



*Arbeidsrecht en insolventie – over de positie van de werknemer van een insolvente werkgever*

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# Summary: Labour Law and insolvency – about the position of the employee of an insolvent employer?

## 10.1 Research questions

At the start of this doctoral research, the following research questions were formulated:

1. In case of insolvency of an employer, what are the relevant rules in the Netherlands relating to, on the one hand, labour law and on the other hand insolvency law, and what is the rationale behind these rules?
2. Considered in the light of the applicable rules of labour law and insolvency law respectively, to what extent does the insolvency of an employer lead to tension, conflicts or inconsistencies between the interests of the concerned parties, such as: individual employees, works councils, unions, (other) creditors, "Uitvoeringsinstituut Werknemersverzekeringen" (Employee Insurance Agency, hereinafter: "UWV"); tax authorities, the (shareholder(s) of the) insolvent person or entity itself, and the entire society?
3. How can the aforementioned tensions, conflicts or inconsistencies be resolved in an efficient and acceptable way, in respect of all involved interests, by (amending) Dutch legislation?
4. In addition to the national legislation mentioned in the previous research questions, are there relevant European rules on this matter and, if so, to what extent are the answers to research questions 2 and 3 influenced by these European rules?

An introductory, historically oriented, chapter (Chapter 2) starts with an outline of the relevant rules of labour law and insolvency law. This chapter demonstrates that these systems are – to put it mildly – only moderately attuned to each other. There is a fundamental field of tension between these legal areas and the way in which they are enforced in legal practice. This field of tension stems mainly from the employee-friendly protection concept in labour law on the one hand and the creditor's approach in insolvency law on the other, which intends to liquidate the bankrupt employer in the most simple and inexpensive manner. This has been the case ever since the end of the nineteenth century.

As further observed, this field of tension has a strongly dynamic character, which can be influenced by legal factors (labour law versus insolvency law, each with their own principles and system), social factors (various political and ideological arguments) and the increasing importance of international relations (Dutch legislation versus European legislation). It

is furthermore influenced by aspects such as globalisation, digitalisation, robotisation, platformisation (in Dutch: 'platformisering') and the desire for a flexible labour market (including the trend towards a new, broader employee concept), each influencing the process to a greater or lesser extent. The fact that there are so many and by nature very different factors influencing the process, also makes the process uncontrollable and not always easy to interpret. Moreover, developments are proceeding at an ever-increasing pace, as follows from the overview provided by this introductory chapter.

Subsequently, intensified research was carried out in six sub-areas, each sub-area leading to a set of answers to the research questions. This led to the conclusions and recommendations discussed in the next paragraphs. Successively, these are:

- Wage;
- Termination of the employment;
- Non-compete clauses;
- Restart or relaunch of the business;
- Abuse of insolvency proceedings;
- Employee participation and other collective aspects.

Regarding the recommendations that entail modification of legislation, preferably all rules and regulations are to be incorporated in the Bankruptcy Act, not the Civil Code. This seems more systematically correct: the regular labour law is provided in (title 10 of book 7 of) the Civil Code and I suggest that if derogations occur as a result of bankruptcy or moratorium (also known as "suspension of payments") this should be arranged in article 40 and if necessary in article 40a (new) et seq. of the Bankruptcy Act. Considering possible adaptation of participation rights, I plead for the sake of clarity and partly with regard to time limits and appeal procedures to regulate those in the law specifically designed for that: the Works Councils Act.

## 10.2 Wage

There is a broad spectrum of laws and regulations with regard to entitlement to wage c.a. of employees of an insolvent employer. Based on the foregoing, the rules;

- are partly to be found in specific insolvency legislation and partly in general contract law;
- partly civil-law and partly social security-law in nature;
- partly national and partly internationally oriented.

In addition, the regulations are characterized by a different personal, substantive and temporal scope.

This has led to a widely varied set of rules and regulations, which is unfortunate because consequently this leads to uncertainty and a lack of clarity, which at the same time is hard to completely avoid. It is relatively logical that wage guarantee schemes with a semi-public institution like UWV as the executive party has a public-law character, as opposed to the civil-law rules from the Bankruptcy Act and the Civil Code. Moreover, the legislator was faced with European guidelines when the Dutch legislation already existed. However, this

does lead to problems, especially now that the rules as recalled, also differ in substantive, personal and temporal scope.

It is established that there are quite substantial differences and discrepancies, however at the same time the common factor in all of this is that all regulations are based apparently on the broadly felt necessity to provide employees with additional protection in case of insolvency of their employer and that this desire is inspired by the above-average weak (social) position employees have compared to other creditors. It has been concluded that there is a somewhat incoherent set of rules, the rationale of which is to offer employees of an insolvent employer a minimum of guarantees to ensure that the bankrupt employer's financial obligations are fulfilled to a certain extent.

The first sub-conclusion that can be drawn is that there are considerable lacunae between respectively the preferential right of book 3 of the Civil Code and the wage guarantee scheme of the Unemployment Insurance Act. On this point, I concluded that both in terms of legal certainty and systematically, it would be much better to smooth out the identified gaps as much as possible by repealing the preferential right to wage. The much broader debate about the abolition of several preferential rights, including the tax authorities' position and its seizure right, emerges from time to time, however it lacks decisiveness and political support for a far-reaching and complete revision or reassessment in general of the system of preferential rights. I therefore think we shouldn't be too afraid to take the next step towards the abolition of the employee's preferential rights. In doing so, I emphasize the arguments given earlier for maintaining preferential rights to wage were relatively pragmatic and hardly fundamental, as they relate to lacunae in the wage guarantee scheme, which I think can be resolved (and for which I have formulated recommendations). It should not be forgotten that the employee's preferential right has degenerated into a preferential right of the UWV, because in practice the UWV benefits from the claim for wages' preference character much more than an employee at the individual level, since the UWV takes over the claim based on the right of recourse from the Unemployment Insurance Act (article 66). A preferential right as such for a public body has been debated in detail; however, to me, the arguments for maintaining this right are no longer valid. Abolition of said preferential rights for that matter is not an infringement of the claims the UWV has, now that they are privileged according to article 66 paragraph 3 of the Unemployment Insurance Act (not article 3:288 of the Civil Code) and the preferential character will continue to apply for the UWV.

A first recommendation is therefore to repeal the privilege/benefit/preferential right of article 3:288 (sub c-e) Civil Code.

In addition to repealing the privilege of wages and adjusting the wage guarantee scheme to a number of less prominent aspects (for which I refer to chapter 3), I came to the conclusion that art. 40 of the Bankruptcy Act requires adjustment. I believe a distinction has to be made between, on the one hand, wages owed to employees whose services are still used by the trustee in bankruptcy or trustee (in Dutch: 'curator'), regardless of whether this is limited to the notice period, or that the employment has not yet been cancelled, and, on the other hand, wages of the employees whose employment contracts are terminated

immediately, but who are exempted from the obligation to work. This also does justice to the relationship between creditors of the insolvent company and ordinary bankruptcy creditors, as well as to the reduction of estate debts (in Dutch 'boedelschulden'), which is a fairly widely supported wish in legal literature, recurring in legislative processes, as was evident from the 2007 Preliminary Draft of the Insolvency Act. The first category of wage agreements for employees concerns estate debts; the second should legally be labelled as a bankruptcy debt, because if it would not be labelled as such then it would be a non-verifiable claim, which should be avoided.

Article 40, paragraph 2 of the Bankruptcy Act would then read as follows:

"From the day of the bankruptcy order, wages and premium debts relating to employment contracts are debts of the estate, unless the trustee in bankruptcy has terminated the employment contract in writing within one week of the bankruptcy order, thereby exempting the employee of the obligation to perform work, in which case there is a bankruptcy claim."

### 10.3 Termination of employment contracts

In the chapter on the termination of employment contracts of employees of an insolvent employer (chapter 4), it has been established that various aspects relating to the termination of employment contracts are subject to labour law and regulations, of which the underlying idea is that the employer, as the 'weaker' party, deserves extra protection. This protection can be found, for example, in rules that restrict employers from the freedom to terminate contracts (prohibition of termination, general and special), as well as – if termination of the contract is actually allowed – the obligation to observe a notice period, of which the length depends on the duration of the relevant employment. Statutory rules have also been developed for the termination of fixed-term employment contracts, which aim to protect the employee's position, such as the obligation to give timely notice of whether or not an employment contract will be renewed (which can be sanctioned with a so called compensation in lieu of notification (in Dutch 'aanzegvergoeding')).

In the event of an employer's insolvency, the question arises whether these rights can remain unchanged and, if not, why not, and what is left of the protection for the benefit of the employee. This research shows that those involved in the development of the relevant laws and regulations have not thought about this or did not think it through sufficiently. An example of this is the fact that ever since July 1<sup>st</sup>, 2015, when the Extraordinary Labour Relations Decree ('Buitengewoon Besluit Arbeidsverhoudingen (BBA) 1945') was repealed for the most part, including article 6, it has not been laid down in law that the trustee in bankruptcy does not need prior permission for termination from the UWV. Also consider the fact that only in respect of the prohibition of termination due to a transfer of undertaking (article 7:670 paragraph 8 of the Civil Code) the law stipulates that this prohibition of termination does not apply during bankruptcy of the employer (however it does during suspension of payment). This raises the legitimate question whether this justifies the conclusion that all other prohibitions of termination do apply. The widely shared opinion on this matter is that these prohibitions do not apply and therefore the answer to this question is 'no'. However the law does not state that.

Say – for pragmatic and efficiency reasons – the fact that there is a lack of clear/just legislation left out, there is still a second question that has to be answered, namely whether the views mentioned in the previous paragraph (“in case of bankruptcy, there is no need for a preventive dismissal assessment through the UWV” and “the prohibitions of termination do not apply to a trustee in bankruptcy”) are correct and acceptable.

In this chapter I found that these views are not always easily arguable, since the main argument for this is always that the trustee in bankruptcy must be able to operate with a minimum of delay in the interests of the joint creditors, without being obstructed too much by time-consuming rules of labour law. However it is particularly hard to argue that all protection due to employees outside of bankruptcy is lost to them if a trustee in bankruptcy continues with the company for a longer time. In case of dismissal, why can't compliance with the relevant rules in the field of termination law, applicable to every employer, be required from a trustee in bankruptcy (including selection criteria in choosing between employees proposed for dismissal)? And why should shortening of the notice period as provided for in article 40 paragraph 1 of the Bankruptcy Act be maintained if the company is continued, based on the idea that the trustee in bankruptcy must be able to act quickly in light of liquidating the company, including limiting the estate debts (i.e. the wages as from the bankruptcy order)? In this research I came to the conclusion that derogations of the regular employment termination law in case of bankruptcy of an employer can be justified for a short period of time, not least in connection with the (substantial) interests of other parties involved, such as creditors (including tax authorities and UWV). However, at a given moment even the trustee in bankruptcy, after having made a few emergency calls and taking a number of far-reaching decisions (also in the field of labour law), has to conform to labour law. A 'revival' of regular labour law after a certain amount of time seems indicated. In that context, a clear period of two months from the date of bankruptcy would be efficient, transparent and acceptable. The six-week notice period, which the trustee in bankruptcy is bound by, will certainly have expired by that time. The mere lapse of time, in this case two months, undeniably means the trustee in bankruptcy has continued the bankrupt company in full or partly with a number of employees.

Furthermore, it has been established that there is no justification for not allowing a transitional payment to be due in the event of bankruptcy and suspension of payment by the employer. The arguments put forward by the minister in the parliamentary debate (paraphrased: “that would lead to an extra financial burden on the UWV”) are evidently incorrect, because a transition payment is not a part of the wage guarantee scheme. It is unclear why the employee would not be able to share in case there are adequate assets, just like other unsecured creditors.

This led to recommendations for amending the legislation, that meet both aforementioned objections to the current state of affairs, which can be summarized in: 1) the lack of clear and congruent legislation; and 2) the existing legislation, including the opinions reflected by

literature and case law, leads to undesirable outcomes with regard to employee protection. Summarized:

- a) Statutory recording of the declaration of inapplicability of the general termination prohibition in case of termination of the employment contract by the trustee in bankruptcy, provided the termination takes place within two months after the bankruptcy order;
- b) Statutory rules concerning the exclusion of certain special prohibitions of termination (the so-called during-prohibitions) during the two months after the bankruptcy order;
- c) Shortening of the statutory or contractual notice period up to a maximum of six weeks, as provided for in article 40 of the Bankruptcy Act, should be limited to the cases in which the termination takes place within the period of two months after the bankruptcy order;
- d) Article 7:668 paragraph 3's notice of termination should also be due in a number of cases where the trustee in bankruptcy does not (fully) comply with the duty of notification and leads to an estate debt;
- e) A transition payment is also due in case of a bankruptcy and results in an unsecured, verifiable bankruptcy claim (article 7:673c paragraph 1 of the Civil Code is repealed).

These recommendations, which have to be read in conjunction with the other conclusions and recommendations in this research, ensure that the law is clear and that this leads to acceptable consequences for all involved parties.

#### **10.4 Non-compete clause**

A non-compete clause does not become invalid as a result of the employer's bankruptcy, as has been stated in chapter 5. However, the employment relationship does change drastically as a result of the bankruptcy. It depends on the circumstances of the case whether a clause's impact increased in such a way that, according to the so-called 'AVM-judgments', it can be stated that the employment relationship has changed to such a significant extent that the clause loses its validity and should have been agreed upon in writing again. This involves a weighing of interests that is closely related to the other possibility to influence the effect of a non-compete clause after an employer's bankruptcy, namely making a request on the basis of article 7:653 paragraph 3 of the Civil Code, whereby the court is requested to partially or fully cancel the stipulation in connection with more compelling interests of the employee. The difference between both 'deterioration options' is that the first (weighing of interest, the 'AVM-option') can be filed as a defence in a procedure, while for the second (article 7:653 paragraph 3 of the Civil Code) option, the procedural initiative has to be taken by the employee.

The current legislation, elaborated in case law, is unnecessarily complicated and leads to (legal) uncertainty. It is ready for (more) clarity, also because of the numerous other potential complications (for example in case of a nullification of the bankruptcy order, or in the application of article 7:653 paragraph 3 of the Civil Code with its expanding scope, as well as in the application of paragraph 5 with its possibility to award a payment based on the ground of fairness to the tied former employee). That is why a change of rules is appropriate.

The legislation proposal from 2001 as discussed, provided for a relatively rigorous approach: the forfeiting of the non-complete clause in case of bankruptcy of the employer. I consider this a bridge too far and therefore not desirable. After all, actual and fair interests can exist on the part of the trustee in bankruptcy to maintain the clause, mitigated or otherwise, for example in favour of the highest possible proceeds for the creditors and for the preservation of jobs in connection with the relaunch of (part of) the company.

The Kortmann Committee's proposal of the Preliminary Draft of the Insolvency Act offers a more well-considered approach, which essentially means that the non-compete clause lapses, but a trustee in bankruptcy can still request the delegated judge to declare the non-compete clause applicable because of special interests of the employer.

Elaborating on that, I think the following regulation should be included in the Bankruptcy Act, in a new article following article 40:

"In the event of bankruptcy of the employer, no rights can be derived from a clause as referred to in article 7:653 paragraph 1 of the Civil Code. However, on the ground of compelling interests, the court may, at the request of a trustee in bankruptcy, determine that such a clause shall nevertheless remain fully or partially in force for a period of time and on the conditions deemed necessary."

This is explicitly in line with article 3.4.4 of the preliminary draft. The only difference being that not the delegated judge, but the sub district court judge is competent to rule on this. In the first place, this is in line with the system of article 7:653 of the Civil Code (in which paragraph 3 already gives authority to the (sub district court) judge to rule over a moderation or to declare the clause inoperable). Moreover, this way provides for a proper, careful judicial process (including application of the principle of hearing both sides of the argument and the possibility of appeal and appeal in cassation). Presumably, this way the threshold for the trustee in bankruptcy will also be raised compared to when the delegated judge gives the judgment, because in general the trustee in bankruptcy already maintains contact with said judge.

The weighing of interest stays intact after the bankruptcy order, however the trustee in bankruptcy is expected to only put it forward in a limited number of cases, namely the cases in which the trustee in bankruptcy considers the interests compelling enough to bring the case before the court (with the authorization of the delegated judge).

## **10.5 Restart**

Outside bankruptcy, employee protection in the Netherlands is above average in relation to our neighbouring countries, while that protection is relatively low in case of a bankrupt employer. There is a large discrepancy here. The gap between both situations (protection from dismissal inside and outside of bankruptcy) inevitably leads entrepreneurs to – consciously or unconsciously – test the limits of the law, as shown by case law. That doesn't necessarily have to happen malevolently. It seems more like a natural development stimulated by article 7:666 of the Civil Code (exceptional cases of misuse aside). This search for finding the limits, clearly expressed in the call for a pre-pack by the insolvency law practice, eventually

leading to the cooperative attitude of the Dutch legislator with a legislative proposal on the Business Continuity Act I (in Dutch: 'wetsvoorstel Wet Continuïteit Ondernemingen I'), left the practice empty-handed in the Smallsteps-judgment from the Court of Justice of the European Union. Not only the pre-pack, but also the more traditional forms of restart are now attacked, with legal uncertainty as a result.

The views on a solution to this problem are divided. I am proposing to repeal article 7:666 paragraph 1 under a of the Civil Code, with a simultaneous introduction of a new article in the Bankruptcy Act, which provides for a smoother regime for the restarter. By declaring articles 7:662 et seq. of the Civil Code also applicable on transfer of undertaking in the event of bankruptcy, first and foremost the gap between protection from dismissal inside and outside bankruptcy, respectively, will be reduced (for example, by introducing selection criteria for dismissal upon bankruptcy, as a result of this). Meanwhile the restart will, as a result of the mitigating measures in favour of the restarter, remain relatively attractive for a restarter, which also maintains the level of the proceeds from the sale of the company by the trustee in bankruptcy, which in turn is in favour of the joint creditors.

It is conceivable that, besides the repeal of article 7:666 paragraph 1 under a of the Civil Code, a new article is added to the Bankruptcy Act that specifically deals with the consequences of this. The following components can be part of it:

1. If the employment contract has been terminated by the trustee in bankruptcy and a restart (that meets the requirements of articles 7:662 et seq. of the Civil Code) takes place after this termination, the termination shall be legally void and the employee shall be deemed to have entered into service of the transferee-employer. Nullity (in Dutch: 'nietigheid') is preferred over voidability (in Dutch: 'vernietigbaarheid'), because extrajudicial annulment is no longer possible within the system of dismissal law after the introduction of the Work and Security Act in 2015 and lengthy proceedings before the sub district court must be avoided for the sake of legal certainty. Moreover, this approach has a certain prohibitive character towards the trustee in bankruptcy: ignoring the rules regarding a transfer of undertaking brings about serious risks. The expectation is justified that the trustee in bankruptcy will enter into conversation with the acquiring party and the employees ('organisations) in case of doubt about the employment law position of personnel. An employee who already has another job or does not wish to be employed by the transferee for any other reason must agree on this in writing.
2. By way of derogation from article 7:663 paragraph 1 of the Civil Code, the transferee-employer is not jointly and severally liable for the fulfilment of obligations arising from the employment contract that arose before the date of the transfer. This implements the possibility offered by article 5 paragraph 2 of the directive (Council Directive 2001/23EC).
3. The transferee-employer may, for example, for six months after the transfer of undertaking proceed to terminate the employment contract due to economic, technical or organisational reasons entailing changes in the employment. By order of our Minister of Social Affairs and Employment the UWV sets further (i.e. more flexible) rules with regard to determining the presence of the (ETO-)reasons stated in the previous sentence.

4. During, for example, six months from the moment of the transfer of undertaking, the reinstatement obligation of article 7:669 paragraph 1 of the Civil Code does not apply to the transferee-employer.
5. If, during a period of six months from the transfer of undertaking, a proposal for the purpose of downward adjustment of the terms of employment is presented to the employee and/or one or more employees' organizations by the transferee-employer and this proposal is not accepted, the sub district court judge may, at the request of the employer, amend the employment conditions in whole or in part, insofar as the sub district court judge considers this reasonable after weighing the mutual interests. Appeal to a higher court and cassation are excluded.

In this way, on the one hand restarters are prevented from so-called “cherry picking” while ignoring the regular selection criteria, but on the other hand a hand is extended to potential restarters.

An essential side effect of these new regulations furthermore is that the pre-pack, while distinguishing itself from the ‘regular’ restart after bankruptcy, remains attractive, which ensures the pre-pack benefits are retained. Conversely, in the absence of such an intervention, the pre-pack becomes an unusable phenomenon. This proposal brings the pre-pack back to life and the envisaged law can still be adopted by the Senate to make an actual serious contribution to practice.

Another solution that is worth exploring, is to make a distinction between a (pre-packed or not pre-packed) restart where the restarter is linked to the original entrepreneur (similar to the concept of a “connected party” as used in the United Kingdom) and a restart where another market participant opts for taking over (part of) a bankrupt competitor and its staff. This will lead to some definition and enforcement problems and also to cases of misuse, however the distinction does touch the sore spot: when an entrepreneur is intent on a cheap and fast reorganisation, without taking into account the applicable dismissal laws, he will come away empty-handed. In that case the general rules apply, including the transfer of undertaking (as well as the regular selection criteria for dismissal, the grave unilateral change-test when adjusting employment conditions, etc.). This is different when another market participant is taking over the company, which should then be arranged in such a way that the latter restart takes place within the framework of the liquidation objective of the bankruptcy.

The research in this chapter also reveals another essential (painful) point: shouldn't the guideline be changed? Given the broad (because: European) recognized development in the field of insolvency law going from traditional law directed towards liquidation, to law increasingly aiming at preservation of the company, it is conceivable that not the distinction between liquidation/continuation, but the distinction between affiliated versus unaffiliated restart will be considered decisive for the question whether the applicability of the guideline can be dispensed with. Obviously, this can only happen on the condition that it, by definition and exclusively, involves a case of insolvency of the employer which will take place in a procedure that is supervised by a government agency.

Such a distinction (affiliated versus unaffiliated restart) can also be made in assessing successive terms of employment: only in case of an affiliated restart do the years of service from the period before a bankruptcy count. Now that it is purely a national matter, it seems obvious to connect to a criterion developed in case law: the “*zodanige-banden*”-criterion (which can be roughly translated/described as that to some extent ties have to exist between the former and the current employer). To me, such a change in legislation seems to be a benefit for the restart practice: for unaffiliated restarters, this would mean the end of the obligation as introduced in the Work and Security Act (article 7:673 paragraph 4 of the Civil Code), to also involve years of service from the period before the restart in calculating the transition payment. This article should, in my opinion, have immediate effect and thus also extend to so-called old restarts (from before July 1<sup>st</sup>, 2015), which is in line with the Constar-judgment from the Supreme Court. As a result, this would end the widely shared undesirability of taking into account old years of service from before the restart (by another market participant) at a later dismissal.

This leads to the recommendation to include the following provision in the Bankruptcy Act:

“Contrary to article 668a paragraph 2 of Book 7 of the Civil Code and article 673 paragraph 4 opening lines and under b, second sentence of Book 7 of the Civil Code, an employer entering into an employment contract with an employee that has been employed for the preceding period of six months by an employer that was put into liquidation, is solely considered to be the successive employer with respect to the performed work, if the ties between the successive employer and the bankrupt employer are such that the latter’s acquired insights in the employee’s capacity and suitability based on their experience with the employee, can reasonably also be attributed to the successive employer.”

In summary, it is important to strike a good balance between reorganisation outside bankruptcy and the restart, in which the benefits of the last phenomenon are secured as much as possible – not least in favour of (the best possible proceeds for) the joint creditors, without compromising the legitimate interests of a specific group of creditors, namely the employees. This is possible with an amendment of the Bankruptcy Act and – in conjunction with this – also of Book 7 of the Civil Code.

## 10.6 Abuse of insolvency proceedings

In the chapter on the sub area Abuse of insolvency proceedings (chapter 7), first of all a number of factors are named that put the interest and especially the scope of the phenomenon of abuse of insolvency proceedings into perspective:

- (1) an entrepreneur hands over control to the trustee in bankruptcy when filing for its own bankruptcy and thereby takes the risk that a restart cannot be realized;
- (2) due to the Smallsteps-judgment and its related consequences, it is not certain to what extent the employer’s target is achieved by filing the bankruptcy in view of reducing its workforce;
- (3) based on various studies and the image outlined by recent lower court judgments, the number of cases of abuse does not seem to suddenly increase.

Affected employees however have relatively extensive statutory instruments at their disposal to take legal action against abuse of insolvency proceedings, but it is necessary to carefully select the right route each time, especially now that in particular the action to set aside the issued bankruptcy order and to bring an action to the restarter and/or director/shareholder for acting wrongfully seem to be most likely to succeed.

The total range of possibilities creates a richly varied whole, in which the players involved (I refer to employees, legal assistance providers, trustees in bankruptcy/administrators and judges) opt for combinations of the different options, whether relevant or not. Although this leads to complications arising from numerous differences – both formal and material in nature – between labour law on the one hand and insolvency law on the other, given that these legal areas are often so badly attuned to each other, however at the same time the cases that lead to published and specifically in this chapter discussed judgments, rarely have unreasonable outcomes. The bold cases of abuse are singled out and in other cases employees see themselves, although it is painful, confronted with the misfortune other creditors also face when a company can no longer keep afloat. Apart from the tenet of abuse, generally this demands solutions, which I put forward in other chapters. With regard to abuse, I limit myself to the following recommendations.

Abuse of insolvency proceedings would – at least from the labour law point of view – become a superfluous tenet if the sting would be removed from the problem: by abandoning the rules of transfer of undertaking in case of bankruptcy of the employer. If the rules of transfer of undertaking are also declared applicable to bankruptcy (and, in other words, article 7:666 paragraph 1, opening words, and under a. of the Civil Code would be repealed), the employer that considers filing its own bankruptcy order for the purpose of reducing its workforce, would see his room to manoeuvre restricted in such a way, that it will no longer see the benefit of doing so.

However, as long as this is not the case yet, I recommend a less far-reaching change in legislation. In order to maintain the balance between, on the one hand, the appeal of a restart by a foreign transferee and, on the other hand, limiting the possibilities or benefits for an affiliated restart, I also argue that rules on seniority stipulate that years of service are prevented from transferring after a 'foreign' restart, but do transfer after an 'affiliated' restart, not least when it comes to the (calculation of the amount of the) transition payment. This could be done, among other things, by regulating that the restarter is considered a successive employer as defined in article 7:673 of the Civil Code (the transition payment) *"if the ties between him and the bankrupt employer are such that the latter's acquired insights in the employee's capacity and suitability based on their experience with the employee, can reasonably also be attributed to the successive employer"*. This inevitably raises the question whether it is advisable to do the same with regard to the definition of a successive employer in the 'Ragelie-rule' and the provisions on succession of fixed-term employment contracts. I answer this question in the affirmative.

Furthermore, I do not consider it necessary to introduce new or other statutory rules. I do, however, argue for a more prominent role for the court in the assessment of a bankruptcy filed by the entrepreneur himself: a stricter admission system. The court may ask questions

directly about recent, unsuccessful attempts to reduce personnel costs and about any plans for (the preparation of) a restart. The court can also check whether the works council has been consulted (which could even be heard by default). This way, the sore spot can often already be touched upon in the preliminary stage. If this becomes fixed policy, this does not necessarily have to result in an overload of the judiciary. It is conceivable that, among other things, when the applicants with what I would like to call a high potential for abuse are confronted with a (critical) questionnaire, they would voluntarily decide not to file for bankruptcy.

Finally, as long as article 7:666 of the Civil Code still exists, after bankruptcy both the delegated judge and the trustee in bankruptcy have a responsibility to examine the extent to which the restarter can be forced by agreement to use the regular selection criteria for the acquisition, or to restart.

### **10.7 Participation rights**

Seen from the perspective of participation rights, ideally the works council should always be able to perform its task fully, including all related rights and obligations, in the event of (imminent) insolvency. However, this is not a realistic wish, especially not after the company's bankruptcy. As a result, the rules of the game change, partly because the role of the trustee in bankruptcy, unlike the role of the entrepreneur outside of bankruptcy, primarily evolves around the interests of the joint creditors and maximising the proceeds. However, a distinction can be made between the situation in which the trustee in bankruptcy immediately ceases the activities and proceeds to liquidating the assets (in that case there is no or hardly any role for the works council) and the situation in which the trustee in bankruptcy continues the business, whether or not for a longer period of time and/or works on the continuation of the activities of the bankrupt company through a restart (in which case there would be a more prominent role for the works council). Sometimes it is however hard to draw a line, which is why it calls for a more flexible participation right with an equally more flexible objective of the works council. The aim is that, as far as possible, the works council is involved in the decision-making process, which also connects to the obligations arising from European regulations.

The main objection against the full maintenance of all participation rights in the event of insolvency, as can be concluded from this research (chapter 8), is the time that it takes to completely comply with all obligations, including its time limits. Often time is lacking when a company is on the verge of collapsing or when an administrator or trustee in bankruptcy has to act at lightning speed with a view to, for example, a possible restart. In those cases it will not always be possible to arrange a consultation meeting with the entire works council right away (article 25 paragraph 4 Works Councils Act). Sometimes it can also not be acceptable to award reasonable time to obtain advice, including for example the appointment of an expert. Often the suspension period of article 25 paragraph 6 of the Works Councils Act will not be awaited, let alone the outcome of the appeal proceedings at the Enterprise Court.

Thus, this is where interests clash: the interest of complying with employee participation rights versus the interests of those involved in a rapid restructuring or rescue operation. How can this be solved? First of all, in my opinion, the interest of the joint creditors in rapid action can't be conclusive too quickly in weighing the conflicting interests. Some flexibility from the person in charge of their interest, the trustee in bankruptcy, is required and practicable. This does not have to be at the expense of due care, which in no way withholds the parties involved from being able to act expeditiously. My proposal is therefore to implement the following changes in the Works Councils Act.

In article 25 paragraph 1 the following text could be implemented (for the sake of convenience, it is assumed that the legislative proposal on the Business Continuity Act I (in Dutch: 'wetsvoorstel Wet Continuïteit Ondernemingen I') will be accepted by the Senate without being altered):

"1. The entrepreneur shall give the works council the opportunity to issue advice on any intended decision on:  
(...)  
o. making a request as referred to in art. 363 par. 1 of the Bankruptcy Act or filing for the bankruptcy of the company."

A seventh paragraph should also be added to article 25:

"7. The period referred to in paragraph 6 shall be one week if it concerns a proposed decision as referred to in paragraph 1 opening lines and under o of this article, or if the company was put into liquidation. In the event of the company's bankruptcy, the aforementioned period will also be reduced to two working days if there has been a designation as referred to in article 363 paragraph 1 of the Bankruptcy Act in the four weeks prior to the bankruptcy order and if a consultation meeting has been held about the proposed decision between the entrepreneur, the trustee in bankruptcy and the works council, at least once prior to the bankruptcy order."

These changes provide for a reduced waiting time, while it is also established that a shortened advisory process can be followed in requesting to appoint the envisaged trustee in bankruptcy and for filing its own bankruptcy. Moreover, this proposal stimulates the entrepreneur to continue to involve the works council in the course of events in the silent preparation phase by setting up a consultation meeting, because this will result in further shortening of the set period (from one week to two days). I am not in favour of the abolition of the right of appeal, because the obligation to ask for advice may then turn into a paper tiger too quickly. I do expect reasonableness and fairness will have a strong influence on the attitude of the works council. Furthermore, this proposal removes any uncertainty after the so called DA-decision of the Supreme Court: the works council must also be consulted in case of bankruptcy of the employer. I consider the objection to consultation of the works council because of the confidentiality of the subject matter, to be already sufficiently covered by the existing rules.

An alternative approach, which does not require a legislative amendment, is the following, which also fits in with the DA-decision of the Supreme Court. I have found that, in my view, the Works Councils Act does provide the right to be consulted to the works council,

both during insolvency, as in the period prior to that, including filing for suspension of payment or a bankruptcy order. This can remain the starting point. The requirements of reasonableness and fairness (as referred to in article 2:8 and 6:2 of the Civil Code) then determine in each separate case to what extent the entrepreneur can reasonably be expected to respect all employee participation rights. Factors that play a role in that were identified in chapter 8. With the starting point that employee participation rights, albeit mitigated, remain applicable to insolvency-related situations, legal exceptions aside, the test of reasonableness and fairness can reduce these rights in content and scope to acceptable proportions, depending on the circumstance of the case.