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THE RIGHTS OF EMPLOYEES IN THE EVENT OF THE EMPLOYER'S INSOLVENCY:

A Comparative Approach to the Rights of Employees During Restructuring in the United States and Europe

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ABSTRACT: The insolvency of a company has severe consequences for those intimately connected with the conduct of the business. In this context, insolvency law and employment law frequently have divergent objectives. Insolvency law is concerned with either reducing operating costs and rescuing the business or, alternatively, liquidating the business and distributing the proceeds to creditors. By contrast, employment law is concerned with preventing unjust dismissals and the protection of employees. The United States and the European Union have two contrasting attitudes towards the treatment of employment relations in the event of a corporate restructuring and sale.

I. INTRODUCTION

The insolvency of a company[1] has severe consequences for those intimately connected with the conduct of the business, such as directors, shareholders and employees.[2] However, employees are clearly the most vulnerable constituency. Most employees cannot (or do not) insure themselves against their employer's failure. Moreover, they do not have any secured rights in the failed business. As a result, employees may be considered more deserving of assistance than other creditors who are better able to protect themselves.[3]

Companies experiencing financial difficulties often try to reduce operating expenses by decreasing labour costs.[4] In the event of insolvency, the need to reduce labour costs becomes acute. This creates an inherent conflict between the objectives of employment law on the one hand, and insolvency law on the other. Employment law dealing with termination aims to protect the rights of employees. In Europe, for example, employees are said to have a property right in their jobs. By contrast, insolvency law is traditionally concerned with the liquidation of assets and the distribution of those assets to creditors or, alternatively, the rescue of the business through reorganisation. Thus, in the event of insolvency the law must balance the objectives of protecting employees against maximizing the value of the firm for the benefit of creditors.[5]

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[1] In the United States the insolvency of a corporation is referred to as 'bankruptcy'. In the United Kingdom bankruptcy is only used in reference to individuals.
[2] Review Committee Report of Insolvency Law & Practice (Cork Report) (1982) CMND 8558, para 203.
[3] Elizabeth Warren "Bankruptcy Policy" (1987) 54 U Chi L Rev 775, 782- 83 and 790 citing 11 USC s 507 (1982).
[4] Mark A Rothstein et al *Employment Law* (West, St. Paul, 1994) 589.

This balance can take different forms. Each country must evaluate which of the competing objectives is more important to its economy. The common understanding is that it is easier in the United States to lay off employees and rescue a business whereas in Europe the protection of employees enjoys higher priority. This Article examines the insolvency regimes of the United States (US) and European Union (EU) and their substantive differences. It seeks to demonstrate how the conflict has been reconciled and determine whose rights (employers, employees or creditors) are favoured under each system.

Furthermore, the right of just cause for dismissals has become an important right of many employees throughout the world. It is mentioned in Article 25 of the Revised European Social Charter of the Council of Europe[6] and in Article 30 of the Charter of Fundamental Rights of the European Union[7]. Outside of Europe, it is protected by Article 4 of the ILO Termination of Employment Convention.[8] Insolvency law must also take account of these developments.

A. Rescue or Liquidation?

The objective of insolvency should be the maximization of the value of the assets of a firm for the benefit of all creditors in a company.[9] In the event of insolvency, the preliminary issue is whether to liquidate or reorganize the company. Generally, the rescue or reorganisation of a company is more advantageous to the creditors. A piecemeal sale of the companies' assets might not yield as much value as the sale of the company as a going concern. However, attention must be paid to the outcome of the reorganisation. A rescue is only successful if the earnings exceed the costs after the reorganisation. This

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[5] Wilfried Berkowsky "Das neue Insolvenz-Kuendigungsrecht" (1999) NZI 1999, 130.
[6] European Social Charter of 18 October 1961, Europ TS No 35; 529 UNTS 89.
[7] EU Charter of Fundamental Rights of 7 December 2000 [2000] OJ 2000 C 364/1.
[8] Convention Concerning Termination of Employment at the Initiative of the Employer, June 22 1982, ILO Convention No 158 and Recommendation No 166 of 1982.
[9] Julian R Franks and Walter N Torous "Lessons from a comparison of US and UK Insolvency Codes" in Jagdeep S Bhandari and Lawrence A Weiss (eds) *Corporate Bankruptcy* (Cambridge University Press, Cambridge, 1996) 464.

will generally be true for most reorganisations because the majority of insolvencies are caused by temporary liquidity problems.

Having said that, reorganisations typically involve significant business decisions effecting employees. The difficulty is to balance the financial obligations owed to creditors against the social needs of the employees.

A reorganisation can take place in two ways. The company can either continue to do business under the same ownership or be transferred to a new owner. The transfer of a business during insolvency has a major impact on the employees. Not only do employees fear the loss of their jobs, they may also be concerned with unpaid wages, holiday entitlements and their retirement savings. Insolvency law must take these concerns into account. Generally speaking, there are two possible solutions. The existing employment contracts may either be terminated by the transfer or be transferred to the new owner. While continuity of contractual relations might suggest the fairest option is to transfer the contracts, the goals of insolvency law might be thwarted. The new owner will often want to freely decide whom to employ and to offer new employment terms based on changed circumstances. Often potential buyers will place conditions on their purchase, such as a prior shut down of existing uneconomical parts of the business and a termination of uneconomical employment contracts.[10] Therefore, the automatic transfer of employment contracts may prevent effective reorganisations if potential buyers face too many constraints on their managerial freedom. The issue is also one of 'super-priority'. The price paid by the new owner will be lower if they must fully meet all the claims of the workforce. Nevertheless, this gain for the employees is at the expense of other creditors because they will receive less money for the sale of the business. In effect, with an automatic transfer of employment contracts the employees are ranked above everybody else and the other creditors are relegated to a lower priority.[11]

[10] Gerald I Lies "Sale of a Business in Cross-Border Insolvency: The United States and Germany" (2002) 10 Am Bankr Inst L Rev 363, 409.
[11] Hugh Collins "Transfer of Undertakings and Insolvency" (1989) 18 ILJ 144.

The following sections of this article describe the law concerning transfers of businesses in the EU and the US. The main emphasis is placed on the transfer of the employment relationships while acknowledging the many other problems arising in the event of an employer's insolvency. This article seeks to answer the question: which system is most advantageous to employees, employers, or purchasers of an insolvent business?

II. THE EUROPEAN UNION LAW

In the EU, three directives concerning employees' rights on the transfer of undertakings, collective redundancies and insolvency were initially adopted as part of the 1974-76 Social Action Programme.[12] They were drafted to secure two main objectives. First, they were intended to assist in the process of restructuring in order to facilitate the emergence of more competitive and efficient undertakings.[13] Secondly, the directives addressed the social consequences and effects of these restructurings. Thereby, the directives acknowledged the employer's managerial prerogative to restructure the business and dismiss employees subject only to national restraints where they may exist.[14]

The legal basis for all three directives is found in Article 94 EC.[15] The aim is to achieve minimum standards of employment protection for employees and harmonise the conditions of competition for Community producers.[16] However, it is acknowledged that national variations in labour law present insuperable obstacles to 'full harmonisation'.[17] Thus, it is not the intention of the Community to establish a uniform level of protection amongst the Member States but rather to achieve a partial harmonisation.[18] Unlike regulations, EC directives are only binding as to the outcome to be achieved.[19] They must

[12] Social Action Programme [1974] OJ 1974 C 13/1.
[13] Catherine Barnard *EC Employment Law* (2d ed, Oxford University Press, Oxford, 2000) 445.
[14] *Dansk Metalarbeiderforbund and Special Arbejderforbundet i Danmark v Nielsen & Son Maskin-fabrik A/S* (248/83) [1985] ECR 553.
[15] Article 94 EC concerns the approximation of measures which directly affect the establishment and functioning of the Common Market.
[16] Gillian More "Community Labour Law and the Protection of Employees' Rights in the United Kingdom" (1994) 19 Eur L Rev 660, 668.
[17] Brian Bercusson *European Labour Law* (Butterworths, London, 1996) 52.
[18] *Foreningen af Arbejdsledere I Danmark v Daddy's Dance Hall A/S* (324/86) [1988] ECR 739, para 16.
[19] Jeff Kenner *EU Employment Law* (Hart Publishing, Oxford, 2003) 52.

be implemented into national law and thus provide for a certain minimum standard of protection.[20] On the other hand, the Member States are left with a degree of flexibility regarding the implementation and have room for special considerations. Accordingly, Member States are free to introduce laws that are more favourable to employees than minimally required.

The following sections address the three directives starting with the Acquired Rights Directive (Part A), followed by the Collective Redundancy Directive (Part B) and the Insolvency Directive (Part C). Finally, Part D discusses the national transformation of these Directives using the example of the United Kingdom and Germany.

A. The Acquired Rights Directive

The first Acquired Rights Directive 77/187/EEC[21] aimed to "ensure as far as possible the continuation without a change of the contract of employment or the employment relationship with the transferee in order to avoid the workers concerned being placed in a less favourable position by reason of the transfer alone."[22] It was amended by Directive 98/50/EC[23] of 29 June 1998. The consolidated Directive 2001/23/EC[24] has "regard to the rescue of undertakings in economic difficulties" but also provides protection for the employees in the event of such rescues, including the transfer of the business.[25]

[20] Treaty establishing the European Community (EC Treaty) consolidated version OJ C 325 of 24 Dec 2002 art 249 and the implementation clauses in the directives: Council Directive 2001/23/EC art 11; Council Directive 98/59/EC art 7; Council Directive 2002/74/EC art 2.
[21] Council Directive 77/187/EEC 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 of 14 February 1977, OJ 5 March 1977, L 61/26.
[22] *Landesorganizationen i Danmark for Tjenerforbundet i Danmark v Ny Muelle Kro* (287/86) [1987] ECR 5465.
[23] Council Directive 98/50/EC amending Council Directive 77/187/EEC 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 of 29 June 1998, OJ 17 July 1998, L 201/88.
[24] Council Directive 2001/23/EC 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 of 12 March 2001, OJ 22 March 2001, L 82/16 (Acquired Rights Directive).
[25] Acquired Rights Directive, recitals (3) and (7).

In short, the Directive provides for the transfer of the employment relationship in the event of a transfer of a business or undertaking or part thereof. Furthermore, the Directive prohibits using the transfer as a ground for dismissal, and it obliges employers to inform and consult with employees' representatives.

Before the introduction of Directive 77/187/EEC in 1977, European law was divided. In France employment contracts have been transferred to the new owner of the business since 1928.[26] This served two purposes. First, it protected the employees from losing their jobs. Second, the new employer acquired a business together with the workforce and the necessary skills and knowledge to continue operations. By contrast, in the common law countries, the employment contract was considered a personal contract and therefore could not be transferred to another employer.[27]

1. Scope

According to Article 1: “the Directive shall apply to any transfer of an undertaking business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.” The business must be located in the territorial scope of the EC Treaty.

(a) Transfer of a business or undertaking

The text of the Directive gives little assistance as to what constitutes a transfer. Article 1(1)(b) points out that a transfer within the meaning of the Directive is “a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary”. Furthermore, it applies to public and private undertakings engaged in economic activities whether or not they are operating for gain.[28]

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[26] L122-12, al 2 Code du Travail (previously Art. 23, al 7 puis 8 of Livre 1) of 18 July 1928. See Couturier, *Droit du Travail: I/Les Relations Individuelles de Travail* (PUE, Paris, 1993) 373.
[27] *Nokes v Doncaster Amalgamated Collieries Ltd* (1940) AC 1014.
[28] Acquired Rights Directive, art 1(1)(c).

The definition of a transfer of a business or undertaking has been the subject of numerous cases. Following a broad purposive interpretation, the European Court of Justice held that a transfer may result from a contract but also from an administrative or legislative act or a court decision.[29] This includes "any legal change in the person of the employer".[30] Thus, a sale by a transfer of shares does not fall within the scope of the Directive. In such cases, the legal identity of the employer remains the same, though the identity of the proprietor of the share capital changes.[31]

In *Spijkers*, the Court identified a range of factors that can determine a transfer.[32] These include, for example, the type of business concerned, the transfer of tangible assets and their value at the time of the transfer, the retention of the employees and customers and the continuation of the operation with the same or similar activities. Subsequently, the Court held in *Süzen* that an entity is more than the 'activity entrusted to it' and its identity emerges from other factors, such as its workforce, management staff, the organisation and operational resources.[33] A group of workers may constitute an economic entity in certain labour-intensive sectors because the new employer will have to take on a major part of the workforce to perform whatever task is required.[34]

The second mode of transfer can result from a merger. It is assumed that the definition of a merger is the same as in Articles 3(1) and 4(1) of Directive 78/855/EEC[35].[36] In that Directive, Article 12 expressly refers to the fact that employees' rights are protected in accordance with Directive 77/187/EEC in the event of a merger. However, the merger must include a change of identity of the employer. Share mergers or takeovers by the acquisition of shares are therefore excluded from the scope of the Directive.

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29 *Barnard*, above n 13, 454.
30 *Allen and others v Amalgamated Construction Co Ltd* (C-234/98) [1998] ECR I-8643, para 17.
31 *Barnard*, above n 13, 460.
32 *Spijkers v Gebroeders Benedik Abbatoir CV* (24/85) [1986] ECR 1119, 1129 para 12.
33 *Süzen (Ayse) v Zehnacker Gebäudereinigung GmbH Krankenhausservice* (C-13/95) [1997] ECR I-1259, para 15.
34 Ibid paras 18-21; *Allen v Amalgamated Construction Co Ltd*, above n 30.
35 Third Council Directive Concerning Mergers of Public Limited Companies 78/855/EEC, OJ L 295/36.
36 *Barnard*, above n 13, 459.

The question of whether there is a transfer following a merger is decided by the national courts based on the facts. The 'employment test' applying the principles laid down in *Spijkers* looks to see whether one employer has replaced another.[37]

(b) Definition of 'Employee'

Who constitutes an employee under the Directive is left to national law. Article 2(1)(d) refers to any "person who, in the Member State concerned, is protected as an employee under national employment law." Accordingly, national law also determines the existence of an employment contract.[38] Member States may not, however, exclude part-time, fixed-term or temporary employment relationships. If only part of the business is transferred the Directive only applies to the employees who are assigned to that part being transferred.[39]

2. Employees' Rights

Employees enjoy three layers of protection: (1) automatic transfer of the employment relations from the transferor to the transferee; (2) protection from dismissals for reason of the transfer; and (3) obligation of the transferee and the transferor to inform and consult the worker's representatives.

(a) Transfer of the employment relationship

In order to protect the rights of employees "the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall be transferred to the transferee."[40] The transferee is obliged to observe

[37] *Bork International v Foreningen af Arbejdsledere i Danmark* (101/87) [1988] ECR 3057; *Berg v Besselsen* (144 and 145/87) [1988] ECR 2559.
[38] *Wendelboe v L J Music* (19/83) [1985] ECR 457, para 16; now Acquired Rights Directive, art 2(2).
[39] *Botzen v Rotterdamse Drbogdok Maatschappij* (186/83) [1985] ECR 519; *Schmidt v Spar und Leihkasse* (C-392/92) [1994] ECR I-1311.
[40] Acquired Rights Directive, art 3(1).

the terms and conditions of the contract.[41] All individual and collective rights are automatically transferred. First, it was held that employees may not waive their rights due to the mandatory nature of the provision.[42] It was assumed that continued employment was more favourable to the employees. Therefore, employees could not consent to changes in their terms and conditions of employment.[43] In *Katsikas* however, the Court changed its position.[44] Employees can refuse to be transferred based on their fundamental right to freely choose an employer. It is then left to the Member State to decide upon the fate of the employment contract.[45] In Germany, the contract generally continues with the transferor whereas in France and Britain the contract is considered terminated.

(b) Protection against dismissal

The transfer of the business does not provide a valid reason to dismiss employees.[46] In order to determine whether the dismissal took place as a result of the transfer it is necessary to consider all the objective circumstances of the dismissal, particularly the date of the dismissal.[47] Employees unlawfully dismissed shortly before the transfer have a claim against the transferee that their dismissal was unlawful.[48] The contract of employment, however, must be regarded as still existing. The question is whether the transferee is liable for the primary obligation to continued employment or for all secondary obligations such as compensation for the loss of employment. This is a matter of national law.[49] According to the European Court of Justice it is the secondary rather than the primary obligations of the employment contract which transfer to the

[41] Ibid art 3(3).
[42] Roger Blanpain *European Labour Law* (6th ed, Kluwer Law International, The Hague, 1999) para 573.
[43] See also, *Berg*, above n 37, para 11.
[44] *Katsikas v Konstandinidis and Skreb and Schroll v PCO Stavereibetrieb Paetz & Co Nachfolger GmbH* (C-132, 138 and 139/91) [1992] ECR I-6577.
[45] *Barnard*, above n 13, 480.
[46] Acquired Rights Directive, art 4(1).
[47] *Blanpain*, above n 42, para 576.
[48] *Déthier Equipement v Dassy* (C-319/94) [1998] ECR I-1061, para 41.
[49] *Europièces v Wilfried Sanders and Automotive Industries Holding Company SA* (C-399/96) [1998] ECR I-6965.

transferee.[50] Thus, employees cannot claim continued employment with the new employer, but may claim reimbursement for the incurred loss. The aim of the Directive is not to prevent *any* change in the business. It is directed at the protection of employees' rights.[51]

Both the transferor and the transferee may dismiss employees "for economic, technical or organisational reasons entailing changes in the workforce".[52] There has been little judicial guidance as to what this might entail. For example, in *Merckx* the European Court of Justice only mentioned this right without giving further details.[53] In *d'Urso*, Advocate General van Gerven said that the Directive does not permit every dismissal for economic, technical or organisational reasons.[54] Moreover, a dismissal is prohibited if it occurs solely as a result of the transfer of the business. In other words, only dismissals that would have been made in any event fall within the exclusion.

In contrast, English courts have dealt with the matter extensively. The 'economic reason' must relate to the conduct of the business. Thus, redundancy constitutes a valid reason.[55] Broader economic reasons, however, such as the desire on the part of the transferor to achieve a higher sale price or achieve a sale at all do not fall within the scope of an 'economic reason'.[56] Furthermore, the reason must entail a change in the nature and type of employment. As such, flexibility and cost-cutting measures that are not premised on a change in the number or the functions of the workforce are not valid reasons for a dismissal.[57] In sum, the employer must have a genuine reason and that reason must result in the dismissal. A reduction of the workforce during insolvency could be such a reason if it is motivated by the need to reduce the costs of the business and keep the business going.[58] A further clarification on this point by the European Court of Justice is desirable.

[50] *Déthier*, above n 48, para 41.
[51] Acquired Rights Directive, recital 3.
[52] Ibid art 4(1).
[53] *Merckx v Ford Motors Company and Neuhuys* (C-171 and 172/94) [1996] ECR I-1253.
[54] *D'Urso v Ercole Marelli Elettromeccanica Generale* (C-362/89) [1991] ECR I-4105.
[55] *Barnard*, above n 13, 483.
[56] *Wheeler v Patel and J. Golding Group of Companies* [1987] IRLR 211.
[57] *Berriman v Delabole Slate Ltd* [1990] ICR 636.
[58] Additionally, if a part of the business is shut down then a dismissal of those employees is a just reason if they cannot be employed in another part of the business.

(c) Information and consultation

The Directive requires the transferor and the transferee to inform and consult the representatives of the employees affected by the transfer.[59] These representatives may be trade unionists or works councillors. The Member States have to take measures to designate worker's representatives.[60]

(d) Change of the Terms and Conditions of Employment

Often a transferee will want to change the terms and conditions of employment in order to bring new employees into line with those of its existing workforce. If the transferee is offering better conditions or if the employee thinks the changes might safeguard their job, the employee may wish to consent to the changes. The European Court of Justice ruled in *Daddy's Dance Hall*: "employees are not entitled to waive their rights conferred on them by the Directive".[61]

3. Exception in the Case of Insolvency Proceedings

Under the first Directive 77/187/EEC it was open to dispute whether the transfer of an insolvent business fell within the scope of the Directive. The Directive itself was silent on this question. In *Abels,* the European Court of Justice held that the Directive did not apply where the transferor is bankrupt or analogous insolvency proceedings have been instituted.[62] The Court allowed an exception if the insolvency proceedings were directed at the liquidation of the business under judicial observation and the debtor loses possession over the assets.[63] National insolvency law would pre-empt Community law in those circumstances because it will normally give priority to the property rights of the

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[59] Acquired Rights Directive, art 7.
[60] *Commission v UK* (C-382/92) [1994] ECR I-2435.
[61] *Daddy's Dance Hall*, above n 18.
[62] *Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* (135/83) [1985] ECR 469.
[63] *D'Urso*, above n 54.

creditors. Therefore, the opportunity to save the business and preserve jobs override the provisions of the Acquired Rights Directive.[64] The Court imposed two limits. First, the Member States could apply the provisions of the directive to a transfer arising out of insolvency. Second, the Court ruled that the directive did apply in situations where a transfer took place in proceedings that intend the continuation of the business (semi-insolvency proceedings).

In pre-insolvency stages the directive remains effective, even where proceedings have been instigated[65] or where a company has gone into voluntary liquidation.[66] This raises the question of how to distinguish between insolvency and pre-insolvency proceedings. Advocate General van Gerven in *d'Urso*[67] emphasized the purpose of the proceedings and the intensity of judicial control. Pre-insolvency proceedings intend to resolve temporary cash-flow problems and are not directed at the liquidation of the assets of the debtor. In contrast, the purpose of insolvency proceedings is the liquidation of the company's assets. During insolvency proceedings courts have more extensive control over the company.

Where the aim was to rescue the business in administration proceedings the Court ruled that the Directive is applicable.[68] In *Déthier* the Court clarified that the Directive applies to a transfer of an undertaking being wound up by a court through a liquidator if the undertaking continues to trade during the winding up proceedings.[69] The Court again emphasized the purpose of the procedure in question. The main purpose was the continuation of the business. Where the business continued to trade (while being wound up) the Directive applied to every transfer.

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[64] Paul Davies "Acquired Rights, Creditors' Rights, Freedom of Contract and Industrial Democracy" (1989) 9 Yearbook of European Law 21, 45.
[65] *Spano and Others v Fiat Geotech and Fiat Hitachi* (C-472/93) [1995] ECR I-4321.
[66] *Europièces*, above n 49. The reason for this is that the shareholder's meeting and not the court decides to wind-up the company and appoint the liquidators.
[67] *D'Urso*, above n 54.
[68] Ibid and *Spano*, above n 65.
[69] *Déthier*, above n 48.

If the business was not continued or was liquidated, there could be no transfer of the undertaking or business.[70] The reason why many companies go into pre-insolvency proceedings is that the chances of selling part of the business as a going concern are much higher. This is precisely the situation that justified the exclusion of insolvency transfers from the application of the Directive.[71] In the case of a transfer via 'asset deal' the business continues to operate whereas the old owner of the business is liquidated.[72] This would also trigger the application of the Directive according to the European Court of Justice. On the one hand, employees require the same protection as in any other transfer; on the other hand, the transfer of the employment relationships might hinder the rescue of the business because the transferee is not willing to take on all the employees. The result would be the liquidation of the company and the loss of all the jobs.

Directive 98/50/EC addressed the issue of insolvency proceedings. It provided for the exclusion of the Directive during liquidation. Basically, the Directive expressly laid down the criteria introduced by the European Court of Justice in *d'Urso*.

The amended Directive 2001/23/EC continues this new approach. Article 5(1) provides that Articles 3 and 4:

> …shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).

The Member States are free to implement laws and regulations that are more favourable to employees.[73] Thus, they may provide for the application of the Directive in every transfer of a business even during insolvency proceedings.[74]

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[70] Romana Weber "Arbeitnehmerschutz contra Sanierung? – Zu den juengsten Entwicklungen im Betriebsuebergangsrecht" (1998) EUZW 1998, 583, 585.
[71] *Davies*, above n 64, 47.
[72] *Weber*, above n 70, 585.
[73] Acquired Rights Directive, art 8.
[74] This has been done by Spain, France, Germany, Denmark and the United Kingdom.

However, this refers only to liquidation proceedings. Although the Directive was designed to be "rescue-friendly" this would contradict its purpose. The transfer of the business to a new owner by use of an asset deal still prompts the application of the Directive and, therefore, the transfer of the employment relationships.

If a Member State makes no use of the right to exclude the application of the Directive during liquidation, it may create laws permitting the transferee to be indemnified against the transferor's debts as long as the affected employees receive compensation consistent with the Insolvency Directive.[75] The Directive clarifies that it does not matter whether the insolvency proceedings have been opened with a view to the liquidation of the assets of the transferor as long as these proceedings are under the supervision of a competent public authority. In addition (or instead) the Member State may allow negotiations between the transferor, transferee and the employees' representatives to agree on changes in the employees' terms and conditions of employment "to safeguard employment opportunities by ensuring the survival of the business".[76] This also applies to situations where the transferor experiences a crisis short of liquidation proceedings or bankruptcy.[77]

Additionally, Member States are obliged to "take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive".[78]

4. Conclusion

The Acquired Rights Directive covers various types of corporate restructurings including mergers, transfers of undertakings and corporate divisions. Only a few situations such as liquidations of companies are exempted from the scope of the Directive. Therefore, employees' interests are highly protected under European law. Every employment

[75] Acquired Rights Directive, art 5(2)(a).
[76] Ibid art 5(2)(b).
[77] *Kenner*, above n 19, 352.
[78] Acquired Rights Directive, art 5(4).

contract is transferred to the purchaser of the insolvent business. Dismissals based solely on the grounds of the transfer are prohibited. Critics argue that the Directive restricts the ability to restructure the workforce. However, dismissals for economic reasons are allowed. As a result, administrators may slim down the workforce in the face of insolvency. The transferor may reduce the numbers and change the functions of the workforce in accordance with operational needs, although the transferor may not dismiss in preparation for the transfer, nor simply replace the workforce with a cheaper one.[79] Where the transferor does dismiss for a transfer-related reason, liability for compensation passes to the transferee.

B. The Collective Redundancy Directive

The Collective Redundancy Directive 92/56[80] of 24 June 1992 amended Directive 75/129.[81] Both directives were consolidated by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.[82]

The motives for the directive were to provide protection of the workers in collective redundancies and to promote free movement of labour and a level playing field for competition.[83] The directive only contains procedural rules. It provides for consultation with workers in the case of a collective redundancy, as well as notification of the competent public authority.

1. Scope

The directive defines collective redundancy in Article 1 as:

[79] Colin Bourn (ed) *The Transfer of Undertakings in the Public Sector* (Ashgate, Dartmouth, 1999) 159.
[80] Council Directive 92/56 on the approximation of the laws of the Member States relating to collective redundancies of 24 June 1992, OJ 26 August 1992, L 245.
[81] Council Directive 75/129 on the approximation of the laws of the Member States relating to collective redundancies of 17 February 1975, OJ 22 February 1975, L 48.
[82] Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies of 20 July 1998, OJ 12 August 1998, L 225/16 (Collective Redundancy Directive).
[83] European Commission *Proposal for the Directive* (1997) 5 EC Bull (No 9) para 42.

> …dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is: - either, over a period of 30 days (1) at least 10 in establishments normally employing more than 20 and less than 100 workers; (2) at least 10 per cent of the number of workers in establishments normally employing at least 100 but less than 300 workers; (3) at least 30 in establishments normally employing 300 workers or more; - over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.

Employees with fixed-term contracts, or employed by public authorities, as well as crews of sea-going vessels are excluded from the application of the directive.

2. Information and consultation

If the employer is contemplating collective redundancies they must inform and consult the worker's representatives.[84] The consultation is aimed to begin in good time with a 'view to reaching an agreement'. This allows time for the workers' representatives to make 'constructive proposals' to reduce the number of workers affected and mitigate the consequences.[85] Workers must be given 'all relevant information' including 'the reasons for the redundancies'.[86] This is a very strong form of consultation close to collective bargaining.[87]

Even though the directive does not intend 'full harmonisation' of national systems for the representation of workers, the employer cannot mandate the system of workers' representation unilaterally because it would deprive the Directive of its effectiveness.[88] The Member States are responsible for taking all measures necessary to ensure consultation with employees even for non-unionised companies.[89]

[84] Collective Redundancy Directive, art 2(1).
[85] Ibid art 2(2).
[86] Ibid art 2(3).
[87] *Blanpain*, above n 42, para 556.
[88] *Commission v UK*, above n 60, para 25.
[89] Ibid; *Commission v UK* (383/92) [1994] ECR I-2479.

3. Notification of a competent public authority

After the consultation of the workers' representatives the employer must notify the competent public authority in writing of any projected collective redundancies.[90] The redundancies take effect not earlier than 30 days after the notification of the authority.[91] The authority shall use this period "to seek solutions to the problems raised by the projected collective redundancies".[92] The authority has no absolute power to prohibit the redundancies. It remains open whether the authority should intervene in an attempt to prevent the redundancies or whether it should simply make provisions for coping with those employees made redundant.[93]

C. The Insolvency Directive

The Insolvency Directive 80/987 of 20 October 1980[94] requires each Member State to ensure the payment of employees' outstanding claims resulting from contracts of employment by establishing 'guarantee institutions' where an employer is in a 'state of insolvency'. It offers protection to workers from the consequences of their employer's insolvency in the form of a guarantee payment of their outstanding claims relating to arrears of pay.[95] Additionally, the benefit entitlements of employees are protected in the case of non-payment of statutory social security contributions.[96] Former employees retain the right to old age benefits, including survivors' benefits under company schemes.[97]

D. Concluding Remarks on European Law

[90] Collective Redundancy Directive, art 3.
[91] Ibid art 4(1).
[92] Collective Redundancy Directive, art 4(2).
[93] *Barnard*, above n 13, 497.
[94] Council Directive 80/987 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 of 20 October 1980, OJ 28 October 1980, L 283, amended by Directive 87/164 of 2 March 1987, OJ 11 March 1987, L 66 and Directive 2002/74/EC of 23 September 2002, OJ 8 October 2002, L 270 (Insolvency Directive)
[95] Insolvency Directive, art 3(1).
[96] Ibid art 7.
[97] Ibid art 8.

The European directives create an extensive system of protection for employees. Employees' protections include: (1) protection against unjust dismissals based on the transfer of a business; (2) rights to information and consultation in the event of collective redundancies; and (3) rights to outstanding payments during insolvency by the Member States.

E. National Law

European Council Directives must be implemented into national law to become effective. The different approaches of the United Kingdom and Germany are described in the following sections as an example.

1. The United Kingdom

Employers in the United Kingdom enjoy substantial freedom to restructure their business. The law reinforces managerial prerogative with little interference from employees.[98] Part IV of the Employment Protection Act 1975 implemented the Collective Redundancies Directive into United Kingdom law. The provisions were consolidated into the Trade Union and Labour Relations Act 1992 (TULR(C)A). The Acquired Rights Directive was implemented by means of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE)[99] and amended in 1993 by the Trade Union Reform and Employment Rights Act 1993 (TURERA). In 1995 the United Kingdom enacted the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulation 1995[100] following a judgment of the European Court of Justice. Later, in 1999 the United Kingdom implemented the revised Collective Redundancy Directive in the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulation 1999.[101]

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[98] Catherine Barnard "Corporate Restructuring and the Role of Labour Law in the United Kingdom" (2003) 47 Bulletin of Comparative Labour Relations 175.
[99] SI 1981/1794.
[100] SI 1995/2587.

(a) Corporate restructuring

Companies on the verge of insolvency have two options to restructure their business. First, the company can apply to the court for voluntary arrangement with its creditors under s 425 of the Companies Act 1985 with court approval. Secondly, it can apply for a voluntary arrangement with approval of the majority of the creditors under the Insolvency Act 1986.

(b) Common law regarding dismissals

An employer may terminate an employee on an indefinite contract with notice under common law.[102] The termination does not require a fair reason.[103]

Insolvency usually terminates the employment contract because the company ceases to trade and goes into liquidation.[104] The appointment of an administrator, receiver or voluntary liquidator does not in itself terminate the contracts of employment because that person is deemed to be the agent of the company.[105] If the liquidator or receiver is appointed by the court, however, they are not considered an agent and therefore the employment contracts are terminated.[106]

In general, the transfer of a business may involve the dismissal of employees. The transferor may dismiss them for redundancy or some other business-related reason prior to the transfer.[107] Otherwise, the sale of the company constitutes a repudiatory breach of contract by the employer and the employees are entitled to treat it as a wrongful dismissal under common law.[108] "It is doubtful that the employees have a sufficient 'legitimate

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101 SI 1999/1925.
102 Employment Rights Act 1996 (UK) ss 86-91.
103 Deborah J. Lockton *Employment Law* (4th ed, Palgrave MacMillan, New York, 2003) 230.
104 Christopher Waud *Employment Law* (11th ed, Kogan Page, 1995) para 15.68.
105 Insolvency Act 1986 s 14(5) administrator and s 44 (receiver).
106 *Reid v Explosives Co Ltd* (1887) 19 QBD 264.
107 Simon Deakin and Gillian S Morris *Labour Law* (Butterworths, London, 1995) 464.
108 *Nokes v Doncaster*, above n 27, 1019; *Litster v Forth Dry Dock & Engineering Co Ltd* [1989] IRLR 161, 169.

interest' at common law to keep the contract alive against the transferor if it no longer owns the business." Common law does not grant employees automatic rights of continuation of employment against the transferee.[109] With the consent of the transferee and the employee concerned, the transferee may be substituted as a party to the contract.[110] This consequence flows from the understanding that the employment contract is personal.[111]

(c) Statutory provisions regarding dismissals

Even if the dismissal is justifiable at common law it is not necessarily fair under statute. Sections 95-134A of the Employment Rights Act 1996 concern the claim of unfair dismissal. They apply to all employees with one year of service in the relevant firm. The remedies for unfair dismissal are re-employment or compensation. Re-employment orders are seldom made.[112] Section 218 of the Employment Rights Act 1996 regulates the protection of employees in the case of transfers. If a business is transferred as a going concern the contract of employment continues.[113]

(d) Transfer of business

The Acquired Rights Directive was enacted into British law by the TUPE Regulations 1981. It altered the common law regarding the transfer of a business. TUPE limits the freedom of contract and the power of employers to arrange their commercial and corporate affairs.[114] It provides: [115]

> …a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by

[109] *Deakin & Morris*, above n 107, 464 n 8.
[110] Ibid 198.
[111] *Nokes v Doncaster*, above n 27, 1026.
[112] Robert Upex (ed) *The Law of Termination of Employment* (5th ed, Sweet & Maxwell, London, 1997) 245.
[113] Employment Rights Act 1996 (UK) s 218(2).
[114] *Deakin & Morris*, above n 107, 197.
[115] Transfer of Undertakings (Protection of Employees) Regulation 1981, SI 1981/1794, reg 5(1).

> the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

According to Regulation 3(1) and (2) of TUPE a relevant transfer is a "transfer from one person to another of an undertaking" by means of a "sale or other disposition or by operation of law". A relevant transfer causes the transfer of all employment relationships. In *Litster*, the House of Lords held that employees dismissed immediately before the transfer of the business were transferred in order to safeguard their rights.[116] The transfer does not itself terminate the employment relationship pursuant to Regulation 5(1) of TUPE. The transferee is bound by the same rights and obligations as the transferor, including those arising from a collective agreement incorporated into employees' individual contracts.[117] The employee may object to the transfer according to Regulation 5(4A). The effect of an objection is that the transfer will terminate the employees' contracts of employment but they will not be treated as having been dismissed by the transferor.[118]

Regulation 8(1) of TUPE makes dismissals connected with the transfer of a business automatically unfair for the purposes of the Employment Rights Act 1996 Part X. In order to determine whether the transfer was the only reason for the dismissal the objective circumstances of the dismissal have to be taken into account; for example, the time of the dismissal or the re-engagement of the workers by the transferee.[119] The House of Lords decided in *British Fuels* and *Wilson* that the dismissal is not a nullity.[120] The dismissed employee cannot compel the transferee to employ him. The transferee has to meet all the transferor's contractual and statutory obligations. A dismissal is fair if for economic, technical or organisational reasons a change in the nature of the workforce is required.[121] That reason will be treated as 'some other business-related reason' within s 98(1)(b) of the Employment Rights Act 1996 and the fairness of the reason must be

[116] *Litster v Forth Dry Dock*, above n 108, 172.
[117] TUPE 1981 reg 5(2).
[118] TUPE 1981 reg 5(4B) as amended by Trade Union Reform and Employment Rights Act 1993, s 33(1), 4(b).
[119] *Wilson v St Helens Borough Council and Meade v British Fuels Ltd* [1998] IRLR 706.
[120] Ibid.
[121] TUPE reg 8(2).

considered under s 98(4).[122] Therefore, redundancy is a valid 'economic reason' for a dismissal but not for s 98(1)(b) (with regard to the redundancy payment). [123] On the other hand, the scope of an 'economic reason' is narrower than 'some other business-related reason' because it does not allow dismissals for reasons of flexibility or cost-cutting, since they do not entail changes in the workforce.[124] 'Economic' is to be given limited meaning relating to the conduct of the business. It does not include broad economic reasons for a sale, such as the desire to enhance the price or the desire to achieve a sale.[125] 'Economic' also excludes making dismissals a precondition of the sale.[126]

Employees who present claims of unfair dismissal under Regulation 8 must have two years of continuous employment.[127] Regulation 8 further applies only for the purposes of the Employment Rights Act 1996 dealing with unfair dismissal. It does not alter the employee's right to claim a redundancy payment.[128] The claim for unfair dismissal may be brought either against the transferor or the transferee. Either the transferor or transferee may then be liable for compensation or even reinstatement.[129] The employee cannot enforce the right to continued employment.[130]

Changes in the terms and conditions of work are prohibited by Regulation 12. The House of Lords held in *Wilson* that if employees are transferred on a relevant transfer of undertaking their terms and conditions could not be lawfully varied for a reason connected to the transfer.[131] It does not matter whether the employees consented to the alteration or how much time has elapsed following the transfer. However, their Lordships acknowledged that "there must, or at least may, come a time when the link with the transfer is broken or can be treated as no longer effective."[132]

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[122] *Upex*, above n 112, 100.
[123] Hugh Collins *Employment Law* (Clarendon Press, Oxford, 2003) 197.
[124] *Berriman v Delabole*, above n 57.
[125] *Wheeler v Patel*, above n 56; *Ibex Trading Co Ltd v Walton* [1994] ICR 907.
[126] *Wheeler v Patel*, above n 56.
[127] TURERA 1993 reg 8.
[128] *Upex*, above n 112, 101.
[129] *Collins*, above n 123, 197.
[130] *Barnard*, above n 98, 171.
[131] *Wilson v St. Helens*, above n 119.
[132] Ibid 714.

(e) Redundancy

Dismissals for reason of redundancy are considered fair if the employer consulted with the individual employees and trade unions.[133] In the case of collective redundancies s 188 of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulation 1999 introduced the wider European definition for collective redundancy in s 195 of the Act. According to TULR(C)A 1992 as amended in 1999 the employer can consult with elected worker representatives in the absence of a recognized trade union.[134] The employer must begin the consultation in good time.[135] This means in advance of the proposal to dismiss the employees to allow adequate time for the representatives to respond.[136] Failure to do so does not lead to the nullity of the dismissal but to the payment of a protective award.[137] The employee may present a claim of unfair dismissal if the dismissal was handled contrary to s 98(4) of the Employment Rights Act 1996. The employee may also complain if the selection for redundancy was unfair under s 153 of TULR(C)A 1992 or s 105 of the Employment Rights Act 1996.

(f) Insolvency

The consequences of termination of employment in the context of insolvency depend to some extent on the type of insolvency in question. During administration the main objective is the rescue of the company.[138] Therefore, an administrator is appointed by the court with the power to run the business. The administrator acts as an agent of the company.[139] The management and control of the company and its property are taken away from the directors. The directors remain in office but they need the consent of the

[133] *Barnard*, above n 98, 168.
[134] The election process is now detailed in Trade Union and Labour Relations (C) Act 1992 s 188A.
[135] TULR(C)A 1992 s 188.
[136] John Bowers *Employment Law* (6th ed, University Press, Oxford, 2002) 394.
[137] TULR(C)A 1992 s 189(3) and (4).
[138] Insolvency Act 1986 (UK) Part II.
[139] Stephen Foster "Enterprise Act 2002: Changes to Corporate Insolvency" (2003) Insolv LJ 2003 (5), 174, 174-185.

administrator to exercise management powers.[140] The administrator is obliged to rescue the company as a going concern or, alternatively, to wind up the company and realise any assets for distribution to the creditors.[141] Thus, the administrator is not obliged to rescue the company at all costs. The administrator may pursue a winding-up of the company where the company cannot be rescued but a going concern sale of all or part of its business is possible or the company can trade for a period to maximize realisations.[142]

Liquidation is the winding-up of an insolvent company resulting in the ceasing of the business.[143] The liquidator may want to carry on the business to achieve a better price for the sale of the business. A compulsory winding-up usually terminates the employment relationships automatically.[144] The employees who continue to work for the liquidator are re-engaged unless there is a gap pursuant to s 218(2) of the Employment Rights Act 1996.[145] A resolution for voluntary winding-up has no effect on the contracts of employment, at least where the business does not entirely cease.[146]

The appointment of the administrator itself has no effect on the employment contracts.[147] The closure of the business brings about the dismissal of the employees for reason of redundancy.[148] As shown above this is a potentially fair reason. If the dismissal is connected with the sale of the business it is automatically unfair according to Regulation 8 of TUPE. The dismissals, however, may be held unfair on the basis of the procedure. If the business ceases, the courts would likely find that the employees suffered no loss from the unfair treatment. If some of the employees are retained there may be a claim for unfair selection.

[140] Stephen Davies *Insolvency and the Enterprise Act 2002* (Jordans, Bristol, 2003) 135.
[141] Enterprise Act 2002 (UK) Sch 16 para 3(1).
[142] *Foster*, above n 139, 174-185.
[143] Insolvency Act 1986 (UK) Part IV.
[144] *Upex*, above n 112, 416.
[145] Ibid 417.
[146] *Fowler v Commercial Timber Company* (1930) 2 KB 3.
[147] He is deemed an agent of the company according to section 14(5) of the Insolvency Act 1986.
[148] *Upex*, above n 112, 408.

The United Kingdom chose to apply the provisions of the Acquired Rights Directive to all insolvency proceedings. However, Regulation 4 of TUPE did permit the practice of 'hiving-down' by the administrator or liquidator.[149] During this process the administrator would transfer the business to a specifically created subsidiary while retaining the employees in the insolvent parent. The parent then lends the use of the employees' labour to the wholly owned subsidiary. The subsidiary may then be sold to a third party without the workforce and the relating responsibilities. The validity of this regulation is in doubt because it may run counter to the aim of the Acquired Rights Directive.[150] This is arguable, however, since the Directive does not apply to insolvency proceedings and Regulation 4 could be a valid deviation from the general provisions.[151] After *Litster,* however, this practice is no longer advantageous because the employees are still transferred. Therefore, the Regulation is no longer used.[152]

Since the amendment of the Directive allowing the Member States to exclude the Directive where the transferor was the subject of liquidation proceedings, the government proposed to consider the second option for the United Kingdom.[153] In situations where the Directive applies changes may be lawfully made to the terms and conditions of employment if: (1) they are agreed between either the transferor or the transferee and appropriate representatives of those employees; (2) they are designed to safeguard employment opportunities by ensuring the survival of the undertaking or business or part of it; and (3) they are not otherwise contrary to UK law. Regulation 4 of TUPE should, therefore, be removed.

The Enterprise Act 2002 was introduced to foster a "rescue culture".[154] According to s 248 of the Enterprise Act 2002 it replaces Part II of the Insolvency Act 1986 with a new Schedule B1—as set out in Schedule 16 of the Act. Until recently, powerful secured creditors (notably banks) have been too ready to put troubled companies into receivership

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[149] *Barnard*, above n 98, 163.
[150] John McMullen *Business Transfers and Employee Rights* (2nd ed, Butterworths, London, 1992) 227.
[151] *Deakin & Morris*, above n 107, 471.
[152] *Barnard*, above n 98, 164.
[153] Government Consultation Paper *Transfer of Undertakings (Protection of Employment) Regulation 1981 (TUPE)* available at <http://www.dti.gov.uk/er/tupe/consult.htm> (at 7 Dec 2004).

and thereby likely destroying the company.[155] Now companies are placed under administration rather than administrative receivership.[156] Furthermore, the process of administration is streamlined by limiting the period of administration to twelve months and requiring a proposal within 8 weeks and a creditors' meeting within 10 weeks.[157] This requires a change of mindset on the part of the banks as well as other constituencies involved in the insolvency proceedings.[158]

(g) Conclusion

In the United Kingdom employment relationships are transferred with every business transfer. This applies to transfers during administration and liquidation. Critics argue that TUPE should not apply to insolvent business transfers because it lowers the number of potential rescuers who fear the liabilities. Furthermore, the Regulation is inconsistent where there is no change of formal ownership (for example, through a sale of a controlling shareholding).[159] This is the most common form of business transfer in the United Kingdom. For the employee this can have the same effects as the change of an employer but here the protection of TUPE does not apply. The administrator or the acquirer may dismiss employees for economic reasons but may face the obligation of redundancy payments.

2. Germany

In principle, employers in Germany are free to organise their business in any way. Courts do not second-guess business decisions unless some form of abuse is evident.[160]

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[154] Vanessa Finch "Re-Invigorating Corporate Rescue" (2003) JBL 527, 527.
[155] Insolvency Service "Regulatory Impact Assessment for Insolvency Provision in the Enterprise Act 2002" (2002) available at <http://www.dti.gov.uk/enterpriseact/pdfs/ria-overall.pdf> (at 7 Dec 2004) 4.
[156] Enterprise Act 2002 (UK) s 250 and Sch 18 prohibit the appointment of administrative receivers.
[157] Enterprise Act 2002 (UK) Sch 16 para 76.
[158] *Davies*, above n 140, 71.
[159] *Deakin & Morris*, above n 107, 201.
[160] Wolf D Schenk "Aspects of German Labour Law" in Bernd Tremml and Bernard Buecker (eds) *Key Aspects of German Business Law* (2nd ed, Springer Verlag, Berlin, 2002) 74.

(a) General dismissal law

In general, either party may terminate contracts of employment after giving notice.[161] The Termination Protection Act of 1969[162] contains statutory provisions for the protection of employees. It is applicable only to companies with more than five permanent employees and to a dismissal of a person whose contract is more than six months old.[163] According to s 1 of the Act, the employer is not allowed to terminate the employment relationship unless it is 'socially justified'; otherwise, the dismissal is null and void. For the dismissal to be socially justified the employer must show that it is based on a reason inherent in the employee or on the employee's conduct or for immediate business-related reasons.[164] Three requirements must be fulfilled to terminate an employee for business-related reasons.[165] First, economic dismissals may be based on the loss or the prospect of a loss of employment opportunities for the individual employee. The cause for dismissal may be influenced by external reasons (e.g. economic crisis) or measures taken by the employer.[166] Secondly, the employer must observe the selection criteria as laid down in the Act. The employer is required to consider which employees are most adversely affected by the dismissals. Relevant criteria include the employee's length of service with the firm, age, family obligations and any other unique circumstances. Younger employees are thought to be the least affected by a dismissal and are therefore most likely to be released.[167] Third, the employer must show that the employee cannot be employed in another vacant position in the same establishment or in any other establishment of the employer. The employer is even obliged to reasonably school or train the employee to fill other vacancies.[168] Prior to every dismissal the employer must inform and consult the

[161] Manfred Weiss and Marlene Schmidt *Labour Law and Industrial Relations in Germany* (3d ed, Kluwer Law International, The Hague, 2000) paras 218-221.
[162] Kuendigungsschutzgesetz (Termination Protection Act) of 25 August 1969, BGBl I 1317, as lastly amended by the Act of 23 July 2001, BGBl I 1852.
[163] Termination Protection Act ss 1(1) and 23(1).
[164] Termination Protection Act s 1(2).
[165] Bernd Waas "Corporate Restructuring and the Role of Labour Law in Germany" (2003) 47 Bulletin of Comparative Labour Relations 93.
[166] *Weiss & Schmidt*, above n 161, para 232.
[167] *Schenk*, above n 160, 74.
[168] Clyde W Summers "Propter Honoris Respectum: Worker Dislocation: Who bears the Burden? A Comparative Study of Social Values in five Countries" (1995) 70 Notre Dame L Rev 1033, 1045.

works council.[169] If the works council objects on any aforementioned grounds the court upon application of the employee will rule the dismissal unfair and void.[170] The employee may contest the legality of the dismissal. The normal remedy is reinstatement.[171]

(b) Redundancy

In the case of a collective redundancy[172] the employer must satisfy additional specific qualifications – besides the burden of proof of 'social justification'. The employer must give written notice containing all relevant information to the works council.[173] This is to allow the employer and the works council to enter into discussion concerning efforts to reduce the number of terminations and to minimise their effects.[174] Furthermore, the employer is under the duty to inform the competent public authority.[175] The terminations become effective one month after this notification. Employees are not entitled to redundancy payments. In practice, the employer is relatively free to restructure the enterprise, relocate or close plants, or reduce the number of employees. The labour courts will not second-guess the employer's economic decision as long as it appears to be made in good faith.[176]

(c) The 'Social Plan'

A unique instrument in Germany is the 'social plan'. It is a special agreement designed to compensate for or reduce economic disadvantages for employees in the event of a substantial alteration to the establishment.[177] If an employer with twenty or more employees plans a change that will materially disadvantage workers—such as

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[169] Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) of 25 September 2001, BGBl I 2518, originally of 15 January 1972, BGBl I 13, s 102.
[170] *Waas*, above n 165, 95.
[171] *Weiss & Schmidt*, above n 161, paras 239-242.
[172] For definition see, Termination Protection Act s 17(1).
[173] Termination Protection Act s 17.
[174] *Waas*, above n 165, 95.
[175] Termination Protection Act s 17 and 18.
[176] Rolf Birk "Protection Against Unfair Dismissal in West Germany: Historical Evolution and Legal Regulation" in Christoph F Buechtemann (ed) *Employment Security and Labor Market Behavior: Interdisciplinary Approaches and International Evidence* (ILR Press, Ithaca, 1993) 250.

restructuring, creating new production processes, closing part or all of a plant, or transferring operations—the works council must be informed.[178] This also includes the mere reduction of the workforce as in the case of a collective redundancy.[179] The employer and the works council then agree on a 'compromise of interests'. If they are unable to reach an agreement they may call on an arbitration committee for a binding decision.[180] The plan may cover all aspects of adjusting the workforce and determine severance pay for each dismissed worker. The employer may even be liable to assist the employees in finding jobs in other companies within the concern or in unrelated companies.[181]

(d) Transfer of the business

S 613a of the German Civil Code[182] implemented the Acquired Rights Directive into German law. Every employment relationship is automatically transferred to the acquirer if a business is conveyed to a third party. The purchaser becomes subject to the rights and obligations of existing employment contracts. It applies to every transfer of either all or an essential part of the business.[183] The transfer may take place as an asset deal, through a merger, or splitting or transfer of assets.[184] The employee has a right to object to the transfer based on his constitutional rights guaranteed by Articles 2 and 12 of the German Constitution.[185] The contract remains in force with the transferor.[186] The transferor, however, may be entitled to terminate the employment relationship if there is a valid reason. Section 613a(2) of the German Civil Code extends the liability of the transferor along with the transferee for the period of one year after the transfer. Moreover,

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177 *Waas*, above n 165, 97.
178 Works Constitution Act s 111.
179 *Weiss & Schmidt*, above n 161, 203 para 496.
180 Works Constitution Act s 112.
181 *Summers*, above n 168, 1046.
182 Buergerliches Gesetzbuch (Civil Code) RGBl 1896, 195 as lastly amended on 24 August 2002, BGBl I 3412.
183 *Waas*, above n 165, 89.
184 Ibid, 91 with reference to the Business Reorganisation Act (Umwandlungsgesetz, UmwG) of 28 October 1994, BGBl I 3210, as lastly amended by the Act of 23 July 2001, BGBl I 1852, s 324.
185 BAG (Federal Labour Court) NJW 1997, 410.
186 *Weiss & Schmidt*, above n 161, para 255.

employment contracts can neither be terminated nor altered by the former employer nor by the purchaser for reasons based solely on the ownership change of the business.[187]

The same applies to collective bargaining agreements.[188] According to s 613a(1) of the Civil Code collective bargaining agreements and works agreements do not lose their legal relevance unless both the employee and the new employer are already bound by another collective bargaining agreement. Moreover, the acquirer may not change the collective bargaining agreement for a period of one year after the transfer.[189]

(e) Insolvency

A restructuring of the business during insolvency is governed by the general law and the Insolvency Code[190]. Generally, an administrator is appointed by the court and takes over the management of the business. The administrator usually proposes an 'insolvency plan' which is then approved by the creditors.[191] The idea for this was drawn from Chapter 11 proceedings in the United States. Employees may be allowed to vote for the approval of the plan if, as a group, they have substantial claims.[192]

(i) Rights of the administrator

Filing for insolvency does not terminate the employment relationship. Additionally, it does not constitute a justification according to the Termination Protection Act.[193] However, the Insolvency Code respects the right to reorganize the business and emphasizes the need to save the business and the associated jobs. Therefore, s 113 of the Code allows the administrator to terminate all employment contracts after giving advance

[187] Civil Code s 613a(4).
[188] Civil Code s 613a(1) sentence 2. The provisions of the collective bargaining agreement are transformed into provisions of the individual contract of employment by way of a legal fiction. This does not apply if the new employer and the employee are bound by another collective bargaining agreement.
[189] Civil Code s 613a(1) sentence 2.
[190] Insolvenzordnung (Insolvency Code) BGBl I 1994, 2866 as lastly amended on 14 March 2003, BGBl I 345.
[191] Meinhard Heinze "Das Arbeitsrecht der Insolvenzordnung" (1999) NZA 1999, 57, 63.
[192] Ibid.
[193] Thomas Kania "Arbeitsrecht in Konkurs und Insolvenz" (1996) DStR 1996, 832, 833.

notice of three months. This applies to all employees regardless of a contractual exclusion of ordinary termination or other restrictions.[194] The administrator is obliged to inform the works council that must issue an opinion; otherwise the termination is invalid. The termination may be challenged on the basis that it is not justified in light of the fact that the business is to continue in operation.

The general applicability of s 613a of the Civil Code in insolvency proceedings follows now from ss 113(2) and 128(2) of the Insolvency Code. According to these provisions, termination of employment does not occur because of the transfer of the business. Every employment relationship is transferred to the new owner of the business. However, the termination or alteration of employment contracts remains possible if a sound business reason other than the mere change of ownership can be proven.[195] Labour courts allow the dismissal of workers in order to increase the chances of selling the business or to achieve a sale.[196] The intention to close the business justifies the termination of employment even if the business is sold later and continues to operate.[197] However, ongoing negotiations between the administrator and a potential buyer invalidate every termination.[198] Even if the termination was justified, the employees may have a right to be re-employed where the reasons for the termination subsequently ceased due to the rescue of the company.[199] This does not simplify the task of the administrator in selling the business, although the administrator may conclude dissolution agreements with the employees by either giving them a financial incentive or providing them a job in a specially created 'Job Creation Company'.[200] However, this is not a risk-free alternative because the labour courts might still view it as an evasion of s 613a of the Civil Code.

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194 J Michael Auerbach and Uwe Krieger "Rechte der Arbeitnehmer in der Insolvenz" (2003) BC 2003, 113, 114. Special exceptions apply to workers with disabilities, members of the works council, workers on pregnancy leave and trainees.
195 Fritz Kempter "Der Betriebsuebergang in der Insolvenz" (1999) NZI 1999, 93, 98.
196 BAG (Federal Labour Court) NZA 1997, 148.
197 BAG (Federal Labour Court) NJW 1997, 1389.
198 Ibid.
199 BAG (Federal Labour Court) NJW 1998, 2379, 2380.
200 Jobst Wellensiek "Uebertragende Sanierung" (2002) NZI 2002, 233, 236.

Pursuant to s 120 of the Insolvency Code the administrator may terminate collective bargaining agreements within three months.

Insolvency does not excuse the employer from developing a 'social plan'. If the administrator does not abide by this obligation, employees are entitled to claim compensation pursuant to s 113(3) of the Works Constitution Act. Moreover, ss 121-124 of the Insolvency Code accelerate the process. Arbitration is only possible if both parties request it. The administrator has the right to ask the labour court to approve changes in the business without prior arbitration after three weeks of negotiations.[201]

Sections 125-127 of the Insolvency Code loosen the restrictions of the Termination Protection Act and make it easier for the administrator to terminate employment agreements for reorganisation purposes. In order to terminate employees the insolvency administrator must meet several criteria. First, the administrator must consult with the works council for a plan of reorganisation that must also be approved by the court. The purpose is to reconcile the interests of the employees and the business and to minimize the effects of the terminations. Second, the acquirer must follow this approach. The reorganisation plan does not alter the rights of the administrator to terminate employees under the general law. According to s 125(1) of the Insolvency Code the burden of proof is shifted to the employee by presuming that the terminations depend on urgent requirements of the business. The courts may only examine the selection on the basis of duration of service, age and maintenance obligations and only for gross errors.[202] If the administrator and the works council do not reach an agreement within three weeks, s 126 of the Code allows the administrator to make an application to the court to approve the terminations.

(ii) Rights of the acquirer

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201 Insolvency Code s 122(1).
202 Christoph G Paulus "The new German Insolvency Code" (1998) 33 Tex Int'l LJ 141, 149.

Section 128 of the Insolvency Code extends the application of ss 125-127 of the Insolvency Code to the acquirer. Therefore, the administrator may sell the business without any modifications. The acquirer is permitted to reorganise the business including making changes in the workforce.

The acquirer may take any measures necessary to keep the business running.[203] This can result in the termination of employment relationships. The acquirer and the works council may agree on changes to the collective bargaining agreement within the limits of the rules set by the Federal Labour Court.[204]

(f) Conclusion

Employers in Germany are relatively free to restructure their business. The only burden they face is possible scrutiny of the selection criteria and the obligation to transfer the worker to another position where possible. Critics argue that the main obstacle to a reorganisation in Germany is not insolvency law, but rather labour law—especially s 613a of the Civil Code.[205] As discussed above, labour law protects employees from unjustified terminations in a quite complicated, time-consuming, and cost- intensive way. However, the argument that this regulation should not be applied in the case of insolvency has been categorically dismissed by the Federal Labour Court.[206] Therefore, many promising takeover offers that were conditioned on a reduction of the number of employees have failed—causing the loss of all jobs instead of saving at least a few.[207] This is a particularly astonishing result in light of the current high unemployment rate in Germany.

F. Summary of European Union Law

[203] *Berkowsky*, above n 5, 137.
[204] *Kempter*, above n 195, 100.
[205] *Paulus*, above n 202, 149.
[206] BAG (Federal Labour Court) 32 BAGE 326.
[207] *Paulus*, above n 202, 149.

The European directives and their national implementation laws offer extensive protection for employees. Employment contracts are transferred with the business. Insolvency administrators and acquirers face tight restrictions on dismissals. Generally, only dismissals for economic, technical or organizational reasons are justified. Thus, the European system clearly offers the most benefit to existing employees of the business. Employers and purchasers must meet a heavy legal burden to justify dismissals. This might be explained with reference to the history of European labour relations and the influence of labour unions on government decisions. The question remains whether this system provides adequate opportunity to rescue insolvent businesses—thus saving jobs—or leads instead to the liquidation of the business.

III. THE UNITED STATES

Compared to other industrialised countries the US provides little protection for workers during corporate restructuring. Corporate directors owe fiduciary duties only to shareholders. In the case of insolvency, it is the creditors who enforce fiduciary duties against the directors.[208] Part A discusses the general termination law during corporate restructurings. Part B turns to reorganisations during Chapter 11 proceedings.

A. Labour Law During Corporate Restructuring

Almost all private sector non-union workers in the US are employed 'at will'.[209] Therefore, the employer may dismiss workers at any time for any reason, without notice.[210] This doctrine assumes that such employees have no legal interest in continuing job security. Moreover, less than ten percent of the private sector workforce is unionized, providing only limited additional protection against dismissals.[211] Although there have been erosions to the at-will doctrine, dismissals based on business reorganisations will

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[208] *Geyer v Ingersoll Publications Co* (1992) 621 A2d. 784 (Del Ch).
[209] Stewart Schwab "The Role of Labor Law in Corporate Restructuring in the United States" (2003) 47 Bulletin of Comparative Labour Relations 195.
[210] *Rothstein*, above n 4, 9 with reference to Horace G Wood *A Treatise on the Law of Master and Servant* (1877).
[211] Ibid. 9 per cent <http://stats.bls.gov/news.release/union2.nr0.htm>.

never be considered wrongful by the courts.[212] Employers enjoy great flexibility during restructuring of the business. They may choose the number of employees they want to dismiss or transfer them to other positions or modify the terms and conditions of employment. The courts recognize an employer's freedom to select their workforce.[213]

Employers in the US are relatively free to make decisions without labour approval or consultation. Restrictions on management regarding plant closings or mass layoffs are minimal. Only eleven States have laws regulating plant closings or work relocations varying from voluntary conduct to affirmative obligations.[214] In general, these laws provide for advance notice of the dismissal and certain insurance payments.

There is no automatic transfer of the employment contract or even a prohibition of dismissals by reason of a transfer of undertaking.[215] Section 2101(a) of the Worker Adjustment and Retraining Notification Act requires 60 days notice for plant closings or mass lay-offs.[216] However, the Act only applies to large employers and offers a wide range of exceptions.[217] A violation by the employer may lead to liability for back pay for the required notice period and a civil penalty but never re-employment.[218]

There are no restrictions concerning dismissals during reorganisation contained in isolated collective bargaining agreements or labour relations laws.[219] The National Labour Relations Act (NLRA) requires an employer to bargain in good faith with the certified union over wages, hours and other terms and conditions of employment.[220] However, other matters regarding the employment relationship are permissive subjects of bargaining if they do not violate statutory policy. Relocation of work is a mandatory bargaining subject if it is based on labour costs, but not if based on issues of capital

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212 *Schwab*, above n 209, 195.
213 NRLB v Burns Int'l Security Serv Inc (1972) 406 US 272, 277-278; *Howard Johnson Co v Detroit Local Joint Executive Board* (1974) 417 US 249, 262-64.
214 *Rothstein*, above n 4, 594.
215 *Summers*, above n 168, 1037.
216 29 USC ss 2101-2109 (1988).
217 For example for 'unforeseeable business circumstances' or seeking new finances.
218 *Schwab*, above n 209, 191.
219 Phillip I Blumberg "United States Report" (1989) 5 Conn J Int'l L 7, 8.
220 29 USC s 158(a)(5), (d) (1982).

commitment or the scope of the enterprise.[221] Most collective bargaining agreements contain a successor and assigns clause that purports to make the employer's obligations binding on successor corporations.[222] However, courts and arbitrators treat these clauses as legally non-binding.[223] In general, the aim of the unions is not to prevent lay-offs; rather, it is to seek to extract promises that work will not be relocated or subcontracted.[224] Additionally, unions may seek assurances that firms will not reduce wages or benefits during economic downturns.[225]

The purchaser of a business may have to recognize and bargain with the union and may be bound for the remaining duration of the predecessor's collective bargaining agreement.[226] First, there must be substantial continuity between the two enterprises; and secondly, a majority of the successor's employees must have been employed by the predecessor.[227] If the new and the old employer are interrelated and have substantially identical management and stock ownership, the 'alter ego' employer is bound by the existing collective bargaining agreement.[228] A modification of working conditions by the employer without consulting the union constitutes an unfair labour practice violating the duty to bargain collectively.[229] However, the employer may ultimately unilaterally change the terms and conditions of work (e.g., if there is a deadlock or for non-mandatory subjects).[230]

In sum, the purchaser of a business is under no duty to hire the existing workers of the business. However, the purchaser may be obliged to bargain with the union. The guiding

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221 *Schwab*, above n 209, 189.
222 Ibid 187.
223 Ibid.
224 Ibid 187.
225 Ibid 188.
226 Takashi Araki "Corporate Restructuring and Employee Protection: Japan's New Experiment" in Roger Blanpain and Manfred Weiss (eds) *Changing Industrial Relations & Modernisation of Labour Law* (Kluwer Law International, The Hague, 2003) 37.
227 *Fall River Dyeing & Finishing Corp v NLRB* (1987) 482 US 27.
228 *Int'l Ladies Garment Wkrs Union, AFL-CIO v NRLB* (1967) 374 F2d 295, cert denied, 387 US 942.
229 NLRA art 8(a)(5).
230 *Araki*, above n 226, 39 n 34.

principle is that restrictions on employers hamper their competitiveness and discourages job creation.[231]

B. Insolvency Law

As with most other countries, the US has two types of insolvency proceedings. Chapter 7 of the Bankruptcy Code 1978 governs the liquidation of a corporation.[232] The assets of the corporation are sold, either piecemeal or as a going concern.[233] The proceeds from the sale are then divided among those who have rights against the corporation.

Reorganisation governed by Chapter 11 of the Bankruptcy Code 1978 is an alternative to liquidation.[234] The objective of Chapter 11 is "to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and to produce a return for its stockholders".[235] Therefore, the main purpose is to maintain the business as a going concern even if that reduces the proceeds available to the creditors. This is based on the assumption that value of the business as a going concern is higher than the liquidation value.[236] As a result, the code is highly debtor-oriented.[237] It is almost always initiated by a voluntary petition filed by the corporate debtor. There are no statutory tests or conditions upon the filing of the petition.[238] The debtor does not necessarily need to be insolvent.[239]

[231] *Blumberg*, above n 219, 28.
[232] 11 USC ss 701-66 (1982 and Supp IV 1986).
[233] Douglas G Baird "The Uneasy Case for Corporate Reorganisations" in Jagdeep S Bhandari and Lawrence A Weiss *Corporate Bankruptcy* (Cambridge University Press, Cambridge, 1996) 345.
[234] 11 USC ss 1101-74.
[235] HRREP No 595, 95th Cong, 1st Sess 220 (1977), reprinted in 1978 US Code Cong & AD news 5963, 6179.
[236] Ibid ("The premise of a business reorganisation is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap.").
[237] *Franks & Torous*, above 9, 450.
[238] Jay L Westbrook "A Comparison of Bankruptcy Reorganisation in the US with the Administration Procedure in the UK" in E Bruce Leonard and Christopher W Besant (eds) *Current Issues in Cross-Border Insolvency and Reorganisations* (International Bar Association, London, 1994) 34.
[239] 11 USC ss 101-151326.

Nevertheless, the process of rehabilitating and reorganizing the debtor under Chapter 11 should result in the enhancement of the value of the corporation.[240] There is no duty on management to liquidate even if the liquidation value is much higher.[241] The management continues to operate the business as a debtor in possession. It acts *qua trustee* under the Bankruptcy Code and is responsible for the preservation and administration of the debtor's estate.[242] The directors owe fiduciary duties to the creditors.[243] They also have fiduciary duties to the other constituencies usually involved in Chapter 11 cases.[244]

The firm may continue operating its business as usual or, with the court's permission, it may sell off assets or raise cash.[245] A plan of reorganisation is worked out with the creditors. The debtor has the exclusive right to propose a plan for the first 120 days after filing and has another 60 days to obtain creditor approval.[246] The plan must be confirmed by the court as conforming to the requirements of s 1129 of the Bankruptcy Code.[247] Sometimes the business is sold to a third party but more often the business continues to operate with a composition and extension of its debts.[248] This usually involves the closure or sale of divisions, a lay-off of employees, repositioning of the business and a re-negotiation of labour contracts.[249] Major decisions taken by the debtor-in-possession must be approved by the court with the right of creditors to oppose.[250]

The Bankruptcy Code does not protect workers employed 'at will'. These workers may be terminated by the management at any time according to common law.

1. Section 365 of the Bankruptcy Code

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[240] Harvey R Miller "Corporate Governance in Chapter 11: The Fiduciary Relationship between Directors and Stockholders of solvent and insolvent Corporations" (1993) 23 Seton Hall L Rev 1467, 1468.
[241] *Franks & Torous*, above n 9, 459.
[242] 11 USC s 1107; *Miller*, above n 240, 1468 and 1487.
[243] *Automatic Canteen Co v Wharton (In re Continental Vending Mach Corp)* (1966) 358 F2d 587, 590; *Bank Leumi-Le- Israel, BM v Sunbelt Industries Inc* (1980) 485 F Supp 556, 559.
[244] *Pepper v Litton* (1939) 308 US 295, 306-07.
[245] *Franks & Torous*, above n 9, 456.
[246] 11 USC s 1121(b).
[247] *Westbrook*, above n 238, 39.
[248] Ibid 34.
[249] Ibid.
[250] Ibid.

According to s 365(a) of the Bankruptcy Code the trustee may assume or reject any executory contract of the debtor with court approval.[251] Thereby, the trustee can relieve the estate of burdensome obligations or force others to continue to do business with the debtor.[252] The trustee may assume or reject the contract at any time before the confirmation of a plan in Chapter 11 cases.[253] The objective behind this provision is to give the trustee time to determine if the contract will be necessary for the reorganisation.[254] However, if the other party to the contract requests the court to fix a time, the court pursuant to subsection (d)(2) may specify a time within which the trustee must act. In subsection (e) it is further specified that the trustee may not terminate or modify such contracts after the commencement of the case solely:

> because of a provision in such contract that is conditioned on (a) the insolvency or financial condition of the debtor at any time before the closing of the case; (b) the commencement of a case under this title; or (c) the appointment of or taking possession by a trustee in a case under this title.

The purpose of this provision is to invalidate *ipso facto* or bankruptcy clauses that might otherwise prevent the estate from receiving the benefit of an executory contract.[255] These clauses automatically terminate the contract or permit the other party to terminate the contract in the event of insolvency. This restricts rehabilitation of the business. The trustee may utilize the contract to assist in the debtor's reorganisation. The other party requires the protection of the courts to ensure that the trustee's performance under the contract gives the other party the full benefit of the bargain.

(a) Employment contracts

[251] 11 USC s 101 (Supp III 1985).
[252] Collier on Bankruptcy (15th ed, Matthew Bender & Company, 2003) 365.02.
[253] 11 USC s 365(d)(2).
[254] *In re Air Vermont Inc* (1984) BC DC Vt, 40 BR 61.
[255] *Collier*, above n 252, para 365.07.

There is no precise definition of what constitutes an executory contract. Generally, it includes contracts in which performance remains due to some extent on both sides.[256] A failure of either party to complete performance would constitute a material breach excusing performance of the other side.[257] Therefore, employment contracts entered into prior to the filing of bankruptcy (and not yet terminated) are executory contracts.[258]

The assumption of the employment contracts may be denied if the burden on creditors is too great.[259]

(b) Collective bargaining agreements

Collective bargaining agreements are considered executory contracts if they burden the estate and the equities balance in favour of rejecting the agreement.[260] The employer must show reasonable efforts to renegotiate the agreement. In response to the Supreme Court's decision in *Bildisco*, Congress added s 1113 to the Code that specifically addresses the rejection of collective bargaining agreements. Under this new legislation, a debtor-in-possession may assume or reject a collective bargaining agreement only if it has complied with certain procedures. The debtor must make a proposal to the union "for those necessary modifications in the employee's benefits and protections that are necessary to permit the reorganisation of the debtor and assuring that all creditors, the debtor and all affected parties are treated fairly and equitably".[261] The debtor must meet with the representative to confer in good faith and attempt to reach a mutually satisfactory modification.[262] If the union refuses to accept the proposal without good cause, the debtor may reject the agreement. The rejection must be approved by the court if the balance of the equities favours the rejection.[263] The court weighs factors such as: (1) the likelihood of a successful reorganisation if the requested contractual relief is approved;

[256] *In re Terrell* (1989) 892 F2d 469, 19 BCD 1853, 21 CBCd 1452.
[257] *Phoenix Exploration v Yaquinto (In re Murexco Petroleum)* (1994) 15 F3d 60, 25 BCD 455.
[258] *In re Anglo Energy Ltd* (1984) 41 BR 337.
[259] *In re Food City Inc* (1988) 94 BR 91, 18 BCD 928.
[260] *NLRB v Bildisco & Bildisco* (1984) 465 US 513.
[261] 11 USC s 1113(b)(1)(A).
[262] 11 USC s 1113(b)(2)
[263] 11 USC s 1113(c).

(2) the probable impact upon the interested parties if the business entity were forced into liquidation under Chapter 7; (3) the possibility of a devastating work stoppage if all of the proposed reductions are implemented; (4) the capacity of the affected workers to withstand the suggested compensation decreases; and (5) the number of jobs that would be preserved through a favourable reorganisation.[264] Section 1113 only speaks to rejection of collective bargaining agreements. The assumption of those agreements is governed by s 365.[265] Even if the bankruptcy court approves the rejection of the contract the employer is still obliged to bargain with the union according to the general law.[266]

C. Concluding Remarks on United States' Law

During Chapter 11 proceedings companies enjoy great flexibility in restructuring their business. Employees that are employed 'at will' may be terminated with very few restrictions as provided at common law. Employees with employment contracts may be terminated after the rejection of their contract pursuant to s 365 of the Bankruptcy Code. Collective bargaining agreements that may bind the purchaser may be rejected according to s 1113 of the Code. Thus, the primary beneficiary under the US approach to insolvency reorganisations is the employer or purchaser of the insolvent business. However, the US system indirectly gives considerable weight to the interests of employees through the incentives to keep the firm running and through judicial oversight during the bankruptcy process.[267] In the final analysis, this approach may ultimately save more jobs.

IV. SUBSTANTIVE DIFFERENCES BETWEEN THE SYSTEMS

The US and the EU have two contrasting attitudes towards treatment of employment relations in the event of corporate restructuring. The European Acquired Rights Directive and its national implementation laws protect workers in any transfer of undertaking. In

[264] *Rothstein*, above n 4, 592.
[265] *Massachusetts Air Conditioning & Heating Corp v McCoy* (1996) 196 BR 659, 20 EBC 1403, 153 BNA LRRM 2672.
[266] *Schwab*, above n 209, 192.

the US, labour law generally refrains from intervening in the corporate restructuring process and provides little protection for employees. This lack of protection reflects the culture of mobility and change that permeates the US.[268]

In Europe employment contracts are automatically transferred to the purchaser and employees are protected against dismissals based solely on the transfer. The prevailing view is that the employee has a right to continued employment.[269] Moreover, dismissals without just cause or without socially justifiable reasons are prohibited. Only in the event of insolvency are the restrictions loosened. The EC Directive is generally not applicable in such cases except where the Member States provide otherwise. Dismissals for economic, technical or organizational reasons are permitted. This includes dismissals related to corporate restructuring and redundancy during insolvency.

In contrast, in the US employment ‘at will’ is the standard. The burden is placed almost entirely on the individual employee. It is the only country in which an employer may close a factory without consulting the workers’ representatives and without any obligation to the dislocated employees. Labor is a commodity in the US and the worker is simply a seller of that commodity, hour by hour, day by day, with no right to continued employment.[270] This flexibility is generally not restricted in insolvency law. The assumption is that a law that increases the cost of laying off a worker raises the expected costs of hiring a new worker and thus lowers the level of employment in the economy.[271]

In Europe, the burden of dislocation is shared between the employers and the employees. However, this comes at a cost. The freedom of the employer to manage the business is restrained. The ability to close down operations is delayed by requirements of notice. Public authorities may postpone action for two months and the employer is required to consult with the works council. Whether employees really benefit from labour protection

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[267] *Franks & Torous*, above n 9, 463.
[268] *Schwab*, above n 209, 177.
[269] For Germany, Manfred Weiss “Individual Employment Rights: Focusing on Job Security in the Federal Republic of Germany” (1988) 67 Neb L Rev 82, 86.
[270] *Summers*, above n 168, 1063.

laws in the long run is an open question. It makes insolvent businesses harder to sell and therefore jobs harder to save. When dismissal is severely restricted and adjustment of working conditions difficult, corporations will lose competitiveness in the global economy.[272]

Dismissals for economic reasons should be guided by the principle of welfare economics (i.e., the minimisation of social costs).[273] Therefore, it is not appropriate to place the burden of these costs on the employer. Neither is it justified to burden the employees because there is no fault on their part. Generally, very few regulatory measures are justified; however, necessary requirements might include the duty to inform public authorities and information and consultation requirements with workers' representatives.[274] Nevertheless, the situation is different during insolvency because the needs of the business are greater than the interests of the employees. If the reorganisation fails the business is liquidated and all jobs are lost. Companies in Europe rely far more heavily on alternatives to layoffs, including work-sharing arrangements, attrition, hiring freezes and voluntary redundancy.[275] In general, employment laws discourage the adjustment of employment to changes in the demand for labour that may not prove to be permanent.[276] During insolvency it is therefore important that these rules do not apply.

V. CONCLUSION

The following question was posed at the outset of this article: In which system is it best to be an employee, an employers or the purchaser of a business? It is now possible to draw some conclusions.

[271] Katherine G Abraham, Susan N Houseman *Job Security in America* (The Brookings Institution, Washington D.C., 1993) 53.
[272] Takashi Araki and Shinya Ouchi "Introduction to Corporate Restructuring and the Role of Labour Law" (2003) 47 Bulletin of Comparative Labour Relations 13.
[273] Hugh Collins *Justice in Dismissal* (Clarendon Press, Oxford, 1992) 226.
[274] Ibid 184.
[275] *Abraham & Houseman*, above n 271, 1.
[276] Ibid 96.

In Europe, employees are highly protected during business transfers by the Acquired Rights Directive even during insolvency reorganisation. The European Court of Justice and the revised Directive only allow an exception for liquidation proceedings. Employees do not face a job loss unless there are other economic, technical or organisational reasons. By contrast, in the US the interests of the business prevail. Employees do not have any protection with the minor exception of rules contained in collective bargaining agreements; however, these agreements may also be rejected by the debtor. Therefore, from the standpoint of the employee, Europe provides the best protection against job dismissal. This may have a negative side too. If the acquirer of a business faces too many expenses and regulatory problems the chances for rescuing the business decrease. Thus, the number of jobs preserved under the US system might ultimately be higher than in Europe.

From the standpoint of the employer the situation is the reverse. An employer faces almost no restrictions in the US compared to the system in Europe. In Europe, during an insolvency an employer may be able to prove an economic, technical or organisational reason for the dismissals. However, the employer may then be liable for redundancy payments.

The same conclusion applies to the acquirer of the business. Under the European system, the acquirer steps into the shoes of the employer because every employment contract is automatically transferred with the business. This situation is nearly always avoidable under the US system.