



Insolvency and Employment Law Newsletter Switzerland

Federal Supreme Court confirms that in the case of a transfer of business in connection with a composition plan employment agreements are assumed by the acquirer pursuant to Art. 333 of the Swiss Code of Obligations.

Decision

In a decision rendered on August 15, 2011, the Federal Supreme Court had to decide, whether Art. 333 Code of Obligations ("CO"), pursuant to which employment agreements are transferred to the transferee of a business, also applies in the case of insolvency proceedings.

In its decision 129 III 335, the Federal Supreme Court has left open the question of the application of Art. 333 CO in an insolvency situation. According to Art. 333 CO an employment agreement passes on to the transferee in the case of a transfer of a business with all rights and obligations and the transferring entity and the transferor are jointly liable for the employees' claims that have arisen prior to the transfer and those that will arise after the transfer up to the time the employment agreement could have been terminated (see Art. 333 para 3 CO).

The court however found in that decision that in the hypothetical cases that Art. 333 CO would apply, that the transferee's liability according to Art. 333 para 3 CO for the employees' claims that have arisen prior to the transfer will not apply in the case of a transfer from a transferor under insolvency administration.

In the decision of August 15, 2011, the Federal Supreme Court argued that there is nothing in the law which would permit to conclude that Art. 333 CO should not apply in the case of a maturity postponement and found that the court of lower instance did not err in applying Art. 333 CO in principle to the transfer, with the effect that the former employer remained liable pursuant to Art. 333 para. 3

CO. The Federal Supreme Court, however, did not have to answer the question, whether the liability of the transferee according to Art. 333 para 3 CO applies also in the case of a composition plan.

Comment

The question whether Art. 333 para 3 CO pursuant to which the transferee is jointly liable for the obligations of the transferor under the employment agreements has unfortunately not been answered by the Federal Supreme Court for the case of a composition plan. However, the arguments raised by the court in the earlier decision in connection with bankruptcy, namely that the transferee is not liable for legacy obligations that have arisen prior to the transfer, appear in our view also to apply to the situation of a composition plan. The rationale behind this Federal Supreme Court's holding is the facilitation of such transfers, which – absent an abuse – is also in the interest of the insolvency creditors, since the overall liabilities of the estate in insolvency are reduced from the claims of the transferred employees as from the date of the transfer onwards.

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