

Chapter 13

Social Policy and the Reform of the European Insolvency Regulation

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Introduction

Social policy is an element of modern European Union¹ legal culture which is commonly seen as running in parallel to discussions of insolvency systems, not to intersect in any meaningful way. Social policy legislation does, however, have an effect on how insolvency systems will function in practice. Ignoring social policy issues limits the perspective of legislators and reformers when considering how insolvency law and more particularly business rescue can be effective within the European Union when crossed with member state and EU requirements of employee protection legislation. While such a matter is not strictly the preveue of EU insolvency law in its current scope, there are practical matters affecting how a pan European rescue culture can function with the greatest efficiency where the conflicting goals of insolvency and the employment protection are not recognised and, to some extent, managed.

Underpinned by traditionally opposing socio political values, the juxtaposition of insolvency law and employment protection is difficult to reconcile. However, in these times of financial crisis and its slow recovery, business failures and unemployment are both at the forefront of economic concerns. The EU has made its mark in this area with the Acquired Rights Directive² which contains provisions dealing with the transfer of employment contracts in the event of a business transfer, including those transfers which occur during corporate rescue procedures. While implementation of the Directive was left to the Member States and a number of derogations were available, the application of employee transfer provisions in corporate rescue procedures has not failed to cause controversy over the 36 years since its initial implementation. Many EU and national cases have caused further complications.

¹ Hereafter referred to as the “EU”.

² Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 82/16 (22 March 2001).

The cooperation of the Member States in matters of insolvency also has a long history. It has been a 40 year project evolving in complexity and cooperation as the EU has expanded and changed.³ The culmination is the EU Insolvency Regulation⁴ which deals with how cross border insolvency should be managed between the Member States. The amendments proposed by INSOL Europe⁵ to the EIR are aimed at furthering the proper functioning of the Regulation by amending substantive aspects and improving technical rules. Among the fundamental issues to be resolved is the ease with which companies can “forum shop”⁶ among Member States to identify a jurisdiction providing the most advantageous environment to commence insolvency proceedings. However, the EU goal of reducing forum shopping overall is not helped by the existence of divergent rules of employment protection.

While there are wide implications in relation to the interaction of employee protection regulations, the EIR and its reforms, for the purpose of this paper only the interaction between business rescue procedures and acquired rights provisions in the United Kingdom and France will be discussed.

Evolution of Modern Corporate Rescue

While the concept of bankruptcy has been around since ancient Roman magistrates were “breaking the benches” of traders who failed to repay their debts,⁷ it has only been relatively recently that the concept of corporate rescue has been recognised as a legitimate aim of insolvency systems. Views on insolvency changed in the 1960s when it was realised that the economic benefits of the preservation of a company were an equally important consideration to the maximisation of creditor returns.⁸

The concept of corporate rescue in France arrived with the Law of 1967,⁹ which provided for either a judicial settlement or a judicial liquidation. The former was chosen if the result of the process was likely to be a composition agreement with creditors while the debtor continued to trade, “rescuing” the business from liquidation. The latter was chosen if there was little likelihood of survival and resulted in the liquidation of the debtors assets. The Court would choose from these options based on their view of the viability of the business.¹⁰ At the same time in the United Kingdom, the focus of insolvency legislation remained to a certain

³ See P. Omar, *European Insolvency Law* (2004, Ashgate Publishing, Aldershot), at 49.

⁴ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings OJ L160/1 (30 June 2000) (hereafter referred to as the “EIR”).

⁵ Proposals are set out in R. van Galen et al., *Revision of the European Insolvency Regulation: Proposals by INSOL Europe* (2012, INSOL Europe, Nottingham).

⁶ *Ibid.*, at 17: “...the transferring of assets or judicial proceedings from one Member State to another seeking to obtain a more favourable legal position...”.

⁷ Omar, above note 3, at 3.

⁸ *Ibid.*, at 11.

⁹ Law no. 67-563 of 13 July 1967.

¹⁰ See A. Sorensen and P. Omar, *Corporate Rescue Procedures in France* (1996, Kluwer Law International, London), at 24.

degree the maximisation of returns to creditors by replacing the chaotic pursuit of individual claims with a statutory regime suspending creditors' rights and providing a mechanism for the orderly collection and realisation of assets and their distribution to creditors through a scheme of distribution.¹¹ However, changes in the market, social policy, and the economic climate eroded this paradigm of British insolvency law,¹² resulting in the initiation of massive reforms to the insolvency laws in the UK.¹³

The prospective entry of the UK into the EU in the 1970s also demanded that it should be capable of negotiating with other Member States under a coordinated insolvency convention. This focussed the attention further on the need for reform, resulting in the formation of an advisory committee on the matter in 1973 and the publication of a report in 1976 (the "Cork Report") which stressed that a comprehensive review of insolvency was required not only for the purposes of negotiating with other Member States, but also due to the poor state of the law¹⁴ which:

“...has been tinkered with, patched and extended by false analogies so that today it is replete with anomalies, inconsistencies and deficiencies.”

Further, the law was viewed at this time as no longer fulfilling its obligation to the demands of fairness and justice in a modern society.¹⁵

Business Rescue in the 1980s

Both England and France saw changes to their insolvency systems in the mid-1980s which shifted the focus from liquidation and creditor wealth maximisation to the rescue of companies and businesses. A more social approach to insolvency had developed among Western nations which left scope for, and indeed justified, rescue activities according to the individual values contained within the corporate rescue principles of each jurisdiction.¹⁶

¹¹ See R. Goode, *Principles of Corporate Insolvency Law* (2005, Sweet and Maxwell, London), at 5.

¹² See J. Silkenat and C. Schmerler, *The Law of International Insolvencies and Debt Restructurings* (2006, Oceana Publications, Dobbs Ferry NY), at 387.

¹³ See M. Hunter, “The Nature and Functions of the Rescue Culture” (1999) *Journal of Business Law* 495.

¹⁴ See V. Finch, *Corporate Insolvency Law: Perspectives and Principles* (2009, Cambridge University Press, Cambridge), at 13-14.

¹⁵ See K. Cork, Sir, *Insolvency Law and Practice: Report of the Review Committee* (1982) Cmnd. 8558, at 10 (paragraph 9).

¹⁶ Finch, above note 14, at 245-246.

France

In France, the law was reformed in response to the changing economic climate. An emphasis on social policy encouraged a move to the maintenance of businesses in the place of liquidation. The harmful effects of unemployment caused by business failures in recessionary times were an influence on the creation of a corporate rescue policy biased toward the protection of employment and the rehabilitation of the business.¹⁷ The Law of 1985¹⁸ was passed, having the objective of protecting employment at the risk of sacrificing creditors' rights. It envisaged three possible outcomes:

- (1) a plan for continuing the business;
- (2) a plan for its sale; or
- (3) winding up with court supervision.¹⁹

The law reduced creditors' rights in favour of focusing on saving the business and the jobs associated with it at all costs.²⁰

This approach was later viewed as too biased in favour of labour and unsuited to allowing the French economy to evolve in the highly competitive global market.²¹ However, the focus on employment protection and business rescue has not been lost in subsequent reforms to the French insolvency code.

United Kingdom

The result of the Cork Report in the UK was the passage of a new Insolvency Act 1986,²² preceded briefly by an Insolvency Act 1985,²³ which put into practice many of the suggestions published in the Cork Report. Cork's philosophy on the matter was, among other things, in favour of increasing the emphasis on rehabilitation of the company.²⁴ Thus in the Insolvency Act 1986, a procedure of administration was introduced which, initially, was a court based procedure designed specifically for corporate rescue rather than asset realisation and was focussed on the interests of unsecured creditors.²⁵

¹⁷ Sorensen and Omar, above note 10, at 26.

¹⁸ Law no. 85-98 of 25 January 1985.

¹⁹ See P. Théry, "The Evolution of Insolvency Law in France", Chapter 1 in W-G. Ringe *et al.* (eds), *Current Issues in European Financial and Insolvency Law: Perspectives from France and the UK* (2009, Hart Publishing, Portland OR) (1-16).

²⁰ Silkenat and Schmerler, above note 12, at 143.

²¹ *Idem.*

²² 1986 c.45.

²³ 1985 c.65.

²⁴ Finch, above note 14, at 15.

²⁵ *Ibid.*, at 21.

Business Rescue Today

France

The French perspective on insolvency is as a collective procedure designed to distribute loss among all stakeholders in a company, subject to a certain hierarchy of distribution where employees are often privileged over creditors. The balance between the rights of employees and creditors has been a consideration in attempts to reform the insolvency code up to the reforms of 2005.²⁶ After a few revisions of the insolvency code in the nineties and early 2000s, a new insolvency text was passed: the Law of 2005.²⁷ In the period leading up to the promulgation of this law, it was observed that the previous insolvency code had, in many instances, failed to keep a company from falling into a terminal financial condition. Other pressures for reform included the coming into force of the EIR and a view that the French insolvency regime was too debtor friendly. Its effectiveness was further questioned in relation to the influence of the perennial French concern for employee job security.²⁸

The Law of 2005 included an entirely new procedure of preservation (*sauvegarde*) which is available to debtor companies before the formal *cessation de paiements*²⁹ situation occurs. It was designed as an anticipatory debtor-in-possession rescue procedure where the business could benefit from a moratorium while conceiving of and proposing a plan to creditors with a view to restructuring the business.³⁰ This law was reformed by ordinance³¹ in 2008 partly as a result of the poor utilisation of the *sauvegarde* procedure. In large part the ordinance addresses perceived inefficiencies in this procedure with the aim of enhancing the operation of this and other insolvency procedures.³²

United Kingdom

Insolvency law in the United Kingdom today remains based on the Insolvency Act 1986; however, changes were made to it through the Enterprise Act 2002.³³ The Enterprise Act phased out administrative receivership in favour of administration. The administration procedure was streamlined to make it easier and less expensive to use and also to give unsecured creditors more rights and a higher priority in distribution. One of its original purposes was to provide a means of rehabilitating a

²⁶ Omar, above note 3, at 129.

²⁷ Law no. 2005-845 of 26 July 2005.

²⁸ See C. Dupoux, "French Bankruptcy Law: Putting the Safeguards in Place" (2006) 3(4) *International Corporate Rescue* 207.

²⁹ Suspension of payments.

³⁰ See P. Omar, "Preservation and Pre-packs à la française: The Evolution of French Insolvency Law" (2011) 22(8) *International Company and Commercial Law Review* 258.

³¹ Law no. 2008-676 of 4 August 2008 on the Modernisation of the Economy.

³² Omar, above note 3, at 260.

³³ 2002 c.40.

debtor company in financial crisis and protecting it from creditor claims. This was reinforced in the Enterprise Act³⁴ by the inclusion of Schedule B1 in the Insolvency Act which provided for three hierarchical objectives of administration:

- (1) to rescue the company as a going concern;
- (2) to achieve a better result for creditors in a winding up; or
- (3) if the first two are not reasonably practicable, to realise property for the benefit of secured or preferential creditors.³⁵

Employees

One area where France and England share a small commonality is the position of employees as preferential creditors, though the level of preference does diverge. In France, unpaid employees are creditors in an insolvency procedure but have certain additional benefits. Employees have a general lien over the employer's property which stands as a guarantee for six months' worth of wages and compensation in place of wages. They also have access to a guarantee fund where funds are not readily available to pay employee claims.³⁶ Employees also are given a super priority for a limited part of their claim. This priority ranks above all other claims including those of secured creditors and also affords employees the facility to avoid the disruption and waiting period of the proceedings so that they can be paid quickly.³⁷

Employees in the United Kingdom also retain the status of preferential creditors.³⁸ Unpaid wages and accrued holiday pay are given preferential priority in the distribution. These are payable in advance of unsecured claims out of the assets of the company. Employees are also able to claim against the state National Insurance Fund in respect of a number of unpaid debts associated with their employment. Unpaid employee pension contributions are also preferential for up to four months. Unpaid employer contributions are also preferential, but limited.³⁹ Discussion of employee pensions in insolvency, however, will have to be a discussion for another time as the matter is quite complex.

There is an inevitable tension between creditors' rights in insolvency and the rights of a company's employees.⁴⁰ If the goal of insolvency is to maximise the distribution to creditors from the debts owed to them by the debtor company, then preferring employee raises their claims above those of other creditors and effectively take funds out of the pool of assets to satisfy their claims in preference, creating a super priority which raises issues of fairness to the treatment of other

³⁴ Silkenat and Schmerler, above note 12, at 388.

³⁵ Schedule B1, paragraph 3, Insolvency Act 1986.

³⁶ *Association pour la Gestion du Régime d'Assurance des Créances des Salariés*.

³⁷ See A. Tetley and M. Bayle, "Insolvency Law in France", in O. Lobo *et al.*, (eds), *World Insolvency Systems: A Comparative Study* (2009, Sweet and Maxwell, Toronto) (195-279).

³⁸ Silkenat and Schmerler, above note 12, at 397.

³⁹ Finch, above note 14, at 756-757.

⁴⁰ Goode, above note 11, at 52.

creditors in insolvency.⁴¹ Some view the TUPE Regulations⁴² in the United Kingdom as having this effect, which raises the question of acquired rights generally and the social policy objectives it addresses.

There is also an argument, however, that the concept of corporate or business rescue brings with it parallel goals of a social nature, such as the protection of employment and job security, the effect business failure might have on a community and questions that go beyond the purely commercial outcomes of insolvency. European social policy has succeeded in applying its views on the importance of employment protection through the application of the Acquired Rights Directive on business transfers generally, but including those transfers occurring out of corporate rescue procedures.

Acquired Rights as Social Policy

European Social Policy was evolving on a similar theme in the 1970s to that of corporate rescue in Europe. The social dimension of the EU had begun to grow in importance, recognising that a philosophy of economic growth based on neoliberal ideology was not capable of addressing the social problems consequential to economic integration. An action programme was conceived with the intention of attaining full and better employment, improving working conditions, and increasing the involvement of management and labour in the economic and social decision making within the Community as well as in the life of the undertaking.⁴³ The emergence of both the rescue culture and modern EU social policy evolved to some degree out of these ideological changes throughout the EU.

The acquired rights legislation was born partly out of a growing concern about the absence of a “social face” to the Common Market⁴⁴ as well as the fact that the prevailing frameworks in both Germany and France had already provided acquired rights legislation and were consequently in a potentially disadvantageous competitive position with the rest of the EU lacking similar legislation.⁴⁵

France had acquired rights legislation transferring employment contracts on the transfer of a business in place since 1928. The original law required that where there was a change in the juridical situation of an employer, such as the transfer of a business, all employment contracts would continue between the new employer and employees of that enterprise.⁴⁶ The failure of a business, except in cases of *force majeure*, would not free an employer from its obligation to respect the notice periods of its employees and provide an indemnity for any losses which

⁴¹ Finch, above note 14, at 754-779.

⁴² Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

⁴³ See C. Barnard, *EC Employment Law* (3rd ed) (2006, Oxford University Press, Oxford), at 8-21.

⁴⁴ *Ibid.*, at 619.

⁴⁵ See N. Adnett, “The Acquired Rights Directive and Compulsory Competitive Tendering in the UK: An Economic Perspective” (1998) 6(1) *European Journal of Law and Economics* 69, at 71.

⁴⁶ Barnard, above note 43, at 620.

may accrue.⁴⁷ Today the position is the much the same, though the new employer is not liable for the obligations encumbering the old employer if the transfer is being made through the *sauvegarde* procedure, *redressement* or judicial liquidation.⁴⁸

In contrast, the first UK legislation conferring continuity of employment on a business transfer⁴⁹ would apply only if the employees were voluntarily retained by the purchasing firm. There was no concept of automatic transfer as this would conflict with the fundamental freedom of contract.⁵⁰ For this reason, it was not until the Labour party came to power in the UK in 1997⁵¹ under the promise of social justice and inclusion that the UK accepted the Social Chapter of the Maastricht Treaty, bringing the UK at last under the influence of EU Social Policy.⁵² As such, any directives passed under the Social Chapter would now require implementation.

When considering the needs of employees in the Common Market, it was surmised that the encouragement of competition across borders would inevitably lead to corporate restructurings and, in some cases, the failure of companies which could not compete. It was acknowledged that competition could lead to reorganisations which would mean a loss of job security for employees subject changes accomplished through reorganisations, including business transfers.⁵³ Thus the Acquired Rights drama begins.

The implementation of the Acquired Rights Directives forced a change to the common law position in the UK in which employment contracts were personal and could not be transferred to another employer without the termination of the contractual relationship.⁵⁴ In administration procedures in England, employment contracts are deemed to have been adopted if they are continued for 14 days following the appointment of an administrator.⁵⁵ Thus the company retains the employment contracts in the event that it is decided to sell all or part of the business undertaking. Much case law has argued the point as to whether TUPE should apply in business transfers out of administration and many writers have argued that its application to such a situation would have adverse effects on the outcome of the procedure owing to the inevitable reduction in the intrinsic value of the business due to the cost of liability associated with the transferring employment contracts.

The first Acquired Rights Directive⁵⁶ did not expressly exclude business transfers on insolvency from its scope, but, following *Abels*,⁵⁷ the European Court

⁴⁷ Article L. 122-12, Code du Travail, repealed by Ordonnance no. 2007-329 of 12 March 2007.

⁴⁸ *Ibid.*, Articles L.1224-1 and 2 (in Chapitre IV: Transfert du contrat de travail).

⁴⁹ Contracts of Employment Act 1963 (repealed).

⁵⁰ See A. Baker and I. Smith, *Smith & Woods Employment Law* (2010, Oxford University Press, New York NY), at 541.

⁵¹ The Labour Government was in power from 1997-2010.

⁵² Barnard, above note 43, at 22.

⁵³ *Ibid.*, at 619.

⁵⁴ Baker and Smith, above note 50, at 541.

⁵⁵ See G. Pitt, *Employment Law* (2007, Sweet and Maxwell, London), at 305.

⁵⁶ Schedule B1, paragraph 99, Insolvency Act 1986.

⁵⁷ Council Directive 77/187/EEC of 14 February 1977 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 businesses OJ L 061/26 (5 March 1977).

of Justice said that it would not apply to transfers of undertakings which took place during the winding up of insolvent companies.⁵⁸ Thus employee contracts would not transfer if a business was sold without the intention to continue trading.⁵⁹ The effect was not so clear in relation to those insolvency procedures such as administration where one of the goals is to continue the business but an alternative outcome might be liquidation. Problems were recognised at an early stage in relation to the obligation to take over the liabilities associated with employment contracts in the context of rescue procedures as it was believed that this would act as a disincentive to the rescue of troubled businesses and would actually harm employees by not allowing their employer to be rescued from insolvency and protect at least some of the jobs.⁶⁰

In *Abels*, the Commission argued that the interests of employees would be better served if the Acquired Rights Directive did not apply on an insolvent business transfer with a view to liquidation as it would likely result in a loss of job security and worker welfare, contrary to the purpose of the Directive. Further, the Directive might dissuade a potential transferee from acquiring an undertaking leading to a liquidation, which would mean that all jobs would be lost. Another reason for relaxing the rules was attributed to the special nature of insolvency laws, designed to weigh up the competing interests involved. It was accepted that insolvency rules could derogate at least in part from social policy. An express provision in the legislation applying acquired rights rules to insolvency situations would be required before it could apply to insolvent transfers.⁶¹

A distinction was drawn by the court in *Abels* between terminal and non-terminal insolvency proceedings. This was incorporated in the Acquired Rights Directive 1998⁶² which was then consolidated under the Acquired Rights Directive 2001.⁶³ Article 5(1) states that unless provided otherwise by a member state, employee contracts will not transfer where the transferor is the subject of insolvency proceedings instituted with *a view to the liquidation*⁶⁴ of the assets of the company under the supervision of a competent public authority.⁶⁵ It was a choice available to each member state to apply this insolvency exception. The UK

⁵⁷ Case 138/83 *Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469.

⁵⁸ See S. Hardy, "Some TUPE Implications for Insolvency Lawyers" (2001) 4 *Insolvency Law* 147.

⁵⁹ See D. Pollard, *Corporate Insolvency: Employment and Pension Rights* (4th ed) (2009, Bloomsbury Professional Limited, Haywards Heath), at 316.

⁶⁰ See M. Sargeant, "TUPE – The Final Round" (2006) *Journal of Business Law* 549, at 562.

⁶¹ Barnard, above note 43, at 647-648.

⁶² Council Directive 98/50/EC of 29 June 1998 amending 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 businesses OJ L 201/88 (17 July 1998).

⁶³ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 082/16 (22 March 2001) ("ARD").

⁶⁴ Emphasis added.

⁶⁵ Article 5(1), ARD.

utilised this derogation but it did not fully solve the problem, rather due to a lack of specific definition, it complicated things.

The Problem with Acquired Rights (in the UK)

The train of European cases which clarify the position as to when the exclusion will apply in the UK is long and complex.⁶⁶ The basic position is that where proceedings are instigated with a view to resolving financial difficulty rather than liquidating the assets of the company, the employees of that company retain their acquired rights and transfer to any purchaser of the business of the company trying to avoid business failure.⁶⁷ A number of UK cases have entrenched this position in domestic law,⁶⁸ with the effect that in any business sale by a company in administration, employees will automatically transfer to the buyer of that business. According to the Court, due to its very nature, administration proceedings can never be instituted *with a view*⁶⁹ to liquidation,⁷⁰ so TUPE 2006 will always apply to business transfers out of administration. This position is regarded as having a potentially serious effect on the sales of businesses out of administration unless further jurisprudence or legislative amendment provides otherwise.⁷¹ A consultation on TUPE 2006 was recently undertaken in the UK but its focus was not on the effect of TUPE in business rescues situations so nothing has changed in this area as a result of it.⁷²

The consequences for business rescue could be significant in relation to the outcome of transfer negotiations once a purchase price is adjusted to reflect the increased risk exposure associated with transferring employees.⁷³ A recent survey performed in the UK by R3⁷⁴ was taken among 379 R3 members and showed that

⁶⁶ See, in addition to the previously mentioned *Abels*: Case C-319/*Dethier Equipement v Dassy* 94 [1998] ECR I-1061; Case 362/89 *D'Urso v Ercole Marelli Elettromeccanica General* [1991] ECR I-4105.

⁶⁷ Barnard, above note 43, at 651; See W. Derbyshire and S. Hardy, *TUPE Law & Practice* (2nd ed) (2009, Spiramus Press Limited, London), at 57-58.

⁶⁸ See *Oakland v Wellswood (Yorkshire) Ltd* [2009] EWCA Civ 1094; [2010] BCC 263; *OTG Limited v Burke & Others* [2011] UKEAT 0320/09; *Key2Law (Surrey) LLP vs Gaynor De'Antiquis and Secretary of State for Business Innovation and Skills* [2011] EWCA Civ 1567.

⁶⁹ Emphasis added.

⁷⁰ See Anon., "Transfer of Undertakings – No Exemption for Administrations" (2011) 94 *Technical Bulletin*, section 94.8.

⁷¹ See R. Carthew and C. Fallon, "Employment: An Insoluble Issue – The Insolvency Provisions of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE)" (2010) September Corporate Briefing, at 2.

⁷² Department of Business Innovation and Skills, Consultation on the Transfer of Undertakings (Protection of Employment) Regulations 2006, copy available at: <<https://www.gov.uk/government/consultations/transfer-of-undertakings-protection-of-employment-regulations-tupe-2006-consultation-on-proposed-changes>> (last accessed 15 June 2014).

⁷³ See S. Horne, "From a Question of Fact to An Absolute Rule" (2011) *Employment Law Journal* 2.

⁷⁴ The Association of Business and Recovery, the leading organisation for insolvency, restructuring and turnaround specialists in the UK.

over 50% of insolvency practitioners have dealt with cases in a 12 month period where a buyer has either withdrawn or discounted its purchase price as a result of TUPE liability. 40% had seen cases where the purchaser had entered liquidation rather than being sold as a going concern. A further two thirds responded to a general query that the purchaser had withdrawn or reduced their purchase bid due to the impact of TUPE while the 1/3 remaining replied that liquidation was a consequence of the impact of TUPE.⁷⁵

France had a provision for contractual acquired rights in place well before the Directives were introduced. The EU social policy position was in fact influenced to some degree by what already existed in French law. Thus France has not suffered a resistance to acquired rights given that the concept was born in that jurisdiction. It is interesting to note, however, that in the more recent reforms, France has chosen to relieve the burden of employment liabilities for certain of their corporate rescue procedures. The UK, however, continues to struggle with its implementation of the Directive in relation to its effect on corporate rescue.

Considering the amount of cross border business and the insolvencies which have occurred during the financial crisis, a diversity of approaches to employment protection is not necessarily a benefit as it confuses the process by allowing employees of the same company to be treated differently if in different jurisdictions. However, little has been done to try to harmonise approaches due to the resistance of Member States to the interference of the EU in matters of national social policy. The same cannot be said for insolvency law and cooperation within the EU.

The Once and Future EIR

The EIR in its current state leaves the governance of employee contracts affected by business transfers solely to the applicable law of the Member State.⁷⁶ The proposed amended regulation retains the same wording and intent but proposes an additional provision in relation to acquired rights. INSOL Europe has recommended the inclusion of a second paragraph to the “Contracts of Employment”, Article 10 of the EIR, which clarifies the legal jurisdiction governing employment contracts affected by business transfers occurring under secondary proceedings. The inclusion of this paragraph is aimed at addressing the fact that different jurisdictions have different approaches to insolvent business transfers and acquired rights owing to the derogation available under the directive. INSOL Europe’s proposals therefore fail to assist in resolving the broader issue of equalising the application of acquired rights in corporate rescue.

The wide divergence of the application of acquired rights in business transfer situations creates an opportunity for another species of forum shopping. The differences in the systems in terms of transferability of employees could

⁷⁵ See A. Stephens and G. Palfrey, “TUPE and the Current State of Play” (2012 Autumn) *Recovery* 22.

⁷⁶ Article 10, “Contracts of Employment”, EIR.

become a consideration in the choices made when group companies find themselves in financial difficulty and must choose to close down or sell off certain parts of their operation throughout the EU. As the proposals by INSOL Europe have been made to try to reduce forum shopping, in addition to resolving a number of other issues, it is reasonable to consider how diverse approaches to the acquired rights directive will influence the efficiency of corporate rescue procedures throughout the EU.

Impact of Diversity of Approaches

The diversity of employment entitlements across the EU can affect the choices businesses make when deciding where to invest or divest. In those jurisdictions where employment regulation is more flexible, companies may develop labour intensive businesses to take advantage of the ease of changing employment contracts, dismissing employees, paying less in wages and social security. It may also be easier to shut down those businesses in times of financial difficulty.⁷⁷ Flexible employment protection facilitates capricious investment and could potentially create greater instability in economies because businesses are able to come and go with greater ease. This also affects communities where businesses are dissolved as it will lead to fluctuating levels of unemployment, placing a greater dependence on State social security systems.

Companies may also choose to close branches where it is least costly to do so. Costs of employee liability are a part of those considered costs. For example, in 2006 Peugeot closed down a plant at Ryton near Coventry in the UK. The company blamed the closure on high production and logistical costs. Unions criticised the UK government for having inadequate employment protection laws, believing that a comparable factory in France would not have been so easily shut down. They insisted that:

“...weak UK labour laws are allowing British workers to be sacrificed at the expense of a flexible labour market...Job protection similar to that enjoyed by workers in France would give British employees the opportunity to compete for investment and work on important issues like productivity and efficiency.”

This assertion was supported by London law firm Clifford Chance, which agreed that the cost of shutting down factories in France would cost nearly three times the amount as in Britain because of the highly protective French employment laws.⁷⁸

⁷⁷ See K-J. Bieback, “Harmonisation of Social Policy in the European Community” (1991) 32(4) *Les Cahiers de Droit* 913, at 926.

⁷⁸ IRRU Warwick Business School, “Peugeot announces Closure of Coventry Plant” (2006) European Industrial Relations Observatory, a copy of which may be viewed at: <<http://www.eurofound.europa.eu/eiro/2006/05/articles/uk0605029i.htm>> (last viewed 15 June 2014).

If one considers choice of investment and divestment in different jurisdictions, more labour flexible economies are likely to remain more volatile places for employee job security. INSOL Europe's proposals seek in part to satisfy EU goals of maintaining a stable internal market by avoiding incentives for forum shopping in the attempt to secure more favourable legal position. The dissonance of applications of acquired rights interferes with this goal in so far as different jurisdictions will continue to attract different varieties of investment depending on the legal climate.

Conclusion: Harmony or Dissonance?

The EU Treaties have so far left the competence to regulate social policy to the Member States.⁷⁹ Even when drafting the first Treaties in the 1950s it was mainly France that sought to give more power to the European Community as it was then in the field of social policy so that it might raise the level of protection in other Member States to a level more equal to the system in France.⁸⁰ However, the tension between the goal of harmonization of social policy and the aim of the free market has to date made this difficult if not impossible.⁸¹

There are few Regulations in the EU which deal with social policy issues; most social policy rules are legislated through Directives which are only binding on states as to the results to be achieved. The Member States then have reasonable latitude to implement them through the means and methods that they see fit, often taking advantage of exclusions and caveats which not all Member States will apply.⁸² As such, the European Employment Strategy has seen diverse implementation among the Member States as a result of a gap between the EU level aims and national policies.⁸³ While recently the importance of social policy has been strengthening in the EU, it remains a fractured subject among the Member States which will not be easy to coordinate.

The differences in labour flexibility among the states of the EU can cause instability in a jurisdiction and may arise to some degree where the application of employee acquired rights in business rescue is not so strict. This may also be an argument for the harmonisation of labour laws across the EU generally. In order to avoid this species of social dumping, it may be necessary to remove distortions in competition, such as flexible versus inflexible labour regulation in this case. While most descriptions of social dumping indicate undervalued labour in the sense that

⁷⁹ Bieback, above note 77, at 916.

⁸⁰ *Ibid.*, at 913.

⁸¹ See C. Barnard and S. Deakin, "Negative and Positive Harmonisation of Labour Law in the European Union" (2002) 8 *Columbia Journal of European Law* 389, at 389.

⁸² See G. Barrett, "Deploying the 'Classic Community Method' in the Social Policy Field: The Example of the Acquired Rights Directive" (2009) 15(2) *European Law Journal* 198, at 198.

⁸³ See P. Kettunen and C. Wolff, "Europeanisation through the Back Door: EU Social Policy and the Member States" (2010) 47(5) *Politička misao* 144, at 145.

employees are paid lower wages and have less employment rights,⁸⁴ it is reasonable that this concept could be applied to the rights of employees on business transfers as this also has an effect the cost of doing business in a jurisdiction. As mentioned in the R3 report cited above this can lead to a reduction in a price for a business transfer, the failure of a deal and potentially the failure of a rescue initiative, leading to liquidation and a far more debilitating loss of employment security.

As the future sees the slow meeting of minds among the European countries in relation to business orientated legislation under the umbrella of EU law such as the EIR, the position on social policy remains static. The creation of the Common Market was intended to foster trading across national boundaries and a functioning bankruptcy system forms a part of legal regime needed to support the market.⁸⁵ While the reasons why a similar treatment has not been given to labour regulation are myriad, there remains an argument that an equalisation across the Member States might be best for all.

The question that remains is why two cultures which evolved in such close proximity with so much historical crossover have approached the same social and economic situations so differently and if this context will further elucidate a means by which employment protection and business rescue can be balanced across the EU in order to create a more level playing field between Member States as well as creating greater equality of treatment between employees of all EU countries. Such a balancing could have the effect of fostering greater stability across the EU and certainly in individual Member States whose legal regimes vary greatly. That, however, is a question for a much larger project.

⁸⁴ See B. Hepple, *Labour Laws and Global Trade* (2005, Hart Publishing, Portland OR), at 14.

⁸⁵ Omar, above note 3, at 49.