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Protection of Workers' Rights in Bankruptcy Proceeding in Serbian and Western Balkans Legislation

Abstract

The protection of workers' rights in bankruptcy proceedings is a matter of supreme importance in every country. Comparing national laws, one could conclude that the predominant solution is to grant workers the position of privileged creditors. In Serbia, workers are protected by means of two laws: the Labour Law, which is the *lex generalis* for this area, and the Bankruptcy Law, which has the role of *lex specialis*. In addition to protection during bankruptcy proceedings before commercial courts, workers can appeal to the state's national guarantee institution, namely, the Solidarity Fund. Serbia is, therefore, among the countries which employ a mixed – protectionist system. By analysing the legal solutions related to these issues, the authors want to determine the correlation between national legal solutions and those at the European Union level, and to consider the problems in bringing these claims in legal practice. They have also reviewed the current legislation in some Western Balkans countries including Croatia as a member of the EU, and Bosnia and Herzegovina, which has candidate status akin to Serbia. The authors conclude that Serbian law has a modern, hybrid approach in securing the rights of workers in bankruptcy proceedings, but that there is room

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for improving regulations in this area. This could be achieved by, *inter alia*, increasing the volume of claims guaranteed to workers, restricting the reasons for initiating bankruptcy proceedings, making preliminary payments to workers in the initial stages of the proceedings, and keeping court records on the percentage of workers' claims being realised in bankruptcy proceedings.

Keywords: Protection of Workers' Rights, Bankruptcy, Bankruptcy Legislation, Republic of Serbia, Law Harmonisation, Western Balkans

Introduction

The protection of workers' rights is an issue of essential importance for every country. Therefore, workers are guaranteed numerous freedoms and rights in this sphere, along with several mechanisms of protection. Worker care becomes especially important in cases of bankruptcy proceedings. In this context, workers have claims against a bankrupt debtor, i.e., they gain the status of creditors. In most countries, this category of creditors receives a privileged status, which, historically, has been constantly improving in accordance with the *in favorem laboratories* principle.

The frameworks of the protectionist legislation belong to two branches of law, namely, bankruptcy and labour law. These two areas overlap in a couple of instances, and, according to some authors, they even are interdependent systems (Smokvina, Bodul, Vuković, 2013, p. 526). Initiating bankruptcy proceedings has myriad negative consequences for workers that the state must consider. Thus, social criteria become factors in decision-making when creating bankruptcy solutions. In this way, the basic principles of commercial law, which characterise efficiency and profitability, are corrected. Even though the main objective of bankruptcy is the most favourable collective settlement of bankruptcy creditors, with some of the basic principles being equal treatment, equality, and the protection of creditors, these general rules are still being adjusted, considering the need to protect workers.

Although bankruptcy laws are generally based on the equal treatment of creditors, certain categories of creditors are still awarded special protection by every national bankruptcy law (Radović, 2017, pp. 156–166). Therefore, the general principle of equality and equal treatment of creditors in bankruptcy proceedings must allow for certain exceptions (Višekruna, 2020, p. 62). State intervention in the bankruptcy process involves making social considerations a priority at the expense of profit-oriented considerations. Clearly, economic and social interests are rarely

compatible, so it is necessary to find an appropriate degree of regulation and to fairly protect other categories of creditors. Therefore, the privileged position must be limited as well. Achieving this compromise is often only possible through the "make an attempt – make a mistake – make a correction" mantra, which is why bankruptcy laws are subject to frequent changes. The frequency of those changes is particularly evident in countries which have undergone the transition process, in and of itself a period of turbulent change, where the need to ensure the greatest degree of economy and transparency in bankruptcy procedures and the protection of creditors is most evident. Naturally, the most important creditors are the workers themselves.

The claims of this category of creditors can be protected by legal priorities, social security schemes or even a combination of both (Mucciarelli, 2017, p. 255). Serbian law theory recognises three models of protection, with the first being based on privileging certain claims of workers in bankruptcy proceedings, the second being based on the existence of the guarantee institution, and the third being a hybrid model, i.e., a combination of the first two (Radović, 2017, p. 182). Indeed, many European countries have also founded institutions whose very purpose is to guarantee a second level of protection, and are known as 'guarantee institutions'. This solution is prescribed in the European Social Charter as follows: "With a view to ensuring the effective exercise of the right of workers to the protection of their claims in the event of the insolvency of their employer, the Parties undertake to provide that workers' claims arising from contracts of employment or employment relationships be guaranteed by a guarantee institution or by any other effective form of protection" (*European Social Charter*, Art. 25). This solution has become the standard of EU regulations based on secondary legislation (European Parliament, 2008). Such guarantee institutions agree to the payment of claims that the workers are owed from the employer, and which are taken to represent the minimum amount for a decent and dignified life. In this context, the authors will examine individual legal solutions in the sections that follow.

The authors primarily examine the relevant legislation in the Republic of Serbia, but also review the relevant legislation of the Republic of Croatia *and* the Federation of Bosnia and Herzegovina. It is the authors' belief that a comparative analysis of the protection of workers' claims in bankruptcy cases in those Western Balkans countries has merit because those countries were once part of the Socialist Federal Republic of Yugoslavia *and* share a common legal tradition that developed in different directions after the state's dissolution. Thus, each country today has a specific bankruptcy

system that can serve as an example and a guideline for progress in the field of employee protection. Also, the authors believe that the comparison of legal solutions in the three aforementioned countries is particularly significant, considering the relations between each country and the EU. Currently, both the Republic of Serbia (since 2012) and the Federation of Bosnia and Herzegovina (since 2022) hold candidate status, while Croatia has been a member of the EU for more than a decade. Furthermore, the problem of protecting workers in bankruptcy proceedings, in addition to the ever-present reasons for state intervention, became even more relevant during the COVID-19 pandemic. The data on the number of bankruptcy proceedings initiated during the pandemic and immediately after did not initially show any increase, e.g., in the Autonomous Province of Vojvodina in Serbia (see Mijatović, Vavan, Gajinov, 2023, p. 151), or Switzerland, where despite initial concerns, there was also no large wave of bankruptcies (see Rodriguez, Ulli, 2023, p. 275). Massive fiscal and monetary state support contributed to this, and economic entities were thus better prepared to face the risks of insolvency (Čolović, 2021, p. 134). However, it seems that the crisis was only delayed. According to research for 2023, the number of bankruptcies in the EU was on the rise, reaching a record high in the second quarter (Eurostat, 2Q, 2023) before decreasing in the fourth quarter (Eurostat, Q4, 2023). However, the figures remain above pre-pandemic levels, which means that the issue of employee protection in bankruptcy proceedings concerns an increasing number of people.

The Protection of Workers in Bankruptcy Proceedings in Serbian Legislation

In the Republic of Serbia, the regulation that determines the protection of workers as creditors in cases of bankruptcy is governed by two basic laws: the Labour Law (2015, hereinafter: LL) – *lex generalis,* and the Bankruptcy Law (2009, hereinafter: BL), which, in this context, is the *lex specialis*. The legislation awards a privileged position to workers as a vulnerable group of creditors. This piece of Serbian legislation is in accordance with most European countries, which affords priority to workers (Višekruna, Rajić Ćalić, 2019, p. 266). Besides the preferential settlement of claims in bankruptcy proceedings, the law prescribes its protection through settlement from a guarantee institution, i.e., the Solidarity Fund. Thus, a hybrid mechanism for the protection of workers was implemented by national legislation, following the highest community standards.

The Protection of Workers' Rights and Bankruptcy in the Labour Law

The scope of the Labour Law are the rights, duties, and responsibilities resulting from a labour relationship, i.e., one that is based on labour (LL, Art. 1). Considering workers' vulnerability in the event of bankruptcy, this law provides protection to those categories of persons. The entirety of Chapter 9 of the Law entitled "Claims of Employees in the Event of Bankruptcy Proceedings" regulates certain issues in this area. However, out of the 23 articles contained in that chapter, as many as 20 are dedicated to determining the position and way of the functioning of the Solidarity Fund. Therefore, the focus of the LL is to regulate the position of this guarantee institution. It was founded in 2005 and is designated as a public service with its headquarters in Belgrade, whose activity is securing and paying claims if they have not been paid in accordance with the law regulating bankruptcy proceedings (LL, Art. 124, paragraph 2). According to the LL, the employee has the right to the payment of: 1) salary and compensation of salary during the absence from work due to temporary impairment according to health insurance regulations, that were due to be paid by the employer in conformity with the present Act, for the last nine months before initiation of the bankruptcy proceedings; 2) indemnity for any annual leave which was not used due to an employer's fault, for the calendar year in which the bankruptcy proceedings have been initiated; 3) pension gratuity in the calendar year in which bankruptcy proceedings have been initiated; and 4) indemnity for an injury at work or professional illness awarded in a court decision rendered in the calendar year in which the bankruptcy proceedings were initiated, if that decision has become final before the initiation of bankruptcy proceedings (LL, Art. 125). If these claims are partially paid in accordance with the BL, the employee is entitled to the difference up to the level of rights determined by the LL. According to this model, employees are the only creditors, and the realisation of rights is not based on the assets of the bankrupt debtor (Radović, 2017, p. 181).

The Protection of Workers' Rights in Bankruptcy Law

The BL regulates the conditions and manner of initiating and conducting bankruptcy of legal entities (BL, Art. 1). In the following sections, the authors will examine the regulations concerning creditors in general and workers as a special category of creditors. According to the BL,

the objective of bankruptcy is the most favourable collective settlement of creditors by realising the highest possible value of the bankrupt debtor, i.e., their property (BL, Art. 2). The protection of bankruptcy creditors is the first principle of a bankruptcy procedure (BL, Art. 3). The other principles stated are: equal treatment and equality; the economy; judicial implementation of the procedure; imperativeness and inclusiveness; urgency; two-level jurisdiction; and transparency and informativeness (BL, Art. 4–10), which exist to protect creditor interests.

According to Article 1 of Chapter II entitled "Creditors and Other Participants in the Proceedings" (BL, Art. 48) a bankruptcy creditor is a person who has an unsecured claim against the bankruptcy debtor on the date of the initiation of bankruptcy proceedings, and bankruptcy creditors, depending on their claims, are classified into four payment orders (BL, Art. 58). The first payment order includes the unpaid net wages of employees and former employees, in the amount of the minimum wages for the last year before the opening of bankruptcy proceedings with interest from the due date until the opening of bankruptcy proceedings, as well as unpaid retirement and disability benefits for employees for the last two years before the opening of bankruptcy proceedings. This includes claims based on concluded contracts with companies, the subject of which are unpaid retirement and disability benefits for employees for the last two years before the opening of bankruptcy proceedings. The basis for calculation is the lowest monthly benefits average, in accordance with the regulations on social security benefits on the day of the opening of bankruptcy proceedings (BL, Art. 58). All workers' claims that are salary-based and which exceed the specified value and time limit, are classified in the general payment order and are settled equally with other claims of debtors (Radović, 2017, p. 177).

Challenges in the Practice of Exercising the Rights of Employees in Bankruptcy Proceedings in Serbia

The Republic of Serbia's legislation creates a framework that clearly places employees in a privileged position compared to other creditor categories. More often than not, however, this does not guarantee that the workers' claims will be met. After priority payments are made from a bankruptcy estate (such as the costs of bankruptcy proceedings), there is sometimes not enough left to meet employees' claims in full. This happens when the property value is less than the cost of the procedure, or is of insignificant value, and when the procedure is concluded without delay. For example, the statistics from the Novi Sad Commercial Court show

that out of 150 bankruptcy cases from 2016 to 2021, employees' claims were settled in full in only 19.33% of the cases, 26.6% were only partially settled, and in as many as 54% of bankruptcy proceedings the employees did not settle their established claims at all (Mijatović, Vavan, Gajinov, 2023, p. 152).

These statistics serve as a warning that more socially-responsible actions are necessary. Bankruptcy and insolvency rarely occur suddenly and unexpectedly. Businesses usually experience a progression of financial problems leading to bankruptcy and these signals are clearly recognisable. Therefore, the authors believe that the conditions for declaring bankruptcy should be more strict so as to ensure bankruptcy procedures are initiated in a timely manner (Mijatović, Vavan, Gajinov, 2023, p. 153). This kind of regulatory action would be in line with EU initiatives aimed at improving the protection of creditors. In this sense, the new institutes introduced into the bankruptcy law of the Federal Republic of Germany are particularly noteworthy (Đurić, Jovanović, 2023). For example, German law foresees the solution and conditions when workers are preliminarily paid the amount of three months' wages in the initial phase of bankruptcy proceedings to avoid a situation in which all possible funds are spent on procedural costs. Funds specifically designated for that purpose are called bankruptcy money (in German: *Insolvenzgeld*), and are distributed by the Federal Employment Agency. Employees' bankruptcy claims are not limited to fixed wages, and also include the right to other fixed benefits such as private healthcare, medical care, annual leave. salary, bonuses, and retirement benefits (Ariqah, Anisah, 2022, pp. 63–64). According to 2023's Report of the European Commission, Germany sits in second place after Finland in terms of the efficiency of bankruptcy procedures and protecting workers' rights (European Commission, 2023), so emulating these solutions is certainly justified.

It is the authors' belief that the protection of employees in bankruptcy proceedings should be directed towards including a range of employees' claims against the bankruptcy debtor that are as wide as possible along with being objectively achievable. Merely adopting the EU legal standards should not be unreservedly pursued without prior feasibility studies (Mijatović, 2019, p. 91). According to some authors (Višekruna, Rajić Čalić, 2019, p. 266), Serbia's legal framework in this respect is not fully in accordance with the standards of the International Labour Organisation conventions, which calls for revisions. Although some workers' claims are prioritised, the limitations of the subject matter render this protection insufficient. It is necessary to expand the scope of rights of employees who are guaranteed a privileged position in bankruptcy proceedings. The provisions of the

Labour Law, which determine which rights employees can exercise before the guarantee institution, could be used as a starting point. Finally, establishing the obligation to keep uniform official records on the degree of settlement of bankruptcy creditors may be a good solution. Such records would certainly contribute to a better understanding of the efficiency of bankruptcy proceedings in Serbia (Mijatović, Vavan, Gajinov, 2023, p. 154).

Specific Instances of Protections of Workers' Rights in Croatia's Legislation in the Event of Bankruptcy

The protection of the rights of employees in the event of bankruptcy in the Republic of Croatia is regulated by the Bankruptcy Law (2015, hereinafter: BLRH), and the Law on Insurance of Workers' Claims (2017, hereinafter: LIWC). According to LIWC provisions, in 2017 the Agency for the Insurance of Workers' Claims was established with headquarters in Zagreb as a counterpart to the Solidarity Fund in Serbia. Croatia thus established a similar hybrid, or "mixed" system of employee protection in bankruptcy proceedings. The recent changes in Croatia's legislation have further improved the position of this category of creditors.

According to the Bankruptcy Law, claims of the first order of payment include claims of employees and former employees of debtors that arose before the opening of bankruptcy proceedings from the employment relationship, followed by claims by government institutes or funds in accordance with the Bankruptcy Law with special regulations in the amount of the corresponding part of the total cost of wages or salary compensation, and severance pay up to the amount prescribed by the Law or collective agreement, i.e., a claim based on compensation for damages suffered due to an injury at work or an occupationally-related disease (BLRH, Art. 138).

In Croatia, the LIWC regulates the protection of workers' material rights from employment relationships in the event of the opening of bankruptcy proceedings against an employer, namely: 1) unpaid wages or wages up to the minimum wage for each month of the protected period; 2) unpaid wages for sick leave during the protected period, which the employer was obliged to pay from their own funds, up to the amount of the minimum wage for each month spent on sick leave; 3) unpaid benefits for untaken annual leave to which the employee was entitled until the opening of bankruptcy proceedings, up to the amount of the minimum salary and in the amount of the monthly salary; 4) severance pay in the amount of half of the severance pay determined in the bankruptcy proceedings, and up to half of the maximum amount of severance pay

prescribed by law; and 5) legally-awarded compensation for damages due to work injury or occupational disease, in the amount of up to one third of the legally-awarded damages (LIWC, Art. 8).

The 2023 amendments to the LIWC changed the definitions of the employee and the protected period for exercising rights in the event of an employer's bankruptcy. An employee is a natural person who, at the time the bankruptcy proceedings were opened, was employed by the employer, as well as a person whose employment with the employer ended within 12 months before the opening of the bankruptcy proceedings (formerly 6 months), and the protected period is the last five months before the opening of bankruptcy proceedings against the employer (formerly 3 months). Based on the above, the authors conclude that the rights of employees in the event of bankruptcy in Croatia, especially after the latest amendments, are protected to a greater extent than in Serbia.

Specific Instances of Protections of Workers' Rights in Bosnia and Herzegovina's Legislation in the Event of Bankruptcy

In the complex legal system of Bosnia and Herzegovina, bankruptcy is governed by entity law and regulations of the Brčko District of Bosnia and Herzegovina. Thus, the issue of protecting employees in bankruptcy proceedings is considered according to the Bankruptcy Law of Bosnia and Herzegovina (hereinafter: BLFBIH), the Law on Bankruptcy of the Republic of Srpska (hereinafter: BLRS) and the Law on Bankruptcy of the Brčko District (hereinafter: BLBD). While there is considerable alignment between the three laws, there are also differences in terms of workers' rights. In the following sections, the authors will compare certain solutions in both Serbia's and Croatia's legislations.

The latest reform of the bankruptcy legislation in Bosnia and Herzegovina has not accepted a modern approach to the protection of workers' rights in case of an employer's bankruptcy. For example, workers' claims are defined as being privileged and without restrictions, but the establishment of a guarantee institution is not prescribed, as is the case in Serbia and Croatia. In addition, while Bosnia and Herzegovina's new Bankruptcy Law does not recognise the modern concept of bankruptcy as a reason for dismissal (as is the case in Serbia and Croatia), the opening of bankruptcy proceedings automatically terminates the workers' employment contract (Rizvanović, Vidić, 2021, pp. 318–322).

The Bankruptcy Law of Bosnia and Herzegovina stipulates that the claims of the employees of a bankrupt debtor arising before the opening

of bankruptcy proceedings in the total gross amount are to be settled before other bankruptcy creditors (BLFBIH, Art. 92). In contrast, the Bankruptcy Law of the Republic of Serbia stipulates that the claims of employees with claims from the employment relationship for the last 12 months up to the date of opening of bankruptcy proceedings are also to be settled, but only in the amount of minimum wages and benefits. The employees are to be settled before other bankruptcy creditors, but only after the settlement of claims from the temporary administration (BLRS, Art. 82, para. 1, and 2). The BLBD stipulates that all workers and former workers of a bankrupt debtor, with claims from employment for the last 12 months up to the day of the opening of bankruptcy proceedings, are settled before other bankruptcy creditors (BLBD, Art. 92).

The authors conclude that all three laws prioritise the claims of employees in bankruptcy proceedings, but that in the Bankruptcy Laws of the Republic of Serbia and the Brčko District, there are certain restrictions that are not prescribed by the Bankruptcy Law of Bosnia and Herzegovina. However, the most significant difference when comparing the legislation of Serbia and Croatia is the absence of a guarantee institution, one which should certainly be established in the light of the priorities of future legislative initiatives and changes.

Conclusions

The necessity of the protection of employees as a particularly vulnerable category in the case of bankruptcy proceedings is a ubiquitous comparative legal solution of bankruptcy law. However, this protection is implemented in different ways in different countries, e.g., workers in a given state can have a privileged position compared to other creditors in different states in bankruptcy proceedings, or their position can be improved by establishing special guarantee institutions or by a combination of both approaches. The combination of these two models constitutes a hybrid model of protection.

In Serbia, this issue is regulated not only by the state's Bankruptcy Law which places employees in the first payment order, but also by the Labour Law which regulates the position of the Solidarity Fund as a guarantee institution for their claims. Serbia has thus joined the countries whose legislation supports the hybrid model and solutions in accordance with the EU acquis. Croatian law provides even more protection to employees as creditors and prescribes a hybrid model with a wider scope of claims. On the other hand, in Bosnia and Herzegovina, through the three laws that regulate bankruptcy, employees are privileged

according to payment orders, without the existence of a guarantee institution.

Besides reviewing the solutions in the Western Balkan countries that may be compared to Serbia, it is important to stress the observed problems in practice that require further efforts to improve the position of employees via amendments and the further harmonisation of Serbian and EU law. The treatment of employees as creditors in bankruptcy proceedings is unsatisfactory; it is often the case that employees' claims remain unsettled. Therefore, it is the authors' belief that the grounds for bankruptcy should be severely restricted so that the applicable procedure can be initiated in a timely manner. The scope of claims guaranteed to employees should be expanded, preliminary payments of minimally-determined amounts should be provided in the initial stages of the procedure, and official records should be kept on the degree of employee settlement in bankruptcy proceedings by the commercial courts for the purpose of creating relevant records.

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