SCHULTZE & BRAUN **INSOLVENCY LAW**

The authoritative period of notice in insolvency

Background

Opening insolvency proceedings leaves the existence and the content of the employment relationship untouched. This is stipulated in § 108 Section 1 InsO which says that the debtor's service relationships continue to exist with effect on the insolvency estate. With the transition of the managerial and disposal powers under § 80 Section 1 InsO, the insolvency administrator succeeds the debtor in the latter's employer status. The rights and duties of the employment relationship are therefore also binding upon the insolvency administrator.

If the insolvency administrator wishes to terminate an existing employment relationship, he must give notice of termination for operational, personal or conduct-related reasons as defined in § 1 Section 2 KSchG (Dismissal Protection Law). Opening insolvency proceedings alone does not constitute a reason for giving notice[1].

To prevent, in the interest of the insolvency estate, unnecessarily long commitments to employment relationship which are no longer reasonable, § 113 Section 1 InsO provides some relief from the dismissal constraints, relieving within an appropriate period of time the insolvency estate from class action claims by employees whose employment can no longer be continued. § 113 Section 1 Sentence 1 InsO therefore allows the contractual notice of termination of employment relationships „without regard to any agreed contractual term or an agreed waiver of the right to receive proper and contractual notice of termination".

Periods of notice

Under § 113 Section 1 Sentence 2 InsO, a period of notice of three months applies both to the insolvency administrator and the regular employer, unless a shorter period of notice is authoritative for the employment outside the insolvency.

The periods of notice outside the insolvency normally arise from the contract of employment, by act of law or by collective bargaining agreements. If these periods of notice are different in length, in particular shorter than the three-months period laid down in § 113 Section 1 Sentence 2 InsO, the partners to the contract of employment always face the problem of which period of notice is now the „authoritative" one in the insolvency.

Authoritative principle

Using the Duden[2] dictionary, the BAG in its ruling of December 1998[3] said that „authoritative" (maßgeblich) is deemed to be everything which is of decisive importance, i.e. claiming to be valid and effective. On principle, it is left to the private autonomy of the parties to decide what is considered to be „authoritative" among them, as long as they do not infringe binding law.

In the case ruled upon by the BAG (Federal Labour Court), the employment at the time of the notice of termination had existed almost three years; the parties had agreed a period of notice of

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[1] Cf. BAG, ruling dated 16 Sept 1982, 2 AZR 271/80 DB 1983, 504
[2] Duden Bedeutungswörterbuch [The Meaning of Words], 2nd edition, p. 433
[3] BAG ruling dated 3 Dec 1998, 2 AZR 425/98 BAGE 90, 246 (250)

notice of six weeks to the end of the quarter. The employee had been given notice with the monthly period of § 622 Section 2 No. 2 BGB (Federal Civil Code), i.e. the shorter statutory period.

The BAG rightly noted that this statutory period had not been "authoritative" in the inter-party relations. Agreeing periods of notice which are longer is, on principle, permissible, (§ 622 Section 5 Sentence 2 BGB).

Under § 22 KO (Bankruptcy Law) and observing the statutory period of notice, the bankruptcy administrator was actually within his rights to give notice even if a longer period of notice had been agreed, However, this regulation is not reflected in § 113 InsO, with the effect that the opinion expressed by the BAG, following the wording and the origin of § 113 Section 1 Sentence 2 InsO, is very close to the mark.

One more reason to agree with the BAG is found in the fact that, if a longer statutory period has been agreed under labour law, such longer period is authoritative in the event of a termination under insolvency up to the maximum period stipulated by § 113 Section 1 Sentence 2 InsO (three months to the end of the month).

Collective rules of termination
Periods of notice
In several rulings dated 16 June 1999, the BAG has ruled that a longer period of notice under collective bargaining law in a notice of termination in insolvency is superseded by the maximum period of three months to the end of the month envisaged by § 113 Section 1 Sentence 2 InsO[4].

With these rulings, the BAG has laid to rest the debates involving the compliance with the constitution of § 113 Section 1 InsO and has clarified that curtailing the collective periods of notice does not contravene Article 9 Section 3 GG (Basic Law, Constitution). Protecting the remaining insolvency creditors from an excessive deterioration of the insolvent estate justifies the intervention into the collective bargaining autonomy.

Provisions relating to non-terminability and notice of termination for cause in the event plant closure
Many collective bargaining agreements provide for the waiver of the statutory right of termination for elderly employees with long service records. These so-called "age-secured" employees could be given notice only for good cause. A good cause (important reasons) was considered to be the plant closure because the employer could not reasonably be expected to maintain an "empty" employment relationship. In the event of a plant closure, the employer was therefore permitted to give the age-secured employees notice for cause with a socially acceptable expiry period. This expiry period (notwithstanding the non-terminability) was ultimately defined by the otherwise applicable statutory period of notice.[5]

[4] E.g. BAG ruling dated 16 June 1999, 4 AZR 191/98, NZA 1999, 1331 (1335); BAG ruling dated 16 June 1999, 4 AZR 68/98 ZinsO 1999, 714 (716); BAG ruling 16 June 1999 4 AZR 775/98, unpublished
[5] Cf. e.g. BAG ruling dated 5 Feb 1998, 2 AZR 227/97, NZA 1998, 771 (775)

The BAG has ruled that § 113 Section 1 InsO with its period of notice of three months to the end of the month not only has priority over collective bargaining agreements with longer periods of notice, but also over any collectively agreed non-terminability for elder employees with longer service records. Agreements within the meaning of § 113 Section 1 Sentence 1 InsO are also collective bargaining agreements. "Agreed" was also a non-terminability under the collective bargaining law. As a matter of fact, non-terminability may also be considered to be an especially long period of notice, with Sentence 2 of § 113 Section 1 InsO therefore superseding any non-terminability clauses agreed under collective bargaining law.[6]

Fixed-term employment without the option of notice of termination

In fixed-term employment relationships (legally effective), where the statutory right of termination is ruled out, the question of which is the "right" period of notice also arises. Normally, these are short-term and limited employment relations of up to two years. If the insolvency administrator could fall back on the statutory period of notice under § 622 BGB, employment in these cases could be terminated within a period of four weeks to the 15th day or to the end of the calendar month.

This limitation in time is, however, equal to an agreement relating to a period of notice complying with the time limitation. Outside the insolvency – and therefore authoritative for the parties to the employment contract – a period of notice must therefore be applied with corresponds to the period of limitation.

The BAG has therefore ruled that, if an employment is limited to at least another three months at the time the insolvency administrator terminates the employment without the option of giving statutory notice, the maximum statutory period of three months should apply. Also, this period is not replaced by a shorter statutory period of notice which had been authoritative for the employment relationship even before the insolvency proceedings had been instituted.[7]

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[6] BAG ruling dated 19 Jan 2000, 4 AZR 70/99, NZA 2000, 658(659)
[7] BAG ruling dated 6 June 2000, 2 AZR 659/99, ZIP 2000, 941(943)