



# Insolvency judges meet strategic behaviour: A comparative empirical study

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## Abstract

This article reports the results of a comparative empirical legal study that analyzed (1) strategic behaviour by actors in insolvencies that is salient to insolvency judges and (2) how insolvency judges respond to such behaviour. After examining four different European countries, namely Italy, the Netherlands, Poland, and Portugal, the study reveals how differences regarding case allocation, judge – insolvency practitioner (IP) interaction, and remuneration and case financing can result in strategic behaviour on both the side of the judges and the IPs. From this, it follows that improving the efficiency and effectiveness is not merely a matter of implementing legislation and case law, but that it also requires a look into the dynamics between insolvency judges, IPs, and other actors in the insolvency process.

## Keywords

Insolvency, bankruptcy, comparative, empirical, judges, courts

## 1. Introduction

Insolvency judges commonly decide on insolvency matters, which often include, but are not limited to, declaring and closing the insolvency, which court has jurisdiction over which matters

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(for example, center of main interests), or who has priority over who. Such decisions are often laid down in case law, which is generally the object of study of legal scholars.<sup>1</sup> In addition, insolvency judges are involved in a variety of activities that do not result in case law. Such activities include approving a dismissal of employees and of the sale and transfer of assets, and determining the remuneration of the insolvency practitioner (IP).<sup>2</sup>

Although judges' reasoning for some activities can be found in or inferred from case law, research about how insolvency judges operate in activities that are not laid down in case law is lacking, particularly empirical research. Moreover, the way in which insolvency judges operate may differ among jurisdictions. As a result, it is unclear which behaviour and strategies insolvency judges adopt with respect to their interaction with other actors in an insolvency procedure, whether differences can be observed between or even within jurisdictions, and what causes the strategic behaviour.

This article addresses this knowledge gap. It analyzes strategic behaviour by actors in insolvencies that is salient to insolvency judges and how they respond to such behaviour. It reports the findings of a comparative empirical study that analyzed strategic behaviour judges are confronted with, and how they respond to these types of behaviour. The ACURIA-project of which this article is a part of, examined four different European countries, namely Italy, the Netherlands, Poland, and Portugal. The analysis of strategic behaviour by insolvency actors in these jurisdictions, whose insolvency regimes are dissimilar and distinguishable by their judicial cultures and institutional environments with different economic, social, and political conditions, contributes to the understanding of what are effective, efficient, and optimal ways of judicial intervention in insolvency procedures, and of how insolvency judges can impact the dynamics between the parties involved, and the insolvency process as a whole.

A crucial element for what strategic behaviour becomes salient and how insolvency judges can respond to this, is the institutional role insolvency judges play, and which powers are assigned to them. Consequently, it is important to first explore the role and powers insolvency judges have in the four countries (Section 2). The comparison is followed by an explanation of the methodology of the empirical study that examined the strategic behaviour insolvency judges face and how they respond to it (Section 3), and by the results of the study (Section 4). The conclusion discusses the findings and its implications (Section 5).

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1. A quick-scan at International Insolvency Review publications provides plenty of examples, see for instance: Z. Fabok, 'Grounds for Refusal of Recognition of (Quasi-) Annex Judgements in the Recast European Insolvency Regulation', 26 *International Insolvency Review* (2017), p. 295 (discussing recognition of judgments); C.Z. Qu, 'The court's power to appoint provisional liquidators to carry out rescue roles: Rethinking Legend', 28 *International Insolvency Review* (2019), p. 86 (courts' power to appoint provisional liquidators); R. Mangano, 'From 'Prisoner's Dilemma' to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases', 26 *International Insolvency Review* (2017), p. 314 (the role of courts in cross-border insolvencies); A. Godwin, T. Howse and I. Ramsay, 'The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity', 26 *International Insolvency Review* (2017), p. 5 (same); R.B. Chapman, 'Judicial abstention in cross-border insolvency proceedings: Recent protocols in simultaneous plenary cases', 7 *International Insolvency Review* (2007), p. 1 (same).
  2. E.g. J. Dickfos, 'The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration', 25 *International Insolvency Review* (2016), p. 56. Other terms commonly used to describe the insolvency practitioner are 'bankruptcy trustee' or 'liquidator'. Because such terms can have different meanings in different countries, we use the more neutral term 'insolvency practitioner (IP)' throughout this article.

## 2. Comparative analysis<sup>3</sup>

This article analyzes four countries. The Italian Insolvency Act dates back to 1942<sup>4</sup> and has been amended several times since, with reforms in 2005 (aimed at reducing the duration, complexity, and costs of the insolvency proceedings, encouraging the start of proceedings, providing more efficient mechanisms to allow ‘going concern’),<sup>5</sup> in 2009 (decreasing the power of courts, increasing the powers of the IP and the creditors’ committee),<sup>6</sup> in 2012 (simplifying restructuring agreements and rescue plans),<sup>7</sup> and in 2015 (introduction of boundaries for the execution of the IP’s actions).<sup>8</sup> A new reform is currently implemented (d.lgs. no. 14/2019,<sup>9</sup> drafted by the ‘Rordorf Commission’, aimed at increasing the efficiency of insolvency proceedings and to promote a timely recovery of viable businesses, for example by the introduction of alert proceedings that allow companies in distress to file for assistance and support).

The financial support Portugal received from the ‘Troika’ (European Commission, the European Central Bank, International Monetary Fund) required Portugal to introduce effective restructuring mechanisms and general principles concerning voluntary out-of-court restructuring.<sup>10</sup> It led to a revision of the Portuguese Insolvency Act in 2012, which changed existing liquidation and reorganization instruments, and which introduced new out-of-court instruments (only for companies and sole traders with organized accounting). Furthermore, 2017 amendments imposed new requirements for pre-insolvency proceedings, changed the rules on consolidated insolvencies, and prevented certain companies (for example, water, electricity) to interrupt the supply of essential services to the debtor.<sup>11</sup> More reforms, which include the introduction of a restructuring mediator and a ‘silent’ procedure that ensures confidentiality were introduced in 2018.<sup>12</sup>

The Dutch Insolvency Act (hereinafter: DIA) was enacted in 1893 and has undergone only a limited number of fundamental reforms since then. An example of such fundamental reform concerns the introduction of the statutory debt-rescheduling rules for natural persons in 1998.<sup>13</sup> The amendments proposed in the ‘Re-evaluation of Insolvency Law’ (*Herijking Faillissementsrecht*) are significant examples a more recent nature. The ‘Re-evaluation of Insolvency Law’ is a legislative program initiated to resolve specific obstacles in the Dutch insolvency practice. This program consists of three pillars aiming at (1) modernization of the national liquidation procedure,

3. This section is based on the overview provided by ‘Corporate restructuring and insolvency law at issue: A comparative perspective of four EU countries’ (Research report for the ACURIA project, unpublished). A summary can be found at [acuria.eu](http://acuria.eu). More extensive descriptions of the insolvency laws in the four countries can be found in the report.

4. (IT) Regio Decreto of the 16th of March 1942, no. 267, in the Italian Gazzetta Ufficiale of the 6th of April 1942, no. 81.

5. (IT) See, in particular, d.l. of the 14th of March 2005, no. 35, and the following Law of the 14th of May 2005, no. 80.

6. (IT) See the Law of the 18th of June 2009, no. 69.

7. (IT) D.l. of the 22th of June 2012, no. 83, and the following Law of the 7th of August 2012, no. 134.

8. (IT) See d.l. of the 27th of June 2015, no. 83, and the following Law of the 6th of August 2015, no. 132; and, also, d.lgs. of the 16th of November 2015, no. 180.

9. In the Italian Gazzetta Ufficiale of the 14th of February 2019, no. 38.

10. European Commission, ‘Portugal: Memorandum of Understanding on Specific Economic Policy Conditionality’, *European Commission* (2011), [https://ec.europa.eu/economy\\_finance/eu\\_borrower/mou/2011-05-18-mou-portugal\\_en.pdf](https://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf).

11. (PT) Article 17-E.8 of the Portuguese Insolvency Act (*Código da Insolvência e da Recuperação de Empresas*).

12. See (PT) Law 6/2018, of 22 February 2018 on the restructuring mediator and Law 8/2018, of 2 March 2018 establishing a new extrajudicial and voluntary arrangement scheme (*RERE - Regime Extrajudicial de Recuperação de Empresas*).

13. (NL) Articles 284 – 362 of the Dutch Insolvency Act (*Faillissementswet*).

(2) business continuity and (3) combating insolvency fraud.<sup>14</sup> A number of amendments from this program are already in force; consider for example the entry into force of the Act on Strengthening the Position of IPs (*Wet Versterking Positie Curator*) on 1 July 2017.<sup>15</sup> This act introduces a fraud-detecting task for the IP with the objective to prevent and combat insolvency fraud.<sup>16</sup> More recently, on 1 January 2019, the Insolvency Modernization Act (*Wet Modernisering Faillissement-sprocedure*) came into effect, which modernizes certain aspects of the national liquidation procedure.<sup>17</sup> The example of three other proposals from this program are aimed at promoting business rescue and continuity: Act on the Continuity of Companies I (pre-pack proceedings),<sup>18</sup> the Act on the Homologation of Out-of-Court Composition Proceedings,<sup>19</sup> and the Act on the Continuity of Companies III (obligation for suppliers to continue to supply the insolvent debtor; in preparation).

In Poland, a new restructuring act (*Prawo restrukturyzacyjne*) with new recovery proceedings was adopted on 15 May 2015. This changed the insolvency act in a significant way, since from that moment the insolvency and restructuring proceedings were laid down in two autonomous acts. Four new restructuring proceedings were introduced: arrangement approval proceedings, accelerated arrangement proceedings, ordinary arrangement proceedings, and rehabilitation proceedings, as were pre-pack proceedings. The reform was the result of the failure of rescue proceedings in the majority of cases, with various shortcomings being pointed out in a World Bank report.<sup>20</sup>

The four jurisdictions show several resemblances and differences. Highlighting the ones relevant for the topic of this article, a comparison reveals that courts commonly have specialized insolvency or commercial law chambers within their court district, but no concentration of insolvency cases in one or more specialized courts. Moreover, judges may attend specialized training, yet no mandatory training in economic / business matters for judges exists. Furthermore, IPs are commonly appointed by the court. Creditor committees are allowed, but uncommon. The IP generally is a private individual – in most cases an attorney at law specialized in insolvency law, except for in Portugal, where the majority has an economic degree – who is paid from the available assets in all four countries (if appointed by the court). If the assets are not sufficient to compensate the IP, the insolvency cannot be declared (Poland) or the IP receives a fixed fee from the State (Portugal).<sup>21</sup>

Differences can be observed regarding the opening of the insolvency procedure. While the state of insolvency (e.g. unable to pay its debts) is sufficient to successfully declare for bankruptcy, in Italy the insolvency decision will not be issued if the total amount of matured debts that have not been paid is less than 30,000 Euros.<sup>22</sup> Moreover, in Poland and

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14. (NL) Kamerstukken II 2012/13, 29 911, no. 74. See also Kamerstukken II 2012/13, 33 695, no. 1.

15. (NL) Dutch Official Gazette 2017, 176.

16. (NL) Dutch Official Gazette 2017, 124. The fraud-detecting task is laid down in Article 68, paragraph 2, of the Dutch Insolvency Act.

17. Entered into force on 1 January 2019, Dutch Official Gazette 2018, 299.

18. (NL) Kamerstukken II 2014/15, 34 218, no. 3 (Explanatory Memorandum). Stalled due to the preliminary ruling of the Court of Justice in the FNV/SmallSteps case: Case C-126/16 *FNV/SmallSteps*, EU:C:2017:489.

19. (NL) Kamerstukken II 2018/19, 35 249, no. 3 (Explanatory Memorandum).

20. The World Bank Group, 'Towards a stronger insolvency framework in Poland', *The World Bank* (2013).

21. (IT) Article 30 of Law 22/2013, of 26 February 2013.

22. In this perspective, see Article 15.8 of the 1942 Italian Insolvency Act, according to which insolvency cannot be declared if the overall amount of unpaid and overdue debts is less than 30,000 Euros; and, now, see also Article 49.5 of the New Italian Insolvency Code (d.lgs. no. 14/2019), according to which Judicial Liquidation cannot be commenced in the same.

Portugal<sup>23</sup> the debtor is obliged to request opening of insolvency procedure within thirty days after the discovering the insolvency, whereas no such requirement is found in Italy<sup>24</sup> and the Netherlands. Furthermore, in the Netherlands the court can homologate a compulsory composition, but, first, approval is required by the majority of the ordinary creditors in order to achieve a reorganization within the insolvency procedure.<sup>25</sup>

Regarding the role of the judge, Polish insolvency law provides for participation of both the court and the supervisory judge within insolvency and restructuring proceedings.<sup>26</sup> The supervisory judge is responsible for the actions within the insolvency or restructuring proceedings, except the ones that are expressly assigned to the court (for example, deciding over the IP's preliminary and final remuneration, deciding over complaints against some supervisory judge's decisions, deciding to discontinue the proceedings or to declare that insolvency proceedings are completed). There is a presumption of supervisory judge's competence if case the law does not specify who is in charge of an action within the proceedings.

The main tasks of a supervisory judge in Poland include managing the proceedings, monitoring the actions taken by the IP, specifying the actions that the IP may not take without the supervisory judge's approval or without the consent of the creditors' committee, and pointing out any mistakes made by the IP (for example, intervene if an IP does not meet a deadline or provides the judge with documents that are unclear).<sup>27</sup> The IP is obliged to provide a supervisory judge with reports on his actions taken within the proceedings together with a financial report every three months – in insolvency proceedings, and every month – in restructuring proceedings, however, a supervisory judge may demand more frequent reporting.<sup>28</sup> The supervisory judge either approves the financial report, or changes (for example, changing 1,000 into 100) or rejects it. The judge can reject a report in case the IP acted in contradiction with the law (for example, sold something without the judge's or creditors' consent) or acted to the detriment of creditors, in which case the IP needs to return the expenditures he made.<sup>29</sup> In case a final report is rejected, the Minister of Justice is also informed about this.<sup>30</sup> Supervisory judges are insolvency judges from the insolvency and restructuring department of the district court in which the proceedings were opened. It is not possible to open insolvency proceedings and then appoint a supervisory judge from another court.

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23. See (PT) Article 18.1 of the Portuguese Insolvency Act.

24. Nevertheless, in the early warning system provided for by the New Italian Insolvency Code, the debtor's timely initiative has a relevance in order to obtain 'reward measures'; to this aim, according to Art. 24 of the d.lgs. no. 14/2019, the application for access to a crisis resolution procedure is considered not to be timely if proposed 3 or 6 months after the beginning of the state of crisis, according to specific parameters.

25. However, the majority of creditors must represent at least fifty percent of the total amount of ordinary claims: (NL) Article 145 of the Dutch Insolvency Act.

26. It is worth mentioning that there are also vice-supervisory judges within the proceedings. The vice-supervisory judge is in charge of the proceedings when the supervisory judge cannot temporarily perform his duties (vacation, sick leave etc.) and in other situations expressly mentioned in Insolvency Act (e.g. if a supervisory judge's decision is repealed and should be considered again). In insolvency proceedings the appointment of a vice-supervisory judge is obligatory, while in restructuring proceedings it is optional (Articles 151-152 of the Polish Insolvency Law and Article 21 of the Polish Restructuring Law).

27. (PL) Article 152 of the Polish Insolvency Law and Article 19 of the Polish Restructuring Law.

28. (PL) Article 168.1 of the Polish Insolvency Law and Article 32.1 of the Polish Restructuring Law.

29. (PL) Article 168.5 of the Polish Insolvency Law and Articles 32.3 and 33.2 of the Polish Restructuring Law.

30. (PL) Article 168.5a of the Polish Insolvency Law and Article 33.4 of the Polish Restructuring Law.

Portugal, in turn, started a dejudicialization of insolvency proceedings with the current Insolvency Act (approved by Law 53/2004, March, 18). As a result, judges mainly intervene with respect to the insolvency order (Article 27), the homologation of insolvency plans (Article 214), and the verification and ranking of claims (Article 140). In addition, it is the judges' responsibility to decide on the qualification of an insolvency situation as fraudulent or non-fraudulent<sup>31</sup> and to determine the consequences of such decision (Article 189). In relation to the IP, it is up to judges to appoint the IP (Article 52 (1)) and to oversee the IP's activities. According to Article 58 of the Portuguese Insolvency Act, 'the IP carries out his activity under the supervision of the judge, who may at any time require information on any matters or the presentation of a report on the activity carried out and on the state of administration and realisation of assets'. For certain acts, the IP needs the consent only of the creditors' committee or creditors assembly. The judge can decide on certain acts of the IP if a creditor challenges the decision of the IP. Otherwise, the IP does not require previous consent from the supervisory judge. Nevertheless, it is the judge's prerogative to remove an IP from office if there is fair motive to do so (Article 56). In the Portuguese revitalization procedure ('*processo especial de revitalização*', Articles 17-A to 17-J), the judge is in charge of appointing the temporary IP (Article 17-D (4)) and of deciding on the homologation (or not) of the approved restructuring plan (Article 17-F).

In Italy, the role of the judge and its powers are defined in Articles 122-123 of the new Crisis and Insolvency Code. Article 122 ('*Poteri del tribunale concorsuale*') includes that the court provides for the appointment, removal or replacement of the IP. In addition, the court has the power to request information from the IP (122.1 lett.b) and is competent to decide on certain claims (122.1 lett.c) and to ascertain the rights claimed by third parties on the insolvency assets (123 lett. h). Additionally, Article 123 ('*Poteri del giudice delegato*') lists responsibilities that the supervisory judge has, which include referring to the court on all matters for which a measure of the court is required, adopting measures aimed at asset conservation, and convening the IP and the creditor committee when prescribed by law.

### 3. Methodology

After having conducted preliminary interviews, which were aimed at generating a topic list and follow-up questions for the qualitative study, an interview script was developed and used by the researchers in the four countries, with each country adjusting the questions according to national specificities and the profile of the interviewee. The script included questions on the role of courts, companies, and other professional actors and stakeholders in restructuring and insolvency cases, specifically focusing on the identification of challenges and blockages at the following levels: legal, organisational, IT, and communication.

Subsequently, the interviews and focus group sessions were conducted. The interviews were semi-structured. After a general introduction, the interviews commonly commenced with introducing the theme (obstacles, best practices, strategic behaviour) and asking the interviewee to indicate what came to mind regarding the specific topic. This constitutes the structured part of the interviews. The unstructured part refers to the answers that followed these three main questions. Although possible follow-up questions were drafted prior to the interview study, the

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31. The IP or a creditor may request the court to qualify the insolvency as culpable or fortuitous. If it is found culpable, the judge will decide on the exact consequences for the administrators according to Article 189 of the Insolvency Code.

interview structure did allow for asking follow-up questions that were not put on paper prior to the interview. The latter turned out to be common practice during the interviews. With similar but also different obstacles, best practices, and strategic behaviour observed in the four countries, the follow-up questions that were posed were not exactly the same for the four countries nor the same in each individual interview. Nevertheless, all interviews discussed obstacles, blockages and strategic behaviour relating to courts and judges. The majority of the interviewees were insolvency judges and IPs. Additionally, interviews were conducted with insolvency specialists working for the tax authority, banks, employee agencies, insolvency law professors, lawyers, social security employees, court clerks, trade unions, and officers of the ministry of justice.

The focus group research focused on reflecting on and further discussing the interviews results. Consequently, the focus group research was partly aimed at confirming the interview results and partly at further exploring them. Three focus groups sessions were organized in each country. It was preferred that in each focus group IPs were approached who worked in different court districts than where the judges were working, in order to exchange different practices and to enhance open communication (working in the same court district could have reduced the willingness of participants to openly discuss their experiences). However, for geographical reasons this only turned out to be feasible in the Netherlands and in one focus group in Poland, whereas it turned out impossible in Portugal, as Portuguese IPs can work in every court district across the country.

Since the populations of insolvency practitioners, insolvency judges, insolvency specialists in banks etc. were unknown, probabilistic sampling such as stratified sampling and random sampling was not possible. Alternatively, three sampling strategies were combined. The first was to identify experts the researchers specialized in insolvency law already knew. Secondly, organizations such as the judiciary council and the representative body of insolvency practitioners were approached for suggestions of possible interviewees. Thirdly, interviewees were requested to provide suggestions for other experts who could be interviewed.

The interviews and focus group sessions were recorded and subsequently transcribed. If participants did not agree to the recordings, notes were taken. The transcripts were coded, first dividing the texts into the three main themes (obstacles, best practices, strategic behaviour), possible further categorized, and subsequently analysed based on the questions (scripts) that were developed. Below we select the, in our view, representative answers for the respective answers to the questions. The analyses were conducted for the countries separately. We decided to not express answers in terms of percentages or proportions (for example, '70% of the interviewees reported that (. . .)'). Given the relatively small number of interviewees compared to the population, percentages can give false impressions regarding generalization.

#### **4. Results**

Three main themes emerged from the qualitative study: case allocation, judge – IP interaction, and remuneration and case financing. These themes will be elaborated on below. Not surprisingly, the findings revealed a variety of other types of strategic behaviour, including the role of stakeholders in reorganizations and pre-packs, secured creditors (selling assets prior to the bankruptcy to maximize the proceeds), debtors using the insolvency to avoid labour law protection for employees, and forum shopping (for example, move to a court district that allows pre-packs). Since these instances predominantly concern strategic behaviour that do not involve the active participation of the judge (for example, strategic reporting in the hope of incentivizing a director to settle for a



possible director's liability claim) and therefore do not contribute to the understanding of the role of insolvency judges, these types of strategic behaviour are not discussed below.

### A. Case allocation

Differences were observed regarding the way in which cases are allocated to IPs. In Portugal, random assignment prevails.<sup>32</sup> According to some of the Portuguese interviewees, it should not be up to the judge to formulate preferences regarding IPs, whereas others criticize the lack of control that comes with the random assignment.

For me, this question of a random appointment seems correct. (...) I think that the judge should not demonstrate preferences regarding one [IP] or another. (Respondent PT-16).

When we had the old system, we had control over the number of cases per IP, but not now. You might have control on the distribution of cases, but there is no limit. (Respondent PT-9).

Nonetheless, exceptions to the rule of random allocation are allowed.

I am completely supportive of the mixed system. That is, the rule of appointment by the judge, to me seems absolutely right. The appointment by the judge can be made at random or can be made taking into account the suggestions [from creditors or debtor]. (Respondent PT-11).

According to Article 52, no. 2, the judge may take into account suggestions made by creditors or the debtor 'in cases where the insolvent estate comprises a company with an establishment or establishments in operation or where the insolvency proceedings are highly complex (...).' Non-random decisions can therefore be made based on suggestions by creditors (for example, because the judge thinks this will allow for more cooperation from creditors in some complex cases), which in practice only occurs in insolvencies that involve large-sized companies or companies with a strategic interest for the economy of the country or region. Judges apply the exceptions differently.

It is a rarity that judges choose an IP based on his or her own experiences. This happens when the individuals selected by the random process or suggested by the creditors do not provide the judges with sufficient confidence that the estate will be wound up in the best way possible. For example, judges may feel the IP lacks office structure to deal with a large, complex case; that the IP is partial towards some creditors; that there is a good chance of restructuring, which causes them to seek an IP who fits that profile.

In Portugal, the possibility of a combined system – a random appointment as a rule with the possibility to deviate from it based on the suggestions made by creditors or debtor, when – is considered to be an adequate solution that balances the value of transparency and autonomy of the IP towards the supervisory judge and the need to appoint an IP with more sophisticated skills to complex cases. However, the use of this safety clause is perceived by some IPs as lacking transparency and the general use of the random appointment is viewed by creditors with skepticism, mainly due to the significant differences of the organization of each IP offices.

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32. Software is used for the randomization.



In Italy,

Judges try to choose the IPs carefully [with a law that] does not provide for specific rules. (Respondent I-6).

and

There still are different praxes in the various Italian courts. (Respondent I-3).

This is why courts have adopted ‘internal’ guidelines, also through conventions between courts and professional associations, to establish the criteria for assigning cases to IPs. The guidelines consider expertise obtained by the IP in previous cases (and the number of previous cases) or the qualification reached on the basis of training; in the most relevant or difficult cases, the appointment involves the best qualified professionals. The adoption of such ‘spontaneous’ criteria can be considered as strategic behaviour by the insolvency judges. In fact, the choice

keeps into account the peculiarities of the case and the specific skills and professional qualifications of the IPs, and, also, his/her past expertise in proceedings characterized by similar matters. In this way there are usually positive results. (Respondent I-19).

Nevertheless, even though Italian insolvency judges have a high level of discretion in the appointment of IPs, they often follow a rotational-based system when assigning appointment.

In Poland, although courts are allowed to appoint any of the around 1,000 IPs that are listed at the Ministry of Justice, they generally appoint an IP from the court’s district. The court chooses an IP based on his or her skills, professional experience, and according to experiences in previous contact between the court and the IP.

I know that this person is a great IP, but would not be good at negotiating an arrangement with creditors. Every IP is good at different things. When we appoint an IP, we know who should be appointed. (Respondent PL-18).

The model of appointing IPs is from my point of view a good model. The court has a free choice and takes into consideration rational prerequisites. The court bases its decision on a person’s knowledge, whether s/he can handle it. The assessment made on the basis of [practical experiences] is fine. (Respondent PL-21).

If an IP moves from another court district, a judge calls the president of the insolvency department in another court district and asks about the IP’s skills and experience.

The practice of assigning the more complex cases to experienced IPs results in inexperienced IPs not having enough work

They come to us and say that they want to work but they are so inexperienced that we cannot assign them to big cases. It is risky for creditors and a debtor. (Respondent PL-18).

or not being allowed to handle insolvencies that are complex (insolvency proceedings in which an IP would not get paid are not a problem in Poland, because the court denies insolvency in non-consumer cases).

Of course we don't give them bigger insolvencies. Presently we start with giving them a consumer insolvency (...) especially if the court suspects the possibility to deny opening of the proceedings due to insufficiency of assets. (Respondent PL-21).

On the other hand, experienced IPs report they are frequently appointed and have too much work. They sometimes ask the court to not appoint them in next cases

We sometimes ask experienced IPs if anyone would accept another case (without specifying the case). One IP said that she is unable to come to work anymore. She has so much work that she even works overtime at home. Another IP said that he will definitely not accept another case. (Respondent PL-18).

however others – although having too many assignments – they accept the new ones.

I cannot refuse a judge. (Respondent PL-23)

A similar mechanism as in Poland and Italy can be observed in the Netherlands. There, courts also generally keep a list with IPs who can be appointed in an insolvency case. The list that courts keep often consists of several categories. Experience determines to which category the IP belongs. When assigning cases to IPs, the largest and most complex insolvencies will be assigned to practitioners that fall in the category with the highest experience. These lists are not publicly available. This practice, however, does not follow from the law nor from soft law-instruments.

We have also divided the IPs themselves into categories: one to four. A 'List 4 practitioner' simply does the heavy cases in which a lot of interests play a role, where with great social importance (...) A 'List 1 practitioner' does, so to speak, the small businesses that have no staff and almost has no assets. (Respondent NL-10).

Nevertheless, insolvency judges do appoint strategically in the Netherlands, in that they aim to appoint the right IP in an insolvency case that matches the practitioner's expertise, skillset, and personality,

Then we take that list and then we look who is at the top [of the list]. [Practitioner A]? Well, then [Practitioner A] gets that bankruptcy. Only, sometimes [Practitioner A] is skipped, because then I think of 'mwah, this is a bankruptcy that [Practitioner A] should not do, then I give it to [Practitioner B]. You are, of course, looking strategically, with a trade-off between, on the one hand, keeping the allocation policy clear and open - you want to work as transparently as possible. You know that that is very important for IPs, transparency. Everyone wants a case and especially now that there are not enough, everyone says 'yes, but I am still at the top of the list and I have passed!' But, on the other hand, you know that one bankruptcy is better in the hands of one IP than the other IP. (Respondent NL-1).

although this policy is not applied in all court districts or is not always clear to IPs.

And what exactly is the policy therein? Everyone would like to know how the appointment policy works. I do not know. I think they will see if someone has achieved INSOLAD [the Dutch association for IPs that offers courses and programs] and how much experience they already have and how the past bankruptcies went. So whether there have been many complaints there and many [Article] 69 requests, for example. If someone has a lot of [Article] 69 requests and he doesn't come up with good answers, then of course such a person will never again get [appointed in] a considerably larger bankruptcy. Then you can just forget it. (Respondent NL-18).

The non-random appointment creates a dependency for the IP on the court, as future appointments depend on the performance in insolvencies. It creates an important incentive for IPs to limit their engagement in unnecessary activities and to not claim excessively.

And if you do [claim too much salary or fees for unnecessary activities], you can probably only do it once. (Respondent NL-2).

They [the IPs] also know that if we are not satisfied, they risk not being appointed anymore. (Respondent NL-10).

But if the supervisory judge finally decides that it should become option C or directs me to [option] C, then I will try to explain why I think it should be option A and why I am or am not prepared to go for option C. [It has happened that] a supervisory judge who really thought differently about everything, who would say to us: 'I'm just not going to give permission.' Then you can jump high and low as an IP, but if you do not have permission, then it becomes a problem. From a formal point of view, I am allowed to act, but that is not advisable for your relationship with the supervisory judge and it is certainly not so useful with regard to your personal liability if things go wrong. (Respondent NL-14).

The formal consequences of behaviour that is unsatisfactory can therefore be twofold: either the court moves the IPs to a different category on the list, or the court no longer appoints the IP altogether.

This mechanism can put IPs in a vulnerable position, as personal interactions and preferences can become important or even decisive factors in appointing IPs.

Sometimes there is a personality clash. For example, you have a Supreme Court ruling on a situation where the supervisory judge and the IP were unable to get along. The effect of that is that that person lost his entire practice. (Respondent NL-20).

This mechanism creates a dynamic where, because of their dependency, IPs aim to please the supervisory judge in order to smoothen decision-making processes,

Those IPs who have an update every week, they do so (...) so that they more easily get permission for the steps they take. If you are a bit more cautious with that, then such a judge might less easily think: 'well, that [request] will probably be fine'. (Respondent NL-4).

to ensure a long-standing relationship and future appointments,

That you occasionally accept something from the supervisory judge when you actually think it makes no sense. (Respondent NL-19).

So he also knows 'if I do not play the game exactly right one day, I may not get an appointment anymore'. So there is also a kind of power factor behind that; a dependence of the IP on the supervisory judge and the court. (Respondent NL-10).

but where the benefit for the creditors and other stakeholder can be questioned.

But you can see that certain IPs – (...) they have weekly update discussions with a supervisory judge, of which I think: 'what are you actually doing except showing that supervisory judge how amazingly good you are with winding up this bankruptcy?' and 'what exactly do those creditors and the other stakeholders actually benefit from this?'. Respondent NL-4).

## B. Judge – IP interaction

How insolvency judges interact with the IP, also strategically, to a large extent depends on the duties of the IP and the power assigned to insolvency judges. In Portugal, the IP does not require the approval of the court when it comes to activities such as the transfer of assets and the termination of labour contracts. Instead, the IP has the duty to regularly inform the court and the creditors' committee about the progress of the case. Sometimes, however, they ask for support and for the opinion of the judge, although this is not mandatory.

There is an important exception laid down in the law regarding the mere information duty of IPs in Portugal. After the declaration of insolvency, the IP must present to the creditors' assembly a report in which the IP may advocate for the immediate liquidation of the debtors assets or for the approval of an insolvency plan. The assembly shall vote on the immediate liquidation or on the submission of an insolvency plan proposal. When an insolvency plan is proposed, the judge has the power to decline the proposal for specific reasons that will not be further discussed in this article.

The consequence of the existence of information duties can be that IPs merely feed the insolvency judges with information in order to avoid possible repercussions. In the interview study in Portugal it was found that some judges charge IPs with a fee or remove the IP from office if they fail to fulfill their reporting obligations. There are even some cases of fraud that have been prosecuted by the professional regulatory body and by criminal courts.

Every day I get complaints from the judges (...) the strategy is a bit like this: [the IPs] because they have many lawsuits and cannot process them and because they are already at an advanced age, they start not responding to the judge. Then they are removed from office. They are removed from office and the case passes to another [IP]. (Respondent PT-33).

I apply fines. I insist once, twice, three times and (...) We are requesting information that for [the IPs] is mandatory. But this has happened to us a lot (...). (Respondent PT-9).

In the other three countries, the IP requires approval for a number of activities. The interviews included various examples of strategic behaviour in the interaction between the insolvency judge and the IP in those countries. In this interaction, the perceived role of the judges is pivotal for how they are approached by IPs, as well as for the communication between the two. IPs in Poland mentioned that judges do not treat them as partners, but rather as a party to proceedings (Respondents PL-13, Respondent PL-32). It was pointed out that IPs are sometimes afraid to express their opinion if it could be contrary to the supervisory judge's opinion.

It is impossible for an IP to oppose a supervisory judge. The IP is responsible for insolvency proceedings (...). Although an IP is more experienced than a judge s/he is afraid to contest a judge's viewpoint. (Respondent PL-7).

In Poland, IPs pointed out that each judge demands different information included in the reports. Therefore, IPs observe what a particular judge desires and they subsequently adapt (Respondent PL-13).

Additional evidence for the relationship between the IP and the judge affecting their communication was found in the Netherlands. There, strategic reporting was observed in the qualitative study, in the sense that IPs sometimes share information to the supervisory judge in a way that it serves the desired outcome of the IP.

I think the IPs are strategic with regard to supervisory judges. It can be strategic ‘how’ and ‘at what time’ certain information is brought to the supervisory judge. If you do not want to have too many questions at a certain moment, then you wait a while [before you share]. (Respondent NL-19).

A typical example of such strategic behaviour is an instance where the IP aims to initiate legal proceedings, for which s/he requires the approval of the supervisory judge.<sup>33</sup>

Then you come across something, for example that you have given permission to start a procedure and then think ‘I have been sufficiently informed, so I do not need to have any more information’, but then the underlying documents show - if later the procedure is ongoing – that everything is a bit different. Then you think: ‘I should have avoided that’. There are also IPs who get to know you as ‘pit bulls’, but who because of that cannot find a solution that easily. That just costs a lot of money. Then you see afterwards that they may have been proven right, legally speaking, but it has not helped the estate very much, because a lot of money went away due to the discussions [i.e. the procedure]. You then think: ‘we could have solved that differently’. (Respondent NL-1).

If I want to start proceedings against a director or I want to take action (. . .). If I don’t have too many objections, then I think ‘I have a large estate, so I’m going to tell the supervisory judge that it’s like this, that and that’, in which case I omit a number of nuances. That could happen. (Respondent NL-9).

Another example is the situation where the IP expects to make a deal with an external party who wants to take over the business or a part of the business.

(. . .) that you just don’t want anyone to interfere with it because you are in the negotiation phase. You then want to negotiate and ‘massage’ [the deal] in a certain way, where you think it will succeed in that way with that one party. If you share that with the supervisory judge, then he could push his vision and say ‘I don’t want you to do it like this and that’, because then you have to adjust your behaviour at the negotiating table. You better wait a while until you really have a deal and you can say, ‘Look, I made a good deal that will restart the business under those and those conditions.’ (Respondent NL-19).

IPs often have previous experience with an insolvency judge and consequently anticipate their responses. This is the impression of both IPs and supervisory judges.

We know as an IP, the moment we get into bankruptcy and have to call someone for permission, we think: ‘okay, that is this supervisory judge, he will go deep [into the matter], he does not go deep, he will quickly give permission, he is going to ask very difficult questions’. Yes, you prepare differently for one supervisory judge than for the other. (Respondent NL-2).

If you do a lot of bankruptcies, then you know how critical your supervisory judge is. I’d lie if I said it wasn’t the case, but some supervisory judges are less critical in asking questions than others. So you just look who the supervisory judge is in the bankruptcy. I have the impression that the longer you work together, the more you build up a credibility balance. If your records are correct, you will notice at some point that your requests are more easily given the stamp ‘permission as requested’. It is almost a self-fulfilling system. If I don’t get that [permission], I try to look for the ratio behind the question that comes and next time I [think about] the answer to that question before it is asked. (. . .) If I really don’t know, I just say we can go left and we can go right. There are situations that I don’t really know which

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33. (NL) Article 68, paragraph 3, Dutch Insolvency Act.

option is better and if that happens, I ask for consultation. And how often is that? Well, if that happened five times, then that's a lot. (Respondent NL-15).

That they are going to call you at an early stage and tell you what they are planning, while they would not do that with someone else. That they wait there for a while. I sometimes see it happen that with a different supervisory judge he only informed about a certain case much later, while in the same situation they had already informed me about it for a long time or even contacted me to see what I thought about it. The IPs simply assess it for each supervisory judge: 'what can I expect from him or her?' and 'is that possible or not?' You see that happening, yes. (Respondent NL-18).

The interaction between the judge and the IP can also be affected by the level of expertise of the judges, which can impact the way judges organize their expertise and how openly they interact with IPs. In Italy it was observed that judges, legal scholars, lawyers, and accountants organize knowledge on insolvency law themselves, with the aim to develop the discussions about the most important insolvency law matters. An example is the constitution of the *Scuola superiore della Magistratura*, an institution originated with the aim to improve of judges training trough courses taught by academic professors. In Poland, some courts started organizing meetings with the IPs to discuss issues encountered by both judges and IPs in the course of insolvency and restructuring proceedings in order to improve the communication and efficiency of insolvency proceedings. Although welcomed by the IPs in those court districts, representatives of other court districts pointed out that such a meeting would not be welcome there due to the fact that judges refrain from the contact with IPs outside the proceedings.

Although in other courts regular meetings of judges and IP are set up, (...) such practise was not established [here]. I don't know whether it is because of the size or lack of interest, it is hard to say. (...) I find such meetings beneficial because they change the philosophy and the point of view. (...) There is this closed attitude of judges to limit the contact out of the proceedings. (Respondent PL-21).

An issue reported by various interviewees that affects the level of expertise as well as the interaction with insolvency judges is the lack sufficient funding, which can cause courts to be understaffed. The problem of insufficient number of administrative staff can be observed in Poland,

There is a problem with staff. Courts suffer from the problem of insufficient number of clerks. (...) There is a problem of a lack of candidates. There is a stable tendency of [IPs] leaving [the profession] due to financial reasons. Nobody [denies] that (s)he leaves and gets paid better. If somebody [starts working], they often resign. Often experienced staff resigns. (...) It is the result of too much work, stress, pressure, responsibility. (Respondent PL-21).

where it delays the proceedings and negatively affects the efficiency of the proceedings.

It happens that the supervisory judge quickly adopts the necessary decision, and then, due to lack of staff in the office, the decision is sent to the participant with a delay, which makes it pointless. (Respondent PL-26).

At the height of the financial crisis, in Portugal, between 2011 and 2014, the continuous omission to hire new court clerks (notwithstanding the decrease of the number of court clerks active) and the boom of revitalization and insolvency cases put pressure on the available human resources.

When I first came to this court in 2010, I thought, ‘Well, I’m going to start with the old bankruptcy cases’ and I started by seeing bankruptcies that were the oldest. In 2011 I had to put these old cases aside, I had to put everything aside because it was the insolvency boom (. . .). In other words, the court staff was small for the volume of work. I have to say that from 2010 to 2013 I’ve been working alone. Punctually, in the first few months, I still had two court clerks helping, but they were moved to another court. (Respondent PT-8).

In Italy, the lack of clerks has the effect of delaying the transmission of judicial responses in formal ways. One of the strategies there, and a positive side effect of being understaffed, is the adoption of processes where courts reduce bureaucratization, for example by allowing direct contact with the judiciary, particularly in cases that require urgent intervention.

### *C. Remuneration and case financing*

Remuneration issues are likely to occur in assetless estates. If the fees of the IP are paid from the available assets, the lack thereof results in limited or even in no remuneration for an IP, particularly in instances where the estate does not contain assets. Such assetless estates may cause IPs to reduce their activities when winding up the estate. Several interviewees mentioned this mechanism. This is less of an issue in Poland, as the law does not allow opening commercial insolvencies in the event that debtor’s assets are not enough to cover costs of the proceedings including IP’s remuneration.<sup>34</sup> If insolvency proceedings are opened, an IP should receive remuneration. It is also less of a problem in Portugal, where the IP receives a fixed fee, which is complemented by a variable remuneration based on a percentage of the amount gathered through liquidation, with a maximum of 50,000 Euros.<sup>35</sup>

One typical response of IPs is to quickly conclude that the estate does not contain any or sufficient assets, and to subsequently request the (supervisory) judge to close the case.

This morning the tax authority called me. He is now working with IP number three in a large bankruptcy where real estate is sold far too cheaply. There, the IP, who now had one of his employees call, says that he is going to close the bankruptcy due to the condition of the estate. So he didn’t feel like [conducting activities] at all. So the tax authority calls me in distress and says, ‘what should I do now?’. Then I said, ‘give a call to the supervisory judge and otherwise I can call.’ But I’m also curious how that will turn out. Is that the supervisory judge who stands behind that IP and says: ‘yes, the IP is already so busy, he has not earned much money’ and so on. Or [am I saying this] (. . .) because actually I think that you as an IP should go all the way and certainly if, as in the case I am now sketching, money can probably still be collected from the directors etc. then I think that you simply have the duty to do that. (Respondent NL-7).

Supervisory judges do not always agree with the IP, as they hope or expect returns in the foreseeable future. They then respond to the IP to not close the case.

What you see, for example, is that the IPs call very quickly after a verdict in an empty bankruptcy that it should be liquidated. Often within a month. Then they receive a message from me: ‘Come back in a

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34. According to (PL) Article 13.1 of the Polish Insolvency Law the court shall dismiss an insolvency petition if the assets of an insolvent debtor are not sufficient to cover the costs of proceedings or are sufficient to cover these costs only.

35. See Article 23.6 of Law 22/2013, of 26 February 2013.



year, because we do not know what else will come out of the post blockage and what else will appear in this bankruptcy.’ After a month you simply cannot know [the extent of] the estate. That behaviour bothers me and you then take it as a supervisory judge and then we have to make it clear that it doesn’t work that way - even if you don’t earn anything with it. That is a bottleneck, because you wonder if enough attention is paid to it when you show that attitude. (Respondent NL-18).

The lack of a financial incentive has an effect on the activities of the IP and on the quality of the winding up, causing a possible tension between the supervisory judge and the IP.

Or that if the bankruptcy runs out of assets, then suddenly everything becomes quiet in that bankruptcy. There are some IPs where I am concerned - and I find that a problem - whether it’s about the turnover or about whether you like the profession so much? Look, of course they do it for the turnover, but you don’t do it - I hope - just for the turnover. (Respondent NL-18).

Yes, I must say that if I know there is nothing in it [i.e. the estate] ( . . . ) Yes, why would I make myself tired by very carefully looking at what is the list of debtor, and without mistakes, and do I now have everything what I should have? No, if I get such a list and after two or three rounds of debt collection, I’ll be satisfied. ( . . . ) Even if you have already threatened with legal proceedings, then I’m not going to figure out everything again to make this as accurate as possible ( . . . ). That just isn’t worth the effort. (Respondent NL-8).

Assetless estates do not only have the effect of IPs reducing their activities in such insolvencies. The lack of remuneration also seems to result in unnecessary activities in insolvencies that contain sufficient assets. More generally, supervisory judges observe unnecessary activities in various instances. Examples mentioned in the interviews are initiating extensive investigations regarding legal procedures, the causes of the bankruptcy, or with respect to investigations on director’s liability.

The reason for conducting activities that are possibly unnecessary is often a financial one,

Well, at a certain point you see that certain firms are inclined to go all the way, legally speaking, but of course with the intention of being able to declare a lot of costs themselves. (Respondent NL-1).

although IPs who were interviewed reject the notion of displaying such unethical behaviour. An important factor for the incentive to conduct more activities than necessary is reinforced by the nature of insolvencies

Look, bankruptcy practice, and that realization is sometimes missing, is winning and losing for the IPs. If there are sufficient assets, then it is a goldmine, because [their] hourly salary is quite nice. But if there are no assets, then it is just too bad. (Respondent NL-18).

and by the low remuneration of IPs compared to colleagues who work in different areas of the law or in other professions.

However it is sometimes unfair. For example, if the proceedings last 5 years and there is a low number of creditors and small assets, an IP gets 20,000 PLN (ca. 5,000 Euros). When we divide it to months, an IP earns much less than an accountant. It often happens. (Respondent PL-23).

The difference in remuneration becomes particularly visible in large-sized law firms.

The fact is that the IPs often deal with a very difficult position in their firm, because they - especially the large firms - earn considerably less for the firm, because they can charge rates that are less high than their other partners in other sectors. So they are always the ugly duck of the firm and they can compensate for that by simply bringing in big bankruptcies and when such a bankruptcy is in [i.e. assigned], they also have to get enough money out of it. You see that again. It will not be said out loud, but you can see that. You can see that the IPs really do their best - certainly those of the large offices - in order to earn as much as possible from bankruptcy. That should not be too much in the spotlight, because then we will get angry. It is, of course, disguised as 'this is such a matter of principle, that it needs litigation'. (Respondent NL-1).

The lack of remuneration results in the practice of IPs requesting an increased rate, at least in the Netherlands. With possible individual differences between supervisory judges, they face the challenge of applying a fair and consistent policy as to how to decide on such requests. One strategy found in the interviews is to discuss requests for increased rates with a team of supervisory judges.

(...) [Standard rates apply], but in certain bankruptcies they can get a higher rate. That is always something that we [the team of supervisory judges in a certain court district] all decide together. So they cannot approach any of us individually for that; we always say 'we present that in the supervisory judge meeting'. It is clear to everyone that that is something that the collective decides and not the individual supervisory judge. (Respondent NL-13).

Nevertheless, the remuneration concerns do result in strategic behaviour on the side of the supervisory judges, who are not always as critical in order to keep top law firms and top IPs interested for acting as IPs.

For my part, it is a strategy because I want to keep certain firms on board, because I also think it is important to have a list of IPs [to which the cases are assigned] in which a number of large firms also participate. Not every firm has financial international expertise, which some firms do have. (Respondent NL-1).

Another practice related to remuneration, particularly if the instances with low remuneration occur frequently, is the overclaiming by IPs. Such strategic behaviour is difficult to detect, not only in insolvencies.

The possibility to verify IPs' expenditures by a supervisory judge is illusory. This causes the abuse by dishonest IPs. In this respect, we often observe the bizarre behaviour of IPs. The problem is that in the absence of unambiguous regulations we have ample possibility to question this type of dubious expenditure. In practice, the only solution to this problem - for the future - is not to appoint this person in other insolvencies.<sup>36</sup> (Respondent PL-26).

Common phenomenon in the legal profession, but that is really difficult to supervise. We now have this conversation (...) You can then write that this [conversation] lasted an hour, but you can also write that this took two hours. If you have not been there yourself, who will see that? It is really very difficult. (Respondent NL-10).

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36. The Minister of Justice may deprive an IP of a licence or suspend a licence in case of a misconduct or criminal charges.

In general, supervisory judges are critical - rightly critical - of salary proposals. But it is actually impossible to check for them, because that in the end is perhaps (...) based on the trust that someone does that fairly. Otherwise it is forgery. (...) So you don't do that. I don't know, but there are no doubt IPs who do that. (Respondent NL-5).

In Poland, overclaiming does not relate to an IP's remuneration, as there is no hourly rate. Polish Insolvency Law provides for relatively clear rules on establishing IP's remuneration.<sup>37</sup> However, excessive spending is a possibility in Poland. Some judges, in order to eliminate the risk of extensive expenses, require that an IP obtain their consent before concluding crucial agreements.

At the beginning I always issue a decision in which I specify that in crucial fields like accountant, HR, experts evaluating assets, they can be hired upon the supervisory judge's consent. In terms of lawyers I demand that an IP provides me with an offer prepared by a few lawyers that the IP would like to work with. (Respondent PL-18).

Evident irregularities are likely to be detected, as the courts, often clerks, check salary proposals and will request an explanation from the IP if oddities are detected in the salary proposal.

We check IPs' remunerations a lot. They are high, but we check them. (...) We thoroughly look into expenditures. They need to be reasonable so that IPs do not tend to increase remuneration or to hire additional staff with extraordinarily high salaries. (Respondent PL-18).

Furthermore, it was noted in the interviews that comparing salary proposals of various IPs can assist in detecting excessive claiming or spending. Another solution is to outsource certain activities to other companies or law firms, yet this also has downsides.

Even investigations into the cause [of bankruptcies] are now completely outsourced to external parties. But also if you do the cause investigation, you will come across so many things that you have not seen before. For example, that there are still claims on someone you didn't notice at all. That would be good, because then you can just send a reminder to that debtor and that can increase the estate. So you just see a lot and it's just your role to be a spider in the web. If, as an IP, you increasingly outsource, you will simply become much less effective. In addition, you are also much less creative, because you can no longer come up with a total solution. (Respondent NL-14).

Another solution to ensure a minimum quality of winding up the estate and to mitigate possible unnecessary activities and excessive claiming is to introduce a fixed remuneration for instances where the estate does not contain sufficient assets to pay the salary of the insolvency representative. In Portugal, for example, every IP has a fixed and a variable remuneration. The fixed fee is paid by the State in case of insufficient assets in the insolvency.

Monetary incentives also exist for the judiciary. In the Netherlands and Poland, for example, the handling of insolvency cases is based on the number of closed cases. In Poland, for instance, it was reported that judges prefer to handle multiple consumer insolvencies instead of one commercial insolvency in order to 'look good' in the statistics and the funding, whereas commercial cases are

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37. IPs' remuneration depends on inter alia creditors' satisfaction rate, number of debtor's employees, number of creditors, duration and complexity of the proceedings.

generally more complex and require more effort than a consumer insolvency (Respondent PL-10). The same was observed in Portugal.

## **5. Conclusion**

This article explored three types of strategic behaviour: case allocation, judge – IP interaction, and remuneration and case financing. Regarding case allocation, it was found for all four systems that insolvency judges use non-random criteria to allocate cases to IPs. Non-random allocation rules are either suggestions offered by creditors, or they follow from the confidence the judges have with respect to that the estate will be effectively and adequately wound up. The criteria insolvency judges use include the IP lacking office structure to deal with a large, complex case, the IP possibly favouring certain creditors, the likelihood of restructuring, or whether the case concerns a corporate group insolvency.

Courts have adopted categories of insolvencies (less/more complex) and/or categories of IPs (less/more experienced) in order to provide transparency as to how cases are allocated to IPs. Despite such efforts, strategic behaviour was observed. On the one hand, insolvency judges appoint strategically based on the practitioner's expertise, skillset, and personality. On the other hand, the non-random allocation rules that were observed create a dependency for the IP on the insolvency (supervisory) judge, with future appointments being dependent on the IPs' performance. Although this creates an incentive for IPs to limit their engagement in unnecessary activities, it also puts IPs in a vulnerable position, as personal interactions and preferences may become decisive for future appointments. This can result in IPs 'pleasing' judges or in activities with the primary purpose to secure future appointments.

A second main theme concerned the interaction and communication between the judge and the IP. First and foremost, how judges interact with the IP to a large extent depends on the powers assigned to the IP and to the judges. The powers judges have vary from approving the transfer of assets and the termination of labour contracts to removing the IPs from a case if the IP violates his duty to regularly inform the insolvency judge and / or the creditors' committee about the progress of the case. In most of the countries that were researched, it was found that the powers and duties impact what IPs report, the manner in which they report, and the amount of information that they provide. In addition, more distance between the IP and the judge can result in IPs being hesitant to express their opinion.

Regarding case remuneration and case financing, the way courts are financed can introduce incentives to be involved in certain types of cases (for example, consumer insolvencies). Furthermore, assetless estates make IPs reduce their activities when winding up the estate, particularly if the fees of the IP are paid from the available assets. This can cause a possible tension between the supervisory judge and the IP, as the judge may want the IP to conduct certain activities or to not close the case in order to ensure a proper winding up, which can subsequently affect the duration of insolvencies.

On the other end of the spectrum, it was found that IPs sometimes conduct unnecessary activities. This particularly can be observed in asset-rich insolvencies, where additional activities lead to additional remuneration. The low remuneration of IPs compared to colleagues who work in different areas of the law or in other professions strengthens the incentive to conduct additional activities. The dynamic that then may arise is that IPs request increased rates and that judges grant such requests in order to keep top law firms and top IPs interested for acting as IPs. A possible solution for this is to introduce a fixed remuneration for IPs in instances where the estate does not


contain sufficient assets to pay the salary of the insolvency representative. However, such fees should approximate the market rates in order to reduce the risk of unnecessary activities or of excessive claiming.


This article identified types of strategic behaviour that insolvency judges are confronted with or display during the course of a liquidation or reorganization. The analysis reveals how differences regarding the powers of insolvency judges and IPs, remuneration, and case allocation can result in strategic behaviour on both the side of the judges and the IPs. From this, it follows that improving the efficiency and effectiveness is not merely a matter of implementing legislation and case law, but also requires a look into the dynamics between insolvency judges, IPs, and other actors in the insolvency process.

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