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Insight

Compulsory arbitration for mass layoffs (“Massenentlassungen/ licenciement collectif”) in Switzerland

This post sets out the scope of application of Swiss mass layoffs regulations and practical aspects of the compulsory arbitral proceedings they entail.

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There has been a recent spike in mass layoffs by large Swiss companies (some proposed, some enacted), many of which are affiliates of multinationals such as Google[1], Vetropack[2], Pfizer[3], Ringier[4], Swiss Post[5], Migros[6], etc.

Under Swiss law, such companies will have to negotiate a social plan with their employees. What is less well known is that under Swiss employment law – should these negotiations fail – the parties must resort to mandatory arbitration.[7] The arbitral tribunal will then issue a social plan.

Definition of mass layoffs

Mass layoffs are notices of termination given by the employer to employees of a business within 30 days of each other for reasons not pertaining personally to the employees and which affect:[8]

1. at least 10 employees in a business normally employing more than 20 and fewer than 100 employees;
2. at least 10 per cent of the employees of a business normally employing at least 100 and fewer than 300 employees; and
3. at least 30 employees in a business normally employing at least 300 employees.

Importantly, the term “business” (*Betrieb* in German; *entreprise* in French) does not refer to a corporate entity but to any long-term, self-contained organisational service unit.[9] So, if several businesses belong to the same group, it must be determined separately for each unit whether the requirements of a mass layoff are met.[10] A business that is embedded in a group is also deemed to be a business in the sense of Art. 335*d* Swiss Code of Obligations (CO), even if it provides services exclusively for that group.[11]

In principle, such requirements also apply to international groups, which means that when determining the threshold of redundancies, only the employees of the Swiss business are taken into account, and the number of employees of a group worldwide or of a foreign sub-business are irrelevant.

- However, there may be an exception if employees are posted within an international group to the Swiss business. If such posted employees are integrated into the Swiss business (e.g., at least partial transfer of the right to issue instructions from the foreign employer to the Swiss business,

assignment of a workplace within the Swiss business, etc), they are considered when determining the number of redundancies within the meaning of Art. 335*d* CO.

- Conversely, employees of a Swiss business who are posted to a group company abroad (or any foreign company) are to be counted as employees within the meaning of Art. 335*d* CO if a legal and organisational assignment to the Swiss company is still possible (i.e., a formal employment relationship exists and the Swiss employer maintains at least a partial right to issue instructions to the employee).[12]

Obligation to negotiate a social plan in the event of mass layoffs

Entities employing 250 or more staff must negotiate a social plan if they intend to make at least 30 employees redundant within 30 days for reasons that have no connection with their persons.

Redundancies over a longer period of time that are based on the same operational decision are added together.[13]

A social plan must include measures to avoid redundancies or to reduce their numbers and mitigate their effects (but do not jeopardise the continued existence of the company[14]).

The employer negotiates:[15]

1. with employee associations that are party to the collective employment contract where the employer is a party to such collective employment contract;
2. with the organisation representing the employees; or
3. directly with employees if there is no organisation representing them.

Although the provision on the social plan mentions “the employer,” it refers to a business. So, if a company or group wants to carry out a mass layoff and has several businesses, the threshold must be determined separately for each of these businesses, so any negotiations and the social plan can only be drawn up for those businesses that fulfil the threshold based on this individual approach.[16]

Social plans established by compulsory arbitration

If the parties (i.e., the employer and the employee association or the employee representatives or the employees themselves) are unable to agree on a social plan, an arbitral tribunal is appointed, which issues the social plan in a binding arbitral award.[17]

It is controversial whether the employees must act jointly in the arbitration proceedings. However, the practical implications seem negligible, since Art. 335*j* CO states that “the arbitration tribunal issues the social plan”. This means that the arbitration tribunal draws up a social plan appropriate for the specific circumstances on its own initiative – i.e., free from what the parties have previously (and unsuccessfully) negotiated.[18] The arbitral tribunal must therefore take into consideration which measures are necessary, suitable and financially viable for the employer to avoid redundancies, limiting their number and mitigating their consequences, while also taking into account that the social plan must not jeopardise the continuation of the company.[19]

The arbitrators’ discretion is not unfettered, since – in addition to not adopting any solutions jeopardising the continued business of the employer – neither must its social plan prohibit the employer from issuing notices of termination.[20] It is clear that the legislator meant to prevent the parties from taking unrealistic positions in the negotiation.[21]

Practical aspects of the arbitration proceedings

Absent any other agreement, the arbitration proceedings are governed by Art. 353 et seq. and, in particular, Art. 372 et seq. of the Swiss Civil Procedure Code (CPC).

- The parties are free to select the arbitrators, who need not necessarily be lawyers admitted to the bar (so, academics, professional familiar with employment matters/social security or with the industry concerned, accountants, etc, are also eligible).
- Typically, the parties tend to appoint arbitrators who are perceived as employer/employee-friendly. Given that only few experienced arbitrators will have much exposure to employment law, this approach might not be advisable. In any event, all arbitrators must be independent, which excludes individuals having a conflict of interest or appearing biased (for instance, having publicly voiced an opinion on the matter).
- The presiding arbitrator (or sole arbitrator) will often be a seasoned arbitrator. Indeed, the tribunal must be able to run the arbitration process professionally and deal with all incidents that might occur, including applications for document production, jurisdictional objections, interim measures, conduct of a hearing and issue guidance for counsel.

The employees should jointly appoint a member of the arbitral tribunal, irrespective of whether they qualify as a mandatory or voluntary joined parties. If the employees do not jointly appoint a member of the arbitration tribunal (and/or if the parties cannot agree on the sole arbitrator or the chairperson), the state court will appoint the arbitral tribunal upon request of either party.[22]

Individual employment contracts of employees might contain arbitration clauses, which might extend to matters overlapping with the scope of the social plan. The law does not specify whether these clauses survive, nor how to deal with a situation where several employees have distinct contractual arbitration clauses. One could consider that compulsory arbitration per Art. 335*j* CO takes precedence over such arbitration clauses, or forum selection clauses. In such a case, the arbitral tribunal (or judge at the seat of the arbitration) will have to establish how these clauses interact.

One or more employees might have had or still have their domicile outside Switzerland. According to Art. 176 of the Swiss Private International Law Act, arbitration proceedings are deemed international when at least one of the parties was domiciled outside Switzerland at the time the arbitration agreement was concluded. In that event, the Private International Law Act (international arbitration), and not the Code of Civil Procedure (domestic arbitration) applies. It will be for the courts to decide any dispute about the applicable legal regime.

The parties can agree on ad hoc or administrated arbitration. In the interest of time, they may want to opt for expedited proceedings, for instance under the Swiss Rules of International Arbitration, providing for an award within six months from the transfer of the file to the arbitrators.[23] However, this would require a well-run process, especially if multiple employees with different interests are involved.

The arbitral award establishing the social plan is not only binding on the parties involved in the proceedings, but also for third parties.[24] This means that, if the company subsequently goes bankrupt, the social plan cannot be challenged by creditors.[25] It may be appealed to the Federal Supreme Court on the limited grounds set out in Art. 393 CPC (formal defects or arbitrary decision).

LALIVE has Switzerland's largest arbitration team and long-standing experience in advising and representing employers and employees, both domestic and international, on Swiss employment law aspects.

For more information about our Employment and Arbitration practices, please click here and here.

References

[1] https://www.handelszeitung.ch/unternehmen/bei-google-schweiz-lauft-eine-massenentlassung-678342, last visited 1 July 2024.

[2] https://www.vetropack.com/de/ueber-uns/medien-news/aktuelles/schliessung-des-werks-in-st-prex-stellenabbau-beginnt-bald_pub-3738/, last visited 1 July 2024.

[3] https://www.nzz.ch/wirtschaft/wirtschaft-die-neusten-meldungen-ld.1830220 ; last visited 1 July 2024.

[4] https://www.ringier.com/de/ringier-medien-schweiz-konsultationsverfahren-verringert-stellenabbau/; last visited 1 July 2024.

[5] https://www.handelszeitung.ch/unternehmen/post-konzern-verkundet-kahlschlag-hier-fallen-4000-jobs-weg-650052; last visited 1 July 2024.

[6] https://www.nau.ch/news/schweiz/grosser-umbau-migros-baut-150-stellen-am-standort-zurich-ab-66765678; last visited 1 July 2024.

[7] Introduced in 2010: BBl 2010 6455 Botschaft zur Änderung des Bundesgesetzes über Schuldbetreibung und Konkurs (Sanierungsrecht).

[8]Art. 335*d* Swiss Code of Obligations.

[9] BGE 129 III 336, c. 2.1.

[10] BGE 137 III 27, c. 3.3.

[11] AppGer BS, 1998, 247.

[12] Licci, Die Massenentlassung im schweizerischen Recht, 2018, N 110-112.

[13] Art. 335*i* para. 2 CO.

[14] Art. 335*h* CO.

[15] Art. 335*i* para. 3 CO.

[16] BSK OR I-PORTMANN/RUDOLPH, 7th edition, 2020, Art. 335*i* N5.

[17] Art. 335*j* CO.

[18] PIETRUSZAK, ArbR 2016/2017, p. 98.

[19] Art. 335*h* CO.

[20] BSK OR I-PORTMANN/RUDOLPH, 7th edition, 2020, Art. 335*j* N6.

[21] "*Damit die Verhandlungen in einem vernünftigen Rahmen geführt werden können und keine überrissenen, letztlich kontraproduktiven Forderungen gestellt werden, schränkt Absatz 2 die Freiheit der Parteien und das Ermessen des Schiedsgerichts (vgl. Art. 335j E-OR) ein*." BBl 2010 6455, 6498; Botschaft zur Änderung des Bundesgesetzes über Schuldbetreibung und Konkurs (Sanierungsrecht).

[22] BSK ZPO-Habegger, 3rd edition, 2017, Art. 362 N16.

[23] Art. 42 Swiss Rules of International Arbitration (2021).

[24] BSK OR I-PORTMANN/RUDOLPH, 7th edition, 2020, Art. 335*j* N7.

[25] BBl 2010 6455, 6500; Botschaft zur Änderung des Bundesgesetzes über Schuldbetreibung und Konkurs (Sanierungsrecht).