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UK of the bAV can permanently reduce insolvency assets

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Assets are protected from the insolvency administrator – in the event of death the situation is different: The Federal Court of Justice (BGH, ruling of 08.12.2016, ref. [IX ZR 257/15](#)) ruled that the general and insolvency-independent waiver of surrender of the (residual) assets of a provident fund (UK) for occupational pension provision (bAV) can be effective. In the case decided, more than EUR 860 thousand had been paid to the UK as an endowment – after a good three years of the UK pension payment, the managing director died. Whether there were any residual assets remained questionable, however, because the employer was in any case not entitled to them.

Insurance is a collective event

The manager had received only about EUR 130 thousand in pensions in three years until his death. The BGH denied the employer's insolvency administrator access to the alleged residual assets in the UK for the purpose of restructuring or satisfying creditors. The insolvency administrator had spared himself the advice of an actuary, who would have immediately explained to him that the endowment funds had been completely used up because they had been used for an annuity policy with survivors' benefits.

In the event of the death of the managing director, the annuity insurance does not show a surrender value. Only the value for the survivor's pension is still available at death, but here too there is no surrender value – this is due to the lack of a cancellation option. The insolvency administrator's argumentation came to nothing and was already recognisably unjustified according to the reasons for the judgement.

Articles of association and benefit plan decide on provident fund in occupational pension schemes

After the death of the business manager, the widow received a pension from the UK amounting to about 53 percent of the original pension of the business manager. The BGH first found that upon the opening of insolvency proceedings the agency agreement between the employer and the UK was terminated by law; [§§ 115, 116 InsO](#).

Correct use of funds for order execution

Only if the UK (or a trustee) has used the money received “for the execution of the order” completely and in accordance with the order, the claim for restitution is extinguished, § 667 case 1 BGB: In this case, the UK had purchased life insurance policies for reinsurance purposes – this meant that there was no longer any question of segregation or (substitute) segregation, because the endowment had been spent as intended.

If the articles of association and the benefit plan of a PF do not provide for an entitlement of the employer to payment of the surrender value, the insolvency administrator cannot access the reinsurance of the PF (BAG, judgement of 29.09.2010, ref. [3 AZR 107/08](#)).

If the case is different – for example, due to frequently encountered incorrect use or deviating articles of association with pension regulations – a title against the employer is sufficient to directly seize the assets available there from the UK as well, including any design rights. Insofar as the UK did not use the funds received in accordance with the contract, it must “return them after the end of the contract in accordance with Section 667 of the German Civil Code”.

waiver of asset recovery

The UK can, however, agree with the employer that all assets obtained “from the performance of the contract” are generally and from the beginning waived, § 667 case 2 BGB. The law of general terms and conditions (AGB) is not applicable to company and association law, [§ 310 VI 1 BGB](#). Therefore, there is only a limited content control, [§§ 242, 315 BGB](#).

In the opinion of the BGH, the UK statute was neither arbitrary nor inequitable, [§ 242 BGB](#):

“The clause expressly excludes claims for the transfer of accumulated fund assets to other pension schemes and the recovery of grants made on the basis of error.”

This opens the way for the employer as well as the insolvency administrator to indirectly achieve the goal of lifting the “treasure in the UK”. The insolvency administrator preferred to sue – instead of sensibly(er) shaping the circumstances for the future in accordance with the statutes and the performance plan.

The court considers that the UK has to “fully execute” its mandate (e.g. the pension payment) even after the opening of insolvency proceedings, and that this mandate does not cease to exist pursuant to [§§ 115, 116 InsO](#), because due to the effective exclusion of the duty to surrender pursuant to [§ 667 BGB](#), the agency agreement with the UK does not (any longer) have a sufficient connection to the insolvency estate.

No challenge to gift because of waiver of surrender

The BGH is also unable to recognise a gift to the UK, because the UK had undertaken “as a third party in accordance with [§ 267 BGB](#)” to provide the pension promised by the employer, [§ 134 InsO](#). According to the reasons for the judgment, it was not examined whether there was a partial gratuitousness because the plaintiff insolvency administrator had “not submitted anything on the value ratios”. “The plaintiff has not submitted anything on other grounds for rescission,” the BGH clarifies in its reasoning.

The UK could also have had something that had been obtained from the management of the business, which may have then also become part of the assets of the treasury up to the present time. However, it was not examined whether such assets existed, because the waiver of this surrender was effective. In any case, the insolvency administrator’s further insurance-related submission was also lacking: this could, for example, be surpluses paid out to the UK and retained there or reimbursements of costs by the VR. In addition, there are conceivable kickbacks and commissions not due to the UK, which could ultimately prove to be potential pecuniary offences under the articles of association and benefit plan.

On the other hand, the idea that what is left of the original endowment after pension payments is the difference (between endowment on the one hand and much lower pension payments on the other) is beside the point. These funds are “inherited” by the other pensioners – this is how pension schemes are calculated, because they are a collective event.

Risk of lack of credit security with regard to widows and orphans

Business managers do not always remember to have a lien placed on the assets in “their UK” and to document its effectiveness after review. Occasionally, for example, widows – despite a pension commitment – come away empty-handed after the death of the manager simply because a single pledge is not sufficient if the widow has to disclaim the inheritance due to over-indebtedness or, for example, another family member becomes the heir. If the claim (on the annuity) and the lien (in the inheritance) fall apart, the lien expires immediately. If children, i.e. future (potential) orphans, are beneficiaries, effectiveness may depend on the involvement of a guardian, [§§ 1909 et seq. BGB](#).

The regular review of the UK’s investments also comes in handy because some UKs have already gone bankrupt – or the mail has suddenly come back as “unknown moved”.

Separation from the bAV support fund?

The approximately 40 billion euros in cover funds in provident funds regularly burden the employer with “double” administrative costs – once for the UK itself, and also for the investments – for example in life insurance policies. If the assets accumulated at the UK are transferred to another occupational pension provider and the employee is not granted a settlement option, this does not trigger any wage tax (BFH, ruling of 18.08.2016, Ref. [VI R 18/13](#)). The deceased, whose company as employer provided more than EUR 860,000, will perhaps turn over in his grave when he subsequently realises that the occupational pension scheme was chosen as a tax shifting model without necessity, but that it unnecessarily reduced the assets for the heirs in the event of death.

The business manager could have put the savings into a family trust to provide for him. Alternatively, the occupational pension scheme could have been structured as an inheritable asset.

One should already think about whether someone should get something in case of death from spent amounts. There are solutions for this too, because the GmbH, as the employer, could have taken out term life insurance for this purpose – for a fraction of the cost. In the event of a claim, the broker’s errors of advice and, if applicable, the insurer’s deficits in advice usually become apparent. This is then borne by the heirs if there were no qualified (fee-based) advisors of their own during the drafting process.

At the end the consultation was not in vain because of commissions – but at first because of a lack of understanding with the mediator and its customer simply in vain had been. The assets for the endowment have not gone, just someone else got them – a fact rarely documented as desired, and thus a good entry point into the question of damages from the UK, the BoD as well as intermediaries.

by Dr. Johannes Fiala and Dipl.-Math. Peter A: Schramm

by courtesy of

www.experten.de (published 02/13/2017)

Link: <https://www.experten.de/2017/02/13/uk-der-bav-kann-insolvenzmasse-dauerhaft-mindern/>

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Dr. Johannes Fiala

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