X-Part II-Memo05

Article 13. Contracts of employment

1. The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.
2. The courts of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of the contracts referred to in this Article even if no insolvency proceedings have been opened in that Member State. The first subparagraph shall also apply to an authority competent under national law to approve the termination or modification of the contracts referred to in this Article.

[10696] Article 13(1) EIR 2015 is similar as Article 10 EIR 2000, with no material change. For an account on how Article 10 EIR 2000 has been applied in the Member States, see Pfeiffer, in: Heidelberg-Luxembourg-Vienna Report (2013), nr. 803 et seq. Article 13(2) EIR is new; it has been included in the recast. See also Prager and Gulbins (*Festschrift* Kübler, 2015), in general in agreement with the way Article 10 EIR 2000 has been applied in Germany.

The consequences of the main insolvency proceedings on employment contracts and employment relations are not those of the *lex concursus* (as a result of Article 7), but are coupled with the law – including the insolvency law – of the Member State which is applicable to the contract of employment: 'In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment should be determined by the law applicable to the relevant employment agreement, in accordance with the general rules on conflict of law', see recital 72, first paragraph, to the EIR 2015. The goal of the provision is: '... to protect employees and labour relations from the application of a foreign law, different from that which governs the contractual relations between employer and employees', see the Virgós/Schmit Report (1996), nr. 125. Niggeman/Blenske (2003), 477, opine that Article 13 is the result of a lack of trust in a minimum income across Europe.

In the former edition of this work (2012) I mentioned the case of LAG (Labour court) Frankfurt am Main 14 December 2010, *ZIP* 2011, 289 (*Nortel GmbH*) observing that in main insolvency proceedings opened in England against the German company Nortel GmbH (with COMI in England) German employment law has to be applied. The case went to the Federal Supreme Court 20 September 2012, *NZI* 24/2012, 1011, comments by Hess; *EWiR* 2/2013, 49, comments by Knof and Stütze; *ZIP* 47/2012. It decided that Article 10 EIR 2000 must be interpreted as meaning that, despite the applicability of German labour law to a cross-border insolvency, an administrator under English law, representing the employer and, unlike a German insolvency administrator (*Insolvenzverwalter*) not replacing the employer in his or her position, has to be regarded as qualifying as a *Insolvenzverwalter* within the meaning of Section 125 of the German *Insolvenzordnung*. As a result, the administrator is able to conclude a so-called reconciliation of interests (*Interessenausgleich*) comprising a list of names of employees to be dismissed. Accordingly, dismissed employees enjoy only limited protection against dismissals on business grounds in the meaning of Section 125.

Despite the highlighted rationale being the protection of employees, Article 13 comprises neutral text and also applies to cases of insolvent employees, see Duursma-Kepplinger (2002), Art. 10, nr. 2; Bos (2006b); Haubold (2010), 135; Nabet (2010), 193ff. Where during the years in some Member States employee' dismissal laws have become

more flexible, the justification for Article 13 is not as solid as it initially, over fifteen years ago, was, see Bork, in: Bork/Mangano (2016), 4.91.

Interpretation. The words 'employment contract and relationships' in Article 13(1) include, according to Paulus (2001a), 513, and Damman, in: Pannen (2007), Art. 10, nr. 5, collective (bargaining) employment contracts. It should be noted that the words must be interpreted autonomously and not according to the *lex laboris*, see Haubold (2010), 135; Bork, in: Bork/Mangano (2016), 4.92.

In addition – unlike Article 11 – when applying Article 13 the preliminary question of whether there is an employment contract and what law applies to that contract (according to the *lex contractus*) has to be resolved See Virgós/Garcimartín (2004), nr.209; Israël (2005), 284.

For the remainder: application of lex concursus. Issues concerning insolvency, which arise irrespective of the opening of the main proceedings with regard to employment contracts will continue to be governed by the *lex concursus* (Article 7). The *lex laboris* determines all consequences of the main insolvency proceedings on employment contracts, but: 'Any other questions relating to the law of insolvency, such as whether the employees' claims are protected by preferential rights and the status such preferential rights may have, should be determined by the law of the Member State in which the insolvency proceedings (main or secondary) have been opened, except in cases where an undertaking to avoid secondary proceedings has been given in accordance with the Regulation', see recital 73, third paragraph, to the EIR 2015. For example, the following instance would be covered by the *lex concursus*: '... the question of whether or not workers' claims arising out of their employment shall be protected by a privilege, the prescribed amount protected and the rank of the privilege if any', etc. See as an example Court of Appeal Gent 11 April 2005 (N-20050411-9): under reference to Article 10 EIR 2000 the court considers that the ranking of a claim (for payment of salary) is determined by the lex concursus; the ranking is related to the determination whether a certain claim is an ordinary claim, whether such a claim enjoys a privilege and the ranking amongst privileged claims.

The power to terminate an employment contract is imposed according to the *lex concursus,* the time limits that must be observed must be calculated according to the *lex laboris.* Questions regarding the amount of the employees' claim, for example, whether or not compensation for holidays not taken should be included, is determined by the *lex laboris.* The actual lodging of the claim and the ranking of the claim are determined by the *lex concursus,* Article 7(2)(h) EIR 2015, see the Virgós/Schmit Report (1996), nr. 128; Berends (2005a), 316.

Solely. According to the Virgós/Schmit Report (1996), nr. 127, the word 'solely' in Article 10 EIR 2000 emphasizes the fact that only the law applicable to the employment contract shall be applied in order to establish these effects (and not the *lex concursus).* The Report goes on to state 'Any problem regarding possible conflicts between the two laws is therefore avoided'.

[10697] *Lex laboris.* Articles 8 and 9 Rome I determine which law applies to an individual employment contract. The general principle being that the parties are free to choose to which law the employment contract is subject, see Article 3 Rome I. By taking advantage of this free choice the employee may not be deprived of the protection afforded to him by the mandatory rules of the law which would be applicable under Article 8(1) Rome I in the absence of this free choice. Article 8(2) sets out that an employment contract shall be governed (in the absence of a choice as according to Article 3):

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or
(b) if the employee does not habitually carry out his work in one country, by the law of the country in which the place of business through which he was engaged is situated.

Both conflict rules are excluded if 'it appears from the circumstances as a whole that the contract is more closely connected with another country,' in which case the contract shall be governed by the law of that country.

Under the application of this system Article 8(1) of Rome I allows effect to be accorded to the mandatory rules of the law of another country with which 'the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract'. Also the applicability of a rule of the law of any of the countries specified may be refused under public policy ('*ordre public*'), see Article 21. See Zilinsky, *WPNR* 2009 (6824); Asser/Kramer & Verhagen 10-III 2015/875ff. However, Israël (2005), 285, submits that Article 7 of the Rome Convention (rather similar predecessor of Article 9 Rome I) does not allow the court to apply said rules, as this matter is specifically dealt with in Article 10 EIR 2000. I am inclined to agree with the Israël. For further comments on this subject see, Garašić (II, 2005), 310ff.

[10698] *Elaboration.* Four scenarios are discussed below in order to illustrate the application of the above rules and the rules laid down in the Insolvency Regulation:

1. Main insolvency proceedings are opened in The Netherlands against an employer; the employee works in another country (e.g. England) and has an employment contract which specifies a choice of Dutch law;
2. Main insolvency proceedings are opened in the Netherlands against an employer; the employee works in England, based on a contract which specifies a choice of English law;
3. Main insolvency proceedings are opened against an employer in another Member State (e.g. Germany). One female employee works in the Netherlands at the location of the German employer's establishment; her contract of employment is subject to Dutch law;
4. As in scenario 3, but the employment contract is governed by German law.

Scenario 1. The effects of the main insolvency proceedings will be determined by the *lex concursus* (Dutch law). According to Articles 40 *Fw* (bankruptcy liquidation), Article 239 *Fw* (postponement of payments) or Article 313 and Article 40 *Fw* (debt rescheduling of natural persons) the insolvency practitioner has the power to terminate the contract. The notice period is six weeks. The effects of the main insolvency proceedings on current contracts to which the debtor is party (Article 7(2)(e) EIR 2015) and therefore the effects on the contract of employment (notice period; claim of the employee) will be determined by Dutch law. The Article 13 exception is in principle applicable, but as the contract is governed solely by Dutch law the same outcome arises.

Scenario 2. The power to terminate the contract is within the legal capacity of the insolvency practitioner in the Dutch main proceedings; however, Article 13 ensures that the effect of the insolvency proceedings on related employment issues (term to obey; amount of employee's claim; claim e.g. for holidays not taken) are determined by the *lex laboris*, i.e. English law.

Scenario 3. The German employer has an establishment in The Netherlands. Two situations may arise: (a) the request to open secondary proceedings in The Netherlands

may be waived, or (b) the German insolvency practitioner (see Article 37(1)(a)) requests the opening of secondary proceedings in The Netherlands.

(a) In principle, the consequences of the main insolvency proceedings are determined by the German *lex concursus*. However, the female worker is protected by the *lex laboris.* According to Dutch law the effects of the German insolvency proceedings on the employment contract are determined by Dutch law, including Article 40 *Fw.* Therefore, the German insolvency practitioner needs the prior permission of the supervisory judge (Article 68(2) *Fw*). However, it is clear that there are no 'Dutch' insolvency proceedings. How should this situation be resolved? For suggestions made under the EIR 200, see the former edition of this book (para. 10698). See now Article 13(2) EIR 2015.

(b) The German insolvency practitioner may, as may the employee, request the opening of secondary proceedings. There is no requirement for proof of the employer's insolvency (Article 38 EIR 2015) and the employee can lodge claims for overdue wages and for pension. The consequences of the proceedings would be determined by Dutch law, including Article 40 and 68(2) *Fw.*

Scenario 4. Where German law is applicable to the contracts the power to terminate lies in the hands of the German insolvency practitioner. The insolvency proceedings and the effects of such proceedings will be determined by German law.

Wages as debts of the estate. According to Article 40(2) *Fw,* from the date of the bankruptcy order, the wages and premiums relating to the employment agreement are held to be debts of the estate. Ongoing payments of wages do not qualify as distributions of the proceeds from the realisation of assets, to which the *lex concursus* applies (Article 7(2)(i)). This is an effect of the insolvency proceedings and is applicable as part of the *lex laboris*. See Van Galen (2001), 291. Paulus (2001a), 511, has raised the question of whether a Dutch employee has the right to claim, under German main proceedings – as a German employee has – an '*Anspruch auf das Insolvenzausfallgeld*', which translates as a 'claim for insolvency drop out money'. Paulus, without differentiating between the facts of scenarios 3 and 4, believes this will not be the case as he does not regard this claim as one which falls under the scope of 'the conditions for the opening of those proceedings, their conduct and their closure' (Article 7(2) opening words). It is my contention that the claim could be successful, particularly in scenario 4 to which German law applies.

[10699] *Guaranteed payment of employees*' *outstanding claims.* Guaranteed payments of employees' claims in the event of the employer's insolvency are ensured under a wage guarantee scheme implemented by a national institution. In the case of insolvency, the scheme is governed by the national law of the Member State and is subject to the law of that State. See Virgós/Schmit Report (1996), nr. 128. If the employee works in another Member State within which the employer does not possess an establishment then the employee must issue his request to the relevant institution in the Member State of the employer. If the employer does have an establishment in the other Member State then the employee must send his request to the relevant institution in the latter Member State, see ECJ 16 December 1999, case C-198/98. See part II of this series, para. 2563 for a more elaborate discussion; Van Apeldoorn (2002), 130; Berends (2005a), 321; Csöke (2011).

[10699a] Although the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment (Article 13(1)), the courts of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of these contracts and relationships, even if no insolvency proceedings have

been opened in that Member State; this rules also applies to an authority competent under national law to approve the termination or modification of these contracts (Article 13(2)).

[10699b] *Prior authorisation of supervisory judge?* In the previous edition of this work, in para. 10698 elaborating on scenarios 1 (Main insolvency proceedings are opened in The Netherlands against an employer; the employee works in another country (e.g. England) and has an employment contract which specifies a choice of Dutch law) and 2 (Main insolvency proceedings are opened in the Netherlands against an employer; the employee works in England, based on a contract which specifies a choice of English law) I submitted that in the first scenario the Dutch liquidator needs the prior authorisation of the supervisory judge (Article 68(2) *Fw*). Authorisation is also required in the second scenario as the 'effects of the insolvency proceedings' on the employment contract are determined by English law and the judge's authorisation does not influence the employee's legal position. As with the approach taken in relation to Article 8 EIR 2000, the (Dutch) *lex concursus* applies in the second scenario as the interests which Article 10 EIR 2000 serves to protect (a Member State's policy protecting interests of parties to the contract, which policy is included in the party's choice of law) are not influenced. The judgment of the court that opened main insolvency proceedings will then decide on the proposed termination. The decision is a judgment deriving from and closely linked with the insolvency proceedings as pursuant to Article 25 EIR 2000. See also Berends (2005a), 326. *Permission of UWV-agency?* Generally, prior to terminating an employment contract in the Netherlands, an employer is required to gain permission from a public agency (*UWV WERKbedrijf*). In scenario 2 this permission is required if it is expected that the employee will return to the Dutch labour market following his dismissal; no permission is required when the dismissal does not affect the Dutch labour market, see Netherlands Supreme Court 23 October 1987, *NJ* 1988/842 (*Sörensen*). It should be noted that Court of Appeal Amsterdam 27 April 2010, *JAR* 2010/160 and District Court 's-Hertogenbosch (subdistrict Eindhoven) 28 October 2010, *LJN* BO5346; *JAR* 2011/1, both have decided that such a permit too is required when the Dutch labour market is not affected. In both scenarios the employee's legal position may be exceeding his Dutch or English position if Directive 96/71 (O.J. L 18 of 16 December 1996) concerning secondment of employees is applicable. The Directive contains certain mandatory rules with regard to minimum wages and non-discrimination (no dismissal during pregnancy), see Van Hoek (1998), 9; Van Apeldoorn (2001), 173. Article 13(2) EIR 2015, however, does not cover a prior approval system based on the *lex concursus* in the main insolvency proceedings. It stipulates that the courts of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of these contracts and relationships, even if no insolvency proceedings have been opened in that Member State; this rules also applies to an authority competent under national law to approve the termination or modification of these contracts (Article 13(2)). It therefore provides the answer to scenario 3 under a in para. 10698. Article 13(2) provides a jurisdictional rule, not a conflict-of-laws rule, as the secondary court must apply the law applicable to the contract, which very well may be the law of another Member State, then the one which is the basis for that court's jurisdiction, see Bork, in: Bork/Mangano (2016), 4.91.

[10700] *Non-EU Law.* Reference can be made to earlier comments concerning a choice of law for non-EU Law. The following scenario illustrates the consequences of a choice for

non-EU law. A Japanese company has its European headquarters in Lyon (France) and a small office location in Rotterdam. The staff at the Rotterdam office consists of two employees. One employee has a contract of employment which specifies the applicability of Dutch law. The other specifies Japanese law. With regard to questions concerning the former contract, the 'intra-Union' connection between France and the Netherlands is decisive – see the aforementioned scenarios. With regard to the contract to which Japanese law applies, the following alternatives are available:

(i) due to the choice of Japanese law any legal issues will fall outside the scope of the Insolvency Regulation. The private international law rules of the forum will be decisive, see Article 8 Rome I. See Duursma-Kepplinger (2002), Art. 10, nr. 2; Haubold (2005), 137. Also see Reinhart, MüKoInsVO (2016), Art. 10, nr. 2, for comments specifically relating to the situation in which the place of work is outside the Community. Reinhart is in agreement with alternative (iii) below with regard to a situation in which the work place is within the Union.

(ii) the choice of Japanese law is not a choice for the law of a Member State and therefore the applicability of Article 13 is not invoked. With no available exception the case must be decided according to the general rule, the *lex concursus* (French law). See also Huber (2001), 163;

(iii) The rationale behind Article 13 is to provide protection against the applicability of foreign (French) law, thus Japanese law will be applied.

The protection offered to employees working within a multicultural company which has headquarters in London, branches in Athens, Hamburg and Porto and contracts which specify various choices of law, may differ substantially. The point of reference is not 'equal treatment' as such, but equal treatment in comparison with all other employees falling under the same jurisdiction. See also Israël (2005), 285.