



**Parliament of Montenegro
Parliamentary Institute
Research Centre**

Comparative overview:
**Rights of employees during bankruptcy – legal solutions of
countries in the region**

Podgorica, June 2016

Number: 05/2016

Classification No: 00-52-4/

Date: June 2016

Prepared by: Research Centre – Parliamentary Institute

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FOREWORD

Bankruptcy represents a “legal mechanism which excludes insufficiently effective subjects from the economic life”¹. It appears due to the insolvency and/or over-indebtedness of the debtor, and it can be performed through liquidation or reorganization. Liquidation involves creditors’ satisfaction through the sale of the debtor’s entire assets and the sale of the debtor, as a legal entity, while reorganization is creditor’s satisfaction performed in accordance with the plan of reorganization, through redefining debtor and creditor relations, changing the legal status of the debtor or in another manner prescribed by the plan of reorganization.²

With regard to the employees, employer’s bankruptcy is a prerequisite for terminating an employment contract.³ Rights of employees to protection of claims in the event of bankruptcy at the international level are defined by a set of conventions of the International Labour Organization and also the *Directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the insolvency of their employer*. When it comes to the national level, this issue is regulated by bankruptcy and labour legislation. Smokvina and others discern four legal-theoretical models of (social) protection of employees in the event of insolvency of the employer:

- *Approach which favours the employees in favorem laboratoris* is used in China and it involves obligatory insurance for unemployed persons, which means much more than compensation for the overdue receivables, in practice. In accordance with this approach, under the priority of collection in the bankruptcy procedure employees receive up to 80 % of the national minimum wage in the period of two years;
- *Approach of Employees Rights Unsecured* which exists in Mexico, does not provide for the difference between the rights which should be provided to employees on one side, and liquidation value of assets on the other, however it guarantees some priority rights of employees during bankruptcy, such as paying up to three monthly wages rather than the severance pay.
- *Existence of the Fund for Insurance of Workers’ Claims*. For instance, in Denmark, in case of bankruptcy of the employer, priority will be given to unpaid wages and settlement of other rights pertaining to employees. In case the bankruptcy estate does not suffice, there is a fund which provides for the insurance of workers’ claims;
- *Access to secured funds*. The German system has regulated in an equal manner the issue of unprivileged creditors, including employees, which implies equal access to the remaining bankruptcy estate. In case workers are unable to realize their rights using the bankruptcy estate, the State Insolvency Fund shall provide these funds.⁴

In the remainder of the research paper, in line with the request for development of a research paper, within a specific chapter, there is a comparative overview of legal solutions involving rights arising from employment and rights pertaining to employees during the bankruptcy procedure of the employer in Bosnia and Herzegovina (Federation BIH, the Republika Srpska and the Brčko District), Croatia, Slovenia and Serbia. Furthermore, there is a review of

¹ *Ekonomski leksikon*, (ur) Mia Mikić, Silvije Orsag, Nina Pološki Vokić, Sandra Švaljek, Zagreb: Leksikografski zavod Miroslav Krleža i Masmedia, p. 885.

² Branislav Radulović, *Privredno pravo*, Podgorica: Uprava za kadrove, 2015, p. 28, http://www.fm-hn.com/wp-content/uploads/2015/10/Privredno_pravo_Knjiga.pdf (accessed 8 June 2016)

³ *Vodič kroz postupak osiguranja radničkih potraživanja u slučaju stečaja poslodavca*, Zagreb: Agencija za osiguranje radničkih potraživanja u slučaju stečaja poslodavca, <http://www.mrms.hr/wp-content/uploads/2012/11/vodic-kroz-postupak-osiguranja-radnickih-potrazivanja.pdf> (accessed 10 June 2016)

⁴ Vanja Smokvina, Dejan Bodul, Ante Vuković, *O načelu socijalnog postupanja u stečajnom postupku s naglaskom na prava radnika*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol.34 No.1 travanj 2013, pp. 533-536.

regulation involving this issue at the international level, respectively provisions of International Labour Organization conventions: Workmen's Compensation (Accidents) Convention, 1925 (No. 17); Protection of Wages Convention, 1949 (No. 95); Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173); Private Employment Agencies Convention, 1997 (No. 181); European Social Charter and Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of bankruptcy of their employer which ensures payment of outstanding claims in the event of insolvency of their employer. In addition, definitions on main concepts involving bankruptcy procedure comprising the main subject matter, entities and authority dealing with bankruptcy as well as termination of the bankruptcy procedure are shown in tabular form. Aside from the main rights of employees in the event of bankruptcy procedure in four countries covered by the research, the main research findings also include the main solutions in the legislation of Albania concerning this issue.

Protection of employees in case of bankruptcy procedure in Montenegro

Protection of employees in case of bankruptcy procedure in Montenegro is regulated by the Labour law.⁵ An employee who was employed on the day when the bankruptcy procedure was initiated shall be entitled to settlement of outstanding claims with an employer that is in bankruptcy procedure, in accordance with this Law, and in the period for which the rights determined by this Law are realized. If the entitlements are partially paid in accordance with the separate law, an employee shall be entitled to the difference up to the level of the entitlements determined by this Law.

An employee shall be entitled to payment of:

- salary and wage compensation during absence from work due to temporary inability to work in accordance with the health insurance regulations that the employer had the obligation to pay in accordance with this Law for each month not paid for a period of six months prior to the bankruptcy proceedings;
- indemnification for unused annual leave due to employer's fault, for the calendar year in which the bankruptcy procedure was initiated, if he/she was entitled to it prior to initiation of the bankruptcy procedure;
- severance pay due to retirement in the calendar year in which the bankruptcy procedure was initiated, if he/she became entitled to retirement prior to initiation of the bankruptcy procedure;
- Indemnification based on a court decision passed in the calendar year in which the bankruptcy procedure was initiated due to an injury at work or a professional disease, if that decision became final prior to initiation of the bankruptcy procedure.

An employee shall be entitled to payment of contributions for mandatory pension and disability insurance in accordance with the regulations on mandatory social insurance. Salary and wage compensation, shall be paid in the amount of the minimum wage, or indemnification for unused annual leave. Severance pay due to retirement shall be paid in the amount of two minimum net salaries in Montenegro. Indemnification shall be paid in the amount of the indemnification determined by a decision of the relevant court.

The Labour Fund shall be paying pension and disability insurance contributions for the lacking years of service to a person whose employment terminated due to bankruptcy, until such person meets the retirement requirements, for the period for which the employer failed to make payment of such contributions. The right may be granted to a person, who until applying for the exercise of the right before the Fund, has met one of the legal requirements for entitlement to a pension. The authority deciding on the procedure for acquiring the rights on pension and disability insurance shall provide to the relevant person the data for acquiring his/her rights, upon his/her request. The basis of the contribution shall be the minimum wage in Montenegro, established before submitting the application to the Labour Fund. The Labour Fund shall be competent for exercising the aforementioned rights.

⁵ Labour Law („Official Gazette of Montenegro", No 49/08 as of 15 August 2008, 26/09 as of 10 April 2009, 88/09 as of 31 December 2009, 26/10 as of 7 May 2010, 59/11 as of 14 December 2011, 66/12 as of 31 December 2012, 31/14 as of 24 July 2014)

1. MAIN RESEARCH FINDINGS

When it comes to rights of employees in the event of bankruptcy in countries in the region, there is a number of similar legal solutions, nevertheless, specific cases are also available. In all the analysed countries (Albania⁶, Bosnia and Herzegovina, Croatia, Slovenia and Serbia), relevant legislation which regulates this area ensure that employees receive compensation wage in the event of bankruptcy of the employer, which is determined on the basis of the minimum wage in those countries. In Slovenia and Croatia, during a bankruptcy procedure, employees are entitled to payment of wages for the last three months before the bankruptcy procedure was initiated, up to the amount of a minimum wage. In the Federation BiH, employees are entitled to a compensation wage for eight months before the bankruptcy procedure was initiated, and up to the amount of a minimum wage, which is determined by the General Collective Agreement. In the Republika Srpska, the compensation is paid for twelve months in the amount of a minimum wage determined by law. Serbian Labour Law envisages payment of a compensation wage which the employer was obliged to pay in accordance with the law in the last nine months prior to the initiation of the bankruptcy procedure. The legislation of Albania ensures payment of claims to employees for at least the last three months before the termination of the employment contract, as well as other compensation to which the employee is entitled, upon termination of the employment contract.

When it comes to other types of compensation, in Serbia, employees are by law entitled to compensation for unused annual leave for the last calendar year, compensation due to injury at work or a professional disease, as well as payment of contributions for mandatory social insurance. In Croatia, aside from contributions for annual leave and injury at work, employees are also entitled to unpaid contribution for sick leave within the protected period. All three types of contributions (during sick leave, annual leave and injury at work) are also regulated by the legislation of Slovenia; however, this country also guarantees contributions to employees who terminated their employment contract due to technical progress, up to the amount and under the conditions prescribed by regulation dealing with employment relationships.

Croatian, Slovenian and Serbian legislation also regulate the right to severance pay in case of bankruptcy. Namely, in Croatia, employees are entitled to severance pay within the conditions prescribed by law, which shall amount to a half of severance pay determined within the bankruptcy procedure, and may not exceed the half of the highest severance pay prescribed by law. In Slovenia, employees are also entitled to severance pay during the bankruptcy of the employer, which is determined on the basis of the monthly average earnings of an employee for the last three months prior to termination of employment contract as well as the extent of employment relationship. Serbian legislation guarantees the right to severance pay due to retirement in the calendar year in which the bankruptcy procedure was initiated, if the employee became entitled to retirement prior to initiation of the bankruptcy procedure, and it should be paid up to the amount of two average monthly earnings at the state level.

With regard to the institutional framework, Croatia provides for a public facility which is entirely competent for conducting the procedure of Insurance of Workers' Claims in Case of Employer's Bankruptcy, i.e. Agency for Insurance of Workers' Claims in Case of Employer's Bankruptcy. In Serbia, this area is under the jurisdiction of the Solidarity Fund which guarantees the payment of part of claims which could not be settled during the bankruptcy procedure from the bankruptcy estate of the debtor. In Slovenia, Public Guarantee, Maintenance and Disability Fund of the Republic of Slovenia is in charge of protection of claims of employees in case of bankruptcy of the employer.

The complete document in Montenegrin language can be found at:

<http://www.skupstina.me/images/dokumenti/biblioteka-i-istrazivanje/2017/5.pdf>

⁶ Law No 136/2015 on Amendments to the Law No 7961 as of 12 July 1995 https://www.parlament.al/wp-content/uploads/2016/01/ligi_nr_136_dt_5_12_2015_25080_1.pdf (accessed 10 June 2016)