply reimburse the CIP in respect of

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277 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 36 [35] [Singapore].
278 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England].
279 Practice Directions – Insolvency Proceedings, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/insolvency_pd#21.
280 *Idem*, at 21.2(1); T Robinson and P Walton, *Kerr &Hunter on Receivers and Administrators* (20th ed, Sweet & Maxwell 2018), 359.
281 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England].
282 See para 6.5 below on Transparency.
283 Practice Directions – Insolvency Proceedings, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/insolvency_pd#21, at 21.2(2).
284 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 649 [England].
285 Practice Directions – Insolvency Proceedings, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/insolvency_pd#21, at 21.2(3).
286 T Robinson and P Walton, *Kerr &Hunter on Receivers and Administrators* (20th ed, Sweet & Maxwell 2018), 359.

time expended and cost incurred.[287] This principle confirms the "value" element of remuneration.

"**Proportionality of remuneration**" – the amount and basis of remuneration should be proportionate to the nature, complexity and extent of the work that has been completed by the CIP.[288] Other factors to consider in relation to proportionality are: the value and nature of the assets and liabilities with which the CIP had to deal; the nature and degree of responsibility to which the CIP has been subject; the nature and extent of any risk assumed by the CIP and the efficiency with which the CIP has completed the work.[289]

Although the principles in the practice statement contribute significantly in providing guidance to courts, it has also been stated that the application of the criteria to the facts of any particular case remains difficult.[290] Judges confirm that while the principles were helpful in identifying the main criteria to apply, these principles lacked precision and could be said to lean too heavily in favour of unsecured creditors at the expense of IPs.[291]

The terminology used in legislation, regulations and even case law can sometimes further exacerbate remuneration disputes: "So far as formal regulations are concerned it is, I think, the case that these are somewhat sketchy, ill-expressed and consequently liable to be misunderstood."[292] In the Australian case of *Conlan v Adams*,[293] McLure JA expressed her disapproval of the term "unnecessary work" and stated that this term was unhelpfully vague.[294] When it is not clear from the rules what should be disallowed, it leaves too much room for subjective (ill-informed) interpretations of what is practically required from a CIP.

The consequence of the inconsistent manner in which courts deal with remuneration issues, is uncertainty. Inconsistency in approach creates uncertainty for CIPs as well as stakeholders. It should therefore come as no surprise that a possible ethical consequence due to the uncertainty, is the inflation of fees by CIPs. If the CIP cannot trust the court responsible for reviewing the remuneration claimed in a thorough, respectful manner (taking all necessary factors into account without creating new conflict scenarios) he might feel that he has to resort to inflating his fees in order to make sure that he is paid what is rightfully due to him.

6.2 Peer review

Peer review of remuneration refers to any system by which the fees claimed by CIPs are evaluated and reviewed by a peer. A peer in this instance would be any other CIP with the requisite amount of experience to render an opinion as to the reasonableness and appropriateness of the fees claimed. As seen above, peer review systems are often used in conjunction with court review due to the

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287 Practice Directions – Insolvency Proceedings, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/insolvency_pd#21, at 21.2(5).
288 *Idem*, at 21.2(7).
289 *Ibid*.
290 S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts" (2018) 13 *AsJCL* 141, 149.
291 *Ibid*.
292 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 648 [England].
293 *Conlan v Adams* [2008] WASCA 61 [Australia].
294 *Conlan v Adams* [2008] WASCA 61, [44] [Australia].

fact that the court makes use of a CIP's peer as an assessor or expert to provide the court with guidance. This practice is often without any statutory basis.[295]

There are, unfortunately, various troublesome ethical issues with regard to utilising this method of review.

6.2.1 Conflict of interest

One of the issues with utilising peers to review the remuneration claimed by CIPs, is the conflict of interest that is created along with the method. Symes and Brown mention the reluctance of expert witnesses (peers) to express strong views on whether the remuneration charged is reasonable.[296] This is, of course, due to the fact that at some point their own fees will have to be reviewed by a peer and they will be mindful of this. On the other hand, CIPs will be aware of this reluctance on the part of their peers and will likely make the most of it, which might cause some inflation of the fees claimed. Rajah JC commented as follows on this reluctance in the Singaporean case of *Re Econ Corp Ltd:*

> "…insolvency practitioners have been reluctant to challenge or question each other on issues involving their remuneration – hence my observation on unsheathing a double-edged sword."[297]

6.2.2 Hindsight bias

Another issue here is the hindsight bias often expressed by peer reviewers. For example, in Scotland the courts often make use of court reporters to review the remuneration of CIPs.[298] The precise role and remit of the Scottish court reporter has raised some debate due to a difference of opinion on the part of various stakeholders as to what it ought to be. The reporter's remit is to examine and audit the CIP's accounts and to report what in the reporter's opinion is a suitable remuneration.[299] This statement as to the reporter's remit seems innocuous enough; however, it appears that reporters in Scotland often go above and beyond "examination and audit" in the name of "a superabundance of concern that the job be well done and the costs incurred by the liquidators kept within reasonable bounds".[300] This approach often manifests itself in a complete forensic investigation into every action taken by the CIP, leading to reporters raising concerns regarding CIP remuneration due to the fact that the reporter disagrees with the course of action followed by the CIP. In other words, the reporters take the opportunity to second guess the decisions made by the CIP, detailing how they would have done it differently, often succeeding in convincing the court that the CIP's remuneration should be reduced. In doing so, the reporter becomes "guilty" of the same offence as that which he often holds against the CIP, that is, doing more than what is necessary in order to charge more. The effects of this could be disastrous for the CIP and the estate involved.

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295 In Scotland the practice of utilising a reporter has no statutory basis, but has been consistently followed since the end of the nineteenth century: P1012/17 [2018] CSOH 35, [18].

296 See D Brown and C Symes, "Submission to Senate Inquiry into Liquidators and Administrators" [2009] 6-7, about the role of the court in Australia.

297 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 293 [76] [Singapore].

298 P1012/17 [2018] CSOH 35, [18] [Scotland].

299 L6/12 [2017] SC DUMF 78, [7] [Scotland].

300 L6/12 [2017] SC DUMF 78, [23] [Scotland].

In a 2017 note, a Scottish reporter claimed a fee of GBP 15,000 (excluding VAT), although a "typical" reporter's fee is usually between GBP 1,500 and GBP 2,000.[301] The Sheriff in this case, quite ironically, stated that the reporter's fees should be paid on the principle that "…the labourer is worthy of hire" as the reporter's work "…resulted in reducing the liquidation costs…"[302] The irony in the Sheriff's statement is that the CIP is also worthy of hire and that the Sheriff has allowed his remuneration to be reduced due to an opinion by a reporter acting outside of the scope of his remit and charging seven times more than what typical fee should be. In a reading of the Scottish notes it is evident that courts often slash down remuneration claims due to the influence and report of reporters who have taken it upon themselves to act as "watchdogs", finding fault with every decision made by a CIP merely because they would have done it in a different way. The consequence of such an approach is once again the possibility of CIPs inflating their fees.

There is evidence of similar hindsight bias approaches in other jurisdictions. In the New Zealand case of *Fann*,[303] an assessor appointed to review a liquidator's claim for remuneration submitted a report in which he detailed all the decisions he would have made differently in comparison to the CIP's approach. Examples of this being that he would rather have made phone calls and rely on information provided by the directors to secure assets instead of taking immediate steps to secure assets in person;[304] that he would rather have made use of a simple agreement instead of drafting a deed of settlement and indemnity (a form of contractual agreement with more advantages for the other party due to the lack of the required consideration) to give effect to the wishes of the shareholders to avoid liquidation by paying the creditors.[305] Furthermore, the assessor was "puzzled by the in-depth analysis of company bank records to identify voidable transactions…".[306] The assessor made this statement due to the fact that there was a possibility that the liquidation would be terminated, yet this never materialised. It is not fair to say that all of the comments made by the assessor were unjustified but they do illustrate, quite clearly, a possible ethical issue. As fiduciaries, it is expected that CIPs will conduct the administration of the estate in the best interest of the beneficiaries and also that they would act with the necessary care and diligence. The three examples from the *Fann* case could be interpreted as a CIP complying with these duties. If, however, CIPs are to be criticised for being careful and meticulous and consequentially have their remuneration reduced, they might not in future do the work required in relation to complying with their fiduciary duties.

6.2.3 Independence

Another important factor to consider is the high probability of the assessor and the CIP not being independent from each other. Due to the specialised nature of insolvency practice work, it is likely that an assessor and the CIP he is reporting on may know each other or even have interacted on a personal or professional

301 L6/12 [2017] SC DUMF 78, [22] [Scotland].
302 L6/12 [2017] SC DUMF 78, [22, 25] [Scotland].
303 *Fann and Guofan v Norrie as liquidator of Rayland Investment Limited (in liq)* [2017] NZHC 2019 [New Zealand].
304 *Fann and Guofan v Norrie as liquidator of Rayland Investment Limited (in liq)* [2017] NZHC 2019, 24(b) [New Zealand].
305 *Fann and Guofan v Norrie as liquidator of Rayland Investment Limited (in liq)* [2017] NZHC 2019, 24(e) [New Zealand].
306 *Fann and Guofan v Norrie as liquidator of Rayland Investment Limited (in liq)* [2017] NZHC 2019, 24(f) [New Zealand].

level before. There might be instances of friendly relationships (and equally so of animosity) between rival CIPs. This creates an unsound approach to obtaining a "neutral" assessment of whether the remuneration and expenses claimed by a CIP are reasonable. It will be difficult to believe that an assessor acted without bias when a report of unreasonable fees is lodged against a CIP with whom the assessor is not on good terms. The same is true of situations where remuneration is found to be reasonable and proportionate by an assessor who frequents public houses with the CIP in question. It is important to note that in both cases the assessor's report might be absolutely impartial, yet the perception will be one of bias. This is to be avoided at all costs. Engendering opportunities within the insolvency framework for stakeholders and the public to mistrust the CIP and the insolvency process, is an undeniable way of undermining the success of the entire insolvency system.

6.2.4 Cost

Making use of an expert assessor inevitably adds a further layer of costs to the proceedings. The court in *Kao* sensibly remarked that the "benefit of appointing an assessor must always be balanced against the costs which will be incurred."[307]

The added layer of costs, coupled with the abovementioned issues relating to the use of peer review, makes this method of review ethically dubious.

6.3 Review by creditors

It is typical for creditors to be involved in the determination of remuneration due to the fact that the amount of remuneration payable will have a direct financial bearing on their recovery rate. It is, therefore, not very typical for creditors to be involved in the review of remuneration retrospectively. However, creditors are most likely to request a review of the remuneration claimed by CIPs.

In an effort to boost competition in the industry, Australia recently made some amendments to their insolvency legislation which increases the powers of creditors in relation to CIP remuneration.[308] The first of these is the power to appoint another liquidator to review the remuneration of and expenses incurred by an external administrator.[309] The appointment of a reviewing CIP constitutes peer review and therefore all of the issues discussed under the peer review section will be equally applicable.[310]

The second power is the power to remove a CIP from office and appoint another without providing any particular grounds for removal.[311] However, removal due to discontent regarding the CIP's remuneration and overcharging would be a possibility.[312] Dickfos argues that this power may reduce creditor disengagement

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307 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 40 [46] [Singapore].
308 J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration", (2016) 25 *Int Insolv Rev* 56, 69-70.
309 Corporations Act 2001, (Schedule 2) as amended, s 90-23 Insolvency Practice Schedule (Corporations) [Australia].
310 See para 6.2 above.
311 Corporations Act 2001, (Schedule 2) as amended, s 90-35 Insolvency Practice Schedule (Corporations) [Australia].
312 Corporations Act 2001 (Schedule 2) as amended, s 90-35 Insolvency Practice Schedule (Corporations); J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration", (2016) 25 Int Insolv Rev 56, 70.

and might thereby increase the level of competition in the CIP market.[313] Although this argument has merit, I am of the opinion that the power to remove CIPs in this manner might also add to the cost and cause a delay of proceedings, as well as being open to abuse by creditors who wish to strong-arm the CIP.[314]

6.4 Review by a regulator, oversight body or a recognised professional body (RPB)

In many jurisdictions the regulation of CIPs is conducted by a Regulatory or Supervisory body.[315] The World Bank Principles advise that the regulatory functions may be performed by a government department or agency,[316] or a separately constituted body or professional body, or even a combination of these.[317] Complaints may be made against the remuneration claimed by a CIP to a Regulatory body or RPB.

These regulatory and oversight bodies could provide a sensible approach to address many of the issues pertaining to lack of practical knowledge in the review process. This is due to the fact that these bodies are usually heavily involved in all stages of the insolvency process and insolvency appointments.

There are, however, two main issues that could arise and have an impact on a CIP's behaviour.

The first issue pertains to the nature of the insolvency profession, due to insolvency practice being a very niche area; many CIPs are well acquainted with each other. This is important to mention as many RPBs (and their management structures) consist of members of the profession who are still in practice. There is also an aversion to expressing criticism against the remuneration claims made by other CIPs and this could lead to a lack of independence being carried over into the reviewing body,[318] especially where this review is done by an RPB with a board consisting of mainly other practicing CIPs. Care should therefore be taken to ensure that the body responsible for review is truly independent.

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313 J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration", (2016) 25 Int Insolv Rev 56, 70.

314 L Jacobs, "When the Honeymoon is over. Comparative considerations for the removal of a liquidator", (2019) 31 ARITA Journal 33: "One should also consider the cost and delay implications of removing the liquidator. The outgoing liquidator has performed a service and will be entitled to their fee. However, the incoming liquidator will have to get up to speed and will probably spend time and resources on tasks that were already completed by the outgoing liquidator. This seems like an unnecessary expense for the estate of the already financially embarrassed company. What will the impact of this be on smaller, unsecured creditors of the company who might suffer a greater financial loss when liquidation costs increase?"

315 World Bank Principles, p 60, par 222.

316 *Ibid*. For example, in some jurisdictions (Canada and the United States), registration and regulation are government functions.

317 World Bank Principles, p 60, par 222. In the United Kingdom the Insolvency Service acts on behalf of the Secretary of State as the oversight regulator in Great Britain for the Recognised Professional Bodies (RPBs) that authorise and regulate insolvency professionals. There are five recognised legal and accountancy professional bodies. More information available at https://www.gov.uk/government/publications/insolvency-service-as-oversight-regulator-of-the-insolvency-profession.

318 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 293 [76] [Singapore]. "…insolvency practitioners have been reluctant to challenge or question each other on issues involving their remuneration – hence my observation on unsheathing a double-edged sword."

The second issue is one of inconsistent approaches due to the categorisation of the profession and lack of harmonisation in certain jurisdictions. In South Africa the remuneration sought by the liquidator of an insolvent company will be subject to taxation (review) by the Master of the High Court.[319] This is a task that the Master's office takes quite seriously and it diligently applies the rules in relation to remuneration to all liquidations in South Africa on a fairly consistent basis. Should a party feel aggrieved by the outcome of the taxation, it is possible to take it on review to the court. However, the fees of business rescue practitioners (BRPs) in South Africa are not subject to any form of formal taxation and should a stakeholder feel aggrieved by the remuneration claimed by a BRP, his only recourse would be to the court. It does, however, often happen that CIPs who usually act as liquidators also accept appointments as BRPs in other cases. This leads to an extremely undesirable situation where BRPs, aware of this discrepancy, could make use of the lack of oversight to engage in unethical or dubious behaviour regarding their remuneration.

The body responsible for the review should therefore be able to understand insolvency practice, be independent from the CIP and the company and apply relevant and applicable remuneration rules in a consistent manner in relation to all categories of CIP.

6.5 Transparency

> "…the core principle which undergirds the remuneration process is transparency, which behoves disclosure, and the central objective of disclosure is to allow an informed decision to be made."[320]

Transparency and fiduciary duties are inextricably linked. As fiduciaries, CIPs have a duty to account.[321] In the case of *Mirror Group Newspapers plc v Maxwell*,[322] Ferris J emphasised the fiduciary nature of the CIP's office and related this effectively to remuneration and the duty to account. Ferris J stated that, as fiduciaries, CIPs have a duty to protect, get in, realise and pass on to others assets and property which do not belong to themselves but to their beneficiaries.[323] What a CIP retains for himself out of the property which he controls as an officeholder will no longer be available for those towards whom he is a fiduciary.[324] Because a CIP is not expected to act gratuitously, he cannot account for the retention by paying it over. The only way in which to account for it is by showing that he ought to be allowed to retain it. This duty to account

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319 Companies Act 61 of 1973, s 384(1) [South Africa]. The old Companies Act of 1973 still applies the liquidation of insolvent companies whilst the new Companies Act of 2008 applies only to solvent liquidations. The Master plays a pivotal role in every stage of the administration of the solvent estate. *Ex parte The Master of the High Court South Africa (North Gauteng)* [2011] 5 SA 311 (GNP) at 322, Bertelsmann J: "Every stage of the administration of the insolvent estates and companies and close corporations under winding-up, from the launching of the original sequestration or liquidation application to the rehabilitation of the insolvent or the deregistration of the corporate entity, is controlled by the Master's office. Its duties include many specialised functions and administrative tasks that can only be carried out efficiently by a dedicated organisation that exists specifically for that purpose."

320 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 59 [A 14] [Singapore]; See also *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424 at para 35 [Australia].

321 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 31 [24] [Singapore]; *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 648 [England].

322 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England].

323 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 648 [England].

324 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 648 [England].

brings about an obligation to justify expenses incurred, including an obligation to justify and explain the remuneration claimed in exercising the duties of the office.[325] The UK's Insolvency Practice Statement's principle on "justification" encapsulates this obligation of the CIP.[326]

It is important that a CIP be transparent regarding his fees and the cost of proceedings from the outset. The level of detail required should be proportionate to the complexity of the appointment.[327] Understanding the steps to be taken in a case with a complex set of facts or legal issues, would necessarily require a more detailed explanation in order to place parties in the best position to appreciate what steps are required.

According to empirical work done by Steele, Chen and Ramsay, common objections to remuneration include: "…remuneration claims were too high and could not be justified. Complaints included allegations that the practitioners had claimed remuneration for unnecessary tasks or that they had spent excessive time or charged unreasonable amounts for the work done. Creditors also argued that practitioners should have delegated simpler tasks to junior staff or that the claims were not substantiated by the insolvency practitioner's records."[328] These objections are illustrative of a lack of information provided to creditors; creditors being unaware of the time involved to perform certain tasks or the costs in performing them. It might be sensible for a CIP to explain the nature of the main tasks to be undertaken, the considerations that led to those tasks being undertaken and any factors that might cause a task to be more difficult or expensive to perform.[329] This necessitates proper record keeping by the CIP, not only of what has been done, but also why it has been done.[330] In *Mirror Group Newspapers plc v Maxwell*, Ferris J quite persuasively stated that those officeholders whose records are inadequate often find themselves liable that doubts as to whether they should be remunerated as claimed are resolved against them because they are unable to fulfil their duty to account.[331]

In the recent Australian case of *ACN* it was emphasised that in order to place the court in a position to determine whether the remuneration sought is fair and reasonable, the CIP must lead evidence in sufficient detail.[332]

The need for timely transparency regarding CIPs' remuneration was emphasised in the Explanatory Memorandum to the 2015 Amendment of the Insolvency Rules in the United Kingdom. The memorandum revealed that

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325 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 648 [England]; *Re Peregrine Investments Holdings Ltd* [1998] 3 HKC 1 [Hong Kong]*, Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 31 [24] [Singapore]; S Steele, M Wee and I Ramsay, "Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts", (2018) 13 *AsJCL* 141, 147.

326 Practice Directions – Insolvency Proceedings, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/insolvency_pd#21; T Robinson and P Walton, *Kerr &Hunter on Receivers and Administrators* (20th ed, Sweet & Maxwell 2018), 359.

327 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 32 [27] [Singapore].

328 S Steele, V Chen and I Ramsay, "An empirical study of Australian judicial decisions relating to insolvency practitioner remuneration", [2016] 24 *Insolv LJ* 165, 174.

329 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 648 [England]; *Deputy Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in Liq), in the matter of ACN 154 520 199 Pty Ltd (In Liq)* [2020] FCA 134 at par 3 [Australia].

330 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 649 [England].

331 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 649 [England].

332 *Deputy Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in Liq), in the matter of ACN 154 520 199 Pty Ltd (In Liq)* [2020] FCA 134 [Australia].

stakeholders believe that a key issue is the need for "meaningful information at an early stage".[333] This will afford all stakeholders some measure of predictability, which could bring about fewer disputes regarding the remuneration claimed by the CIP.

It was stated in the *Kao* case that creditors are extremely hesitant of paying for work which they did not specifically request to be done.[334] The court, therefore, commented that a sense of cost-awareness is necessary in insolvency practice, which means that parties should turn their minds to the question of cost at every stage of the insolvency not just at the start of proceedings.[335] If stakeholders and creditors are kept in the loop before decisions are made, it could lead them to a better understanding[336] as to the need for the costs to be incurred, or alternatively provide them with an opportunity to object to the costs being incurred before it is too late.[337]

In a recent decision in New Zealand, the court encouraged CIPs to disclose relevant information regarding remuneration to creditors and shareholders during the liquidation.[338] This seems to be a sensible suggestion as many applications to court for the review of remuneration take issue with the amount claimed being higher than anticipated.

In an article discussing the insolvency reform initiatives regarding CIP remuneration in Australia, Dickfos refers to this issue of information asymmetry.[339] She states that disclosure and transparency are aimed at combatting the information asymmetry that arises for creditors (but probably all stakeholders) regarding the reasonableness of CIP remuneration.[340] However, due to their lack of practical knowledge, experience or judgement required to make informed decisions regarding the claims, she convincingly argues that disclosure and transparency (no matter how high the quality and comprehensiveness) might not overcome this stumbling block.[341] The article debates the comprehensiveness of the information provided and reflects on the fact that often "too much" information is provided for the average unsecured creditor; it questions whether the information provided is meaningful and able to be understood and states that stakeholders tend not to read lengthy remuneration reports.[342]

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333 Explanatory Memorandum to the Insolvency (Amendment) Rules 2015 (2015 No 443), para 7.5 [England].

334 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 59 [A 21] [Singapore].

335 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 59 [A 22,A 26] [Singapore]. "A deeper problem, as I perceive it, is that it matters not just what information is presented but when it is given."

336 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 59 [A 25] [Singapore]: "…creditors are extremely leery of forking out sums (albeit indirectly) for work whose scope they do not fully understand."

337 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 59 [A 26] [Singapore]: "Often the difficulty that creditors have is that bills are presented almost as a *fait accompli*, leading parties to distrust the explanations proffered by the insolvency practitioners…"

338 *Fann and Guofan v Norrie as liquidator of Rayland Investment Limited (in liq)* [2017] NZHC 2019, 18 [New Zealand].

339 J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration", (2016) 25 *Int Insolv Rev*, 56.

340 *Idem*, 60.

341 *Ibid*.

342 *Idem*, 61.

In line with the arguments put forward by Dickfos, Rajah J made the following sensible suggestions regarding the detail that should be provided by CIPs: i) the identity and seniority and years of experience of the person who performed the work, ii) the circumstances of the appointment, including any unusual features of the tasks to be undertaken or details regarding circumstances giving rise to urgency or special attention, iii) the need for and the role of various team members, and iv) time sent on performing the various tasks.[343] These details clearly relate to the creation of a narrative that would enable stakeholders to understand the practicality of the work performed by the CIP and, consequently, the remuneration sought. He also criticised CIPs for not shedding light on what was involved in terms of responsibility and / or complexity, averring that the CIPs are guilty of making the review "an exercise of hide-and-seek" and emphatically stating that it is not the court's job to seek.[344]

Dickfos also notes that often the expectations of stakeholders in the process are unrealistic.[345] They have unrealistic views as to what the CIP will do and what the outcomes of the procedure will be. If these expectations are not met by the CIP, stakeholders might feel that the CIP "failed" and should therefore not be remunerated. The CIP could make use of the opportunity to educate stakeholders as to the tasks to be performed in order to minimise disputes. This would, however, only be feasible if the stakeholders have trust and confidence in the CIP.

A further sensible suggested solution to the problem of information asymmetry is to allow for stakeholders to make reasonable requests for information regarding the process and, ultimately, the remuneration.[346]

The conclusion is reached that it is not about how much information the CIP discloses but how and what is disclosed.

6.6 Summarising remarks on review mechanisms

The review mechanism incorporated into the remuneration framework of any jurisdiction is a very important measure to ensure trust and confidence in the CIP and the insolvency regime in general. The mechanism should, however, encourage ethical behaviour by CIPs and not create further risks in this regard.

The factors taken into account by the reviewing party in order to determine whether the remuneration claimed by the CIP is reasonable given the circumstances, are themselves reasonable. They take various considerations into account regarding an insolvency appointment and the practicality of administering an estate. These factors are, in our view, not the issue. The issue is the manner in which the factors are applied in practice and the approach followed by the reviewing party.

We agree that courts, other than specialised insolvency or bankruptcy courts, are not best placed to determine whether the remuneration sought by a CIP is reasonable. This is due to a lack of time and practical knowledge which leads to inconsistent approaches to the reviewing task (even with the help of guiding

343 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 288 [61] [Singapore].
344 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 293 [62] [Singapore].
345 J Dickfos, "The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration", (2016) 25 *Int Insolv Rev* 56, 61.
346 *Idem*, 67-68.

principles). The inconsistency created could encourage CIPs to inflate their fees due to a concern that the fees sought might be subject to arbitrary adjustments by the courts.

The use of a peer review system of review is not ideal due to various ethical considerations such as conflicts of interests being created, the prevalence of unfair hindsight bias and second-guessing, the possible lack of independence and perception issues due to relationships with other CIPs and, lastly, the extra layer of costs added to the proceedings. These considerations could give rise to various forms of unethical behaviour by CIPs.

I believe that disclosure and transparency throughout the CIP's appointment is a guaranteed method to encourage and engender trust and confidence in the CIP and the insolvency regime. Moreover, it provides an opportunity to bridge an ever-widening education gap by providing information to stakeholders who at times struggle to understand what needs to be done. It also provides a measure of predictability that could bring about fewer remuneration disputes. The information to be disclosed should be of such a nature that it promotes understanding and does not dump an excessive amount of information on stakeholders without any context.

I agree wholeheartedly with the suggestion by Brown and Symes that "[t]here needs to be a specialist and independent assessment of remuneration as it is not something which should take up judicial time, but is something in which the public needs confidence…"[347]

If the reviewing task does not rest with the court or individual assessors, how then should the specialised and independent assessment of remuneration be achieved? In many jurisdictions independent departments could perform the task of scrutinising bills while also having the practical knowledge of how insolvency appointments actually work. Brown and Symes have suggested the introduction of an insolvency ombudsman; this is a very sensible suggestion which incorporates solutions to a number of the issues highlighted above.

Similar to that of having an ombudsman is the suggestion that taxing masters or an Official Receiver be involved in the regulation and review of remuneration.

The review mechanism should not only engender trust and confidence from the public, but in order to minimise unethical behaviour should also engender trust from the CIP, as this will be in the best interest of stakeholders / beneficiaries. CIPs need to be able to rely on consistent, fair and reasonable approaches to the review of their remuneration claims. This would prevent behaviour by the CIP aimed at trying to anticipate an unpredictable negative outcome of the review of their fees.

> "Inadequate recognition or remuneration will never be an impetus for inspiring professionals to resolutely and uncompromisingly strive for the highest standards of excellence in the discharge of their duties. Suppressing remuneration irrationally is therefore not necessarily the most advantageous option to creditors."[348]

[347] D Brown and C Symes, "Submission to Senate Inquiry into Liquidators and Administrators" [2009] 4.
[348] *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 293 [75] [Singapore].

Lastly, any review mechanism should allow for an appeal to a higher authority by the parties involved.

7. Ranking of claim / priority in payment

The UNCITRAL Guide states that it is desirable that an insolvency law recognises the importance of according priority to the payment of the CIP's remuneration.[349] The Guide's recommendations include that the insolvency law should specify that administrative costs and expenses rank ahead of all other claims other than secured claims.[350] Accordingly the Guide suggests that the insolvency law should specify that claims other than secured claims, are ranked in the following order: (a) administrative costs and expenses; (b) claims with priority; (c) ordinary unsecured claims; (d) deferred claims or claims subordinated under the law.[351]

The reason why the law should ensure priority for the CIP's remuneration and expenses, is to avoid a conflict of interests between his interests (own fees) and the best interests of the beneficiaries of his fiduciary duties, the creditors. An interesting practical example of an issue in this regard can be found in the South African case of *Diener N.O. v Minister of Justice and Correctional Services and Others*.[352] The facts of the case pertain to the unpaid remuneration of a Business Rescue Practitioner (BRP) in his capacity as such in a subsequent liquidation proceeding of the debtor company. According to section 143(5) of the South African Companies Act,[353] the BRP's fees and disbursements are to be paid as first priority before the payment of any other claims against the entity, both pre-and post-commencement of the business rescue proceedings.[354] The assumption and perception for a number of years had been that BRPs' unpaid remuneration and disbursements would retain its priority ranking in a subsequent liquidation proceeding. This was founded on the provisions of section 135(4) of the Act which states that certain claims created after commencement of the proceedings retain their preferential status in the event of a business rescue being converted into liquidation.[355] In the *Diener* case the liquidators of the corporation in question refused to pay the remuneration and disbursements of the BRP in priority to all other claims and were successful in both the court of first instance as well as the Supreme Court of Appeal.[356] The appellant in this case, Mr Diener, who was appointed as the BRP, sought leave from the Constitutional Court[357] to further appeal the decision

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349 UNCITRAL Guide, p 182, para 57. M Murray and J Harris, *Keay's Insolvency Personal and Corporate Law and Practice* (10th ed, Thomson Reuters 2018), 431: "A liquidator's remuneration is necessarily given a high priority in the order of distribution of the company's assets…"

350 UNCITRAL Guide, p 275, para 189.

351 UNCITRAL Guide, p 275, para 189.

352 *Diener NO v Minister of Justice and Correctional Services and Others* [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA) [South Africa].

353 Companies Act 71 of 2008 [South Africa].

354 *Idem*, s 143(5) [South Africa].

355 *Idem*, s 135(4). This section also specifically refers to the remuneration of BRPs in s 135(3).

356 *Diener NO v Minister of Justice and Correctional Services and Others* [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA) [South Africa].

357 The Constitutional Court of South Africa is the highest court in the country when it comes to the interpretation, protection and enforcement of the Constitution. Section 167(3)(b)(ii) of the South African Constitution empowers the Constitutional Court to hear matters that raise an arguable point of law of general public importance. *Diener NO v Minister of Justice and Correctional Services and Others* [2018] ZACC 48, para 30: "I am satisfied that this matter raises an arguable point of law of general public importance. The correct interpretation of sections 135(4) and 143(5) of the Companies Act and whether these sections confer a "super preference" on practitioners will have a significant impact on credit

of the Supreme Court of Appeal. Although the Constitutional Court dismissed the application for leave to appeal, the Court did comment on some of the aspects covered by the judgment of the Supreme Court of Appeal. It ultimately confirmed the view of the Supreme Court of Appeal that the BRP's claim for unpaid remuneration and disbursements should be paid from the free residue after the costs of liquidation, but before employees and other post-commencement financing.[358] The court based much of its thinking on the provisions regarding priority and costs of proceedings contained in the South African Insolvency Act of 1936.[359] Legislation that is obviously outdated and that does not take the modern business rescue procedure contained in the Companies Act 2008 into account. The problem created by this judgment therefore lies in the inconsistency in approach to remuneration between two insolvency procedures. In business rescue a BRP will be paid as a matter of super priority whilst he will be in a far less favourable position should the rescue proceedings be converted to liquidation proceedings. Wherein lies the ethical issue? The Court's approach creates a conflict between the financial interests of the BRP and his fiduciary duties to act in the best interests of the creditors:

> "The less attractive ranking order for the BRP's remuneration in liquidation created by this decision, creates a self-interest threat in that the BRP's interest in the proceedings (the BRP's remuneration) could be in conflict with his or her statutory duties and duties as a fiduciary, in that he or she might be influenced by this not to convert rescue proceedings to liquidation proceedings when it is no longer feasible to rescue in fear of not being paid what he or she is due in a subsequent liquidation. This scenario will hamper the BRP's duty to exercise his or her powers in an independent and impartial manner and would most definitely not lead to a proper balancing of the rights and interests of other stakeholders."[360]

From this example it is clear that an inconsistent approach in priority of the CIP's remuneration could have an adverse effect on the interests of creditors, his beneficiaries.

CIPs need to be certain of payment for the performance of the tasks in relation to their appointment; if they are not, would we be able to convince qualified and skilled professionals to take up insolvency appointments?

8. Disbursements and other expenses

Both the UNCITRAL Guide and the INSOL Principles elaborate on the fact that a CIP will invariably come across the need to incur certain expenses during the course of the administration of the estate (administrative costs).[361] Although the

providers, and therefore the public, and should be considered. I will deal below with the question of whether the application has 'reasonable' prospects of success."

358 *Diener NO v Minister of Justice and Correctional Services and Others* [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA), [21] [South Africa].

359 Insolvency Act 24 of 1936 [South Africa].

360 L Jacobs and D Burdette, "Queue Politely! South African Business Rescue Practitioners and their fees in Liquidation. *Diener NO v Minister of Justice and Correctional Services and Others* [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA)", (2019) 2 *WLJ* 1,61, 67-68.

361 UNCITRAL Guide, p 4: a. "…claims that include costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor, debts arising from the exercise of

remuneration claimed by CIPs tends to be a contentious issue, the disbursements and expenses can have a significant impact on the value of the estate as well. It would therefore be fair to say that in light of the fiduciary nature of his position, the CIP has a duty to minimise the extent of the impact of these administrative costs. Moreover, the incurring of these expenses is dependent upon his commercial judgement, reasonably exercised. The need for record keeping[362] and the duty to account[363] prevail in the case of administrative costs and the CIP's transparency should continue when disclosing payment of these costs.[364]

Due to the fact that the beneficiaries and the nature of these expenses are not the same and should be accounted for in different ways, it is necessary to distinguish between the different types of administrative costs.

The INSOL Principles defines disbursements and third-party costs as follows:

> "Disbursements – Sums paid by a Member or its firm to third parties or a recharge or allocation of costs incurred by Members or their firms which is charged to the estate."[365]

Disbursements thus referring to monies paid by the CIP for expenses incurred by the CIP as part of the discharge of his duty. This serves to reimburse the CIP. Costs pertaining to travel are an example of this.

> "Third-party costs – Sums paid directly from the estate to a third-party supplier. The third-party supplier invoices the estate."[366]

Third-party costs would, therefore, consist of payments made to parties who rendered services to the estate and which were not paid by the CIP or his firm. Utility bills and costs pertaining to continued trade are examples here.

The ethical issues relating to both of these types of administrative costs will now be considered.

8.1 Disbursements

As part of the CIP's duty to account, he should be able to justify payments to third parties and should take responsibility for subjecting the bills of third parties to scrutiny.[367]

The difficulty in quantifying disbursements made to professionals (other than legal professionals) was highlighted in *Mirror Group Newspapers plc v Maxwell*,[368] where the court was confronted with an unusual expense paid to a firm of public relations consultants. The court stated that it did not have the kind

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the insolvency representative's functions and powers, costs arising from continuing contractual and legal obligations and costs of proceedings;"

362 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 649 [England]; INSOL Principles, p 8: "It is in Members' (and their agents and service providers) interests to implement policies, procedures and systems to ensure reasonable and proper: record-keeping…"

363 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 648 [England].

364 See para 6.5 above on Transparency.

365 INSOL Principles, p 9.

366 *Idem*, p 10.

367 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 639 [England].

368 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 662 [England].

of information in order to form a judgement on the matter and identified the consequential need for a proper explanation by the officeholders.[369] In such cases, where insufficient information regarding somewhat obscure disbursements has been given, practitioners should expect the disbursement to be subjected to careful scrutiny.[370] As part of his fiduciary duty to account, a CIP should still be able to provide transparent and full disclosure as to the nature and need of the expenses incurred.

In 2004 both Singaporean and Australian courts provided much needed guidance as to the approach to be taken in the case of disbursements by CIPs.[371]

In Singapore, Rajah J stated that "some measure of restraint and discipline"[372] is needed in recouping disbursements. The court touched on the seemingly innocuous disbursement of photocopying charges, which could be very substantial in major matters. The court confirmed the principle laid out in *Mirror Group Newspapers plc v Maxwell,*[373] by stating that a CIP would still need to provide sufficient particulars in order to establish whether these expenses were reasonably necessary.[374]

In Australia, Finkelstein J stated that a practitioner should act with the same care as a prudent businessman would act in his own affairs when dealing with disbursements.[375] He mentions that a prudent businessman will only litigate as a last resort and, if it is unavoidable, will keep it under close scrutiny. A prudent businessman will shop around to ensure the best legal advice at the best rates by negotiating for the best fees and monitoring the fees incurred.[376] "Personal relationships should not obscure the practitioner's duty. The sole selection criteria should be the benefit to him as litigant. So he will avoid cosy relationships with solicitors and counsel."[377] Here an important ethical issue regarding the use of service providers comes to the fore. The nature of their professional work might lead to familiarity issues being created between CIPs and certain service providers. The familiarity issues give rise to a lack of independence creating a conflict of interest. This is to be avoided in order to enhance the trust and confidence in the CIP and the insolvency regime.

In the Singaporean *Kao* case, the court identified two further issues in relation to disbursements: i) allegations of over-servicing, referring to all instances in which unnecessary work was performed; and ii) allegations that work was duplicative, particularly where other professionals (like lawyers) were engaged.[378] Both of these issues to some extent relate back to the duty of the practitioner to act with care. A careful CIP would make sure that no unnecessary tasks are performed and would be careful to not do work that has already been done or allow service providers to charge for work already performed.

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369 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 662 [England].
370 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 662 [England].
371 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264 [Singapore]; *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424 [Australia].
372 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 286 [59] [Singapore].
373 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England].
374 *Re Econ Corp Ltd (No 2)* [2004] SGHC 49, 264, 287 [59] [Singapore].
375 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 443 [51] [Australia].
376 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 443 [51] [Australia].
377 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 443 [51] [Australia]; *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [58] [Singapore].
378 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 23 [Singapore].

As fiduciaries, CIPs do not have an automatic right to recover all expenses (not even if they were incurred in good faith) unless the expenses were reasonably incurred in the discharge of their stewardship.[379]

8.2 Third-party costs

Third-party costs are paid directly from the debtor's estate and therefore also have an effect on beneficiaries' interests by diminishing the estate. These administrative expenses, although paid directly from the estate of the debtor, are still executed by the CIP or under his supervision.

These expenses might relate to the payment of utilities or suppliers in the case of continued trade.

8.3 The use of legal professionals

One of the most contentious administrative costs is those paid to legal professionals. This is due to the fact that multiple sets of professionals (CIPs and legal professionals) translate to multiple sets of professional fees and disbursements.

It is possible that the services of legal professionals (lawyers and counsel) can be paid as disbursements or third-party costs. This was carefully illustrated in the Singaporean *Kao* case by Chong J.[380] The court explained that the costs of legal professionals can be claimed i) as part of the CIP's disbursements,[381] or ii) the costs can be billed separately and directly to the debtor company.[382]

When the costs are claimed as disbursements the onus is on the CIP, as the party responsible for the payment, to consider whether the bill is reasonable and appropriate given the circumstances.[383] This reasoning is reminiscent of that expressed in Australia by Finkelstein J in *Korda,*[384] where it was stated that the CIP should exercise his commercial judgement when hiring legal professionals and that a prudent CIP would monitor the fees claimed by these professionals.[385] Similar to the *Korda* judgment,[386] the court in *Kao* made mention of the possible familiarity issues between CIPs and legal professionals:

> "It must be remembered that insolvency practitioners and lawyers often develop a durable working relationship over time. In one case, it might be the insolvency practitioner who owes his appointment to the lawyer; in another case, it might be the lawyer who proposes a particular insolvency practitioner for appointment. In a situation where neither has to bear the costs

379 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 35 [32] [Singapore].
380 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [Singapore].
381 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [57] [Singapore]. As was the case in *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 660 [England]. Ferris J stated that where the solicitors were engaged in providing legal services in connection with the CIP's appointment there is a contract between the parties and CIPs will be personally bound to pay solicitors for work done in accordance with that contract.
382 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [59] [Singapore].
383 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [57] [Singapore].
384 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 443 [51] [Australia].
385 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 443 [51] [Australia]; *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [57] [Singapore].
386 *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 443 [51] [Australia].

> of the other directly (since the remuneration will come out of the company's funds), there is little incentive for either to dispute the sums claimed in the other's bills of costs."[387]

In *Mirror Group Newspapers plc v Maxwell,*[388] Ferris J stated that CIPs must subject the bills received to scrutiny and if they were to "simply pay them without such scrutiny"[389] the CIPs would run the risk of becoming vulnerable in the sense that they would not be able to get full reimbursement.

When the costs of legal professionals are not claimed as disbursements but billed to the company, the issues relating to the monitoring of the fees and scrutiny of the bill prevail. A new issue in relation to this type of administrative costs is one of duplication of work done by the legal professional.[390] In such a situation the burden rests on the CIP to justify claims for work performed when there are other professionals instructed on the same matter.[391] In the *Dovechem*[392] case the court was confronted with a complaint by the majority shareholders of the company that the liquidators had charged four times more than the solicitors that were instructed to institute action on behalf of the company. At first glance it would appear that the liquidators in the case had duplicated the work done by the legal professionals, but the liquidators successfully proved that the work done by them in relation to the case was very different from that of the solicitors.[393]

In certain jurisdictions, such as South Africa and England and Wales, the CIP appointed to perform a rescue or turnaround of a debtor might not be trained in law or have specialised legal knowledge and as such would at times have to rely on expert advice at a certain cost. That is why it is sensible to include guidance on engaging legal professionals in codes of conduct.

The brand new Insolvency Code of Ethics by the Institute for Chartered Accountants of England and Wales (ICAEW), addresses this issue with remarkable clarity and sensible advice.[394] In a section dealing with the specialist advice and services the ICAEW Code requires that when a CIP intends to rely on the advice or work of a third party, the CIP should evaluate whether such advice or work is warranted.[395] The Code also requires a CIP to document the reasons for choosing a specific service provider.[396] Additionally where a professional or personal relationship exists between the CIP and the service

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387 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [58] [Singapore].
388 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638 [England].
389 *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 661 [England].
390 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [59] [Singapore].
391 *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 45 [59] [Singapore].
392 *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd* [2015] 4 SLR 955 [Singapore].
393 *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd* [2015] 4 SLR 955 [46] [Singapore]. "The Liquidators had to establish the facts and find the documents supporting those facts in order to instruct the lawyers and to obtain legal advice on how the statement of claim should be amended. It is not surprising that the work of the Liquidators involved checking many boxes of documents since Suit 833 involved several years of the plaintiff's operations (it related to the employment of an allegedly phantom employee) and the Liquidators had not run the Company or the plaintiff at the material time. In this case, the time spent by the Liquidators and that spent by the lawyers cannot be compared and the fees of the Liquidators cannot be assessed by reference to the lawyers' fees."
394 The ICAEW Insolvency Code of Ethics is based on the International Ethics Standards Board for Accountants Code, effective from 1 May 2020 and is available at: https://www.icaew.com/-/media/corporate/files/technical/ethics/insolvency-code-of-ethics.ashx?la=en [England and Wales].
395 ICAEW Insolvency Code of Ethics: R2320.3.
396 *Idem*, R2320.4.

provider, the Code suggests full disclosure of the relevant relationship and the process undertaken to evaluate whether the service will be the best value for the creditors.[397] In order to establish whether the service provider will be offering best value and service, the CIP would have to consider the cost of the service, the expertise and experience of the provider, whether the provider holds appropriate regulatory authorisation and the professional and ethical standards applicable to the service provider.[398]

The requirements and guidance set out in the Code could be applied effectively to the use of legal professionals. Where a CIP requires the advice and services of a legal professional he should be able to show that it is indeed necessary and should be able to explain why he chose a specific legal professional. Where he has a relationship that could create the perception that he is not independent from the legal professional, he should disclose the relationship to the stakeholders. He should also be able to provide details of the process he followed to make sure the service provider would offer the best value for the beneficiaries.

8.4 Approval of the disbursements and expenses

Disbursements and expenses are usually approved together with the remuneration claimed by the CIP and in the same manner (by the same approving party) and ought to be approved.

Given the possible threats to ethical behaviour that could arise in relation to disbursements and expenses, it would be rather worrying if the insolvency framework does not allow for these expenses to be subjected to approval. This is the case in Australia where lawyers' fees by a liquidator as a disbursement are not subject to creditor approval.[399] In my view, such an approach only creates opportunity for improper behaviour.

8.5 Summarising remarks on disbursements and expenses

The disbursements and expenses paid by a CIP during the course of his appointment could have a significant impact on the insolvent estate and, ultimately, the stakeholders. For this reason the CIP has a duty to minimise this potential negative impact.

As it is unavoidable to incur certain administrative costs, it is imperative that the CIP keep proper records of his dealings with service providers and should be able to give specific particulars as part of his fiduciary duty to account. The particulars should include details on why the service was needed, why he chose the specific service providers and evidence that he negotiated for the best value and scrutinised the bills and invoices received by services providers. Failure to do so might lead to a CIP being held personally responsible for the disbursements and expenses.

Moreover, CIPs should exercise extreme caution when utilising service providers (especially legal professionals) with whom they might have an existing relationship. Where they do utilise professionals who have provided services in

397 *Idem*, R2320.6 A6(b).
398 *Idem*, R2320.4 A.
399 M Murray and J Harris, *Keay's Insolvency Personal and Corporate Law and Practice* (10th ed, Thomson Reuters 2018), 437.

the past, it is imperative that they disclose this relationship to the parties responsible for approving remuneration and expenses. The nature of the relationship and the reason why the CIP chose the professional should be divulged. Transparency in this regard would minimise the risk of accusations by stakeholders that the professional and the CIP are not independent from one another.

Where the CIP is a legal professional himself, he ought to be able to explain how services rendered by legal professionals on his authorisation differs from his work and that of his staff.

9. Subsequent appointments

Subsequent appointments do not really constitute a remuneration issue, but are most definitely closely related thereto. Subsequent appointments refer to a scenario where the same CIP is allowed to act in different insolvency capacities in relation to the same debtor company. In other words, the same CIP might be a rescue or turnaround professional for a company and should that company end up in liquidation, the CIP is subsequently appointed as the liquidator. Subsequent appointments pose problems in relation to independence and impartiality due to the self-review threat it creates. The Insolvency Code of Ethics of the ICAEW recognises the potential conflict of interest in this regard and utilised the scenario, "sequential insolvency appointments", as an example of circumstances that might lead to a self-review threat being created.[400] A self-review threat refers to a situation where a CIP, due to being involved in prior decision-making, will not be able to appropriately evaluate the results of previous judgements made or services rendered.[401]

In certain jurisdictions subsequent appointments in relation to the same debtor company are prohibited due to the threats expressed above. South Africa is a good example. The South African Companies Act 2008 provides that a business rescue practitioner may not be appointed as the liquidator of the debtor in subsequent liquidation proceedings.[402] Other jurisdictions, such as England and Wales[403] and New Zealand,[404] permit subsequent appointments.

The reason why subsequent appointments might pose an issue in relation to the remuneration of the CIP, is that the CIP will be remunerated twice for work done in relation to the same company, thereby creating a self-interest threat. A self-interest threat refers to a situation where the interests (including financial interests) of the CIP might inappropriately influence his judgement or behaviour.[405] An example of a way in which a subsequent appointment and the corresponding subsequent remuneration might influence the behaviour of the CIP could be that a rescue or turnaround practitioner might not put his best

400 ICAEW Insolvency Code of Ethics, 2114.1 A5(b)(ii).
401 *Idem*, 2114.1 A4(b).
402 Companies Act 71 of 2008, s 140(4).
403 An example can be found in the Insolvency Act 1986, Sch B1, para 83(7)(b), which allows for an administrator to be a liquidator in a subsequent appointment.
404 Companies Act 2003, s 239ABY provides that the administrator is to be the default liquidator. This section was inserted into the Act by the Companies Amendment Act of 2006.
405 ICAEW Insolvency Code of Ethics, 2114.1 A4(a). See also INSOL Principles, p 10 for a definition of self-interest: "A situation in which a Member has, or is perceived to have, a direct interest in obtaining a particular outcome: for example, where such Member (or a close associate) is also a creditor or shareholder of the insolvent estate."

effort into saving the debtor from liquidation due to the fact that he knows he would be appointed as the liquidator subsequently and be paid again.

CIPs who engage in subsequent appointments often hold the view that the previous appointment does hold some benefits and advantages in the subsequent appointment (such as institutional knowledge) and as professionals have the opinion that they are able to act with independence and impartiality. In jurisdictions where subsequent appointments are allowed, the opinion is held that the benefits outweigh the risks. In my view it is, however, an ethical issue in relation to remuneration and warrants a warning about the potential for abuse.

10. Concluding analysis and recommendations

This report has to concede that no remuneration system or framework will ever be perfect. No system will be able to leave all the stakeholders content. Regardless of how well the system provides for fair and reasonable remuneration of CIPs, there will always be someone who is still unhappy. I believe and would like to emphasise the notion that there is a balance to be struck in relation to remuneration matters. The complexity of insolvency appointments and the vulnerability of insolvency stakeholders call for an approach to remuneration that exhibits and instils high standards of ethical behaviour from CIPs and that is also fair to all parties involved.

This report set out to determine whether remuneration and disbursement provisions can influence the CIP's ethical behaviour, whether it be for better or for worse. The report considered various aspects relating to the CIP's remuneration and disbursements, and evaluated the propensity towards a possible breach in fiduciary duty or unethical behaviour in relation to all aspects of remuneration.

This research found clear evidence that the provisions relating to remuneration were drafted, or later interpreted, in a manner that encouraged unethical behaviour by CIPs – or at least in a manner that created opportunities for unethical behaviour. It also found that the insolvency profession prides itself on being ethical and, as such, insolvency practitioners realise that they carry a heavy burden in upholding trust and confidence in the integrity of the profession. I believe that an inherent lack of the ability to distinguish between right and wrong on the part of the CIP exists on only the rarest of occasions. It can therefore be categorically stated that unethical behaviour by CIPs in relation to remuneration is not due to a case of moral bankruptcy. More often the behaviour can be linked to shortcomings in the insolvency regime's remuneration framework.

The shortcomings of the remuneration framework can occur in relation to every aspect of CIP remuneration, from the method of calculation to the review of the remuneration claimed and issues of tangential concern such as allowing for subsequent appointments. Every aspect of a jurisdiction's remuneration framework can be open to unethical behaviour and abuse and can lead to CIPs failing to comply with their fiduciary obligations to their beneficiaries, the creditors.

In light of these findings, the following comments and recommendations can be made:

10.1 Codes of conduct and ethics

CIPs can often stumble into a breach of their fiduciary duties in relation to remuneration matters, not necessarily because they are unethical but because they sometimes fail to understand the extent of what is expected of them in the role of CIP. One way in which an attempt can be made to remedy this, is for jurisdictions to draft a code of professional conduct and ethics specifically aimed at CIPs. This will provide CIPs with the opportunity to examine the nature and goals of their work; it also offers information to others (the stakeholders and general public) about what can be expected from members of the insolvency profession. To this end, INSOL International has compiled a set of Ethical Principles for Insolvency Professionals as best practice guidance that can be incorporated into their own legislation by member organisations across the globe. Jurisdictions can use this to provide guidance on remuneration issues (and other aspects of insolvency) to their own CIPs and stakeholders.

Not only will this enable CIPs to better navigate the ethical conundrums of insolvency appointments relating to remuneration, but it will also provide a rare opportunity to educate stakeholders and members of the public who are often too keen to believe the worst of the insolvency profession.

10.2 Education and transparency

Ignorance of insolvency practice often contributes to and exacerbates remuneration disputes. Remuneration frameworks should assist in educating stakeholders by requiring that CIPs be as forthright and transparent as possible regarding their remuneration and expenses throughout their appointment.

CIPs should approach this task sensibly and provide the type and volume of information that would place stakeholders and especially creditors in an informed yet unconfused position. The aim is to educate stakeholders on the tasks to be performed, the complexity of these tasks, how long it will take to perform them and who will be involved in performing them.

10.3 Calculation methods and stakeholder involvement

There are many ethical pitfalls to be avoided when determining the way in which the remuneration of the CIP will be quantified and approved.

Time-based costing remains the preferred method of calculating remuneration, despite this method's propensity to encourage the running up of hours, over-servicing and delays. Despite these shortcomings it remains a fair method to compensate for work done, subject to certain safeguards such as providing a fees estimate and the claim being subjected to independent review in order to evaluate whether the CIP's time also added value.

Percentage-based costing in relation to realisations and distribution could offer a sensible approach to calculating remuneration, but could be subject to proportionality issues. This method incentivises the optimisation of creditor wealth and is, therefore, regarded as being directly linked to prioritising the interests of the fiduciary's beneficiaries. The proportionality issues could be addressed by requiring proper record-keeping and providing for an effective review mechanism to increase (or decrease) amounts claimed where proven necessary (or unnecessary). This method might pose issues in relation to the

type of proceedings. This method should be used with caution to calculate the remuneration of rescue or turnaround practitioners, as the main aim of such proceedings is not necessarily to maximise returns to creditors, placing the CIPs own financial interests in conflict with his duties in terms of the proceedings.

Fixed fees are problematic as they rarely provide for remuneration commensurate with the work performed. Where fixed fees are used, it should form part of a larger combination of methods to ensure fair and reasonable remuneration.

Possibly the most sensible method of calculation is to allow for a combination of methods. Allowing for a combination of methods provides the opportunity to utilise the best of each whilst the drawbacks in as far as ethical behaviour is concerned, can be avoided. The power to choose the combination of methods to determine his remuneration, does create a conflict of interest for the CIP. It is at this junction where his decision-making is based on his personal financial interests, creating a self-interest threat that might inappropriately influence his judgement or behaviour. To minimise the risks involved, the proper disclosure and transparency of all the options considered should be shared, along with the reasoning behind the choice(s) made.

Contingency or conditional fee arrangements should be avoided. As fiduciaries, CIPs ought to perform all of their tasks in good faith and to the best of their ability. A contingency fee should only be payable in extraordinary circumstances for a truly remarkable achievement by the CIP in the administration of the estate, and should not reward him for performing tasks that were part of his remit as a fiduciary in the first place. Where jurisdictions allow for fee arrangements, the framework should require that it be drafted in a manner that does not encourage the CIP to spend a disproportionate amount of time on certain tasks, thereby inadvertently causing him to neglect other tasks and duties. The terms of the arrangement should be transparent and objectively measurable.

Regarding approval of the remuneration, CIPs should disclose all relevant and necessary information to the party responsible for approving the remuneration. The importance of honesty, truthfulness and transparency cannot be overstated. Moreover, the integrity of the procedure should be protected by ensuring that the approval method does not threaten the independence and impartiality of the CIP and thereby his fiduciary duty to exercise his powers in an independent and impartial manner. The insolvency regime should recognise threats in relation to agency problems and take care to avoid situations that would enable one party to unduly influence the situation based on the misguided assumption that the CIP owes them any specific allegiance.

Lastly, the source of payment or means of payment for the CIP’s remuneration should not single out one group of creditors, as the beneficiaries of the CIP’s fiduciary duties, to bear the brunt of an adverse impact due to of the payment of his remuneration. The remuneration framework should take care to distribute the burden in a fair manner, even allowing for secured creditors to also contribute towards the payment of administration costs.

10.4 Efficient review mechanisms

An efficient review mechanism constitutes an essential part of the remuneration framework and should contribute toward ensuring that the remuneration claimed is fair, reasonable and proportionate. If, however, the review mechanism creates new threats to ethical behaviour, it undermines the entire remuneration framework of the insolvency regime.

This research found that court review is the most popular method for reviewing the remuneration claimed by CIPs in various jurisdictions. Another commonality was the opinion expressed in almost all of the jurisdictions considered that the courts are not best placed to determine whether CIPs' remuneration claims are fair, reasonable and proportionate. This is mainly due to the fact that in most jurisdictions courts lack time and specialist knowledge to consider the *minutiae* of the bills submitted in support of the amount claimed. Where courts are involved in reviewing remuneration claims, it appears that although most jurisdictions have adequate guidance on how to evaluate the claims of the CIP, the approach of the courts are inconsistent, thereby creating a great deal of uncertainty for CIPs and stakeholders alike. If the CIP cannot trust the court responsible for reviewing the remuneration claimed in a thorough, respectful manner (taking all necessary factors into account without creating new conflict scenarios), he might feel that he has to resort to inflating his fees in order to make sure that he is paid what is rightfully due to him. This behaviour obviously leads to a breach of fiduciary duties.

In several jurisdictions the courts make use of expert assessors to review remuneration, thereby creating a peer review system with other CIPs evaluating the remuneration claims of their peers. This practice is troublesome due to the ethical issues it creates in relation to conflicting interests (some CIPs are reluctant to express strong views in fear of retaliation), hindsight bias (CIPs acting as "watchdogs", second-guessing all of the decisions made and charging their own exorbitant fees to illustrate how they would have done things differently), independence issues (the CIP reviewing the remuneration might not be independent leading to doubt as to whether the review is a neutral assessment) and added cost (using another CIP leads to having to pay another CIP). All of these issues raise the possibility of unethical behaviour and makes this method of review ethically dubious.

Review by Regulators, oversight bodies and RPBs could constitute a sensible approach to review as the parties involved will usually be familiar with insolvency practice and the rules regarding remuneration. Care should, however, be taken to ensure independence and impartiality, as again familiarity issues might be at play. It is important that the remuneration framework of a jurisdiction approach the remuneration and review of different members of the profession in a consistent manner by not treating liquidators in a completely different way to rescue professionals. Inconsistent approaches encourage unethical behaviour.

A proposal for an independent review mechanism that engenders trust and confidence from the public and ensures fair and reasonable remuneration for CIPs, is put forward. The suggestion of an independent insolvency ombudsman is made, as this would address issues in relation to lack of knowledge regarding insolvency practice, familiarity issues, consistency and costs.

10.5 Priority in ranking

It is of great importance that jurisdictions accord priority to the payment of CIP remuneration. This is to avoid a conflict of interests between the CIP's interests (his own fees) and the best interests of the beneficiaries of his fiduciary duties, the creditors. If the CIP feels that his interests are in competition with those of his beneficiaries, he would not be able to effectively perform his fiduciary duty to act in their best interests.

10.6 Disbursements and other expenses

Disbursements and expenses play an important part in the administration of an insolvent estate and, as such, have the potential to cause a significant impact on the value of the estate. In light of the fiduciary nature of his position, the CIP has a duty to minimise the extent of the impact of administrative costs. Moreover, the incurrence of these expenses is dependent upon his commercial judgement, reasonably exercised. The need for record-keeping and the duty to account prevail in the case of administrative costs and the CIP's transparency should continue when disclosing payment of these costs. In this regard CIPs as fiduciaries have a duty to negotiate the best possible rates and should subject every bill received to intense scrutiny. CIPs should take care when making use of advisory services to ensure that there are not any familiarity issues that might bring about a perceived lack of independence and impartiality with regard to exercising their duties, and should incorporate safeguarding measures such as full and frank disclosure of any relationships. He should also be able to provide details of the process he followed to ensure that the service provider offers the best value for the beneficiaries.

10.7 Subsequent appointments

The tangential issue of subsequent appointments in relation to remuneration must enjoy some attention in the remuneration framework of an insolvency regime.

Apart from the ethical issues relating to possible conflicts of interest and self-review threats arising, sequential or subsequent appointments result in a CIP being remunerated twice (or in some instances three times) in relation to work done for the same company in different capacities. This scenario creates a self-interest threat in that his own interests might not be aligned with his duties to succeed in his objectives of each insolvency procedure. In other words, it could create an incentive to fail.

The remuneration framework of an insolvency regime should aim to improve the overall confidence in the professionalism and competence of CIPs and provide for fair and reasonable remuneration. The remuneration framework itself and the interpretation thereof should not hamper or impede the CIP's ability to perform his duties to the best of his ability, in an ethical manner and for the benefit of the beneficiaries.

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