



503 Navigating the Cross Border Labor Quagmire

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Faculty Biographies

Nicole Cambre

Nicole Cambre is senior counsel Europe for International Paper located in Brussels, Belgium. She has been with International Paper for eight years. Her responsibilities include providing legal counsel to International Paper's chemical business Arizona Chemical's European operations located in seven different European countries as well as International Paper's large Russian paper mill located in Svetogorsk. She furthermore provides legal counsel on capital investment projects, outsourcing initiatives and other strategic projects. She also has experience handling labour issues in various European countries.

Prior to joining International Paper, Mrs. Cambre was in private practice as an associate in the corporate and securities practice group of the U.S. law firm, Hunton & Williams.

Mrs Cambre received her JD in law from the University of Antwerp, Belgium (1993) and holds a master in international law from the University of Lund, Sweden (1994) as well as a Master in European economics from University College Dublin, Ireland (1994).

Michel P. Cloes

Michel Cloes is the Paris-based European Counsel for Dana Corporation. Dana is a \$13 billion automotive parts supplier based in Toledo, Ohio and listed on the NYSE.

Mr. Cloes has a wide range of legal experience in Europe, Asia and the United States where he worked for about ten years. Prior to joining Dana, he was European Counsel for Denver-based Gates Corporation for five years. Prior to that, he was in private legal practice in Los Angeles, CA where he also worked for EuroDisneyland Corporation.

Mr. Cloes is a member of the California Bar and the Los Angeles County Bar Associations. He is a former member of the Brussels Bar. He is admitted to practice before the U.S. Court of International Trade. Mr. Cloes is co-author of *European Union Business Law*, West Publishing 1995. He was a visiting lecturer at the IberAmericana Universidad in Tijuana, Mexico and at the Mexico U.S. Law Institute in San Diego. He is the Founding President of the European Chapter of the Association of Corporate Counsel (ACC has more than 17,000 members worldwide).

He holds a J.D. from the Faculty of Law at Liège State University, Belgium and a LLM from the University of San Diego School of Law.

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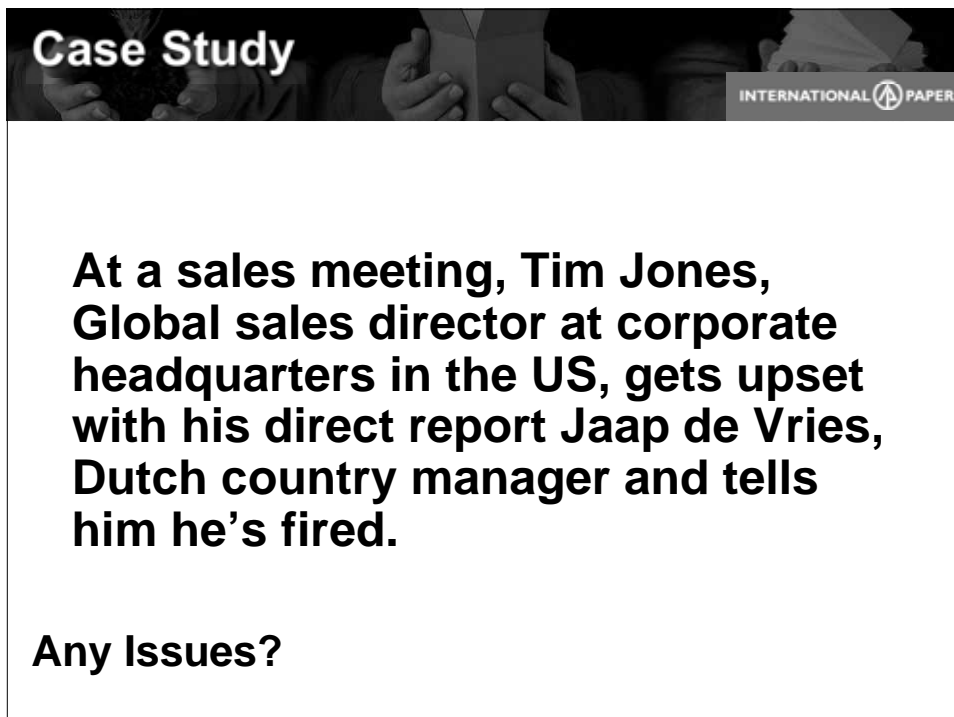
Eversheds LLP




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**Navigating The
Cross Border
Labour Quagmire**

Hiring & Firing- Some practical
examples
Nicole Cambre
Senior Counsel Europe



Case Study

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**At a sales meeting, Tim Jones,
Global sales director at corporate
headquarters in the US, gets upset
with his direct report Jaap de Vries,
Dutch country manager and tells
him he's fired.**

Any Issues?

Many Issues !

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- 1. Tim Jones has no legal authority to act on behalf of the Dutch subsidiary (which is a different legal entity) so termination is invalid.**
- 2. Dutch employment contracts (employees in Europe in general have written employment contracts) cannot be terminated unilaterally by the employer and have to be dissolved by the Dutch cantonal court or the Dutch Centre for work and income.**

Many Issues !

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- 3. Grounds for obtaining a dissolution of the employment in the Netherlands are reorganization or documented non-performance.**
- 4. If Mr de Vries is not just an employee but also the managing director of the Dutch legal entity a shareholders' resolution is required to terminate his mandate.**

If you get it wrong:

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1. It will cost (more) money

- **Compensation can be multiplied by an adjustment factor**
 - Instead of a neutral multiplier in the Netherlands of 1 or in case of employee non-performance a multiplier below 1 for the cantonal court severance formulae, you might end up with a multiplier of 2 or more on the whole termination package.

2. Employee can be reinstated.

Grounds for termination

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In Europe grounds for termination are limited:

- Serious Cause
- Non-Performance
- Reorganization.

Termination for Serious Cause

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- Facts have to be so serious so that a continuation of the employment relationship is impossible.
- Strict deadlines
- Consequences for the employee are severe:
 - No termination package
 - No unemployment benefits.

Termination for Serious Cause.

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- **The same facts could constitute serious cause in one country and not in another country.**
 - **E.g. a purchaser getting commissions from a supplier. This would constitute serious cause in Belgium but not in Russia where the grounds for termination are fixed in the labor code (e.g. alcohol and drug abuse).**

Termination for Serious Cause

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- In Belgium the employer has three (3) days from the moment he obtains knowledge of the facts that constitute serious cause to give notice of termination to the employee.
 - If the employer doesn't react within those three (3) days, no termination for serious cause is possible.
- Following the notice, the employer has another three days to supplement the motivation for the termination for serious cause
 - Only the reasons set forth in the motivation letter will be taken into account by the labour court to determine the existence of serious cause.

Termination for non-performance

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- In Sweden, an employer has to provide all possible assistance to make an employee perform.

It can take years and it's extremely difficult to terminate a long term employee on the basis of non-performance.
- In the Netherlands a well documented file is required to get permission from the cantonal court.
 - e.g. not meeting objectives as documented in a performance improvement plan.
- In Belgium an employer does not have to justify the termination.
 - Generally the courts award the employee a termination package (Formulae Claeys) unless there is abusive termination (+ 6 months)

Termination for Reorganisation

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- **Some Countries like the Netherlands and Sweden apply the principle of Last- In/ First- Out in reorganisations to avoid that the system is used to terminate non-performing employees.**
 - **If a position disappears and the affected employee is qualified for a position held by an employee with less seniority, he can bump that employee and take over that position.**

Hiring


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1. Select Country

- Think about where to locate the position.

2. Use the correct legal entity

- Don't send the employment contract to a Belgian new hire on the letterhead of the German legal entity for a job in the Dutch legal entity to cover the Benelux.
- In case you ever have to terminate this Belgian employee you could be faced with litigation in Germany, the Netherlands and Belgium.
- Get the right person (authorized representative of legal entity) to sign the agreement.




Hiring

3. Unless otherwise specified contracts are of unlimited duration

- Think about a Trial Period.
- In Belgium, if you want a trial period it must be included in the contract prior to the start of the employment.
- If it doesn't work out a party may terminate the contract with very short notice (in Belgium 7 days) and without any liability for severance pay.

- Consider Fixed term/ fixed work contract

- If you need a project manager for a specific project don't offer him a contract of unlimited duration.



Hiring

4. Keep it simple

- Avoid split employment contracts
- If you transfer an employee from one country to another country, offer him a local employment contract

5. Governing Law and Dispute Resolution

- Select Law of country of employment.
- Employment laws cannot be changed by contract (at least not the disadvantage of the employee).
- Arbitration might or might not (e.g. Belgium) be possible

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Plant Closure in Bankruptcy Proceedings in France
Michel P. Cloes
Dana Corporation - Paris

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Pre- Bankruptcy Situation Example

Manufacturing Industry – US Parent
Customers have moved East and to China

LoseCo:

- Has statutory losses for the last 5 years
- Successive recapitalizations; part of cashpooling (NOLs)
- Used to have 1,200 workers; down to 400 after successive and expensive (litigated) lay off plans
- Only one manufacturing site left – polluted
- High scrap levels, low productivity, high wages, union obstruction

One Affiliate: OKCo:

- About 100 workers at Site 2 (assembly)
- Break-even – no pollution
- Can be sold – but worthless without the TM

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Cost Benefit Analysis of a plant closure in Bankruptcy

Goal: eliminate source of losses / social impasse

Benefits:

- Reduced lay-off costs – legal minimum
- Speed – no protracted negotiations, accumulation of losses
- Legal certainty - thru Court orders

The Stars need to be aligned!

- Buy in at the top: BOD advocacy + Tax / Finance / Risks
- Loss situation – technical insolvency
- Strategic timing in labor relations with unions
- Advanced planning – no customer let down!
- A core team! A Project Leader! Insight Knowledge of Procedure and players !

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French Bankruptcy Proceedings
General Presentation

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INSOLVENCY
(Cessation des paiements)

Filing for bankruptcy (*declaration de cessation des paiements*)
Judgment deciding (1) the immediate liquidation
Or (2) opening the procedure of rehabilitation

Observation period (*Periode d'observation*)
(from 0 up to 20 months)

Judgment

Continuation Plan (*Plan de continuation*)
Asset Transfer Plan (*Plan de Cession*)

Rehabilitation (*redressement Judiciaire*) Liquidation (*Liquidation judiciaire*)

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The Observation Period

"Go thru the Motion":
Offering Memo
Industrial Expert
Report of Receiver

Liquidation Judgment Rehabilitation

Asset by asset sale Continuation Plan Asset Transfer Plan

Total Safeguard of Employment Plan Partial Safeguard of Employment Plan

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Go through the Motions:

- Offering Memorandum Process
- Industrial Expert Process
- Consider all Options with Trustee / Court / Unions
- All along, prevent risks upon exit:
 1. Piercing the corporate veil (de facto manager or fraud)
 2. Unions law suits
 3. Excessive write-offs at US parent
 4. Reallocation of assets
 5. A particular item: deferred currency translation loss (75% PPE rule)

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Offering Memorandum

- Buyers for OKCo but TM issue and Trustee's primary goal is rescue or sale of the whole
- No Buyer for LoseCo SAS:
 - Environmental Concerns
 - Global Overcapacity
 - Slow Market Growth
 - Global Competition
 - History of Scrap
 - History of Poor Productivity
 - History of Poor Labor Relations
 - High Labor Cost

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Industrial Expert

- Confirmed:
 - Scrap Is Too High
 - Productivity Is Too Low
 - People Motivation Is Poor
 - Not Enough Sales Volume
- Our Opinion:
 - Breakeven Is Impossible
 - All Previous Plans Failed
 - Social Climate Is Worse Than Ever Before
 - Dana Is World Leader in Ring Manufacturing
 - If Dana Can't Solve Problems, Nobody Can

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Options: Downsize

- Chance of Success?
 - After Each Social Plan in the Past
 - Productivity Did Not Increase
 - Scrap Did Not Decrease
 - Social Climate Worsened
 - No Reason To Think Today Will Be Different
- Future Sales Forecast Does Not Support Breakeven Volumes
 - Volume Simply Does Not Exist for Site 1
 - Future Price Decreases Only Worsen the Problem
 - Low Cost Country Competition

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Workers' Rights in a Court Supervised Bankruptcy
(Presentation to the European Workers Council)

- Information and Consultation of the CCE (French Workers Council) prior to filing the COP.
Done ✓
- Attendance of Workers representatives to the special Corporate Meetings of both LoseCo and OKCo prior to filing for COP.
Done ✓
- Appointment of 1 workers' representative per category (3) to attend the Court's opening judgment hearing
Done ✓
- Trustee now formally in charge of Unions relations
- (French parent in a support role at a distance)

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End of Observation Period

- Shareholders and managers have no control over the decision to terminate the Observation Period.
- The adopted Plan may be a combination of various solutions.
- In any case, the Lay Off Plan is the sole responsibility of either the Trustee or the Liquidator.

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Environmental issue: Ground Water Contamination

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Nature the contamination

> **Hydrocarbons**
It's mainly a kerdane contamination that has been found adsorbed in the soil, but also as free floating product and dissolved in the aquifer. It's not a recalcitrant contaminant that is biodegradable in aerobic conditions

> **Chlorinated solvents**
The main compound is TCE, his biological by-products are cis 1,2 DCE and VC which are as the mother compound recalcitrant contaminant with cancer risks.

> **Chromium**
The chromium is a recalcitrant contaminant that occurs mainly in 2 oxidative forms : Cr III which is the stabilised form and the Cr VI which is highly soluble and toxic. The stabilisation of Cr VI to III requires negative redox conditions

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Treatment of the deeper soil contamination

Techniques, advantages and drawbacks

Hydrocarbons	Chlorinated solvents	Chromium
Bioventing Adv => cheap Dh => treatment homogeneity & not compatible with low targets Excavation and treatment or disposal Extremely complicated and expensive Doing nothing with a capping Adv => really cheap Dh => risk that the groundwater treatment won't work	Soil vapor extraction (SVE) Adv = cheap & efficient Dh = efficiency/time in chalk ? & compatible with in-situ hydrocarbons treatment Excavation and treatment or disposal Extremely complicated and expensive Doing nothing with a capping Adv => really cheap Dh => risk that the groundwater treatment won't work	Soil washing or in-situ stabilisation Adv => cheapest solution Dh => high risk to over contaminated the aquifer & lack of references Excavation and stabilisation or disposal Extremely complicated and expensive Underground containment Adv => it's expensive but it's a solution Dh => the problem is not definitively solved Doing nothing with a capping Adv => really cheap Dh => risk that the groundwater treatment won't work

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Treatment of the groundwater

Remediation strategies

Minimum	Middle	Maximum
Pump & treat	Anaerobic biological treatment for VOCH and chromium If the risk of a non-definitive (in terms of slow release) stabilisation of the chromium is acceptable	First step = biological treatment of VOCH Second step = in-situ chemical stabilisation of the chromium
Remediation budget 150 to 250 k€ / year using the existing pumping points	Rough surface estimation 10 000 m² Remediation budget 800 to 1 200 k€ for 2 to 3 years of treatment	Such a solution would need a detailed feasibility study Remediation budget 1 500 to 2 500 k€

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REMEDICATION COSTS

**New Concept: Turn Key Liability Buy Out –
Tip: Public Utility Easements**

- **LAND CLASSIFICATION : INDUSTRIAL + EASEMENT
OK Co ACTIVITY & PLATING PROCESS PURSUED
GW REMEDIATION COST ESTIMATE = € 3.5
MILLIONS**
- **INTERMEDIATE SCENARIOS TO BE EVALUATED = € ??**
- **PLANT SHUTDOWN AND CLOSE OUT
LAND CLASSIFICATION : INDUSTRIAL OR RESIDENTIAL ?
BUILDING DEMOLITION (PARTIALLY)
SOIL + GW REMEDIATION COST ESTIMATE = € 9.0 MILLIONS**

NOTE , COST WILL BE REFINED AFTER DRA SUBMISSION

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Project Management – Counsel’s Office

- Core Team Daily Conference Calls
- Backup Supply Team Weekly Calls
- PR consultant US / Local
- Intranet Web Site (QuickPlace)
 - Daily activity report
 - Action items & milestones
 - E-Storage of Key documents

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Project COP - Confidential

Index	Date	Author	Modified
End of Creditors Registration		James R Holsem	12/17/2004
Index of Documents Given to Trustee		James R Holsem	09/16/2004
2004.07.22 Presentation to Mike Latorre @ CDG		James R Holsem	09/24/2004
2004.07.23 - Trustee @ CCE @ CDG		James R Holsem	07/28/2004
2004.07.23 - Trustee @ Versailles Office		James R Holsem	07/28/2004
2004.07.26 Action Items		James R Holsem	09/02/2004
2004.07.27		Bernard Nicolas	07/27/2004
2004.07.27 COP Daily		James R Holsem	07/28/2004
2004.07.27 COP Team Meeting		James R Holsem	07/28/2004
2004.07.28 COP Daily		James R Holsem	07/28/2004
2004.07.28 Creditors' Representative		James R Holsem	07/28/2004
2004.07.29 COP Daily		James R Holsem	07/29/2004
2004.07.30 COP Daily		James R Holsem	07/30/2004
2004.08.02 Action Items		James R Holsem	09/02/2004
2004.08.02 COP Daily		James R Holsem	09/02/2004
2004.08.03 Action Items		James R Holsem	09/02/2004
2004.08.03 Jean Bonhomme		James R Holsem	09/04/2004

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Achievements

- Speed: plant closed in 6 months
- Reduced Lay-off Costs: legal minimum, plus...
- Legal Certainty: a mixture individual waivers, court orders to secure PCV challenges, foreclosure of third party claims thru the Court process
- Liquidation was avoided thru a shareholder rescue plan. We avoided: bad PR; US. write offs; environmental wasteland; social
- Equipment: court order allowed a wholesale buy-back thru broker by parent Co.
- Efficient judicial maneuvering in a known poisoned pit...
- Saved jobs in money-making business only
- Reduced environmental bill while staying good environmental citizen

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Lessons Learned

- Teamwork
- Dedicated project management
- Communication
- Specialized counsel for specialized process
 - But cannot abdicate responsibility and must question soundness of all advice
- Ownership structure of legal entities pre-filing is very important

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Thank you!

● **QUESTIONS?**

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INTRODUCTION

- Employment at will not recognised in Europe
- Consultative structures based on laws passed following World War II
- Consultation with Employee Representatives required before implementing redundancies
- European definition of Consultation very different from requirements of WARN legislation

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WHAT IS EUROPEAN CONSULTATION?

- Where an Employer contemplating redundancies
- Consult in “good time” and “with a view to reaching agreement”
- Provide information re: reasons, numbers involved, timelines, selection criteria, compensation
- Notify Public Authorities
- Member States can introduce more favourable laws

N.B. ECJ Decision in JUNK –v- Kuhnel

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MANAGING A CROSS BORDER DOWNSIZING SITUATION

- Does the matter fall within the remit of any European Works Council?
- If an European Works Council to be involved – care needed over EWC and state specific consultative requirements
- Best practice – run European level and State Consultation “back to back”
- Stock Market announcements usually dictate time line

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MANAGING A CROSS BORDER DOWNSIZING SITUATION

- Focus detail at National/State level
- Understand timelines in different States, particularly if transferring production between affected sites
- Understand penalties for Non Compliance: they range from financial (UK) to a block to Corporate plans (France)
- Retain advisors who understand political/social implications as well as legal issues.

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COLLECTIVE REDUNDANCIES – PHASED TERMINATIONS

Germany

Day 1-30

- Consultation with the Works Council
- Economic Committee

Day 31 - 53

- Equalization/Balancing of Interest Agreement
 - Social Plan
(If no agreement – mediation & arbitration)

Day 54-90

- Notices – Employee Dismissals/Federal Agency for Labour
- Social selection

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COLLECTIVE REDUNDANCIES – PHASED TERMINATIONS

Italy

- When more than 5 people are dismissed within 120 days – notification to unions/Ministry of Labour/Employee Associations
- The procedure can take as long as 75 days
 - Phase One – 7-45 days – negotiation
 - Phase Two – 30 days – if no agreement – called before Ministry of Labour
- Seniority, family situation and production reasons (not in that order) are the criteria to be used in choosing who to dismiss
- When a challenged dismissal is declared unlawful by the Labour Court:
 - in companies employing over 15 people, the employee is re-instated with all back pay
 - in companies employing under 15 people, an indemnity of between 2.5 and 6 months salary is awarded



COLLECTIVE REDUNDANCIES – PHASED TERMINATIONS

Belgium

- Lay-off where at least 10 employees dismissed over period 60 days (or 30 where average total employees is 300)
- Information and Consultation to the workers:
 - Written report of outline proposals, supporting evidence, invitation for questions and duty to respond
- A written report to the Works Council/union representation/the workers themselves
- Confirmation of the Intention – a registered letter containing further information
- Social Plan
 - Notice indemnity/collective dismissal indemnity/holiday pay/bonus/outplacement/early retirement
- Termination of the employment contracts (cooling off period of 30 days)
 - No dismissals can take effect during 30 days (usually minimum period for consultation 7-8 weeks)
- Indemnities
 - To be agreed and employee representatives will negotiate increased indemnities for themselves given their protected status



COLLECTIVE REDUNDANCIES – PHASED TERMINATIONS

Spain

- Notice to the Labour Authority
- Information and Consultation
 - Written reasons and active proposals
- Documentation
 - A report explaining the causes
 - Documentation for economic reasons
 - Documentation for other reasons
 - Details of the affected employees
 - Elaboration of the Social Plan
- Termination Procedure
 - Agreement
 - No agreement
- Compensation for Affected Employees
 - Agreement
 - No agreement and collective dismissal approved by the Labour Authority:
 - 20 days per year of service up to a maximum of 12 months salary