Insolvency & Restructuring - Austria

Court rules that company pensions are not always safe in case of insolvency

Author

Alexander Isola

Contributed by Graf & Pitkowitz Rechtsanwälte GmbH

August 12 2011

Background

As a matter of principle, company pension commitments to employees should be secured in case of the employer's insolvency. The Company Pension Act requires employers to hold securities equal to 50% of the accrual, computed on the basis of the pension commitment, with which to secure pension entitlements for their employees. Under the act, such securities constitute a so-called 'special estate', intended exclusively for securing pension entitlements following the employer's insolvency (ie, they form a statutory pledge).

It was hitherto uncertain whether eligible employees were entitled to the proceeds from the sale of the securities, especially where those securities had additionally been pledged to third parties by way of contract. In particular, this risk exists for companies in crisis, as banks will provide them with urgently needed financing only against collateral. If a contractual pledge also exists, the courts must consider whether the contractual pledge or the statutory pledge has priority. This issue was recently discussed in a case before the Supreme Court.(1)

Facts

Some time before filing for insolvency, the employer had pledged all of its securities as collateral, including those that were intended to cover pension commitments. Following the declaration of insolvency, a former managing director of the insolvent company demanded that the receiver surrender the proceeds from the sale of the securities. The receiver rejected that claim, in reliance on the contractual pledge. The managing director filed a lawsuit and the case was referred to the Supreme Court.

Decision

It has long been disputed whether the Company Pension Act is in any way applicable to company pension commitments when they are issued to managing directors of limited liability companies in the form of defined benefit commitments. In its first judgment on this issue, the Supreme Court held that the act is applicable to third-party managing directors who do not hold interests in the limited liability company.

Further, in respect of securing the pension entitlement, the court ruled that in order to preserve the statutory pledge, the securities that constituted the special estate would have to have been clearly attributed and separated from the other assets. However, these assets could not be attributed if they were also earmarked as collateral. As it was impossible to attribute the securities after insolvency proceedings had been opened in the case at hand, the managing director could not recover the proceeds from the sale of the securities.

Comment

The legislature almost certainly did not intend to achieve this result. If (contrary to legal requirements) those securities that are intended to cover pension provisions are not held separately from the employer's other securities, the statutory pledge for securing company pensions cannot fulfil the hedging purpose prescribed by law - an approach which even the Supreme Court supports. Therefore, if the company acts unlawfully by not holding pension securities separately, then safeguarding company pensions is to no avail.

For further information on this topic please contact Alexander Isola at Graf & Pitkowitz Rechtsanwälte GmbH by telephone (+43 316 833 777), fax (+43 316 833 777 33) or email (isola@gpp.at). The Graf & Pitkowitz Rechtsanwälte GmbH website can be accessed at www.gpp.at.

Endnotes

(1) Austrian Supreme Court, April 26 2011, 8 ObA 14/10g.