

# Rescue of Business in Insolvency Law



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**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**

## Introduction of panel



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: [businessrescue@europeanlawinstitute.eu](mailto:businessrescue@europeanlawinstitute.eu)

# Topic 1:

# Special challenges to rescue of SMEs

*Ass. Prof. Kristin van Zwieten*

# Topic 2: Employees' position in business rescue

*Prof. Stephan Madaus*

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MARTIN-LUTHER-UNIVERSITÄT  
HALLE-WITTENBERG  
Prof. Dr. 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**
  - 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
    - 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

→ 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 Acquired 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
- Further harmonisation seems possible.

# Topic 3:

# Contractual issues re business rescue

*Prof. Bob Wessels*

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# Outlook and closure

*Prof. Bob Wessels*

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# Join the MCC!

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

*Register via:*

[businessrescue@europeanlawinstitute.eu](mailto:businessrescue@europeanlawinstitute.eu)



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