

Remuneration of the German Administrator – Role model or road to nowhere?

IEEI London Panel: The Remuneration of Insolvency Practitioners

Dr. Sven-Holger Undritz, June 2023



Agenda

- Legal basis
- Who is entitled to remuneration?
- The remuneration of the insolvency administrator
 - Concept
 - Practical difficulties
 - Delegating tasks to external service providers
- Setting remuneration

Legal basis

- **Insolvency Code (InsO):** The law sets outline for remuneration
- **Ordinance on remuneration in insolvency matters (InsVV):** Remuneration is regulated in greater detail by the Federal Ministry of Justice
- Federal Court of Justice (BGH) often measures the InsVV against the requirements under the InsO
 - In various cases, this has led to a ping-pong between the BGH rulings and the InsVV-legislator



Who has a right to remuneration?

- (Provisional) insolvency administrator (*Insolvenzverwalter*)
- (Provisional) insolvency custodian (*Sachwalter*)
- Insolvency administrator in consumer insolvency proceedings
- Trustee (*Treuhänder*)
- Special insolvency administrator/special custodian (*Sondersachwalter*)
- Expert
- Members of the creditors' committee (*Gläubigerausschuss*)
- Restructuring agent (*Restrukturierungsbeauftragter*), members of the creditors' advisory committee (*Gläubigerbeirat*, StarRUG)

The remuneration of the insolvency administrator

□ Concept:

The starting point is the **calculation basis** determined on the basis of value of the insolvency estate at the time of termination of the proceedings

The remuneration is usually calculated according to **standard levels (factor 1.0)**, in this respect a distinction is made between nine (degressive) value levels, from which the remuneration is calculated as a proportion of the insolvency assets

Remuneration according to standard levels is adjusted by **surcharges or deductions**

The remuneration of the insolvency administrator (cont'd)

□ Practical difficulties:

1. Determining the **calculation basis** more precisely

- The **realization of the value of the rights to separate satisfaction** by the insolvency administrator results in the creditors being required to contribute to the costs of the insolvency estate. The insolvency administrator can then choose:
 - ❖ (1) either the contributions lead to an increase in the calculation basis
 - ❖ (2) or the insolvency administrator receives a special fee (which is part of the regular remuneration), assessed according to the amount of the contributions.
- Procedural costs and liabilities of the estate are generally not deducted from the calculation basis.
 - ❖ However: where the **business is continued**, only the surplus resulting after expenditures have been deducted from revenues is taken into account

The remuneration of the insolvency administrator (cont'd)

□ Practical difficulties (cont'd):

2. Determining surcharges and reductions more precisely

- The InsVV only sets out a few **standard examples** in this respect, apart from that the court has to set surcharges and reductions within the framework of an “*overall review*”
- The actual *amount of work* (reduced or increased) is decisive
- In this respect, a so-called *normal* procedure is often used as a reference point, although there is no agreement on how this should be defined more precisely (problem: occupation of servicers)
- In addition to this, there is also the idea of *cross-financing*, occasionally mentioned by the BGH
- The expedient often adopted in practice is to use tables setting out rules of thumb

The remuneration of the insolvency administrator (cont'd)

- Delegating tasks to external service providers:
 - The insolvency administrator may deploy internal and external staff, unless the tasks concerned are highly personal
 - The following principles apply to the deployment of external service providers:
 - A distinction has to be made according to whether they perform standard tasks or special tasks
 - Deployment for **standard tasks** is at the expense of the insolvency administrator's own remuneration
 - Deployment for **special tasks** is at the expense of the insolvency estate
 - The insolvency administrator must specify the relevant occurrences in the application for remuneration
 - In many cases, the insolvency administrator has to notify the deployment to the insolvency court in advance
 - Participation by the insolvency administrator in an external service provider is permissible (e.g. proceedings conducted by own law firm), as is delegation to the insolvency administrator him/herself (“deployment of special expertise”)

The determination of the remuneration (procedure)

- The remuneration and the expenses are determined by the competent official (court clerk, no judge! *Rechtspfleger*) of the insolvency court upon *application* by the insolvency administrator
- The need for a prior *hearing* of the creditors is disputed, the court decides in a reasoned decision, which is made public
- The amounts that are determined are not published in the *public notice*, although the operative part of the decision and the main reasons must be apparent
- In most cases, *third parties* not involved in the proceedings may – taking into account the interests involved – demand *anonymized copies* of the decision

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