



Fourth Study Commission  
Public and Social Law

Meeting in Trondheim, 23 - 27 September 2007

Conclusions

**RIGHTS OF WORKERS IN CASE OF INSOLVENCY (SHUTDOWN)**

*Glossary:*

"insolvency" - a situation in which the employer is generally unable to pay his/her debts as they mature;

"insolvency proceedings" - collective proceedings, subject to any public authority supervision, either for reorganization or liquidation.

*Introductory remarks:*

Insolvency of an employer and insolvency proceedings against employers are relevant for employees. There are concerned aspects of preservation of their employment contracts and payment of their wages. Its also import aspect, whether wages are paid by guarantee institutions. An interesting question is, if after the opening of an insolvency proceeding, the employees may maintain their employment contract when the enterprise is transferred.

*International Regulations quoted in the reports:*

European level:

Council Directive 2001/23/EC relating to transfer of undertakings and the safeguarding of employees rights.

Council Directive 80/987/EEC relating to the safeguarding of employees rights in case of employers insolvency

*Summary of the answers.*

1. Are there any specific regulations on insolvency proceedings?

Bankruptcy and insolvency are regulated in all countries. There are specific provisions applying to bankruptcy and insolvency proceedings for companies and/or individuals ( Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Denmark, Estonia, France, Germany, Iceland, Ireland, Israel, Japan, Kazakhstan, Lithuania, Mexico, Morocco, Norway, Panama, Spain, Slovakia, South Africa, Switzerland, Taiwan, Tunisia, USA, Uruguay):

In most countries there is a legislative framework for the liquidation of assets. Usually a kind of "trustee" is appointed to take charge of the assets, sell them and to distribute the proceeds.

Many countries also provide a legislative framework for the reorganization of insolvent companies, in which for instance a court may stay any action by creditors while negotiations take place for rescheduling or compromises. Often it is not possible to start or proceed with an action during the

insolvency proceeding. The aim is normally to restructure in order to make it possible, that debts are paid off and the business may continue.  
In several countries there are specific provisions for financial institutions (e.g. banks, insurance companies...).

2. Which institutions (government agencies, courts, etc.) are in charge of insolvency proceedings generally and which institutions are in charge of the resolution of conflicts related to employment law.

In most countries there are people, who act as a trustee (administrator, receiver, executor) who is competent for the liquidation of assets and distribute the proceeds ( Austria, Canada, Estonia, Germany, Ireland, Norway, Taiwan, USA ).

Courts are also involved being responsible for issuing certain orders or approving various actions and disputes arising from decisions made by the trustees (e.g. Austria, Canada, Israel, USA).

In some countries there exists a specific public authority, which is in charge of ensuring that bankruptcies and insolvencies are conducted in a fair and orderly manner and they are also responsible for "licensing" and supervising the bankruptcy trustees (Canada, USA) or are in charge of the insolvency proceeding (Israel, Kazakhstan).

In several countries there exist committees of creditors, which also have certain competences (e.g. Austria, Australia, Ireland, Norway, Slovakia).

In some countries bankruptcy courts (e.g. USA, Uruguay), or commercial courts are in charge of insolvency proceedings (e.g. Austria, Belgium, France, Morocco, Spain, Tunisia). In other countries this is a part of general civil jurisdiction (Australia, Brazil, Bulgaria, Denmark, Germany, Japan, Iceland, Israel, Norway, South Africa, Taiwan). In several countries these courts are competent for all claims (in Lithuania, USA) except for such regarding labor relationship (e.g. Austria, Brazil). With respect to the resolution of conflicts that arise in the context of employment or collective agreements, in most countries the relevant institutions are labor courts (Argentina, Austria, Belgium, Denmark, Germany, Iceland Israel, Morocco, Panama, South Africa, Tunisia, Uruguay) and/or labor boards or commissions (Australia, Bulgaria, Canada, Ireland).

3. When a declaration of opening of an insolvency proceeding is issued, are the employment contracts considered automatically terminated or are they still in force?

In most countries a declaration of opening of an insolvency proceeding does not terminate employment contracts automatically (Australia, Austria, Belgium, Bulgaria, Denmark, Estonia, France, Germany, Iceland, Ireland, Japan, Kazakhstan, Mexico, Morocco, Norway, Slovakia , Switzerland, Taiwan, USA, Uruguay).

In some countries the order for compulsory winding up or shut down of a company operates as a notice of dismissal (Australia) or terminates the contract (Ireland). In some other countries employment contracts are terminated if the court orders the termination of the business (e.g. Brazil, Israel), or appoints a receiver (Ireland), or if after a certain period of suspension (South Africa,) the continuation of the business has not been ordered (Argentina, Tunisia).

In some countries upon the bankruptcy of an employer, the employment contract is deemed to be terminated by the act of the employer (e.g Canada).

4. When an employment termination automatically occurs due to the opening of the insolvency proceedings, what benefit or severance could the workers be entitled to as a consequence?

In some countries where there may be a termination employees are entitled to claim for payment in lieu of notice (Canada;) or if it would have been a dismissal without cause (Brazil) by the employer (Israel). Generally in some other countries there exist severance payments if employees are made redundant (Australia, Estonia, Morocco)

5. Is there any chance to terminate the employment contract of one or more employees once the opening of the insolvency proceedings already occurred? Which reasons are considered fair in order to allow the administrator of the insolvency proceedings terminate the employment contracts? Is the employee entitled to any benefit or severance?

In most countries the trustee or insolvency administrator can terminate the employment relationship, subject to the appropriate notice requirements (e.g. Australia, Austria, Canada, Denmark, Estonia, Germany, Iceland, Japan, Morocco, Norway, Switzerland, Taiwan, Uruguay) especially if the further continuation of the business could reduce the proceeds of the liquidation of the assets (e.g. Austria, Bulgaria). Sometimes there is also a permission of the court (e.g. France, USA).

In some countries periods for notice are reduced in specific situations (e.g. Austria, Germany, Iceland) but employees are entitled to indemnities (e.g. Austria).

6. What privileges or preferences, if any, are granted to employment credits?

In some countries employees certain remunerations are ranked ahead of ordinary creditors but sometimes behind secured creditors or certain costs (e.g. Argentina, Australia, Denmark, Canada, Japan, Iceland, Ireland, Israel, Norway, Switzerland, Taiwan, USA). Often there are different ranks for amounts due for services rendered to the bankrupt before the date of bankruptcy and after the date of bankruptcy (Australia, Austria, Germany, Norway) or after announcing the lacks of assets (Germany). Sometimes this is restricted to a certain amount of wages (Brazil)

Some countries impose a liability on a company's directors for certain unpaid wages for services performed (Canada).

7. Is there a guarantee institution that takes charge of the debts unpaid by insolvent employers and to what extent subrogated in the rights and/or privileges granted to the worker, and may claim for them during the insolvency proceedings?

In many countries there exist guarantee institutions, which pay employees' wages earned during a certain period ( eg. 3 or 6 month) prior to the date of bankruptcy or a prior termination of employment to a certain maximum sometimes related to the maximum weekly insurable earnings under social insurance or/ indemnities or severance benefits (e.g. Australia, Austria, Belgium, Bulgaria, Denmark, Estonia, France, Iceland, Ireland, Israel, Japan, Lithuania, Norway, Slovakia , Spain, Taiwan, Tunisia). Often this is funded by employers payments (Austria, Bulgaria, France, Iceland, Taiwan, Tunisia).

In some countries there exists a specific institution to protect claims for retirement payments (Germany). In Switzerland there exists a social insurance solution-

8. Is there a guarantee institution subrogated in the rights and/or privileges granted to the worker, and may claim for them during the insolvency proceedings?

In most countries guarantee institutions take the rank in order of priority of payment that the employee would have had (Australia, Austria, Bulgaria, Denmark, France, Germany, Japan, Lithuania, Norway, Slovakia, Spain, Taiwan, Tunisia).

9. What other effects has the insolvency proceeding on the employment relationship?

In most countries employment relationships do not change, but often the former employer is replaced by the insolvency administrator or trustee (e.g. Australia, Austria, Belgium, Germany, Japan, Lithuania, Norway, Switzerland, Taiwan, Tunisia, Uruguay).

10. When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights?

If the trustee sells the business of the bankrupt employer in some countries employees are transferred or the purchaser has to rehire them or may be ordered by the court to do so ( Belgium, Bulgaria, Estonia, Germany, Ireland, Norway, Slovakia, South Africa. Tunisia).

In other countries if the purchaser rehires them voluntarily and later on terminates the employment contract the employees are entitled to credit for their previous employment (Canada) or the purchaser is bound to certain instruments which covered the employee previously for a certain period (Australia)

In several countries if an enterprise is sold during insolvency procedure the purchaser is not tied to the former employer relationship (e.g. Austria, Brazil, Israel).

11. Are there specific regulations protecting employees if an enterprise is shut down or if there are mass dismissals? Describe them.

In many countries there exist specific provisions, if an enterprise is shut down or if there are mass dismissals (Australia, Austria, Belgium, Denmark, France, Germany, Lithuania, Norway, Switzerland, Taiwan).

In some countries there exist special notice periods or other obligations (Information of employment services a certain period before notice and/or works council; negotiation of agreements) on employers who dismiss a large number of employees at the same time (e.g. Australia, Austria Canada- Alberta, Germany, Iceland Lithuania, Norway, Switzerland, Taiwan). In some countries the employer has to obtain permission from the local labor inspection or employees are entitled to compensation from an unemployment insurance fund (e.g. Estonia, Uruguay).

#### *Final conclusions:*

1. In many reports it was mentioned, that the subject of insolvency has been debated during the last years and there have been several new statutes in this field.

2. The question of employees rights during insolvency proceedings is one of increasing importance. There may be a conflict between the Interests of employees to maintain their employment and other creditors.

3. An important interest is to restructure and continue businesses, because due to winding up and shut down of enterprises values of commercial interest are destroyed. This makes it necessary on the one hand to terminate some employment relationships or change the terms. On the other hand this makes it necessary to encourage employees to stay in the enterprise.

#### *Recommendations*

1. Before termination of employment contracts there should be an evaluation of all possibilities to continue the business.

2. If it is possible to continue the business it should be possible to handle questions of termination of employment contracts or to change working conditions also on a level of collective bargaining. This should also be part of the provisions governing the employees rights in the case of a transfer of an undertaking.

3. In the event of transfers of businesses all employees or their representatives should receive appropriate information in due time especially regarding the legal consequences.
4. Even during insolvency proceedings there should be a competence of courts, which have experience in commercial questions but also regarding labor law conflicts.

*Topic for next year:*

Rights of parents in the employer employee relationship