

## **ANHANG zum Bericht über den UIM-Jahreskongress 2007 in Trondheim**

### **First Study Commission:**

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#### **CONCLUSIONS**

#### **ACCESS TO JUSTICE: THE COST OF BRINGING OR DEFENDING CLAIMS; INFORMATION ABOUT THE JUSTICE SYSTEM AND ENFORCEMENT OF JUDGMENTS.**

The Declaration of Human Rights states:

"Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures"

1. The answers of 37 countries to the Questionnaire demonstrated that all countries operate some form of legal aid for both criminal and civil cases. However, the degree to which this legal aid is provided by the state varies considerably. In many states it appears that the availability of legal aid to bring or defend civil actions is regarded as less important than for criminal cases, where the liberty of a person might be in issue.
2. It was agreed that states have an obligation to provide an impartial and independent legal aid system (either directly or through enabling other agencies to do so) for both criminal and civil cases, which will enable all persons to utilise or enforce their legal rights.
3. The answers to the Questionnaire also showed that many countries are concerned with the increasing costs of both criminal and civil legal aid, particularly the latter. As a result, governments have frequently attempted to reduce the availability of legal aid, particularly in civil cases. Delegates concluded that economic considerations must not compromise a state's obligation to ensure proper access to justice for all persons.
4. In civil cases, the combination of court fees, lawyers' fees, the cost of experts and (frequently) the requirement that the losing party must ultimately pay the costs all make it increasingly difficult for persons (other than the richest individuals and well funded companies etc) to have access to justice. A party that is in a stronger financial position can use its financial strength to force a less wealthy party to submit. Steps should be taken to reduce this "inequality of arms" as much as possible.
5. Delegates expressed concern that if states do not provide an adequate system of legal aid (particularly civil legal aid), then persons may be forced to take other routes to solve civil disputes against their will, thereby denying them access to the impartial and independent court system and judges, which is their right.
6. Many states' legal systems require or encourage mediation (sometimes by judges) or provide a system of early neutral evaluation ("ENE") of cases by judges. Such systems can be a useful means of reducing costs and delays. However, they must never prevent parties from having a full adjudication of their disputes by an independent and impartial tribunal if they so wish, by a judge who has not been involved in any pre - trial mediation/ENE.
7. The answers to the Questionnaire demonstrated that education about the rights of persons to use the court system and how it functions is provided in most countries, to varying degrees. It

was agreed that education of members of the public on the court system and their legal rights, particularly in the case of minorities, is an important aspect of access to justice.

8. A citizen does not have access to justice to obtain legal redress unless there is an effective system for the enforcement of the decisions of courts. The answers to the Questionnaire demonstrated that there is widespread concern about the efficacy of enforcement systems in states' legal systems. Some countries indicated that there were dangers of corruption and other misuse with regard to enforcement of court decisions.

9. It was agreed that it is an obligation of the state, as part of its task for ensuring that there is effective access to justice for all citizens, so that:

(1) the system for the enforcement of court decisions is either controlled by the state or is under state supervision;

(2) the enforcement system is as quick and efficient as possible;

(3) the system of enforcement will enable a losing party's assets to be attached, or executed upon or otherwise made available to enforce a judgment;

(4) the enforcement is sufficiently efficient so as to avoid the danger of winning parties attempting to use their own systems for enforcement, which may be illegal or dangerous or both.

Trondheim, September 27th, 2007

1st Study Commission

Gerhard Reissner, Richard Aikens, Christophe Regnard

## Second Study Commission:

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### CONCLUSIONS

#### SANCTIONS FOR PARTIES' INACTIVITY IN CIVIL LITIGATION

1. The parties should be required to disclose all factual information relating to the issues in a case at a very early stage of proceedings.
2. Provisions should exist whereby failure to meet procedural requirements in a timely way may result in the imposition of sanctions such as costs, dismissal of a claim or defense or some other procedural disadvantages.
3. While a judge should be pro-active in managing the progress of a litigation to avoid unnecessary delay, any power vested in him (e.g. to call witness or to conduct investigations) on his own motion requires to be exercised with proper regard to the need to be impartial and to avoid any appearance of partiality.
4. The remuneration of lawyers in civil litigations should be fixed in such a way as to encourage efficiency and the avoidance of unnecessary procedural steps.

Subject for the next year:

Damages for personal injury

Nina Betetto, Robert Blair, Jacques Kessler

## Third Study Commission:

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### CONCLUSIONS

#### THE YOUNG OFFENDER IN THE CRIMINAL JUSTICE SYSTEM

##### **Introduction**

Continuing its study of different approaches and solutions to the unique problems faced by particular identifiable groups in criminal justice systems, the Third Study Commission examined the situation of young offenders. Our purpose was to deepen our members' understanding of the problems facing young offenders within different criminal justice systems and to study approaches that meet their particular needs more effectively.

##### **Survey and discussion**

Written responses to a questionnaire on a variety of issues related to young offenders were received from 41 countries. Delegates from over 30 countries participated in our two sessions and provided valuable contributions to our discussions.

We noted that special young offender legislation exists in virtually every member country, several of them having selected the age of 12, and others, the age of 14, as the minimum age of responsibility in criminal matters. Some countries have selected a younger minimum age. Scotland, for example, has established 8 years as its minimum age, while Nordic countries have opted for a minimum age of 15 years. The adult age of criminal responsibility is almost universally 18 years. We noted that in countries having a minimum age of less than 14 years, much emphasis is placed on education and social integration programs. While some delegates referred to an increase in gang-related crimes involving children less than 12 years of age, they also noted that adults seeking to avoid penal consequences for themselves often recruit these children. In response, Panama, for example, has adopted legislation designed to curb adult recruitment of young children for criminal purposes.

Most member countries have adopted measures prohibiting the publication of information that would disclose the identity of adolescents facing criminal charges. The exceptions, such as Finland and Sweden, have strong traditions of transparency in their criminal justice systems. Both countries, however, have set the minimum age of responsibility at 15 and the press in both countries has adopted guidelines to protect the privacy of juveniles. The lack of privacy protections was noted in situations where a young offender prosecution continues past the age category to which privacy protection measures extend. The consensus of the members was that privacy protections should remain in place throughout the proceedings.

A variety of alternative measures programs, among them, mediation programs, have been adopted by most countries, aimed at diverting young offenders from the penal consequences of their offences. Mediation is a consensual process involving the crime victim and the young offender in which a wide range of solutions may be implemented, from a written apology, to compensation and community service. However, while diversion programs exist "on paper" in virtually all member countries, many of them, in particular, those of some African member countries, are not properly funded and as a result, may not be available as viable alternatives to penal sanctions.

Many member countries have adopted measures permitting the transfer of juveniles who have been charged with serious crimes or repeat offenders to the adult criminal justice system.

Conversely, some countries, notably the Netherlands, have adopted special measures that permit young adults between the ages of 18 and 21 years to be treated as young offenders, depending on the circumstances of the offence and the character of the offender. In most countries, the age of the offender is determined to be his or her age at the time of the offence, not at the time of the trial or disposition of the offence. Members from countries having no specialized tribunal for young offenders reported that an offender's youth is considered as a mitigating circumstance. Some member countries expressed a concern about the potential for disparities in sentence in situations of multiple accused, where older offenders under 18 are transferred to adult court and younger offenders are tried in youth court. Some countries have avoided this situation by ensuring that all co-accused are tried in young offender courts despite their age differences.

In discussing different sentencing options available for young offenders, the use of penal sanctions as a last resort was a common theme in the responses of virtually all member countries. If detention is resorted to, most countries ensure that young offenders are housed separately from adults. Sentencing principles in the vast majority of member countries give primacy to education, rehabilitation and the reintegration of the young offender, while protection of society, general deterrence and accountability play a minor role. Only 4 countries have adopted general deterrence and protection of society as sentencing principles in the case of young offenders and, for the most part, these are countries that have not adopted specialized young offender provisions.

It was noted that legislated sentencing principles favouring education and reintegration stand at times in contrast to media reports of public opinion favouring the increase in accountability for youth crime. The consensus was that in parliamentary states, one would expect the legislated principles of sentencing favouring the rehabilitation and reintegration of young offenders, are, at least in some measure, reflective of public opinion on the subject. Some countries have recognized the important role of parents and guardians in controlling children in their care, by enacting legislation permitting courts to make parents and guardians subject to supervision and mandatory counselling orders, whose breach may be sanctioned.

Finally, the questionnaire responses reflected almost universally that special protections are afforded to young offenders who suffer from mental disorders. In countries that have no special statutory provisions applicable to young offenders, the protections afforded to adults charged or convicted of crimes who suffer from mental disorders also extend to children under the age of 18 years.

### **Next year's topic**

The topic chosen for next year's questionnaire and conference is "Sex offences: today's problems and effective legal solutions". The survey will look into practices and problems of member countries in the investigation, trial and sentencing stages, and will include a review of specific legislative responses to Internet pornography and human sexual trafficking.

Mary Moreau  
President - Third Study Commission

## Fourth Study Commission:

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### CONCLUSIONS

#### RIGHTS OF WORKERS IN CASE OF INSOLVENCY (SHUTDOWN)

##### Glossary:

"insolvency" - a situation in which the employer is generally unable to pay his/her debts as they mature;

"insolvency proceedings" - collective proceedings, subject to any public authority supervision, either for reorganization or liquidation.

##### Introductory remarks:

Insolvency of an employer and insolvency proceedings against employers are relevant for employees. There are concerned aspects of preservation of their employment contracts and payment of their wages. Its also import aspect, whether wages are paid by guarantee institutions. An interesting question is, if after the opening of an insolvency proceeding, the employees may maintain their employment contract when the enterprise is transferred.

##### International Regulations quoted in the reports:

European level:

Council Directive 2001/23/EC relating to transfer of undertakings and the safeguarding of employees rights.

Council Directive 80/987/EEC relating to the safeguarding of employees rights in case of employers insolvency

##### Summary of the answers.

*1. Are there any specific regulations on insolvency proceedings?*

Bankruptcy and insolvency are regulated **in all countries**. There are **specific** provisions applying to bankruptcy and insolvency proceedings for companies and/or individuals ( Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Denmark, Estonia, France, Germany, Iceland, Ireland, Israel, Japan, Kazakhstan, Lithuania, Mexico, Morocco, Norway, Panama, Spain, Slovakia, South Africa, Switzerland, Taiwan, Tunisia, USA, Uruguay):

In **most countries** there is a legislative framework for the **liquidation** of assets. Usually a kind of "trustee" is appointed to take charge of the assets, sell them and to distribute the proceeds.

Many countries also provide a legislative framework for the **reorganization** of insolvent companies, in which for instance a court may stay any action by creditors while negotiations take place for rescheduling or compromises. Often it is not possible to start or proceed with an action during the insolvency proceeding. The aim is normally to restructure in order to make it possible, that debts are paid off and the business may continue.

In several countries there are specific provisions for **financial institutions** (e.g. banks, insurance companies...).

2. *Which institutions (government agencies, courts, etc.) are in charge of insolvency proceedings generally and which institutions are in charge of the resolution of conflicts related to employment law.*

In most countries there are people, who act as a **trustee** (administrator, receiver, executor) who is competent for the liquidation of assets and distribute the proceeds ( Austria, Canada, Estonia, Germany, Ireland, Norway, Taiwan, USA ).

**Courts** are also involved being responsible for issuing certain orders or approving various actions and disputes arising from decisions made by the trustees (e.g. Austria, Canada, Israel, USA).

In some countries there exists a **specific public authority**, which is in charge of ensuring that bankruptcies and insolvencies are conducted in a fair and orderly manner and they are also responsible for "licensing" and supervising the bankruptcy trustees (Canada, USA) or are in charge of the insolvency proceeding (Israel, Kazakhstan).

In several countries there exist **committees of creditors**, which also have certain competences (e.g. Austria, Australia, Ireland, Norway, Slovakia).

In some countries **bankruptcy courts** (e.g. USA, Uruguay), or **commercial courts** are in charge of insolvency proceedings (e.g. Austria, Belgium, France, Morocco, Spain, Tunisia). In other countries this is a part of **general civil jurisdiction** (Australia, Brazil, Bulgaria, Denmark, Germany, Japan, Iceland, Israel, Norway, South Africa, Taiwan). In several countries these courts are competent for all claims (in Lithuania, USA) except for such regarding labor relationship (e.g. Austria, Brazil). With respect to the resolution of conflicts that arise in the context of employment or collective agreements, in most countries the relevant institutions are **labor courts** (Argentina, Austria, Belgium, Denmark, Germany, Iceland Israel, Morocco, Panama, South Africa, Tunisia, Uruguay) and/or labor boards or commissions (Australia, Bulgaria, Canada, Ireland).

3. *When a declaration of opening of an insolvency proceeding is issued, are the employment contracts considered automatically terminated or are they still in force?*

In **most countries** a declaration of opening of an insolvency proceeding does **not terminate** employment contracts automatically (Australia, Austria, Belgium, Bulgaria, Denmark, Estonia, France, Germany, Iceland, Ireland, Japan, Kazakhstan, Mexico, Morocco, Norway, Slovakia , Switzerland, Taiwan, USA, Uruguay).

In **some countries** the **order for compulsory winding up** or shut down of a company operates as a notice of dismissal (Australia) or terminates the contract (Ireland). In some other countries employment contracts are terminated if the court orders the termination of the business (e.g. Brazil, Israel), or appoints a receiver (Ireland), or if after a certain period of suspension (South Africa,) the continuation of the business has not been ordered (Argentina, Tunisia).

In some countries upon the bankruptcy of an employer, the employment contract is deemed to be terminated by the act of the employer (e.g Canada).

4. *When an employment termination automatically occurs due to the opening of the insolvency proceedings, what benefit or severance could the workers be entitled to as a consequence?*

In some countries where there may be a termination employees are entitled to claim for payment in lieu of notice (Canada; ) or if it would have been a **dismissal without cause** (Brazil) by the

employer (Israel).

Generally in some other countries there exist severance payments if employees are made redundant (Australia, Estonia, Morocco)

*5. Is there any chance to terminate the employment contract of one or more employees once the opening of the insolvency proceedings already occurred? Which reasons are considered fair in order to allow the administrator of the insolvency proceedings terminate the employment contracts? Is the employee entitled to any benefit or severance?*

In **most countries** the trustee or insolvency administrator can terminate the employment relationship, subject to the appropriate notice requirements (e.g. Australia, Austria, Canada, Denmark, Estonia, Germany, Iceland, Japan, Morocco, Norway, Switzerland, Taiwan, Uruguay) especially if the further continuation of the business could reduce the proceeds of the liquidation of the assets (e.g. Austria, Bulgaria). Sometimes there is also a permission of the court (e.g. France, USA).

In **some countries** periods for notice are **reduced** in specific situations (e.g. Austria, Germany, Iceland) but employees are entitled to indemnities (e.g. Austria).

*6. What privileges or preferences, if any, are granted to employment credits?*

In some countries employees certain remunerations are **ranked ahead** of ordinary creditors but sometimes behind secured creditors or certain costs (e.g. Argentina, Australia, Denmark, Canada, Japan, Iceland, Ireland, Israel, Norway, Switzerland, Taiwan, USA). Often there are **different** ranks for amounts due for services rendered to the bankrupt **before the date** of bankruptcy and after the date of bankruptcy (Australia, Austria, Germany, Norway) or after announcing the lacks of assets (Germany). Sometimes this is restricted to a certain amount of wages (Brazil) Some countries impose a liability on a company's directors for certain unpaid wages for services performed (Canada).

*7. Is there a guarantee institution that takes charge of the debts unpaid by insolvent employers and to what extent subrogated in the rights and/or privileges granted to the worker, and may claim for them during the insolvency proceedings?*

In **many countries** there exist **guarantee institutions**, which pay employees' wages earned during a certain period ( eg. 3 or 6 month) prior to the date of bankruptcy or a prior termination of employment to a certain maximum sometimes related to the maximum weekly insurable earnings under social insurance or/ indemnities or severance benefits (e.g. Australia, Austria, Belgium, Bulgaria, Denmark, Estonia, France, Iceland, Ireland, Israel, Japan, Lithuania, Norway, Slovakia , Spain, Taiwan, Tunisia). Often this is funded by employers payments (Austria, Bulgaria, France, Iceland, Taiwan, Tunisia).

In some countries there exists a specific institution to protect claims for retirement payments (Germany ). In Switzerland there exists a social insurance solution-

*8. Is there a guarantee institution subrogated in the rights and/or privileges granted to the worker, and may claim for them during the insolvency proceedings?*

In **most countries** guarantee institutions **take the rank** in order of priority of payment that the employee would have had (Australia, Austria, Bulgaria, Denmark, France, Germany, Japan, Lithuania, Norway, Slovakia, Spain, Taiwan, Tunisia).

*9. What other effects has the insolvency proceeding on the employment relationship?*



In most countries employment relationships **do not change**, but often the former employer is replaced by the insolvency administrator or trustee (e.g. Australia, Austria, Belgium, Germany, Japan, Lithuania, Norway, Switzerland, Taiwan, Tunisia, Uruguay).

10. When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights?

If the trustee sells the business of the bankrupt employer in some countries employees are transferred or the purchaser has to rehire them or may be ordered by the court to do so (Belgium, Bulgaria, Estonia, Germany, Ireland, Norway, Slovakia, South Africa, Tunisia).

In other countries if the purchaser rehires them voluntarily and later on terminates the employment contract the employees are entitled to credit for their previous employment (Canada) or the purchaser is bound to certain instruments which covered the employee previously for a certain period (Australia)

In several countries if an enterprise is sold during insolvency procedure the purchaser is not tied to the former employer relationship (e.g. Austria, Brazil, Israel).

*11. Are there specific regulations protecting employees if an enterprise is shut down or if there are mass dismissals? Describe them.*

In many countries there exist specific provisions, if an enterprise is shut down or if there are mass dismissals (Australia, Austria, Belgium, Denmark, France, Germany, Lithuania, Norway, Switzerland, Taiwan).

In some countries there exist special notice periods or other obligations (Information of employment services a certain period before notice and/or works council; negotiation of agreements) on employers who dismiss a large number of employees at the same time (e.g. Australia, Austria Canada- Alberta, Germany, Iceland Lithuania, Norway, Switzerland, Taiwan).

In some countries the employer has to obtain permission from the local labor inspection or employees are entitled to compensation from an unemployment insurance fund (e.g. Estonia, Uruguay).

### **Final conclusions:**

1. In many reports it was mentioned, that the subject of insolvency has been debated during the last years and there have been several new statutes in this field.
2. The question of employees rights during insolvency proceedings is one of increasing importance. There may be a conflict between the Interests of employees to maintain their employment and other creditors.
3. An important interest is to restructure and continue businesses, because due to winding up and shut down of enterprises values of commercial interest are destroyed. This makes it necessary on the one hand to terminate some employment relationships or change the terms. On the other hand this makes it necessary to encourage employees to stay in the enterprise.

### **Recommendations**

1. Before termination of employment contracts there should be an evaluation of all possibilities to continue the business.
2. If it is possible to continue the business it should be possible to handle questions of termination of employment contracts or to change working conditions also on a level of collective bargaining.

This should also be part of the provisions governing the employees rights in the case of a transfer of an undertaking.

3. In the event of transfers of businesses all employees or their representatives should receive appropriate information in due time especially regarding the legal consequences.

4. Even during insolvency proceedings there should be a competence of courts, which have experience in commercial questions but also regarding labor law conflicts.

**Topic for next year:**

Rights of parents in the employer employee relationship

Gerhard Kuras  
Fourth Study Commission  
Supreme Court of Austria