

SOCIAL POLICY

The impact of social policy on cross-border insolvency

Jennifer L. L. Gant looks at how social policy regulation can impact corporate rescue success



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Introduction

Cross-border insolvency can often be impeded by the lack of legal coordination between jurisdictions, both in terms of differences in insolvency systems and in other more fundamental differences in legal approach to regulation generally. The European Insolvency Regulation (“EIR”) is one attempt to increase cross-border coordination in an area that is important to business-related market activities. While the EIR aims to coordinate insolvency proceedings within the EU, gaps remain between Member state insolvency procedures as well as in other regulations linked to insolvency. The content and even the fundamental aims of regulation differ throughout the EU, exemplified through a comparison between the UK and France below. One legal area that can be a particular obstacle to effective cross-border business coordination is social policy regulation which impacts corporate rescue success.

The individual quality of social policy

Social policy has an influence on the aims of regulation throughout the EU. However, Member states retain their own views and approaches to it. The individual character of social policy is evident in the hands-off approach taken by the EU in relation to social policy legislation. As such, EU social policy regulation primarily takes the form of directives, which only require Member states to achieve a particular result, without dictating the means in which that result should be achieved. The absence

of a clearly defined and legislated EU social policy is due to the belief that social policy, and labour law in particular, lies at the heart of national sovereignty. It is also an important element by which the integrity and political stability of Member states is preserved.¹ The individualistic character of social policy in the Member states has consequences for the implementation of any legislation with a social connection. This includes insolvency laws, where social considerations naturally arise because the outcomes of insolvency procedures have an impact on individuals, small businesses and communities, necessitating the protection of these interests.

Diverse approaches to labour regulation

Jurisdictional differences in labour regulation can be an issue in cases of multinational companies going through restructurings, in which layoffs or redundancies may be required. This is because there will be different rules for compliance in the various Member states. General dismissal rules will differ as will the involvement of unions and employee participation in decision making. Apart from the potential confusion, different treatment of employees in different jurisdictions is likely to affect the morale of the work force, regardless of the fact that any actual or perceived inequitable results may be solely due to the requirements of laws specific to each jurisdiction. In addition, when the success of a corporate rescue procedure is reliant on the need to sell all or

part of the undertaking, there are different rules which will affect the way employee contracts are managed. This will be particularly relevant in a case where the buyer is from a different jurisdiction. Even those procedures initiated with a view to liquidation may result in the differential treatment of employees.

The Acquired Rights Directive²

While there are many labour laws which may affect the outcomes of an insolvency procedure, the rules relating to the transfer of employment contracts following a business transfer are of particular importance. Though the Acquired Rights Directive (“ARD”) provides a common framework for the transfer of employment contracts across the EU, Member states retain considerable flexibility in how they implement it. Differences in implementation derive from the diverse aims of the underlying labour law. These include the consequences of dismissing employees, union involvement, employee participation and the differences in the interpretation between courts in different jurisdictions.³ These underlying differences are influenced by a jurisdiction’s legal family, regulatory style, economic and social policies, among a number of other factors.

Legal families and regulatory style

The differences in the way in which the rules have been enacted in certain Member states are only partly due to whether they are members of the civil or common

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law legal families, as the former has a reputation for more interventionist legislation than does the latter. In France, the various rules which comply with the ARD are contained throughout the labour code. While Articles L.1224-1 of the labour code state the conditions in which a transfer of employment contracts will take place, rules regarding employee consultation, dismissal for economic reasons, and the effects of a transfer on collective agreements are contained elsewhere in the employment code. In the UK, the effects of a transfer of undertakings on employment contracts are entirely regulated by TUPE 2006, including collective agreements, dismissal and specific insolvency exceptions.

Social and economic concerns

Business transfers occurring out of corporate rescue procedures are typically caught by acquired rights provisions in both the UK and France. However, attitudes toward this application of acquired rights differ due to differences in the underlying economic and social policies of

each jurisdiction. Rules about migration of employment contracts to a buyer upon the sale of a business have been in place within the French labour code since 1928⁴ as it was recognised that business transfers could put employee job security at risk, a social concern. However, these rules did not apply in the UK, given the view of their incompatibility with the fundamental principle of freedom of contract, a legal and potentially economic concern. It was not until TUPE 2006⁵ was brought into force that the ARD was implemented in such a way as to meet the minimum criteria stipulated by EU law. The differences in approach to the issue of acquired rights demonstrate fundamental jurisdictional differences which alone can cause an impediment to coordination.

An example of a specific functional difference

The results of a failure to comply with the law, particularly in respect to consultation, vary greatly between the UK and France. A failure to consult in

France can lead to penal sanctions of imprisonment and/or a fine. Prior information and consultation is required to be given to the relevant work councils who will provide an opinion on the terms of the agreement which can potentially delay a deal for months. In the UK, consultation with employee representatives is required for a specified period as well⁶, but there are no state-organised institutions such as the French work councils to report to. As such, the information and consultation exercise is dependent upon the parties involved and may or may not involve a union. A failure to consult in the UK will only yield a penalty for an employer if an employee chooses to pursue the failure at an employment court.

Conclusion

Conflicts such as those described above are common between the aims of labour law⁷ and the aims of market-driven branches of the law, such as insolvency. As labour laws vary more widely across states due to the individual character of social policy, the discrepancy between levels of labour protection could impede the effective coordination of insolvency proceedings with an international element. This could potentially limit the ability to coordinate cross-border cases to the greatest advantage of the stakeholders in all involved jurisdictions. Awareness of these differences and distinctions could be a key influencing the coordination of cross-border restructurings. ■

Footnotes:

- 1 C. Barnard, *EC Employment Law* (2006, Oxford University Press, Oxford) 7-8.
- 2 Council Directive 2001/23/EC.
- 3 Global Human Resources Lawyers, *Transfer of Undertakings Guide* (2009, Ius Laboris, Brussels).
- 4 Now contained in *Code du travail* Article L. 1224.1-4.
- 5 SI 2006/246 Transfer of Undertakings (Protection of Employment) Regulations 2006.
- 6 See TUPE 2006 Articles 13-16.
- 7 N Bruun and B Hepple, "Economic Policy and Labour Law" in B Hepple and B Veneziani, eds, *The Transformation of Labour Law in Europe* (Hart Publishing, 2009) 31-57.



DIFFERENT TREATMENT OF EMPLOYEES IN DIFFERENT JURISDICTIONS IS LIKELY TO AFFECT THE MORALE OF THE WORK FORCE

