Rescue of Business in Insolvency Law





EUROPEAN LAW INSTITUTE MCC Meeting Friday 4 September 2015 Vienna, Austria

Professor Bob Wessels Professor Stephan Madaus Associate Professor Kristin van Zwieten



- 1. Topic 1: Special challenges to rescue of SMEs Kristin van Zwieten
- 2. Topic 2: Employees' position in business rescue *Stephan Madaus*
- **3. Topic 3:** Contractual issues re business rescue *Bob Wessels*
- 4. Outlook and closure





Prof. Bob Wessels (Leiden Law School)



Prof. Stephan Madaus (Martin Luther University Halle-Wittenberg)



Ass. Prof. Kristin van Zwieten (University of Oxford)



Involvement:

- To allow open-minded debate to ensure that aspects of the project which may provide difficulties of transposition into the legal culture of a Member State can be addressed
- To provides certain contacts to European/national representatives in the insolvency field
- Provide comment on reporters' draft texts
- Alert Reporters to national or regional (scientific) events in which ELI Business Rescue project can be discussed and be available as a speaker

ELI Members are still welcome to register for the MCC Register via: <u>businessrescue@europeanlawinstitute.eu</u>



Topic 1: Special challenges to rescue of SMEs

Ass. Prof. Kristin van Zwieten

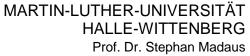


Topic 2: Employees' position in business rescue

Prof. Stephan Madaus







The Employees' Position in Business Rescue

Dominant or Irrelevant?





The specific interest of an employee of an insolvent employer

- Continuation of employment with the rescued business
 - Livelihood and family depending on the job
 - Changing the employer would
 - Devalue firm-specific knowledge and expertise
 - Cause a disruption in the employee's career
 - Full payment of unpaid salary

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- Livelihood and family depending on the job
- Incapable of negotiating liens on collateral





The specific interest of an IP/DIP of an insolvent employer

- Continuation of the business or transfer of the business (as a going concern)
 - Maximizing value and creditor pay-off
 - Management stays in control
 - \rightarrow BUT
 - Legacy costs (salary, pensions) scare off investors
 - Reducing the workforce (to zero?!) improves the firms' value

= Common interest in business continuation, BUT conflicting interests regarding protection of employment contracts from termination or salary claims





Protecting the specific interest of an employee

1. Employment contracts are not terminated automatically in case of insolvency

 \rightarrow BUT

- IP may terminate them under insolvency law (executory contracts)
- Labour law protection does not apply in most jurisdictions
- "Collective dismissals" need to be pre-negotiated in some jurisdictions (EW, GE, IT, PO, FR)
- → In case of pre-insolvency or specific reorganisation-only proceedings, however,
 - Labour law protection is fully available in most jurisdictions





Protecting the specific interest of an employee

2. Employment contracts are transferred automatically in case of a transferred business

(Protection under Aquired Rights Directive 2001/23/EC)

- → In case of pre-insolvency or specific reorganisation-only proceedings in most jurisdictions
- → Protection in case of a business sale by IP under insolvency law?
 - Art. 5 authorises MS to exempt such sales or at least prevent the transfer of old claims
 - Diverse legislation and interpretation across MS (see EW, GE, PO, ESP BE, AUS, NE)
 - BUT: Sale under insolvency plan does not result in an automatic transfer of employees





Protecting the specific interest of an employee

- 3. Safeguarding employees' salary claims
 - a) In case of an assumed employment contract or post-commencement claim:
 - Salary claims are **administrative expenses** (ahead of other creditors)
 - b) In case of a terminated contract and/or pre-commencement claim:
 - Salary claims or damages claims for wrongful termination are unsecured claims
 - Special protection?
 - (1) Collateralised by State Funds (unpaid pre-petition salary claims; min. 3 month) (Protection under Directive 2008/94/EC, formerly 80/987/EEC)
 - (2) Preferred claims under insolvency law in some jurisdictions (EW; FR; GR, IT, PO, ESP; BE, HU)





Protecting the specific interest of an employee?

Conclusion:

- Limited harmonisation in this area
- Common idea of need for special protection
- Difficult to strike balance with necessary quick lay-offs under a rescue strategy
- \rightarrow Further harmonisation seems possible.



Topic 3: Contractual issues re business rescue

Prof. Bob Wessels



Outlook and closure

Prof. Bob Wessels



Join the MCC!

ELI Members are most welcome to join the MCC for the Business Rescue Project

Register via: <u>businessrescue@europeanlawinstitute.eu</u>

www.europeanlawinstitute.eu businessrescue@europeanlawinstitute.eu www.tri-leiden.eu/projects/businessrescue