

Labour costs in the business interruption insurance (BGH decision of 21st April 2010 – IV ZR 308/07)

1. INTRODUCTION

The recent natural disasters in Japan point up the risk of business interruptions caused by earthquakes. Business interruptions in form of production downtimes can endanger the existence of the affected companies. Among others, continued salary payments despite a production downtime can drive a company, which cannot employ its personnel profitably, to the brink of insolvency.

Numerous risks that lead to a production downtime can be insured by an Extended-Coverage-business interruption insurance (EC-BI-insurance). With the EC-BI-insurance, insurers take the financial risk of inner disturbances, malicious damage, strike, lock-out, water extinguishing system leakage, mains water, storm, hail, housebreaking, burglary, vandalism, robbery, flood, re-flow, land subsidence, land slip, snow pressure, avalanches, volcanic eruption and earthquakes.

The business interruption insurer indemnifies the affected company for revenue losses within the so-called indemnity period. The indemnity period is usually twelve months. The business interruption insurer insures not only revenue losses, but also fixed costs which incur despite the standstill of the production. Such fixed costs might for example be salaries, rental costs, interests and taxes.

Many companies affected by a business interruption finance the monthly payable salaries through credit institutions. So far, it was disputed whether companies insured against business interruptions can demand the reimbursement of labour costs if the company does not pay its salaries itself but had it pre-financed. With its decision of 21st April 2010 (File Number: IV ZR 308/07) the Federal Court of Justice decided in favour of the insured. A pre-financing of salaries by third parties is sufficient for a reimbursement of labour costs.

2. CURRENT CASE OF THE FEDERAL COURT OF JUSTICE

2.1 Facts

In the proceeding in front of the Federal Court of Justice, the liquidator of a company demanded the reimbursement of salaries, which became due during a business interruption. The company was insured against business interruption.

The insured company was over indebted as a result of the business interruption and the district court in charge initiated insolvency proceedings.

The liquidator in charge noticed outstanding salaries. Supported by the work council and the employees, he agreed that a credit institution pre-financed the outstanding salaries. The employees ceded their net salary claims to the credit institution and accredited the credit institution to file claims for payment of insolvency money at the Federal Department of Employment. After payment of the outstanding salaries, the Federal Department of Employment paid the insolvency money to the credit institution. According to sec. 187 SGB III et seq., the employees' salary claims passed over to the Federal Department of Employment.

Afterwards, the local court initiated insolvency proceedings against the policy holder. The Federal Department of Employment filed its outstanding claims against the insolvent company for the insolvency schedule. The liquidator requested from the business interruption insurer to reimburse the salary claims that were filed for the insolvency schedule. The insurer denied the reimbursement with the argumentation that the insurance payment was only due if the policy holder had made the salary payments itself. Furthermore, the insurer's indemnification payment would lead to an unjustified enrichment.

2.2 Decision of the Federal Court of Justice

The Federal Court of Justice did not agree to the opinion of the defendant insurer and sentenced the insurer to make the salary payments.

2.2.1 Policy holder must not make advance payments of salaries to justify claim for insurance indemnification payments

The Federal Court of Justice disagreed with the insurer and denied the policy holder's duty to pay in advance as a requirement for the insurance claim.

There was no agreement on such a requirement according to the insurance contract.

2.2.1.1 Policy holder must not make advance payment according to the wording of the general terms of insurance

The Federal Court of Justice interpreted the wording of the general insurance terms and denied the necessity that the policy holder had to make the salary payments itself. According to the insurance terms salaries must be “paid continuously” as a necessity for the claim. This clause might though be interpreted by the policy holder (whose understanding of the terms is relevant) in such kind that the continued payment of salaries can be made by third parties, e.g. the credit institution or the Federal Department of Employment by means of insolvency payments.

2.2.1.2 Policy holder must not make advance payments as a consequence of the insurance contract’s intended purpose

Also the intended purpose of the conclusion of an insurance contract speaks against an obligation of the policy holder to make advance payments. The Federal Court of Justice clarified, that the business interruption insurance is no pure labour cost insurance. The insurer must reimburse labour costs only if damage occurred because the policy holder could not use these costs in order to gain profits as it would have been without a business interruption. For the insurance law related entitlement for payment of labour costs, it is, according to the Federal Court of Justice, not required that the policy holder paid for the labour costs itself and thus made advance payments. With the conclusion of a business interruption insurance, the policy holder wishes to be protected against, among others, insolvency resulting from the ongoing burden of costs. The obligation to make advance payments could financially overcharge the policy holder during a business interruption and lead him to the risk of insolvency.

Further, with the conclusion of a business interruption insurance the policy holder aims at emphasizing its willingness to invest in securing salaries. This leads to the employees’ willingness to keep working for their employer even in economically difficult times.

The above mentioned purposes would be missed if the policy holder had to make advance payments for the insured costs.

2.2.2 No unjustified enrichment of the insolvency estate

The further objection of the defendant insurer, that indemnification payments in the amount of the labour costs would lead to an unjustified enrichment of the insolvency estate, did not convince the Federal Court of Justice. The court though determined that no enrichment of the insolvency estate should result from an indemnification payment. But since the employees' salary claims pass over to the Federal Department of Employment after the payment of the insolvency money according to sec. 187 Criminal Code (SGB III a.F), the original salary claims become reclaims towards the insolvency estate. Since the insolvency estate is burdened by the reclaim demands, the payment of labour costs by the insurer does not result in an unjustified enrichment.

The Federal Court of Justice therefore decided that the claim for a reimbursement of the labour costs from the business interruption insurance was justified.

3. CONCLUSION

The decision of the Federal Court of Justice clarifies the question whether a policy holder must pay for salaries owed by contract in advance in order to demand indemnification from the business interruption insurer. Rightly, the Federal Court of Justice denies an obligation of the insured company to pay in advance as a requirement for the receipt of insurance indemnification payments.

Such an obligation overstrains companies hit by a business interruption. The risk of insolvency increases. The business interruption insurance would often not be adequate to avoid over-indebtedness. Companies wish to minimize the insolvency risk by concluding business interruption insurance contracts. With the insurance contract, they wish to be equipped with sufficient capital to cover costs in case the company cannot realize sales due to the business interruption. The whole purpose of the business interruption insurance would be reduced ad absurdum, if the policy holder had to make advance payments for current salaries before being able to claim for indemnification payments from the insurer.

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