Conflict of interest involving liquidators

Recommendations to the European Union legislator

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Preface and acknowledgements

The completion of this thesis marks the end of my time as a student and thus the end of a very interesting phase in life. This thesis was written in the context of my Masters of Law on Company Law at Leiden University. During my lectures on international insolvency law within this master's programme, prof. dr. Bob Wessels sparked my interest in this field. The professional regulation of those in charge of insolvency proceedings, whom I refer to in this thesis as "liquidators", specifically caught my attention, especially in regard to more ambiguous ethical values and norms of conduct. I was happy to accept an invitation from prof. dr. Bob Wessels to write a thesis on the topic of "conflict of interest" involving liquidators. In the light of recent developments on the level of the European Union legislature as regards conflict of interest and liquidators, the goal of my thesis is to provide recommendations on harmonization of rules on conflict of interest in a European context to the EU legislator. The final product combines different sources, both international and national, legal and non-legal, hard law and soft law and, I hope, will provide some new perspectives on this topic.

First of all, I would like to thank my supervisor prof. dr. Bob Wessels, not only for his supervision, valuable suggestions and his always swift responses to my questions, but also for being a great teacher and inspirator. Second, I would like to thank prof. dr. Volker Römermann of the Humboldt-Universität Berlin for his role as second reader of this thesis. Third, I would like to thank mr. Rinke Dulack for the conversation we had on the topic of this thesis during the earlier stages of the writing process. Fourth, I would like to thank mr. drs. Gert-Jan Boon for his willingness to critically comment on some of my ideas and views.

The responsibility for any errors and views expressed in this thesis is solely mine.

Throughout this thesis, "he", "him" or "his" also refers to "she" or "her" or "hers", as appropriate.

Contents

Introduction

On 15 November 2011, the European Parliament ("**EP**") adopted a resolution ("**EP Resolution**"), including recommendations on harmonizing the general aspects of requirements for the qualification and work of liquidators in the European Union ("**EU**").[1] Recommendation 1.4. reads as follows:

- the liquidator must be approved by a competent authority of a Member State or appointed by a court of competent jurisdiction of a Member State, must be of good repute and must have the educational background needed for the performance of his/her duties;
- the liquidator must be competent and qualified to assess the situation of the debtor's entity and to take over management duties for the company;
- when main insolvency proceedings are opened, the liquidator should be empowered for a period of six months to decide on the protection of assets with retroactive effect in cases where companies have moved capital;
- the liquidator must be empowered to use appropriate priority procedures to recover monies owing to companies, in advance of settlement with creditors and as an alternative to transfers of claims;
- the liquidator must be independent of the creditors and other stakeholders in the insolvency proceedings;
- in the event of a conflict of interest, the liquidator must resign from his/her office.

In the explanatory report of the EP Resolution, Rapporteur Lehne expressed the following view: "*While the rapporteur would not endeavour to harmonise the powers and duties of liquidators at that stage, he would still like to propose some common requirements. Some harmonization in this area would support the idea of closer cooperation between the liquidators and enhance the comparability in the profession.*" In its opinion on the "Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – A new European approach to business failure and insolvency"[2] and on the "Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings"[3] ("**EESC Opinion**"), the European Economic and Social Committee ("**EESC**") urges the European Commission ("**EC**") to consider the recommendations made by the EP.[4]

[1] EP Resolution of 15 November 2011 – 2011/2006 (INI). The EP Rapporteur is K.-H. Lehne. The report can be found at <www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0355&language=EN>. References to the EP Resolution include the report.
[2] See COM (2012) 742 final.
[3] See COM (2012) 744 final – 2012/0360 (COD).
[4] The EESC Opinion was published under 2013/C 271/10, see <http://new.eur-lex.europa.eu/legal-content/EN/TXT/?qid=1393270734997&uri=CELEX:52013AE0472>. See paras. 1.2.7 and 9.1 – 9.3. Para. 9.2, however, makes no mention of the third recommendation of the EP Resolution.

Before the EESC gave its opinion, in December 2012, the European Commission published a proposal ("**InsReg Proposal**")[5] to amend the Insolvency Regulation ("**InsReg**").[6] One of the changes put forward by the InsReg Proposal is the insertion of a new article 42a, which deals with the "Duty to cooperate and communicate information between liquidators". Article 42a(1) InsReg Proposal reads as follows:

> Where insolvency proceedings relate to two or more members of a group of companies, a liquidator appointed in proceedings concerning a member of the group shall cooperate with any liquidator appointed in proceedings concerning another member of the same group to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interests.

In February 2014, the EP adopted a legislative resolution ("**EP Legislative Resolution**")[7] containing amendments to the InsReg Proposal. One of the more significant amendments proposed by the EP is the introduction of so called "group coordination proceedings" in which a "coordinator" is appointed.[8] This coordinator has, among other things, the power to present a group coordination plan which can, subsequently, be approved by the court. The coordination plan is not binding. It does, however, function on the basis of "comply or explain". In the EP Legislative Resolution, the phrase "does not entail any conflict of interests" is transposed to a number of other provisions. It is applied to (i) cooperation between the liquidator in the main proceedings and liquidators in secondary proceedings, article 31(1) InsReg Proposal,[9] (ii) cooperation between liquidators and courts, article 31b(1)(a) InsReg Proposal[10] and (iii) cooperation between the liquidator and courts in the context of enterprise group insolvency, article 42(c) InsReg Proposal.[11]

Therefore, in the view of the EP, in any situation where the liquidator is under a duty to cooperate (with either courts or other liquidators) and this cooperation entails a conflict of interests, the cooperation should be limited.[12]

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[5] Regulation (EC) No 1346/2000.
[6] See COM (2012) 744 final and for an overview of the legislative process <http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=202244#1213335>.
[7] EP Resolution of 5 February 2014, COM(2012)0744 – C7-0413/2012 – 2012/0360(COD). The report can be found at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0481+0+DOC+XML+V0//EN#title2>. References to the EP Legislative Resolution include the report.
[8] See Amendments 60 – 65 EP Legislative Resolution.
[9] Amendment 48.
[10] Amendment 51.
[11] Amendment 55.
[12] That the EP interprets the phrase "does not entail any conflict of interests" as such follows from the "justification" of amendment 55 EP Legislative Resolution: "*Clarification that conflicts of interests pose limits to the cooperation between courts and insolvency representatives.*"

The justification of the insertion of the phrase "does not entail any conflict of interests" in the aforementioned articles is "aligning" the provisions on cooperation in respectively main and secondary insolvency proceedings with articles 42a and 42c respectively (as amended in the EP Legislative Resolution) InsReg Proposal, both dealing with enterprise group insolvency. In this context, the EP Legislative Resolution specifically refers to recital 20a InsReg Proposal. It seems that the EP mainly took into account the following phrase contained in recital 20a InsReg Proposal: "*The various liquidators and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor.*"

Specific terminology has been used in this thesis. In the EP Resolution, the EESC Opinion and the InsReg (Proposal), the term "liquidator" is used. This term refers to article 2(b) InsReg, and means "(…) *any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C.*" The EP Legislative Resolution prefers to use the term "insolvency representative" rather than "liquidator".[13] In this thesis, the term "liquidator" in the meaning of article 2(b) InsReg will be used. Whereas the EP Resolution and EESC Opinion mention "conflict of interest", the InsReg Proposal and EP Legislative Resolution make mention of "conflict of interests". In this thesis it is assumed that both terms mean the same. Where, instead of "conflict", "conflicts" is used, this will be treated as referring to multiple instances of either a "conflict of interest" or "conflict of interests". In general, throughout this thesis, the term "conflict of interest" is used, except in those places where the source being discussed uses the term "conflict of interests".

Conflict of interest recently made a prominent appearance in the legislative context of insolvency in the EU. What is remarkable, however, is that the EP Resolution, EESC Opinion, InsReg Proposal and EP Legislative Resolution do not explain what would amount to a conflict of interest involving a liquidator. Taking this into account, the goal of this thesis is to provide the European legislator with recommendations on the concept of "conflict of interest" in connection with the function of the liquidator. The EP Resolution, EESC Opinion, InsReg Proposal and EP Legislative Resolution raise the following three main questions:

(i) what is conflict of interest involving a liquidator?;

(ii) what should be the response to a conflict of interest involving a liquidator?;[14]

[13] Amendment 17 to article 2(b) InsReg Proposal justifies this as follows: "*The replacement of the word "liquidator" by "insolvency representative" is a horizontal amendment. This term is also used by UNCITRAL and unlike liquidator also emphasises the aim to rescue companies in difficulties.*"

[14] "Responded to" should be understood as to include all ways of treatment of the issue, including sanctions.

(iii) would harmonization of a rule on conflict of interest involving a liquidator be desirable?

The scope of this thesis is limited in four areas. First, it does not discuss the possible instruments of harmonization and/or the possible legal basis for such harmonization under EU law. For an excellent discussion on this topic, a report made by *Fletcher* and *Wessels* for the Netherlands Association for Civil Law is recommended.[15] Second, this thesis does not deal with "debtor in possession" ("**DIP**") proceedings[16] so as to focus on conflict of interest involving liquidators. Third, as the size of this thesis is limited, national case-law on conflict of interest is not discussed. Fourth, less detail is given on the relationship between and overlap of different disciplinary rules or rules of professional conduct that may apply to liquidators by virtue of other capacities in which they act.[17]

To answer the central questions, the following approach will be taken.

Chapter 1 introduces a number of insolvency-related international sources and national sources derived thereof. These international sources contain soft law or recommendations to national legislators. As becomes apparent, these international sources are important for a discussion of the theme of conflict of interest involving a liquidator. Two of these international sources have led to national rules and are taken into account in the context of the international sources. The end of the chapter gives a brief and general introduction to the function of a liquidator and to what requirements go with the function.

Chapter 2 conducts a limited comparative research into the legal regime in the Netherlands, Belgium, Germany and England, and how insolvency proceedings are governed, ethical requirements imposed on liquidators and the rules concerning conflict of interest.

Chapters 3 and 4 answer the first central question, namely what is a conflict of interest involving a liquidator. Chapter 3 focuses on the notion of conflict of interest involving a liquidator.

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[15] See I.F. Fletcher and B. Wessels, *Harmonisation of Insolvency Law in Europe*, Deventer: Kluwer 2012.

[16] DIP proceedings entail, according to Amendment 18 of the EP Legislative Resolution: "(…) *a debtor in respect of whom insolvency proceedings have been opened which do not involve the complete transfer of the rights and duties to administer the debtor's assets to an insolvency representative and where the debtor therefore remains at least partially in control of his assets and affairs* (…)".

[17] Examples of such other capacities are most importantly lawyer and accountant. These capacities are generally heavily regulated. The issue of the applicability of such rules and whether those would apply in other capacities will, however, concisely be touched upon in § 6.1., in which I discuss the autonomy of the profession of liquidators.

The first part assesses the notion of conflict of interest in non-legal literature that is concerned with (business) ethics and morality. This gives a working definition for conflict of interest catered to the specifics of the function of the liquidator. The second part looks into the notion of conflict of interest as it follows from the international sources and national sources derived thereof that were introduced in Chapter 1. The third part discusses conflict of interest involving liquidators in the context of (cooperation in) enterprise group insolvency. The fourth part assesses conflict of interest involving liquidators in the context of (cooperation in) main and secondary insolvency proceedings under the InsReg. The end of the chapter reviews the working definition given in this thesis of conflict of interest involving a liquidator, taking into account findings throughout this chapter.

Chapter 4 addresses the issue of demarcation between conflict of interest on the one hand and independence on the other, which is relevant due to the EP Resolution and EESC Opinion urging the EC to come up with legislative proposals for both. A definition is given of independence involving a liquidator. An example is given of the overlap that could exist between conflict of interest and independence. Finally, a possible way to demarcate the concepts is provided.

Chapter 5 concerns the second main question, how to respond to a conflict of interest. The first part looks into the responses that are proposed in non-legal literature. The second part looks into the responses that are proposed by the relevant international sources and national sources derived thereof. Third, my own thoughts on responses to a conflict of interest are presented. Fourth, I specifically look into the responses in the event of conflict of interest in enterprise group insolvency. Finally, sanctions are concisely discussed.

In Chapter 6 and in the light of findings in Chapter 2, it is assessed whether harmonization of rule as regards (among others) conflict of interest would be desirable. This assessment discusses: liquidators as seen as being part of an autonomous profession with cross-border powers; the expectations of the market in general and of creditors more specifically; the system of cooperation under the InsReg (Proposal); the proposed inclusion of conflict of interest(s) in the InsReg.

Hereafter, the main findings given in chapters 2 – 6 are briefly summarized. Finally, seven recommendations on harmonization of conflict of interest are presented to the EU legislator.

This thesis states the law as of June 2014.
All the websites referred to in the footnotes were lastly visited in June 2014.

Chapter 1 – An international perspective on a liquidator's function

This chapter introduces a number of international sources that will, due to their international origin and, most importantly, their design as model law or recommendations to legislators, be used as main sources for exploring the concept of conflict of interest involving a liquidator. The function of a liquidator is discussed and then, taking the aforementioned international sources into account, so are the requirements of the function.

§ 1.1. Relevant international sources

In 2004, the United Nations Commission on International Trade Law ("**UNCITRAL**"),[18] published the "UNCITRAL Legislative Guide on Insolvency Law", Parts One and Two ("**UNCITRAL Guide**"). The UNCITRAL Guide's purpose "(…) *is to assist the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. It is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.*"[19] The UNCITRAL Guide provides for 198 recommendations. In 2010, Part Three of the UNCITRAL Guide, "Treatment of enterprise groups in insolvency", was published ("**UNCITRAL Guide on Enterprise Groups**"). Its purpose is, among others, "(…) *to permit, in both domestic and cross-border context, treatment of the insolvency proceedings of one or more enterprise group members within the context of the enterprise group to address the issues particular to insolvency proceedings involving those groups and to achieve a better, more effective result for the enterprise group as a whole and its creditors* (…)".[20] In 2013, Part Four of the UNCITRAL Guide, "Directors' obligations in the period approaching insolvency" was published, focusing on "(…) *the obligations that might be imposed upon those responsible for making decisions with respect to the management of an enterprise when that enterprise faces imminent insolvency or insolvency becomes unavoidable.*"[21] While part Four has some relevance as regards conflict of interest in the context of insolvency, it does not (primarily) address liquidators and will, therefore, not be discussed in this thesis.

One of the twelve areas in which national jurisdictions are assessed by the World Bank[22] and the International Monetary Fund is the area of insolvency and creditor rights.

[18] See <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html>.
[19] See UNCITRAL Guide, p. 1.
[20] See UNCITRAL Guide for Enterprise Groups, pp. 1 – 2.
[21] See UNCITRAL Legislative Guide, part Four, p. 1.
[22] The World Bank Group consists of (i) the International Bank for Reconstruction and Development, (ii) the International Development Association, (iii) the International Finance Corporation, (iv) the

In 2001, the World Bank published the "World Bank Principles for Effective Insolvency and Creditor Rights Systems" ("**World Bank Principles**").[23] The World Bank Principles were revised in 2005 and 2011. The 2011 revision incorporates updates to the UNCITRAL Guide on Enterprise Groups. The World Bank Principles are described on the website as representing international consensus on best practices in insolvency and creditor rights.[24] In 2012, the World Bank Group member International Finance Corporation ("**IFC**") published the "Code of Ethics and Professional Conduct for Insolvency Administrators" in cooperation with the Ukrainian government ("**IFC/Ukraine Code**").[25] The IFC/Ukraine Code is to be adopted by two professional associations of liquidators in Ukraine. Its aim, among others, is to develop new qualification requirements for liquidators in Ukraine and to introduce a transparent and objective method for the appointment of liquidators. Due to its origin, in this thesis the IFC/Ukraine Code is treated as concretizing the World Bank Principles.

The European Bank for Reconstruction and Development ("**EBRD**") has been providing technical assistance to its countries of operations in the field of insolvency.[26] Like the World Bank, the EBRD assesses insolvency legislation in national jurisdictions. In 2007, the EBRD published the "EBRD Insolvency Office Holder Principles"[27] ("**EBRD Principles**"). Its purpose is to "(…) *articulate the core elements which should be reflected in the development or reform of an insolvency legal regime that provides for the appointment of office holders.*"[28] From 2005 to 2012, the EBRD cooperated with the Serbian Bankruptcy Supervisory Authority ("**BSA**") "(…) *on a project to improve the regulation, supervision and discipline of insolvency administrators.*"[29] In phase I of the project, two documents were made, being the "Regulation Establishing the National Standards for Administering the Bankruptcy Estate" ("**National Standards**") and the "Code of Ethics for Bankruptcy Administrators" ("**EBRD/BSA Code**").[30] The EBRD/BSA Code has the force of (secondary) law.[31]

Multilateral Investment Guarantee Agency and (v) the International Centre for Settlement of Investment Disputes.

[23] See <http://go.worldbank.org/RJ467Z4MC0>.

[24] See <http://go.worldbank.org/XM8XQMX2U0>.

[25] See <www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/insolvency/ukraine-ramps-up-insolvency-procedures.cfm>.

[26] See <www.ebrd.com/pages/sector/legal/insolvency/legal_framework>.

[27] See <www.ebrd.com/downloads/legal/insolvency/ioh_principles.pdf>.

[28] See EBRD Principles, p. 3.

[29] See <www.ebrd.com/pages/sector/legal/insolvency/legal_framework>.

[30] See <www.ebrd.com/downloads/legal/insolvency/ethics.pdf>.

[31] Article 27, paragraph 9 of the Serbian Bankruptcy Act provides for the legal basis of the EBRD/BSA Code. The EBRD/BSA Code was published in the "Official Gazette of the Republic of Serbia" under No 11/10, 5 March 2010. See also the EBRD/BSA Manual, p. 131.

To guide liquidators in applying the National Standards and the EBRD/BSA Code, the EBRD and BSA published the "Manual on the National Standards and Code of Ethics for Bankruptcy Administrators" ("**EBRD/BSA Manual**"). Here, the EBRD/BSA Code and Manual are treated as concretizing the EBRD (Principles).

§ 1.2. The function of a liquidator

According to the UNCITRAL Guide, the key objectives of effective insolvency law are as follows: [32]

- providing certainty to the market;
- maximization of the value of the assets;
- striking a balance between liquidation and reorganization;
- equitable treatment of similarly situated creditors;
- providing timely, efficient and impartial resolution of insolvency;
- ensuring a transparent and predictable insolvency law;
- recognition of creditors' rights and establishing clear rules for ranking priority claims.

Generally, a liquidator is appointed in the insolvency proceedings. The liquidator secures and manages the assets of the insolvent debtor. Depending on the type of (national) proceedings and the factual circumstances, the liquidator will sell the assets of the insolvent debtor, sell all or part of the business "going concern", or attempt to reorganize/restructure the business of the debtor.[33] In Principle §2.2 of the "Principles of European Insolvency Law", the function of the liquidator is described as follows:[34]

> An administrator is appointed in order to carry out the liquidation or the reorganisation. The administrator must be independent and must act impartially.

Liquidators play a major part in achieving the aforementioned main objectives of effective insolvency law, because of their important role in insolvency proceedings. The liquidator is confronted with the interests of various parties. In principle, the liquidator will first and foremost be required to pay attention to the interests of creditors.

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[32] See UNCITRAL Guide, pp. 9 – 14.
[33] See J.L. Westbrook, C.D. Booth, C.G. Paulus and H. Rajak, *A Global View of Business Insolvency Systems*, World Bank/Brill, Leiden/Boston: Martinus Nijhoff Publishers 2010, p. 207. See also UNCITRAL Guide, pp. 178 – 180, for a (non-exhaustive) list of duties and/or tasks of the liquidator. See also § 2.2, § 4.1, § 11.1 and § 12.1 in W.W. McBryde, A. Flessner and S.C.J.J. Kortman *et alii*, *Principles of European Insolvency Law*, Deventer: Kluwer Legal Publishers 2003, pp. 627 – 632.
[34] See W.W. McBryde, A. Flessner and S.C.J.J. Kortman *et alii*, *Principles of European Insolvency Law*, Deventer: Kluwer Legal Publishers 2003, pp. 30 – 32.

The liquidator has also to keep in mind the interests of the insolvent debtor. And, at least to a certain extent, the liquidator must keep in mind the interests of other parties that are involved in or affected by the insolvency proceedings, an example being the employees of the insolvent debtor. Often, the interests of these different parties will (inherently) conflict. In handling these matters, the liquidator is required to "(…) *act as a neutral person, taking into account all the interests concerned.*"[35]

§ 1.3. Requirements to the function of a liquidator

The central role of the liquidator, his powers in the insolvency proceedings and the broad spectrum of involved subjects indicates that the function of a liquidator comes with a number of requirements, as "(…) *the success, speed, and efficiency of such proceedings depend primarily on the administrators' skills, knowledge, and experience.*"[36] Being a "good" liquidator in the sense of having skill, knowledge and experience, however, is not enough.[37] According to the UNCITRAL Guide, "*In addition to having the requisite knowledge and experience, it may also be desirable for the insolvency representative to possess certain personal qualities* (…)".[38] Recommendation 115 of the UNCITRAL Guide includes both knowledge and experience-based requirements and so called "personal qualities":[39]

> The insolvency law should specify the qualifications and qualities required for appointment as an insolvency representative, including integrity, independence, impartiality, requisite knowledge of relevant commercial law and experience in commercial and business matters. The insolvency law should also specify the grounds upon which a proposed insolvency representative may be disqualified from appointment.

Principle D8 of the World Bank Principles, titled "Competence and Integrity of Insolvency Representatives" is similar to recommendation 115 of the UNCITRAL Guide and reads as follows:

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[35] See W.W. McBryde, A. Flessner and S.C.J.J. Kortman *et alii*, *Principles of European Insolvency Law*, Deventer: Kluwer Legal Publishers 2003, p. 31.
[36] See J.L. Westbrook, C.D. Booth, C.G. Paulus and H. Rajak, *A Global View of Business Insolvency Systems*, co-publication of The World Bank and Brill, Leiden/Boston: Martinus Nijhoff Publishers 2010, p. 207.
[37] According to the Dutch author Aerts, in addition to having a certain knowledge (of applicable insolvency and general law) and managing skills, integrity (including but not limited to financial integrity) should also be seen an element of the characterization of the liquidator, see W. Aerts, *De curator en het tuchtrecht – Een gedragscode voor curatoren?* in S.C.J.J. Kortmann, N.E.D. Faber, J.J. van Hees, S.H. de Ranitz *et alii*, *De curator, een octopus*, Deventer: W.E.J. Tjeenk Willink 1996, p. 332.
[38] See UNCITRAL Guide, p. 175. In addition to what I refer to as professional and ethical requirements, a third relevant category of requirements can be identified. This category could be referred to as "standards of work", see EBRD/BSA Manual, p. 126.
[39] See UNCITRAL Guide, p. 188.

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

The EBRD Principles make a more clear distinction between these two types of requirements. Principle 1 of the EBRD Principles, titled "Qualifications & Licensing Generally" puts in place a number of requirements regarding (continuing) education and experience. According to Principle 12 EBRD Principles ("Code of Ethics"), the "personal qualities" mentioned by the UNCITRAL Guide are to be seen as ethical in nature:

The law should encourage and facilitate the development of a code of ethics for office holders, preferably through a professional body
Such a code should deal with appropriate conduct as, for example:
• the need for impartiality
• the need for integrity and accountability
• the need for independence
• the need to avoid the perception of possible conflicts of interest
• the need for proper conduct between office holders (as, for example, if they are competing for appointment to an insolvency case).
The law could compel the application of a 'code' of ethics, either by setting that code or requiring that a code that has been established by a professional body be recognised as binding on office holders.

Conflict of interest, whatever its definition or scope, must at first sight be seen as something relevant in the light of "ethical" requirements or "personal qualities", as follows from Principle 12 of the EBRD Principles and from the UNCITRAL Guide.[40] Hereafter, knowledge and experience-based requirements are referred to as "professional requirements", as opposed to "ethical requirements", which include less measureable attributes such as integrity, independence, impartiality and the absence of conflict of interest.

[40] See UNCITRAL Guide, p. 176.

Conflict of interest is also mentioned in the UNCITRAL Guide on Enterprise Groups. Recommendation 233 and recommendation 252, both titled "Conflict of interest", read as follows:[41]

> The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members. Such measures may include the appointment of one or more additional insolvency representatives.

The World Bank Principles, inspired by the UNCITRAL Guide on Enterprise Groups, deal with the insolvency of domestic and international enterprise groups in Principle C16 and C17 respectively. Principle C16.5 reads as follows:[42]

> (…) The system should permit a single or the same insolvency representative to be appointed with respect to two or more enterprise group members, and should include provisions addressing situations involving conflicts of interest. Where there are different insolvency representatives for different enterprise group members, the system should allow insolvency representatives to communicate directly and to cooperate to the maximum extent possible.

In the UNCITRAL Guide on Enterprise Groups, recommendation 233 explicitly refers to recommendation 117 and the accompanying explanation of that recommendation in the UNCITRAL Guide. "Regular" conflict of interest and conflict of interest in the event of the insolvency of an enterprise group are therefore, according to UNCITRAL, related concepts. The EBRD Principles do not contain a provision on insolvency in the context of enterprise groups.

[41] The two recommendations are similar and apply to (i) domestic enterprise groups and (ii) international enterprise groups respectively.
[42] Principle 17.4 is quite similar to Principle C16.5, except for the fact that the appointment of a single or the same is only recommended in "specific circumstances".

Chapter 2 - The Netherlands, Belgium, Germany and England

Following, is a comparative assessment of four jurisdictions: the Netherlands, Belgium, Germany and England. As "(…) *an understanding of an insolvency regime depends upon knowing the rules of the process of selecting administrators and of the safeguards for the administrator's trustworthiness, ongoing qualification, and integrity*.",[43] I will primarily focus on the appointment (and removal) of the liquidator, the presence of ethical requirements (regardless of their form or legal status) and, in particular, provisions dealing with conflict of interest that are part of such a scheme of ethical requirements.[44]

§ 2.1. The Netherlands

§ 2.1.1. Legislation

The Dutch Bankruptcy Act ("**Fw**") provides for three different insolvency proceedings, being (i) a procedure aimed at liquidation of the insolvent estate, (ii) a procedure that provides for a stay in the event of financial distress and, finally, (iii) a procedure that is solely aimed at bankruptcy of natural persons. Hereafter, only the liquidation proceedings are discussed. The debtor and one or more of his creditors can request the court to open the insolvency proceedings. The court will open these proceedings after assessing whether the debtor is in a situation where he has stopped paying his debts.[45] Simultaneously with the opening of the insolvency proceedings, the court will appoint one or more liquidators and a judge commissioner.[46] The duty of the liquidator is to manage and liquidate the estate,[47] whereas the judge commissioner has to supervise the management and liquidation of the insolvent estate.[48] Based on the fact that the Dutch Bankruptcy Act contains no provisions dealing with (professional or ethical) qualifications or qualities, one may conclude that the position of liquidator is open to potentially anyone. From the explanatory memorandum accompanying the Dutch Bankruptcy Act, however, follows one ethical requirement: the liquidator needs to be impartial to both the creditors and the debtor. In addition to that, the liquidator must possess knowledge about relevant laws.[49] By virtue of this, there is a long tradition of appointing only lawyers as liquidators.[50]

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[43] See J.L. Westbrook, C.D. Booth, C.G. Paulus and H. Rajak, *A Global View of Business Insolvency Systems*, World Bank/Brill, Leiden/Boston: Martinus Nijhoff Publishers 2010, p. 207.
[44] Hereafter, I treat the words *belangenverstrengeling* and *belangenconflict* as the Dutch and *Interessenkonflikt* and *Interessenkollision* as the German translations of conflict of interest.
[45] Article 1 Fw.
[46] Article 14(1) Fw.
[47] Article 68 Fw.
[48] Article 64 Fw.
[49] See *Kamerstukken* (parliamentary papers) *II*, 1890/91, 100. 3, p. 46.
[50] See B. Wessels, *Wessels Insolventierecht IV*, 3rd edition, Deventer: Kluwer 2010, para. 4091a.

A liquidator can be removed from his position, or additional liquidators can be appointed, following a proposal by the judge commissioner or by a reasoned application of a creditor, the creditor committee or the debtor.[51]

§ 2.1.2. Court-established principles and directives

The lawyers are appointed from a list of candidate liquidators, which list is created and kept by the courts.[52] For a long time, the requirements for being listed as candidate liquidator (and the circumstances that would lead to removal from the list) were not publically known. In March 2013, Recofa, the Dutch consultation body of judge commissioners in insolvency proceedings, published a set of principles ("**Recofa Principles**") that shed some light in this respect.[53] The Recofa Principles require lawyers, seeking to be listed as potential liquidator, to have certain qualities. Most of these qualities are professional in nature (such as having sufficient knowledge and experience), however, one ethical requirement is set. It is required that the slightest doubt about the integrity of the liquidator is absent.[54] Integrity, however, is neither defined nor described. Since Dutch legislation and the Recofa Principles lack any provisions in this regard,[55] it is unclear if and to what extent a lawyer can protest against a decision of the court to remove him from the list of prospective liquidators or to deny his enlistment as prospective liquidator. In article 3.3 it is merely provided that the liquidator has a right to be heard before his removal from the list is effectuated. A number of liquidators have brought actions before civil courts, arguing that their removal from the list constituted an unlawful act of the state. [56] The general line that follows from these cases is that the courts have a great degree of discretion to consider insolvency appointments. Depending on the circumstances, however, the removal from the list of prospective liquidators can indeed constitute an unlawful act.[57] Article 4 deals with the appointment in individual insolvency proceedings. According to this provision, the court will always appoint the liquidator that it sees as most suitable. Additionally, the court may put liquidators in certain categories dependent on their experience, education and functioning.

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[51] Article 73 Fw.
[52] See B.Wessels, *De onafhankelijkheid van de faillissementscurator*, Zutphen: Uitgeverij Paris 2013, p. 26.
[53] <www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Documents/130315-Benoemingenbeleid.pdf>.
[54] Article 1.1.2 d Recofa Principles.
[55] Article 3.1 Recofa Principles merely provides for a number of grounds that may play a role in the decision to remove a liquidator from the list.
[56] See for example the judgments of the *Rechtbank* (court of first instance) The Hague, 18 March 2010, *JOR* 2011/156, *Rechtbank* The Hague, 14 June 2011, *JOR* 2011/202, *Rechtbank* The Hague, 11 Octobre 2012, *RI* 2013/20 and *Gerechtshof* (court of appeal) The Hague, 7 May 2013, *JOR* 2013/263. See also R.D. Vriesendorp, *De curator en de rechter: soms net (geen) egeltjes*, *TvI* 2010, 12.
[57] In the judgment of the *Rechtbank* The Hague, 18 March 2010, *JOR* 2011/156, for example, the court ruled that the removal of the lawyer from the list of prospective liquidators constituted an unlawful act. The liquidator had to be re-admitted to the list of prospective liquidators.

Finally, it is put forward that the court will strive for a balanced distribution of insolvency appointments, with the aim of ensuring that liquidators can keep their knowledge and experience to a sufficient level. Another relevant publication by Recofa is a set of directives ("**Recofa Directives**") with regard to insolvency proceedings.[58] According to article 1.2(a), the clerk of the court will contact the liquidator that has been chosen for appointment by the court, and will ask the liquidator whether he is free to take on his appointment. In the event that the liquidator doubts about whether he is free to be appointed as liquidator, he has to substantiate these doubts. Lacking any further detail, article 1.2(a) may be interpreted in different ways. It could, for example, merely refer to whether the liquidator is burdened by other work but it could also refer to ensuring that the liquidator has no conflict of interest. In practice, it seems that article 1.2(a) is (also) used in such a way as to include the latter.[59]

§ 2.1.3. Professional association - INSOLAD

The Dutch association of insolvency specialized lawyers, INSOLAD, has established a set of practice rules for its members ("**INSOLAD Practice Rules**"). INSOLAD has around 500 members and around 30 – 40% of all appointed liquidators in the Netherlands are members of the association.[60] A substantial number of liquidators that are appointed in insolvency proceedings are, therefore, not bound to the INSOLAD Practice Rules. According to article 1.1 of the INSOLAD practice rules, the liquidator should abide to the following fundamental principles: (i) independence, (ii) integrity, (iii) objectivity with regard to professional judgment and (iv) proper conduct. Conflict of interest is not mentioned as a fundamental principle. Nevertheless, three articles seem to deal with conflict of interest or the appearance thereof. Article 3.3 forbids the liquidator to directly sell assets to natural persons or legal entities he has a direct or indirect special relationship with. According to the explanation of the rule, this is prohibited by the principles of objectivity, independence and integrity. The explanation accentuates that any appearance of a conflict of interest should be avoided and recommends the liquidator, in case of doubt, to confer with the judge commissioner, for example about the appointment of a second liquidator, temporary or not. Conflict of interest is also mentioned in article 4.3, which deals with litigation by or on behalf of the liquidator. The central issue is whether or not the litigation is to be conducted by the liquidator himself or his law firm – as opposed to an external law firm.

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[58] <www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Documents/Recofa-richtlijnen%20voor%20faillissementen%20en%20surseances%20van%20betaling.pdf>.

[59] See <www.bnr.nl/incoming/678881-1306/bnr-juridische-zaken-toezicht-op-curatoren-moet-beter> for a radio interview with B. Wessels and R. Mulder (a Dutch liquidator) on the topic of supervision of Dutch liquidators. At around six minutes and fifteen seconds, Mulder refers to article 1.2(a) Recofa Directives after being asked whether the court assures that a liquidator has no conflict of interest.

[60] See B. Wessels, *Wessels Insolventierecht IV*, 3rd edition, Deventer: Kluwer 2010, par. 4091a.

In principle, the liquidator must seek the assistance of an external lawyer for litigation. According to the explanation, litigation by the liquidator himself or his law firm could give the appearance of a conflict of interest. That is, it could be perceived that the interest of the insolvent estate is connected or subjected to the interest of the liquidator or his law firm to generate revenue from the litigation. Finally, article 13.2 deals with conflict of interest in enterprise group insolvency. In the event that a conflict of interest arises between one or more estates in which the same liquidator has been appointed, the liquidator has to confer with the judge commissioner about a solution. In the first (public) insolvency report thereafter, the liquidator has to report the conflict of interest and the solution that was chosen to deal with it. The explanation of article 13.2 propounds that conflicts of interest often arise in enterprise group insolvency. From the explanation, on the other hand, it follows that the appointment of only one liquidator in enterprise group insolvency leads to more efficiency. As such, the appointment of only one liquidator in enterprise group insolvency is not a problem, as long as the conflicts of interest between the estates are recognized and there is transparency with regard to these conflicts. If there is any reason for that, either (i) additional liquidators should be appointed or (ii) a liquidator should be replaced.

INSOLAD has some form of internal disciplinary law within the association.[61] Interested parties can mount a complaint against a member of INSOLAD. The review commission of INSOLAD will then, according to their regulations, assess whether or not the liquidator has acted in accordance with the law and whether or not the liquidator has acted in a way as to sufficiently demonstrate integrity, objectivity, independence, care, competence, effectiveness and respect to those involved in the insolvency proceedings. In this assessment, the INSOLAD Practice Rules are taken into account.[62] The review commission, however, does not have the power to sanction the liquidator, nor can it make any judgment about the liquidator's liability.[63]

§ 2.2. Belgium

Belgian insolvency law provides for two acts that are relevant for commercial insolvency. These are the 2009 Business Continuity Act and the 1997 Bankruptcy Act ("**Faill.W.**"). The main function of the Business Continuity Act is to provide, among others, "merchants"[64] with a temporary form of protection against their creditors. During this period, the debtor can employ recovery or restructuring plans.

[61] See <www.insolad.nl/toetsingsreglement.html>.
[62] Article 2 "Reglement Toetsingscommissie INSOLAD", <www.insolad.nl/toetsingsreglement.html>.
[63] Article 5 "Reglement Toetsingscommissie INSOLAD".
[64] See article 3 Business Continuity Act. "Merchants" are commercial subjects (including both natural and legal persons employing commercial activities).

The judicial reorganization provided by the Business Continuity Act requires a situation in which the continuity of the debtor is threatened. The Bankruptcy Act is aimed at liquidation of the estate of the debtor and also applies only to merchants. Hereafter, only the Belgian Bankruptcy Act is discussed. The bankruptcy proceedings can be opened by the court if there is a situation in which the merchant has lastingly stopped paying his debts and where the creditworthiness of the merchant is threatened.[65] Similarly to Dutch law, the court appoints a judge commissioner to oversee the proceedings and one or more liquidators.[66] The liquidators are chosen from list made by the general meeting of the (commercial) court. Only lawyers that are admitted to a (local) Belgian bar and are competent in and have enjoyed special education with regard to insolvency proceedings can be listed as prospective liquidator.[67] Other professionals can, however, be appointed as additional liquidator.[68] The specific procedural rules for the application process are laid down in a royal decree.[69] Most importantly, according to this royal decree, the court has to substantiate its refusal to the lawyer seeking enlistment. The prospective or listed liquidator can then appeal to the court of appeal against decisions of the general meeting of the court concerning refusal of admission to the list as prospective liquidator or removal from that list.[70] If a liquidator is admitted to the list, he is required to take an oath before the president of the court. The liquidator swears allegiance to the Belgian crown, obedience to the constitution and laws of the Belgian nation and swears to fulfill his duties (i) honorably, (ii) conscientiously, (iii) meticulously and (iv) honestly.[71] Contrary to Dutch law, the Belgian Bankruptcy Act does provide for a number of provisions dealing with conflict of interest. The liquidator is obliged to notify the president of the court of any conflict of interests or appearance of partiality.[72] In any event, the liquidator is required to notify the president of the court in case he or one of his business partners or employees has carried out any work for the (i) insolvent debtor or (ii) its directors or business managers or (iii) a creditor in the eighteen months before the bankruptcy proceedings were opened. The president of the court then determines whether the facts mentioned in the notification disqualify the liquidator. Originally, the statements of the liquidator on conflicts of interest would be included in the public insolvency report.

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[65] Article 2 Faill.W.
[66] Article 11 Faill.W. The court has, under certain circumstances, a discretionary power to appoint a provisional liquidator prior to the declaration of bankruptcy, see article 8 Faill.W.
[67] Article 27 Faill.W.
[68] Article 27 Faill.W. See also E. Dirix and R. Fransis, *National Report for Belgium* in D. Faber, N. Vermunt, J. Kilborn and T. Richter *et alii*, *Commencement of Insolvency Proceedings*, New York: Oxford University Press 2012, p. 58.
[69] See the royal decree titled "KB van 5 december 1997 in uitvoering van artikel 27, lid 5 Faill. W." See also E. van Camp, *De curator* in H. Braeckmans, H. Cousy, E. Dirix, B. Tilleman en M. Vanmeenen *et alii*, *Curatoren en vereffenaars: actuele ontwikkelingen*, Antwerpen – Oxford: Intersentia 2006, p. 378.
[70] Article 28 Faill.W.
[71] Article 30 Faill.W.
[72] Article 30 Faill.W.

The Belgian Constitutional Court, however, decided that this would be disproportionally detrimental to confidentiality duties liquidators have in their capacity as lawyers.[73] The liquidator can be either removed (ex officio by the court or at his own request) or an additional liquidator can be appointed.[74] Article 32 Faill.W. provides for another option in case of a conflict of interest – the appointment of a liquidator "ad hoc". The appointment of the liquidator ad hoc can be at the request of the original liquidator(s) or ex officio by the court. The position of a liquidator ad hoc is different from the position of an additional liquidator. The additional liquidator will team up with the liquidator who was originally appointed, whereas the liquidator ad hoc fulfills his duties in an independent position from the original liquidator. The liquidator ad hoc is appointed in order to take the place of the original liquidator in regard to certain tasks or for a certain time in order to "solve" a conflict of interest.[75] The additional liquidator will, in principle, be in function until the bankruptcy proceedings are terminated, whereas the liquidator ad hoc is only temporarily appointed. In Belgium, no specific association of liquidators exists.[76]

§ 2.3. Germany

§ 2.3.1. Legislation

The goal of the German Insolvency Ordinance ("**InsO**") is laid down in section 1 InsO: the purpose of the insolvency proceedings is the collective satisfaction of the creditors either by (i) liquidation of the debtor's assets and distribution of the proceeds, or, alternatively, (ii) by reaching an arrangement in an insolvency plan, predominantly in order to safeguard the continuity of the business. Both the creditors and debtor can request the court to open insolvency proceedings.[77] The court shall only open the insolvency proceedings in the event that there is a reason to open such proceedings.[78] These reasons are (i) insolvency,[79] (ii) imminent insolvency[80] and (iii) overindebtedness.[81]

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[73] See *Arbitragehof*, 24 March 2004, nr. 50/2004.
[74] Article 31 Faill.W. See E. van Camp, *De curator* in H. Braeckmans, H. Cousy, E. Dirix, B. Tilleman en M. Vanmeenen *et alii*, *Curatoren en vereffenaars: actuele ontwikkelingen*, Antwerpen – Oxford: Intersentia 2006, p. 388.
[75] See E. van Camp, *De curator* in H. Braeckmans, H. Cousy, E. Dirix, B. Tilleman en M. Vanmeenen *et alii*, *Curatoren en vereffenaars: actuele ontwikkelingen*, Antwerpen – Oxford: Intersentia 2006, pp. 391 – 392. The liquidator ad hoc, therefore, plays a similar role as the German special liquidator.
[76] See E. Dirix and R. Fransis, *National Report for Belgium* in D. Faber, N. Vermunt, J. Kilborn and T. Richter *et alii*, *Commencement of Insolvency Proceedings*, New York: Oxford University Press 2012, p. 61.
[77] Sections 13 – 15a InsO.
[78] Section 16 InsO.
[79] Insolvency is, as a rule, presumed in the event that the debtor has stopped paying his debts, see section 17 InsO.
[80] This can only be a reason to open insolvency proceedings in the event that the debtor has filed the request, see section 18 InsO.
[81] Overindebtedness requires the assets of the debtor to no longer cover the existing debts. Moreover, it has to be unlikely that the business has any continuity, see section 19 InsO.

If the court finds the request to open the insolvency proceedings admissible, the first stage of the insolvency proceedings commences. During this stage, the court will assess whether the insolvency proceedings will be opened. The court may take provisional measures, which include, among others, the appointment of a provisional liquidator and a provisional creditors' committee.[82] The court may provide the provisional liquidator with either "weak" or "strong" powers. If the debtor meets a number of criteria related to the size of his business, the courts will, in principle, be obliged to appoint a provisional creditors' committee.[83] The insolvency proceedings will be commenced with the opening of the insolvency proceedings.[84] The court then appoints a (final) liquidator. From the group of people that are available to take on the function of liquidator, the court shall appoint as liquidator a natural person who is (i) suited to the insolvency case at hand, (ii) experienced in business affairs and (iii) independent of the creditors and the debtor.[85] The independence, required by section 56 InsO, is not already ruled out in the event that (i) (appointment of) the liquidator in question was proposed by the debtor or by a creditor or (ii) the liquidator has given the debtor advice of general nature about the course and consequences of the insolvency proceedings, before the request to open those proceedings was filed. Similarly with the Dutch and Belgian practice, German courts select the liquidator for appointment from a list of prospective liquidators.[86] Creditors, however, have the power to influence the appointment of the liquidator. According to section 56a InsO, the court, in principle, shall allow the provisional creditors' committee to express their view on the professional and personal requirements that need to be met by the liquidator that is to be appointed. The court has to keep the requirements that are set out by the provisional creditors' committee into account when appointing another liquidator. The provisional creditors' committee can also unanimously propose a liquidator. The court may only refuse to appointment this liquidator in the event that he is not suitable for the insolvency case at hand. In the order opening the insolvency proceedings, the court has to provide the reasons for not appointing the liquidator that was proposed unanimously.[87] According to *Paulus* and *Berberich*, a conflict of interest may be such a reason for the unsuitability of a specific liquidator.[88]

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[82] Section 21 InsO.
[83] Section 22a InsO.
[84] See section 27 InsO. The Insolvency Statute also provides for debtor in possession proceedings, see sections 270 – 285 InsO. These proceedings are not discussed in this thesis.
[85] Section 56 InsO.
[86] See C.G. Paulus and M. Berberich, *National Report for Germany* in D. Faber, N. Vermunt, J. Kilborn and T. Richter *et alii*, *Commencement of Insolvency Proceedings*, New York: Oxford University Press 2012, p. 338.
[87] See section 27 InsO.
[88] See C.G. Paulus and M. Berberich, *National Report for Germany* in D. Faber, N. Vermunt, J. Kilborn and T. Richter *et alii*, *Commencement of Insolvency Proceedings*, New York: Oxford University Press 2012, p. 339.

After the insolvency proceedings have been opened, the creditors' assembly can, in the first meeting following the appointment of a liquidator, elect a different person to replace the liquidator.[89] Similarly with the unanimous proposal of the provisional creditors' committee, the court can only refuse appointment of the elected person in the event that he is not suitable for the insolvency case at hand. The insolvency court may dismiss a liquidator for an important reason ex officio or at the request of the liquidator, the creditors' committee or the creditors' assembly.[90] There are no specific provisions on conflict of interest in the InsO. However, a common practice in responding to a conflict of interest has arisen in Germany. It consists of the appointment of an additional special liquidator.[91] One of the reasons for appointing a special liquidator exists in the event that a liquidator is legally unable to discharge his duties, which includes situations where a danger of a conflict of interest exists.[92]

§ 2.3.2. Professional association - VID

The "Verband Insolvenzverwalter Deutschlands" ("**VID**") is a professional association of German liquidators, with approximately 460 members.[93] Members of the VID are required to comply with the "Berufsgrundsätze der Insolvenzverwalter" ("**VID Principles**"). According to section 1, the liquidator is required to be, in every function with respect to the insolvency proceedings, (i) independent, (ii) objective, (iii) experienced in business and (iv) willing to serve the interests of all those involved in the insolvency proceedings. Section 4 deals with the independence of a liquidator. According to section 4(1), a liquidator is required to be independent from the debtor and the creditor and, moreover, to avoid anything that could reasonably constitute doubt as regards his independence. It should therefore be clearly apparent that the liquidator is independent. Section 4(2) specifies those situations in which the liquidator is not independent: (i) the liquidator has a (close) relationship[94] with the debtor, (ii) the liquidator, a person with whom the liquidator has a close relationship or a business partner of the liquidator is a creditor of the debtor or a garnishee, (iii) the liquidator or a business partner of the liquidator has represented or advised the debtor or a (close) relation of the debtor in the four years before the request to open the insolvency proceedings has been filed and (iv) a major creditor, a credit insurer or another institutional creditor has been consistently using the services of the liquidator or a business partner in other, insolvency related matters.

[89] See section 57 InsO.
[90] Section 59 InsO. See also section 21 InsO with regard to the dismissal of the provisional liquidator.
[91] The *Sonderinsolvenzverwalter*.
[92] See M.C. Frege, U. Keller, E. Riedel *et alii*, *Handbuch der Rechtspraxis – Insolvenzrecht*, München: C.H. Beck 2008, pp. 468ff.
[93] See <www.vid.de>.
[94] Reference is made to those relationships specified in section 138 InsO.

On the other hand, the liquidator is not already seen as dependent in the following situations: (i) a liquidator has been proposed by the debtor or a creditor, (ii) the liquidator or a relation, associate or business partner of his has provided services in a different capacity with regard to other matters to one of the creditors, except under the circumstances mentioned under (iv) above or (iii) the liquidator or a relation, associate or business partner of his has been appointed as liquidator in insolvency proceedings of a legal entity in the group of the debtor. Section 7 obliges the liquidator, before and after his appointment, to notify the court of circumstances that might raise doubts about his suitability and independence. Section 8 provides for a number of prohibitions with regard to contracting, acquisition and utilization as regards the insolvent estate. The liquidator, his relations or his business partners are prohibited from (i) representing or advising the debtor, a relation of the debtor or a creditor during the insolvency proceedings, (ii) engaging in a contractual relationship with businesses they are involved with, directly or indirectly, without notifying the court and, additionally, the contractual relationship must stand up to scrutiny in compliance with the arm's-length principle, (iii) accepting payment for performances that are done within the window of the insolvency proceedings and that do not benefit the insolvent estate, (iv) directly or indirectly acquiring assets or rights from the insolvent estate, including acquiring those assets or rights at a public auction and, finally, (v) assuming a position in relation to pool administration in proceedings insofar as one of them has the function of liquidator. Failure to comply with the VID Principles may lead to a warning, reprimand or expulsion from the VID, see section 11.

§ 2.4. England

§ 2.4.1. Legislation

In England, four different types of insolvency proceedings are relevant with regard to companies, being [95] (i) administrative receivership, (ii) administration, (iii) winding-up/liquidation and (iv) company voluntary arrangements with creditors. The main rules relevant for these proceedings are the Insolvency Act 1986 ("**IA**") and its schedules. Hereafter, only the administration and winding-up proceedings are briefly discussed.[96]

[95] See R. Goode and E. McKendrick, *Goode on Commercial Law*, London: Penguin Books 2010, p. 906.
[96] The administrative receiver (merely) owes his duties to the debenture holder, see R. Goode, *Principles of Corporate Insolvency Law*, London: Sweet & Maxwell 2011, p. 316. Administrative receivership has been, as Goode puts it, partially "abolished" with the enactment of the Enterprise Act 2002. Most importantly, a prohibition to appoint an administrative receiver now exists under a "qualifying floating charge" that has been created after 15 September 2003. Administrative receivership is also not listed as an insolvency proceeding pursuant to article 2(a) InsReg in Annex A of the InsReg. The company voluntary arrangement is "(…) *a composition in satisfaction of the company's debts or a scheme of arrangement of its affairs, the composition or scheme resulting from acceptance of a proposal by the directors to the company and its creditors*.", see R. Goode, *Principles of Corporate Insolvency Law*, London: Sweet & Maxwell 2011, p. 494.

Unlike in the Netherlands and Belgium, liquidators in England are usually accountants.

Winding-up proceedings will result in liquidation of the assets of the company and can take the form of either (i) voluntary winding-up (by a resolution of members of the company) or (ii) compulsory winding-up (by an order of the court, following a petition by, among others, the company or its creditors).[97] Either form of winding-up may be a follow up of the administration proceedings.

In voluntary winding-up proceedings, both the meeting of creditors and the company may nominate a liquidator. Unless the court decides otherwise, the nominee of the creditors prevails.[98] The usual grounds for compulsory winding-up proceedings are that the company has stopped paying its debts and that it is "just and equitable" for the company to be wound up.[99] In compulsory winding-up proceedings, following the winding up order of the court, the official receiver is appointed as liquidator (unless a private liquidator is directly appointed).[100] The ordinary course of affairs then is that the official receiver convenes a meeting of creditors and contributories, in order to nominate a liquidator for appointment.[101] The liquidator nominated by the creditors prevails.[102] In compulsory winding-up proceedings, the liquidator is regarded as an officer of the court, which requires the liquidator to "(...) *act with scrupulous fairness and impartiality, avoiding "dirty tricks"* (...) *and his status as an officer of the court is relevant to the propriety of contracts into which he enters.*"[103] The liquidator is required to be a qualified insolvency practitioner.[104] In compulsory winding-up proceedings, the liquidator may be removed from his office by an order of the court or by a general meeting of creditors of the company.[105] The liquidator can also resign from office on his own initiative by giving notice to the court.[106]

Administration proceedings are described as collective rehabilitative proceedings, for "(...) *the benefit of the company and the general body of creditors*."[107]

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[97] See section 124 IA. See R. Goode, *Principles of Corporate Insolvency Law*, London: Sweet & Maxwell 2011, pp. 167 – 168 for an overview of all those having *locus standi*.
[98] See section 100 IA.
[99] See R. Goode, *Principles of Corporate Insolvency Law,* London: Sweet & Maxwell 2011, pp. 161 – 162.
[100] Section 136(2) IA.
[101] Section 136(4) IA. See R. Goode, *Principles of Corporate Insolvency Law*, London: Sweet & Maxwell 2011, p. 151.
[102] See section 139(3) IA.
[103] See R. Goode, *Principles of Corporate Insolvency Law*, London: Sweet & Maxwell 2011, pp. 151 – 152. In voluntary winding-up proceedings, the liquidator is not regarded as an officer of the court.
[104] Section 230(3) and (4) IA.
[105] See section 172(1) and (2) IA.
[106] Section 172(6) IA.
[107] See R. Goode and E. McKendrick, *Goode on Commercial Law*, London: Penguin Books 2010, p. 927.

The objectives of administration proceedings are, in this particular order,[108] (i) rescuing the company as a going concern or (ii) achieving a better result for the company's creditors compared to the result they would get from liquidation of the company or (iii) the realization of property with the aim of making a distribution to secured or preferential creditors. Administration can be initiated either (i) by a court order[109] following the administration application of a party with locus standi[110] or, more commonly, either by (ii) the holder of a qualifying floating charge [111] or (iii) the debtor company or its directors.[112] In the event a holder of a qualifying floating charge appoints an administrator, it is not required that the company is or is likely to become unable to pay its debts.[113] The liquidator is regarded as an officer of the court, even if he is not appointed by the court.[114] It is required that the person that is to be appointed in administration proceedings is qualified to act as an insolvency practitioner in relation to the company.[115] Among other reasons,[116] the liquidator can either resign on his own initiative[117] or he can be removed from his position by the court.[118] *Goode* points out that the courts have a wide discretion in taking measures but that courts, at the same time, are not likely to remove a liquidator from his position without cause.[119]

In both administration and winding-up proceedings, the liquidator is required to be "qualified". Being qualified requires either being licensed to act as an insolvency practitioner by a (i) "Recognized Professional Body" ("**RPB**") or (ii) being authorized by the Secretary of the State ("**SoS**") of the Department for Business, Innovation and Skills ("**BIS**").[120]

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[108] The liquidator may only pursue the objective under (ii) if it is not reasonably practicable to achieve the objective under (i) and the objective under (ii) would achieve a better result for the company's creditors as a whole, see section 3(3) Sched. B1 IA. Similarly, the objective under (iii) may only be pursued if (ii) is not reasonably practicable to achieve and if pursuing (iii) does not unnecessarily harm the interests of the creditors as a whole, see section 3(4) Sched. B1 IA.
[109] Para. 11 – 13 Sched. B1 IA. The procedural provisions with regard to the application are laid down in the Insolvency Rules 1986.
[110] Para. 12 Sched. B1 IA. Most importantly, the company itself or its directors or one or more creditors of the company have *locus standi*.
[111] Para. 14 – 21 Sched. B1 IA.
[112] Para. 22 – 34 Sched. B1 IA.
[113] See for this requirement with regard to court and company (or directors) initiated administration proceedings respectively para. 11(a) and para. 27(2)(a) Sched. B1 IA and section 123 IA.
[114] Para. 5 Sched. B1 IA.
[115] Para. 6 Sched. B1 IA.
[116] See for an overview R. Goode, *Principles of Corporate Insolvency Law*, London: Sweet & Maxwell 2011, pp. 469 – 470.
[117] Para. 87 Sched. B1 IA and rule 2.119 – 2.121 Insolvency Rules 1986.
[118] Para. 88 Sched. B1 IA.
[119] See R. Goode, *Principles of Corporate Insolvency Law*, London: Sweet & Maxwell 2011, p. 470.
[120] However, under the draft "Deregulation Bill", the SoS would not anymore be able to directly license liquidators, see <www.gov.uk/government/news/government-unveils-deregulation-bill>.

The Insolvency Service ("**IS**") is an executive agency of BIS and is, among others, responsible for the authorization and regulation of the insolvency profession.[121] From a memorandum of understanding regarding the consistency in authorizing insolvency practitioners ("**MoU**"),[122] concluded between the SoS and the RPB's in 2011, it follows that each RPB needs to apply an ethical code or guide to its members. These ethical codes or guides have to ensure that the authorized insolvency practitioners follow "(…) *the appropriate codes of integrity, objectivity, professional competence and due care, confidentiality, professional behavior, due skill and courtesy*."[123] The RPB's and the SoS participate in the development of professional and ethical standards through the "Joint Insolvency Committee".[124]

§ 2.4.2. RPB's and the Insolvency Code of Ethics

In 2006, it was agreed that the 2004 "Insolvency Ethical Guide" should be altered to more closely align with a code of ethics that was drafted by the "International Federation of Accounting Bodies". In 2007, a draft of the new "Insolvency Ethical Guide" was published. This new guide, subsequently, was adopted by the RPB's. The result of this is that all insolvency practitioners are now bound to a largely similar ethical requirements, regardless of which RPB licenses them.[125] The "Insolvency Code of Ethics" ("**ICE**") of November 2008 consists of two parts. Part 1 deals with the "General Application of the Code" and Part 2 deals with the "Specific Application of the Code". Compared to the INSOLAD Practice Rules and the VID Principles, the ICE is quite extensive.[126] Due to the sheer size of the ICE it is not discussed here in as much detail as the INSOLAD Practice Rules and the VID Principles.

ICE Part 1: General Application of the Code

According to para. 3, the ICE and the spirit that underlies it govern the conduct of the insolvency practitioner. Para. 4 requires the liquidator to comply with a number of "Fundamental Principles", being (i) integrity, (ii) objectivity, (iii) professional competence and due care, (iv) confidentiality and (v) professional behavior. Unlike the EBRD/BSA Manual's notion of conflict and interest (in which conflict of interest and objectivity are described as different concepts), the following is the essence of objectivity according to the ICE:

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[121] <www.bis.gov.uk/insolvency>.
[122] See <www.bis.gov.uk/insolvency/insolvency-profession/Professional%20conduct/memos-of-understanding/mou-consistency-in-authorisation-of-Ips>.
[123] See MoU, Agreed Principle 3, p. 3.
[124] See MoU, 3(B), p. 6.
[125] See "Insolvency Code of Ethics – Background and Overview", pp. 1 – 2, which can be found at <www.bis.gov.uk/insolvency/insolvency-profession/Professional%20conduct/code-of-ethics>.
[126] The ICE consists of 21 pages and deals almost exclusively with insolvency ethics.

An *Insolvency Practitioner* should not allow bias, conflict of interest or undue influence of others to override professional or business judgments.

As follows from para. 5, a so called "Framework Approach" is used. This approach requires the liquidator to first identify any threats to any of the principles mentioned in para. 4. Second, the liquidator has to evaluate these threats. Third, the liquidator has to determine whether he can offset these threats with certain safeguards. Para. 10 ICE provides for a non-exhaustive list of categories of threats:

(a) **Self-interest threats**: which may occur as a result of the financial or other interests of a *practice* or an *Insolvency Practitioner* or of a *close or immediate family* member of an *individual within the practice*;
(b) **Self-review threats**: which may occur when a previous judgment made by an *individual within the practice* needs to be re-evaluated by the *Insolvency Practitioner*;
(c) **Advocacy threats**: which may occur when an *individual within the practice* promotes a position or opinion to the point that subsequent objectivity may be compromised;
(d) **Familiarity threats**: which may occur when, because of a close relationship, an *individual within the practice* becomes too sympathetic to the interests of others; and
(e) **Intimidation threats**, which may occur when an *Insolvency Practitioner* may be deterred from acting objectively by threats, actual or perceived.

Paras. 11 – 16 present specific examples of the aforementioned threats. Paras. 17 – 18 deal with the evaluation of threats to fundamental principles. Para. 18 stresses that "(…) *an Insolvency Practitioner should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat, would conclude to be acceptable.*" How certain circumstances are perceived by third parties is, therefore, deemed to be relevant. Para. 19 puts forward safeguards in relation to possible threats to the fundamental principles and identifies two categories of safeguards. These categories are (i) safeguards that are created by the profession, legislation or regulation and (ii) safeguards in the work environment. Safeguards in the work environment include safeguards that are specific to an insolvency appointment.[127] Moreover, para. 19 identifies safeguards that can be introduced across the practice of the liquidator and gives eleven examples of such safeguards.[128]

[127] These kind of safeguards are dealt with in para. 20 – 39 ICE.
[128] These examples mainly relate to putting in place certain internal policies and procedures and the responsibility of the leadership of the practice in these matters.

ICE Part 2: Specific Application of the Code

As previously mentioned, part 2 of the ICE deals with the "Specific Application of the Code" and contains more concrete ethical guidance to liquidators. Part 2 of the ICE consists of two subcategories. First, a number of "broader" topics are covered, namely: "Insolvency Appointments" (paras. 20 – 30), "Conflicts of Interest" (paras. 31 – 32), "Practice Mergers" (paras. 33 – 34), "Transparency" (para. 35 – 36 ICE) and "Professional Competence and Due Care" (paras. 37 – 39). Second, more specific topics are covered, namely: "Section A: Professional and Personal Relationships" (paras. 40 – 48), "Section B: Dealing with the Assets of a Company" (paras. 49 – 52), "Section C: Obtaining Specialist Advice and Services" (paras. 53 – 56), "Section D: Fees and Other Types of Remuneration" (paras. 57 – 62), "Section E: Obtaining Insolvency Appointments" (paras. 63 – 69), "Section F: Gifts and Hospitality" (paras. 70 – 73), "Section G: Record Keeping" (paras. 74 – 75) and "Section H: The Application of the Framework to Specific Situations" (paras. 76 – 77). Section H has three parts: "Part 1 – examples that do not relate to a previous or existing insolvency appointment" (paras. 78 – 80), "Part 2 – examples relating to previous or existing insolvency appointments" (paras. 81 – 86) and "Part 3 – examples in respect of cases conducted under Scottish Law" (paras. 87 – 88).

The above-mentioned topics, which have specific relevance to the subject of conflict of interest, are now discussed in more detail. According to para. 22, the liquidator has to consider whether the acceptance of his appointment would create any threat to any of the fundamental principles mentioned in para. 4. Threats to the objectivity of the liquidator created by (i) conflicts of interest or (ii) by any significant professional or personal relationship, are seen as particularly relevant. Para. 24 puts forward that the presence of a threat to a fundamental principle makes it inappropriate for the liquidator to accept his appointment. This is different where (i) disclosure is made to the court and the creditors, and no objection is made to the liquidator's appointment and (ii) safeguards are or will be available to reduce the threat to an acceptable level. Para. 25 provides for a list of twelve safeguards that might be considered in the window of para. 24. Para. 30, again, emphasizes the importance of what a reasonable and informed third party would conclude to be reasonable. Para. 31 gives three examples of conflicts of interest in the window of insolvency proceedings, being: (i) the liquidator has to deal with claims between separate and conflicting interests of entities over whom he is appointed as liquidator, (ii) succession of or sequential insolvency appointments (referring to section H) and (iii) a Significant Relationship has existed with the entity or someone connected with the entity (referring to section A).

It is clear that the first example of conflict of interest primarily refers to conflict of interest in enterprise group insolvency situations. The ICE does not substantiate this source of conflicts of interest any further. The second example can be illustrated with the following. Para. 84 deals with a liquidator who is in the first instance administrator, and is thereafter appointed in winding-up proceedings concerning the same debtor. According to para. 84, "*An Insolvency Practitioner may normally accept an appointment as liquidator* (…)", but "(…) *should also consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.*" On the other hand, para. 82 puts forward that a liquidator should not accept any insolvency appointment if he was acting as administrative or other receiver in relation to the same debtor. The third example refers to section A. From para. 40 it follows that, "*The environment in which Insolvency Practitioners work and the relationships formed in their professional and personal lives can lead to threats to the fundamental principle of objectivity.*" From para. 41 it follows that the objectivity of the liquidator may be particularly threatened if an individual within the practice or his close or immediate family has or had a professional relationship that somehow relates to the insolvency appointment. Para. 42 provides for eleven examples of such professional and personal relationships. Para. 44 is concerned with the evaluation of the "significance" of a relationship. It provides for nine relevant factors that should be taken into consideration by a liquidator in his evaluation. Para. 46 provides, in addition to the safeguards listed in para. 25, three specific safeguards to reduce the threat of a professional or personal relationship to an acceptable level, namely: (i) withdrawing from the insolvency team, (ii) terminating financial or business relationships causing the threat and (iii) disclosure of the relationship and financial benefits received by the practice of the liquidator to the debtor or those on whose behalf the liquidator would be appointed to act. In situations in which no safeguards can be taken to reduce threats to an acceptable level, the professional or personal relationship will be "significant". In these situations, it is not appropriate for the liquidator to accept his appointment, see para. 47. Para. 48, again, stresses the importance of the perception of third parties and points out that there could very well be a difference with regard to the liquidator's view and the view of a third party on the significance of a relationship.

Other provisions are contained in Section B (Dealing with the assets of an entity). These provisions, in principle, prohibit a liquidator from selling assets to himself or his familial relationships (or to individuals within the practice or their familial relationships). Section D and Section F respectively deal with gaining referral fees or commissions both before and after the appointment, and with gifts and hospitality. Section D and F, in principle, frown upon benefits being accepted by the liquidator or his familial relationships. However, the liquidator may be able to provide adequate safeguards.

§ 2.5. Concluding remarks

Following this brief *tour d'horizon*, come the following observations.

First, quite some differences exist in the "insolvency governance" of the jurisdictions that have been discussed. In some jurisdictions, such as the Netherlands and Belgium, the courts have, in principle, the exclusive power to select, appoint and remove the liquidator. In other jurisdictions (Germany, England), creditors have more influence over the appointment and removal of a liquidator. In all jurisdictions it would be possible for certain stakeholders to seek the removal of a liquidator by making an application to the court.

Second, there are large differences in ethical regimes that apply to liquidators. In the jurisdictions looked at, three levels of legislation could be identified: (i) legislation contains only very limited ethical requirements,[129] if any, and private associations of liquidators have filled this void by creating more detailed rules (the Netherlands, Germany),[130] (ii) legislation provides, in a more concrete way, for ethical requirements (Belgium), (iii) legislation indirectly imposes detailed ethical requirements upon liquidators through professional bodies (England). A common denominator between the INSOLAD Practice Rules, VID Principles, Faill.W. and ICE is that a "principle-based" and "rule-based" approach is combined, meaning that (i) overarching ethical principles are set and (ii) more detailed rules are set for specific situations or circumstances.[131]

Third, no uniform approach seems to exist in relation to conflict of interest. In the jurisdictions discussed, the following approaches can be identified: (i) both legislation and the rules made by private associations make no mention of conflict of interest, although different ethical requirements are put forward, such as independence (Germany), (ii) legislation does not provide for rules of conflict of interest, whereas the rules created by the private association mention conflict of interest, although only in relation to specific issues (the Netherlands), (iii) legislation, directly or indirectly, deals in varying detail with conflict of interest, provides examples of what constitutes a conflict of interest and prescribes actions that need to be taken should a conflict of interest arise (Belgium and England).

[129] See § 1.3. for a clarification on ethical requirements.
[130] It should be kept in mind, first, that certainly not all liquidators in the Netherlands and Germany are member of said associations. Additionally, these rules are not externally legally binding on liquidators.
[131] The VID Principles, for example, in section 1 require the liquidator to be "independent". Section 7 specifies situations or circumstances in which the liquidator is not independent.

A brief summary of the relevant rules would lead to the conclusion that a conflict of interest could be caused by the liquidator (or his relationships) having (or having had) a relationship, either professional or personal/familial, with (i) a main actor in the insolvency proceedings (such as the debtor or a creditor), (ii) with a subject that is connected to this main actor such as a director or subsidiary of the debtor and (iii) with a subject that is not a main subject in the insolvency proceedings, but gets involved in the insolvency proceedings (for example, because the liquidator sells assets to a relation, not being an actor in the insolvency proceedings). Finally, a conflict of interest could exist where the liquidator has to decide over claims that exist between separate and conflicting interests of different entities over whom he is appointed, which is bound to occur most often in enterprise group insolvency.

The following pertinent observations can be made from comparing the notion of conflict of interest across the jurisdictions. Most importantly, the aforementioned summary of circumstances or situations merely describes instances that are seen as posing a conflict of interest. In none of the discussed jurisdictions has it been possible to find a general definition of "conflict of interest". All refer to circumstances that may constitute a conflict of interest. In addition, it seems that there are issues with regard to terminology and ethical requirements in general, and conflict of interest. This is illustrated in section 7 VID Principles, in which the absence of "independence" seems to encompass circumstances that are the same or similar to circumstances that would in other jurisdictions lead to the conclusion that there is a conflict of interest. Where conflict of interest is contained in provisions, it appears that what is seen as situations constituting a conflict of interest varies. For these reasons, it is difficult to define precisely the notion of conflict of interest. While certain jurisdictions may share their similarities, it cannot be said that there is full consensus on the notion of conflict of interest involving a liquidator.

Chapter 3 – Conflict of interest

Before any harmonization of a rule concerning conflict of interest can take place, it is first necessary to define in some detail conflict of interest. This chapter, sourcing non-legal literature, explores the notion of conflict of interest in different areas as inspiration for creating a working definition of conflict of interest. After this, the notion of conflict of interest involving a liquidator is discussed in the light of the relevant international sources introduced in § 1.1. Conflict of interest is then discussed in relation to the insolvency of enterprise groups. This is followed by looking into conflict of interest and cooperation in main and secondary insolvency proceedings. Finally, I review my own working definition of conflict of interest.

§ 3.1. Defining conflict of interest

§ 3.1.1. Definitions in non-legal literature

Before any harmonization of a rule concerning conflict of interest may take place, it is necessary to get an idea of what conflict of interest entails, both in general and more specifically with regard to the position of the liquidator. Conflict of interest can be seen as a relatively new term. *Luebke* found no mention of "conflict of interest" before the 1930's and the concept only started to show up in legal dictionaries in the 1970's.[132] Academic interest in the term conflict of interest is even more recent.[133] According to *Davis*, "*The history of "conflict of interest" has yet to be written*".[134] In plain language, conflict of interest may seem like a simple concept. It seems to require two or more interests that are colliding, in the sense that fulfillment of one interest will prove to be detrimental to the possibility of fulfilling the other interest. *Bergström* takes a similar view of conflict of interest as a starting point: "*In particular, I shall be concerned with conflicts of interest in the sense in which there is a conflict of interest between two parties if, and only if, their interests are incompatible*."[135] Incompatibility, according to *Bergström*, means that each of the interests can be satisfied, but not both.[136] Since *Bergström's* definition, many authors have come up with different definitions and notions of the concept, both in general and in connection with specific professions or industries.

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[132] See N.R. Luebke, *Conflict of Interest as a Moral Category*, *Business & Professional Ethics Journal*, Vol. 6, No. 1, 1987, pp. 66 – 81.
[133] See W. Norman and C. MacDonald, *Conflicts of Interest* in G.G. Brenkert and T.L. Beauchamp *et alii*, *The Oxford Handbook of Business Ethics*, New York: Oxford University Press 2012, p. 444.
[134] See M. Davis, Andrew Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 17.
[135] See L. Bergström, *What is a conflict of Interest?*, *Journal of Peace Research*, Vol. 7, No. 3, 1970, p. 200.
[136] See L. Bergström, *What is a conflict of Interest?*, *Journal of Peace Research*, Vol. 7, No. 3, 1970, p. 208.

Hereafter, without pretending to give a complete overview of all that has been written about conflict of interest, a number of definitions and notions of the concept of conflict of interest are discussed.

Conflict of interest is, according to the Cambridge Business English Dictionary, "(…) *a situation in which someone cannot make a fair decision because they will be personally affected by the result* (…)".[137] This implies that due to being personally affected by the result of a decision one has to make, it is impossible for one to make a "fair decision". How this impossibility should be interpreted and the exact meaning of a "fair" decision remains unclear. Black's Law Dictionary[138] ("**Black**") provides the following definition of conflict of interest:

> **1.** A real or seeming incompatibility between one's private interests and one's public or fiduciary duties. **2.** A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent (…).

The first part of the definition, rather than talking about a conflict, focuses on an "incompatibility". In the definition, the individual has both a private interest and a public or fiduciary duty. Conflict of interest is seen as an incompatibility between an interest and a duty. The incompatibility, however, does not have to be "real". It is enough that there is a "seeming incompatibility". The second part of the definition is quite different and is specifically aimed at a (single) lawyer who has two clients whom he represents. What it presupposes is that not the lawyer, but these two clients have incompatible interests (real or supposed).

Thompson discusses financial conflict of interest in the medical sector and sees the following as elements of conflicts of interest:[139]

> A conflict of interest is a set of conditions in which professional judgment concerning a primary interest (such as a patient's welfare or the validity of research) tends to be unduly influenced by a secondary interest (such as financial gain).

Under *Thompson's* definition, the primary interest is formed by the duties of the profession.

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[137] See <http://dictionary.cambridge.org/dictionary/business-english>.
[138] See B.A. Garner, *Black's Law Dictionary*, 8th edition, Boston: West Publishing Company 2006.
[139] See D.F. Thompson, *Understanding Financial Conflicts of Interest*, *The New England Journal of Medicine*, Vol. 329, No. 8, 1993, p. 573.

Thompson's definition concentrates on the (risk of a) secondary interest (unduly) influencing the "professional judgment" of a certain person. The notion of "tends to" seems to imply an objective test instead of a mere subjective test with regard to the influence on one's professional judgment.

Boatright discusses conflicts of interest in the financial services sector and comes up with the following working definition, which again, takes quite a different approach:[140]

> A conflict of interest occurs when a personal or institutional interest interferes with the ability of an individual or institution to act in the interest of another party, when the individual or institution has an ethical or legal obligation to act in that other party's interest.

According to *Davis*, conflict of interest on the standard view is to be defined as follows:[141]

> A conflict of interest is a situation in which some person P (whether an individual or corporate body) stands in a certain relation to one or more decisions. On the standard view, P has a conflict of interest if, and only if, (1) P is in a relationship with another requiring P to exercise judgment in the other's behalf and (2) P has a (special) interest tending to interfere with the proper exercise of judgment in that relationship.

In the view of *Davis*, "relationship" may include any connection between P and another person, both formal and informal and both long-term and short-term, as long as it is fiduciary and, therefore, requires P to exercise judgment in the service of this relationship. The notion of "interest" in *Davis'* definition is to be interpreted broadly and includes "(…) *any influence, loyalty, concern, emotion, or other feature of a situation tending to make P's judgment (in that situation) less reliable than it would normally be, without rendering P incompetent. Financial interests and family connections are the most common sources of conflict of interest, but love, prior statements, gratitude and other "subjective" tugs on judgment can also be interests (in this sense).*"[142]

According to *Carson*, "(…) *a very large class of cases not ordinarily regarded as conflicts of interest should be so regarded.*" *Carson's* definition is as follows:[143]

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[140] See J.R. Boatright, *Conflicts of Interest in Financial Services*, *Business and Society Review*, Vol. 105, Issue 2, 2000, p. 202.
[141] See M. Davis, A. Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 8.
[142] See M. Davis, A. Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 9.
[143] See T.L. Carson, *Conflicts of Interest*, *Journal of Business Ethics*, Vol. 13, Issue 5, 1994, pp. 387ff.

A conflict of interest exists in any situation [in] which an individual (*I*) has difficulty discharging the official (conventional/fiduciary) duties attaching to a position or office she holds because either: (i) there is (or *I* believes that there is) an actual or potential conflict between her own personal interests and the interests of the party (*P*) to whom she owes those duties, or (ii) *I* has a desire to promote (or thwart) the interests of (*X*) (where X is an entity which has interests) and there is (or *I* believes that there is) an actual or potential conflict between promoting (or thwarting) *X's* interests and the interests of *P*.

In 2004, *Carson* revised and simplified his definition of conflict of interest:[144]

1. There must be an individual (*I*) who has duties to another party (*P*) in virtue of holding an office or a position, 2. *I* must be impeded or compromised in fulfilling her duties to *P*, 3. the reason for *I's* being impeded or compromised in fulfilling her duties to *P* must be that she has interests that are incompatible (or seem to her to be incompatible) with fulfilling her duties to *P*.

According to *Carson*, the second and third condition should be construed broadly. The second condition is satisfied by "*Anything that makes it difficult for I to fulfill her duties to P or that compromises her duties to P* (…)", whereas the interests in the third condition include "(…) *self-regarding interests, e.g., making money, enhancing one's reputation, or winning the esteem of others, or other-regarding interests, e.g., desiring to promote or harm the interests of other individuals*."

Features of *Carson's* definition are that (i) it is not required that the individual actually fails to perform his duties connected to his office or position, (ii) there need not be an actual conflict between interests of relevant parties, as it suffices that the individual believes that there is an actual or potential conflict of interest, (iii) bribery is seen as a special case of conflict of interest,[145] (iv) involvement in a conflict of interest is only possible to the extent that one has duties stemming from the occupation of an office or position, (v) a conflict of interest can also be created by the individual's desire to harm others (which is, according to *Carson*, often overlooked in other analyses) and (vi) it is required that the conflicting interest makes it difficult to perform the duty.[146] The last feature of *Carson's* definition deserves special attention in relation to this thesis.

[144] See T.L. Carson, *Conflicts of Interest and Self-Dealing in the Professions: a Review Essay*, *Business Ethics Quarterly*, Vol. 14, No. 1, 2004, p. 165.
[145] Davis has a different view this and considers only gifts and bribe offers to create conflicts of interest, the argument being that bribery as such has already lead to bias, see M. Davis, A. Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 18.
[146] See for a further explanation of these features T.L. Carson, *Conflicts of Interest and Self-Dealing in the Professions: a Review Essay*, *Business Ethics Quarterly*, Vol. 14, No. 1, 2004, pp. 165 – 167.

According to *Carson*, "(…) *a person can claim that he has no conflict of interest because he had (or will have) no difficulty fulfilling his duties in spite of having interests that conflict with performing his official duties. My reply is that a person can claim this, but whether such a claim is plausible is quite another matter.* (…) *we have reason to be very skeptical of any such claims*." *Carson* proposes a revision of his definition with regard to this matter, that is "(…) *preferable for the purposes of framing rules, policies, or laws to discourage conflicts of interest*." This revision proposes that instead of assessing what an individual would subjectively find difficult, assessing what "(…) *an ordinary person (a person of ordinary moral virtue) would find difficult*." Taking this revision into account, *Carson* then describes a conflict of interest as follows:[147]

Someone has a conflict of interest when he has interests that conflict with fulfilling his duties in such a way that an average person in his objective circumstances would have difficulty doing his official duties.

§ 3.1.2. Why is a conflict of interest morally problematic?

While it is not the intention to fully cover questions of morality or "wrong-doing" in relation to conflict of interest, it is relevant to provide a brief overview of why a conflict is seen as a problem. According to *Carson*, in order to call a situation in which an individual acts in such a way as to create or incur a conflict of interest as constituting a wrong, "(…) *we must be prepared to specify what it is that the person in question should have done instead. Often individuals have no responsibility for the existence of conflicts of interest in which they are centrally involved*." [148] *Carson*, in principle, has the opinion that permitting and failing to act upon a conflict of interest constitutes a wrong, regardless of whether the individual actually failed to perform his duties.[149] *Davis* has a similar opinion in that he deems a conflict of interest not to necessarily constitute a moral wrong: "*To have a conflict of interest is merely to have a moral problem. What will be morally right or wrong, or at least morally good or bad, is how one responds to the problem*." Whenever a conflict of interest can reasonably be avoided, *Davis* sees it as a moral wrong not to avoid it.[150]

[147] See T.L. Carson, *Conflicts of Interest and Self-Dealing in the Professions: a Review Essay*, *Business Ethics Quarterly*, Vol. 14, No. 1, 2004, p. 167.
[148] See T.L. Carson, *Conflicts of Interest*, *Journal of Business Ethics*, Vol. 13, Issue 5, 1994, p. 396.
[149] See for a more extensive discussion of the moral dimension T.L. Carson, *Conflicts of Interest*, *Journal of Business Ethics*, Vol. 13, Issue 5, 1994, pp. 396 – 398, 400 and T.L. Carson, *Conflicts of Interest and Self-Dealing in the Professions: a Review Essay*, *Business Ethics Quarterly*, Vol. 14, No. 1, 2004, p. 167 – 168.
[150] See M. Davis, A. Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 13.

§ 3.1.3. Apparent, potential and actual conflicts of interest

According to *Davis*, "*Many potential or actual conflicts of interest are, out of politeness or timidity, misdescribed as "apparent conflicts of interest" or "merely apparent conflicts of interest."*[151] In the notion of *Davis*, a conflict of interest is only apparent if an individual in fact does not have a conflict of interest, but where it is justified that another party would conclude that the individual does. Apparent conflicts of interest, as such, "(…) *are no more conflicts of interest than stage money is money.*"[152] According to *Friedman*, "(…) *it is a common misconception that a conflict of interest that has not (yet) led to improper behavior or biased research is only apparent.*"[153] Similar problems arise with defining what potential conflicts of interest are (as opposed to actual conflicts of interest). *Friedman* finds that different (ethical) guidelines for biomedical research wrongly utilize the notion of potential conflicts of interest, in that a conflict of interest is potential only in the event that a biased judgment or action has not yet occurred. *Friedman* views this as inconsistent with the basic thesis "(…) *that interests and conflicts of interest exist before any decision has occurred.*"[154] *Davis* sees conflicts of interest only as potential when the individual has a conflict of interest but is not yet in a situation where he must make a judgment. On the other hand, a conflict of interest is only to be seen as actual if the individual has a conflict of interest and he finds himself in a situation where he must make a judgment.[155] *Boatright*, on the other hand, has the opinion that an actual conflict of interest means that the individual has in fact (already) acted against the interest of a party whose interest he is supposed to serve, whereas a potential conflict of interest arises in the situation in which an actual conflict of interest is likely to occur.[156] As follows from the aforementioned interpretations of apparent, actual and potential conflicts of interest, there is no consensus on the meaning of these modifiers. The differences in interpretation are, seemingly, largely caused by different (general) definitions of conflict of interest that are being used by the respective authors. In order to prevent unnecessarily limiting the working definition (of conflict of interest), the notions of "apparent" and "potential" conflict of interest are included.

[151] See M. Davis, A. Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 18.
[152] See M. Davis, A. Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 18.
[153] See P.J. Friedman, *The Troublesome Semantics of Conflict of Interest*, *Ethics & Behaviour*, Vol. 2, Issue 4, 1992, p. 249.
[154] See P.J. Friedman, *The Troublesome Semantics of Conflict of Interest*, *Ethics & Behaviour*, Vol. 2, Issue 4, 1992, p. 249.
[155] See M. Davis, Andrew Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 15.
[156] See J.R. Boatright, *Conflicts of Interest in Financial Services*, *Business and Society Review*, Vol. 105, Issue 2, 2000, p. 203.

§ 3.1.4. Proposal for a working definition of conflict of interest involving a liquidator

There are many different interpretations of the concept of conflict of interest. Some of these differences are quite minor, others are major. What most of the definitions have in common is that they assume that an individual has a certain primary duty to act in the interests of a certain party. Also required, is an interest that has or may have certain negative, or at least undesirable effects on the ability of an individual to exercise his professional judgment or to act in the interests of the party to whom he has a certain duty, of any sort. The notion of "interest" must, according to most notably *Davis* and *Carson*, be construed broadly. Taking their view into account, even seemingly less relevant factors such as political preference may, in principle, amount to a conflict of interest. It should be noted, however, that most definitions take an agent-principal relationship as the starting point. In § 1.2., it was concluded that the liquidator does not have an easily identifiable principal. As such, it is necessary to concretize the common denominators in the context of insolvency and the liquidator. The liquidator will generally have a duty to (mainly) act in the interests of the creditors. However, the liquidator may also be required to pay attention to the interests of the debtor and, for example, the preservation of employment. To avoid the debate about to whom exactly the liquidator owes certain duties in a given situation, "the interest of the estate" is hereafter used to indicate all those interests that should be taken into account by the liquidator. This will also have as a consequence that any interest that cannot be seen as (belonging to) "the interest of the estate" is (potentially) liable to cause a conflict of interest. For three reasons, my definition of conflict of interest as regards the liquidator leans heavily on *Carson's* definitions. The most important reason for choosing *Carson's* definition as the basis for my working definition of conflict of interest as regards the function of the liquidator lies with him proposing a revision that includes an objective assessment as regards the difficulty an individual may have to fulfill his duties. This objective assessment is where other definitions, in my opinion, fall short. The objective assessment could, as I see it, assure that what *Davis* views as an apparent, and thus a non-existing, conflict of interest is deemed to constitute a conflict of interest, namely if an average person would be considered to have difficulties in discharging his duties. Furthermore, *Carson* defines conflict of interest by way of the individual having "difficulties" in discharging his official duties, which I see as an appealing criterion, due to it, as I see it, being very conceivable. Another reason why I deem *Carson's* definitions to better fit the function of the liquidator is that explicit reference is made to duties that are being attached to or exist in virtue of holding a specific position or office, which makes it clear that the (only) relevant duties that exist for the liquidator exist by virtue of his appointment as liquidator over an insolvent estate. On the basis of the above, I present the following working definition:

1. A conflict of interest exists in any situation in which a liquidator has difficulties in discharging the duties he has to the insolvent estate in virtue of holding his position, because he has an interest that is incompatible or potentially incompatible (or seems to be as such to him) with fulfilling his duties to the insolvent estate.
2. A liquidator is deemed to have difficulties in discharging his duties if an average person, in the same objective circumstances as the liquidator, would be regarded as having difficulties in discharging the duties to the estate in virtue of holding his position.
3. Interests that are deemed to be incompatible or potentially incompatible with a liquidator's fulfillment of duties to the estate are either (i) own personal interests or (ii) other-regarding interests.

As my definition relies heavily on *Carson's* definitions of conflict of interest, I refer to the discussion of his definitions in § 3.1.1. Nevertheless, I feel the need to clarify two elements. As was mentioned above, I deem an instance of apparent conflict of interest to be covered by 2. in my definition. Seeing that not only apparent but also a potential conflict of interest was seen as a problematic modifier, my notion of a potential conflict of interest entails, in accordance with *Davis'* view, situations where the liquidator does not yet have to make a decision. "Other-regarding interests" relates to all those interests that the liquidator may seek to promote, regardless of the reason (e.g. the existence of a certain close relationship, a loyalty and such like) and where those interests are other interests than the interests of the insolvent estate in question.

§ 3.2. Conflict of interest; UNCITRAL, World Bank and EBRD

§ 3.2.1. UNCITRAL Guide

The UNCITRAL Guide does not contain a clear definition of conflict of interest. Instead, it stresses that demonstrating independence from vested interests (being of an economic, familial or other nature) is an essential element of the personal qualities of the liquidator and: "(…) *to that end, it is desirable that the insolvency law impose an obligation to disclose existing or potential conflicts of interest*."[157] A number of examples of situations that may constitute a possible conflict of interest are presented. A conflict of interest may arise from a number of prior or existing relationships with the debtor, including (i) prior ownership of the debtor, (ii) a prior or existing business relationship with the debtor, (iii) a relationship with a creditor of the debtor, (iii) prior engagement as representative or officer of the debtor, (iv) prior engagement as auditor of the debtor and (v) a relationship with a competitor of the debtor.

[157] See UNICTRAL Guide, p. 176.

The UNCITRAL Guide does not get more specific than these examples, and merely proclaims that "(…) *circumstances that amount to a conflict of interest vary between laws* (…)". The legislator is given some guidance: "*In order to enhance the transparency, predictability and integrity of an insolvency regime, it is desirable that an insolvency law specify the degree of relationship that gives rise to such a conflict of interest, including specifying those relationships which will disqualify a person from being appointed*."[158] Not any relationship will therefore constitute a conflict of interest, and, the relationships that do, will not all be as "severe", so as to disqualify the liquidator.

While the UNCITRAL Guide undoubtedly sees independence and conflict of interest as related concepts, no further clarification is given on the exact relationship between the two concepts.

§ 3.2.2. World Bank Principles and IFC/Ukraine Code

The World Bank Principles merely mention conflict of interest in the context of the insolvency of enterprise groups and provide no definition thereof, nor is additional guidance given. The IFC/Ukraine Code does not provide a definition for conflict of interest either, but, article 4.3, titled "Independence and Objectivity", deals with "conflict of interests".[159]

In a number of provisions dealing with circumstances that are considered to pose a conflict of interests, the term "associated person" is used. In article 2.1.5., "associated person" is defined as, first of all, (i) the spouse, (ii) a relative or (iii) the spouse of a relative[160] of the liquidator. Secondly, it includes legal persons of whom a member of the governing body is (i) the liquidator or (ii) the spouse, (iii) a relative or (iv) the spouse of a relative of the liquidator. Thirdly, it includes legal persons that are controlled by (i) the liquidator or (ii) his spouse, (iii) a relative or (iv) spouse of a relative of the liquidator. Another term that is used is "participant in insolvency proceedings". This term refers, as follows from article 2.1.2. to a (i) court, (ii) debtor, (iii) creditor and (iv) any other party involved in insolvency proceedings against the debtor or considered to be a participant according to (insolvency) law.

Article 4.3.4. deals with so called "active conflict of interests". The following more specific circumstances are considered to pose such an "active conflict of interests":

- an "associated person" is either debtor or creditor;

[158] See UNCITRAL Guide, p. 176.
[159] The IFC/Ukraine Code uses the term "conflict of interests" and thus uses the same terminology as the InsReg Proposal and EP Legislative Resolution.
[160] The definition of the "spouse of a relative" is limited to those up to the third degree of kinship.

- the liquidator or an "associated person" (i) has (or had, in the five years before the insolvency proceedings are opened) a contractual relationship with a "participant in insolvency proceedings" and (ii) this relationship impairs (or appears to impair in the opinion of an informed third person) the objectivity or independence of the performance of the liquidator;
- the liquidator or an "associated person" (i) is (or has been, in the five years before the insolvency proceedings are opened) a participant (including but not limited to being shareholder or owner) or member of the governing body of the legal person, that is (ii) considered to be a competitor of the debtor or a creditor, and (iii) insolvency proceedings against the debtor may significantly affect the activity or the position of this competitor.

In addition to these more or less sharply specified circumstances, the IFC/Ukraine Code also provides for a broad residual provision in article 4.3.4.: if other circumstances exist that, in the opinion of a reasonable and informed third party (having knowledge of all relevant information), will impair either the objectivity, independence or performance of the liquidator's functions, these circumstances will also be considered to pose an "active conflict of interests". Noteworthy is that, instead of making use of the figure of an average person, as is done in my working definition, article 4.3.4. utilizes the figure of the opinion of a (reasonable and) informed third party. Therefore, these provisions can also be seen to deal with an apparent conflict of interest.

Article 4.3.5. deals with "inactive conflict of interests". First, if any circumstance mentioned in article 4.3.4. ("active conflict of interests") has existed in the seven years before the insolvency proceedings are opened, it is considered to pose an "inactive conflict of interests". Similarly to the last provision of article 4.3.4., 4.3.5. contains a residual provision that puts forward that if other circumstances exist that, directly or indirectly, indicate the possibility of impairing either the objectivity or independence of the liquidator's performance, these circumstances are considered to also pose an "inactive conflict of interests". This residual provision seems to be even broader than the one in article 4.3.4, containing such phrasing as "directly or indirectly" and "indicate the possibility". A provision that also falls under my definition of conflict of interest and, more specifically, would constitute a personal interest, is article 4.3.3. This provision forbids the liquidator to solicit or accept any gratuity, gift, or other remuneration or thing of value, privileges or other benefits from any person, if this (i) affects or (ii) may affect the official actions of the liquidator. Nevertheless, conflict of interest is not mentioned in this article.

§ 3.2.3. EBRD Principles and EBRD/BSA Code and Manual

The EBRD Principles themselves do not contain a definition of conflict of interest. The thereof derived EBRD/BSA Code and Manual, however, do. The first two paragraphs of article 7 of the EBRD/BSA Code, titled "Elimination of conflict of interest", read as follows:[161]

> Bankruptcy administrators shall perform their tasks in such a manner so as not to subject their performance to personal interests, or create a conflict between the two.
>
> A conflict of interest shall be deemed to exist when the bankruptcy administrator has a private interest that affects or may affect the performance of tasks of the bankruptcy administrator.

The EBRD/BSA Manual contains what seems to be a number of definitions or descriptions of the concept of conflict of interest:[162]

> **Conflict of interest** - it is fundamental to the position of an IA (*Insolvency Administrator; author*) as a fiduciary that personal interests must not be permitted to affect the official duties and responsibilities of an IA

And under the respective headings "What is a conflict of interest?" and "Personal Interest": [163]

> (…) It contemplates a situation in which an IA subjects (or lowers) the performance of his tasks as an IA to his personal interests. He makes or puts the latter ahead of his official capacity. A 'conflict of interest' means exactly that – a situation in which a person is in a position to exploit a professional capacity for the personal benefit of that person (including family, friends and business associates of the person).

> The conflicts rule, as will be explained, contemplates that an IA has a **'personal interest'** in the insolvency case and, possibly, its outcome.

According to the EBRD/BSA Manual, conflict of interest commonly arises in situations regarding (i) self-dealing with property by the liquidator, (ii) occupying a position in which the liquidator is to be confronted with decisions that involve his own interests and (iii) in using a position to get an outcome that would benefit the liquidator.[164]

[161] Both paragraphs are aimed at conflict of interest; see EBRD/BSA Manual, p. 160.
[162] See EBRD/BSA Manual, p. 130.
[163] See EBRD/BSA Manual, p. 161.
[164] See EBRD/BSA Manual, p. 161.

The "personal interest" of the liquidator includes the personal benefit of (i) family members, (ii) friends and (iii) business associates of the liquidator. Also, this personal interest must have a certain effect on the liquidator's performance, as it either (i) affects or may affect his performance of tasks, (ii) the performance of his tasks is subjected to his personal interest or (iii) a conflict is created between this performance and his personal interests.[165] Article 7 EBRD/BSA Code contains, at a first sight, more specific provisions in relation to conflict of interest. While placing these provisions in article 7 suggests that they are seen as circumstances that constitute a conflict of interest, the EBRD/BSA Manual sows some confusion. In the EBRD/BSA Manual, article 7 is said to contain provisions not only concerning conflict of interest, but also concerning (i) improper benefits and improper inducements, (ii) the sale of assets to the liquidator himself and other associated persons and (iii) honesty. Also, according to the EBRD/BSA Manual, the first three paragraphs are directed at conflict of interest. It does not make clear, however, whether that means that only the first three paragraphs are related to conflict of interest. The view that the other paragraphs of article 7 EBRD/BSA Code do not have something to do with conflict of interest does not correspond with an example given EBRD/BSA Manual, dealing with a liquidator selling assets to a relative, about which is said that "(…) *the ethics rule must be interpreted as forbidding the IA from dealing in or having any conflict of interest in the sale of the asset*. (…) *The IA should not sell the asset to the relative without, at least, full disclosure accompanied by court/creditor approval.*"[166] In my view, the fourth, sixth and seventh paragraphs of article 7 are clearly instances of conflict of interest and respectively contain the following rules:[167]

- the liquidator is not allowed to seek or receive any form of remuneration and derive any other gains or benefits for the services he provides as liquidator, except with court-authorization;
- liquidators are not allowed to, directly or indirectly, purchase assets of the debtor in whose insolvency proceedings they are appointed;
- liquidators are not allowed to, directly or indirectly, sell assets to (i) employees, (ii) persons having a personal or business relationship with the liquidator or, but only in the event that this is done knowingly, (iii) to persons that are associated with the employees of the liquidator or persons having a personal or business relationship with the liquidator.

[165] As such, there seem to be three different notions of "conflict of interest" in the EBRD/BSA Code and Manual.
[166] See EBRD/BSA Manual, p. 128.
[167] The fifth paragraph relates to the liquidator offering inducements to secure an insolvency appointment. As I see it, rather than that the liquidator himself has a conflict of interest, he creates a conflict of interest for the person(s) in charge of his appointment. The eighth paragraph, finally, contains an obligation for the liquidator to "act honestly and bona fide" and to not be involved in "corrupt practices". This obligation, while perhaps to a certain extent relevant as regards conflict of interest, cannot be seen as describing a circumstance in which there is a conflict of interest.

The fourth paragraph of article 7 deserves some attention. The rule is similar to article 4.3.3. IFC/Ukraine Code on the liquidator soliciting or accepting benefits, except when permitted by law, the IFC/Ukraine Code or other legislation. According to the EBRD/BSA Manual, "*The law does not require an IA to work for nothing and recognises that an IA must have a degree of self interest in an insolvency case by reference to and providing for the payment of remuneration. However, the law governs that entitlement by providing for its basis, the amount and when it is to be paid.*"[168] As such, the remuneration that is received by the liquidator for his work, in principle, could be seen as constituting a conflict of interest.

The EBRD/BSA Manual seems to support the view that a conflict of interest in the "literal" meaning of the phrase, in a sense that fulfillment of one interest is detrimental to fulfillment of another interest, is not required. This is illustrated by referring to the following situation. The only arm's length third party that is interested in buying an asset from the estate is prepared to pay a certain price. A relationship of the liquidator offers substantially more than that. In this example, it is clear that the interest of the estate (and of all those that are involved) is better served by the liquidator's acceptance of the latter bid. Nevertheless, the liquidator is under an obligation to notify the court of the conflict of interest.[169]

The EBRD/BSA Manual goes into quite some detail with regard to the differences between or the demarcation of independence and conflict of interest:[170]

> So what matters is not just that there is/has been some contact between an IA and an interested party, it is the nature of the relationship involved in that contact. The other point is that the possibility of a conflict arising from a relationship does not destroy independence (see later commentary on conflict of interest).

And the "later commentary" referred to in the citation above: [171]

> (…) It may be the case that if an IA is and remains independent, the prospect of conflict of interest is greatly lessened. However, the conflicts rule is dealing with a different concept. (…) The independence rule deals with maintaining objectivity. Objectivity has nothing to do with having a personal interest.

[168] See EBRD/BSA Manual, p. 164.
[169] See EBRD/BSA Manual, p. 128.
[170] See EBRD/BSA Manual, p. 147.
[171] See EBRD/BSA Manual, p. 161.

§ 3.3. Conflict of interest (and cooperation) in enterprise group insolvency

The insolvency of enterprise groups potentially poses a great number of legal and practical difficulties. The UNCITRAL Guide on Enterprise Groups recognizes as a key issue that, in the absence of legislation on enterprise groups in (domestic) insolvency and company law, "(…) *each entity has to be separately considered and, if necessary, separately administered* (…)". This may, according to the UNCITRAL Guide on Enterprise Groups, not always achieve the best result for individual debtors or for the group as a whole, unless "(…) *parallel insolvency proceedings concerning all group members can be closely coordinated.*"[172] As has been mentioned in the Introduction, article 42(1) InsReg Proposal introduces the notion of "conflict of interests" in regard to the cooperation in cross-border insolvency of enterprise groups. The EP Legislative Resolution expands on this by introducing the same notion in regard to cooperation between liquidators and courts. Hereafter, it is discussed what would entail "conflict of interest(s)" in relation to enterprise group insolvency and whether it would fall under the scope of my working definition.

§ 3.3.1. UNCITRAL Guide on Enterprise Groups and conflict of interest

The first time conflict of interest is mentioned by the UNCITRAL Guide on Enterprise Groups it is under the title "The need for post-commencement finance". Deciding on post-commencement finance involves "(…) *consideration of the desirability and impact of that financing not only for the group member receiving the benefit* (…) *but also the group member providing* (…)".[173] A distinction is made between the situation where that consideration involves more than one liquidator and the situation where just one liquidator is involved in this consideration. If there is more than one liquidator involved in the consideration, coordination and agreement between the liquidators is said to be crucial. However, if there is only one liquidator appointed in the insolvency proceedings of several group entities, "(…) *potential conflicts of interest connected with post-commencement finance will need to be considered and addressed.*"[174] As such, it seems that conflicts of interest are not an issue in relation to post-commencement finance, as long as there are two or more liquidators involved in the consideration.[175]

Under the subtitle "Conflict of interest", the UNCITRAL Guide on Enterprise Groups goes into more detail on the issue.

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[172] See UNCITRAL Guide on Enterprise Groups, p. 19.
[173] See UNCITRAL Guide on Enterprise Groups, p. 40.
[174] See UNCITRAL Guide on Enterprise Groups, p. 40.
[175] The requirement of both/all liquidators being involved in this consideration seems to suggest that both the receiving and providing group entity are represented by their "own" liquidator in this matter.

It is said that in general, the provision of finance raises "(…) *issues concerning possible prejudice and conflict of* interest (…)". Such a conflict of interest can arise "(…) *in balancing the interests of the group as a whole against the potentially different interests of the lender and the receiver of post-commencement finance.*"[176] This instance, however, differs from the example that was contained under the title of "The need for post-commencement finance". The consideration now involves not only the interests of (i) the receiving and (ii) providing group entity (or entities), but also the interests of (iii) the group as a whole. Moreover, no reference is made to how many liquidators are involved in this consideration, which in the previous example was the difference between the requirement of coordination and agreement on the one hand and (potential) conflicts of interest on the other. On the contrary, that post-commencement finance might also be the cause of conflicts of interest if multiple liquidators are appointed is suggested by the following phrase: "*A particular concern might arise where a single or the same insolvency representative is appointed to administer the insolvency proceedings of a number of group members.*"[177] The concern there is caused by the same liquidator having to assess (i) the interest of the receiving member, (ii) the interest of the providing member and, finally, (iii) the interest of the group (as a whole).[178] The phrasing ("particular concern") leaves open the possibility that even if such a consideration involves multiple liquidators, there may be a conflict of interest.

Conflict of interest is again mentioned in connection to the appointment of a single or the same liquidator in the insolvency proceedings of more than one group entity. According to the UNCITRAL Guide on Enterprise Groups, if (i) a single or the same liquidator is appointed in the insolvency proceedings of more than one group entity, (ii) where there are complex intra-group financial and business relationships and (iii) different groups of creditors, "(…) *there is a potential for loss of neutrality and independence.*"[179] Thereafter, it is put forward that conflicts of interest may arise. Five examples of such conflicts are given, being: (i) cross-guarantees, (ii) intra-group claims and debts, (iii) post-commencement finance, (iv) lodging and verification of claims and (v) intra-group wrongdoing. Apparently, a conflict of interest in situations where a single or the same liquidator is appointed is so important that recommendation 233 specifically requires the insolvency law to specify measures to address any conflicts of interest that may arise in such situations.[180]

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[176] See UNCITRAL Guide on Enterprise Groups, p. 44.
[177] See UNCITRAL Guide on Enterprise Groups, p. 44.
[178] The UNCITRAL Guide on Enterprise Groups suggests a few possible ways to address this situation, such as (i) court or creditor approval, (ii) appointing one or more additional insolvency representatives, either specifically to solve the conflict or on general terms for the duration of the proceedings, to ensure protection of the interests of creditors of different group entities, see p. 44.
[179] See UNCITRAL Guide on Enterprise Groups, p. 77.
[180] See UNCITRAL Guide on Enterprise Groups, p. 78. Recommendation 233 mentions the appointment of additional liquidators.

The UNCITRAL Guide on Enterprise Groups deals with conflict of interest in cross-border situations following the appointment of a single or the same liquidator in the insolvency proceedings of more than one group entity. The explanation and accompanying recommendation 252 are similar to those discussed above, but give one specific example of conflict of interest in cross-border situations, namely: "(…) *when the obligations of the insolvency representative under different insolvency laws were directly in conflict*."[181]

Finally, both in the explanation of recommendation 233 and in its title, explicit reference is made to non-enterprise group insolvency conflict of interest.[182] The UNCITRAL Guide on Enterprise Groups, therefore, at the very least seems to suggest that these concepts share some common ground.

§ 3.3.2. III MEG Guidelines and conflict(s) of interest

In 2012, the International Insolvency Institute ("**III**") published the draft "Guidelines for Coordination of Multinational Enterprise Group Insolvencies" ("**III MEG Guidelines**").[183] In two Guidelines, conflict of interest is mentioned in relation to enterprise group insolvency.

Guidelines No. 10 and No. 11 read as follows:

Guideline No. 10

To the extent not precluded by conflicts of interest, a single insolvency representative should be appointed for all of the cases filed in respect of members of the enterprise group to handle matters in which members of the group have common interests and as to which there are no conflicts of interest among the group members.

Guideline No. 11

To the extent not precluded by conflicts of interest, there should be a single officeholder for each other category provided for under the applicable domestic insolvency law. Such officeholders include legal counsel, accountants, restructuring officers, committees of creditors and their professionals, and creditor's representatives (e.g., French law). If local law so provides, any office holder may consist of an entity or several individuals.

[181] See UNCITRAL Guide on Enterprise Groups, p. 107.
[182] The explanation on p. 77 of the UNCITRAL Guide on Enterprise Groups, for example, refers to recommendations 116 and 117 in relation to the disclosure of a conflict of interest in the UNCITRAL Guide. Similarly, in the title of recommendation 233, explicit reference is made to the UNCITRAL Guide, Part Two, Chapter III, paras. 42 – 43.
[183] See <www.iiiglobal.org/component/jdownloads/viewdownload/362/5953.html>. The chair and reporter were R.R. Mabey and S.P. Johnston.

The III MEG Guidelines go quite a bit further than the UNCITRAL Guide on Enterprise Groups, by prescribing the appointment of a single liquidator to handle matters of "common interest". Such matters of common interest include certain (i) procedural matters and (ii) the sale of assets crossing national borders. Explicitly excluded from these common matters are the (i) determination of claims and (ii) the distribution of value, as these matters are deemed to be impossible to be appropriately handled by a single liquidator.[184] According to the III MEG Guidelines, the main issue that arises with the appointment of a single liquidator in all insolvency proceedings in relation to the enterprise group is that it will be contrary to the prohibition on self-dealing and conflict of interest. This is because common representation would require making agreements between individual group entities and "(…) *the group administrator could encounter debilitating conflicts of interest*."[185] The III MEG Guidelines point out that in practice this is solved by appointment of (one or more) "ad hoc" liquidators. Certain powers, such as the power to enter into specific agreements, are then transferred to the ad hoc liquidators.[186]

§ 3.3.3. German legislative proposal on enterprise group insolvency

Recently, enterprise group insolvency has been in the spotlight of the German legislator. In early 2014, following a (public) consultation in 2013, the German legislator published a proposal ("**InsO Proposal**") to amend the InsO.[187] The InsO Proposal embodies a legislative solution for enterprise group insolvencies. Its goal is to provide for better coordination between the different insolvency proceedings that have been opened in respect of different entities of an enterprise group.

First of all, the InsO Proposal provides for the opening of insolvency proceedings regarding an enterprise group before a single insolvency court and, in the event petitions to open insolvency proceedings with regard to enterprise group members were filed before other courts, for the referral of the insolvency proceedings to a single court. In the event that the insolvency proceedings regarding members of an enterprise group play before different courts and there are multiple liquidators appointed in the insolvency proceedings of group entities, the InsO Proposal provides for a legal basis for extensive cooperation between liquidators and courts.

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[184] See III MEG Guidelines, p. 18, footnote 19.
[185] What "debilitating" exactly means in this context is unclear. Perhaps it refers to the "weakening" of the position of said group administrator, due to loss of support from various groups of stakeholders involved in the insolvency proceedings of the enterprise group as a result of self-dealing and instances of conflict of interest.
[186] See III MEG Guidelines, p. 19, footnote 19.
[187] See "Entwurf eines Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen", *Drucksache* 18/407, 30 January 2014.

This includes the designation of a coordinating court, a coordinating liquidator and the drafting a coordination plan.[188] In the InsO Proposal, the issue of conflict of interest is mentioned several times. Questions related to overcoming internal procedural problems concerning conflict of interest between the involved enterprise group members and their respective creditors is named as one of the reasons for not taking an approach in which proceedings regarding enterprise group members are consolidated.[189] The explanation under the title concerning the appointment of a liquidator stresses that the appointment of a single liquidator is not always in the best interests of all creditors due to conflicts of interest. The explanation specifically mentions intercompany transactions as one of the causes of conflicts of interest. The solution that is presented in these cases is the appointment of special liquidators, whose (specific) task it is to watch over the interests of the concerned creditors.[190]

Section 56b InsO Proposal deals with the appointment of the liquidator in the insolvency proceedings with regard to more than one member of an enterprise group. Section 56b(1) InsO Proposal reads as follows:

> (1) Wird über das Vermögen von gruppenangehörigen Schuldnern die Eröffnung eines Insolvenzverfahren beantragt, so haben die angegangenen Insolvenzgerichte sich darüber abzustimmen, ob es im Interesse der Gläubiger liegt, lediglich eine Person zum Insolvenzverwalter zu bestellen. Bei der Abstimmung ist insbesondere zu erörtern, ob diese Person alle Verfahren über die gruppenangehörigen Schuldner mit der gebotenen Unabhängigkeit wahrnehmen kann und ob mögliche Interessenkonflikte durch die Bestellung von Sonderinsolvenzverwaltern ausgeräumt werden können.

Section 56b(1) InsO Proposal could be translated in the following manner:

> (1) In the event that the opening of insolvency proceedings concerning the assets of debtors belonging to an enterprise group is requested, the involved insolvency courts have to deliberate whether it is in the interests of the creditors to appoint merely one person as liquidator. In this deliberation it should particularly be discussed whether this person can look after all proceedings concerning the debtors belonging to an enterprise group with the required independence and whether possible conflicts of interest can be eliminated by the appointment of special liquidators.

The explanation of section 56b InsO Proposal indicates circumstances under which the appointment of just one liquidator is undesirable.

[188] See InsO Proposal, pp. 1 – 2.
[189] See InsO Proposal, p. 17.
[190] See InsO Proposal, p. 17.

This is the case where internal conflicts of interest endanger the independence of the liquidator and the conflicts of interest cannot be sufficiently encountered by the appointment of special liquidators. If there are proceedings regarding enterprise group members across several courts, these courts should agree on the aforementioned issues regarding the appointment of the liquidator.[191]

Section 269a InsO Proposal contains a duty for liquidators to cooperate, and therefore serves a goal similar to that of article 42(1) InsReg Proposal. It reads as follows:

> Die Insolvenzverwalter gruppenangehöriger Schuldner sind untereinander zur Unterrichtung und Zusammenarbeit verpflichtet, soweit hierdurch nicht die Interessen der Beteiligten des Verfahrens beeinträchtigt werden, für das sie bestellt sind. Insbesondere haben sie auf Anforderung unverzüglich alle Informationen mitzuteilen, die für das andere Verfahren von Bedeutung sein können.

Section 269a InsO Proposal could be translated as follows:

> The liquidators of the debtors belonging to an enterprise group are duty bound to brief each other and cooperate, insofar as this does not impair the interests of the parties involved in the proceedings in which they are appointed. In particular, they must, following a request thereto, promptly provide all information which may be relevant for the other proceedings.

One of the examples the explanation of section 269a InsO Proposal contains as regards cooperation that could impair the interests of creditors concerns avoidance actions. The duty to cooperate would not require a liquidator to provide another liquidator with such information enabling the latter liquidator to find grounds for the avoidance of transactions to the detriment of creditors of the estate of the former liquidator.[192] As such, it seems that "parties involved" mainly applies to the interests of creditors.

The explanation of section 269e InsO Proposal, dealing with coordinating liquidator, again brings up conflict of interest. Section 269e(1) InsO Proposal reads as follows:

> (1) Das Koordinationsgericht bestellt eine von den gruppenangehörigen Schuldnern und deren Gläubigern unabhängige Person zum Koordinationsverwalter. Die zu bestellende Person soll von den Insolvenzverwaltern und Sachwaltern der gruppenangehörigen Schuldner unabhängig sein. (...)

Section 269e(1) InsO Proposal could be translated as follows:

[191] See InsO Proposal, p. 30.
[192] See InsO Proposal, p. 32.

(1) The coordinating court appoints a person as coordinating liquidator who is independent from both the debtors belonging to an enterprise group and their creditors. The person who is to be appointed must be independent from the liquidators and trustees of the debtors belonging to the enterprise group. (…)

In the explanation, it is put forward that the coordinating liquidator must be independent from the other liquidators appointed in the enterprise group insolvency proceedings. According to the explanation, conflicts of interests between the different liquidators governing different insolvency proceedings relating to different enterprise group members can pose difficulties for building up mutual trust. The appointment of a neutral third person as coordinating liquidator guarantees that no personal interests will be pursued over the coordination proceedings and that the coordinating liquidator will be accepted in his neutral role of intermediator.[193]

§ 3.3.4. Mevorach on conflict of interest in enterprise group insolvency

Mevorach discusses conflict of interest in relation to the appointment of multiple liquidators in enterprise group insolvency, in the absence of substantive consolidation[194] of the enterprise group in the insolvency proceedings. *Mevorach's* seems to view the following as the essence of the conflict of interest: "*The representatives are, on the one hand, operating for the benefit of the group as a whole (and the creditors in general), but on the other hand are dealing with separate entities that might have contradicting interests*."[195] This seems to cover two instances of conflicts. First, there can be conflicts between the interests of (the benefit of) the group as a whole and separate entities. Second, there can be conflicts between the interests of separate entities. Interestingly, *Mevorach* explicitly points out that also where more than one liquidator is appointed (as opposed to a single or the same liquidator), issues of conflict of interest may arise, "(…) *as operating as a closely tied group of representatives can result in an all too 'cosy' situation, with the potential to neglect certain creditor's interests.*"[196] One could interpret this as meaning that the existence of this closely tied group of liquidators may lead to it acting in concert, which in turn would lead to issues of conflict of interest that are similar to issues of conflict of interest in a situation in which a single liquidator would have been appointed.

[193] See InsO Proposal, p. 35.
[194] Defined by the UNCITRAL Guide on Enterprise Groups as "(…) *the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.*", see p. 2.
[195] See I. Mevorach, *Insolvency within Multinational Enterprise Groups*, New York: Oxford University Press 2009, pp. 265 – 266.
[196] See I. Mevorach, *Insolvency within Multinational Enterprise Groups*, New York: Oxford University Press 2009, p. 266.

§ 3.3.5. Concluding remarks

My analysis of the above is that two different categories of issues that are connected to conflict of interest may arise in the insolvency of enterprise groups. First, there can be a conflict between the interest of the enterprise group as a whole and the interest of (one or more) separate legal entities. Second, there can be a (direct) conflict between (one or several) separate legal entities and (one or more) other separate legal entities. An illustration of the first situation is provided by the Dutch author *Frielink*, who describes a situation in which an enterprise group consists of two entities, A, owning all the real estate and B, the entity that runs the business. A separate sale of the assets of the entities would yield respectively 100 and 20, whereas a combined sale of the assets going-concern would yield respectively 80 and 50. It would, therefore, in the interest of the stakeholders of the enterprise group as a whole, be beneficial to conduct a sale of the business going-concern, as this leads to wealth maximization and possibly preservation of employment. In *Frielink's* opinion, the creditors of A would not be able to contest the sale of the business going-concern if they would get the 100 they originally would have been entitled to. Still, the question remains on how to divide the surplus of 10 that was received.[197] An example of the second situation is provided by the UNCITRAL Guide on Enterprise Groups and entails (possible) wrongdoing by A in respect of B.[198] In this situation, it cannot be said that a successful claim would be in the interest of the (stakeholders of the) enterprise group as a whole, as there would be no increase in wealth. The damages would simply be detracted from the estate of A and would flow into the estate of B. However, the estates and, most importantly, their creditors certainly have a conflicting interest. Not pursuing the claim would be beneficial for A, but would deprive B of the damages. The liquidator's duty to strive for maximization of the assets of the estates thus requires him to both pursue and contest the claim.[199] While the UNCITRAL Guide on Enterprise Groups leaves some room for doubt, issues of conflict of interest can arguably arise both in the situation that a single (or the same) liquidator has been appointed and in the situation that multiple liquidators have been appointed in the insolvency proceedings of all or multiple enterprise group members.

Now does the notion of conflict of interest in enterprise group insolvency fall under the same definition as a "normal" conflict of interest, as the UNCITRAL Guide on Enterprise Groups suggests? The answer to that question will primarily depend on the definition that is used in respect of conflict of interest.

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[197] See K. Frielink, *Tegenstrijdige belangen in het insolventierecht*, *TvI* 2001, pp. 115ff. Frielink also provides for other examples as regards this specific topic.
[198] See UNCITRAL Guide on Enterprise Groups, p. 77.
[199] Another example would be the avoidance of transactions in an intra-enterprise group context.

Thompson, who defines a conflict of interest as professional judgment with regard to a primary interest being unduly influenced by a secondary (financial) interest, would probably conclude that his definition does not include conflict of interest in enterprise group insolvency, since neither of the conflicting interests can, in principle, be seen as "primary".[200] *Argandoña's* notion of conflict of interest, on the other hand, requires a situation in which an agent wishes to satisfy an interest that may be (i) a personal interest or (ii) the interest of another person or institution toward which the agent (also) has a (contractual, conventional, professional or fiduciary) duty. The wish of the liquidator (or group of liquidators) to satisfy the interest of the enterprise group as a whole or the interest of an entity (or more than one entity) would fall under part (ii) of *Argandoña's* definition, as the liquidator (or group of liquidators) has a duty to pursue the aforementioned interests.[201] The duty to also represent the interest of another insolvent estate (or multiple other estates or the interests of the enterprise group as a whole) could be seen as falling under my notion of an "other-regarding interest" as can be found in my working definition,[202] since this duty would constitute a desire for the liquidator to promote the interests of one or more other estates or the enterprise group as a whole. Nevertheless, I feel the need to set apart conflict of interest in enterprise group insolvency, as it is something I would approach differently than, for example, a conflict of interest consisting of the liquidator selling assets to himself or to a relative (or any other circumstances or situations that follows from the UNCITRAL Guide, IFC/Ukraine Code and EBRD/BSA Code and Manual).

A relevant distinction in this regard is made by *Boatright*, namely between "personal" and "impersonal" conflicts of interest. Personal conflicts of interest appear when "(…) *the interest that actually or potentially interferes with the performance of an obligation to serve the interest of another is some gain to an individual or institution*." An impersonal conflict is described by *Boatright* as a "two masters problem" and exists when "(…) *the interfering interest may also be another person's interest which an individual or institution is duty bound to serve*." *Boatright* illustrates this by referring to the lawyer having two clients with opposing interests.[203]

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[200] *Thompson* concludes with regard to competing interests that "*In ethical dilemmas, both of the competing interests have a presumptive claim to priority, and the problem is in deciding which to choose. In the case of financial conflicts of interest, only one of the interests has a claim to priority, and the problem is to ensure that the other interest does not dominate.*", see D.F. Thompson, *Understanding financial conflicts of interest*, *The New England Journal of Medicine*, Vol. 329, No. 8, 1993, pp. 573 – 576.
[201] See A. Argandoña, *Conflicts of Interest: The Ethical Viewpoint*, IESE Business School Working Paper, No 552, 2004, p. 3.
[202] See § 3.1.4.
[203] See J.R. Boatright, *Conflicts of Interest in Financial Services*, *Business and Society Review*, Vol. 105, Issue 2, 2000, p. 203.

In enterprise group insolvency, the liquidator may have a similar impersonal conflict of interest, as he may be caught between his duty to serve the contradicting interests of (i) more than one estate or (ii) one (or more) estates and the interest of the enterprise insolvency group as a whole. The impersonal character of this conflict of interest is perhaps best illustrated by the removal and replacement of a liquidator with a personal conflict of interest on the one hand and one with an impersonal conflict of interest on the other. In principle, removing the former liquidator will get rid of that specific conflict of interest. On the other hand, if one were to remove and replace the latter liquidator, this would not get rid of the conflict of interest, as any liquidator that replaces the former one will be faced with the exact same conflict of interest.

§ 3.4. Conflict of interest (and cooperation) in main and secondary proceedings

As mentioned in the Introduction, the EP Legislative Resolution's justification for introducing the notion of conflict of interests is "alignment" with the provisions on enterprise group insolvency. There are several reasons as to why I am critical of the EP's wish for "alignment" in this matter. As follows from the above paragraphs, the existence of conflict of interest in enterprise group insolvency is mainly caused by a field of tension between the administration of separate legal entities, the contradicting interests that may exist between those entities and/or the contradicting interests that may exist between one or more entities and the interests of the enterprise group as a whole.

First, in contrast to enterprise group insolvency matters, main and secondary insolvency proceedings concern the same debtor. Territorial insolvency proceedings and, therefore, secondary insolvency proceedings can only be opened in those Member States where the debtor has an "establishment" in the meaning of article 2(h) InsReg.[204] It is generally accepted that subsidiary companies cannot be seen as "establishments" of the parent company in the context of enterprise group insolvency, one of the reasons being that subsidiaries are separate legal entities.[205] Second, under the InsReg, the main proceedings are regarded as being the "dominant" proceedings.[206] This contrasts with the situation of enterprise group insolvency, in which it is not clear which proceedings would have to be seen as dominant and, moreover, it is not clear whose interests ultimately would have to prevail. Third, according to article 32(1) InsReg, "*Any creditor may lodge his claim in the main proceedings and in any secondary proceedings*."

[204] See article 3(2) InsReg.
[205] See B. Wessels, B.A. Markell and J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, New York: Oxford University Press 2009, pp. 128 – 129.
[206] See explicitly recital 20 InsReg. See also the overview given of feautures of the InsReg that display this dominance in B. Wessels, B.A. Markell and J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, New York: Oxford University Press 2009, pp. 144 – 145.

In enterprise group insolvency, the creditors are not in such a position. It is exactly this that constitutes an important reason for the existence of conflicts of interest in that context. Creditors of subsidiary A cannot simply lodge their claims in the insolvency proceedings of subsidiary B or those of the parent company. Contradicting interests of creditors of different entities, as they may exist in enterprise group insolvency, as such, would not exist in the context of main and secondary insolvency proceedings.

The mere fact that recital 20a InsReg Proposal states that in enterprise group insolvency, the liquidators should "(…) *be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor*.", does not in itself mean that issues relating to conflict of interests also appear in the context of main and secondary proceedings and that, therefore, conflict of interests also needs to be included in provisions on cooperation regarding the latter. Insofar as the EP has clear ideas about what would constitute a conflict of interests in this context, additional insight in this respect would have to be provided. No literature was found on conflict of interest being caused by cooperation in main and secondary insolvency proceedings. As such, unless additional explanation is provided for, I would strongly suggest leaving out the reference to conflict of interests in the context of cooperation between main and secondary proceedings.

§ 3.5. Concluding remarks and adaptation of the working definition

The concept of conflict of interest is, as the many different definitions and notions in the sources referred to in this chapter show, not set in stone. It seems that, while the UNCITRAL Guide and IFC/Ukraine Code (i) approach conflict of interest from a perspective of relationships the liquidator has (or under certain circumstances, his relationships have) and (ii) view conflict of interest and independence as closely related concepts, the EBRD/BSA Code and Manual take a different approach by (i) approaching conflict of interest from the perspective of personal or private interests of the liquidator and (ii) putting forward that conflict of interest is a different concept than independence.

On a closer look, the actual differences between the approaches may be not as great as it would seem. For example, the EBRD/BSA Code and Manual's notion of private interests seems to include certain relationships of the liquidator, whereas the IFC/Ukraine Code provides for two broad residual categories that make no mention of a relationship but merely refer to "other circumstances" that may lead to the impairment of objectivity, independence and more.

What both the IFC/Ukraine Code and EBRD/BSA Code and Manual have in common is that, similar to certain national rules, see § 2.5., a combination of principle and rule-based instruments is used. As far as enterprise group insolvency goes, it seems that there the concept of conflict of interest has not yet fully crystallized. This however, does not mean that it is impossible to ascertain what would possibly constitute a conflict of interest in such situations. Finally, I have not been able to identify issues of conflict of interest specifically in relation to cooperation in main and secondary insolvency proceedings. Therefore, the EP Legislative Resolution's amendments are not included in my definition. In § 3.1.4. I presented the following working definition:

1. A conflict of interest exists in any situation in which a liquidator has difficulties in discharging the duties he has to the insolvent estate in virtue of holding his position, because he has an interest that is incompatible or potentially incompatible (or seems to be as such to him) with fulfilling the his duties to the insolvent estate.
2. A liquidator is deemed to have difficulties in discharging his duties if an average person, in the same objective circumstances as the liquidator, would be regarded as having difficulties in discharging the duties to the estate in virtue of holding his position.
3. Interests that are deemed to be incompatible or potentially incompatible with a liquidator's fulfillment of duties to the estate are either (i) own personal interests or (ii) other-regarding interests.

In the light of this chapter, I propose the following adaptations to my definition:

1. A conflict of interest exists in any situation in which a liquidator has difficulties in discharging the duties he has to the insolvent estate in virtue of holding his position, because he has an interest that is incompatible or potentially incompatible (or seems to be as such to him) with fulfilling his duties to the insolvent estate.
2. A liquidator is deemed to have difficulties in discharging his duties if a reasonable and informed third party, having all the relevant background knowledge, would regard him to have difficulties in discharging the duties he has in virtue of holding his position.
3. Interests that are incompatible or potentially incompatible with a liquidator's fulfillment of duties to the estate may be caused by:
a. personal interests, financial or otherwise;
b. present or past, direct or indirect, personal or professional relationships of a liquidator, where these relationships, directly or indirectly, are involved in or may be affected by the insolvency proceedings, including such direct or indirect relationships with the debtor, a creditor or a competitor of either;
c. appointments in other insolvency proceedings, insofar as a liquidator has, alone or together with other liquidators, a duty to also fulfill the interests of one or more other insolvent estates and/or the interests of the group as a whole, except where these interests clearly do not contradict each other;
d. other-regarding interests.

As follows from this adapted working definition, the following important changes were made.

First, under 2., I felt that the reference to articles 4.3.4. and 4.3.5. IFC/Ukraine Code made to the reasonable and informed third party, possessing all the background knowledge, would be a more effective objective test than considering whether the average person would in the same objective circumstances have had difficulties in discharging his duties. Using this third-party test does, in my opinion, do more justice to the serious damage of the mere appearance of a conflict of interest. The function of 2. remains the same; it provides both an objective assessment of whether the liquidator has difficulties discharging his duties and includes the mere apparent conflicts of interest.

Second, under 3.a. I highlight that non-financial personal interests may also make it difficult for the liquidator to discharge his duties. It should also be kept in mind that the remuneration of the liquidator, in principle, constitutes a personal financial interest. Especially in jurisdictions in which the liquidator is paid an hourly fee for his work (as opposed to receiving a percentage of the realization of assets), a liquidator may have no incentive to conduct his work as quickly as possible. In his discussion of conflict of interest in the medical sector, *Stark* sees this form of conflict of interest as "internal", "professional" or "in-role" conflicts of interest. According to *Stark*, "*We want professionals to provide unstinting service to their principals even if (as in fee-for-service practice) they earn more professional income in doing so. By the same token, we also want them to avoid unnecessary service provision, even if (through capitation) they earn more professional income by doing so.*"[207] As such, and as is acknowledged by the EBRD/BSA Manual, remuneration being a conflict of interest is unavoidable. The IFC/Ukraine Code and EBRD/BSA Manual deal with this issue by requiring a legal basis or court authorization for the remuneration.

Third, under 3.b., I included a new category, making explicit reference to the liquidator's personal or professional relationships. In 3.b., reference is made to a "direct or indirect" relationship, where "indirect" may, for example, also refer to a current or past relationship of the liquidator's spouse. It is also not necessary that the relationship should have directly existed with, for example, the debtor for a conflict of interest to exist, it may also be caused by a relationship with, among others, a relative, director or even employee of the debtor.

[207] See A. Stark, *Why Are (Some) Conflicts of Interest in Medicine So Uniquely Vexing?* in D.A. Moore, D.M. Cain, G. Loewenstein, M.H. Bazerman *et alii*, *Conflicts of Interest – Challenges and Solutions in Business, Law, Medicine and Public Policy*, New York: Camebridge University Press 2005, p. 154.

To illustrate, if a relative of the liquidator has a relationship with the spouse of the debtor, this could, in principle, constitute a conflict of interest for the liquidator, even though there is no direct relationship between the liquidator and the debtor. In considering conflict of interest in the light of relationships, both sides of the aisle need to be "extended".

Fourth, under 3.c., I included another new category that mainly concerns enterprise group insolvency. Consistent with *Mevorach's* concerns about the appointment of multiple liquidators possibly leading to a similar conflict of interest as the appointment of one or the same liquidator would, both are included under my notion of conflict of interest. The conflict of interest can, in line with my findings, involve the interests of (i) one or more entities and one or more other entities and (ii) one or more entities and the interests of the group as a whole.

Fifth, I kept the category of other-regarding interests in 3.d., which now serves as a residual category. Basically, anything that may lead to a desire for the liquidator to promote (or, in *Carson's* view, also thwart) the interests of another relevant party may fall under this residual category.

Chapter 4 – Independence of the liquidator

Independence (UNCITRAL Guide and IFC/Ukraine Code) and objectivity (IFC/Ukraine Code) are in certain sources explicitly connected to conflict of interest. However, in the EBRD/BSA Manual, independence is said to have a connection to objectivity, which in turn is said to have nothing to do with having a personal interest, other than that independence might help the liquidator to avoid a conflict of interest. This contrasts with the UNCITRAL Guide, from which it follows that the avoidance of conflicts of interest helps the liquidator to stay independent. A vastly different approach seems to be taken in this regard.[208] According to *Davis*, "*Impartiality, independence, and objectivity have only a loose relation to conflict of interest*."[209] Be that as it may, a loose relation is still a relation and would best be described further in the light of the wish of the EP and EESC to harmonize both independence and conflict of interest. For this reason, I deem it necessary to discuss the concept of independence and most importantly the demarcation between the concepts.

§ 4.1. Defining independence of the liquidator

The definition of "independent" given by Black consists of three parts:

> **1.** Not subject to the control or influence of another <independent investigation>. **2.** Not associated with another (often larger) entity <an independent subsidiary>. **3.** Not dependent or contingent on something else <an independent person>.

According to the second part of the definition, independence can exist through "association". The third part of the definition is not useful, as it defines "independence" with being "not dependent" or "contingent". "Contingent" is defined by Black as (primarily) "dependent on something else", and brings us back to where we started. The first part of the definition however, is relevant. Independence can exist in situations where the liquidator is either "controlled" or "influenced" by another person. Two questions arise. First, what amount of either control or influence is required or how strong should either the control or influence be? Second, what circumstances would create this control or influence? The Cambridge Business English Dictionary contains a definition of "independent" that, while being more specific, is quite similar to Black's definition. "Independent" is to be:

> (...) not influenced or controlled by the government or another organization (...)

[208] See most importantly § 3.2.1. and 3.2.3.
[209] M. Davis, Andrew Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 15.

The UNCITRAL Guide does not contain a definition of independence, it only mentions what the liquidator must be independent from, namely interests of an (i) economic, (ii) familial or (iii) other nature.[210] The UNCITRAL Guide on Enterprises also mentions independence as in the event that a single liquidator is appointed in the insolvency of several enterprise group entities with "(…) *complex financial and business relationships and different groups of creditors,* (where) *there is the potential for loss of neutrality and independence*."[211] What exactly could cause this loss of independence (other than complex intra-group relationships, different groups of creditors and the appointment of a single liquidator over multiple of those entities) is not made clear.

The IFC/Ukraine Code deals with "Independence and Objectivity" in article 4.3. (which also contains the aforementioned provisions with regard to conflict of interest). With regard to independence, article 4.3.1. IFC/Ukraine Code requires the liquidator to:

> (…) demonstrate independence from vested interests, whether of an economic, familial or other nature that affect or may affect the performance of *Insolvency Administrator's* tasks.

The phrasing is similar to the UNCITRAL Guide, with the exception that an additional requirement is set. The dependence, to be seen as a lack of independence must affect, even if only potentially, the performance of the tasks of the liquidators. Not just any dependence will therefore do. Article 4.3.2. IFC/Ukraine Code gives, what seems to be, two examples of threats to the independence (and objectivity) of the liquidator. The liquidator is prohibited from engaging in any (i) business or (ii) occupation that would jeopardize the aforementioned objectivity and independence. Independence is mentioned again in certain paragraphs of the articles 4.3.4. and 4.3.5. regarding active and passive conflict of interests, in which independence acts as a sort of "condition precedent". In these situations, before a conflict of interest is deemed to arise, it is required that the independence (and objectivity) of the liquidator appears to be impaired to an informed third party.

The EBRD/BSA Code deals with objectivity, independence and impartiality in article 4. According to the first paragraph, liquidators "*(…) must exercise objectivity, impartiality and independence in the performance of their work*". The second paragraph[212] of article 4 EBRD/BSA Code deals with the aforementioned three requirements in the context of the appointment of the liquidator.

[210] See UNCITRAL Guide, p. 176.
[211] See UNCITRAL Guide for Enterprise Groups, p. 77.
[212] This paragraph applies the requirements of independence, impartiality and objectivity to the appointment of the liquidator.

Article 4 EBRD/BSA Code puts forward that the requirements of objectivity, impartiality and independence could be materially affected in the event that the liquidator either has or had, directly or indirectly, a tie with (i) the debtor, (ii) persons associated with the debtor or (iii) other persons having a material interest in the insolvent estate (including creditors). This could be a (i) business, (ii) financial, (iii) social or (iv) other tie. What is interesting here is that what the second paragraph views under the requirement of independence, could also constitute a conflict of interest under the approach taken by the UNCITRAL Guide and IFC/Ukraine Code.[213] In the EBRD/BSA Manual, independence is described as follows:[214]

- **independence** requires that an IA is not *affected or influenced by others*

Under "What is the test of independence?":[215]

To be independent is to be free of the authority or control of any person who might seek to influence actions and decision making. It is to act uninfluenced or affected by others. (…) Independence is vital because if an IA does not bring an independent mind to his work, he may become partial and may act with bias. (…) The first test is that the IA is *independent in fact*. This means that **there is no influence** on the IA. (…) However, the second test is that the IA must also be *seen or perceived to be independent* by a fair minded observer. (…) if there is a presence of something that suggests there might be an absence of independence (…) that could be enough to make it seem that the IA is not independent (…)

This definition is for the most part consistent with the definitions provided by *Black* and the Cambridge Business English Dictionary. An important aspect, however, is that "others" only seems to include those parties that might seek to influence actions and decision making of the liquidator. Similarly to apparent conflicts of interest, not only an actual influence on the liquidator (in a sense that he is, in fact, influenced) but also an appearance of an influence potentially fails the requirement of independence of the liquidator. One of the requirements in the context of independence put forward by the EBRD/BSA Manual, namely not to be "affected" by others, seems quite similar to the description given of conflict of interest requiring the liquidator to not permit that personal interests "(…) *affect the official duties and responsibilities of an IA".*[216]

[213] See most importantly § 3.2.1. and 3.2.2.
[214] See EBRD/BSA Manual, p. 145.
[215] See EBRD/BSA Manual, p. 147.
[216] See EBRD/BSA Manual, p. 130.

According to the EBRD/BSA Manual, the mere existence of some contact between the liquidator and an interested party is not important with regard to independence. What matters is the nature of the relationship involved in that contact. The possibility of a conflict arising from a relationship is, therefore, insufficient to "destroy" independence.[217]

Independence can, in the context of the person of the liquidator and in the light of the foregoing, perhaps best be negatively defined as follows:

> The liquidator is not independent, either in fact or in appearance, in the situation that the liquidator is (or appears to be) controlled or influenced by another person or institution, with whom the liquidator has ties of an (i) economic (business/financial), (i) social (familial) or (iii) other nature, and where this other person may seek to influence actions and decision-making of the liquidator.[218]

§ 4.2. Independence and conflict of interest – an overlap?

My definitions of independence and conflict of interest can partially overlap in the sense that the same circumstances can lead to both dependence and a conflict of interest. This can be illustrated with the following example. In insolvency proceedings liquidator A is appointed. Suppose the father of A has some interest in the outcome of the insolvency proceedings in which A is appointed. It is evident in this case that the liquidator does not fulfill the requirement of independence. The exact same scenario could also be described as a situation in which there is a conflict of interest. In this situation, there is a personal relationship which would, in the opinion of a reasonable and informed third party, create difficulties for A in discharging his official duties. The same holds true for the notion of conflict of interest in EBRD/BSA Manual (which includes the interests of family members).

§ 4.3. Römermann on independence of the liquidator

A way to demarcate conflict of interest would be to leave relationships out of the notion of conflict of interest and consider only the personal interests of the liquidator. While this could be a solution to the problem of demarcation, I have two main objections to such an approach. First of all, this alternative demarcation would seem contrary to most of the non-legal literature on the topic and also to the notion of conflict of interest in the UNCITRAL Guide, IFC/Ukraine Code and the EBRD Code and Manual.

[217] See EBRD/BSA Manual, p. 147.
[218] Or, as article 4.3.1. IFC/Ukraine Code puts it, affects or may affect the official actions of the liquidator's tasks.

Second, such an approach seems to either (i) not cover circumstances one would deem to be undesirable or (ii) result in the notion of "influence" and "control" being stretched to a level that no longer corresponds with the meaning commonly attributed to these words.

In Germany, there has recently been extensive academic debate regarding the notion of independence of the liquidator. This debate was sparked by the enactment of "ESUG".[219] *Wessels* identifies two main tendencies in German literature.[220] A number of authors approach the issue in the light of the function of the requirement of independence before appointment and during the insolvency proceedings. A different approach is taken by *Römermann* who views the issue of independence in the light of different types of relationships that possibly constitute dependence of the liquidator, after which he puts forward what should not be seen as independence, namely instances of (i) conflict of interest, (ii) a violation of the duty of truthfulness and (iii) a violation of the duty of confidentiality.[221] *Römermann* identifies three categories of relationships possibly giving rise to independence, being (i) legal, (ii) economic and (iii) social in nature. Legal dependence exists when the liquidator has a contractual relationship under which he could be legally obliged to perform certain actions or refrain from taking certain actions. *Römermann* identifies the employment contract and the contract of services. In these situations, the liquidator will be subject to the instructions of the other party to the contract. Therefore, the majority of liquidators will be dependent, as they are normally employed with a law firm. According to *Römermann*, the employing law firm should preserve the liquidators' independence. Economic dependence exists in cases where the liquidator depends largely on one party with regard to his income. *Römermann* gives the example of a liquidator being economically dependent on the local insolvency court. This court will, in its authority to decide who will be appointed in an insolvency case, have a great influence on the income of the local liquidators. Based on this, the liquidator may think twice before steering an independent course from this court. *Römermann* has the opinion that a liquidator is to be seen as economically dependent in a situation where at least fifty percent of his income comes from one source. Finally, the liquidator can be socially dependent. According to *Römermann*, this social dependence only exists in relation to family and close friends of the liquidator. Vaguely knowing a person is insufficient to establish social dependence.

[219] The "Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen", published in the official gazette of Germany under BGBl. 2011, Teil 1 Nr. 64, S. 2582.
[220] See B.Wessels, *De onafhankelijkheid van de faillissementscurator*, Zutphen: Uitgeverij Paris 2013, p. 62.
[221] See V. Römermann, *Die „Unabhängigkeit" des Insolvenzverwalters: Endlich Schluss mit der uferlosen Auslegung!*, *ZInsO* 2013, Issue 6, pp. 218 – 225.

The most important advantage of *Römermann's* approach is that these criteria are relatively easy to apply in practice. He provides for, to the maximum extent possible, "hard and fast" rules that can be used with regard to ethical requirements. The more ambiguous element of *Römermann's* definition is social dependence. While defining "family" causes few problems, the notion of "close friends" is more vague. The liquidator should take into account how in the light of this relationship, his independence is perceived by an informed third party or, differently put, whether he actually appears to be independent in the light of this social relationship. In situations where a certain relationship of the liquidator is involved in or affected by the insolvency proceedings, we can now make a clear demarcation. If the liquidator is seen as dependent with regard to that relationship, the liquidator fails to fulfill the requirement of independence. If the liquidator can, according to *Römermann*, not be seen as dependent, there may still potentially be a potential conflict of interest. As such, there can be a smooth transition between conflict of interest and dependence, which, as I see it, corresponds with the view of the UNCITRAL Guide on conflicts of interest. What initially would only be seen as a conflict of interest could gradually become a situation in which the liquidator is not seen to be independent. Examples are: (i) the liquidator gradually becomes economically dependent on a third party or (ii) "vaguely knowing someone" grows into a "close friendship". Taking *Römermann's* opinion on the matter into account, it is inevitable that the liquidator is dependent to at least some subjects. That, in itself, is not problematic. These dependences only become a problem when these subjects are involved in or affected by the insolvency proceedings and, therefore, may seek to influence the decisions of the liquidator.

§ 4.4. Concluding remarks

Independence, in contrast to conflict of interest, presumes control or influence over the liquidator by a person with an interest in the outcome of the insolvency proceedings. Similarly, with the concept of conflict of interest – which, in my definition, would include the "appearance" of a conflict of interest – independence must be actual and apparent. The required independence may be lacking in the same circumstances in which I also deem a conflict of interest to exist. Both dependence and conflict of interest can be the result of the liquidator having certain relationships. Such a blurry line of demarcation between conflict of interest and independence is undesirable. The notion of independence that is put forward by *Römermann* seems to provide the most adequate demarcation between the concepts and seems to be most congruent with what would be ordinarily understood to constitute (in)dependence.

Chapter 5 – Responses to a conflict of interest

Having established what conflict of interest is in relation to the function of the liquidator, it is necessary to assess what should be done in the event of a conflict of interest. Following on from § 3.1.2., in principle, it is not "wrong" to have a conflict of interest. What matters, however, is how a conflict of interest is dealt with. The EP Resolution and InsReg Proposal already detail the actions that need to be taken in case a conflict of interest arises. First, in the EP Resolution, it is suggested that if a conflict of interest arises, "(…) *the liquidator must resign from his/her office*." Second, from the InsReg Proposal it follows that if insolvency proceedings relate to two or more members of an enterprise group, a liquidator appointed in proceedings shall "(…) *cooperate with any liquidator in proceedings concerning another member of the same group to the extent such cooperation* (…) *does not entail any conflict of interests*." Therefore, in enterprise group insolvency, a conflict of interests would (perhaps also) be responded to by limiting the cooperation in such instances. This chapter discusses non-legal literature as regards responses to a conflict of interest. Then, it discusses the responses that are mentioned by the international sources and national sources derived thereof. My own thoughts are offered on a model of responses to a conflict of interest. This is followed by a review of responses for enterprise group related conflicts of interest involving liquidators. Sanctions are then discussed. Finally, I conclude and compare my findings with the responses provided for in the EP Resolution and InsReg Proposal. Due to my findings in § 3.4., I will not discuss responses to a conflict of interest in main and secondary insolvency proceedings.

§ 5.1. Responses in non-legal literature

According to *Carson*, "*Often, conflicts of interest can be avoided if I* (the individual; author) *asks someone else to assume her official duties*."[222] *Carson* argues that sometimes this request should not be accompanied by an explanation of the circumstances that constitute the conflict of interest, as this may affect the person to whom the duties are transferred. Sometimes, the only way to remove or avoid a conflict of interest is by resigning. *Carson*, however, recognizes that resigning may be quite harmful for both the individual and those parties that are served by the individual. It is in those cases that *Carson* provides an alternative to resigning, which "(…) *would be to inform all of the interested parties of the conflict of interest and ask them to either: (i) remove one from one's position (or request one's resignation), or (ii) consent to one's continuing in one's position in spite of the conflict of interest*."[223]

[222] See T.L. Carson, *Conflicts of Interest*, *Journal of Business Ethics*, Vol. 13, Issue 5, 1994, p. 396.
[223] See T.L. Carson, *Conflicts of Interest*, *Journal of Business Ethics*, Vol. 13, Issue 5, 1994, p. 398.

Davis puts possible responses to a conflict of interest into different categories. The first category consists of "avoiding" a conflict of interest. An example that is given by *Davis* concerns a partner of an accounting firm putting his investments in a blind trust.[224] The second category consists of "escaping", which is described by *Davis* as redefining the underlying relationship. *Davis* provides for three examples of escape: (i) recusal, (ii) divestment of an interest, such as the sale of stock and (iii) resignation, if recusal and divestment are not possible.[225] The third category consists of disclosure of the conflict of interest. This disclosure should be complete and understood by the parties involved, so as to give them the possibility to give their informed consent. *Davis* explicitly mentions that disclosure is not always an independent step: "(…) *disclosure as such does not end the conflict of interest; it merely avoids betrayal of trust, opening the way for other responses*."[226] Other than the fact that disclosure does not end the conflict of interest, *Davis* notes that disclosure may be problematic due to privacy and confidentiality issues.[227] The fourth category of responses consists of "managing" a conflict of interest. Managing, according to *Davis*, may take place either following disclosure or in situations where there has been no disclosure at all, but where disclosure would be improper (due to confidentiality issues) or impossible (if those to whom disclosure should be made are absent, incompetent or cannot be reached in time).[228] *Argandoña* mentions (among others) similar responses as *Carson* and *Davis*, including (i) recusal, (ii) divestiture of private interests and (iii) disclosure of private interests. Disclosure, according to *Argandoña*, "(…) *is probably the most common solution to the kinds of problems we are talking about here* (…)".[229] Like *Davis*, *Argandoña* notes that after the initial disclosure, subsequent measures may be adopted. Disclosure, as *Argandoña* puts forward, may apart from the privacy and confidentiality issues, have various other drawbacks, such as disclosure leading to less confidence in an individual.[230]

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[224] See M. Davis, Andrew Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 12.
[225] See M. Davis, Andrew Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 13.
[226] See M. Davis, Andrew Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, pp. 13 – 14.
[227] The Belgian Constitutional Court, for example, held that the requirement of public disclosure of conflict of interest statements in the insolvency reports went too far, see § 2.2.
[228] See M. Davis, Andrew Stark *et alii*, *Conflict of Interest in the Professions*, New York: Oxford University Press 2001, p. 14.
[229] A. Argandoña, *Conflicts of Interest: The Ethical Viewpoint*, IESE Business School Working Paper, No 552, 2004, p. 9.
[230] See for an overview of other drawbacks A. Argandoña, *Conflicts of Interest: The Ethical Viewpoint*, IESE Business School Working Paper, No 552, 2004, p. 11. See also D.M. Cain, G. Loewenstein and D.A. Moore, *Coming Clean but Playing Dirtier – The Shortcomings of Disclosure as a Solution to Conflicts of interest* in D.A. Moore, D.M. Cain, G. Loewenstein, M.H. Bazerman *et alii*, *Conflicts of Interest – Challenges and Solutions in Business, Law, Medicine, and Public Policy*, New York: Cambridge University Press 2005, pp. 104 – 125 and B.K. Church and X. Kuang, *Conflicts of Interest, Disclosure, and (Costly) Sanctions: Experimental Evidence*, *The Journal of Legal Studies*, Vol. 38, No. 2, 2009, pp. 505 – 532.

A rough synopsis of the framework of responses of the authors would be the following: (i) recusal (*Carson, Davis, Argandoña*), sometimes without explaining the circumstances that amount to a conflict of interest (*Carson*), (ii) resignation, if there are no other ways of removing or avoiding the conflict of interest, such as recusal (*Carson, Davis, Argandoña*) or divestment (*Davis, Argandoña*), or, (iii) alternatively, as resigning may be harmful (*Carson*), disclosure to all those affected by the decision, so as to get their informed consent (*Carson*, *Davis*) and, if desirable, to open the way for other additional responses (*Davis*, *Argandoña*). It is clear that not all the responses that are presented can be applied to a liquidator facing a conflict of interest. For example, recusal seems to be no option as an independent response. A liquidator cannot just transfer to others the responsibility for certain decisions he would have to make himself. An individual is appointed as liquidator in a given case because those in charge of his appointment seek to rely on his professional judgment.

§ 5.2. Responses; UNCITRAL Guide, IFC/Ukraine Code and EBRD/BSA Code

§ 5.2.1. UNCITRAL Guide

According to the UNCITRAL Guide, "(…) *it is desirable that the insolvency law impose an obligation to disclose existing or potential conflicts of interest, which would apply to a person proposed for appointment* (…) *and* (…) *on a continuing basis throughout the proceedings*."[231] The UNCITRAL Guide does not indicate to whom disclosure should be made, but leaves that up to national insolvency law. In addition to the disclosure duties and "*In order to enhance the transparency, predictability and integrity of an insolvency regime, it is desirable that an insolvency law specify the degree of relationship that gives rise to such a conflict of interest, including specifying those relationships which will disqualify a person from being appointed*."[232] I would interpret the last part of the previous citation to be some kind of prohibition on certain relatively well specified relationships. What it also seems to suggest is that there are relationships that, while constituting a conflict of interest, would not disqualify a liquidator. Recommendations 116 and 117 do not add much to the above, with the exception of the latter one, according to which "*The insolvency law should specify the consequences of a conflict of interest or lack of independence*."[233]

§ 5.2.2. IFC/Ukraine Code

As follows from the previous chapter, the IFC/Ukraine Code makes a distinction between (i) active conflict of interests and (ii) inactive conflict of interests.

[231] See UNCITRAL Guide, p. 176.
[232] See UNCITRAL Guide, p. 176.
[233] See UNCITRAL Guide, p. 188.

Article 4.3.4. contains a clear prohibition on performing the functions of a liquidator in case of an active conflict of interests. Article 4.3.6. puts an obligation on the liquidator to take the necessary actions to detect both active and inactive conflict of interests.

Article 5.1. requires the liquidator, before his appointment, to inform in writing the body that is authorized to consider his appointment in the insolvency proceedings of, under sub (e), "(…) *the presence or absence of any conflict of interests (active or inactive)* (…)". The prohibition that already was included in article 4.3.4. makes a comeback in article 5.2.: the liquidator is required to refuse appointment if the performance of this function will pose an active conflict of interests. According to article 5.4., in the event of an inactive conflict of interests, the liquidator may accept his appointment, but only under the following conditions:

> (a) written disclosure is made, prior to the appointment, of the existence and nature of such a conflict to all *Participants in insolvency proceedings,* and
> (b) the *Insolvency administrator* meets all other requirements for the appointment.

These disclosure duties could be called quite extensive, as follows from the fact that the disclosure should, first, be made to all participants in the insolvency proceedings and, second, include at least some information about the nature of the conflict of interests.

Article 7.1., finally, deals with conflict of interests after the liquidator has been appointed. According to this article, the liquidator should "(…) *immediately submit a notice of resignation to the body authorized to terminate his/hers appointment if after accepting such appointment Insolvency administrator* (sic) *discovers that* (…)" the performance of the liquidator's functions is posing either an active or inactive conflict of interests.

Quite an important exception to the applicability of the rules on conflict of interests is made by article 3.1. as regards "(…) *previous performance of tasks of the head of Debtor's liquidation commission or Debtor's liquidator (article 86 of the Law) or the head of the Debtor (article 85 of the Law*)." These exceptions seem to relate to previous insolvency appointments.[234]

§ 5.2.2. EBRD/BSA Code and Manual

According to article 7, third paragraph EBRD/BSA Code, the liquidator is obliged to notify the court in the event that circumstances arise that indicate a potential conflict of interest.

[234] See also § 2.4.2. on para. 31 ICE, which provision also deals with previous insolvency appointments in the context of conflict of interest.

The EBRD/BSA Manual clearly supports the view that having a conflict of interest is not, in itself, "wrong": "*The statement that deems a conflict to exist does not set out to condemn the IA. It does not, for example, disqualify him* (…)".[235] In the event that a conflict of interest is deemed to exist according to article 7 EBRD/BSA Code, the liquidator has to notify the court, without exception. According to the EBRD/BSA Manual, "*The rule* (read: the obligation to notify the court; author) (…) *does not admit of any exceptions. The rules* (read: article 7 EBRD/BSA Code; author) *do not make it wrong to have a conflict of interest, but it will constitute a 'wrong' if the IA fails to notify the court. It is the act of 'public disclosure' that is important.*"[236]

The court may then, for example, (i) consider it trivial or inconsequential, resulting in no consequences for the liquidator (or his position), (ii) order the liquidator to "(…) *remove or deal with that which creates the personal interest* (…)", for example, by ordering the liquidator to sell shares in a competitor of the debtor, (iii) order the liquidator to provide undertakings in order to avoid the conflict of interest by, for example, employment of an independent third party to sell a certain asset, (iv) require a third party evaluation and, finally, (v) as a last resort, require the liquidator's resignation.[237]

§ 5.2.3. Comparison

Broadly summarized, the UNCITRAL Guide's general line in regard to the responses to a conflict of interest seems to consist of (i) an obligation to disclose a conflict of interest, before and after appointment and throughout the insolvency proceedings and (ii) the specification of certain relationships that will disqualify the liquidator from being appointed. The IFC/Ukraine Code seems to follow the UNCITRAL Guide in this respect and consists of (i) an obligation to discover a conflict of interests, (ii) an obligation to inform the body authorized to appoint the liquidator of a conflict of interests, (iii) a prohibition on having an active conflict of interests, resulting in having to refuse appointment or resign, (iv) a prohibition on having an inactive conflict of interest insofar it is not disclosed before appointment and (v) allowing an inactive conflict of interests to exist insofar it is disclosed before appointment to all parties involved in the insolvency proceedings. The EBRD/BSA Manual, on the other hand, takes a more simple approach, consisting of (i) an obligation to disclose a conflict of interest to the court, after which (ii) the court decides what to do.

[235] See EBRD/BSA Manual, p. 162.
[236] See EBRD/BSA Manual, p. 163.
[237] See EBRD/BSA Manual, p. 163.

Two important observations can be made. First, from mainly the UNCITRAL Guide and IFC/Ukraine Code, it follows that conflict of interest deserves attention both before and after appointment. Second, the UNCITRAL Guide, IFC/Ukraine Code and EBRD/BSA Code and Manual, without exception, seem suspicious of the ability of the liquidator to assess a conflict of interest himself and then respond in a manner he sees fit. In none of the sources is the liquidator attributed with much discretion. Liquidators that are faced with a conflict of interest are in none of the discussed sources allowed to "manage" a conflict of interest.

§ 5.3. Thoughts on responses to a conflict of interest

Taking the above into account, the following presumptions could serve as a starting point for formulating a framework of responses to a conflict of interest: (i) conflict of interest is an issue both before and after appointment, (ii) the risk of conflict of interest should be as low as possible, liquidators should not be given too much discretion in appreciating and deciding the response to a conflict of interest, (iii) disclosure should in principle, be addressed to all parties involved in the insolvency proceedings, (iv) however, disclosure may sometimes be improper and, moreover, may come with certain drawbacks and (v) rejecting an appointment is less problematic than resigning after having been appointed.[238]

Taking the aforementioned starting points into account, a possible framework of responses could be formulated. I am fully aware of the fact that certain aspects of this model could be seen as controversial. Moreover, as *Argandoña* rightly puts forward, the proper response to a conflict of interest will in the end depend on an assessment of the particular circumstances of the case. Thus, in a given case, my framework may prove to be too general in nature. Having made these disclaimers, I would propose the following framework:

There are rules available specifying which instances of conflict of interest disqualify the liquidator

If such rules are available, then: (i) the liquidator should not accept his appointment if such a situation exists (UNCITRAL Guide, IFC/Ukraine Code) or, (ii) if the liquidator has already been appointed, he should resign immediately (IFC/Ukraine Code). If the liquidator in one of the aforementioned situations rejects his appointment or resigns, disclosure no longer has a purpose and can be omitted.

[238] Following such a rejection, the body authorized to appoint liquidators could simply turn to the next liquidator available on their list, whereas resignation and subsequent replacement during ongoing insolvency proceedings would probably be more burdensome.

If there are no such rules or the conflict of interest does not fall within the scope of a situation that disqualifies the liquidator, the following would apply before and after appointment respectively:

Conflict of interest before appointment

The liquidator should (i) be able to reject his appointment without disclosing the conflict of interest or (ii) divest that which creates the conflict of interest (insofar as that is possible, *Davis Argandoña*) or, (iii) if the liquidator wants to accept his appointment in spite of the conflict of interest, disclosure should be made. This disclosure should be made to all parties involved in the insolvency proceedings (IFC/Ukraine Code on passive conflict of interests, *Carson* and *Davis*). Only if disclosure would be improper due to privacy or confidentiality obligations (*Davis*), I would see disclosure to the court or body authorized to appoint the liquidator as an acceptable alternative.

Conflict of interest after appointment

If a conflict of interest emerges after appointment, the liquidator should, (i) divest (*Davis*, *Argandoña*) or, alternatively, (ii) disclose the conflict of interest to all parties involved in the insolvency proceedings (*Carson*, *Davis*), or, if such disclosure is improper, only to the court (EBRD/BSA Code), followed by consent (*Carson*, *Davis*) and/or other measures (*Davis*, *Argandoña*, EBRD/BSA Manual), or, (iii) as a last resort, resign (EBRD/BSA Manual).

§ 5.4. Responses to a conflict of interest in enterprise group insolvency

The UNCITRAL Guide on Enterprise Groups provides a number of responses in respect of an enterprise group insolvency related conflict of interest in the event a single liquidator or the same liquidator has been appointed in the insolvency proceedings of more than one group entity. These responses are (i) court directions, (ii) court or creditor approval of post-commencement finance, (iii) providing an undertaking, (iv) the appointment of one or more additional liquidators, either for a limited time or in connection to a particular issue or on general terms for the duration of the proceedings[239] and (v) disclosure.[240]

[239] A disadvantage of the appointment of additional liquidators is that it could lead to very high transaction costs, see S.L. Bufford, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, *American Bankruptcy Law Journal*, Vol. 86, 2012, p. 725. Bufford refers to the transaction costs in the *Lehman* case.
[240] See UNCITRAL Guide on Enterprise Groups, recommendations 233 and pp. 44 and 77. See also I. Mevorach, *Insolvency within Multinational Enterprise Groups*, New York: Oxford University Press 2009, pp. 266 – 267.

In general, it seems that the appointment of additional (possibly special or ad hoc) liquidators is the response most often presented in conflicts of interest.[241] In the InsO Proposal, however, a possible issue in relation to the appointment of special liquidators is put forward. The more serious the conflict of interest and the more complex the factual situation is, the more difficult the communication and cooperation with the special liquidators will become. According to the explanation, in these cases, there should be doubts about whether or not the appointment of a single or the same liquidator over multiple group entities is useful at all. What is meant, it seems, is that if special liquidators are confronted with serious conflicts of interest and complex factual situations, one might as well appoint normal liquidators in the insolvency proceedings of certain enterprise group entities.[242] However, *Mevorach*[243] argues that even the appointment of multiple "ordinary" liquidators is not always a watertight solution.

It should be noted that the responses (i) – (iv) of the UNCITRAL Guide on Enterprise Groups all would initially require disclosure of the conflict of interest. Full transparency and disclosure with regard to the conflict of interest before certain irreversible decisions are taken would be the best and perhaps, only solution.[244] Suppose a single liquidator has been appointed in the insolvency proceeding of more than one group entity. If, in this context, transaction avoidance would potentially be an issue, the liquidator would have to timely disclose this issue along with his view on the matter. Creditors of the respective entities would, following this disclosure, be in a position to either consent with the view of the liquidator or, for example, apply for the appointment of an additional special liquidator. In contrast to situations where there is a personal conflict of interest, the liquidator would have a greater freedom to disclose a conflict of interest related to enterprise group insolvency. A privacy or confidentiality obligation would in practice not soon exist in circumstances that cause a conflict of interest to arise in enterprise group insolvency. Following disclosure of the conflict of interest, the parties involved in the insolvency proceedings can require additional responses as safeguards.

Resignation of the liquidator is in none of the sources specifically mentioned as a response to conflict of interest in enterprise group insolvency situations.

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[241] This response is mentioned in for example the UNCITRAL Guide on Enterprise Groups, III MEG Guidelines and the InsO Proposal. See also, in relation to matters related to transaction avoidance, I. Mevorach, *Transaction Avoidance in Bankruptcy of Corporate Groups*, *European Company and Financial Law Review*, Vol. 8, Issue 2, 2011, p. 254.
[242] See InsO Proposal, p. 21.
[243] See § 3.3.4. and I. Mevorach, *Insolvency within Multinational Enterprise Groups*, New York: Oxford University Press 2009, p. 266.
[244] See also the explanation of article 13.2 INSOLAD Pratice Rules in § 2.1.3.

That seems to make perfect sense.[245] In these situations, there is an impersonal conflict of interest that merely relates to getting appointed in the insolvencies of multiple group entities. Replacing the liquidator(s) with one or more new liquidators will simply result in the latter one(s) being faced with the same conflict of interest. As mentioned in the introduction of this chapter, the presence of conflict of interests serves to limit the duty to cooperate with other liquidators, under article 42(1) InsReg Proposal, and with courts, under article 42c EP Legislative Resolution. Section 269a InsO Proposal, which has been discussed in § 3.3.3., provides an exemption to the duty to cooperate in case this impairs the interests of the parties involved in the proceedings in which the liquidator has been appointed. While serving the same purpose as 42(1) InsReg Proposal, section 269a InsO Proposal makes no reference to conflict of interest(s). Conflict of interest in enterprise group insolvency, as became apparent in § 3.3., can be caused by many different circumstances. It would be highly inefficient to limit cooperation under all these different circumstances. Many of these issues would best be tackled with cooperation, as this cooperation may very well lead to a solution that is beneficial for the creditors of all group entities involved.[246] It would seem that section 269a InsO Proposal (taking into account the lack of explanation on article 42(1) InsReg Proposal) would provide a clear criterion that could be applied effectively in the assessment of cooperation duties in certain matters and, additionally, is confined to those situations where the interests of the stakeholders, specifically creditors, would actually be impaired due to the cooperation.

§ 5.5. Sanctions

In line with *Carson*'s and *Davis'* view on the matter, sanctions could be appropriate in situations in which a liquidator failed to adequately respond to a conflict of interest, as only that constitutes a "wrong". In the view of the UNCITRAL Guide, "(…) *removal operates as a sanction against the insolvency representative* (…)".[247] However, as follows from, for example, the IFC/Ukraine Code, in certain situations the liquidator may be required to resign.

[245] I do not mean to say that decisions of the liquidator in matters where there is a conflict of interest cannot ever be a ground for removal of the liquidator. The existence of a conflict of interest in itself, on the other hand, should not to be a reason for disqualifying or removing the liquidator.
[246] For example, in the event post-commencement finance would be in the interest of the enterprise group as a whole, it would be undesirable that liquidators appointed in the insolvency of certain entities that could or would have to provide this finance would, as a matter of principle, be relieved from their duty to cooperate due to a conflict of interest, which would be caused by the duty to act in the interests of the enterprise group on the one hand, and, on the other hand, the duty to act in the interests of the respective group entity or entities over whom the liquidator has been appointed. See also the UNCITRAL Guide on Enterprise Groups, p. 40, discussed in § 3.3.1., according to which coordination and agreement between liquidators is crucial in such cases.
[247] UNCITRAL Guide, p. 187.

Resignation, while having in principle the same outcome (the liquidator is off the case) as removal, is not in itself a sanction but merely a prescribed response. Apart from removal as a sanction, it may therefore be desirable to have additional means to sanction a liquidator who fails to respond adequately to a conflict of interest. The availability and type of sanctions will greatly depend on the legal and institutional framework of the jurisdiction concerned. However, it would need to be sufficiently clear what the required response to a conflict of interest would be, before sanctioning a liquidator for not responding adequately is to be considered. Due to the limited size of this thesis I will not discuss sanctions in any further detail, however, inspiration could be drawn from article 3.5. IFC/Ukraine Code:

> *Insolvency administrator's* violation of this *Code* may lead to refusal to appoint such administrator as an asset manager, reorganization manager or liquidator, or early termination of such appointment, or another liability established by legislation.

§ 5.6. Concluding remarks

Perhaps the most important observation that can be made is that a conflict of interest can be responded to in many different ways. Moreover, what is appropriate as a response will depend on the type of conflict of interest and on the individual circumstances of the case. Nevertheless, in § 5.3., I have formulated a number of starting points that may be used in formulating a model of responses. In my opinion, the response put forward by the EP Resolution, requiring resignation of the liquidator in case of a conflict of interest, is first of all too limited, as it does not seem to pay attention to the situation before appointment. On the other hand, in a way it may go too far, as there are a number of other responses, such as disclosure, which may be, independently or combined with other responses, preferable to resignation. Moreover, if it is taken into account that the remuneration that is received by the liquidator in itself constitutes a conflict of interest,[248] it is evident that resignation should not be seen as the only adequate response.

In situations of enterprise group insolvency, I argue that full transparency and timely disclosure of the conflict of interest would, as a matter of principle, be the best response. This would allow parties involved to either consent to the decision taken by the liquidator(s) or to require additional responses. In these matters, resignation or removal of the liquidator(s) makes little sense. The response put forward by article 42(1) InsReg Proposal, seeking to limit the cooperation between liquidators, and by article 42c EP Legislative Resolution, seeking to do the same as regards cooperation between liquidators and courts, insofar as this entails a conflict of interests, may, especially in the absence of further explanation, go too far.

[248] See § 3.2.2., 3.2.3. and 3.5.

Section 269a InsO Proposal is more clear in this regard, providing an exemption to the duty to cooperate that makes reference to the actual impairment of interests of the parties involved in the proceedings in which the liquidator has been appointed.

Finally, I have briefly touched upon the subject of sanctions in regard to conflict of interest. Sanctions could be considered only where the liquidator has not adequately responded to a conflict of interest, which implies that it is quite clear what is expected of a liquidator in this regard.

Chapter 6 Harmonization of ethical requirements of the liquidator

Different elements of conflict of interest involving a liquidator have been reviewed. This chapter now discusses the need for harmonization of conflict of interest in the context of a liquidator. From Chapter 1 it follows that the sources of international organizations view "ethics" or "personal qualities" as an inescapable requirements of the function of the liquidator. The EP, however, not only wants to set ethical requirements, but seeks for harmonization of those. The EESC Opinion elaborates on this by considering that "(…) *it would benefit business and economic recovery for harmonisation of the general aspects of the requirements for the qualification and work of liquidators to take place quickly.*" The arguments that are presented in this chapter concern ethical requirements in general. These arguments apply mutatis mutandis to conflict of interest, as "(…) *the most important general exclusion criterion* (as regards the appointment of liquidators; author) *is that the insolvency administrator not be exposed to any conflict of interest* (…)".[249]

§ 6.1. Professions and ethical requirements

McGlothlin sees ethical behavior as "(…) *an inescapable characteristic of a profession. Without an ethical component, a profession would forfeit the support and status society now awards it.*"[250] A question that may be raised is whether liquidators can be seen as belonging to an autonomous profession. In general, liquidators are already a member of a profession. Most liquidators, at least in Europe, are either lawyers or accountants.[251] A definition of "profession" is given by *Flores*, who sees as the defining characteristic of a profession "(…) *the possession of a unique authority derived from specialized knowledge and skills that are obtained through experience and training*."[252] Without going into too much detail on this issue here, it is arguable that liquidators are considered to belong to an autonomous profession, as their highly specialized function and tasks in the window of the insolvency proceedings differ greatly from the function and tasks liquidators would exercise in their professional capacity as lawyer or accountant. Being a liquidator should therefore not merely be seen as a "sideline" of certain other professions.

[249] See I.F. Fletcher and B. Wessels, *Harmonisation of Insolvency Law in Europe*, Deventer: Kluwer 2012, p. 83, making reference to C. Köhler-Ma, *Verwalterauswahl und Qualitätskriterien im internationalen Vergleich*, *DZWIR*, Vol. 16, Issue 6, 2006, pp. 228ff.
[250] See W.J. McGlothlin, *The professions*, *The Journal of Higher Education*, Vol. 34, No. 2, 1963, p. 111.
[251] See W.W. McBryde, A. Flessner and S.C.J.J. Kortman *et alii*, *Principles of European Insolvency Law*, Deventer: Kluwer Legal Publishers 2003, p. 32.
[252] See A. Flores, *A Concise Selected Bibliography on Professional Ethics*, *Science, Technology & Human Values*, Vol. 4, No. 26, 1979, p. 29.

The EBRD/BSA Manual takes a similar view, by mentioning the "profession of insolvency administrators" and setting it apart from other professions by referring to the unique capacities in which the liquidator acts.[253] First, the liquidator acts in a "public" capacity, as he acts "(…) *not for one party or another, but in the* ***interests of all parties*** *that are involved in or affected by the insolvency bankruptcy case*." And second, he acts in a "fiduciary" capacity, "(…) *as the custodian and manager of the assets of the insolvent debtor* (…)".[254] The view that liquidators belong to an autonomous profession seems, at least to a certain extent, to be supported by the practice in most of the jurisdictions discussed in Chapter 2. This is perhaps most visible in England, where the qualified insolvency practitioner is required to be member of an RPB and is heavily regulated. However, even in the Netherlands and Germany, where no such mandatory membership of a professional body exists, there is a tendency towards further professionalization, as is evidenced by the existence of private professional associations exclusively for liquidators which, albeit in a more limited way than the English RPB's, impose ethical rules on their members. An issue that is closely related to the question of autonomy of the profession is the question of whether rules of professional conduct applicable to lawyers are also applicable to those lawyers acting in their capacity as liquidators. In the Netherlands, the lawyer's courts generally hold that the conduct of a lawyer in his capacity of liquidator is not covered by rules of professional conduct of lawyers. Nevertheless, the rules of professional conduct remain applicable if (i) the lawyer, in his capacity of liquidator, carries out acts which are indistinguishable from the acts of lawyers or (ii) where the lawyer, in his capacity as liquidator, acts in such a way as to damage the confidence in the advocacy.[255] In general, the lawyer's courts do not seem that reluctant in applying rules of professional conduct to lawyers for acts done in their capacity as liquidators.[256] *Römermann* discusses the topic of autonomy of the profession of the German liquidator in the light of a recent verdict of the lawyer's court in Munich,[257] in which case it was held that a liquidator, who in his other capacity was lawyer, was bound to observe the prohibition against direct attorney-opponent communication as laid down in the rules of professional conduct applicable to lawyers.[258] *Römermann* criticizes the view of the lawyer's court that there is no such thing as an autonomous profession of liquidators and that therefore the rules of professional conduct applicable to lawyers apply to those lawyers also in their capacity as liquidator.

[253] See EBRD/BSA Manual, p. 127.
[254] See EBRD/BSA Manual, p. 127.
[255] See *Raad van Discipline* Amsterdam, 12 December 2012, ECLI:NL:TADRAMS:2012:YA3563.
[256] See also H. Dulack, *Tuchtrecht voor curatoren bestaat wel degelijk!*, *TvI* 2006, 40.
[257] *Anwaltsgerichtshof* Munich, 17 February 2014, – BayAGH III - 4 - 5/13.
[258] See V. Römermann, *Anwendbarkeit anwaltlichen Berufsrechts auf den als Insolvenzverwalter tätigen Rechtsanwalt*, *ZIP* 2014, Issue 17, pp. 830ff.

Römermann refers to a judgment of the German Federal Constitutional Court,[259] from which it explicitly follows that there is such a thing as an autonomous profession of liquidators. *Römermann* moreover points out the inconsistency in the reasoning of the lawyer's court, as it argues that the capacity of liquidator is part of the profession of the liquidator, but on the other hand merely sees room for the application of a slimmed-down version of the rules of professional conduct of lawyers by putting forward that these rules do not apply unrestrictedly and to the same extent to lawyers in their capacity as liquidators. According to *Römermann* it should be clear that every profession deserves its own rules of professional conduct and that the characteristics of the profession of lawyers differ from the characteristics of other professions which may be practiced by lawyers, such as their appointment as liquidator. On the basis of all of the above and in line with *Römermann*, I would argue that, in addition to it being seen as an autonomous profession, autonomous and specific ethical requirements should be imposed upon liquidators, as "*In the context of the profession of insolvency administrators, ethics rules should reflect (…) the unique position of an administrator.*"[260]

From the above-mentioned line of argument it does not yet follow why harmonization is desirable. As was mentioned, the jurisdictions that were discussed in Chapter 2 have a vastly different and sometimes fragmented approach to ethical requirements for liquidators. Ethical requirements, such as conflict of interest, seem to have different notions. In my opinion, the need to harmonize such ethical requirements for liquidators is far greater than for other legal professions (such as lawyers or the civil notary), due to the powers that are given to the liquidator to act in other Member States under the InsReg. In the words of *Fletcher* and *Wessels*: "*With the automatic recognition of an opening judgment, the powers of any appointed liquidator can be exercised* (…) *in 25 other Member States. The coordination of activities related to the insolvent debtor's estate in all Member States in the EU is in her or his hands.*"[261] In my view, an autonomous profession with cross-border powers requires certain harmonized ethical requirements.

§ 6.2. Market and creditor expectations

An important argument that is closely related to the professional status of the liquidator lies with the legitimate expectations of the internal market and, more specifically, of the creditors. The harmonization of certain ethical requirements would, to a great extent, ensure that liquidators throughout the EU are bound to similar ethical requirements.

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[259] *Bundesverfassungsgericht*, 3 August 2004, – 1 BvR 135/00 u. 1086/01.
[260] See EBRD/BSA Manual, p. 127.
[261] See I.F. Fletcher and B. Wessels, *Harmonisation of Insolvency Law in Europe*, Deventer: Kluwer 2012, p. 81.

Following harmonization, creditors may expect a certain level of equality in this area regardless of the Member State in which the centre of main interests or an establishment of their debtor is situated. As *Fletcher* and *Wessels* put forward: "*It is not only the creditor's confidence but the trust the market puts in the insolvency office holders' actions, which may translate in her/his ability to exercise a transparent process* (…)*, to understand the way the profession is regulated, which would include a mechanism to maintain trust in any regulatory regime, such as post-action review or a complaints procedure*."[262] In return, this may facilitate the confidence of the market and specifically of creditors in cross-border creditor-debtor relationships. The present fragmented state of affairs as regards ethical requirements in the jurisdictions discussed in Chapter 2 shows that currently it cannot be said that such a situation of equality exists.

§ 6.3. Trust and cooperation under the InsReg (Proposal)

The InsReg requires liquidators in both the secondary- and main insolvency proceedings to communicate and cooperate.[263] In early 2013, an external evaluation of the InsReg was made publically available. The "External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings" [264] ("**Heidelberg/Vienna Report**") concluded that involving courts in the cross-border cooperation and coordination is desirable. In cases where there had been court-to-court communication, this "(…) *led to an obvious improvement of the coordination of the respective proceedings*."[265]

The Heidelberg/Vienna Report stresses that an amendment to the InsReg would have to include not only duties for courts regarding communication, but also duties regarding cooperation and coordination, and this to the maximum extent.[266] These findings are in line with other sources consisting of soft law or guidelines on the cross-border handling of insolvency cases.

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[262] See I.F. Fletcher and B. Wessels, *Harmonisation of Insolvency Law in Europe*, Deventer: Kluwer 2012, p. 82. Fletcher and Wessels specifically refer to the "Cork Report" ("Report of the Review Committee on Insolvency Law and Practice", 1982, Cmnd 8558) that was drafted in the United Kingdom and, eventually, led to the IA. In para. 732 it is put forward that "*The success of any insolvency system* (…) *is very largely dependent upon those who administer it. If they do not have the confidence and respect, not only of the courts and of the creditors and debtors, but also of the general public, then complaints will multiply and, if remedial action is not taken, the system will fall into disrepute and disuse*."

[263] See mainly recital 20 and article 31 InsReg.

[264] See B. Hess, P. Oberhammer, T. Pfeiffer *et alii*, *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings*, JUST/2011/JCIV/PR/0049/A4.

[265] See Heidelberg/Vienna Report, p. 360.

[266] See Heidelberg/Vienna Report, pp. 361 – 362.

An example of such soft law is the 1997 "UNCITRAL Model Law on Cross-Border Insolvency", which deals with cooperation and direct communication of (foreign) courts and (foreign) liquidators in the articles 25 – 27.[267] Examples of influential guidelines are the "European Communication and Cooperation Guidelines for Cross-border Insolvency" ("**CoCo Guidelines**"),[268] published in 2007 by *Virgós* and *Wessels*, and the "Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases" ("**ALI/III Global Principles**"), published in 2012 by the American Law Institute ("**ALI**") and the III.[269] Apparently, the EC was convinced. The InsReg Proposal (among others) amends recital 20 InsReg and inserts the following relevant phrase: "*The main condition here is that the various liquidators and the courts involved must cooperate closely, in particular by exchanging a sufficient amount of information*." The InsReg Proposal also inserts two new articles, 31a and 31b, that deal specifically with cooperation and communication duties between courts and courts and liquidators. An important element of cross-border insolvency communication, cooperation and coordination that comes back in the CoCo Guidelines and ALI/III Global Principles is the importance of trust between the actors playing a role in cross-border insolvency cases. From Guideline 4.3. CoCo Guidelines it follows that "*A liquidator is required to act honestly, objectively, fairly and expeditiously in dealing with all parties concerned, including the courts*." Guideline 4.3. contains mostly ethical requirements. The explanation of the Guideline stresses that a relationship of trust and cooperation between liquidators and courts is required for successful communication and cooperation.[270] Global Principle 9 ALI/III Global Principles is titled "Cooperation and Sharing of Information Between Courts and Administrators". According to Global Principle 9.1, cooperation between courts and administrators should include prompt and full disclosure of all relevant information to promote transparency and reduce fraud.

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[267] See also the 2009 "UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation", pp. 17 – 25 and the 2012 "UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective", pp. 46 – 54, see <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997 Model.html>.

[268] See B. Wessels and M. Virgós, European Communication and Cooperation Guidelines for Cross-border Insolvency, developed under the aegis of the Academic Wing of INSOL Europe, 2007. The aim of the CoCo Guidelines is "(…) *to function as a first step in a framework to realise the objective of enabling liquidators and courts to efficiently and effectively operate in cross-border insolvency proceedings in the context of the EC Insolvency Regulation*." and "(…) *to serve as a sound and well-tailored framework for cross-border cooperation and as a basic reference for individual liquidators, professional insolvency practitioner's associations, judges and other public authorities in all EU Member States and internationally.*" [268] The CoCo Guidelines can be found at <www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf>.

[269] The main goal of the ALI/III Global Principles is to "(…) *provide a standard statement of principles suitable for application on a global basis in international insolvency cases.*" I.F. Fletcher and B. Wessels were the joint reporters for the ALI/III Global Principles project. See <www.iiiglobal.org/component/jdownloads/viewdownload/36/5897.html>.

[270] See CoCo Guidelines, p. 41.

The "Comment to Global Principle 9" (and more specifically, 9.1, 9.5 and 9.6) elaborates on the importance of trust between the actors that are involved in the insolvency proceedings:[271]

> (…) However, such a degree of cooperation can only be attained if all participants are able to place complete trust in the integrity and professional discretion of their counterparts with regard to the use that is made of the information provided. (…)
>
> To ensure that the full benefits of international cooperation are realized it is essential that courts are able to place their trust in the integrity and candor of those parties who appear before them (…). In the absence of such trust, courts will invariably be inclined to exercise a high degree of caution in their approach to the granting of assistance, to the ultimate detriment of the legitimate interests affected by the case.

Before trust will exist in cross-border situations, courts and liquidators need to be certain that their foreign counterparts are sufficiently competent and experienced in a professional sense. Merely fulfilling these professional requirements however, is something I deem to be insufficient. Liquidators or courts would not be willing to place their complete trust in those foreign liquidators they deem to be corrupt or under the influence or control of or affected by others, regardless of their knowledge, training or experience. In other words, the fulfillment of ethical requirements is something that seems to me to be just as important as fulfilling the relevant professional criteria.

It is in this light that I see the harmonization of ethical requirements, including those related to conflict of interest and independence, as an important step forward towards ensuring the proper functioning of the cross-border insolvency system in Europe. Liquidators and courts may be hesitant to place their full trust in foreign liquidators and, therefore, cooperate and communicate to the fullest extent possible, if they are dealing with foreign liquidators coming from a jurisdiction in which there are no ethical requirements or in which those requirements are unclear. This will be especially true if the InsReg Proposal is adopted and courts are involved in the cooperation duties. Courts may be even more hesitant to cooperate and communicate with foreign liquidators if there are doubts about their ethical standards.[272] These findings appear to be in line with the EP Resolution, in which it is stated that "*Some harmonisation in this area would support the idea of closer cooperation between the liquidators* (…)".

[271] See ALI/III Global Principles, pp. 73 – 75.
[272] See B. Wessels, *De onafhankelijkheid van de faillissementscurator*, Zutphen: Uitgeverij Paris 2013, p. 77.

§ 6.4. (Proposed) inclusion of "conflict of interest(s)" in the InsReg

My final argument pro harmonization relates to the recent proposed inclusion of conflict of interest(s) in the InsReg, in which it seems to function as grounds that limit cooperation in enterprise group insolvency (InsReg Proposal) and main and secondary proceedings (EP Legislative Resolution). As previously mentioned, no explanation is given on how to interpret or apply "conflict of interests" under these provisions. In the light of my findings in Chapter 2 that is problematic, as it will in the first instance be left to the national courts to apply a rule which has never been clarified and potentially has great consequences for the liquidator's duty to cooperate either with other liquidators or with courts. While the concept of conflict of interest(s) in enterprise group insolvency can, thanks to a respectable number of sources, be identified in a sufficient way, the meaning of conflict of interests involving liquidators in the context of main and secondary proceedings is, without further explanation, unclear. Thus, if the EU legislator aims to introduce the notion of conflict of interest(s) into the InsReg and especially if the notion is introduced in relation to cooperation in main and secondary insolvency proceedings, sufficient explanation and harmonization of this term is necessary.

§ 6.5. Concluding remarks

It can be concluded that harmonization of ethical requirements would be desirable, in the light of the arguments that relate to (i) liquidators having to be seen as belonging to an autonomous profession with cross-border powers under the InsReg, (ii) the expectations of the market and creditors, (iii) the trust of the main actors in insolvency proceedings in each other so as to ensure effective cooperation among them under the InsReg and (iv) the proposed inclusion of "conflict of interest(s)" in the InsReg by EU legislative bodies.

Concluding Summary

Answers are given for the three main questions that were put forward in the introduction, being: (i) what is conflict of interest involving a liquidator (ii) what should be the response to a conflict of interest involving a liquidator and (iii) would harmonization of a rule of conflict of interest involving a liquidator be desirable?

What is conflict of interest involving a liquidator?

Chapter 2 concluded that only circumstantial references to conflict of interest exist in the national jurisdictions. A general definition of conflict of interest is absent.

Chapter 3 reviewed various sources to come to a workable definition of conflict of interest in the context of a liquidator. The following are key aspects of my definition: (i) a conflict of interest does not require a situation in which the liquidator failed to discharge his duties, it merely requires a situation in which it is more difficult for him to discharge his duties, (ii) a clear reference is made to whom the liquidator owes his duties: the insolvent estate in whose proceedings he has been appointed, (iii) a mere potential of conflict of interest is included, (iv) an objective assessment is provided for, which assessment also would cover a mere apparent conflict of interest and, finally, (v) categories of causes of incompatible interests are identified, namely private interests, relationships, enterprise group insolvency appointments and a residual category.

Chapter 4 discussed the notion of independence of the liquidator. This followed observations that the relationship between this concept and the concept of conflict of interest is unclear in the international sources and that the EP and EESC seek for harmonization of both concepts. Independence is necessarily caused by relationships the liquidator has, whereas conflict of interest can, among other reasons, be caused by such relationships. I conclude that a line of demarcation between the concepts based on *Römermann*'s notion of independence would be preferable.

What should be the response to a conflict of interest involving a liquidator?

Chapter 5 deals with responses to a conflict of interest. As a starting point, it is concluded that merely having a conflict of interest does not constitute a "wrong". The two conclusions that are drawn are: first, a conflict of interest can be responded to in a number of ways and second, the manner in which a conflict of interest should be responded to is dependent on the facts and circumstances.

In considering a framework of responses, I have formulated a number of presumptions that could be used as a starting point. As such, requiring the liquidator to resign in case of a conflict of interest, as is proposed by the EP and the EESC, should not be the first and/or only response.

In the context of enterprise group insolvency, I conclude that full transparency and disclosure of a conflict of interest would be the best and, perhaps, only possible response. Other responses that are mentioned in this regard necessarily rely on transparency and disclosure. Also, this would allow parties involved, such as creditors, to appreciate this information themselves and to seek measures if they deem those necessary. Resignation of the liquidator due to a conflict of interest caused by appointment in insolvency proceedings of one or more enterprise group entities makes little sense. In addition to that, I argue that the criterion that is used to limit cooperation in the InsReg Proposal, namely, "conflict of interests", is quite an unclear criterion for limiting cooperation. Inspiration in this regard could be drawn from article 269a InsO Proposal, in which clear reference is made to the impairment interests of those involved in the proceedings of the estate in which the liquidator is appointed. Finally, if a liquidator does not respond adequately to a conflict of interest, it would be desirable to impose sanctions in addition to the liquidator's removal from an insolvency appointment in a given case.

Would harmonization of a rule of conflict of interest involving a liquidator be desirable?

Chapter 6 argues that harmonizing conflict of interest in the context of a liquidator would be desirable. Arguments for this view are to be found in (i) the professional status of the liquidator and his cross-border powers, (ii) the expectations of the market and creditors, (iii) cooperation and trust of the main actors under the InsReg and (iv) the proposed inclusion of "conflict of interests" in the InsReg by the InsReg Proposal and the EP Legislative Resolution.

Recommendations

Based on the view that it would be desirable to harmonize the concept of conflict of interest involving a liquidator, I present the following recommendations to the EU legislator.

Recommendation 1

An explanation of conflict of interest should include a general definition of the concept, notions of a potential and an apparent conflict of interest, an objective criterion to assess whether there is a conflict of interest and, finally, a general overview of circumstances that may cause a conflict of interest to exist, such as private interests, relationships and insolvency appointments over enterprise group entities.

Explanation of Recommendation 1

This recommendation is based on findings in Chapter 3. It is mainly derived from the reviewed working definition in § 3.5., which is given as a possible starting point for a definition. The full working definition is not given in the recommendation because it is based on personal choices.

Recommendation 2

If harmonization of the concept of independence of a liquidator is considered, this concept should be sufficiently demarcated from the concept of conflict of interest.

Explanation of Recommendation 2

As concluded in Chapter 4, conflict of interest and independence are two concepts that can overlap in some circumstances, namely where the liquidator has certain strong relationships. For this reason, independence should be more strictly defined. The notion of (in)dependence that is put forward by *Römermann* would allow this.

Recommendation 3

Having a conflict of interest is not, in itself, a "wrong". What matters is the response to a conflict of interest. Harmonization in dealing with conflict of interest would require formulating instructions on the way a liquidator should respond in such a situation. With this, a distinction should be made between an enterprise group insolvency-related conflict of interest and other conflicts of interest that are more closely connected to the individual who is appointed as liquidator. If a conflict of interest is not responded to adequately, it may be desirable to impose sanctions.

Explanation of Recommendation 3.

This recommendation makes reference to the broadly supported view that having a conflict of interest does not in itself constitute a "wrong", see § 3.1.2. That harmonization on the way a liquidator should respond to a conflict of interest would be required follows from recommendation 117 UNCITRAL Guide, see § 5.2.1., according to which the insolvency law should specify the consequences of a conflict of interest. That conflict of interest related to enterprise group insolvency requires its own approach in relation to responses follows from § 5.4. and § 3.3. It is concluded that conflict of interest in enterprise group insolvency is "impersonal", in that it exists regardless of whom is appointed.

Recommendation 4

There are many different ways to respond to a conflict of interest and the actions to be taken will largely depend on the facts and circumstances. Nevertheless, the following should be considered in the harmonization of responses: conflict of interest is an issue both before and after appointment; liquidators should not be given too much discretion to decide their response; disclosure should, in principle and insofar as possible, be addressed to all parties involved in the insolvency proceedings; disclosure may sometimes be improper and, moreover, may come with certain drawbacks and, finally; rejecting an appointment due to a conflict of interest is less problematic than resigning after having been appointed. Importantly, resignation should not be the standard response to a conflict of interest.

Explanation of Recommendation 4

This recommendation follows from the findings in § 5.1. – 5.3. Additionally, § 5.3., proposes a framework of actions that may be seen as controversial and perhaps too general in nature and is therefore not included in this recommendation. Perhaps the best example showing that conflict of interest does not as a matter of principle justify resignation, is the liquidator's remuneration constituting a personal financial interest, see § 3.5.

Recommendation 5

A harmonized rule on conflict of interest should, in sufficient detail, lay down those circumstances that would in any case disqualify a liquidator from being appointed or continuing his appointment.

Explanation of Recommendation 5

As follows from the UNCITRAL Guide and IFC/Ukraine Code, certain circumstances may be considered to constitute such a severe conflict of interest that the liquidator should be disqualified, see also § 5.2.1. and 5.2.2. This, however, would require laying down those circumstances in a sufficiently precise and detailed manner. Mere reference to a "past or present professional relationship", for example, would be insufficient.

Recommendation 6

In enterprise group insolvency, as a rule, the response to a conflict of interest should be full transparency and disclosure, after which additional responses may be taken or requested. Resignation of the liquidator in this context is not a useful response. Moreover, limiting cooperation as a matter of principle if this cooperation entails a conflict of interest may be counterproductive.

Explanation of Recommendation 6

As follows from § 5.4., transparency on conflicts of interest is a prerequisite for other actions that are regularly mentioned in connection with enterprise group insolvency, such as the appointment of additional liquidators, special or not, or court or creditor approval.

Recommendation 7

Rather than using "conflict of interests" as a criterion to limit cooperation in enterprise group insolvency, the EU legislator should consider using a criterion that makes reference to the impairment of the interests of creditors. Moreover, it seems that there is no reason for inserting the criterion of "conflict of interests" as a limit to cooperation in the context of main and secondary insolvency proceedings.

Explanation of Recommendation 7

Chapter 5 concludes that the criterion "conflict of interests" as limiting cooperation would go too far. In instances in which a conflict of interest is present in enterprise group insolvency, cooperation could be quite desirable. Rather than choosing such an ambiguous term as "conflict of interests", the criterion that is utilized in article 269a InsO Proposal should be considered, see § 3.3.3. and 5.4. As follows from § 3.4., I see no convincing grounds for the insertion of "conflict of interests" in cooperation provisions as regards main and secondary proceedings.

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