Annual Meeting of the International Association of Judges

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Questionnaire
Study Commission on Labour Law

German Law

I.
Are there any specific regulations on insolvency proceedings?

There is a special insolvency code - Insolvenzordnung - which settles all procedures concerning cases of insolvency.

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

Insolvency cases are treated by a special segment of the county courts. This is regulated in the above mentioned insolvency code, § 2 Insolvenzordnung. Any cases with regard to employees, especially cases of protection from unwarranted termination, are treated by labour courts. This applies also in case of insolvency.

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?

Employment contracts do not end automatically in case of the opening of an insolvency procedure. The insolvency administrator enters into the legal position of the employer with respect to all rights and duties from the employment contract.

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?

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5.
Is there any chance to terminate an employment contract of one or more employees once the opening of the insolvency proceedings already occurred? What reason is considered fair in order to allow the administrator of the insolvency

proceedings to terminate the employment contracts? Is the employee entitled to any benefit or severance?

It is possible to terminate an employment contract after the opening of the insolvency proceedings. The termination has to be declared by the insolvency administrator as the former employer loses his legal position to decide about his property during the course of the insolvency proceedings. This includes the right to give notice.

The termination of an employment contract during insolvency proceedings is principally possible on the same legal basis as the termination of any employment contract. The opening of the insolvency proceedings does not give the insolvency administrator another or a better legal position. All rules of protection in favour of the employees are applied, may they be originating from law codes as well as from contract or union agreement. There are for example rules to protect pregnant women or handicapped people from unjust termination. These have to be applied without regard to the insolvency. Rules on form have to be respected, too.

Again principally the general rules of termination are valid where the time limit of termination is concerned. Nevertheless, the insolvency administrator may give notice with a maximum termination time limit of three month, notwithstanding longer time limits in law, contract or union agreement. This regulation is part of the special insolvency code, § 113 Insolvenzordnung. It is intended to give the insolvency administrator a better chance to use the assets of a business best.

The employees may also give notice during the shorter termination time limit of insolvency law. They too are not bound by any other rules in this respect.

The employees are not entitled to special benefits because of a possibly shorter time limit of termination.

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

There are no special rules for employee credits.

That means that the insolvency administrator cannot terminate a credit contract with which the business has given credit to an employee at once. He has to keep the agreed termination time. Also the employees have no privileges with regard to any credit they might have given to their employer before the opening of the insolvency proceedings even if their intention was to avoid insolvency. Their claims for paying back the sum of the loan are treated like the claims of any other creditor. So claims that were payable before the opening of the insolvency proceedings will usually only be paid to a very small percentage, if any. All claims that get payable after the opening of the insolvency proceedings belong to another category of claims which are served usually at least slightly better because they are served before the others.

7.

Is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer and to what extent?

There are special rules to secure the claims of the employees for wages to a certain extent.

For employees still working, not retired, these rules are included in the social law code, §§ 183 – 189.The institution that gives a certain guarantee for payments is the so called employment agency. This institution has taken over the position and tasks of the former employment office.

Following the rules of social law code part III § 183 an employee is entitled to payment of any unpaid wages during the last three months before insolvency. The claim is dependent on the following conditions:

- either the opening of the insolvency proceedings

- or the application to open the insolvency proceedings has to be rejected because the absence of any or sufficient assets

- or the complete end of any business activities in Germany if the application to open the insolvency proceedings was omitted and there are evidently no assets.

The claim includes all parts of the wages that would have been paid had the business continued. This may include a gratification for Christmas or holiday time or any additional payment may be for late night work etc. If the wages included non-money parts there has to be a payment to substitute them. There are no payments on interest because of late payment and no substitution of the cost to get the papers of the employee back or to follow up any other claim of the employee that is not part of the wages.

If employees are already retired and have claims for retirement payments against the business that employed them during their active working time these claims are protected by another special institution called "Pensions-Sicherungs-Verein". You might translate this as "old age pensions security agency". The institution was installed by a law on occupational pension schemes, "Gesetz über betriebliche Altersversorgung", short BetrAVG, § 14. Its task is to fulfil all occupational pension claims which get invalid because of insolvency. It was specially designed to make sure that these pensions are secured against the risk of insolvency and is to the greatest part financed by all businesses that operate pension schemes.

The claim depends on either the opening of the insolvency proceedings or the rejection of an application to open insolvency proceedings or the complete end of all business activities and obviously no more assets of the former business. So the conditions for this claim are nearly the same as they are for a claim of an active worker against the employment agency. The claim secures the pension just as well as the business would have to pay it.

If employees are not yet retired but have already gained a pension claim which cannot expire any more there claims are also secured by the "Pensions-Sicherungs-

Verein". They are entitled to pension payments as soon as they reach old age / the agreed pension payment time.

There is further also some security for employees working old-age part-time. In German law different models of old-age part-time work are used. The legal regulation is contained in an old-age part-time code – "Altersteilzeitgesetz". One of the models requires that from the whole time of part-time work the employee works the first half fully receiving only 50 % of his wages and in the second part does not work any more but still receives 50 % of his wages from the employer. Additionally the employee receives a certain compensation from the employment agency so that he still gets about 80% - 90 % of his former wages. This means that during the first half of the part-time work the employee gains already some claim to the (reduced) wages of the second half. This claim has to be secured by the employer who can use different sorts of security, for example an insurance but also by guarantee of a bank. The claim is based on the condition that already the wages of three full months are accumulated for the second haft part of the old-age part-time. Not allowed are securities from inside the business group or trust to which the employing business belongs. Should the employer fail to give sufficient security the employee can demand that the money that is needed to fulfil his claim has to be deposited in a bank account.

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

There is a subrogation in all cases described above in answer 7. insofar as the institution which can be held liable for unfulfilled claims has paid the employee. In all cases of subrogation the institution – employment agency, old age pensions security agency, insurance company or other guarantor – steps exactly in the place of the employee and takes his position in the insolvency proceedings. The chance to get still any money in fulfilment of these claims depends on the time they turned payable.

9.
What other effect have the insolvency proceedings on the employment relationship?

Like explained above the employment contract is legally unaffected by the opening of the insolvency proceedings. The former employer is replaced by the insolvency administrator who is the legal successor to the person or business fallen into insolvency. The insolvency administrator is legally bound by all rules applying to the employment contract, may they derive from the contract itself, from law or from union agreement.

Nevertheless, in reality many businesses fallen into insolvency are closed down sooner or later. This development influences most strongly the claim of the employees to get their wages paid. The strengths of the claims of the employees depends very much on the time when they get payable or do arise. German insolvency law differentiates between such claims that have already arisen and are payable before the opening of the insolvency proceedings and those that arise

afterwards. There is a further differentiation between claims that have arisen before the announcement that there are not sufficient assets and those that originate later. The different claims belong to different classes which are paid in a certain order. The money provided for each class of claims is distributed proportionately to all claimants so that all get a certain percentage of the claimed sum.

Claims arising after the opening of the insolvency proceedings are paid after any costs of the proceedings are covered. Those claims caused by the insolvency administrator after announcing the lack of assts come next. Last in this group are those claims which have arisen after opening the insolvency proceedings while the insolvency administrator has checked and audited the estate of the insolvent business or person and before he has declared a lack of assets. The reason for the better standing of claims originating from the time after finding a lack of assets is that the insolvency administrator shall best not go on with a business when there is no chance to realize any money.

Claims originating from the time before the opening of the insolvency proceedings belong to the lowest class of claims. They are paid last, usually not at all or only with only a small percentage of the real height of the claim. These claims have to be registered with the insolvency administrator who then checks if they exist and in which possible height they do exist. If he accepts the claim it is listed in the list of insolvency claims. All of these are paid if there is any money left after all other claims are paid.

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

There a special rules concerning the termination of employment contracts.

The insolvency administrator must not give notice to employees to make the selling of the business or parts of the business easier. This is regulated in § 128 Insolvency Code together with § 613 a Civil Code. It is not allowed to terminate an employment contract just to make the business more attractive to potential buyers or to give the potential buyer the possibility to choose freely which employees he will keep or not.

But the insolvency may give notice within the usual legal reasons for terminating employment contracts, for example because a business is closed completely or partly. Naturally he can also give notice if the conduct of the employee should legitimate this.

Furthermore the insolvency administrator may terminate employment contracts in advance for a buyer of the business or parts of it if the buyer has a ready concept how to go on with the business. Should this concept include some terminations of employment contracts they can be declared.

If the sale of the whole or part of the insolvent business includes mass dismissals or at least a greater number of terminations of employment contracts the insolvency administrator has to come to an agreement with the staff committee.

This is regulated in § 122 Insolvency Act and in § 112 of the so called employees´ representation act "Betriebsverfassungsgestz". To reach such an agreement the insolvency administrator has to lay down a plan why and how the business or part of it has to be closed down and what compensation shall be given to those employees who are dismissed. The staff committee has three weeks time to negotiate the plan with the insolvency administrator. If they do not reach an agreement the insolvency administrator can apply to the labour court to approve the plan. The labour court has to give its approval if the economic situation of the business is so bad that it has to be closed down anyway even if the protected interests of the employees will suffer.

The duty to come to an agreement with the staff committee also offers advantages to the insolvency administrator. If an agreement is reached and it contains a list of employees who may be dismissed to carry out the agreed plan the employees who file a lawsuit at the labour court against their dismissal carry the burden of proof that the plan is wrong and the termination of the employment contract not justified. This is a strong advantage for the insolvency administrator who – in the position of the employer - usually has to prove the legal justification of a dismissal. So such agreements often are used jointly between staff committee and insolvency administrator to safe at least part of a business.

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

Some of the legal necessities in case of mass dismissals are already described above in answer 10.

There may also be mass dismissals if the business cannot or shall not be carried on. If so, the insolvency administrator has to declare the number of dismissals at the employment agency if a certain number of employees is dismissed at the same time. A declaration is needed if in businesses with between 21 and 59 employees more than five employment contracts are terminated, in businesses with between 60 and 499 employees ten percent or more than 25 employees are dismissed or in businesses with more than 500 employees at least 30 notices are given. "At the same time" in this context means during thirty days. The declaration at the employment agency has to be given before notice is given to the employees. The notices get valid at earliest one month after the declaration to the employment agency. The employment agency is entitled to shorten this time frame or lengthen is up to two months.

As well as the employment agency the insolvency administrator has to inform the staff committee about the planned dismissals and to confer with the committee if the dismissals can be avoided. The insolvency administrator and the staff committee can also in this situation agree on a certain list of employees who are to be dismissed. This follows the same rules as outlined in answer 10.

The rules described here to not only apply in cases of insolvency but generally for mass dismissals.