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Effect of Insolvency on Employment Contracts Addressed by Supreme Court

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Given that Swiss statutory law does not contain any general provisions according to which insolvency automatically results in the termination of all contracts to which the insolvent debtor is a party, the is-sue of whether insolvency terminates an employment contract depends on the actions of the em-ployee and the debtors? estate, the Swiss Supreme Court has held (decision 4C.239/2006 in A. v. B., La masse en faillite de D. (?the bankruptcy estate of D?) of October 5, 2006[1].

A had been employed full-time as an accountant by Group X., a general partnership, composed of C and D In December 2002, D had been declared bankrupt, which was confirmed in March 2003. That same month D gave notice of termination of A?s employment, effective 30 September 30, 2003. A had ceased working in December 2002. In April 2005 A brought a claim both against the bankruptcy es-tate of D and against B (administrator of C?s estate) for unpaid wages for the period January 2003 through August 2004, although A had not performed any work for his employer following the declara-tion of D?s bankruptcy in December 2002.

Approving a lower court ruling finding against A, and dismissing A?s appeal, the Swiss Supreme Court pointed out that under Swiss law the bankruptcy of an employer does not necessarily lead to the ter-mination of the employment contracts with its employees. On the employee?s side, under Article 337a of the Swiss Code of Obligations (CO)[2], in case of an employer?s insolvency, the employee may im-mediately terminate the contract if no security to guarantee the employee?s contractual claims is pro-vided within a suitable period of time. On the employer?s side, the bankruptcy estate may decide to take over an employment contract, but it is also free to decide to terminate an employment contract. Since under Swiss law bankruptcy does not justify an immediate termination of the employment con-tract by employer, such a termination would constitute a violation of the law, resulting in a duty of the employer under Article 337c(1) CO to pay the employee the full salary for the notice period? or if the contract is for a definite period, for its full intended duration?plus an indemnity in an amount determined by the court but not exceeding six-months? worth of salary.

The Swiss Supreme Court emphasized that the legal status of the employee?s claim for salary for the period from the declaration of bankruptcy until an eventual termination of his or her

employment de-pends on whether the employment contract has been taken over by the bankruptcy estate.

- If the employment contract has been taken over, the respective salary claim becomes the debt of the bankruptcy estate itself, which is to be satisfied ahead of any other claims in accordance with Article 262 of the Federal Law on Debt Collection and Bankruptcy (LP)[3].
- On the other hand, if the contract is not taken over by the bankruptcy estate, it is terminated and the employee's claim for salary that he or she would normally have received during the notice period (or during the full intended duration of a contract for a definite period) receives a *pro rata* distribution of assets as a first priority claim in accordance with Articles 219 and 220 LP.

According to the Swiss Supreme Court decision, no express declaration is required for the continuation of the employment relationship; the continuation may follow from the pattern of conduct (asking the employee to perform work, or even tolerating the employee's coming to the office). However, the Court also pointed out that when the notice of termination has been given, in order to continue receiving salary until the expiration of notice period, under Article 319(1)CO the employee still has to perform work, unless precluded from doing so by valid reasons. Overall, the situation is to be evaluated in the light of the principle of good faith. Since A had neither performed any work nor offered his services to either B or to the bankruptcy estate of D following the declaration of D's bankruptcy, the Court concluded that A was not entitled to a salary for the period in question.

[1]The decision appears at http://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm. Type 4C.239/2006 in the box headed "Autres arr?ts d?s 2000" and press enter. Then click on the link below to access the judgement

[2]http://www.admin.ch/ch/f/rs/2/220.fr.pdf

[3]http://www.admin.ch/ch/f/rs/2/281.1.fr.pdf