

INTERNATIONAL ASSOCIATION OF JUDGES

RESPONSE OF IRELAND

to the

Questionnaire of the Fourth Study Commission 2007

Insolvency Proceedings

1. Are there any specific regulations on insolvency proceedings?

Yes - there are several pieces of legislation which make reference to insolvency proceedings in Ireland. Their application will depend on which party is subject to insolvency proceedings and how those proceedings arise.

- General insolvency proceedings in Ireland were originally governed by the Irish Bankrupt and Insolvent Act 1857 and the Bankruptcy (Ireland) Amendment Act 1872, which have since been repealed and replaced by the Bankruptcy Act 1988.
- Company insolvencies are governed by the Companies Acts 1963-2001, Order 74 of the Rules of the Superior Courts and case-law.
- Members' voluntary liquidation is governed by sections 256-264 of the Companies Act 1963 as amended by section 9 of the Companies (Amendment) Act 1982 and section 128 of the Companies Act 1990.
- Creditors' voluntary liquidation is governed by sections 265-273 of the Companies Act 1963 as amended by the Companies Act 1990 and the Company Law Enforcement Act 2001.
- Compulsory liquidations are governed by section 213 of the Companies Act 1963.
- Protection for workers whose company or firm is subject to insolvency proceedings is governed by the Protection of Employees (Employer's Insolvency) Act 1984, which implements European Council Directive 80/987/EEC and incorporates the later Directive 2002/74/EC.

Ireland has not opted out of the EU Council Regulation No. 1346/2000 on Insolvency Proceedings.

2. Which institutions are in charge of insolvency proceedings generally and which institutions are in charge of the resolution of conflicts related to employment law?

Companies in Ireland may be wound up in one of two ways – voluntary and compulsory. The former relates to the scenario where the shareholders resolve to wind up the company depending on whether the company is solvent or insolvent respectively. The latter relates to the scenario where the company is wound up by the

High Court. In both cases a liquidator is appointed to take charge of the insolvency proceedings.

Voluntary Insolvency Proceedings: The liquidation commences at the date of the passing of the resolution for the winding up of the company: section 220(1) Companies Act 1963. If this process begins, a liquidator will be appointed to take control of all the property and assets of the company, to realize those assets and to apply the proceeds of the realization to the discharge as far as possible of the claims proved against the company. Where there is a deficit, he must refer to the law as to priorities.

Compulsory Insolvency Proceedings: Court liquidation will occur where a creditor or the company itself petitions to the court for an order seeking the winding up of the company and the appointing of a liquidator. The normal grounds for doing so is that the company is unable to pay its debts (section 213(e) Companies Act 1963) or that it would be just and equitable (fair) (section 213(f) Companies Act 1963) to wind up the company. The liquidation commences when the petition for the winding up is presented: section 220(2) Companies Act 1963 – this is the filing of the petition in the Central Office of the High Court and the registrar allocating a date for the hearing of same.

Conflicts related to employment law are dealt with by a number of institutions. Venues for redress are either the statutory tribunals or the civil courts. Statutory tribunals include:

- The Labour Relations Commission (LRC) – this arranges the appointment of an Industrial Relations Officer who facilitates meetings between the parties in dispute and attempts to find an acceptable resolution
- The Labour Court – this deals with industrial relations matters that have been first referred to the LRC for conciliation and will not investigate unless conciliation has failed. Both parties present submissions, the court deliberates and a non-binding recommendation is made; generally speaking this recommendation is followed.
- The Employment Appeals Tribunal (EAT) – this tribunal has quasi-judicial function and interprets the terms of relevant organisations, with a leave to appeal to the ordinary courts of justice. Disputes arising under the Protection of Employees (Employer's Insolvency) Act 1984 are heard before this tribunal.
- The Equality Tribunal – this hears claims on the grounds of discrimination.

Vis-à-vis the civil courts, the Circuit Court has original jurisdiction in the case of gender-based discrimination with an appeal to the High Court possible. It also has an appellate jurisdiction in the matter of statutory appeals from the EAT, which constitutes a full hearing of the matter. Common law actions which can be heard in the civil courts include actions for breach of contract for unfair dismissal, straightforward claims for outstanding remuneration, or bonus or commission.

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

The contracts are considered to be still in force. The appointment of a receiver of debts out of court by the debenture holders does not terminate the contracts of employment except where the continuation of the employment of some particular employee would be inconsistent with the receivership itself, e.g. the managing director.

If the receiver proposes to sell any part of the business, he must abide by the provisions of the EC (Safeguarding of Employee's Rights on Transfer of Undertakings) Regulations 1980 – this requires him, inter alia, to consult with and inform employees' representatives.

If the receiver is appointed under a debenture, this will not affect the employees, as the receiver is the agent of the company.

If the receiver is appointed by the court, contracts are terminated.

Upon appointment, and providing there is no automatic termination of contracts, the receiver must decide as soon as possible whether he wishes to continue the contract or dismiss the worker.

4. When employment is automatically terminated due to the opening of the insolvency proceedings, are workers entitled to any benefit or severance package?

Yes. Under the Protection of Employees (Employer's Insolvency) Act 1984 in the case of a court-ordered insolvency, employees may seek severances and benefits. This is stated in section 6 of the Act and will cover all pay lost up to and not exceeding eight weeks after the date of redundancy. Monies covered include salary, holiday pay and sick pay.

5. Is there the possibility to terminate the employment contract of one or more employees when the insolvency proceedings have already commenced? 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?

(A) Yes – if the court determines that there must be a compulsory liquidation of the company, then the employment contract will be automatically terminated and severance packages arranged as discussed in Question 4. Also, the receiver of debts has a role in determining whether to terminate the employment contract. Section 316(2) Companies Act 1963 provides that the receiver of a company is personally liable on any contract entered into by him in the performance of his functions, whether or not the contract is entered into by him in the name of the company or in his own name as receiver or otherwise, unless the contract specifically provides that he is not to be personally liable. A receiver who is appointed by the court is substituted as an employer and therefore becomes liable for all the usual consequences of a dismissal.

(B) As the receiver is substituted as an employer it would appear to be a corollary that he/she is subject to the same terms regarding dismissal as an actual employer.

(C) Yes – see Question 4.

6. What privileges or preferences, if any, are granted to employees

See Question 4.

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

Yes – this person is known as a receiver. He is appointed by the holders of a debenture, which constitutes a charge over the undertaking and assets of a company incorporated under the provisions of the Companies Acts. He is normally an accountant. The restrictions on person being appointed are the prohibition on a body corporate acting as receiver under section 314 Companies Act 1963 and other named restrictions in section 315 Companies Act 1963 (as amended by section 170 of the Companies Act 1990).

The receiver will be appointed if the principal under a debenture is in arrears, or if the interest under a debenture is in arrears, or some other event has happened by which, under the terms of the debenture, the security has become enforceable, for example a winding up order or because the security is in jeopardy. The receiver has the legal right to receive property belonging to others, and may carry on the business of a company.

He will only be appointed over assets which have been charged. The receiver does not bring an end to the life of the company – he merely administers and discharges the debts of the company.

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

No.

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

This will depend on the nature of the insolvency proceedings themselves; see Question 3.

10. When the whole or part of the enterprise is transferred during insolvency proceedings, are there any particular provisions regarding the rights of employees?

Yes; see questions 3 and 4

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

Yes – the Protection of Employees (Employers' Insolvency) Act 1984 places an obligation on the State to ensure that a fund is available from which the employees can claim payment of debts, arising from the employment relationship, which have not been paid because of their employer's insolvency. This fund is known as the Social Insurance Fund. The debts which the employee can claim payment under the Act include up to eight weeks arrears of normal pay, sick pay and holiday pay, up to a weekly maximum of €507.90. These benefits apply to all workers who have attained the age of 66 years.