Thirteenth Meeting of European Labour Court Judges

Conference Room, Palazzo Ratta,
via Castiglione 24,
Bologna, Italy
19 September 2005

Theme 1: Insolvency Proceedures and Workers' Rights

General Reporters: Dr. Bartolomé Ríos Salmerón,
Emeritus Judge, Supreme Court,
Madrid, Spain

and

Dr. Miguel A. Limón Luque,
Professor of Law,
Autonomous University of Madrid,
Madrid, Spain

Chairperson for theme 1:
Mr. Vladislav Egorov,
Senior Labour Law Specialist
Social Dialogue, Labour Law and
Labour Administration Department
International Labour Office
Geneva

Table of contents

Thirteenth Meeting of European Labour Court Judges
Bologna, Italy
19 September 2005

Insolvency Proceedings and Workers' Rights

Questionnaire

General Reporter: Dr. Bartolomé Ríos Salmerón
Emeritus Judge, Supreme Court
Madrid, Spain
in collaboration with Dr. Miguel A. Limón Luque
Professor of Law
Autonomous University of Madrid
Madrid, Spain

Introductory notes

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.

The employer's insolvency and the opening of an insolvency proceeding against him/her are relevant to workers, who are concerned with the preservation of their employment contracts and with the payment of their wages and any other credits owed them by their employer. They would prefer that their credits be paid before other creditors. The provision of a *guarantee institution* that takes responsibility for the payment of the employer's debts when an insolvency occurs is also relevant to them. Finally, after the opening of an insolvency proceeding, the employee seeks to maintain his/her employment contract when the enterprise is transferred as an organized and productive whole. An additional employee concern would be to bring to the Employment Law Judge any claims against the employer, as he/she was doing before the start of the insolvency proceedings.

The *XIIIth Meeting of European Labour Court Judges* gives all of us a chance to pose some questions on the subject, as it is a time in which many Insolvency Acts are of current interest, some of them because they are recently issued, others because they still are at the debate process before being issued; in any case, the trend is towards maintaining the enterprise (and not favoring its liquidation). Some modern Insolvency Acts are found in the following countries: **United Kingdom** (Insolvency Act 1986 and 2000); **France** (Act 1985, regarding the reorganization and legal liquidation of enterprises; the *Loi de Sauvegarde des entreprises* is still being debated); **Germany** (Insolvency Act [Insolvenzordnung] 1994, entered into force in 1999); **Italy** (Bankruptcy Act 1942, and the Extraordinary Administration of the Major Enterprises in Insolvency Act, 1999); the 1942 Act would be slightly amended in a short time); **Spain** (Insolvency Act 2002 [Ley Concursal]); **Portugal** (Law on Enterprise Recovery and Insolvency, 2004) [Codigo da Insolvença e da Recuperaçao de Empresas]).

Brief and clear responses are encouraged, in order to enable the reader to easily understand each local Law and its comparison with other local Laws. It is also suggested that the responses take into account both the local Insolvency Law and the local Employment Law, as well as the international (ILO Conventions) and European Law.

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

2. The employment contract

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

2.2 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?

2.3 Is there any chance to terminate the 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?

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

4. Transfer of undertakings during an insolvency proceeding

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

Thirteenth Meeting of European Labour Court Judges
Bologna, Italy
19 September 2005

Insolvency Proceedings and Workers' Rights

GENERAL REPORT

General Reporter: Dr. Bartolomé Ríos Salmerón
Emeritus Judge, Supreme Court
Madrid, Spain
and
Dr. Miguel A. Limón Luque
Legal Counsel, Supreme Court
Madrid, Spain

1. General questions

This synthesis report takes into account only the countries that answered the questionnaire before 13 September 2005: Australia, Belgium, Finland, France, Germany, Hungary, Iceland, Ireland, Israel, Italy, Malta, Norway, Slovenia, Spain, Sweden, United Kingdom and Venezuela.

In general, as was mentioned in the introductory note to the questionnaire, the subject of insolvency has been largely debated during the last years in several countries, and this debate has affected regulations: during this period many countries passed amendments or whole new regulations on the matter (we quote the list by year of enactment): Ireland, (amendment of the Companies Act, 1999); United Kingdom (Insolvency Act, 2000); Australia (Corporations Act, 2001), Spain (Insolvency Act, 2002); Finland (Bankruptcy Act, 2004); Italy, in which the old Legge Fallimentare of 30 March 1942 is still in force, though it was amended several times, the last one by Act n. 80 of 14 May 2005; and France (Loi de sauvegarde des entreprises passed in July 2005). These legislative interventions have helped to increase the number of States with a special and separate regulation body on insolvency or bankruptcy (Italy, Slovenia, Finland, Hungary, Norway, Sweden and Spain), but many countries still maintain these regulations as a part of their Corporations Acts (Ireland and Australia, for example) or as a part of their Commercial Law Code (France, Venezuela).

Regarding employees' rights during insolvency, many of the answers reveal that at least part of the regulations relevant to the subject remain regulated by Employment Law (Slovenia and Finland – terminations of employment; Hungary, Norway and Spain˜ Wage Guarantee Fund or State guarantee; France, Venezuela – payment of wages).

Institutions that are in charge of insolvency proceedings vary, but judges and/or courts are always part of the procedure, exercising varying degrees of control on how the procedures take place, appointing administrators, trustees, executors, receivers or liquidators, and controlling their work in most cases. But in some countries there exists other relevant public intervention: in Ireland, the Director of Corporate Enforcement; in Finland, the Bankruptcy Ombudsman; in Italy, an administrative authority (commissario liquidatore) is in charge of bankruptcy against companies of special public interest – nevertheless the judge remains in charge of the assessment of insolvency. In Australia, there is also private participation, as the company itself may appoint an administrator to decide whether or not the company must be wound up.

In most countries, ordinary courts are in charge of insolvency proceedings: Israel, Iceland, Slovenia, Sweden, Finland, Malta, Norway. In others, specialized Commercial Judges or Courts are in charge of them, as in France, Italy, Venezuela, United Kingdom and Spain. Regarding matters specifically related to Labor and Employment Law, sometimes the Employment Law Judge loses partially or totally his/her jurisdiction on Employment and Labor Law during an insolvency proceeding. This is the case in Malta and Spain. In the United Kingdom, the employee must bring the claim to the Companies Court when a compulsory liquidation has occurred. It must be pointed out that in Israel, once an insolvency proceeding is opened, the whole jurisdiction (terminations, suits on wages, etc.) pertains to a civil court and not to Employment and Labor Tribunals. Something similar occurs in Ireland, but it must be noted that Employment Tribunals are not considered a jurisdiction in the proper sense of the word. Moreover, in some countries, no special jurisdiction on Employment Law or on Commercial Law is provided by their national law; in these cases, as in Norway, when it is said that the ordinary judge is in charge, this cannot be perceived as a special rule – the rule should be that the ordinary courts are always in charge of the legal conflicts. Labor Courts on these cases are usually in charge only regarding collective conflicts and the like.

Germany, Belgium (with some exceptions), Hungary, Sweden, Slovenia, Australia and France do not have major peculiarities regarding jurisdiction during insolvency proceedings; the Employment Law Judge, the Labor Judge or Court or the Administrative Tribunal are still in charge of the resolution of employment and labor conflicts as they would have normally done even if there were no insolvency proceedings.

Sometimes the credits obtained by the employee before an Employment Court must be added to the list of credits of the insolvency proceeding by the court or administrator that is carrying out the insolvency proceedings. Some countries may have conflicts of jurisdiction in those cases, but they seem to be a minority.

2. The employment contract

As a matter of fact, it is not common that the opening of an insolvency proceeding automatically causes the termination of the employment contracts. The closest regulation to this idea of automatic termination of contracts can be found in Norway, in which the estate may decide whether to enter the employment contract or not. But if the contract is terminated, the employee is entitled to standard termination rights (i.e. previous notice of dismissal). This must be seen as a kind of soft subrogation right for the employee. Something similar happens in the United Kingdom: in a voluntary liquidation, the contract does not terminate automatically, but the liquidator has 14 days to dismiss or to adopt the employment contract. In liquidations by the court, the winding-up order automatically terminates any contract.

Normally it is the administrator or trustee who decides after the opening of the proceeding to terminate the contracts, if necessary, albeit sometimes subject to judiciary control (as in Italy or France). In some countries, as in France, the Labor Inspection Body must also authorize the decision, but only when the rights of the workers´ representatives are involved. In other countries, such as Spain, the collective termination (a concept that was taken from European and local regulation on collective redundancies) of the contract must be decided by the judge.

The procedures that must be followed in order to terminate the employment contract and/or the benefits and/or severance payments which the employees are thereafter entitled to do not substantially change because of the opening of an insolvency proceeding, at least until liquidation starts (see for example, France, Belgium, Malta, Australia, Hungary, Israel and Iceland; as an exception, in Finland, termination during both insolvency proceedings and bankruptcy imply less guarantees to the workers). Concerning automatic effects once liquidation has occurred, in Ireland, for example, the mere appointment of a liquidator serves as notice of termination to employees. Nevertheless the liquidator may be authorized to maintain some or every employment contract. In some countries regulations

establish special guarantees during liquidation: thus, in Sweden, if the employees are not given notice after the bankruptcy decision, they could be considered employed by the bankruptcy estate.

3. Employment credits and guarantee institutions

Employees' credits and their privileges or preferences are of different types. Privileges cover not only wages but also severance payments, holiday pay, compensation for injuries at work, pension contributions and, sometimes, benefits such as paid maternity leave, sick leave or leave to care for sick relatives. Essentially there is a privilege over the wages corresponding to the work performed during the last sixty days (France), or ninety days (Finland, Malta, Slovenia) or six months (Norway), preferences over movable property and over real state; pay holidays are also specially covered in some cases (as in France or Norway). Nevertheless, in Australia, credits which originated in employment are unsecure credits and rank behind secured creditors. In the United Kingdom wages are only secured up to a maximum of 800 pounds – and still there are preferential creditors who rank before the employees. In Venezuela employee's credits are privileged by labor regulations, but the jurisdiction of Commercial Courts do not take them into account, so in practice, they are unprotected.

Usually, those privileges or preferences do not cover the whole amount of the salary or severance payment which the employee is entitled to, and it is common that the Law establishes a specific privilege for some reduced amounts, and another tier of protection for the amounts that exceed the one most protected (as it happens in France – the so-called superprivilège providing other privileges or preferences as well; or in Spain, in which the Law guarantees, as part of the insolvency expenses, the last 30 days of wages before the opening of the insolvency, plus the wages and severance payments which occurred after the opening of the insolvency and still maintain part of the wages or severance costs which occurred before the opening of the insolvency proceeding as privileged credits. The idea of privileging employees' claims founded after the opening of insolvency proceedings is also present in German regulations).

In most countries, there is a guarantee institution: sometimes it is an Association (France); exceptionally the bankruptcy estate by itself (Norway); more often a Fund – usually Public – (United Kingdom, Belgium, Hungary, Ireland, Finland, Slovenia); or a Public Agency (Australia, Italy, Finland, Israel, Spain, Sweden). These guarantee institutions take care of the payment of the salaries, which are generally subrogated in the rights and privileges granted to the worker, except in Iceland. Most reports, excluding Australia and Venezuela, state that their local regulations at least comply with the relevant ILO Convention [nº 173, 1992]. Nevertheless, in the United Kingdom it seems that in practice the application of the ILO Convention is not fully guaranteed. EU countries also comply with the EC Directive 80/987/EEC [as known, amended by Directive 2002/74]; as an exception Italy reports to have had in the past some legal problems regarding this issue.

4. Transfers of undertakings during an insolvency proceeding

A few European Union members have made exceptions on compulsory employee rights in order to guarantee that the new company owner does not subrogate into the position of the previous owner, as section 5 of the Council Directive 2001/23/EC allows. This is the case in Germany, as the new owner who buys the undertaking from the administrator is not responsible to pay insolvency credits (also in Sweden or France). On the contrary, Slovenia applies to those transfers of undertakings the same consequences as always (joint liability between transferor and transferee). The same is true in Ireland, Malta or Finland, but the latter excludes the declaration of bankruptcy, in which case the transferee is not responsible unless the company is run by the same persons on the basis of ownership, agreement or other reason in order to prevent fraud. The same thing happens in Belgium, but only for private companies as the guarantee is part of collective agreement num. 32bis. Spain is halfway, establishing some peculiarities, but formally maintaining the application of the subrogation principle. Outside the EU border, in Norway the new owner is not responsible for any claim issued against the previous owner if the business was transferred during the insolvency proceedings. Australia deems liable only the transferor company, which may also waive its liability if

the new employer offers to employees "acceptable alternative employment". Nevertheless in Israel an employer must always ~ even when an insolvency proceeding is opened ~ subrogate into the employment contracts once a transfer of an undertaking happens; on the contrary, the employee may resign and is entitled to severance pay as if he were dismissed.

5. The role of workers' representatives and unions during insolvency proceedings

It is common that the workers' representatives participate in the insolvency proceedings defending the general interests of the employees. Specifically, as in Australia, unions (or workers' representatives in the case of other countries) may represent employees as creditors during the administration of a company or during insolvency proceedings. They may also negotiate on their behalf in obtaining redundancy benefits and may be involved in the process of seeking a transfer of the business to a new employer and specifying the conditions of the transfer. In some countries, as in France, there is an employee's representative during insolvency proceedings specially appointed to follow the abovementioned proceedings and survey the declaration of credits arising from contracts of employment. In Venezuela this function of defending individual credits is carried out by special representatives elected in an assembly of workers.

In the majority of cases, workers' representatives are in charge of the negotiations when redundancies occur or when a transfer of undertaking takes place. European regulations have helped a lot in harmonizing the participation of workers' representatives in redundancies and transfers of undertakings. As an exception, however, in Iceland, the United Kingdom and Ireland, workers' representatives have no formal role; in practice, at least in Ireland, they are fully consulted by the liquidator. Something similar occurs in Finland and in Norway.

6. Some questions for debate

After the discussion that took place in Bologna, there were several points of debate that would be interesting to stress in future meetings, as they are areas of concern in a majority of countries.

- Most countries do not have special regulations regarding insolvency of small companies. Those small companies appear and disappear extremely quickly and in many cases an employee may obtain a legal ruling stating the company obligation to pay, but in the end the employee may or may not be paid. Also, insolvency procedures are not flexible and quick enough to guarantee payments and not merely organize creditors in the case of small companies. In many cases, insolvency procedures are not opened in small companies because they are already dissolved before there is a chance of starting those procedures.

- There is a real concern about company obligations as regards pension schemes. As a consequence of an insolvency, the employee can lose many rights regarding employer obligations of funding pension schemes that the company previously guaranteed through collective bargaining agreements or company or individual agreements.

- In many countries, it is not clear that a goal of Insolvency Law should be maintaining employment. Insolvency Law's main goal in most of countries is still to organize creditors, and the social role of the company is seen as secondary when an insolvency proceeding is opened. The Guarantee Fund is the instrument that mainly covers employee credits in cases of insolvency. Maintaining employment in a company in financial crisis is not always good for the employee: his losses might be increased.

- Sometimes, Insolvency Law, as in many other fields of law, does not deal well with groups of companies. There is still an extended feeling that the companies may be broken up as a group strategy; also, insolvency could be used as a measure against unions that are well organized in a company branch.

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Dominica Whelan,
Commissioner,
Australian Industrial Relations Commission

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

Corporations Act 2001 (Cth).

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

The company itself may voluntarily appoint an administrator to investigate its affairs and determine if it should be wound up. A Court or a secured creditor may appoint a receiver who will take control of the company's assets and ensure that secured creditors are paid out. A Court may also appoint a liquidator to wind up a company in the interests of both secured and unsecured creditors.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

Generally speaking the role of resolving conflict between employers and employees is the responsibility of the Australian Industrial Relations Commission (AIRC) and in some cases State Industrial Tribunals. The Commission may, for example, fix the level of sererance pay to be made to employees, deal with disputes concerning redundancy provisions in an industrial agreement, and determine compensation for an employee who is unfairly dismissed. Enforcement of employees' entitlements is however dealt with by the civil courts.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

Matters relating to the determination of employees entitlements and claims of unfair dismissal remain the province of the industrial tribunals. Matters relating to the enforcement of existing entitlements are dealt with by the insolvency practitioner or the Court overseeing the winding up of the company. Where a company is in administration, or is being wound up, proceedings again the company in a Court can

only proceed with the consent of the administrator or the Court dealing with the winding up. As the Industrial Relations Commission is not a 'court' the AIRC has adopted the view that it can continue to deal with matters between the employees and the company which are within its jurisdiction. This means that the Commission may create new entitlements to severance benefits or compensation for employees although these may only then be enforced in a Court.

2. The employment contract

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

Generally the employment of the relevant employees is taken to cease when the company ceases to trade. While the company is in administration and still trading employment contracts continue unless they are terminated by the administrator.

2.2 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?

Severance benefits are generally determined by the relevant award or industrial agreement which covers the employees. In some states they are determined by statute. The level of benefit will depend on the length of service of the employee and in some cases the number of employees engaged by the employer. Standard benefits where the business employs more than 15 employees vary from 4 weeks pay for an employee with more than one year and less than two years service to 16 weeks pay for an employee with nine and less than 10 year service. For 10 years or more the amount drops to 12 weeks pay as an employee becomes eligible for long service leave payments after 10 years. The employees will also be entitled to notice of termination or payment in lieu thereof which varies from one week for an employee with up to one years service to four weeks for an employee with 5 or more years service.

2.3 Is there any chance to terminate the 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?

The administrator may terminate the employemnt of an employee after the company is placed in administration. If the termination is for a valid reason based on the operational requirements of the business then the employee will be entitled to the usual sererance benefits (see 2.2 above). If the termination is related to the employee's capacity or conduct then he/she may only be entitled to notice of termination. This may vary from one week for an employee with less than one years employment to 4 weeks for an employee with 5 or more years service. In cases of serious misconduct no notice or severance benefits may be required.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

Australia has ratified Convention 173 but has not enacted legislation to put it into operation. Employees are regarded as unsecured creditors and rank behind secured creditors in the pay out from assets liquidated on winding up of an insolvent company.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

Some industrial agrements provide for protection of employees entitlements by guarantee institutions although this is not widespread. The Federal Government also operates a scheme, General Employee Entitlements &Redundancy Scheme (GEERS), which will provide eligilbe employees in the event of an employer's insolvency with accrued entitlements to pay, annual leave, long service leave, notice of termination and standard severance benefits. It will not cover benefits provided in industrial agreements which are in excess of statutory or award standards.

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

See answer to 3.2.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

The employees would need to authorise any person or body to act on their behalf in insolvency proceedings. This may be included as a term in an industrial agreement. The Goverment does not act for employees in insolvency proceedings. Eligibility for GEERS benefits only arises when the company is would up and assets are insufficient to meet the employees entitlements.

4. <u>Transfer of undertakings during an insolvency proceeding</u>

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

If there is a transmission of business and the new employer is required as part of that transfer to recognise the employee's period of service with the prior employer then the insolvent employer is not required to give notice of termination or make payment in lieu thereo. If the new employer offers the employees employment which the Commission regards as 'acceptable alternative employment' then the requirement to pay severance benefits may also not apply. In any other case those benefits remain the liability of the insolvent company. Unless the new employer takes over the accrued liabilities of the insolvent company any other benefits owed to the employees will remain subject to the outcome of the insolvency proceedings.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

Unions may represent employees as creditors during administration of a company or during insolvency proceedings. They may negotiate on their behalf in obtaining redundancy benefits and may also be involved in the process of seeking a transfer of the business to a new employer and the conditions of that transfer.

BELGIUM

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

par Christian Storck
Conseiller à la Cour de cassation de Belgique

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

Tout commerçant qui a cessé ses paiements de manière persistante et dont le crédit se trouve ébranlé est en état de *faillite*.

La faillite est régie par la loi du 8 août 1997 *sur la faillite*, entrée en vigueur le 1er janvier 1998 ?

Les entreprises qui ne peuvent temporairement acquitter leurs dettes ou dont la continuité est menacée par des difficultés pouvant conduire, à plus ou moins bref délai, à une cessation de paiement peuvent, si leur situation financière peut être assainie et si leur redressement économique semble possible, demander le bénéfice du *concordat judiciaire*.

L'institution fait l'objet de la loi du 17 juillet 1997 *relative au concordat judiciaire*, entrée en vigueur le 1er janvier 1998.

Toute personne physique qui n'a pas la qualité de commerçant peut, si elle n'est pas en état, de manière durable, de payer ses dettes exigibles ou encore à échoir et dans la mesure où elle n'a pas manifestement organisé son insolvabilité, introduire devant le juge une requête visant à obtenir un *règlement collectif de dettes*.

Cette procédure est détaillée aux articles 1675/2 et suivants du *Code judiciaire*, introduits dans ce code par la loi du 5 janvier 1998, entrée en vigueur le 1er janvier 1999.

Bien que le règlement collectif de dettes soit plus spécialement destiné à améliorer la situation de particuliers victimes du surendettement, il ne peut être exclu que se

trouvent parmi les dettes impayées des sommes dues à des travailleurs occupés ou ayant été occupés par le débiteur.

Ces trois procédures constituent des procédures d'insolvabilité au sens de l'article 2, a), du règlement (CE) n° 1346/2000 du Conseil du 29 mai 2000 relatif aux procédures d'insolvabilité.

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

La matière de la faillite et du concordat ressortit à la compétence exclusive du tribunal de commerce (C. jud., art. 574, 2°). Ce tribunal désigne, s'agissant de la faillite, un ou plusieurs *curateurs* et, s'agissant du concordat, un ou plusieurs *commissaires au sursis*.

La matière du règlement collectif de dettes ressortit actuellement à la compétence du juge des saisies, qui est un juge au tribunal de première instance, et, en degré d'appel, à la cour d'appel. Un projet de loi en cours d'examen, qui sera très vraisemblablement adopté très prochainement, mais dont l'entrée en vigueur ne sera pas immédiate, prévoit, en raison de la dimension sociale accentuée du règlement collectif de dettes, d'en transférer la connaissance aux juridictions du travail. Ce contentieux ne sera toutefois pas soumis, suivant le projet, à la formation paritaire du tribunal ou de la cour du travail mais à une formation composée du seul magistrat professionnel. Il revient en cette matière à la juridiction compétente de désigner un *médiateur de dettes*.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

Les contestations relatives aux contrats de louage de travail sont de la compétence du tribunal du travail, dont les jugements peuvent être frappés d'un appel dont connaît la cour du travail.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

La compétence exclusive du tribunal de commerce en matière de faillite et de concordat est circonscrite aux actions et contestations qui découlent directement des faillites et des concordats judiciaires, conformément à ce qui est prescrit par la loi sur la faillite et par la loi relative au concordat judiciaire, et dont les éléments de solution résident dans le droit particulier qui concerne le régime des faillites et des concordats (C. jud., art. 574, 2°, précité).

Il s'ensuit que, si le tribunal du travail est exclusivement compétent pour statuer sur l'existence et le montant de la créance du travailleur sur l'employeur, le tribunal de commerce est, en revanche, seul compétent pour admettre cette créance au passif de la faillite et, sous réserves de certaines controverses, pour déterminer si elle est privilégiée ou chirographaire.

2. The employment contract

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

2.2 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?

2.3 Is there any chance to terminate the 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?

En principe, la survenance d'une procédure d'insolvabilité ne met pas fin aux contrats en cours.

Il appartient dès lors au curateur à la faillite du débiteur d'y mettre fin.

S'agissant des travailleurs protégés en raison de l'exercice d'un mandat au sein des organes sociaux de l'entreprise, on enseignait traditionnellement que la survenance de la faillite ne dispensait pas le curateur, au même titre que l'employeur avant la faillite, de demander à la commission paritaire compétente, préalablement au licenciement, la reconnaissance des motifs d'ordre économique ou technique justifiant celui-ci.

Rompant avec sa jurisprudence antérieure, la Cour de cassation a, par arrêt du 25 juin 2001 (*Pas.*, 2001, *n°* 396), décidé que cette obligation ne s'impose pas au curateur après la faillite.

Elle a en effet estimé que la discrimination que la reconnaissance préalable des motifs du licenciement a pour but de prévenir « est exclue lorsque la cessation des activités ou la fermeture de l'entreprise, allant de pair avec le licenciement simultané, ou en un temps très proche, de tous les travailleurs, constitue l'exécution d'une décision judiciaire ».

Considérant que, sauf les cas exceptionnels résultant de la loi, le curateur ne peut continuer les opérations commerciales du failli et que, dès sa désignation, il est dès lors tenu de mettre fin aux contrats de travail en cours, la Cour a décidé que le jugement déclaratif de faillite constitue une décision judiciaire qui impose en principe la cessation de toute opération commerciale, en sorte que le risque de discrimination n'existe plus.

La question reste entière de déterminer si la circonstance de fait que le curateur exercerait encore de manière limitée l'activité du failli, ainsi qu'il y est autorisé en de certains cas, suffirait à maintenir ce risque.

En règle, le travailleur licencié en raison de la cessation des activités de l'entreprise a droit à une indemnité de fermeture qui s'ajoute à l'indemnité de rupture.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

Les travailleurs bénéficient, en ce qui concerne le paiement de leur rémunération et des indemnités comprises dans la rémunération et dues pour la rupture de leur engagement d'un privilège général sur les meubles du débiteur.

Leur créance prend rang immédiatement après celles qui ont pour objet les frais de justice faits dans l'intérêt commun des créanciers, des frais funéraires en rapport avec la condition et la fortune du défunt et les frais de dernière maladie pendant un an [loi du 16 décembre 1851 *sur la révision du régime hypothécaire*, art. 19, al. 1er, 3°, b)] .

D'autres créances à caractère social, au sens large, bénéficient d'un privilège semblable qui prend place immédiatement après celui-là.

Ces privilèges sont préférés à celui de l'Etat.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

En cas de fermeture d'entreprise, définie comme la cessation de l'activité principale, lorsque le nombre de travailleurs es réduit en dessous du quart du nombre de travailleurs qui y étaient occupés en moyenne au cours de l'année civile précédant l'année de la cessation, les travailleurs bénéficient, pour les indemnités auxquelles ils ont droit, et dans les limites prévues par la loi en fonction de leur ancienneté, de la qualité de certains d'entre eux et de la nature des avantages concernés, de l'intervention du Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises (loi du 26 juin 2002 *relative aux fermetures d'entreprises*).

Subrogé aux travailleurs dans la mesure de son intervention, le Fonds bénéficie d'un privilège général sur les meubles du débiteur qui prend rang immédiatement après celui de ces travailleurs.

La Belgique n'a pas ratifié la Convention *n*° 173 sur la protection des créances des travailleurs en cas d'insolvabilité de leur employeur.

Les garanties dont bénéficient les créances des travailleurs sont toutefois au moins équivalentes à celles que prévoit cette convention. Elles leur sont en réalité supérieures.

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights? Does your local Law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

La matière est régie par la convention collective de travail n° 32*bis* du 7 juin 1985 *concernant le maintien des droits des travailleurs en cas de changement d'employeur du fait d'un transfert conventionnel d'entreprise et réglant le droit des travailleurs repris en cas de reprise de l'actif après faillite*, modifiée par les conventions collectives de travail n°s 32*ter* du 2 décembre 1986, 32*quater* du 19 décembre 1989et 32*quinquies* du 13 mars 2002.

Cette convention a un champ d'application plus restreint que la directive 2001/23/CE du Conseil du 12 mars 2001 dans la mesure où elle ne s'applique pas aux entreprises publiques.

Compte tenu toutefois de l'effet d'une directive, dont les dispositions peuvent être invoquées directement contre l'Etat ou les personnes morales de droit public, cette restriction n'est en principe pas de nature à nuire aux travailleurs occupés au service de ces entreprises publiques en vertu d'un contrat de travail.

La convention collective n° 32*bis* constitue pour le surplus la transposition de la directive.

Elle comporte en outre un chapitre consacré aux droits des travailleurs repris en cas de reprise d'actif après faillite. Etant donné que les dispositions des articles 3 et 4 de la directive ne s'appliquent pas, « sauf si les Etats membres en décident autrement », aux transferts qui se réalisent à l'occasion d'une procédure de faillite, ce chapitre s'écarte assez sensiblement desdites dispositions des articles 3 et 4.

A noter que le transfert d'entreprise consécutif à un concordat est considéré comme un transfert conventionnel d'entreprise.

FINLAND

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Dr. Jorma Saloheimo
Vice President, Labour Court

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

In Finland, the proceedings for liquidation are regulated in the new Bankruptcy Act (konkurssilaki, issued 20.2.2004, in force as from 1.11.2004). The rules on business

reorganization procedure are laid down in the Act on Reorganization of Companies (laki yrityksen saneerauksesta, 25.1.1993). Finally, the provisions on the termination of an employment relationship in the context of insolvency proceedings are included in the Employment Contracts Act (työsopimuslaki, 26.1.2001).

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

Matters belonging to insolvency proceedings are handled in the Finnish regular courts. In the Ministry of Justice there is also a special officer, the Bankruptcy Ombudsman, whose task is to supervise the administration of bankrupt's estates. He is competent also to monitor business reorganizations to the extent he finds it appropriate.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

Conflicts relating to statutory labour law or to individual employment contracts are resolved within the system of regular courts. This also applies to disputes having their origin in the insolvency of the employer.

Applications for guaranteed payment of wages, based on the Pay Security Act (1998), are submitted to the local Manpower and Economy Centre, which is an administrative body dealing with various manpower affairs.

It is to be pointed out that the competence of the Finnish Labour Court is confined mainly to claims based on collective agreements. Since employees' rights in the event of the insolvency of their employer are normally not regulated in collective agreements, the Labour Court plays practically no role at all in matters covered by this questionnaire. Therefore, the responses given here reflect the activities of a regular court judge.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

Under Finnish law, a judge never terminates an employment contract; the decision on this rests with the employer or the bankrupt's estate. The normal order of things is that the insolvency of the employer occurs first and is presented as grounds for a termination, and then arises a dispute concerning the validity of the grounds. But even if proceedings in an employment case are initiated prior to insolvency proceedings, the judge handling the employment issue remains competent to preside over the case.

The kinds of competence conflicts envisaged in the question seldom arise in Finland due to the fact that both employment law cases and insolvency proceedings fall within the jurisdiction of regular courts. It is another matter that insolvency matters are administered in summary proceedings, whereas employment cases are heard and tried in ordinary proceedings with an oral hearing etc.

2. The employment contract

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

No, a separate measure is required to terminate an employment contract. See above.

2.2 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?

See above.

2.3 Is there any chance to terminate the 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?

In case of an opened business reorganization procedure, employment contracts may be terminated on grounds relating to the needs of the reorganization, e.g. if the termination derives from a measure, contained in a confirmed reorganization plan, that causes the work to cease. Such grounds are regulated in more detail in Section 7, Chapter 7 of the Employment Contracts Act. By and large, we are dealing with ordinary dismissal grounds of a collective nature. What is particular here is that the term of notice is only two months and that also contracts made for a fixed period may be terminated even if the contract period is still running.

Should the ground for termination not be valid, the employee is entitled to damages. In any case he or she will receive the services and monetary benefits that are granted to all employees made redundant on collective grounds. The level of such protection has been recently (in 2005) improved by amendments in statutes regulating cooperation within undertakings, manpower services and unemployment benefits.

If the employer is declared bankrupt, the employment contract may be terminated by either party regardless of its duration. The period of notice is 14 days. The pay due for the period of bankruptcy shall be paid from the bankrupt's estate. As for other forms of protection, see above.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

Employment credits enjoy no special privilege in bankruptcy proceedings. Instead, the workers' claims are protected under the system of guaranteed payment of wages, see below.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

Yes, there is such a guarantee under which the employee's claims are in the first instance met out of public funds. The system is regulated in the Pay Security Act (1998, with amendments) which is designed to comply with the relevant ILO Convention and EC Directive. The administration of the guarantee is entrusted to the manpower authorities.

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

In the event of the employer's bankruptcy or insolvency, the employee is entitled to a guaranteed payment of wages and other debts arising from the employment which have not been due for more than three months when the employee's application is filed. The maximum amount of payments thus guaranteed is 15 400 euros. Regarding the prescribed time and the types of claims protected, the guarantee has has a wider coverage than the one set forth in the ILO Convention.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

Yes. Claims payable as pay security pass to the State on the date of the decision on payment of the security. The State will then appear as a creditor in the insolvency proceedings.

The part of the claims that cannot be recovered from the bankrupt or insolvent employer is finally reimbursed to the State by the Unemployment Insurance Fund. The assets of the Fund derive from the obligatory unemployment insurance contributions collected from all employers and wage-earners.

4. Transfer of undertakings during an insolvency proceeding

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights? Does your local Law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

The basic rules on transfer of undertaking are equally applicable to transfers effected during insolvency proceedings. These rules include the joint liability of the transferor and the transferee in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer, as laid down in Art. 3(1) of Directive 23/2001.

Furthermore, and in line with Art. 5(2)(a) of the Directive, Finland has opted to provide that where a transfer is effected by a bankrupt's estate, the transferor is not liable for the employee's claims arising from the employment relationship and payable before the transfer. This "exception to an exception" does not, however, apply if controlling power in the bankrupt enterprise and in the transferee enterprise is or has been exercised by the same persons on the basis of ownership, agreement or other arrangement. The provision has been adopted in order to undermine attempts to circumvent the law, which in general aims to facilitate transfers of viable parts of bankrupt undertakings.

The national provisions explained here are included in Section 10, Chapter 1 of the Employment Contracts Act.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

Workers' representatives have no special role in insolvency proceedings in Finland. However, alongside with insolvency proceedings there often is a cooperation procedure taking place in the insolvent firm. All decisions and measures leading to reductions of the work force are subject to negotiations with the workers' representatives, normally shop stewards of the relevant personnel groups (Cooperation Within Undertakings Act, 1978). In the event of insovency or bankruptcy of an employer firm the negotiation procedure is in some respects simplified; e.g. the negotiation periods are shorter than in the regular procedure.

FRANCE

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Michel Blatman,
Conseiller à la Cour de cassation
Paris, France

1. <u>General questions</u>

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

Yes.

*Loi n° 73-1194 du 27 décembre 1973 « tendant à assurer, en cas de règlement judiciaire ou de liquidation de biens, le paiement des créances résultant du contrat de travail » (Law of 27 december 1973 aiming to ensure, in case of administrative order or winding-up , the payment of credits (claims) related to the contract of employment). This law was resumed and extended by the following one.

* The « Loi du 25 janvier 1985 relative au redressement et à la liquidation judiciaire » [*Law of 25 january 1985 relating to administrative order and winding-up of undertakings*] has been modified by the Loi du 10 juin 1994 (*Law of 10 june 1994*).

The law of 1985 has been codified as part of the Commercial code by the Ordonnance du 18 septembre 2000 « relative à la partie législative du Code de commerce » [relating to Commercial code, legislative part] as Articles L. 620-1 and following of the Commercial code).

The recent « Loi n° 2005-845 du 26 juillet 2005 de sauvegarde des entreprises » (Law of 26 July 2005 on safeguard of undertakings) both renumbered and changed the contents of these articles of the Code de commerce.

Some articles of the "Code du travail" (labour code) related to the payment of wages (privileges _ Art. L.143—6, L.143-7 and L.143-8) and the guarantee against employer's insolvency (L.143-9 to L.143-11-9) have also been modified by the law of 26.07.2005.

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

The **Tribunal de commerce** *(Commercial Court)* deals with insolvency proceedings.

It designates a "**juge-commissaire**" (court-appointed receiver) – a commercial magistrate- an **administrator** and a **creditors'representative**. In case of winding-up, it appoints a **liquidator**. If a recovery plan is approved, a **commissioner for execution of the plan** shall be appointed by the court.

A **workers's representative** is designated by the work council, failing that by the work's delegates, and failing that by the employees.

Experts and supervisors may be appointed too.

The **Procureur de la République** (*public prosecutor*) supervises the proceedings and can ask that some acts should be done.

The "**AGS** » (Association pour la Gestion du régime d'assurance des créances des salariés) is the insurance agency managing the wage guarantee insurance in case of employer's insolvency. It is linked with ASSEDIC (Associations for Employment in Industry and Commerce) – bodies managing the local unemployment insurance funds) or CGEA (Centre de Gestion et d'Etude AGS) which, under management conventions, carry out the guarantee insurance scheme.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

Conseils de prud'hommes (first level labour courts) .

Cours d'appel (second level jurisdictions)

Cour de cassation (supreme court)

The **Labour inspectorate** authorizes the dismissal of employees protected as a result of their statute against the termination of their contract of employment.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

Yes, after the opening of the insolvency proceeding, the Employment Law Judge remains in charge of individual conflicts opposing the employee to his employer,

related to the formation, execution or termination of an employment contract. His competence is exclusive.in these matters.

Thus, the Employment Law Judge has to determine the existence and the amount of worker's credit against the employer, the administrator, the liquidator, the creditors' representative.

If the wage guarantee institution opposes to the employee's claim, the Employment Law Judge is also competent to decide the case.

No, there is no chance of conflict of jurisdictions between the two judgdes. Because the Employment Law Judge has received exclusive jurisdiction about these matters.

It must be seen that if the Insolvency Judge may grant leave to declare redundancies (art. L.621-37 and L.621-64 of the Code de commerce) where such measures become for economic reasons "urgent, inevitable and indispensable" during the observation period, or where the recovery plan provides for redundancies on economic grounds, the Employment Law Judge deals whith the regularity of the redundancy proceeding and appreciates if relocation has been attempted as it should.

2. The employment contract

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

They are still in force. Insolvency is not considered as a case of contract frustration, as a cause beyond control or act of God.

And the administrator, creditors's representative or liquidator has to terminate them if the undertaking is not transferred or if redeployment inside the undertaking or the group to which it belongs cannot be made.

But if liquidation (winding-up) is decided by the court, the termination shoud be notified within 15 days by the liquidator, otherwise the employee's severance could not be insured by the Wage Guarantee Insurance (AGS)

2.2 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?

N-A

2.3 Is there any chance to terminate the 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?

Once the insolvency proceedings occured, the receivers may terminate the employment contracts on economic grounds (redundancy) or for personal reasons of dismissal (for instance disciplinary offence, gross fault).

The administror (or liquidator) of the insolvency proceedings may terminate the employment contracts :

If he is authorized by the Insolvency judge to make employees redundant

If he alleges and proves real and serious reasons to dismiss.

The employee , if made redundant or dismissed for other fair reasons, will receive, according to his seniority in the company, severance payment and wages in lieu of notice.

If the Employment Law Judge would not consider the termination fair, the employee would be also granted a compensatory award.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

Article L.621-130 of Code de commerce provides : "Claims pursuant to a contract of employment shall be guaranteed in the event of an administrative order or court-ordered winding-up:

1. by the preferential right established under Articles L. 143-10, L. 143-11, L. 742-6 and L. 751-15 of the Employment Code on the grounds and for the amounts defined therein and

2. by the preferential right established in Article 2101 (4) and Article 2104 (2) of the Civil Code. "

Besides a general rignt of preference over movable property and another one over immovables, employees are guaranteed by the "superprivilège" of Article L.143-10 of Code du travail : "*Where administrative order or winding-up proceedings are instituted, all manner of remuneration owing to salaried employees or apprentices and the compensation referred to in Article L. 980-11-1 which the employer owes trainees for the last sixty days of work or apprenticeship shall be paid, less payments on account already received,* ***the existence of any other preferential claim notwithstanding****, up to an identical monthly ceiling for all categories of beneficiary*."

Holiday pay must also be paid the existence of any other preferential claim notwithstanding (art. L.143-11)

As exists a wage guarantee insurance, these privileges look like meeting the provisions set by ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992, n°173.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

Yes. The AGS (aforementioned) is an association that takes charge of these debts.

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

Under Article L.143-11-1 of the "Code du travail" (after « Loi n° 2005-845 du 26 juillet 2005 de sauvegarde des entreprises » [Law of 26 July 2005 on safeguard of undertakings] the insurance shall cover the following sums owing to employees pursuant to their contracts of employment in the event of asafeguard, administrative order or court-ordered winding-up :

- on the date of the judgment instituting any administrative order or court-ordered winding-up.

- Claims as the result of breach of contracts of employment during the period of observation, within one month of the judgment setting out the plan of safeguard, administration or assignment for the undertaking, within fifteen days of the winding-up order and during provisional trading authorised under the winding-up proceedings order.

- Claims pursuant to breach of contracts of employment of salaried employees offered a redeployment agreement in accordance with Article L. 322-3 shall be covered by the insurance, provided that the administrator, employer or liquidator, as applicable, proposed the said redeployment to the interested parties during one of the aforementioned periods.

- Where the court orders winding-up, the sums owed during the period of observation, the fifteen days following the winding-up order or the month following the winding-up order for the salaried employees' representatives for whom provision is made in Articles L. 621-8 and L. 621-135 of the Commercial Code and during provisional trading authorised under the winding-up proceedings order, up to a maximum limit equivalent to one and a half month's work.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

* The AGS is subrogated in the rights and privileges granted to the worker (art.. L.143-9 of "Code du travail " modified by law of 26 July 2005).

* It has been held by a court that this institution could claim tor her subrogated rights and privileges during the observation period only if the undertaking had sufficient funds to pay its debts without hampering its functioning.

4. Transfer of undertakings during an insolvency proceeding

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

Article L.122-12-1 of the "Code du travail" provides that in case of transfer of undertaking realised during insolvency proceedings, the new employer will not be accoutable for the debts of the previous employer..

This an exception to the principle laid down by article L.122-12 according to which the contract of employment is transferred with the undertaking. The insolvency proceedings are a legal limit to the conveyance of employees' claims on to the transferee.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

A distinction is made between the employees' representative (designated by the works council or, if none, elected at the commencement of the insolvency proceedings) and the workers'representatives (works councils, unions, personal delegate).

* The employees' representative follows insolvency proceedings and surveys the declaration of debts arising from contracts of employment that is submitted to him by the creditors' representative for verification. The creditors' representative must send the representative all relevant documents. The employees' representative is consulted about the major decisions of the court relating to the future of the undertaking (observation, continuation, recovery, assignment, winding-up). He/she follows proceedings and can present applications before the court. Decisions and rulings are notified to him/her.

  He/she can stand up for an employee before the Employment Law Judge (conseil de prud'hommes) to get payment by the administrator, creditors' representative, liquidator or by the AGS.

* The workers' representatives inform the Insolvency Judge on the firm or company's economic and social situation. They are informed and consulted. The court hears them before deciding on major steps. For instance, the "tribunal de commerce" (Commercial court) shall decide if the activity of the undertaking shall be continued during the observation period, after interviewing or duly calling to a hearing in chambers the debtor, the receiver, the creditors' representative, a supervisor and the representatives of the works council, or, if none, the personnel delegates. Samely, as to the adoption or modification of a recovery plan.

  If redundancies are contemplated, the administrator, the creditors' representative or the liquidator must consult the worls council. The consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

GERMANY

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Dr.Mario Eylert
Richter am Bundesarbeitsgericht

1. General Questions

1.1. In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue.

Yes. The “Insolvenzordnung” (InsO) (Insolvency Act).

The bill was passed on October 5th, 1994. The act came into force at January 1st, 1999.

The rules of the Insolvency Act are completed by regulations of the unemployment insurance in the Social Security Act (Sozialgesetzbuch – SGB III). The SGB III contains rules for the protection of workers’ claims (Insolvenzausfallgeld).

1.2. Please list the institutions (government, agencies, courts etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

The insolvency proceedings begin by an application from a creditor or the debtor himself. The court in charge of the decision, whether or not the proceedings is to be opened, is the (civil) **District Court (Amtsgericht)**. Reasons for the opening of insolvency proceedings are: bankruptcy of the debtor (§ 17 (2) InsO), heavy indebtedness (§ 19 InsO).

The aim of insolvency proceedings is the equal satisfaction of all creditors. All creditors are represented in the **creditor insolvency assembly** (Gläubigerversammlung).

After a preliminary test of the facts, the District Court can order measures of protections, such as to impose restraints of power of disposing of assets or to nominate a provisional/preliminary **trustee/receiver (administrator) in insolvency**.

If there are enough assets, the District Court will institute the insolvency proceedings. The task of the civil court is to create the procedural frame for the insolvency proceedings. The court nominates and controls the trustee in insolvency. The trustee in insolvency supervises the debtor’s property and assets. From now on, the trustee has the right to dispose and sell the goods and collect the claims of the debtor (§ 80 InsO). And the most important fact for the Employment Law: The trustee takes over the position of the employer.

The “Agentur für Arbeit” (unemployment insurance agency) is involved in the insolvency proceedings as soon as it pays money to the employees (Insolvenzausfallgeld).

1.3. Please list the institutions that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees

Labour Courts
Agentur für Arbeit

1.4. Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceeding are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

The Labour Law Court remains in charge of any legal labour law matter after opening the insolvency proceedings. In cases of termination of contract or in dismissal cases the labour courts continue – sometimes after a short break – their jurisdiction. Therefore there are no conflicts between the labour courts and the jurisdiction of the civil courts.

2. The employment contract

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

The insolvency proceeding does not terminate the employment contract automatically. The InsO (§ 108 (1)) formulates: "The debtor's contracts of employment (Dienstverhält-nisse) continue with the trustee of insolvency." Other provisions of the InsO base on the continuation of the contract between the workers and the trustee of insolvency.

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

As there is no automatic termination of the contract, there are no special rules in Germany.

2.3. Is there any chance to terminate the 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?

During an insolvency proceeding the employment protection act (Kündigungsschutzgesetz) is still applicable and not suspended. The insolvency itself is not a reason for termination the contract. If the trustee/administrator closes the undertaking and consequently dismisses the workforce, normally the dismissal is not held to be unfair.

In a case of an insolvency the German law knows only a few corrections:
- the period of notice is reduced,
- the trustee/administrator could apply a simplified procedure for termination with the works-council (Interessenausgleich mit Namensliste).

If the trustee/administrator terminates the contract – with or without legally acceptable reason - the employees are not entitled to any benefit or severance, as long as there is no works-council. If there is no legal reason for the dismissal, the contract is not legally terminated by the dismissal and the employee may claim reinstatement. If a works-council is elected it may demand a social compensation plan from the trustee/administrator (§123 InsO - (Sozialplan). The compensation/severance for the loss of the workplace is up to two and a half times the monthly salary.

3. Employment credits and guarantee institution

3.1. What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against employer)? Are they coincident to the coverage and rank set in Article 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No.173) ?

Employees' claims which are founded after the opening of an insolvency proceeding are privileged (sog. Masseforderung, § 55 (1) InsO). These claims are satisfied beforehand.

Employees'claims which are founded before the opening of an insolvency proceeding, are not privileged (sog. Insolvenzforderungen, § 38 InsO). These claims are treated like all other claims. They must be claimed for acknowledgement in the insolvency list which is kept by the trustee/administrator.

3.2. In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

Yes – In Germany the "Agentur für Arbeit" takes care of that. It is obliged to pay to the employee his last three salaries before the opening of the insolvency proceeding.

3.3. To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the onset under Article 12 of ILO Convention No. 173?

See answer 3.2.

3.4. Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceeding?

Yes, if the "Agentur für Arbeit" pays the "insolvency money", the employee's claim is subrogated by law to the institution

4. Transfer of undertakings during an insolvency proceeding

4.1. When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC of March 12th, 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses?

When an undertaking is transferred, the contract of employment is transferred to the new owner (§ 613 a BGB). There are no modifications in a case of an insolvency proceeding.

Normally the new owner is liable for the debts which were incurred by the old owner. This is modified in an insolvency case. The new owner who buys the undertaking from the trustee/administrator acquires the establishment completely without these old debts.

5. Role of the workers' representatives

During an insolvency proceeding the works councils stay in office. Like any other employer the trustee/administrator has to pay attention to the rights of the works councils. The InsO establishes some special rights for the works councils in the case of an insolvency proceeding (§§ 218 (3); 225 (3); 125 InsO).

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Judge Handó Tünde
President, Labour Court of Budapest
Hungary

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

1) A csődeljárásról, a felszámolási eljárásról és a végelszámolásról szóló 1991. évi IL.tv (Act IL of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Voluntary Dissolution)

2) Bérgarancia Alapról szóló 1994. évi LXVI. Tv. (Act LXVI of 1994 on the Wage Guarantee Fund)

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

Bankruptcy and liquidation proceedings are non-contentious proceedings falling under the authority of the county court (or, in Budapest, the Municipal Court) with jurisdiction for the registered office of the debtor. Voluntary dissolution is a non-contentious proceeding falling under the authority of the aforementioned court, as a court of company registration. An important role is played by the Labor Market Found, which is discussed in detail under 3.2. The liquidator appointed by the county court that has ordered the liquidation process has also a significat role in the proceeding.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

Lawsuits originating in employment belong to the jurisdiction of Courts of Labor.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

1. The opening of the insolvency proceeding doesn't affect the charge of the employment law judge if the filing of a complain was prior than the opening of the the insolvency proceeding (ongoing employment lawsuit).

2. But following the initial date of liquidation any claim against the economic organization in connection with property falling under the sphere of liquidation may only be enforced within the framework of liquidation. In this case Courts of Labor shall dismiss the action. From the initial date of liquidation, employer's rights shall be exercised and obligations shall be fulfilled by the liquidator.

If a worker creditor claims for the acknowledgement in an insolvency proceeding, the liquidator has to examine the claim: if he accepts it, he takes it into the list of the debts, otherwise, if the claim or the amount of the claim is doubtful he sends it to the court, that has ordered the liquidation process to judge the claim.

There has been an ongoing vacillation for quite some time over the jurisdiction of labor disputes in insolvency proceedings. Nonetheless, Court praxis direction moves towards a decision in favor of the authority of the County Court.

2. The employment contract

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

The employment contracts are in force until the court decision regarding the conclusion of liquidation and the dissolution of the debtor.

2.2 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?

The employment contract doesn't expire if the employers resolve to terminate themselves with legal successor (transformation).

Employment ceases with cessation without legal successor of the employer. In this event, the employee is entitled to his average earnings during the notice period and also a severance pay.

2.3 Is there any chance to terminate the 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?

Yes, the administrator of the insolvency proceedings shall exercise the employer's rights and obligations by the Labor Code and may terminate employment of unspecified duration by notice.

The reason for the notice shall only be a cause connected with the employer's operations. The employee is entitled to his average earnings during the notice period and sevarance pay.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the

coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

The Hungarian insolvency legislation is coincident to the Convention No.173. The economic organization shall first satisfy the costs of liquidation debts from the assets under the sphere of liquidation.

Costs of liquidation are: Wage and other personal costs payable by the debtor, also including average earning for the periof of notice and severance pay due at the termination of employment (but just for an amount based on the Labour Code), along with all applicable tax and contribution obligations. However it does not include the employee's claim for damages/compensation.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

Yes, the wage debt of economic organizations under liquidation towards employees which cannot be settled for lack of cash may be advanced from the wage guarantee fund part of the Labor Market Found.

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

In the course of establishing the requirement for subsidy, the liquidator may take into account the wage debt of the business organization entitled to receive subsidy towards the entitled parties existing on the day of wage payment, but not more than fourfold the compulsory minimum wage per entitled party, as defined in the legal rule on the establishment of the compulsory minimum wage.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

Yes, if the liquidator is not able to pay the wages and severance pays of the employees employed by an economic organization under liquidation within 8 days following the day of wage payment for lack of revenues serving as cover for the costs of liquidation, he may submit an application for refundable financial subsidy to the Fund. The employees do not have the right to ask for this financial subsidy directly, only the liquidator has this possibility.

4. <u>Transfer of undertakings during an insolvency proceeding</u>

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

The Hungarian legislation has implemented the Directive 2001/23/EC. This entered into force by Act XX of 2003.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

State authorities and employers are obliged to cooperate with trade unions to promote activities that represent their interests by ensuring the information required thereto, and to make known to them the viewpoints and reasons pertaining to their comments and proposals.

Prior to carrying out an action, the employer shall inform the trade union of the workplace.

ICELAND

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Eggert Óskarsson
President of the Labour Court of Iceland
Reykjavík

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

The Bankruptcy Act of March 26, 1991, no. 21 (Lög um gjaldþrotaskipti nr. 21/1991)

The Wage Guarantee Fund Act, no 88. (Lög um ábyrgðarsjóð launa nr. 88/2003.)

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

In the Icelandic judicial system there are no special courts such as probate courts. Therefore, insolvency proceedings are within the jurisdiction of the regular district courts.

Once, the insolvency proceedings have been opened by the court's decree, an executor (always a lawyer) is appointed to administer the estate.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

Conflicts related to collective agreements fall within the jurisdiction of the Labour Court. Otherwise, all conflicts related to Employment Law are solved by the regular trial courts. No other public institutions are involved in solving conflicts between an employer and his/her employees related to Employment Law.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

The judge never terminates an employment contract.

Once the insolvency proceedings have been opened by the court's decree and the court has appointed the executor / administrator, it is at the executor's discretion whether or not it is in the creditors' interests to maintain the enterprise, and thereby to maintain the employment contracts.

The regular judge has jurisdiction over a dispute between the bankrupt estate and a worker creditor concerning the amount of the worker's credit and its privilege.

Since both the insolvency proceedings and the employment issue are solved by the regular judge there is no chance of conflict of jurisdiction.

2. <u>The employment contract</u>

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

No, the contracts are still in force until the executor / administrator decides to terminate them, unless the employer terminated the contracts once s/he knew that bankruptcy proceedings were imminent.

2.2 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?

See answer above.

2.3 Is there any chance to terminate the 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?

Yes, some or all of the employment contracts can be terminated once the insolvency proceedings have started. It is entirely at the executor's discretion what is in the interest of the bankrupt estate's creditors. If it is not viable to keep the business running the executor can terminate the employment contracts on the grounds that it is not possible to keep the business running. The period of notice in this case would be the same as if the business was not in financial crisis, maximum six months. The employee would always be entitled to payment during the period of notice, as well as holiday pay earned during that time and the employer's percentage of the pension fee.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

The privileges and preferences granted to employees by the Bankrupcy Act of 1991 do coincide with the coverage and the rank set in Articles 6 and 8 of the ILO Convention no. 173.

More precisely, wages and other remuneration for services granted to the bankrupt employer, which were due 18 months prior to the date of notice, are privileged.

The privilege further comprises claims for compensation for dismissal or termination of the employment, holiday pay, claims by pension funds for pension fee (i.e. the percentage paid by the employer) earned and due 18 months prior to the notice date.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

Yes, the Fund Guaranteeing the Payment of Wages takes charge of those debts. The directive was the incentive for the creation of the fund in 1993. In 2003 the Fund's legal basis was amended to ameliorate it and to adjust it to the ideas set forth in the Directive 2002/74/EC.

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

The fund guarantees the payment of claims which were due 18 months prior to the opening date of the insolvency proceedings, that is the date the decree was issued.

Guaranteed is the payment of wages which the employee earned during the last three months in his/her employment for the bankrupt employer, as well as claims for compensation for dismissal or termination of the employment for up to three months period, holiday pay due 18 months prior to the opening of the insolvency proceedings and further, claims by pension funds for pension due within the 18 months.

The financial limit for wages and compensation for dismissal is 250.000 IKR per month or 750.000 IKR (9.750 Euro) and 400.000 IKR (5.200 Euro) for holiday pay and the limit on pension claims is proportional to the employee's wages.

The credit protection under Icelandic law seems to be a bit more extensive than the protection described in Article 12 of ILO Convention No. 173.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

No, the Fund cannot claim from the bankrupt estate the amount paid to the employees. The Fund is financed by payments from employers. Each employer pays 0,04% of the amount of the remuneration s/he pays to the employees to the Fund via the state's taxation system.

4. Transfer of undertakings during an insolvency proceeding

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

Icelandic law fully respects the provisions in the Council Directive 2001/23/EC.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

Under Icelandic law, worker's representatives do not play any role in the insolvency proceedings. Once the court has issued the decree opening up the insolvency process, the executor is appointed and s/he is entirely responsible for the administration of the bankrupt estate. If s/he wants to consult with workers' representatives or feels s/he needs their cooperation, when for example many workers have to be laid off due to the insolvency, s/he has the choice, but is not legally obligated to do so.

IRELAND

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Mr. Kevin Duffy
Chairman, The Labour Court
Ireland

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

The law in relation to insolvency in Ireland is complex and is governed by a number of statutes. For the purpose of this questioner the law relating to the insolvency of limited companies will be considered. Here, the relevant law is found in the Companies Act 1963, (the Act) which has been amended several times. The last amendment which is relevant for present purposes was in 1999.

Where a company becomes insolvent there are three possible statutory mechanisms which may be activated:

i. Liquidation – where the company is would up and its assists distributed in a manner prescribed by the Act.

ii. Receivership – where a debenture holder appoints a receiver/ manager of the business. The receiver may run the business but the appointment of a receiver usually leads to liquidation.

iii. Examinership- here a company which is unable to pay its debts is placed under the protection of the Court (the High Court) and an examiner is appointed to report to the Court on the company's chances of survival. The main purpose of this process is to facilitate the survival of the company as a going concern.

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

Only the High Court has original jurisdiction in matters relating to company law. Thus there is no role for the Labour Court in this area. The Director of Corporate Enforcement has a general supervisory role in relation to the observance of the requirements of the Companies Acts 1963-1999 and is authorised to bring proceedings in the High Court where there is a breach of the Act. The Director of Corporate Enforcement can apply to have Directors of a company disqualified or restricted where the company becomes insolvent or trades in a manner prohibited by law.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

- Rights Commissioners
- The Equality Tribunal
- The Employment Appeals Tribunal
- The Labour Court

None of these bodies have direct jurisdiction in respect of the process of dealing with insolvency. Where wages are unpaid the Employment Appeals Tribunal can direct that the outstanding amounts be paid by the State.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

Please refer to the answers above. In relalty the Judge of the High Court has jurisdiction in all matters relating to company insolvency.

2. <u>The employment contract</u>

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

Where a liquidator is appointed to an insolvent company this operates as notice to the employees of dismissal with immediate effect. The liquidator may, however, be authorised to continue the business and for this reason may continue to employ some or all of the employees.

2.2 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?

Employees are entitled to redundancy payments and woud also be ebtitled to payments in lieu of notice.

2.3 Is there any chance to terminate the 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?

Please refer to question 2.1 and 2.2 above.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

Wages and other payments (holiday pay, redundncy pay, pension contributions and payments in lieu of notice) rank as preferential debts and are paid before ordinary creditors.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

Yes. There is an insolvency fund which is administered by the Department of Enterprise Trade and Employment.

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

See question 3.2 above

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

The liquidator of a company is responsable for distributing the assets in the manner provided for under the Act. He or she must pay the workers in the priority to which they are entitled. The liquidator is in turn answerable to teh High Court.

4. Transfer of undertakings during an insolvency proceeding

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of

employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

Where employees are in employment at the date of transfer the regulations apply. If their employment has come to an end at the time the liquidatoris appointed, they would not be in employment at the date of transfer.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

They have no formal role. However in practice they would be fully consulted by the liquidator.

ISRAEL

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Judge Elisheva Barak-Ussoskin,
Vice-President, National Labour Court,
Israel

Introduction

1. The enactments

Various enactments (laws and bylaws) regulate bankruptcy and liquidation proceedings in Israel. The law also provides for court mandated recovery programs for insolvent corporations. The trend in the Israeli legislature is towards combining insolvency regulations with bankruptcy law. These laws apply to all workplaces, both corporate and private.

The primary enactments are:

A relatively new law, the Companies Law, 5759-1999 (hereinafter Companies Law) that, in questions of liquidation, adopts the regulations defined in the older Companies Ordinance [New Version], 5743-1983, (hereinafter Companies Ordinance) an enactment from the British times which has been amended periodically over the years.

The new Companies Law, which created a mechanism whereby the court may freeze insolvency proceedings in order to implement a court-supervised recovery program for the corporation.

Government corporations, companies wherein the government holds the majority of the voting power, are regulated by the Government Companies Law, 5735-1975. Liquidation of a government corporation, and other related proceedings, requires government approval. Non-profit organisations are likewise regulated by a special law, the Amutot, or Non-Profit Organisations Law, 5740-1980, as are cooperative organizations in the Cooperative Societies Ordinance. The Bankruptcy Ordinance [New Version], 5740-1980, regulates bankruptcy.

Israel's guarantee institution is the National Social Security Institute, which will pay an insolvent employer's debts as prescribed by the National Social Security Law (Consolidated Version) 5755 – 1995. It will be discussed in further detail below.

2. The courts and the proceedings

In Israel, a corporation may enter insolvency proceedings of its own accord, or by virtue of court order. In both instances, the court with jurisdiction over insolvency and bankruptcy in Israel is the Regional Court. A company or a creditor that wishes to instigate insolvency proceedings must apply to the court, and the court must give a liquidation order for any proceedings to commence. However, prior to the granting of the order, a temporary administrator may be appointed. Once the liquidation order is in place, a permanent administrator is appointed who is in charge, among other things, of protecting workers and the rights guaranteed to them by their contracts and extant collective agreements.

The court charged with the resolution of employment related conflicts, both as regards individual and collective employment law, is the Labour Court. The Labour Court consists of five Regional Courts and one appellate body, the National Labour Court.

If insolvency proceedings are instigated in a case pending before the Labour Court, the Labour Court judge must halt the proceedings and transfer the case to the Regional Court. The Labour Court has exclusive jurisdiction over worker's rights in the case of a solvent employer. However, once insolvency or court-mandated recovery proceedings commence, jurisdiction transfers to the Regional Court and workers must seek redress as creditors. According to the **Companies Ordinance**, unpaid wages from the period prior to issuance of a court insolvency order have top priority in payment of creditors. However, payment is capped and earnings above this ceiling are not similarly protected.

3. The employment contract

When insolvency proceedings are initiated, the employment contract remains enforceable until the court issues a liquidation order. A number of rights attach to an employee once the liquidation order is granted.

In the case of insolvency proceedings that result in the company's closure, if the proceedings result in a *de facto* termination of an employment contract, the employee is entitled to severance pay according to the **Severance Pay Law, 5723-1963**.

In cases where the insolvency proceedings result in a reorganization of the company, the new company may choose to terminate employment contracts as part of its effort to attain solvency. In such a case, the company is obligated to negotiate with the union or representative worker's body in order to agree on the terms of the dismissals. Once an agreement has been reached, the employment contracts of the laid-off workers are terminated and they are entitled, in addition to whatever other benefits were negotiated, to severance pay.

As mentioned earlier, the **Companies Law** also provides for court-mandated recovery of a corporation. At the request of creditors, shareholders, or workers, the court may halt insolvency proceedings, during which period, not to exceed nine months, no action may be taken against the corporation without the permission of the court. A trustee is appointed by the court to oversee the process. Workers have a dual interest in the company's recovery: as "creditors," to whom the corporation has a financial obligation, and as workers who seek job security. Therefore, they may have an incentive to agree to reductions in salary for a specified period, or may waive receipt of wages all together, in order to aid the company in regaining solvency. During such a process, the solution for workers torn between needed income and the pursuit of long-term job security may be to allow them to apply to the National Social Security Institute as if a court order were in place. I shall address this subject in more detail below.

The trustee overseeing the recovery program is obligated to negotiate with workers regarding any changes in their employment contracts. The trustee is the corporations' *de facto* manager until it returns to normal business activity.

In cases of a change of ownership or "transfer of undertaking," including privatisation, transfer of part or all of the company to another owner, or any other change of ownership, the **Collective Agreements Law, 5717-1957**, provides:

> **Change of employer**
> **"Where an undertaking has changed hands or been partitioned or amalgamated, the new employer shall be regarded as an employer to whom the collective agreement applies."**

This binds the new employer to collective agreements signed by the previous employer. However, workers are not likewise bound. Reorganization, redundancy dismissals, change of ownership and the like may bring about significant changes in employment conditions. The new employer is obligated to negotiate such changes with the workers, either individually in order to arrive at new individual employment contracts, or with the representative body of the employees in order to reach a new collective agreement. This must be done if the conditions of employment change significantly. If the new owner cannot reach an agreement with the employees regarding these changes, the employees have the right to have their employment contracts terminated and the new owner must pay all attendant rights, including severance pay.

In cases of insolvency, the owner may choose to selectively terminate employees after negotiations with the union. These employees are likewise entitled to severance pay. In cases of dismissals resulting from insolvency when no insolvency order yet exists, management is obliged to consult the union or any other representative body of the workers. In such instances, the union will usually negotiate for a larger severance package than that dictated by law.

In sum, changes resulting from insolvency affect the employment contract, whether an individual contract or a collective agreement. As a rule, the individual employment contract comes to an end once bankruptcy proceedings begin. However, in cases of a transfer of undertaking or court-mandated recovery, the employment contract may be renegotiated with the agreement of the employees.

4. Employment credits and guarantee institutions

Israeli insolvency regulations seek to protect employees *vis-a-vis* other creditors, and guard their rights. As mentioned above, the National Social Security Institute functions as Israel's guarantee institution. Once the court gives a liquidation order, an order of adjudication of bankruptcy, an order to wind up a company, partnership or society, a dissolution of a partnership, an order to wind up a cooperative society, or an order to wind up a non-profit organisation, as provided by law, an employee is entitled to seek compensation for unpaid wages and benefits from the National Social Security Institute, up to a limited amount.

The problem arises when no legal proceedings have been instigated. Many insolvent companies, especially small ones who are seeking to avoid liquidation, dismiss their employees without applying to the court. As a result, the employees are barred from application to the National Social Security Institute. Similarly, a corporation may begin the winding-up process, but proceedings are expensive and time-consuming, and employees have no redress until the court grants its order. Piercing the corporate veil, while technically possible in some circumstances, is highly unusual, and moreover impractical as most employers in such a situation are unable to personally pay their debts to their employees.

In my opinion, this situation points to a *lacuna* in the law. The purpose behind the regulations providing for application to the National Social Security Institute is to protect the employees of insolvent employers. If as a result of the company's insolvency an employee does not receive his or

her wages, whether or not an employer has technically been declared insolvent, that employee is entitled to compensation. To my mind, this is a gap in the law the court must fill.

If an insolvency proceeding is initiated and the court appoints a temporary administrator, the court defines the administrator's duties, including the right to terminate employees. If such a right is granted, the temporary administrator may do so at his or her discretion in keeping with the obligation to preserve company resources and prepare it for liquidation. In such cases, there is no doubt that the employees may apply to the National Social Security Institute.

5. Transfer of undertakings

As discussed above, in a transfer of undertakings that results from insolvency, the new owner inherits the liability of the former owner as regards the rights of employees, including pension, paid leave, severance pay, etc. The new owner is bound by all collective agreements signed by the previous owner. If the new owner wishes to alter extant collective agreements, he or she must negotiate with the union regarding any changes, and may not detract from existing rights. According to the Severance Pay Law, an employer who dismisses an employee after one year of work is obligated to pay one month's salary for every year of employment.

Likewise, according to the Severance Pay Law,

> "Where an employee resigns by reasons of an appreciable deterioration of his conditions of employment, or in view of other matters of labour relations affecting him and because of which he cannot be expected to continue in his employment, the resignation shall, for the purpose of this law, be deemed to be dismissal."

A transfer of undertakings is considered a significant change in the conditions of employment. Workers who resign because of a transfer of undertaking are entitled to severance pay as if they were dismissed. Furthermore, if only a part of the company is transferred, an employee who does not wish to work under the new corporation is likewise considered dismissed in redundancy dismissals, and is part of the negotiations for severance packages.

6. Institutions for the resolution of conflicts

Institutions for the resolution of conflicts between employees and employers may be divided into internal and external, or judicial, bodies. The Labour Court is the primary external or judicial site for the resolution of conflicts between employees and employers in Israel; the Arbitration Institute likewise play an important role, as do centers for mediation, the Legal Aid office, and a host of non-profit organizations. Internal mechanisms include Bi-Lateral Negotiation Committees, and the dispute resolution tribunals of many large corporations and private institutions.

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

It is still in force, as comprehensive act of bankruptcy proceeding, the "Legge Fallimentare of 30 March 1942. This old law has been more times amended, also though calling-off interventions of the Constitutional Court and at last by act n.80 of 14 May 2005. New reforms in the proceeding are in settlement

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

A Specialized judge (*Tribunale Fallimentare*) is competent in insolvency proceedings.

In the *liquidazione coatta amministrativa* **forced liquidation** procedure similar to bankruptcy, but against companies of special public interest (like Insurance or Credit Companies), only the assessment of insolvency is judicial task. The proceeding is managed by an administrative authority (*commissario liquidatore*)

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

Ufficio di conciliazione Conciliation Office (before introducing a labour claim, it is compulsory a previous attempt of agreement at Conciliation Office)

Tribunale (in funzione di giudice del lavoro/ as industrial Tribunal).

In case of insolvency proceeding, the judge of the proceeding is competent for paying-injunctions for employees credits but for assessments related to the labour contract and for reinstatement is still competent the labour judge (industrial Tribunal)

Corte d'Appello (for second instance)

Corte di Cassazione (only for legal flaw)

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

Jurisdiction in labour law cases is shared between bankruptcy court (tribunale fallimentare) and industrial tribunal (giudice del lavoro).

For injunction to pay is always competent the "Tribunale fallimentare"(Bankruptcy Court) for assessments related to the labour contract and for reinstatement is only competent the labour judge (industrial Tribunal).

2. The employment contract

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

They are still in force since the Company's activity is definitively closed down .

The administrator of the insolvency must formally dismiss the employees, otherwise the labour contract is still in force and workers are creditors of the wages

2.2 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?

The earnings supplement fund (" prestazioni della Cassa Integrazione Guadagni")

2.3 Is there any chance to terminate the 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?

He should receive (in charge of The National Social Security Service) unemployment benefits).

The employee must receive the final severance (TFR Trattamento di Fine Rapporto), due also in case of fair dismissal.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

The former protection of employment credits with a general privilege over real estates (art. 2778 of Civil Code), was implemented at first on 1969 and then on 1975 with a **first** privilege not only for wage credits, but also for severances, indemnities and credits in case of omitted social security allowances. After a Constitutional Court decision, this first privilege prevails also over the credits of Social Insurance Institutes for missed contributions

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

It is the Fondo di Garanzia, managed by INPS (Social Security Institution)

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?.

Yes, like in the Directives.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

Yes, but strictly in the amount they have really paid to the workers.

4. Transfer of undertakings during an insolvency proceeding

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

Italy implemented Directives of workers' rights in case of transfer of enterprise.

Some misimplementations were amended trough preliminary ruling of EC Court of Justice.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

In new reforms, a more active role is forecasted. At present, the big role is establish in collective dismissals proceedings and in the transfer of undertakings in implementation of community law.

MALTA

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Judge Abigail Lofaro
Magistrate, Courts of Justice
Malta

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

The Companies' Act, 1995.

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

The First Hall of the Civil Court – followed by an Appeal to the Court of Appeal.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

The Industrial Tribunal.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

Insolvency Proceedings are tried by the Ordinary Court and not by the employment Court judges. The Judge is not in charge of the termination of an employment contract once the insolvency proceedings are open. A Judge sitting in the 1 st Hall of the Civil Court. There is no chance of a conflict.

2. The employment contract

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

They are still in force.

2.2 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?

N/A

2.3 Is there any chance to terminate the 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?

Yes. Financial considerations. Yes.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)?

Three months wages are privileged over all other creditors.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

Yes.

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

Substantially protected. Yes.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

Yes.

4. Transfer of undertakings during an insolvency proceeding

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

Employees' rights are fully protected and new owner takes over responsabbility. Yes.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

Intervening to safeguard workers' interest.

NORWAY

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Elin Nykaas, Law Clerk
The Labour Court of Norway

1. General questions

1.1 In your country, is there any specific regulation on insolvency proceedings? Please list its title and date of issue (please state the original title and a rough English translation).

The Bankruptcy Act of 8 June 1984 no. 58.

The Act regarding enforcement and provisional protection of 26 June 1992 no. 86.

The Satisfaction of Claims Act of 8 June 1984 no. 59.

The Act relating to the state guarantee for wage claims in the event of bankruptcy, etc. of 14 December 1973 no. 61.

1.2 Please list the institutions (government agencies, courts, etc.) that are in charge of insolvency proceedings; feel free to add any relevant information.

The Probate Court decides whether to open bankruptcy. The Probate Court's decision may be appealed to the circuit court within two weeks. On opening the insolvency proceedings, the probate court appoints an executive trustee (as a rule a lawyer) who shall ensure that the bankruptcy is carried out correctly. S/he shall investigate whether the estate has outstanding claims, whether there have been payments from the estate which may be returned, and whether the claims against the estate must be complied with and which priority they have. If the estate is a large or complex one, a creditors' committee shall be appointed. The creditors' committee, together with the executive trustee, constitutes the board of trustees. The executive trustee and the creditors' committee shall look after the common interests of the creditors and the interests of the employees. For estates that exceed a certain limit an auditor shall also be appointed. The meeting of creditors, which consists of all the creditors, has the highest authority in the insolvency proceedings. During the bankruptcy proceedings these are called in to make decisions.

A bankruptcy may be avoided for a certain time through negotiations. The purpose is to obtain an agreement with all the creditors on postponed payment if possible combined with waivement of parts of the debt. The business is then not bankrupt, but certain decisions regarding its operation such as collective redundancies etc. must be assessed according to the rules of the Bankruptcy Act.

1.3 Please list the institutions (government agencies, courts, etc.) that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

Conflicts between the employer and the employees related to Employment Law shall be decided by the ordinary courts as long as the conflicts do not concern the validity, existence or interpretation of collective agreements. Such conflicts shall be decided by the Labour Court.

1.4 Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the Judge in charge of the insolvency proceedings and the Employment Law Judge?

After insolvency proceedings are opened, it is up to the executive trustee to decide whether employment contracts are to be terminated. Such a decision depends on whether the operation is to be terminated immediately or to continue until further notice. In case of the latter the question is whether to undertake changes that entail reductions in the labour force and whether the business subsequently shall be sold or

liquidated. The executive trustee or the board of trustees are responsible for the administration of the estate and make all decisions regarding the estate. The executive trustee shall take care of the employees' claims towards the estate and the state guarantee for wage claims. There is no judge involved except in the Probate Court at the request and decision of the insolvency proceedings and in the case of a court trial in connection with the bankruptcy. Whether a termination of employment is valid – objectively justified – may be contested in the ordinary way before the ordinary courts. Conflicts relating both to individual contracts of employment, including termination of contracts, and to bankruptcy are decided by the ordinary courts. Consequently, there are no conflicts between different judges. Oslo is an exception in that there is a separate Probate Court. Since the Probate Court's jurisdiction is limited to the opening of insolvency proceedings, there will be no conflicts between individual judges.

2. The employment contract

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

Opening of an insolvency proceeding in itself does not entail automatic termination of employment contracts. The estate may decide whether to enter the employment contract or not. An employee may demand that the estate decides whether to enter the agreement within three weeks from opening the insolvency proceedings. Within this period the estate has to decide whether to enter a new contract or to terminate the existing contract. In both cases the estate must issue a declaration of its decision. In addition, the employees shall receive a standard notice of dismissal according to the provisions of the Act relating to Worker Protection and Working Environment (WEA).

The estate automatically enters the contract after three weeks unless it issues a declaration to the contrary.

2.2 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?

The contract of employment does not automatically terminate at the opening of the insolvency proceedings. The question is consequently not relevant.

If a contract of employment is terminated, the agreed period of notice shall be kept and the employee shall receive pay during the period of notice.

2.3 Is there any change to terminate the 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?

If the executive trustee or the board of trustees immediately decide to reduce or terminate the business, it is normally up to the estate to decide which employees that are needed and which employees that are to continue working during this period depending on an objective evaluation of the requirements of the estate. This means that the estate may terminate the contracts of one or more employees immediately at the opening of the insolvency proceedings. In that the demand to objective justifiability is connected to the requirements of the estate, this assessment will be

somewhat different than in case of termination of employment contracts for other reasons. Seniority rights are not decisive in the estate's decisions about which employees that are given new contracts of employment and which contracts that will be terminated. The courts will presumably not easily overrule the executive trustee's decision in regard to the demand for objective justifiability. The agreed period of notice and right to pay is the same as when insolvency proceedings are not the case.

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claim (Employer's Insolvency) Convention, 1992 (No. 173)?

Workers' claims are privileged in case of employer's insolvency. Wages include, among other things, ordinary regular pay or incentive wages, payments in kind that by both parties are intended to be reimbursements of the work of the employee, and benefits from the employer. Overtime pay, as well as supplementary pay for shift work and the like are privileged. This does, however, not include typical expenses related to work such as working clothes, equipment, and travels. The preferred claim applies to employees. It does not include pay to commissioned workers, manager, equals to manager, and members of the board or any employee who has owned more than 20% of the business. Claims to wages from the employees' elected representatives to the board are privileged but not to the fee for this assignment.

The date of expiration of the claim must normally not exceed more than 4 months previous to the time limit, which usually is the day of the opening of the insolvency proceedings. The right is limited to a total of six months but so that it is possible to choose the best six months.

Holiday pay is also a privileged claim. Claims to holiday pay are, however, limited to maximum 30 months. The holiday pay must, as a main rule, not have been earned more than 24 months before the time limit, unless the date of expiration of the claim does not exceed four months before the time limit.

Pay during the period of notice is also a privileged claim. This right is however limited to the period of notice that follows from WEA § 58, unless a longer period of notice has been set in a collective agreement less than six months before the time limit.

Sick pay during the period of the employer's obligation to pay[1] is a privileged claim. The same applies if better terms than the provisions of the National Insurance have been agreed upon through a collective agreement and are to be covered by the employer, for example the difference between six times the basic amount and 100% pay. If an agreement has been made relating to pay during family care leave in connection with adoption or birth, educational leave, or other types of leaves of absence, the claim might be warranted. The conclusive point is whether these payments are to be regarded as wages, which are privileged according to the provisions of the law. In my opinion does the Norwegian legislation accord with the ILO Convention no. 173, Art. 6 and 8.

[1] The employer is required to pay an employee wages for a certain period of time in case of employee's illness. This period starts from the first day of absence due to incapacitation and lasts up to 16 calendar days. The National Insurance is responsible for the payment of sick benefits in case of illness that exceeds this period.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or in the Directive 80/987/EEC?

The state guarantee for wage claims ensure that the state on certain conditions cover wages, holiday pay, and a number of other payments in the event of employer's bankruptcy. The claims will only be covered by the state guarantee if the estate is unable to pay privileged claims in full. The executive trustee is responsible for payments from the estate or applies to the state guarantee for wage claims. Payments from the estate must be approved by the court.

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when insolvency occurs? Is the credit protection similar to the one set under Article 12 of the ILO Convention No. 173?

The state guarantee for wage claims does, as a main rule, cover all privileged wage claims as mentioned in 3.1. The guarantee covers ordinary wages or incentive wages. This means that all claims to wages, including payment in kind that by both parties are understood to be payment for the work of the employee, are covered. Almost all benefits from the employer are therefore covered, except for typical reimbursements in connection with the work such as working clothes, tools, and travels. Overtime pay, extra pay for shift work, and similar payments, however, are included. This protection seems to at least be comparable with that of Article 12 of the ILO Convention No. 173.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

The rights of the employee in the event of employer's bankruptcy mainly correlate with the rights granted by the Act Relating to Wage Claims in the Event of Bankruptcy. The state guarantee is based on the executive trustee's application to the Directorate of the Labour Commission, which considers and decides the matter.

4. Transfer of undertakings during an insolvency proceeding

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local Law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertaking, businesses or parts of undertakings or businesses?

If whole or part of the enterprise is transferred during an insolvency proceeding, the new owner is not responsible for claims towards the previous owner. Employees with privileged claims towards the previous owner's estate may get wage guarantee coverage on ordinary grounds. If whole or part of the enterprise is transferred before the opening of the insolvency proceedings, claims earned during the previous ownership may be addressed to the new owner.

The provisions on transfers of undertakings in WEA Chapter XII A execute Council Directive 2001/23/EC on business transfers and are assumed to correlate with this.

5. What is the role of the workers' representatives (works councils, unions) during insolvency proceedings?

Worker's representatives have no special role during insolvency proceedings except for taking care of workers' rights in the ordinary way. If the majority of the employees so demand the Probate Court, as a main rule, is to appoint a representative for the employees to the creditors' committee. This is also the case if one or more unions that together organize a majority of the employees ask for the appointment of such a representative.

Translated by Gyri Ryen

SLOVENIA

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Prof. Dr. Janez Novak
Supreme Judge
Supreme Court of the Republic of Slovenia

1. GENERAL QUESTIONS

1.1.

In Slovenia (hereinafter referred to as RS), the field concerned is regulated by:

- Compulsory Composition, Bankruptcy and Liquidation Act (Official Gazette of RS, Nos. 67/93 to 1001/2000, in Slovenian: Zakon o prisilni poravnavi, stečaju in likvidaciji);

- Guarantee and Maintenance Fund of the Republic of Slovenia Act (Official Gazette of RS, Nos. 25/978 to 53/99, in Slovenian: Zakon o jamstvenem in preživninskem skladu Republike Slovenije);

- Provisions of Articles 103 to 108 of the Employment Act (Official Gazette RS, No. 42/2002, in Slovenian: Zakon o delovnih razmerjih), regulating the termination of employment contract due to the opening of a dissolution proceeding against the employer or composition (forced settlement) proceeding;

- Convention of International Labour Organization No. 158 concerning Termination of Employment at the Initiative of the Employer (hereinafter referred to as Convention No. 158);

- Convention of International Labour Organization No. 173 concerning the Protection of Workers' Claims in the Event of the Insolvency of their Employer (hereinafter referred to as Convention No. 173);

- EU Directives:
  * Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses
  * Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer

1.2.
The institutions acting or participating in the proceedings concerning the protection of the employees' rights in the event of the insolvency of their employer are the following:
The Guarantee and Maintenance Fund (under the provisions of the Guarantee and Maintenance Fund of the Republic of Slovenia Act), General Courts (Commercial Law Divisions of Courts of General Jurisdiction - under the provisions of the Compulsory Composition, Bankruptcy and Liquidation Act), and Labour Courts under the provisions of the Employment Act.
Composition (forced settlement) proceedings are conducted by: settlement senate and forced settlement administrator.
Bankruptcy proceedings are conducted by: bankruptcy senate, administrator in bankruptcy and creditors' board.
Liquidation proceedings are conducted by: liquidation senate and administrator in liquidation. Commercial Law Divisions of Courts of General Jurisdiction are competent for proceedings under the Compulsory Composition, Bankruptcy and Liquidation Act.
The founder member of the Guarantee and Maintenance Fund is the Republic of Slovenia (Article 4 of the Guarantee and Maintenance Fund of the Republic of Slovenia Act).

1.3.
During the bankruptcy proceedings, the claims (for example, the workers' claims against the employer) have to be registered with the bankruptcy senate (Article 137 of the Compulsory Composition, Bankruptcy and Liquidation Act). In the majority of cases, Labour Courts rule in insolvency proceedings against the employer (for example, concerning the termination of employment contract, payment of wages, severance pay and similar).

1.4.
Labour Courts are competent to rule in disputes arising from the termination of employment contract. This applies also to cases involving employer's insolvency (for example, in cases of composition, bankruptcy or liquidation). Relevant for labour disputes is the provision of Article 137 of the Compulsory Composition, Bankruptcy and Liquidation Act, setting out in the first paragraph that the creditors shall register their claims with the bankruptcy senate within two months from the day on which the announcement of the opening of the bankruptcy proceedings was published in the Official Gazette of the Republic of Slovenia. The above-mentioned term is preclusive. The claim or part of claim arising out of the employment that is not acknowledged by the bankruptcy senate may be invoked by the worker in the proceedings instituted at the Labour Court.
Jurisdictional dispute between the Court of Labour and the Court of General Jurisdiction (Commercial Law Division of District Court, conducting the bankruptcy proceedings) is possible. Such disputes are resolved by the Labour and Social Division of the Supreme Court of the Republic of Slovenia. During the last ten years, there have been no such disputes.

2. THE EMPLOYMENT CONTRACT

2.1.
The first paragraph of Article 103 of the Employment Act specifies that in the bankruptcy or liquidation proceedings executed by the court, the administrator in bankruptcy or the administrator in liquidation **may** (underlined by J.N.), with a 15-day period of notice, terminate the employment contracts to employed workers whose work became unnecessary due to the start of the bankruptcy proceedings or liquidation of the employer.
This means that the employment contracts are not automatically terminated and that those workers whose work is still necessary shall remain employed.
The second paragraph of the same Article of the Employment Act regulates separately the termination of employment contracts to a large number of workers (Articles 96 to 102 of the Employment Act). In this case the administrator in bankruptcy or the administrator in liquidation shall observe the provisions of the first and third paragraphs of Article 97 (notifying the trade union and the National Employment Office on the situation relating to the employed workers), and shall consult the trade union about the possible ways of preventing and limiting the number of terminations and about the

possible measures for the prevention and mitigation of harmful consequences of the employer's bankruptcy or liquidation.

2.2.
See the answer under Point 2.1.

2.3.
Such a possibility exists, however, the employment contract shall not be terminated immediately, but only after the expiry of a 15-day period of notice starting to run one day after the date when the service of termination of the employment contract was effected to a worker. Under the terms and conditions determined in the first paragraph of Article 103 of the Employment Act (Point 2.1.), it is possible to terminate the employment contracts to a large number of workers. The condition is that due to business reasons (for example, the insolvency of the employer), the work of the workers becomes unnecessary (first paragraph of Article 96 of the Employment Act, Article 4 of the Convention No. 158). The existence of a business reason shall be proved by the employer (first paragraph of Article 82 of the Employment Act, Point a of the second paragraph of Article 9 of the Convention No. 158).
The workers shall have the preferential right to employment if in the bankruptcy proceedings, the debtor (the employer) is sold as a legal entity (Article 104 of the Employment Act), or if composition (forced settlement) was reached in the bankruptcy proceedings (Article 105 of the Employment Act).
The workers are also entitled to the severance pay (Article 107 of the Employment Act) as laid down in Article 109 thereof, that is to say in cases when the employment contract is terminated regularly due to the business reason (as for example, the employer's insolvency), or the reason of a worker's incapacity (non-achievement of expected work results, non-fulfilment of conditions for the execution of work, second indent of the first paragraph of Article 88 of the Employment Act). Fault reasons on the part of the worker are excluded (violation of the contractual obligation or any other obligation arising from the employment, third indent of the provision mentioned).

3. EMPLOYMENT CREDITS AND GUARANTEE INSTITUTIONS

3.1.
Preferential rights, set out in Articles 6 and 8 of the Convention No.173, are extended in Slovenia by the provisions of the second paragraph of Article 160 of the Compulsory Composition, Bankruptcy and Liquidation Act and Article 19 of the Guarantee and Maintenance Fund of the Republic of Slovenia Act. The above mentioned provision of the Compulsory Composition, Bankruptcy and Liquidation Act states that the following shall be paid as preferential costs during the bankruptcy proceedings:

- Wages and wage compensations for the period of the last three months prior to the opening of the bankruptcy proceedings,
- Claims arising from injuries at work which the worker suffered with the debtor, and arising from occupational diseases,
- Holiday pay for the time of unused regular annual holiday for the current calendar year,
- Severance pay in the amount and under the conditions determined for the redundant workers by the Employment Act.

If the claims of a worker cannot be paid from the employer's assets due to his insolvency (Article 2 of the Guarantee and Maintenance Fund of the Republic of Slovenia Act), the worker shall be entitled, under Article 19 of the Guarantee and Maintenance Fund of the Republic of Slovenia Act, to the payment of:

- Unpaid wages for the last three months prior to the date on which the employment was terminated;

- Unpaid wage compensations for paid absence from work for the three months prior to the date on which the employment was terminated;

- Wage compensation for the period of unused annual leave to which the person is entitled during the current calendar year;

- severance pay in the amount and under the conditions determined for redundant employees by the regulations governing employment relationships.

3.2.
This is the Guarantee and Maintenance Fund of the Republic of Slovenia, implementing the provisions of Article 9 and the subsequent Articles of the Convention No. 173 and the EU Directive 80/987/EEC.

3.3.
Compulsory Composition, Bankruptcy and Liquidation Act and the Guarantee and Maintenance Fund of the Republic of Slovenia Act, and partially also the Employment Act, actually extend the rights of the workers, stipulated in Article 12 of the Convention No.173.

3.4.
The main obligation of the Guarantee and Maintenance Fund of the Republic of Slovenia is to ensure the above-mentioned rights (particularly Point 3.1.). The first paragraph of Article 28 of the Guarantee and Maintenance Fund of the Republic of Slovenia Act stipulates that the claims of the beneficiary (worker) against the employer or the bankrupt pass to the above-mentioned Fund to the extent of rights as determined by this act. The Fund is also entitled to demand the repayment of the funds obtained on the basis of false information (Article 29 of the Guarantee and Maintenance Fund of the Republic of Slovenia Act). The Slovenian law does not stipulate that the Fund could claim for the workers during the insolvency proceedings.

4. TRANSFER OF UNDERTAKINGS DURING AN INSOLVENCY PROCEEDING

4.1.
This issue is regulated by the Employment Act under a special subchapter titled: 11. Change of Employer (Articles 73 and 74 of the Act). These articles transpose into the Slovenian legislation the principles stated under Articles 3 to 6 (maintaining the workers' rights) and Article 7 (informing and consulting) of the Directive 2001/23/EC.
In case of transfer of undertaking or part of undertaking, the principle of equal rights of the workers at the new employer - transferee shall apply for at least one more year (second paragraph of Article 73). If the employer – transferee must terminate a worker’s employment contract due to objective reasons, the worker shall have the same rights as if his employment contract was terminated due to business reasons (burden of proof on the employer, right to the period of notice, right to severance pay) (third paragraph). The employer – transferor and the employer - transferee shall share the liability (joint liability) for damages related to the claims of workers which occurred until the date of the transfer and which arise from the termination of employment contract (under the third paragraph), made by the employer – transferee due to objective reasons (fourth) paragraph.
If the worker refuses the transition and the actual carrying out of work with the employer - transferee, the latter may extraordinarily terminate his employment contract (fifth paragraph of Article 73).
Article 74 binds both employers to inform the trade unions at least 30 days prior to the transfer and to consult them on the circumstances related to the transfer.

5. THE ROLE OF THE WORKERS' REPRESENTATIVES

Partial answer to this question was already given in Point 4.1:
Article 74 of the Employment Act stipulates that the employer – transferor and the Employer – transferee shall inform the trade union at least 30 days prior to the transfer on the following: the date or the proposed date of transfer, the reasons for transfer, the legal, economic and social consequences of the transfer for workers and about the foreseen measures for workers (first paragraph of the said article). Both employers shall, at least 15 days prior to the transfer, consult the trade union about the legal, economic and social consequences of the transfer and about the foreseen measures for workers (second paragraph). If there is no trade union with the employer, the workers concerned by the

transfer shall be within the deadline directly informed about the transfer conditions, in accordance with the first paragraph of this Article (third paragraph).

SPAIN

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Judge Antonio Martin Valverde
Tribunal Supremo
Madrid, España

1. General questions

1.1. Yes.- *Ley 22/2003, de 9 de julio, Concursal*. Insolvency Proceedings Law.

1.2. Insolvency proceedings Judge.- Insolvency proceedings "management"-"trustee" (group of three members appointed by the Insolvency proceedings Judge).

1.3. The conflicts related to Employment Law during the insolvency proceedings must be solved by the Insolvency proceedings Judge and not by the Employment Law Judge (Social Judge). But the initial resolution of the Insolvency proceedings Judge on conflicts related to Employment Law may be appelled before the Regional Social Court.

1.4. See 1.3.

2. The employment contract

2.1. The opening of a insolvency proceeding does not terminated automatically the contracts of employment in which is part the debtor.

2.2. Not the case in Spanish law.

2.3. Yes : a) the debtor, the insolvency proceedings "management" and the workers representatives may claim the "authorization" of the "collective" termination of the contract of employment to the Insolvency proceedings Judge ; b) besides, the debtor and the insolvency proceedings "management" may decide by themselves the "individual" dismissal for "economic reasons" ; c) the fair "economic reasons" for "collective" or "individual" dismissal during the insolvency proceedings are the generally established in the Employment Law ; d) the trheshold which separate the "collective" and the "individual" dismissal for economic reasons is, too, the generally established in the Employment Law (Estatuto de los Trabajadores).

3. Employment credits and guarantee institutions

3.1. The priveleges and preferences granted to employment credits are : a) absolute preference to the salaries of the last thirty days ; b) special privilege to the salaries concerning the "objects elaborated by the workers" in power of the employer ; c) general or common privilege to the remaining not-payed salaries and to the compensations for termination of the employment relationship (maximum : three times the minimum wage).

3.2. Yes : The salaries guarantee Fund (FGS), a public body created in 1976 and regulated in the Employment Law (Estatuto de los Trabajadores).

3.3. Extent of the responsability of the FGS concerning salaries : a) maximum 120 days; b) besides, maximum double of the minimum wage.- Extent of the responsability of the FGS concerning compensations for dismissals or termination of the employment relationship : a') maximum amount equivalent to one year of salaries ; b') besides, maximum amount equivalent to double of the minimum wage.

3.4. Yes to the first question.- No to the second question.

4. **Transfer of undertaking during an insolvency proceeding**

4.1. The employment relationship continues with the "new employer" in the transfer of undertaking during an insolvency proceeding. In principle, the employees' rights must be respected, but the Insolvency proceedings Judge can exclude the responsability of the new employer for salaries and compensations payed by the FGS.

SWEDEN

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Cathrine Lilja Hansson
and Carina Gunnarsson
The Labour Court of Sweden

1.1
Yes there is; konkurslagen (1987:672), the Bankruptcy Act of 11 june 1987.

One could also mention lagen (1996:764) om företagsrekonstruktioner, the Company Reconstruction Act. The act regulates proceedings aiming at to try to reconstruct the companys business and its finances in order to avoid bankruptcy. If a company reconstruction is proceeding under this act, a bankruptcy petition by a creditor shall be declared stayed pending the cessation of company recontruction, if the debtor so requests.

1.2
A petition for bankruptcy are made to a district court which makes the decision on bankruptcy . A decision of a district court in a bankruptcy matter can be appealed against to court of appeal.

To deal with the administration of the bankruptcy estate the court appoints an administrator (often a lawyer who is a member of the bar association).

The administration of the estate is subject to the supervision of a supervisory authority which are the enforcement services.

1.3
The district courts (if no trade union is involved) and the National Labour Court. (That is if you can´t resolve the problems without taking legal actions.)

1.4
A legal matter concerning the relations between an employer and an employee which is pending before the court (the National Labour Court or the district court) will not automatically be affected by the opening of the insolvency proceedings. Once a bankruptcy decision is made the bankrupcy estate may enter into the litigation on the side of the debtor (in almost all cases the debtor is the employer). The termination of an employment contract is not a matter for the labour court; that will be dealt with by the employer or – after a bankruptcy decision is made – by the bankruptcy estate administrator. If you claim your credit etc. as an employer within the insolvency proceedings it will be decided upon by the court handling the bankruptcy. There is no chance of conflict of jurisdiction.

2.1
The employment contracts are not automatically terminated. If the contracts are not already terminated (with notice time) by the employer before the bancruptcy decision the administrator have to terminate the contracts by given notice to the employee or employees within a month in order to avoid the bankruptcy estate as such beeing held responsible for the wages.

2.2
See the answer on 2.1.

2.3
As said before the employment contracts can be terminated by the employer until the bankruptcy decision is made. Such a termination (with time allowed for given notice) can almost always be motivated with scarcity of labour, that is you have no financial possibilities to pay the wages. The employees are then intitled to wage guarantee (within the limits of that guarantee) during the notice time. If the employees are not given notice after the bankruptcy decision they could be considered employed by the bankruptcy estate and then entitled to payment directly from the bankruptcy estate assets before the money is distributed to the creditors.

3.1
Yes, article 6 and 8 of the ILO-convention 173 are implemented in Sweden.

3.2
There is not one institution. As a general it is the bankruptcy administrator, who is appoineted by the court, who conciders and decides whether a claim aginst the estate in bankruptcy skall be paid in accordance with the guarantee. Guarantee amounts are paid by the County Administrative Board.

3.3
An employee has the right to payment under the guarantee made for a claim of pay or other remuneration which considers the time before the bancruptcydecision and one month after that decision. The pay or the remunaratoin shall consider a workingperiod of three months before the application of bancruptcy. One month after the bancruptcydecision the the employee has the right to get payment for pay during the period of notice. The total amount of payment is limited (in 2005 about 160 000 Skr wich is approxamatly 17 000 Euro).

3.4
The state shall be subrogated to the employee´s right against the bankruptcy debtor with respect to guarantee amounts which has been paid.

4.1
Sweden has implemented the directive. The rules of transfers of undertakings are not applicable when the transfer is done during a insolvency proceeding (according to article 5).

5.
The rules on information and consultations of the employees organisations are applicable during the insolvency proceeding as long as the bussiness is carried on.

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Judge Colin Sara
Chairman of Employment Tribunals
Bristol, United Kingdom

Introduction

In order to explain the answers to the questionnaire it is necessary to say something about the system for dealing with insolvencies in the UK

There are several different kinds of insolvency proceedings

- Liquidation by the court. This, which equates to "insolvency proceedings" as defined in the glossary, is now only rarely used. The winding-up order has the effect of automatically terminating employment. A court appointed receiver is in a similar position.
- Voluntary liquidation. This can be instigated either by the company itself or by the creditors. It does not terminate the employment automatically. The liquidator is treated as an agent of the company and has 14 days to dismiss or to adopt the contracts of employment. He is personally liable to pay any employees not dismissed, but is not liable for any prior debts.
- Administration by the court. This involves the administrator continuing the business as a going concern with a view to selling it in whole or part, or trading out of administration. The administrator is treated as an agent of the company. He is in the same position as a liquidator on a voluntary liquidation.
- Administrative receiver. Appointed by the creditors or the company. He also acts as agent for the company.
- Other receivers e.g. appointed by the Bank. They act as agents for the company, but have no statutory protection against personal liability for employees.
- Personal bankruptcy. Because it is very easy to set up companies, most UK employers, including small employers, are companies and therefore personal bankruptcy of the employer is comparatively rare. Once a bankruptcy order has been made, the employee's employment automatically comes to an end and he must prove in the bankruptcy in respect of any claims.
- Voluntary Arrangement with creditors. The employer carries on business or closes it. There is no direct effect on the employee, but an employee who has been given notice of the Meeting of Creditors may be bound by the agreement reached.

Where the court appoints the liquidator or administrator or trustee in bankruptcy, it carries out continuing supervision. Where the liquidator or administrative receiver is appointed by the creditors, the court only becomes involved if someone brings a claim.

1. General Questions

1.1 In your country is there any specific regulation on insolvency proceedings?

- Insolvency Act 1986 – the principal statute
- Insolvency Act 1994 – which deals with personal liability of liquidators and administrator.
- Insolvency Act 2000

1.2 Please list the institutions that are in charge of insolvency proceedings.

- The Companies Court, which is part of the High Court.

- The Official Receiver, who oversees personal bankruptcies and is appointed the company liquidator where no private liquidator is appointed.

1.3 Please list the institutions that are in charge of the resolution of conflicts related to Employment Law between the employer and his/her employees.

- the Employment Tribunals
- the Employment Appeals Tribunal

1.4 Does the Employment Law judge remain in charge of any legal matters after the opening of the insolvency proceedings?

- As explained above, in most cases the liquidator or administrator is treated as agent of the company. Accordingly the employee can bring a claim against the company, if he thinks it has any available assets.
- In a compulsory liquidation the employee is automatically dismissed and can only prove in the liquidation and bring any claim to the Companies Court. He is prevented from bringing a claim in the employment tribunal (unless he obtains the leave of the Companies Court)
- The Employment Tribunal deals with claims by the employee for arrears of wages, notice pay, holiday pay etc. except where there has been a compulsory liquidation or personal banruptcy.

2. The employment contract

2.1 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 the case of a voluntary liquidation or the appointment of an administrator, the liquidator or administrator has 14 days to decide whether to dismiss the employee or adopt the contract of employment. If he dismisses within the 14 days, the employee can bring a claim of unfair dismissal, arrears of pay etc. against the company, but not against the liquidator or administrator. If he adopts the contract he is not liable for any debts etc. up to that date, but he is liable to pay the employee from then on and to honour any other rights he has, including the right not to be unfairly dismissed.
- In the case of a compulsory liquidation, the employment ends automatically on the winding up.
- In the case of a receivership or a Corporate Voluntary Arrangement, the employee retains his rights to unfair dismissal etc. against the company and, in the case of receivership, the receiver may be liable to his own acts, including unfair dismissal

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

- The employee becomes a preferential creditor in respect of arrears of wages up to four months and a maximum of *£800* and holiday pay. However, this is of little value, since preferential creditors rank below secured creditors (e.g. banks and other institutions who have mortgages on assets, including floating assets)
- He is an unsecured creditor for the rest of any money owing to him. This will form part of any dividend paid on winding-up

2.3 Is there any chance to terminate the employment contract of one or more employees, once the opening of the insolvency proceedings has 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 on severance?

- Once the administrator has adopted the contract, he is in exactly the same position as any other employer. Therefore he can terminate the employment by reason of

redundancy or re-organisation, provided that he has an admissible reason for dismissal and acts reasonably

3. Employment credits and guarantee institutions

3.1 What privileges or preferences, if any, are granted to employment credits? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's insolvency) Convention 1992 ((No. 173)

- The entitlement is set out at 2.2 above.
- It appears that the rights purport to comply with the Convention, but the limit of £800 (€1176), (for up to three months' wages) means that, in practice, it does not.

3.2 In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer, such as the one mentioned in ILO Convention No. 173 and/or the Directive 80/987/EEC?

- There is a guarantee institution, called the National Insurance Fund

3.3 To what extent, if any, are the employee's credits protected by the guarantee institution when an insolvency occurs? Is the credit protection similar to the one set under Article 12 of ILO Convention No. 173?

- The following payments are made by the National Insurance Fund whenever there have been insolvency proceedings. The problem is that often employers simply close the company, secured creditors use other processes to recover their security, the creditors decide that there are no assets and so no-one bothers to liquidate the company. They just leave it dormant.
  - statutory redundancy pay
  - up to 8 weeks' arrears of pay
  - statutory Notice pay (one week per year of service up to 12 weeks)
  - holiday pay in respect of the past year – up to 6 weeks
  - basic award of compensation for unfair dismissal (basically one week per year of service)
  - protective award, where there has been a failure to consult.

  All of these are subject of a maximum currently £280 (€410) per week.
- The Pensions Act 2004 sets up (from 1 April 2005) the Pension Protection Fund, funded as to 80% by a levy on the private Pensions Industry and the guaranteed by the government. This is to assist employees and company pensioners whose pension fund has been made insolvent by the insolvency of the employer.

3.4 Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may the so-called institution claim for them during the insolvency proceedings?

- Yes

4. Transfer of undertaking during an insolvency process

4.1 When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (ie limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by the Council Directive 2001/23/EC of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

- As stated above, the administrator is treated as agent of the company. Therefore, he has the same obligations as any employer in the event of a transfer of undertaking. This means that he cannot dismiss in advance of the transfer for reasons connected

with the transfer (unless he shows a valid economic, technical or organisations reason for making changes in the work-force). It also means that he has to follow normal consultation procedures (unless he can show that there were special circumstances which rendered it not reasonably practicable for him to do so).

- The transferee is liable for all payments due to employees who were employed at the date of the transfer and for compensating employees dismissed before the transfer for reasons connected with the transfer.
- The UK has implemented the 2001 Directive.

5. What is the role of the workers' representatives (works councils, unions,) during insolvency proceedings?

- The unions or staff associations have no formal role in insolvency proceedings.

VENEZUELA

Insolvency Proceedings and Workers' Rights

Reply to Questionnaire

by Magistrate Juan Rafael Perdomo
Vice Presidente, Sala de Casación Social
Tribunal Supremo de Justicia
Caracas, Venezuela

1.1. In your country, is there any specific regulation on insolvency proceeding? Please list its title and date of issue (please state the original title and a rough English translation).

Yes, insolvency in Venezuela is regulated in the commerce code (Art. 898- 1081). It covers two phases: 1) the phase of delay, in which the person is seen in need to delay or postpone his/her payments, and will be able to request Court authorisation to proceed to the liquidation of his/her business; 2) the phase of bankruptcy.

From the labor point of view, during the delay stage the workers cannot exercise against the single employer any action, because the employer is complying with the payment of the ordinary remunerations. The Labour Law establishes a privilege so that the workers can charge the employer for some benefits and should be paid with preference to all other credits, in conformity with the article 158 to 161 of the Labour Law 1987 (Ley Orgánica del Trabajo de 1987). Nevertheless, in the reality in the cases of bankruptcy, rare time the worker manages to charge an upper percentage al 20% of his balance.

The privileges established in the Labour Law (Ley Orgánica del Trabajo) are relative because privileges of guarantee and the mortgage credits can be charged before them. Thus, the protection against the insolvency of the owner give mere expectations. In case of bankruptcy they concur to the general assembly of creditors with the hope that they all will be paid first..

In Venezuela there is no real guarantee to charge the labor credits to the insolvent owners, not even in the case of the mixed businesses. A symbolic case of this affirmation is that of the workers of Viasa (Venezuelan air line). In fact the business was privatized and acquired by Iberia. This last one acted as the shareholder and took for itself all the routes of Viasa. When this was carried out alleged insolvency of the business Viasa in January of 1997 and even the date no worker has charged his social benefits.

This situation should be corrected so that all the workers victims of management insolvency could have access to the collection of their salaries and social benefits. This aspect could be incorporated to the reform of the Labour Law. It is certain that the Regulation of the Labour Law established a special procedurewhich intends the immediate payment of the credits protected by the Labour Law. Nevertheless, this regulation, that goes beyond the law, is not actually applied by the commercial judges and the privileges created by law lack effective enforcement.

1.2. Please list the institutions (government agencies, courts, etc), that are in charge of insolvency proceedings; feel free to add any relevant information.

The commercial Courts are the competent tribunals for dealing , in case of delay or of bankruptcy, with the insolvency of the employers. The workers concur with their pending credits as the remainder of the creditors. According to the Regulation of the Labour Law (Art. 102), the judge of the contest will order the immediate payment of the credits protected with the privilege established in Law. This norm directs that the payment will be done cash with the funds that exist just as the transfer of goods was declared or the bankruptcy. Despite what the regulation indicates, the process of insolvency is conducted in his/her own by the commercial Judge, who qualifies the credits in an special long procedure in case of insolvency of the merchant and can agree that labor balances be paid first.

1.3. Please list the institutions (government agencies, courts, etc), that are in charge of resolution of conflicts related to Employment Law between the employer and his/her employees.

Concerning the labour administration, the Ministry of Labour is entrusted, through the Labour Inspection, to deal with: a) the complaints from workers for the employer to take or to stop taking certain measures relating to the working conditions; b) a collective convention be negociated or celebrated, or be respected (Art. 475 of the Labour Law); c) the conflicts in case of massive (collective) dismissals; or d) the employer request for a reduction of personnel, based on economic reasons or of progress, or for technological. All this regulation is detailed but it does not really benefit the employee and not even to the employers.

Concerning the judiciary, legal conflicts on labour and social security matters are dealt with by labour courts (two instances and casation, from the Supreme Tribunal of Justice, Sala de Casación Social).

1.4. Does the Employment Law Judge remain in charge of any legal matters after the opening of the insolvency proceedings? Specifically, is the Employment Law Judge in charge of the termination of an employment contract once the insolvency proceedings are opened? In an insolvency proceeding, who is the Judge in charge when a worker creditor claims for the acknowledgement, the amount or the privilege of his/her credit? Is there any chance of conflict of jurisdictions between the judge in charge of the insolvency proceeding and the Employment Law Judge?

The commercial Judge is the responsible for paying the workers, according to the existing assets. Some benefits, such as the utilities and holidays, remain out of these payments.
In case of termination of the labor relation for insolvency of the employer, the Labour Courts dealt with the procedures for dismissals or for the termination of the relation of work and decide them. After the labor procedure is finished, the claim is remitted to the Commercial Court so that it takes into account the sentence regarding the credits for labor concepts. In other cases, the expedient of the Labour Court is remitted to the Commercial Court in the phase in which it is, included the demand and the annexs accompanied.
Therefore, there is no possibility of conflict by reasons of competence between the Commercial Judge and the Labour Judge. Everything is decided by the Commercial Judge.

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

The process of bankruptcy puts an end to the labor relations, and is characterized for the prior occupation of the goods of the business and there is not opportunity to do distinction as for the termination of the labor contract. It is a total cessation of the business activities and by logic, all the workers remain out of the service lent. On the other hand, the Commercial Judge, does not assume any responsibility aconcerning workers, except the administrators and other employees that can contribute to the processing of the accounting registrations and to dealt with the rights of the workers as they wereat the moment of the end of the business.

2.2. 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?

They have the right to severance pay, to the contractual benefits established in the contract of employment, and to the payment of the unpaid salaries and the corresponding interests.

2.3. Is there any chance to terminate the employment contract of one or more employees once the opening of the insolvency proceedings already occured? What reason is considered fair in order to allow the administrator of the insolvency proceedings to terminate the employment contract? Is the employee entitled to any benefit or severance?

See answers under 2.1 and 2.2

3. Employment credits and guarantee institutions

3.1. What privileges or preferences, if any granted to employment credits (i.e. credits owned by the employee against the employer)? Are they coincident to the coverage and rank set in Articles 6 and 8 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (N° 173)?

The privileges that exists in our legal system (arts. 158, 159) are the following:

a) employment credits for a maximum equivalent to the last six months salaries and for severance payments for a maximum of ninety days of normal salary, will be baid before any other credit;

b) for the remaining credits for salary, severance payment and any other employment credit the worker will be able to make use of the privileges on the personal property and real estate of the employer. However, guarantees established on personal property of the employer and mortgage prevail on the employment credits.

The regulation of the labour law (arts.101 and 102) reaffirms these privileges and creates a procedure to dealt with. In fact at the end the employment credits run in the commercial Court the same luck of the others.

To date the regulation is not a solution against the insolvency of the employers. Privileges do not have a real force in the sens of article 5 of the Convention No. 173 of the ILO.

3.2. In your country, is there a guarantee institution that takes charge of the debts unpaid by the insolvency employer, such as the one mentioned in ILO Convention N° 173 and/or in Directive 80/987/EEC?

No.

3.3. To what extent, if any, are the employee's credits protected by guarantee institution when a insolvency occurs? Is the credit protection similar to the one ser under Article 12 of ILO Convention N° 173?

See 3.2.

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

See 3.2.

4. Transfer of undertakings during an insolvency proceeding

4.1. When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights (i.e. limitations on the obligation of subrogation regarding the employee's credits due by the new owner of the transferred enterprise)? Does your local law respect what is provided by Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses?

No.

5. What is the role of the workers' representatives (works councils unions) during insolvency proceedings?

The assembly of workers appoint the representatives that will appear before the competent Commercial Court to be presents in the procedure of bankruptcy. Normally they require the aid of a lawyer, so that this one exercises their rights in the assembly of creditors and before the Judge. He/she also participates in the discussion on the payment of the rights of the workers set by the Judge, according to the existing financial availability, and to the agreements derived from the general assembly of creditors. This it is a phase where is determined the duration of the labor relation, the total of the salaries and social benefits owed. Generally, it is a very slow procedure. As a general rule, in case of employer insolvency there is no effective protection of labour rights.