RECOGNIZING WORKERS' ECONOMIC CONTRIBUTIONS:

THE TREATMENT OF EMPLOYEE AND PENSION CLAIMS DURING COMPANY INSOLVENCY,

A Comparative Study of 62 Jurisdictions

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PREFACE

This study is a research project on the treatment of employee and pensioner claims in insolvency and bankruptcy on a broad comparative basis internationally. The study reflects the contributions of 62 countries, collected with the assistance of law students from the University of British Columbia Faculty of Law, Vancouver Canada. There is still much information and many insights to be drawn from the data. The study has been possible only because of the efforts of the country contributors.

The genesis of the research was as a background research report in 2007 for the International Insolvency Institute and its Social Claims Committee, which, along with the University of British Columbia Faculty of Law, funded research on 20 countries in 2007. Those findings were presented at a conference in New York in June 2007. The research will provide the backdrop of a future Report on the Treatment of Social Claims in Insolvency by the Institute’s Social Claims Committee, which will examine different models of treatment of wage, pension and other claims in 2008-2009.

Additional research funding for a follow up research project in 2008 was funded by the Faculty of Law University of British Columbia and the Social Sciences and Humanities Research Council of Canada, allowing the collection of data from 62 jurisdictions in total and updating information in the original report. The findings of the study were presented to the Canadian Senate Committee on Banking Trade and Commerce in Ottawa Canada in early 2008. The will be published by Carswell Thomson Reuters in summer 2008.

This study is the most comprehensive analysis of the treatment of social claims in insolvency to date, and will make an important contribution to a timely and important public policy debate. The issue of the most appropriate treatment of worker and pensioner claims when business enterprises become insolvent engages our notions of fairness, certainty and the efficient administration of insolvency proceedings. It challenges us to consider the most appropriate balance of protection to vulnerable claimants, while at the same time preserving the integrity of credit markets. Please join us in the ongoing discussion. Any comments, corrections, and insights can be sent to Dr. Janis Sarra at sarra@law.ubc.ca.

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Appendix 1   Contributor names

Appendix 2   Sample Questionnaire
I. Introduction

When a corporation or other business enterprise becomes insolvent or bankrupt, employees and pensioners comprise a unique category of creditors. Their vulnerability at the point of enterprise failure is tremendous, as they face loss of jobs, loss of outstanding and future compensation, and sometimes loss or diminution of the value of their pensions. These effects occur whether employees have been employed in a developed nation or an emerging nation, and whether they live in a civil law or common law jurisdiction. It is their unique position in the business enterprise that makes their claims deserving of special consideration in the design of insolvency systems.

Claims by employees and pensioners at the point of company insolvency range from outstanding wages, to health and disability benefits, to the issue of how longer term pension commitments are to be dealt with. While they are social claims in the sense that they contribute to the social supports and social fabric of countries in dealing with a more vulnerable segment of the population, they are also economic claims in the sense that employees and pensioners become creditors in any distribution of a liquidated bankrupt estate or in an insolvency restructuring proceeding.

Employees’ claims for outstanding wages, vacation pay, parental leave compensation, sick leave pay, termination and severance pay are fixed claims outstanding at the point of commercial insolvency. The diminution or loss of compensation claims can have serious economic consequences for employees, at a time when their livelihood is at risk. The risks are particularly acute for those workers in their 50s or older who are nearer to the end of their productive working lives or for whom the ability to gain comparable employment may be seriously limited. Job loss, in the absence of retraining or retooling programs and a robust economy that allows employees to gain new and sustained employment, can have a negative multiplier effect on the individuals, their families, communities and other businesses. While other creditors suffer risk of losses on insolvency, most creditors, such as banks, debenture holders, trade suppliers, and landlords, are not at risk of losing their employment at the same time that their claims are not satisfied. In contrast, employees risk the loss of both pre-filing claims and going forward income.

Employees face information asymmetries and lack of diversification of their investment in the debtor company. Hence, they are often the last creditors to know of the company’s financial distress and the least able to protect themselves in advance from the losses associated with firm failure. Moreover, employees and pensioners have not bargained a risk premium, nor have they intentionally assumed a risk of firm insolvency. In this regard, they can be contrasted with many secured lenders who factor the risk of enterprise insolvency into their decisions about credit availability and pricing, and in respect of the security that they require on the advance of credit.

The World Bank has called for special treatment of employee claims during insolvency, recognizing that workers are a vital part of an enterprise. It suggests that careful consideration should be given to balancing the rights of employees with those of other creditors.

The issue of wage and pension claims requires public policy debate and choices. While the debates have been rigorous in North America and other jurisdictions, there is relatively little understanding of how such claims are treated globally. Hence the research was commenced to try to capture, from as many jurisdictions as possible, both the normative choices and practical policy options chosen to address employee and pensioner claims. Questions in the study included: what is the nature of

protection of claims during insolvency in different jurisdictions, and how have wage preference systems, super-priority or guarantee funds or insurance schemes been used to reduce losses for employees and pensioners? How does one address the issue of outstanding contributions to pension funds owing at the time of enterprise insolvency? What is the interaction of labour relations regimes with insolvency regimes? Has director and officer liability for social claims during insolvency been a public policy choice for jurisdictions, to encourage corporate decision makers to be diligent in ensuring the debtor company or business enterprise meets its obligations to employees and pensioner in the period leading up to insolvency? This study begins to answer some of these research questions.

Part II of this text discusses the methodology of the study, highlighting the benefits to be drawn from a broad-based collaborative effort to document the treatment of wage, pension and other claims in multiple countries. The cross-jurisdictional dialogue generated by the study was an important aspect of the research and contributed to its accuracy. Part III provides an overview of how countries approach treatment of employee and pension claims during insolvency. Part IV analyses the priority or preference of wage and related compensation claims. Part V then compares the monetary value of the wage priority or preference across jurisdictions. Part VI looks at wage guarantee funds and insurance systems for employee compensation claims. Part VII explores hybrid wage priority and guarantee fund systems, including the public policy rationale for adopting concurrent strategies to protect these claims.

Part VIII examines the treatment of pension claims in insolvency as a unique set of claims, including the issue of risk allocation and pension deficits. This issue is of concern in jurisdictions where there are employer-sponsored pension plans. Part IX discusses how director and officer liability is utilized in some jurisdictions to create incentives for corporate officers to ensure that the enterprise keeps current in payment of its wages and pension contributions in the pre-insolvency period. Part X explores the treatment of collective agreements in insolvency, including how disputes are addressed when insolvency law and labour law intersect. Part XI briefly touches on legislative reform in the area of wage and pension claims. Part XII makes some summary observations and identifies areas of further research. Finally, Part XIII of the report sets out the country profiles, whereby the author has worked with the country contributors to create a profile of each reporting jurisdiction’s treatment of employee and pension claims.

II. Methodology

The methodology for this study was four-fold. It commenced with a literature search to discern the level of information in respect of employee and pension related claims and as background to design of an extensive questionnaire.

A questionnaire was then designed and tested in several jurisdictions, and revised based on initial feedback. The revised survey consisted of 45 questions, eliciting a great deal of information. A copy of the final questionnaire is appended as Appendix 2. Given the detail in the questionnaire, in a number of instances, several people collaborated from one country to ensure that all of the relevant topics were covered in a comprehensive manner. In some cases, it took a number of attempts before sufficient information was collected in a jurisdiction to create a country page. Legal scholars, judges, government officials and insolvency professionals have contributed to the country profiles.

Unlike a typical survey, information gathering did not end with submission of the questionnaire. Rather, it facilitated a dialogue, by telephone and e-mail exchange, with more than one hundred country contributors over a 15 month period, clarifying priorities, exchanging information on nuances in the law, and filling in some gaps in the data. Given the cross-jurisdictional nature of the study, this exchange was particularly important. All countries situate wage and pension claims in a broader insolvency framework and a much broader social, legal and political framework where systems vary considerably.

Each contributor was sent the draft of the full study in early 2008 and asked to verify their country information, as well as to comment more generally on the report and its findings. This third round of exchange was most helpful and contributed to the accuracy of the data collected.
The graphs were generated through the creation of excel data sheets and the inputting of country specific information. When the information was not available, further e-mails were sent to contributors and others for clarification, and where received, the data was consolidated.

The data represented in the graphs are data for pre-filing wage, compensation and pension claims. The text itself addresses information on treatment of post-filing claims, where this information is available. Post-filing treatment of wage and pension claims was not included in the overall data totals, as often post-filing claims are treated differently, either as a cost of administration and thus paid out on a priority basis, or paid out on a current basis as an incentive for employees to continue working where the debtor has an expectation of a restructuring plan and wants to ensure that employees’ informational capital and experience are not lost to other employment pending the workout process.

The first draft of the study was tabled at an International Colloquium on Social Claims in Vancouver, Canada on February 21, 2008, co-hosted by the National Centre for Business Law at University of British Columbia Faculty of Law, the International Insolvency Institute, and INSOL Europe, and attended by almost 30 of the country contributors. More than 65 participants in total discussed the preliminary findings of the study. It was followed by a period of consultation and comments from a wide variety of scholars, judges, practitioners and others. The final draft of the study is being presented at the International Insolvency Institute’s Annual Conference in Berlin, Germany in June 2008 as part of a panel discussion on the treatment of social claims in insolvency; and the text is forthcoming, Carswell Thomson Reuters, Toronto, Canada, in 2008.

The project has collected information from 62 jurisdictions. In most cases, the information collected is comprehensive. In a few instances, such as the Russian Federation, further research is required. The data will hopefully form the basis in the future for much more detailed analysis of the insights that different approaches offer.

A. Terminology and the Challenge of Comparative Research

A word about terminology is necessary. Different jurisdictions often use the same words to mean different concepts. Numerous jurisdictions use different kinds of terminology to mean the same thing. For example, unsecured claims can be called ordinary claims, non-preferred claims, current claims or concurrent claims. Some jurisdictions refer to priority claims; others call them preferred claims, preferences or preferential claims. Different jurisdictions use the words insolvency and bankruptcy to distinguish different stages in an insolvency proceeding or to distinguish commercial or consumer treatment of financial distress, whereas other jurisdictions use the terms interchangeably. Pension funds and superannuation funds have different meanings in some jurisdictions and are used interchangeably in others, as discussed in Part VIII. Reference to insolvent debtors can refer to corporations, unincorporated companies, business trusts, partnerships or other business enterprises in some countries, whereas in other jurisdictions, the insolvency laws do not cover businesses such as partnerships or trusts.

To the extent possible, the use of particular terminology has been retained in the country pages in Part XIII and in the study, but with explanation where necessary. It is important to bear in mind that certain descriptions or terminologies must be understood in the context in which they are being referred to, in terms of the broader social, economic and legal framework of a jurisdiction. This use of terminology necessarily poses some interesting challenges for comparative work and for tabulation of data in order to observe broad trends.

Aside from the challenge of legal terminology, there was also the challenge of language. The language of the survey and subsequent dialogue was English. The author reads only English and French and thus was dependent on the country contributors for accurate translation of particular statutory language and/or court judgments rendered in respect of treatment of wage and pension claims during insolvency. The country contributors took this responsibility very seriously and were incredibly diligent and helpful in researching particular questions.

Many country contributors engaged in an ongoing exchange to try to understand the specific information being sought. A good example was the pension survey questions. For jurisdictions with
only publicly funded and administered pension or superannuation schemes, the survey questions regarding outstanding pension claims and pension funding deficiencies were initially somewhat of a mystery, given that they assumed both a legal framework and the language that accompanied it. Here again, the comparison of language and terminology added to the richness of the dialogue, for which the author is deeply grateful to the country contributors.

For purposes of this text, the terms debtor company, debtor, employer, business enterprise and firm are used interchangeably, in describing the scope of protection for claims against these insolvent businesses. In the context of the discussion on employer-sponsored pension plans, the same terms are used, as well as the term debtor plan sponsor. Clearly, when one analyzes the actual statutory language under corporate law, securities law, insolvency and bankruptcy law, employment standards, labour relations legislation and pension law, the terms are utilized in a more precise manner to articulate the scope of liability or obligation for employer wage and related compensation and pension claims.

Also of note is that several jurisdictions are currently contemplating or are in the process of enacting legislative change. For purposes of calculation of the global statistics, the law as it stood in force on May 1, 2008 is what has been used. Thus, for example, in Canada, comprehensive insolvency law reform has been enacted but is not yet proclaimed in force.3 Those amendments are not included in the global data, which tabulates data of provisions in force in the various jurisdictions, although proposed legislative changes are discussed in the text. Similarly, the currency conversions used are those as of February 14, 2008, for consistency in comparing levels of protection.

The methodology adopted has allowed for a comprehensive gathering of information that should contribute to the international comparative knowledge base and in turn help to assist with public policy development.

III. Countries have Adopted a Variety of Protective Approaches

There has been a relatively wide diversity of approaches to wage and related compensation claims during insolvency, as indicated by the data collected. Some jurisdictions have enacted a system of priority or preference for claims for wages and other compensation, without adopting a guarantee fund, insurance system or other social safety net expressly aimed at compensating employees for wage and other losses on firm failure. Gibraltar, Chile, Jersey Channel Islands, China, Cayman Islands, Guatemala, Singapore, Nepal, and Nigeria are examples of these jurisdictions. The underlying policy rationale for enacting a system of priority or preferred claims for employees is frequently that employees are considered particularly vulnerable claimants and a statutory priority offers them some limited relief from losses incurred due to their employer’s insolvency.4

For those jurisdictions adopting a super-priority for wage and other compensation claims over both secured and unsecured creditors’ claims, as discussed in Part IV below, such adoption recognizes the particular public policy importance accorded to employee protection. Arguably, such a ranking also creates some incentives for senior secured lenders to monitor the debtor for compliance with wage and similar obligations, both as an indicator of enterprise financial health and as a mechanism to ensure that their secured claims are first in line to be satisfied on any liquidation.

Other jurisdictions have adopted wage or compensation guarantee funds or insolvency insurance schemes to pay out wage claims to employees, but have chosen not to adopt a preference or priority scheme for wage and related claims to the bankruptcy estate. Examples are Germany and Finland. The policy rationale is that such funds guarantee payments to workers when they are most vulnerable and can be far more expeditious than recovery after a bankrupt estate has been liquidated and payments made to creditors.

3 Chapter 47, Statutes of Canada, 2005 and Chapter 36, Statutes of Canada, 2007. As at May 21, 2008 these statutes had received Royal Assent, but had not yet been proclaimed in force. These statutes establish the Wage Earner Protection Program Act and modify the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and make consequential amendments to other acts.

4 See the discussion in the country pages at Part XIII of this study.
A number of other countries have adopted a hybrid approach in order to reduce the losses to employees on firm failure, adopting both a preferred claim or priority system of claims during insolvency and a wage guarantee fund or insurance scheme. Examples of these hybrid systems include Italy, Japan, France, Korea, Cyprus, Thailand, Spain, and Denmark. Here, the policy rationale is that both strategies are needed to protect employees and to create the appropriate incentives for director and officer conduct in the period leading up to the business enterprise entering insolvency proceedings, as discussed in Part VII below.

These three broad approaches summarize the approach of almost all of the countries for which data has been collected. Graph 1 provides a breakdown of the types of protection afforded employee wage claims in insolvency for the 62 countries in the study. Significantly, the greatest numbers of jurisdictions have chosen to protect employee wage and related claims through a hybrid approach, implementing both a statutory preference or priority for employee compensation claims and a wage guarantee fund. Graph 1 illustrates that 29 jurisdictions, or 47% of those surveyed, have adopted a hybrid approach to protection of social claims.

26 countries, or 42%, have adopted a priority or preference only regime, whereas five jurisdictions, 8% of reporting countries, use only a wage guarantee fund. Overall then, 89% of all jurisdictions has some form of priority for employee wage claims, when won adds the hybrid systems and the wage priority only systems. 55% of the 62 jurisdictions studied have a wage guarantee fund.

Only two jurisdictions in the study, Estonia and the United Arab Emirates, provide no special protection for employee wage and related claims during insolvency, although Estonia has a general unemployment insurance scheme that also addresses job loss on insolvency. The United Arab Emirates, recorded here as no protection, does offer nationals some limited insurance as well.

Graph 1

Treatment of Wage Claims in Insolvency

IV. Priority or Preference of Wage and Other Compensation Claims

A priority or preference system is one in which employees or former employees with wage and other compensation claims are given a statutory priority over other classes of creditors. In some jurisdictions, wage claims rank as unsecured claims, ranking pari passu with other unsecured creditors and behind secured creditors, although as evident in the graph above, this is a small minority of the 62 jurisdictions. A statutory priority or preference allows employees to receive some portion of their claim on a basis that ranks ahead of specified creditors.

Where there are priority or preference systems, different countries have made different policy choices in respect of the scope, amount and ranking of priority to be given to employee compensation claims. Scope refers to the types of compensation covered by the priority or preference. Amount refers to whether the jurisdiction has placed monetary limits on the amount of outstanding claims that are entitled to the preference or priority, or have placed limits on the timeframe pre-filing for which a priority can be declared. Ranking refers to where, in the hierarchy of credit claims, wages and other compensation claims are placed.

A. The Scope of Claims Covered by a Priority

With respect to scope, the definition of compensation varies across jurisdictions for purposes of the priority claim, in terms of whether the priority or preference covers wages, vacation pay, severance, termination pay, and/or accident compensation. There are a number of employee wage claims that are not given priority, even if ordinary wages and vacation pay are covered, as illustrated by the following examples.

Severance pay claims in Jersey, Channel Islands are treated as ordinary unsecured claims. In contrast, in Argentina, the Bankruptcy Law specifies that the amounts owed for wages for six months prior to insolvency, as well as severance payments, labour accidents, lack of notice for severance and contributions to the unemployment fund have a special preference over the merchandise, raw materials and machinery of the debtor that are at the location in which the employee works. These claims also granted a general privilege over all the debtor’s assets. In Bulgaria, vacation pay, severance and termination pay and work related expenses such as travelling expenses are treated as preferred claims with no limit on the amount entitled to a preference.

Vacation pay, severance pay, termination pay, and travelling/other expenses also have priority under Greek law. Although there is no statutory provision to this effect, these amounts are included in the definition of “wages” in Greece and are therefore treated to the same general preference as third ranking among preferred creditors. Such claims are limited to amounts arising in the two years prior to insolvency.

Honduras has a system of wage preference established in the Commerce Code (Código de Comercio) and Labour Code (Código del Trabajo), under which all wages, vacation pay, pension claims and severance pay are entitled to preference. The Código del Trabajo establishes a 15 year term of employment as the cap for calculating an employee’s severance payment. The law also guarantees payment of social security, and employee training programs and housing programs, to which both employee and employer have contributed. The Honduran Código del Trabajo establishes that in the case of bankruptcy, salaries up to one year prior to bankruptcy and all other compensation owing are to be paid by the trustee within 30 days of having been filed for in the Labour Courts.

Yet in Brazil, only wages are covered by the preference; and holiday pay owing, severance pay and termination pay have no priority. In Nepal, the Insolvency Act provides preferential treatment to the whole amount of outstanding wages and remuneration of workers and employees at the point of insolvency.

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6 Section 241, Sub-sections 1, 2, Argentine Bankruptcy Law.
7 Martin Campbell, Argentina country contributor, 2008.
8 Vladimir Natchev, Bulgaria country contributor, 2008.
10 Ibid.
11 José Rafael Rivera Ferrari, Honduras country contributor, 2008.
12 Dr. Sidnei Beniti, Brazil country contributor, 2008.
insolvency, without any cap on the amount of claims; however, vacation pay, gratuity, or provident funds payable to workers and employees are to be settled only after the payment of wages and remuneration owing.\(^\text{13}\)

The Cayman Islands Labour Law (2007) Article 40 provides for a limited preference for severance pay of one week’s basic wages for each 12 month period of employment, up to a maximum of 12 week’s pay; all other wage claims are unsecured claims.\(^\text{14}\) There is no wage guarantee fund in the Cayman Islands.

**B. Caps or Limits on the Amount of Priority Claims**

In many jurisdictions, there are caps on the amounts of claims that are given a priority in insolvency or bankruptcy, either a cap of the total monetary amount of the claim or a weekly maximum amount that can be claimed. The study results indicate that some jurisdictions place limits on the periods prior to insolvency proceeding for which a preference is given. These amounts vary considerably.

For example, the United States grants priority to pre-proceeding wage claims over other unsecured claims under 11 U.S.C. section 507(a)(4), for 100\% of amounts owing up to a maximum of 10,000 USD\(^\text{15}\) for wages and under section 507(a)(5) up to 10,000 USD per employee for employment benefits.\(^\text{16}\) Vacation pay, severance pay, and termination pay are all included within the wage priority up to the maximum of 10,000 USD.\(^\text{17}\) Several dollar amounts in the US Bankruptcy Code are adjusted for inflation every three years and the current adjusted amount of wages that are granted a priority is 10,950 USD.\(^\text{18}\) The next adjustment will be in April 2010.\(^\text{19}\) There is no wage protection fund or guaranteed insurance for wage claims during insolvency. Wage and benefit claims arising during a proceeding are normally administrative claims and entitled to the priority of section 507(a)(2) of the US Bankruptcy Code.\(^\text{20}\)

In contrast, in Canada, the priority is 100\% on the amount of compensation owed up to a dollar cap of 2,000 CAD, with another 1,000 CAD for disbursements of travelling salespeople, relating to the six months immediately preceding the bankruptcy.\(^\text{21}\) Hence the amount of the claim that is preferred under US law is five times that in Canada, notwithstanding that the economies of the two countries are similar, as is their current exchange rate. In Jersey, Channel Islands, the cap is £3,500, which is 6,877 CAD, with an additional £1,000 to cover vacation claims and bonuses, for claims arising in the six months preceding initiation of a bankruptcy.\(^\text{22}\)

Even where the preference does not have a cap, however, employees’ claims may not be fully protected. Seyi Akinwunmi observes that the preference for wage claims in Nigeria, established under section 494 of the Nigerian Companies and Allied Matters Act 1990, extends to the wages or salaries of employees, vacation pay, and any accrued workers’ compensation.\(^\text{23}\) However, while there are no legal restrictions on the realization of the preference claim in Nigeria, in practice, where


\(^\text{14}\) David Collier and Joanna Chong, Cayman Islands country contributors, 2008.

\(^\text{15}\) 10,000 USD is 9,883 CAD. Several dollar amounts in the Bankruptcy Code are adjusted for inflation every three years. The figure in the text is correct as of May, 2008. The next adjustment will be in April, 2010.

\(^\text{16}\) Professor Jay Westbrook, United States country contributor, 2008. \(\text{Ibid.}\) Travelling and other expenses are not preferred unless they are classified as earnings.

\(^\text{17}\) \(\text{Ibid.}\) 10,950 USD is 10,821.89 CAD.

\(^\text{18}\) \(\text{Ibid.}\)

\(^\text{19}\) \(\text{Ibid.}\)

\(^\text{20}\) \(\text{Ibid.}\)

\(^\text{21}\) Section 136, Bankruptcy and Insolvency Act (BIA). Note that the status of the claims of employees will change when the statutes amending the Bankruptcy and Insolvency Act are proclaimed in force, likely in 2008..

\(^\text{22}\) Article 32(1)(b), Bankruptcy (Désastre) (Jersey) Law1990, as amended. There is no guarantee fund in Jersey for wage claims.

\(^\text{23}\) Seyi Akinwunmi, Nigeria country contributor, 2008.
the assets realized in the course of the liquidation are not sufficient to meet the preferred claims, employees are not paid the entire amount.\textsuperscript{24}

This observation is an important one. Where there is a preference, but placement of the preferred claim on the hierarchy of credit is relatively low, employee claims may not be met as senior secured claimants take all the value of the assets on liquidation. Similarly, in jurisdictions where debtors can defer liquidation for too long, there may be insufficient remaining value to satisfy wage claims, even where there is a higher priority or preference.

C. The Ranking of Priority Claims

Thus, a significant distinguishing feature is that the placement of employee claims on the overall hierarchy of secured and unsecured claims differs considerably across jurisdictions. Countries such as Brazil, Chile, Colombia, Mexico, Indonesia and Malaysia grant employee claims an absolute priority, including over secured creditors, for a capped amount.

For example, pursuant to Chile’s \textit{Civil Code}, first priority claims consist of: (1) employees’ remuneration, wages and family allowances, the latter of which is a social security benefit funded by the State; (2) social security contributions of employees withheld from such remunerations and wages; and (3) severance pay accrued in favour of employees, whether legal or conventional, as of the date of the claim, up to a maximum of 15 minimum monthly salaries, which is approximately 4,910 USD per employee.\textsuperscript{25} Employee compensation claims in excess of this amount are unsecured claims.\textsuperscript{26}

While Brazil previously granted an absolute priority for wage claims, without a cap, the perception of risk in the credit market and consequent concern about the future availability of credit created the impetus in Brazil to amend the legislation and impose for the first time a cap on the amounts that can be claimed on a priority basis. Under Brazil’s Federal Law 11101/05, \textit{Law of Restructuring and Insolvency}, Article 83, labour-related claims have a super-priority, up to 150 minimum wages per creditor,\textsuperscript{27} which is a cap of 57,000 BRL or 32,550 Canadian dollars.\textsuperscript{28} The amount is significant in contrast to the 2,000 CAD priority granted under Canadian insolvency legislation.

Graph 2 illustrates the priority of wage preference by type of priority for the 62 countries in the study. 25 jurisdictions, 40\% of the countries in the study, grant a super-priority for wage and related claims over both secured and unsecured assets. The policy rationale reported by many jurisdictions is that this choice has been made because of the unique vulnerability of employees at the point of enterprise insolvency.

A further 12 countries, 19\% of the 62 jurisdictions studied, grant a partial priority over secured claims, usually over floating secured claims, but not mortgages or other security on real property. One jurisdiction creates equity of priority with secured claims. Hence, 61\% of the jurisdictions accord some priority over secured claims or a priority equal to secured claims for employee wage and related compensation claims.

Graph 2 also illustrates that 17 jurisdictions, 27\% of the total, grant a priority over unsecured claims only. 11\% of the total, 7 countries, offer no priority for wage claims.

\textsuperscript{24} \textit{Ibid.}
\textsuperscript{25} Cristián Eyzaguirre, Chile country contributor, 2008. 4910 USD is 4,852.55 CAD.
\textsuperscript{26} \textit{Ibid.}
\textsuperscript{27} The minimum national wage is 380.00 BRL. Thomas Heather, Mexico country contributor, 2008. 380 BRL is 217 CAD.
\textsuperscript{28} Dr. Sidnei Beniti, Brazil country contributor, 2008.
The types of priorities for wage and related compensation claims can be sub-divided further, based on particular distinct features.

For example, the Republic of Slovenia has a variation on absolute priority. There is a statutory preference for wage claims under the Law on Compulsory Settlement, Bankruptcy and Liquidation for the basic wages determined in the collective agreement plus unpaid wages owed for the period three months prior to the commencement of the bankruptcy proceeding, with no cap on the amount. Effective 2007, wages and related compensation, including termination pay to 100% are treated as a cost of bankruptcy and given first priority in insolvency proceedings. There is no priority for travelling or other employment related expenses owing.

Other jurisdictions, such as the Czech Republic, have implemented what can be classified as a “restricted absolute priority” regime. Specifically, secured creditors are paid preferentially out of 70% of assets of the insolvent firm, whereas 30% of the estate must be available to meet employee claims on a full priority basis.

Both the absolute priority and the restricted absolute priority schemes place a high degree of social value on the meeting of employee claims on a priority basis, but the caps on both and the partitioning by percentage of the priorities between secured creditors and employees creates a fair degree of certainty in the credit market, as lenders know precisely the amount of risk they are assuming in respect of potential subordination of their claims.

Another model is a split priority system, in which only particular types of employees are given a special or super-priority. For example, in India, “blue collar” workers rank equally with secured creditors and priority over unsecured and uninsured claims.

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Ibid.
creditors, while “white collar” workers rank below secured creditors, but equally with governmental tax and fiscal claims above other creditors.\textsuperscript{31}

Some countries grant a priority for employee compensation claims after secured creditors but prior to floating security creditors. Examples here include Australia,\textsuperscript{32} Israel, Slovakia and Ghana. For example, the Ghana Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) grants priority to certain claims of employees, which rank below fixed charge holders but above floating charge holders.\textsuperscript{33} The priority applies to remuneration not exceeding the current value of £150 for a period not exceeding four months before the commencement of the insolvency proceedings.\textsuperscript{34}

In contrast, France grants a priority based on particular timeframe, granting super-priority for wages not paid in 60 days prior to the insolvency proceedings, granted over secured claims but not those with retention of title, and general preference over personal property and real estate for unpaid wages up to six months prior to insolvency.\textsuperscript{35}

Finally, numerous countries have granted employee compensation claims a priority over unsecured creditors; for example, Austria, Hungary, Japan, Norway, and Switzerland. The policy rationale in many of these jurisdictions is that it is important to credit markets that secured claims be respected, and that any losses to employees from the placement or ranking of their claims can be addressed through wage guarantee funds or other social supports.

Arguably then, one can construct a matrix of the types of priorities or preferences for wage and related claims. Beyond the broad categories set out in Graph 2, such a matrix illustrates some interesting variations on the treatment of preferences.

- **Absolute priority**, including over secured creditors, for a capped amount; examples include Brazil, Chile, Colombia, Malaysia
- **Restricted absolute priority**, secured creditors and employees paid preferentially only for a percentage of assets; for example, Czech Republic.
- **Split priority**, distinguishing types of employees in ranking; for example, India.
- **Priority as a Cost of Bankruptcy**, with first priority as part of costs of administration; for example, Slovenia.
- **Priority after secured creditors but prior to floating security creditors**, Australia, Israel, Ghana, Slovakia.
- **Priority by time frame**, for example, France, with different priorities for different time frames.
- **Priority over unsecured creditors**, for example, Austria, Hungary, Japan, Norway, Thailand, and Switzerland

In thinking about such a matrix, one can assign an arbitrary value of 0 to 20 by amount of protection offered through the placement on the credit hierarchy of the priority or preference claim for wages and related compensation. While the assignment of value is arbitrary, it does serve as one indicator of whether employee wage claims will be met. Graph 3 below plots the arbitrary values assigned to place of ranking on the credit hierarchy and the number of jurisdictions that offer that ranking. It

\begin{itemize}
  \item Vaneeta Patnaik, India country contributor, 2008.
  \item It is important to note that the treatment of employee entitlements in Australia depends on the type of insolvency administration and whether the debtor employer is incorporated or not.
  \item Jacob Arko Saah, Ghana country contributor, 2008.
  \item \textit{Ibid.} £150 is 293.81 CAD.
  \item Isabel Didier, Marie-Christine Lafitte, Dominique Haleva, Emilie Codeço and Jean Michel Lucheux, France country contributors, 2007 and 2008.
\end{itemize}
assists in illustrating the different risks faced by workers in different jurisdictions in respect of their wage and related claims. The black line in Graph 3 signifies the arbitrary value assigned, with the greatest protection valued at 20, measured from the left of the graph, sloping downward to no protection, valued at 0. The pink line indicates where countries in the study fall within that continuum of protection.

For example, the greatest number of countries rank highest on the matrix because they enjoy a priority over both secured and unsecured claims, as indicated by the data point to the far left of the graph. Restricted absolute priority has a high value in terms of protection of claims, but fewer jurisdictions that have adopted this level of protection, as indicated by the data point second from the left. In contrast, a significant number of countries have priority only over unsecured claims, but the value of that priority is more limited, as illustrated by the data point second from the right.

Graph 3
Matrix of Priority of Wage and Related Claims in terms of Degree of Protection

While the matrix needs further conceptualization, Graph 3 does provide an initial snapshot of how jurisdictions locate themselves in terms of statutory priorities as the policy choice to protect workers. Thus, for example, a preference over only unsecured creditors may be of limited value in jurisdictions where the majority of assets tend to be secured, so the higher peak at the lower end of the protection scale, on the right of the graph, indicates that workers may still be highly vulnerable to not having their wage and related claims met.

If one removes the five jurisdictions for which there is no priority, but there is a wage guarantee fund or insolvency wage insurance scheme, the data point at the far right would change to indicate a smaller gap between the value of protection and the number of countries, in that only two jurisdictions offer no priority or other protection. This matrix only measures protection through priorities granted during insolvency, not overall protection of wage and related claims.
Even this matrix of priorities simplifies the treatment of wage and related claims in insolvency, because some jurisdictions bifurcate the treatment of wage claims pre and post-filing of insolvency or bankruptcy proceedings, the latter claims of which are not captured by the above graph. For example, under the Argentine Bankruptcy Act, all labour wages that are due after the filing of the debt reorganization proceedings or the bankruptcy are considered conservation expenses, and are therefore granted the highest ranking of collection against other creditors, with the exception of secured creditors over their secured assets.36

Hence, in some jurisdictions, the priority shifts higher as a mechanism to encourage workers to continue employment during the period that the fate of the insolvent firm is being decided. Graph 3 only covers pre-filing claims.

Another aspect of the wage priority framework is that some jurisdictions require mandatory insurance or guarantee schemes, as a form of insurance against the debtor employer’s ability to pay the priority claims. An example is the Dominican Republic.

**Dominican Republic**

In the Dominican Republic, the Labour Code provides that all credits relating to wages pertaining to an employee enjoy a general priority over credits of any other nature, except for credits of the Dominican Government or any subdivision.37 This priority is accompanied by a system in which a type of insurance, a guarantee, is mandatory. The guarantee must be funded by the employer.38 Article 465 of the Dominican Labour Code provides that a guarantee must be set up to insure the payment of up to four months of overdue salaries to employees in case of insolvency of the employer corporation; and all wage claims awarded by a court of law or by arbitral award in case of termination of a labour contract, to a limit of one year of salaries. For such purposes, the guarantee must be set up as an insurance policy contracted by the employer with an insurance company and the employer must notify the Labour Ministry of the particulars.39 Hence the priority is accompanied by a form of insurance that is aimed at ensuring that employees will be paid out the amount of the priority claim on the debtor’s insolvency.

**D. Different Priorities under Different Legislation in the Same Jurisdiction**

In a couple of jurisdictions in the study, there appear to be some contradictions, if not uncertainties, between how wage claims in insolvency are dealt with in different statutes within the same jurisdiction, or maybe it is rather a matter of such legislation not being aligned properly in all instances.

**Botswana**

For example, employees in Botswana seemingly enjoy a top ranking priority for wages and related claims in arrear over and above other non-secured creditors in terms of the Botswana Employment Act;40 yet the Insolvency Act of 1929 provides for less elaborate employee claims that rank fourth on the list of statutory preferences or priorities provided for under the Insolvency Act.41

**Namibia**

In Namibia, the South African-inherited Namibian Insolvency Act of 1936, bar certain differences, provides for a similar type of preference as the Botswana Insolvency Act, but the new 2007 Namibian Labour Act that is due to come into operation in 2008 seems to create a super-priority type of

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36  Section 240, Argentine Bankruptcy Act; Martin Campbell, Argentina country contributor, 2008.
37  Isabel Andrickson and Norman De Castro, Dominican Republic country contributors, 2008, citing Article 207 of the Dominican Labour Code. There are no restrictions on the realization of these credits and no cap on the amount entitled to priority.
38  Isabel Andrickson and Norman De Castro, Dominican Republic country contributors, 2008.
39  Ibid.
41  Professors André Boraine and Stefan van Eck, Botswana country contributors, 2008.
preference in favour of employees. At present the Labour Act does not refer to the preference in the Insolvency Act.42

Hence, Professors André Boraine and Stefan Van Eck correctly observe that the priority granted under insolvency legislation must be read in conjunction with labour and other laws that may give other priorities.43 Where systems do not expressly state which legislation is paramount, there can be uncertainty in terms of the remedies afforded to employees on insolvency.

E. Jurisdictions with Only a Preference or Priority System for Treatment of Employee Wage and Related Claims

As noted above, 42% of the countries surveyed rely solely on a priority or preference system to protect workers’ wage and related claims on insolvency, although it is important to remember that a full 89% of the 62 jurisdictions studied grant a priority if one includes the countries that offer a priority to wage and related claims as part of the hybrid system of protection, as discussed in Part VIII below.

Seven examples of priority-only systems from different parts of the world are briefly discussed here, but reference should be made to the country profiles in Part XIII for a fulsome description from all reporting jurisdictions. The priority for wage and related claims may be located in the insolvency or bankruptcy legislation, but equally, as some of the examples below indicate, the preference may be statutorily required under employment and labour law or may be part of a constitutional right enjoyed by employees.

Mexico

Mexico has a super-priority for employee wage claims. The statutes and regulations giving rise to the preference are the Federal Constitution (Constitución Política de los Estados Unidos Mexicanos), the Federal Labour Law (Ley Federal del Trabajo) and the Insolvency Law (Ley de Concursos Mercantiles).44 The wage claims that are entitled to preferential treatment are those corresponding to the two year period prior to judicial commencement of the insolvency proceeding (business reorganization), pursuant to Article 123, Constitución Política de los Estados Unidos Mexicanos. The provision affords a constitutional preference for workers with regard to unpaid salaries.45 Pursuant to federal labour law, absolute priority is given to workers.

The absolute priority in Mexico covers seniority payments and the wages that accrued in the two prior years of employment before the insolvency and up to three months of severance pay, but does not cover vacation pay.46 Seniority payments are mandatory, and accrue as of fifteen years of service, pursuant to federal labour law 162; and the Ley de Concursos Mercantiles includes the same provision.47 Liquidation of assets can be requested to satisfy claims after bankruptcy.

One limitation on the effectiveness of the priority in Mexico is the amount of assets available in order to make the corresponding payments.48 Mexico does not have a wage guarantee protection fund or guaranteed insurance for wage claims during insolvency.

China

China also relies on a wage preference rather than a guarantee fund to protect workers’ claims at the point of insolvency. Under China’s new Enterprise Bankruptcy Law, effective 1 June 2007, secured claims have first priority with respect to the security, a shift from the prior bankruptcy legislation that in practice resulted in employees having an absolute priority.49 Under the new legislation, realization

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42 Professors André Boraine and Stefan van Eck, Namibia country contributors, 2008.
43 Ibid.
44 Dr. Luis Manuel C. Méjan Carrer, Mexico country contributor, 2007.
45 Thomas Heather, Mexico country contributor, 2007.
46 Ibid.
47 Ibid. citing section 224(1) of the Mexican Insolvency Law.
49 Professor Jingxia Shi, China country contributor, 2007. She reports that Under Article 109 of the 2006 Enterprise Bankruptcy Law secured creditors have a priority claim against the assets pledged to their
of secured claims is followed by the costs of bankruptcy proceedings and then a statutory preference for employee claims.\textsuperscript{50} The wage preference favours employees over other unsecured creditors, and there is a specified order of preference. First are the wages, subsidies for medical treatment and disability, comfort and compensatory expenses, labour insurance premia, old-age insurance premia, fundamental medical insurance premia and compensation to employees, unemployment insurance, and minimum living security.\textsuperscript{51} The next preference is for social insurance premia and tax fees, followed in order by unsecured claims. Vacation pay, severance pay and termination pay claims do not enjoy a preference.\textsuperscript{52}

China's new bankruptcy legislation is aimed at addressing the deferred liquidation tendencies of the system, whereby state-run or owned enterprises (SOEs) delay filing insolvency proceedings due to custom in respect of reluctance to acknowledge financial distress and loss of job security in a culture where life-long employment has been considered important.\textsuperscript{53}

The shift down in priority for employee wage claims is partly as result of China seeking new markets in the US and elsewhere, and a decision to increase certainty for secured creditors in terms of priorities on bankruptcy and liquidation. Professor Jingxia Shi observes that uneven enforcement of laws has meant uncertainty for insolvent debtors and their creditors, including workers.\textsuperscript{54} She also observes that the Chinese system engages in systematic retraining and job referral services as an aid to workers recovering from job loss due to insolvency.

**South Africa**

South Africa grants a statutory priority for outstanding salary or wages owing at the point of insolvency of the employer.\textsuperscript{55} Effective as of 1 September 2000, section 98A of the South African Insolvency Act of 1936 improved the statutory preferences granted to employee claims. Their claims rank after secured creditors as well as some specified statutory preferential claims but ahead of preferences in favour of the State, for instance for taxes in arrear; certain claims secured by general mortgage bonds; and unsecured and non-preferential claims, which are termed concurrent claims in South Africa. The preferential claim under this heading provides for a claim for salary or wages to a maximum of 12,000 ZAR for any period prior to sequestration or liquidation, not exceeding three months.\textsuperscript{56}

**Venezuela**

Venezuela has wage preference or super-priority in terms of employee wage claims; this preference is provided in articles 158 through 160 of the Venezuelan *Organic Labour Law (Ley Orgánica del...*\textsuperscript{50}

\textsuperscript{50} 2006 Enterprise Bankruptcy Law (China), Article 113, effective June 1, 2007.
\textsuperscript{51} Articles 32, 37 of the Enterprise Bankruptcy Law for Trial Implementation; Wang Weiguo, “The Order of Payment of Workers’ Claims and Security Interests under China’s New Bankruptcy Law. Report to the OECD, April 28, 2007, http://www.oecd.org at 2, (last accessed December 1, 2007). Article 32 specifies: “With respect to claims secured with property that are established before bankruptcy is declared, the creditors enjoy the right to receive repayment with priority with respect to such security. With respect to claims that are secured with property whose amount exceeds the value of the security collateral, the part that is not repaid constitutes a bankruptcy claim, and will be repaid in accordance with the bankruptcy proceedings.”
\textsuperscript{52} Professor Jingxia Shi, P.R. China country contributor, 2007.
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid.
\textsuperscript{55} Professor André Boraine, Professor Stefan van Eck and the Honourable Ralph Zulman, South Africa country contributors, 2007 and 2008.
\textsuperscript{56} ZAR is South African Rand. 12, 000 ZAR is 1, 537.20 CAD.
All wage claims involving salary, severance and termination benefits, indemnity and other credits that a debtor employer owes to an employee with respect to the employment are entitled to preferential treatment, for amounts owing to employees equivalent up those salaries of the last six months, and for severance benefits equivalent up to ninety days of salary. After the employees have executed this preference and the employer has not yet paid in full, the employees will have a security interest over the employer’s assets. Venezuela does not have wage protection fund or guaranteed insurance for wage claims during the insolvency.

New Zealand

In New Zealand, a number of statutes cover similar protection to employees, depending on the legislation regulating the particular insolvency or enforcement process being employed, including the Property Law Act 2007, the Receiverships Act 1993, the Insolvency Act 2006, and the Companies Act 2003, the latter of which regulates the distribution of the assets of a company in liquidation. Section 312 and Schedule 7 of the Companies Act 1993 grant a preference for employees for wages for the four months preceding liquidation, holiday pay, redundancy entitlements, deductions from wages and various other payments up to an aggregate maximum of currently 16,420 NZD. The amount of priority is periodically inflation adjusted.

These preferred claims must be paid after liquidation costs but before other unsecured creditors. If there are insufficient unencumbered assets to meet this preference, these employee claims rank in priority to security interests over inventory and accounts receivable except for security interests that are duly perfected purchase money security interests or that are perfected security interests arising from the transfer of an account receivable for new value.

Thus, in New Zealand, employees rank up to the statutory maximum before the holder of a general security interest over inventory or accounts receivable, but behind purchase money security interests in inventory and factors’ claims to accounts receivable and behind all security interests over all other assets including, chattel paper. There is no wage protection fund or state insurance for wage claims in New Zealand.

Colombia

In Colombia, the Civil Code specifies that all wage claims, indemnifications, social services benefits or rights are considered to be privileged and prevail over any other claim, except for children’s maintenance rights (Law 1098, 2006), in insolvency or bankruptcy procedures. Pursuant to Article 36 of Law 50 of 1990, all wages, indemnifications and social benefits or rights are considered to be privileged and are entitled to the preferential treatment in insolvency or bankruptcy proceedings. There are no restrictions on the realization of the preferential wage claims, such as a cap on the amount given preference or the length of the employee’s employment.

Under the Colombian insolvency regime, there is a distinction between labour claims that originated before the initiation of the insolvency procedure and labour or wage rights originated after the
initiation of the process called “administration expenses”. These administration expenses have a preference for their payments above those subject to the reorganization agreement.

Namibia

Under the Namibian Insolvency Act of 1936, employees acquire a statutory preferential claim, or priority, for a certain portion of salary or wages and bonuses, limited to two months, in arrears. The remaining amounts are unsecured claims, termed concurrent claims. Employees also acquire a statutory right to claim compensation for the premature termination of their contracts of employment under section 38 of the Namibian Insolvency Act. They then have unliquidated unsecured claims against the estate for damages resulting from the premature termination of their contracts. On the hierarchy of prescribed statutory preferences, employees rank sixth in position, directly after funeral and deathbed expenses, sequestration and administration costs, specified sheriff charges incurred for legal proceedings before sequestration, a number of statutory claims such as compensation for occupational injuries and diseases and amounts payable to pension funds, which claims rank pari passu and abate in equal proportion if necessary. Then salary and wages rank next, above certain claims secured by general mortgage bonds and unsecured, non-preferential claims, i.e. concurrent claims. The funeral and deathbed priority will only apply where the employer is an individual and not in case of a company for instance.

Certain provisions of the new Namibian Labour Act of 2007, which Act was enacted December 2007 and is set to come into operation soon, also deal with social claims in insolvency and related matters. Section 32(1) deals with the automatic termination of contracts of employment one month after sequestration or liquidation of the employer. If the Labour Act of 2007 comes into operation without an amendment to section 38 of the Insolvency Act, section 32(1) will be in conflict with the Insolvency Act in this regard.

Section 32(3) of the Labour Act of 2007 makes provision for a preferential right in favour of employees whose contracts have terminated in respect to “any remuneration due or monies payable to the employee” in terms of the Act. Since these preferences override “any other law”, it seems that they will prevail at least over the preferences created under the Insolvency Act, and hence may rank first in the order of preferences, as explained above. Professors Boraine and van Eck observe that it may be, however, that a super-priority that will even override secured claims has been introduced, since the Namibian Labour Act of 2007 does not define the term “preference”.

Employees have preferential claims up to a maximum of 5,000 NAD in terms of the Insolvency Act for salary or wages in arrears but not exceeding two month’s salary or wages due and owing prior to date of sequestration or liquidation. They also have preferential claims for bonuses due in respect of leave or holiday not exceeding 21 days to a maximum of 2,500 NAD. Claims exceeding these limits are of a concurrent nature and rank pari passu with other concurrent creditors. Likewise, if the Namibian Labour Act of 2007 comes into operation without an amendment of the relevant provision.

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71 Colombia Law 1116 of 2006. Juan Fernando Gaviria and José Alejandro Oliveros, Colombia country contributors, 2008.
72 Juan Fernando Gaviria and José Alejandro Oliveros, Colombia country contributors, 2008.
73 Professors André Boraine and Stefan van Eck, Namibia country contributors, 2008.
74 Ibid.
75 Section 97(2)-(3) of the Namibia Insolvency Act of 1936.
76 Ibid, section 98(1)-(2).
77 Ibid, section 99(1)(a)-(f).
78 Ibid.
79 Professors André Boraine and Stefan van Eck, Namibia country contributors, 2008.
80 Ibid.
81 Ibid.
82 Section 32(3) of the NLA clearly states that “despite the provisions of any law to the contrary, an employee whose contract is terminated in the circumstances referred to in subsection (1) is a preferential creditor in respect of any remuneration due or monies payable to the employee in terms of this Act.”
83 NAD are Namibia Dollars. 5,000 NAD is 659 CAD.
84 Section 100.
85 2,500 NAD is 330 CAD.
86 Professors André Boraine and Stefan van Eck, Namibia country contributors, 2008.
in the Insolvency Act, the preferences created by the labour law will be in conflict with the provisions of the Namibia Insolvency Act in this regard, but the Namibian Labour Act will nevertheless trump the latter act in such an instance.\textsuperscript{87}

Thus, in Namibia, the free residue is used to pay the creditors with preferential claims, and then to pay the unsecured (concurrent) creditors.\textsuperscript{88} The unsecured creditors are paid out of the free residue within a prescribed order of payment. Should the claim of a particular employee exceed the preferential amount he or she will have the right to claim the balance of his or her claim as a concurrent creditor at the end of the payment queue. Like the position in South Africa,\textsuperscript{89} Boraine and van Eck observe that in this last instance, the employee will increase his or her risk to become liable to make a contribution as to the general cost of administration.\textsuperscript{90} There is no central guarantee fund for employee compensation claims on insolvency.\textsuperscript{91}

The risk of employees being held liable to make a contribution to the general cost of administration in South Africa and in Namibia creates an additional hurdle in those countries to employees realizing on their wage claims. Employees are less likely to move to enforce their claims where the risk of assuming the administration costs is greater that any amount they may realize on outstanding wage and related claims.

The above brief descriptions illustrate that even when jurisdictions adopt preferences only, the type of wage preference or priority varies considerably from country to country. The scope of that protection also varies, as discussed in the next part.

V. Comparing the Monetary Value of the Wage Priority or Preference across Jurisdictions

In terms of the priority or preference of wage and related claims, whether the system is a hybrid system, as discussed in part VII below, or one that has enacted solely a wage preference or priority system, there is quite a range of benefits available to employees of insolvent companies.

Graph 4 below converts the monetary amount of wage preferences of the reporting jurisdictions into Canadian dollars for comparative purposes. Of the 55 countries for which this information is available, 42% have no cap on the amount of wage and related claims that receive a priority, but they have a limit on the amount of claims given a priority through the setting of a mandatory timeframe prior to filing of the insolvency proceeding for which employees can claim. In the vast majority of cases, this time frame was between three months and two years. In two instances, the priority was unlimited only for amounts owing in the month prior to the insolvency or bankruptcy filing.

5% of the jurisdictions have a cap of less than 1,000 CAD per employer, primarily the African countries. 11% have a limit between 1,001 and 2,000 CAD, and 5% a limit between 2,001 and 5,000 CAD. 9% of the countries in the study have a cap of 5,001 to 10,000 CAD for the priority wage claim.

Graph 4 also illustrates that 15% of the countries set the cap of priority claims at between 10,000 and 50,000 CAD. 13% have no cap and no time limit on the period for which claims can be made; hence, all the claims receive a priority.

Although the conversion of the priority amounts to Canadian dollars is a helpful comparative measure, a more accurate measure would be to bench mark amounts by average wages or minimum wages of the specific jurisdiction, given that 1,000 CAD means a great deal more in some African countries, for example, than it does in a developed continental European nation. This information is not currently available, hence, the amounts are compared only through a common currency, that of Canada. Graph 4 only includes those countries that have a wage priority or preference system, and does not reflect those reporting countries with no priority scheme.

\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid.
\textsuperscript{89} Professors André Boraine and Stefan van Eck, South Africa country contributors, 2008.
\textsuperscript{90} Professors André Boraine and Stefan van Eck, Namibia country contributors, 2008.
\textsuperscript{91} Ibid.
The graph illustrates that countries such as Canada, South Africa and Namibia are in the low range of the amount of wage and related compensation claims given priority. However, these lower amounts may be more significant protection for some emerging nations that they are in developed economies, because prices are lower so the same amount of money will buy more. As noted above, depending on where the claims rank in the priority of claims and the ability to realize the value of the preference, the amount of the preference may or may not be effective in protecting employee interests.

The other factor to note is that different jurisdictions have different practices and norms with respect to how frequently employees are paid or the length of time employees may be expected to go without payment of their wages. Hence the period of coverage is important. In Canada, part of the policy rationale for the low monetary amount of the preferred claims is that debtor employers generally keep wage payments current, except perhaps for the few weeks prior to filing insolvency proceedings. As will be discussed in Part IX, there is also the view in Canada that making directors and officers personally liable for outstanding wage claims acts as an ongoing incentive for payrolls to be kept current. However, there has been a problem with having those claims met; hence the proposed reforms that are discussed in Part VII below, which will convert Canada to a jurisdiction with hybrid or dual protection.

VI. Wage Guarantee Funds and Insurance Systems for Employee Compensation Claims

Guarantee funds and insolvency insurance schemes for wage protection are the second major means of protecting employee wage claims during insolvency. Numerous jurisdictions have chosen to create wage guarantee funds or comprehensive insurance systems that are aimed at redressing the problems faced by employees in realizing their wage claims. The greatest advantage of such funds or schemes is that they usually offer immediate financial relief to employees suffering job loss due to insolvency or bankruptcy by paying out some of claims directly and then seeking to recover funds from the estate of the debtor company once the assets are liquidated. Hence, guarantee funds
enable employees to have some immediate realization of their claims, and places the risk of non-payment with the guarantee fund or government agency providing the funding.

Austria

For example, Austria has a wage protection fund called the *Insolvenz-Ausfallgeld-Fonds*. The IAF will pay out wage claims for ordinary wages (*Laufendes Entgelt*), termination payments (*Entgeld aus der Beendigung des Arbeitsverhältnisses*), vacation payments (*Urlaubsabfindung*) and corporate pension claims (*betriebliche Pensionsansprüche*). It will also pay damage claims, which include claims for compensation if the employment relationship was unlawfully terminated by the employer or if it was lawfully terminated during insolvency proceedings, as well as other damage claims resulting from a breach of the employment relationship; other claims grounded in the employment relationship; and necessary legal costs incurred by the employee prior to the employer’s insolvency.

An employee must apply for compensation from the *Insolvenz-Ausfallgeld-Fonds* within six months following the opening of bankruptcy proceedings and the Fund pays out the claims as soon as it is determined valid. Hence, the Austrian *Insolvenz-Ausfallgeld-Fonds* is a comprehensive form of protection of employee claims for compensation. Wage claims in Austria rank below secured creditors but ahead of ordinary creditors, making Austria a hybrid jurisdiction.

More generally, wage guarantee funds require a pool of assets available to satisfy wage and related claims and the study collected data on the various methodologies used to fund such wage guarantee funds.

Graph 5 summarizes the type of payments available through the wage guarantee funds examined. Of the 24 jurisdictions for which this data was available, 50% did not place a monetary cap on the amount of payments, but did place a time limit prior to the insolvency or bankruptcy filing for which a claim could be made.

Three jurisdictions specify a monetary cap of less than 10,000 CAD, 12.5% of the total. Another 12.5% (3) of the countries currently have set a cap of 10,001 to 20,000 CAD per employee. Graph 5 also illustrates that 8% (2) place a monetary limit of 20,001 to 50,000 CAD on payments out of the fund per individual employee and another 8% (2) set the cap at 50,001 to 100,000 CAD.

Finally, Graph 5 illustrates that 8% (2) of the 55 countries do not place a limit either on the amount that can be paid out or the period prior to insolvency filing for which wage claims can be made.

92 Christian Michal, Austria country contributor, 2008.
Monetary Cap or Other Limit on the Amount Available from the Wage Guarantee Fund

Hence, Graph 5 illustrates that the most common means of limiting the obligations of the wage guarantee fund is to place a limit on the timeframe prior to insolvency filing for which employees may make a claim, while not restricting the amount that can be claimed. In a number of jurisdictions studied, the amount that could be claimed from the fund corresponded in some measure to the amount of priority granted such claims, although in a number of cases, the amount available from the wage guarantee fund was considerably more generous that the priority or preference claims granted.

A. Funding Methodology

The comparative study reveals that there are a number of different methodologies for funding wage guarantee funds. In numerous jurisdictions, the guarantee fund is sector funded or industry funded, with premiums paid by corporations and other business enterprises, based on the risks inherent in the particular sector or industry. Examples of these jurisdictions are Belgium, Germany, Korea, Italy, and Denmark.96

Another funding mechanism is to fund the guarantee fund through the general tax base, spreading the risk across the entire economy. Countries that have adopted this funding methodology include Finland,97 as well as the proposed Canadian Wage Earner Protection Program, which has been enacted but is not yet in force. The third option is for a jurisdiction to fund a wage guarantee plan or insolvency wage insurance scheme through a combination of employer-funded and state-funded resources, an example being Italy.98

Whether the wage guarantee fund is primarily funded through the tax base or through employer levy, funds tend to use multiple strategies to ensure adequate funding.

96 See the descriptions in the country pages in part XIII.
97 Pekka Jaatinen, Finland country contributor, 2008.
98 Silvio Tersilla, Italy country contributor, 2007.
To use Austria as an example once again, Austria’s Insolvenz-Ausfallgeld-Fonds is funded primarily through a premium payable by employers on their annual unemployment insurance contribution, which is payable pursuant to the Labour Market Policies Funding Act (Arbeitsmarktpolitik-Finanzierungsgesetz). In addition, the Insolvenz-Ausfallgeld-Fonds receives recoveries from the employee claims it has paid out, through recoveries from the insolvency estate, interest payments on the fund’s assets, and from fines imposed on employers, pursuant to sec. 16 of the Insolvency Wage Protection Act 1977 (Insolvenz-Entgeldsicherungsgesetz 1977).

The premium under the Austrian wage guarantee fund is set annually by the Federal Minister of Economics and Labour. In accordance with the Insolvenz-Entgeldsicherungsgesetz 1977, the Federal Minister of Economics and Labour must ensure that the Insolvenz-Ausfallgeld-Fonds is able to achieve balanced accounts each year. Accordingly, the Minister must set the premium payable by the employers annually at a level that provides sufficient funds. Although not funded by state revenue, the fund is subrogated to the claims of employees.

Cyprus

In 2001, Cyprus enacted the Protection of Employees Rights in the Event of Insolvency of the Employer Law, which creates a fund to cover social claims. The Fund is financed each month with a transfer of 16.6% of the contributions paid by employers to the Redundancy Fund, which had been set up under the Termination of Employment Law, Law 24 of 1967. On 9 March 2001, when the Protection of Employees Rights in the Event of Insolvency of the Employer Law entered into force, the Fund was financed with the transfer of CYP 1,000,000 out of the Redundancy Fund. The Fund is under the control and administration of the Director of the Social Insurance Services, funds are invested by the Director under the instructions of the Minister of Finance and the Fund is adequately funded.

According to the Cyprus Protection of Employees Rights in the Event of Insolvency of the Employer Law, an employee is entitled to the following payments out of the Fund: payment of outstanding claims relating to pay for the last 13 weeks of employment occurring within a period of 78 weeks preceding the date of the onset of the employer’s insolvency; payment of the proportion of the outstanding claims relating to paid leave for the above mentioned 13 weeks in the case where the employer is exempted from the obligation to pay contributions to the Central Holiday Fund; payment of the proportion of the 13th or the 14th salary or the 53rd to 56th weeks wages. Employees are entitled to a payment out of the Fund if their employment was terminated because the debtor employer became insolvent, where the employee has been continuously employed by the employer for not less than 26 weeks before the onset of the employer’s insolvency.

Hence, Cyprus has used a long-established state funding mechanism and earmarked and transferred resources into a wage guarantee fund that was expressly set up to address insolvency claims.

Latvia

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99 Christian Michal, Austria country contributor, 2008
100 Ibid.
101 Ibid.
102 Ibid.
103 Ibid.
104 Protection of Employees Rights in the Event of Insolvency of the Employer Law, the Law 25(I) of 2001. 1,000,000 CYP is 2,490,960 CAD. Note that the Cyprus currency is now the Euro, as of 1 Jan 2008, after the survey was completed.
105 Maria Koundourou and Pelagia Kyriakidou, Cyprus country contributors, 2008.
106 Ibid.
107 Ibid.
108 In the calculation of the weekly wage, any amount of that wage which exceeds four times the amount of the basic insurable earnings each year, as this is determined by the Social Insurance Law, Law 41 of 1980, is not taken into account, ibid.
109 Maria Koundourou and Pelagia Kyriakidou, Cyprus country contributors, 2008.
It is evident that wage guarantee funds are an important mechanism to relieve the hardship caused by insolvent employers not meeting their compensation obligations to employees. For example, in the Republic of Latvia, which has a hybrid system, the Employee Claims Guarantee Fund established pursuant to the Law on Protection of Employees in Case of Insolvency of Employer, is funded by employers’ paid state fees, donations, contributions and amounts recovered by administrators. The Fund paid out claims to employees in 2006 in amount of 1,349.2 thousand LVL.110 There were 2,598 claims of employees at 95 enterprises satisfied in 2006.111

B. Jurisdictions Relying Exclusively on a Wage Guarantee Fund or Insolvency Insurance System

In some jurisdictions, the wage guarantee system is the sole protective mechanism. It can be called a wage guarantee fund, in the language of the jurisdiction, or it can be referred to as an insurance scheme for the payment of employee wage claims on insolvency, the latter distinguishable from general unemployment insurance schemes in that they have been created to address the specific economic and social problem of employee wage losses on insolvency or bankruptcy. There are advantages and disadvantages to wage guarantee funds and insolvency wage insurance systems being used as the sole protective device, in comparison with granting a priority claim for employee and other social claims during insolvency or bankruptcy.

The primary advantage is that the wage guarantee fund does not interfere with the hierarchy of claims in insolvency, but affords employees protection for a portion of their unpaid compensation claims. Hence, creditors may make different decisions regarding pricing and availability of credit, knowing that their secured claims will not be subordinated to an unknown amount of liability from the employers’ failure to make wage and related compensation payments in the period leading up to insolvency proceedings.

Another advantage can be timeliness of payments to employees at a time they are financially vulnerable, assuming that the fund has a mechanism for timely and efficient processing and payout of employee claims. For example, under the Belgium wage guarantee fund, which is part of a hybrid system, if the debtor company is unable to pay outstanding wage claims within 15 days of the insolvency filing, the wage protection fund commences payment to the employees.

One potential disadvantage of wage guarantee funds as the sole protective mechanism is that it can create the wrong incentive effects. The existence of the fund may encourage debtors not to pay wages and other compensation payments in the period leading up to a bankruptcy filing, confident that the state will intervene to provide the financial relief. Financially distressed companies may have an incentive to pay other creditors, even those that would rank below employee wage claims, prior to meeting outstanding wage claims in the period just prior to insolvency or bankruptcy, knowing that the wage guarantee fund will cover the employee’s claims if the company ends up in insolvency proceedings. It may be the debtor’s strategy to avoid insolvency or to meet pressure for payment from suppliers or other creditors that the business is particularly dependent on in terms of continued supply of materials or credit.

While some of these pre-filing payments to creditors may be eligible to be recovered to the estate under preference or transfer at undervalue provisions of the jurisdiction’s insolvency legislation, the ability to recover these amounts depends on 1) the existence of insolvency statutory provisions that offer such relief; 2) a system of insolvency administration in place that has the authority to claw back such payments or seek such relief from the court; and 3) the political will and economic resources to enforce such provisions.

Another issue is whether a wage guarantee fund or insolvency wage insurance system inappropriately transfers costs to the state where the fund or insurance is not employer or sector funded. For jurisdictions that have a highly developed society safety system, it may be that longstanding public policy reflects strong social and political support for costs to be borne across all employers and citizens through the general tax base. In other jurisdictions, with more of a user pays

110 1,349,200 LVL is 2,836,013 CAD. Maris Brizgo, Republic of Latvia country contributor, 2008.
approach, the existence of a fund that is based on general tax revenues may be viewed as an inappropriate transfer of wealth from financially healthy companies to financially distressed companies, without an accountability check in the form of a priority scheme that allows the state to recover amounts from the company on some priority basis.

Generally, the study results indicate that costs are controlled under guarantee funds or insurance schemes through the capping of amounts that can be claimed by individual employees suffering the consequences of a firm’s failure. The capped amount can be by either total amount claimed or by a limit on the period back-dated from the date of bankruptcy or insolvency filing for which claims can be made. For example, under the German scheme, employees are entitled to net wages for three months prior to the insolvency.

The type of compensation covered by such guarantee funds varies considerably. Some of the funds restrict benefits to particular a definition of employee. For example, as noted above, Cyprus requires 26 weeks of continuous employment with the employer before employees are eligible to access the wage guarantee fund.112

Unlike pension guarantee funds, discussed below, under-funding of wage guarantee funds has not been identified as an issue in any of the countries in the study. In Denmark, the wage protection fund, Lønmodtagernes Garantifond, is currently overfunded due to the relative small numbers of bankruptcies, and the ability to adjust employee contributions; creating a substantial social safety net for any future downturn in the economy.113

The guarantee fund or the state is frequently subrogated to any claims paid; for example, Italy, Germany, Korea, Denmark and the United Kingdom. Hence, the fund realizes some recoveries from the insolvency estate. The study was not able to collect data systematically on the amounts recovered; as many jurisdictions do not collect or publish these data. However, of note is that a number of jurisdictions reported that the fund’s ability to recover on the employees' behalf addresses the collective action problems faced by individual employees who may not have the information, resources or bargaining power to realize on their claims individually. These collective action problems are particularly acute in jurisdictions that do not have strong trade union representation serving as advocate on the employees’ behalf.

Finland

In Finland, there is a wage protection fund called the pay security system, but no preference system or super-priority for employee wage or other compensation claims.114 The purpose of the Finnish pay security system is to ensure the payment of outstanding wages and salaries, based on an employment contract, in the event of the employer’s bankruptcy or other insolvency.115 The authority governing the pay security system is the Finnish T&E Centre (Employment and Economic Development Centres).116 The pay security system is funded out of general tax revenue, and pays wages if they are unpaid three months prior opening the insolvency procedure. The state is subordinated to the claims of employees but the state’s claim arising out of such payment is a non-preferential claim in insolvency proceedings.117

Germany

Germany has a wage protection fund for wage claims during insolvency, which will pay the net wages for the last three months before the opening of insolvency proceedings, pursuant to the Federal Labour Agency (§§ 183 ff. SGB III).118 Employees receive compensation if the employer has

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112 Maria Koundourou and Pelagia Kyriakidou, Cyprus country contributors, 2008.
113 The law creating and governing the Fund is called the Lovbekendtgørelse 2005-10-28 nr. 1043 om Lønmodtagernes Garantifond; Steen Klein, Denmark country contributor, 2007.
115 Pekka Jaatinen, Finland country contributor, 2008.
116 Ibid.
117 Employees are generally paid once a month in Finland. Pekka Jaatinen observes that the pay security system is sufficiently funded through tax money through the national budget.
118 Peter Gottwald, Germany country contributor, 2008.
become bankrupt, if insolvency proceedings do not take place for insufficient assets, or in case of complete termination of business if there are no assets. Germany does not have a wage preference for employee wage claims; the Insolvency Code of 1994 abolished any preferences. The only exception is that wages earned while a preliminary receiver has been appointed, after application, but before opening of insolvency proceedings, as such employees and their claims are massseglaubiger, creditors of the bankrupt’s estate, and receive full payment.

The German wage protection fund is industry funded. The employers’ associations demand payments from any enterprise, the share depending on the total sum of wages of all socially insured employees, including quarterly advance payments and one final payment. This method of funding ensures adequate capitalization. The statutory provisions create the fund. Having paid out wage claims relating to insolvency, the Federal Labour Agency is subrogated to the claims of employees, but without the privilege.

C. General Unemployment Insurance Scheme Covering Insolvency-related Wage Claims

In some jurisdictions, there is no wage guarantee fund nor an insurance system expressly designed to address employee wage and related compensation claims during insolvency; but rather, a more general social insurance scheme exists, which offers some relief to employees whose jobs are terminated on insolvency. While such schemes are not tallied in the total count in this study of the number of jurisdictions offering a wage guarantee fund or insurance scheme expressly addressing employee compensation claims during insolvency, it is important to take note of their existence.

The availability of general unemployment insurance is also a feature of the study that illustrates that the survey questions are only one aspect of understanding how different systems operate, in that the answer to the survey question about whether a wage guarantee fund exists was in the negative, but further dialogue with country contributors revealed other aspects of the social security system that offer at least some protection against wage losses due to job loss in insolvency. China, Estonia and Ghana are three such examples.

China

In China, there is no express wage protection fund, although it is under public policy discussion. There is a general unemployment insurance regime, funded by employer and employee contributions, which covers compensation for entitlements owed on a priority basis during insolvency, as well as additional compensation up to 80% of the national minimum wage for up to two years. The scope of coverage is broad, including wages, medical expenses, support for the disabled, basic pension and medical insurance premiums in arrears and compensation payable to employees according to the law.

Estonia

Similarly, Estonia does not have a priority for wage claims during insolvency or an express wage guarantee fund for insolvency. However, there is some wage protection under the Unemployment Insurance Act, which has a section that addresses insolvency. The Act grants the right to receive unemployment insurance benefits for persons registered as unemployed pursuant to section 6 of the

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119 Ibid.
120 Ibid.
121 Ibid.
122 Ibid, citing §§ 358 – 361 III.
123 Ibid.
124 Ibid.
125 Professor Jingxui Shi, China, Peoples’ Republic of China country contributor, 2007.
128 Section 6 of the Estonia Unemployment Insurance Act.
Market Services and Benefit Act. Section 8 of the Unemployment Insurance Act places a cap on unemployment benefits of: 180 calendar days if the insurance period of the insured person is shorter than 56 months; 270 calendar days if the insurance period of the insured person is 56–110 months; or 360 calendar days if the insurance period of the insured person is 111 months or longer. An employee has the right to receive unemployment benefits in the amount of one month’s average wages of the employee, if the employee has been continuously employed by or in the service of the employer for up to five years. That amount increases to 1.5 times one month’s average wages of the employee, if the employee has been continuously employed by or in the service of the employer for five to ten years; and to an amount of two months’ average wages of the employee, if the employee has been continuously employed by or in the service of the employer for over ten years.

The Estonian unemployment insurance scheme is funded by employer and industry taxes. On insolvency of a debtor employer, the state, represented by the Tax and Customs Board is, in bankruptcy proceedings, the creditor in respect of unemployment insurance premiums not received within the term. The Unemployment Insurance Fund has a legal reserve, provided for under section 34 of the Unemployment Insurance Act. The Estonian Ministry of Finance has the right to organize the investment of the legal reserve funds either directly or, on the proposal of the Minister of Financial Affairs, through a representative external portfolio manager designated by a resolution of the supervisory board of the unemployment fund. Thus, in Estonia, while there is no express legislation addressing social claims in insolvency, there is at least some protection through the insurance system.

Ghana

Ghana does not have a wage protection fund or guaranteed insurance for wage claims. However, in recent high profile insolvencies of state owned enterprises, the Government has provided funds for the payment of employee severance claims and other entitlements. Employees receiving such payments have subrogated their claims in the insolvency proceedings to the Government.

Hence, it is important to situate the existence of insolvency-specific remedies for employee wage and related compensation claims within the overall economic and social framework of jurisdictions, in order to have a complete picture of the nature of protections offered.

VII. Hybrid Wage Priority and Guarantee Fund System

Almost one half of the 62 jurisdictions studied have adopted a mixed wage priority and guarantee fund system, providing a more integrated approach to addressing social claims at the point of insolvency. The objective of such hybrid systems is to have the debtor corporation or bankrupt estate pay employee claims where assets are sufficient, at whatever priority the jurisdiction decides, while having a guarantee fund available where the assets are insufficient. Japan, Bulgaria, France, Thailand and other jurisdictions have all adopted a hybrid approach.

The incidence of jurisdictions adopting a hybrid approach in Europe may be explained in part by the EU policy in respect of protection of employees during insolvency. Bulgaria, for example, reports that its creation of a wage guarantee fund in 2004 was a move to comply with EU policies as a result of its new EU member status.

However, the move to protection through both wage priority claims and a wage guarantee fund is much broader globally than just the EU Member States. Adoption of hybrid schemes is a feature of jurisdictions around the world, including both developed and emerging nations, indicating a high

130 Ibid.
131 Section 44 of the Estonia Unemployment Insurance Act, Ibid.
133 Ibid.
135 Ibid.
137 Vladimir Natchev, country contributor, 2008.
degree of acceptance that multiple strategies are needed to adequately protect employee wage claims.

A key rationale for adopting a hybrid approach is that a preference or super-priority system that accompanies a wage guarantee system allows the guarantee fund to recover from the insolvent estate on a priority basis, thus removing incentives from directors and officers to pay other creditors in advance of employees in the period leading up to insolvency proceedings because they know that employee wages will be covered by the state fund. At the same time, employees are guaranteed a level of payment even where assets in the insolvent estate are not sufficient to cover those claims, and those payments can be made on a timely basis when employees are most in need of the funds.

The following are very brief summaries of 18 jurisdictions that have adopted a hybrid approach, represented geographically from different parts of the world. It is important to consult the full country profiles in Part XIII of this study to fully understand how each system works and to acquire a sense of the number of jurisdictions that have adopted this more comprehensive approach to the protection of wage and related compensation claims.

France

France’s system is a good illustration of a hybrid system of protection for employee wage claims. Section L.143-7 of the French Labour Code provides that wages are guaranteed by the general preference that exists in the French Civil Code (section 2331-4° and section 2375-2°, créances privilégiées). Section L.143-10 provides that wages are guaranteed by a super-priority, which supersedes any other preferential debt (créance super-privilégiée). The totality of the wage claim, covering the six months of actual work prior to the judgment pronouncing the insolvency, is entitled to the general preference. The wage claim has a cap; specifically, the claims entitled to the super-priority correspond to the last 60 days of actual work before the judgment and realization of the preferential claim. The ability to access the fund is not submitted to a condition of length of employment. The super-priority is limited by a monthly cap, which in 2007 is €5,364.

All employees and apprentices are granted a general priority on their employer’s personal property and real estate assets to ensure the recovery of the following claims: the last six months’ wages, provided they were earned before the opening judgment; compensation in lieu of notice; vacation pay; compensation for unfair breach of contract; redundancy payment; compensation in case of dismissal without cause; compensation for end or anticipated breach of fixed-term contract; insecurity of work bonus for temporary employees; compensation for unfair or erratic dismissal of workers victim of an industrial accident or occupational illness.

Complementary to the priority system, France has a guaranteed insurance for wage claims called Assurance de Garantie des Salaires. The Assurance de Garantie des Salaires is funded by employer contributions. All employers are liable for guaranteed insurance for wage claims, pursuant to section L.143-11-1 of the Labour Code. This structure ensures that the system is sufficiently funded.

The Assurance de Garantie des Salaires covers the sums owed for work within a limit calculated according to the length of employment. The amounts fixed for 2007 were: €64,368 if the employment contract was entered into 2 years at least before the judgment pronouncing the

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139 Ibid.
140 5,364 EUR is 7,811 CAD. EUR is Euros. Section D.143-1, France Labour Code.
141 Isabel Didier, Marie-Christine Lafitte, Dominique Haleva, Emilie Codeço, France country contributors, 2007.
142 Sections L.143-11-1 to L.143-11-9 of the Labour Code are relative to wage insurance.
143 Section D.143-11-1, France Labour Code.
144 Jean-Michel Lucheux, France country contributor, 2007, observes that if the contract expired before the judgment pronouncing the insolvency, the applicable limit is determined according to the length of employment.
145 64,368 EUR is 93,727 CAD.
insolvency: €53,640,\textsuperscript{146} if it was entered into between 6 months and 2 years before the judgment; and €42,912,\textsuperscript{147} if it was entered into less than 6 months before the judgment.\textsuperscript{148}

The official receiver is to pay the wage claim entitled to the super-priority within ten days following the judgment pronouncing the insolvency. If the company has no liquid assets, the Assurance de Garantie des Salaires advances the funds within five to eight days following the statement of wage claims (relevé de créances salariales).\textsuperscript{149}

Jean-Michel Lucheux reports that the guaranteed insurance fund is balanced and that the board of directors of the Assurance de Garantie des Salaires sets the rate of the contributions paid by the employers according to the level of advances of funds, recoveries and employer contributions of the previous year. For 2007, the rate decreased from 0.25% to 0.15%.\textsuperscript{150} The guaranteed assurance is not funded by the state, but the Assurance de Garantie des Salaires is subrogated in the claims of the employees and becomes a creditor of the company, benefiting from the preferential treatment granted by the law to employees.\textsuperscript{151} Lucheux also observes that the EU Directive provides that the Member States have to guarantee the payment of employee wages in the event of their employer's insolvency.\textsuperscript{152}

Italy

Similarly, Italy has a hybrid system of wage priority under the Italian Civil Code and a wage protection system, called the Fondo di garanzia.\textsuperscript{153} Employees are granted a priority over movable property in satisfaction of their wage, vacation, severance, termination and travelling expense claims. Neither the length of the employment relationship nor the amounts due affect the enforcement of the claim, except a more general five year limitation.\textsuperscript{154}

However, should the trustee of the insolvency procedure maintain the business of the company after the declaration of insolvency and, as a result, employees continuing to work for the insolvent company, their credits rank after the expenses of the insolvency procedure, but before the claims of the employees due at the time of the opening of the insolvency procedure.\textsuperscript{155}

The Italian national authority for social security contributions (INPS) manages the Fondo di garanzia, which is financed by employers' contributions. On insolvency, the fund pays to employees the whole severance indemnity treatment (T.F.R.) accrued at the time of the opening of the insolvency procedure, plus all the other credits deriving from the employment relationship that accrued during the last three working months. The Fondo di garanzia provides the same guarantees even if the employer fails to pay its contributions to the fund.\textsuperscript{156} Once the employees’ credits are formally recognized as admitted claims, fifteen days after filing date of the list of creditors if not appealed, employees or their relatives are entitled to request the payment of the relevant sums from the fund and the credit vis-à-vis the fund becomes due within sixty days from the request.\textsuperscript{157} The legislator

\begin{footnotes}
\item 146 53,640 EUR is 78,105 CAD.
\item 147 42,912 EUR is 62,484 CAD.
\item 148 Isabel Didier, Marie-Christine Lafitte, Dominique Haleva, Emilie Codeço, and Jean-Michel Lucheux, France country contributors, 2007.
\item 149 Ibid.
\item 150 Ibid.
\item 151 Section L.143-11-9, France Labour Code.
\item 152 Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer modified by Directive 2002/74/EC of the European Parliament and of the Council. Pursuant to article 2751 bis of the Italian Civil Code a general privilege on movable property is granted to claims relating to remuneration due -at the time of the opening of the insolvency procedure-, in any form, to employees. The only claims which rank ahead of the 2751 bis claims are those related to the expenses of the insolvency procedure; Silvio Tersilla, Italy country contributor, 2007.
\item 153 Ibid., who reports that pursuant to article 2948 of the Italian Civil Code, interest and all sums that are paid periodically or by annual or more frequent installments are subject to five-year statutory limitation. As a consequence, all the credits deriving from remunerations due are subject to the above limitation. The same principle applies as to credits deriving from unpaid social security contributions.
\item 154 Ibid.
\item 155 Silvio Tersilla, Italy country contributor, 2007.
\item 156 Ibid.
\item 157 Ibid.
\end{footnotes}
may vary employers’ contributions to the fund in order to guarantee sufficient funding and the balancing of the accounts.158 After the payments, the Fund is subrogated to the claims of employees with the same priority.

Thailand

Thailand has a priority system for wage claims during insolvency; such claims rank equally with taxes and have priority over unsecured creditors but not secured creditors.159 The amount entitled to priority is limited to four months’ wages, to a maximum of 100,000 Baht.160 There is also a wage guarantee fund in Thailand, called the Employees’ Provident Fund (กองทุนสงเคราะห์ลูกจ้าง), created under the Labour Protection Act 1998, which is funded by both employer and employee contributions.161 These sources of funding are sufficient for the Provident Fund’s needs; and benefits available under the Provident Fund include unpaid wages not exceeding 60 times the amount of the monthly payment.162

Malaysia

In Malaysia, employee wage claims are given priority respectively over secured and unsecured creditors during insolvency under section 31 of the Employment Act 1955 and section 292 of the Companies Act 1965.163 The amount that can be claimed by any employee is not more than Ringgit Malaysia 1,500 or such other amount as may be prescribed from time to time in respect of services rendered by the employee to the company within a period of four months before the commencement of the winding up.164 Under s. 51 of the Malaysian Employees’ Provident Fund Act 1991, wages owing to workers are protected from any debt or claim. Further, under the Companies Act, provident funds are given priority over unsecured creditors. The amount of the contribution to the Employees’ Provident Fund is calculated based on the monthly wage of an employee. The current rate of contribution is 23% of the employee’s wages, of which 11% is from the employee’s monthly wage while 12% is contributed by the employer.165

Korea

Korea is another example of a hybrid system. Article 37 of the Labour Standards Act of Korea (LSAK) provides for preferential treatment of employee wage claims, plus there is guaranteed payment of employees’ wage claims prescribed in the Wage Claim Guarantee Act of Korea (WCGAK). The wages of the last three months and accident compensation allowance are entitled to preference over secured claims by pledges or mortgages, taxes and public charges, and other claims.166 There are no restrictions on realization of the preferential claim in terms of the minimum length of employment or minimum number of workers in the company; however, only the wages of the last three months and accident compensation allowance are entitled to the super-priority.167

Under Article 15 of the WCGAK, the Korean Minister of Labour has established a wage claim guarantee fund to apply to wage claims paid by the government where employers fail to pay the wages of the last three months and accident compensation allowance in accordance with Article 6, Payment of Wages, etc. in Arrears, of the WCGAK.168 This fund is established with financial resources consisting of recovered amounts from the exercise of subrogation rights by the Minister of Labour, charges from employers, borrowings from financial institutions, and profits accruing from the management and operation of the fund.169 The fund is also industry-funded. It provides for payment

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158 Ibid. The Fondo di garanzia is regulated by Law no. 297 of 1982 and by Legislative Decree no. 80 of 1992 which implemented EEC directive 80/987.
159 The Honourable Wisit Wisitsora, Thailand country contributor, 2008.
160 100,000 Thai baht is 3,090.00 CAD.
161 The Honourable Wisit Wisitsora, Thailand country contributor, 2008.
162 Ibid.
163 See Hua Chua, Malaysia country contributor, 2008.
164 1500 MYR (Malaysian ringgit is 458.40 CAD.
165 Hua Chua, Malaysia country contributor, 2008.
166 Professor Soogeun Oh and Ji Woong Lim, Korea country contributors, 2007.
167 Ibid.
168 Professor Soogeun Oh and Ji Woong Lim, Korea, Survey contributors, June 2007.
169 Ibid, citing Article 16.
of wages of the last three months, accident compensation allowance, and retirement allowance for the last three years in amounts equal to the average wage of 90 days are guaranteed by the fund. The Minister of Labour announces the cap on the guaranteed amount in terms of the type of wages and the age of the worker; and currently, the maximum amount guaranteed amounts to 10,200,000 Korean Won. The wage claim guarantee fund under the WCGAK amounts to as much as 181.5 billion Won as of 2007; with financial resources consisting of recovered amount by the exercise of subrogation rights by the Minister of Labour, charges from employers, borrowings from financial institutions, and profits accruing from the management and operation of the fund. The claim for unpaid wages and other compensation of the concerned employee against the concerned employer is transferred to the Minister of Labour.

Taiwan

In Taiwan, where a debtor employer is winding up or liquidating the business or is adjudicated bankrupt, the employees have a preferential right to claim payment of wages payable under the employment contracts. The priority is capped at six months of the employee’s wages and the claim is preferential to the regular claims of the employer’s creditors, but secondary to the mortgage claims. The preferential treatment of wage claims in Taiwan is prescribed in Article 28 of the ROC Labour Standards Act, paragraph One specifies that where an employer is winding up or liquidating the business or adjudicated bankrupt, the employees shall have a preferential right to claim payment of wages payable under the employment contracts that have been overdue for a period not exceeding six months. The amount of the wage claim is capped at six months of the employee’s wages and the claim is preferential to the regular claims of the employer’s creditors but secondary to the mortgage claims, pursuant to the ruling issued by the Labour authorities dated May 21, 1985. Vacation pay, severance pay, termination pay, and traveling and other expenses do not receive priority over other claims.

A wage payment fund, the Arrear Wage Payment Fund is prescribed in Paragraph Two, Article 28 of the Labour Standards Act. When an employee applies for repayment of arrear wage debt, the government authority in charge of the Fund, the Bureau of Labour Insurance (“BLI”), shall make a decision within 30 days of receipt of the application. According to Paragraph Two, Article 28 of the LSA, an employer must make a monthly deduction at a fixed rate of the insurance-wage of employees and deposit the same in the Fund established by the Council of Labour Affairs (“CLA”) for the purpose of paying the arrear wages referred to Paragraph One, Article 28 of the Labour Standards Act. The current contribution rate of the Fund is 0.025%. When the Fund has reached a certain sum, either the ratio shall be reduced or the collection of such payment is suspended.
the employer contributes to the Fund every month pursuant to Article 28 of the Labour Standards Act, its employees can apply for the full amount of the six-month wages arrear wages payable by the BLI for a period of six months preceding the date of winding up or liquidation of the business or being adjudicated bankrupt.\(^{180}\)

When the BLI has to investigate the account books, authorization documents and other documents together with other personnel from the local labour authority or the labour inspection authority before the final decision is made, its response may be delayed by another 15 days.\(^{181}\) Although the Fund is contributed to by all employers in Taiwan, after the BLI repays the arrear wage debt according to Article 28 of the LSA, the BLI may in its own name exercise the right to top-priority compensation to request repayment of the Fund from the employer, liquidator, or the supervisory personnel for the bankrupted property within a time limit.\(^{182}\)

Croatia

Croatia also has a hybrid system for protection of social claims. The Croatian bankruptcy law, Stečajni zakon, provides that all employees’ claims arising out of their employment that were created prior to the opening of bankruptcy proceedings, have the highest priority in bankruptcy among the creditors in bankruptcy.\(^{183}\) The employees are considered as a kind of creditors in bankruptcy, personal creditors of the debtor who, at the time of the opening of the bankruptcy proceedings, have legally based claims against the debtor.\(^{184}\) There are three ranks of creditors in bankruptcy, and the claims of the employees present the highest priority.\(^{185}\) The claims of employees rank first after secured creditors’ claims and the costs of the bankruptcy proceedings and the other obligations of the bankruptcy estate.\(^{186}\)

Croatia also has the Fund for the development and employment (Zakon o osiguranju potraživanja radnika u slučaju stečaja poslodavca), which has the function of a guarantee fund for workers’ claims in the event of the employer’s bankruptcy.\(^{187}\) This guaranteed insurance makes payments for wages and salaries for the last three months prior to the opening of bankruptcy proceedings or the termination of the employment contract in the amount that corresponds to the lowest monthly wage/salary paid in the Republic of Croatia for a given month; wage and salary compensation for sick-leave that the employer should have paid according law on health insurance in the same period; wage/salary compensation for annual leave to which the employee is entitled in the calendar year in which bankruptcy is opened or in which the employment contract is terminated, up to the amount that corresponds to half of the lowest monthly wage/salary paid in the Republic of Croatia for a given month; severance pay under conditions provided by law in the amount of half of the severance provided by law; and compensation of damages incurred due to injuries at work or job-related illness up to the amount that corresponds to one third of amount that is determined by final judgment.\(^{188}\) The funds are covered by the general tax base.\(^{189}\)

Spain

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\(^{180}\) Ibid.

\(^{181}\) Ibid.

\(^{182}\) Dr. C. V. Chen, Joyce Chen and Judge Chien-Lin Tsai, Taiwan country contributors, 2007 and 2008.


\(^{184}\) Article 70(1) Stečajni zakon.

\(^{185}\) Professor Jasnica Garasic, country contributor, 2008.

\(^{186}\) Articles 81-83, 85(1) Stečajni zakon. Professor Jasnica Garasic, country contributor, 2008.

\(^{187}\) Article 1 of Law on insurance of workers’ claims in the event of the employer’s bankruptcy (Zakon o osiguranju potraživanja radnika u slučaju stečaja poslodavca), Official Gazette “Narodne novine”, nos. 2003/114.

\(^{188}\) Professor Jasnica Garasic, Croatia country contributor, 2008, citing Article 3 of Croatian Law on insurance of workers’ claims in the event of the employer’s bankruptcy.

\(^{189}\) Ibid. The state gives the necessary money for the realization of those workers’ rights from the state budget (Article 4 Croatian Law on insurance of workers’ claims in the event of the employer’s bankruptcy, the Zakon o osiguranju potraživanja radnika u slučaju stečaja poslodavca).
In Spain, super-priority is given to wage claims arising in the last 30 days of employment over all other claims, and general preference is given to all wages. These claims are limited to amounts equaling three times the legal minimum wage. Vacation pay, severance pay, and termination pay claims have the same preference as wage claims. Spain also has a wage guarantee fund called the Fondo de Garantía Salarial, funded by industry contributions, calculated as a percentage of the social security paid by employers and employees. The fund provides for the payment of wages, up to 120 days, and for the payment of severance pay up to 12 months, limited to triple the legal minimum wage. The fund is ruled by the Real Decreto 505/1985 de 6 de marzo sobre organización y funcionamiento del Fondo de Garantía Salarial. The Fondo de Garantía Salarial receives industry funding and is sufficiently funded. Contributions are computed as a percentage of the social security paid by employers.

Serbia

In Serbia, pursuant to Bankruptcy Proceedings Act, wage claims are given a priority in the settlement of creditors in accordance with Article 35. Bankruptcy creditors, depending on their claims, are classified into ranks. The creditors of lower rank can only be satisfied after the creditors of higher rank. The creditors of the same rank are satisfied in proportion to the amount of their claim.

The rank of bankruptcy claims is as follows: 1) the first rank of claims comprises claims based on expenses of the bankruptcy proceedings and includes all claims considered to be expenses of the bankruptcy proceedings according to this law; 2) the second rank of claims comprises unpaid net salaries of employees of the bankruptcy debtor in the amount of the yearly minimum wage for the year before starting the bankruptcy proceedings, as well as unpaid contributions for pension and disability insurance for two years before starting the bankruptcy proceedings; 3) the third rank of claims comprises all public income claims which became due in the last three months before starting the bankruptcy proceedings, except contributions for pension and disability insurance of employees; and 4) the fourth rank of claims comprises the claims of other bankruptcy creditors. Secured creditors’ claims do not fall within the bankruptcy estate and thus the priority does not apply to secured assets. Where the security is not sufficient to cover the outstanding claim, the residual part of the secured creditors’ claim is unsecured and falls within the Bankruptcy Proceedings Act provisions.

Serbia has a wage guarantee fund called the Solidarity Fund of the Republic of Serbia, established in 2005 under the Labour Act, and funded by the budget of the Republic of Serbia. The fund covers payment of salary during temporary inability to work in the last nine months prior to the bankruptcy procedure being commenced; compensation for unused annual holiday pay entitled to in the calendar year prior to the bankruptcy procedure; retirement gratuity for retirement in the calendar year in which the bankruptcy procedure was opened should the employee have met the requirements for retirement before the opening of the bankruptcy procedure; and workplace injury compensation pursuant to a court ruling in the calendar year prior to commencement of the bankruptcy procedure.

The policy rationale underlying establishment of the Solidarity Fund was to ensure that employees do not wait for the main distribution of the bankruptcy estate to take place, which could be an excessive procedure. When the bankruptcy administrator, on the receipt of claim applications recognizes the rights of employees, in accordance with Article 125 of the Labour Act, employees apply to the
Solidarity Fund. The Fund then passes the decision approving these rights and pays off employees. Then the Fund, according to the legal subrogation, Art 300 of Obligations Act, and at the latest until the decision was passed on main distribution, appears as a creditor instead of the employee, whose claims have already been satisfied by the Fund.

Israel

In Israel, on insolvency, the Israeli Companies Ordinance places employee wages as the first priority among other guaranteed creditors of the company, after certain types of subordinations. In the event of bankruptcy, section 78 of the Bankruptcy Act, specifies a super-priority for employee wage claims. The National Insurance Law sets a parallel arrangement in section 182, according to which the National Insurance Institute is liable for wage claims that were approved by the trustee/liquidator. In addition, according to the Severance Pay Law, an employee whose employment is terminated due to an event of liquidation is entitled to severance pay as if he or she was dismissed by the company. Such severance pay is deemed as wages payable in precedence to all other debts. Furthermore, the Israeli courts have ruled that payments prior to the notice period shall also have a super-priority, and shall be paid together with wages in cases of insolvency or bankruptcy. According to Section 27 of the Severance Law, the amount of severance pay and wages paid in the event of insolvency is not, in the aggregate, to exceed 150% of the amount described in the cap, which is currently 7,909 LIS. According to the National Insurance Law, the super-priority is limited to 10 times the average salary.

The Israeli National Insurance Law establishes the National Insurance Institute, which is a national fund for social claims and which has a branch that deals with the issue of employee rights in the event of an employer's bankruptcy or insolvency. Every employee and employer contributes a certain percentage of each employee's monthly salary. Where the debtor employer has been declared insolvent by the court or where there has been a trustee or liquidator appointed, an employee is entitled to the benefits of this insurance, and must receive a payment of wages, severance pay and prior notice as relevant to the employee's term of employment, to the extent that the employee contributed all the necessary funds throughout his or her term of employment.

Australia

In Australia, employee entitlements vary depending on the type of insolvency administration and whether the insolvent employer is incorporated or not. In relation to the winding-up, also called liquidation, of companies, the Australian Corporations Act 2001 provides a hierarchy of specified classes of unsecured debts and claims that are to be paid in priority to all other unsecured debts and claims. Wages and related claims rank second after those relating to the administration and/or winding up process. These second ranked claims include four classes of employee claims, namely, wages, superannuation contributions and superannuation guarantee charges, injury compensation, amounts due under industrial instruments in respect of leave of absence and retrenchment payments. Employees enjoy priority over ordinary unsecured creditors with no monetary or time

201 Ibid.
202 Ibid.
205 Ibid.
206 7,909 ILS (Israeli new shekel) is 2,341.85 CAD.
208 Ibid.
209 Ibid.
210 Unincorporated employers that are insolvent, such as partnerships, are dealt with under the Bankruptcy Act 1966 (Cth) (s109) which is similar but not the same as under the Corporations Act.
211 Section 556(1), Australia Corporations Act 2001 (Cth). Retrenchment payments are defined in s. 556(2)
limit, with some exceptions for excluded employees such as company directors. Wages, superannuation contributions and superannuation guarantee charges, amounts due under industrial instruments in respect of leave of absence and retrenchment payments are to be paid in priority to claims under a floating charge.  

Australia also has a wage guarantee fund called the General Employee Entitlements and Redundancy Scheme (GEERS), which provides a basic payment scheme for the unpaid entitlements of employees who have been terminated because of their corporate employer’s liquidation. Eligible entitlements for payment under GEERS are those that are payable as priority payments under the Corporations Act and consist of unpaid wages in the three month period prior to the appointment of the liquidator, annual leave, long service leave, pay in lieu of notice, and redundancy pay up to a maximum of 16 weeks’ wages in respect of liquidations. Where the employee has a legal entitlement derived from legislation, an award, a statutory agreement, or a written contract of employment, at the date of the debtor corporation’s insolvency, employees are eligible to receive payments subject to an income cap of 98,200 AUD. Eligible claimants who earn more than the scheme’s cap will be paid as if they earned a rate equivalent to the scheme’s income cap. Hence, the hybrid system for protection of Australian workers is one of the most comprehensive in the study, affording consideration protection of employee claims during insolvency.

Denmark

The hybrid approach has also been expressly used to facilitate restructuring of insolvent companies. In Denmark, there is a wage preference or super-priority in terms of employee wage claims with a cap on the amount. There is also a wage protection fund (Lønmodtagernes Garantifond) for wage claims during insolvency that is employer/industry funded, created in 2005. The law creating and governing the Lønmodtagernes Garantifond is called the Lovbekendtgørelse 2005-10 -28 nr. 1043 om Lønmodtagernes garantifond. The Lønmodtagernes Garantifond provides funds for Danish companies in suspension of payments, to be used to pay outstanding wage and related compensation claims to employees affected by the debtor company’s insolvency. The insolvency professional, called the appointed supervisor, on behalf of the distressed debtor, can apply to the Fund. The insolvency supervisor of the debtor can receive up to a total net amount of 110,000 DKK per employee, equivalent to a maximum of three months’ net wages and salaries. The Fund provides relief to workers and, at the same time, avoids the distressed company’s limited cash flow being used as security for the mandatory guarantees for wages that could jeopardize a successful restructuring and prevention of job loss.

Pursuant to the Danish Insolvency Act, employees of a company in suspension of payments have a legal right to ask for “sufficient security”, regarding the first periodic wages and salaries. In practice, the bank issues the guarantee, but only where the cash is deposited as a counter-security in favour of the bank. This cash drain had previously placed restructuring at risk. The new regulation allows resources from the Fund to be directed to employees, freeing up the company’s cash flow to try to effect a successful restructuring. When the Fund approves the application for funds, the funds are transferred to a special escrow account owned by the applying debtor company, and the funds can only be used to pay employees, up to a capped amount.

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212 Section 561, Corporations Act 2001 (Cth).
213 GEERS is funded through general tax revenue.
214 This period refers to liquidations that occur on or after 22 August 2006. Prior to this date, the eligible entitlement was a maximum of eight weeks.
215 98,200 AUD is 87,683 CAD.
216 Steen Klein, Denmark country contributor, 2008.
217 110,000 DKK is 21,484 CAD.
218 Steen Klein, Denmark country contributor, 2008.
220 Steen Klein, country contributor, 2008.
221 Ibid.
In Japan, which is another example of a hybrid system, social claims are treated differently, depending on which of four proceedings are utilized to address the debtor’s financial distress. In the Bankruptcy Procedure, according to Article 308 of the Japanese Civil Code (Min Pou), an employee’s wage and retirement payment claims are treated as preferential claims (Yusenteki Hasan Saiken).\footnote{Article 515(3) of the Japanese Companies Act (Kaisha Hou)} In addition, claims for wages arising during the three months prior to the beginning of the Bankruptcy Procedure are treated as super-priority claims (Zaidan Saiken).\footnote{Article 2(7) of the Japanese Companies Act (Kaisha Hou).} Furthermore, the partial claim for retirement payments equal to three months’ wages just before retirement is treated as a super-priority claim (Zaidan Saiken).\footnote{Article 149(1) of the Japanese Companies Act (Kaisha Hou).} If the amount of the retirement payment is less than the amount of three months’ wages just prior to retirement, the claim for retirement payment is treated as a super-priority claim (Zaidan Saiken), the amount equal to the three months’ wages before retirement. Super-priority claims can be paid on demand independently of the Bankruptcy Proceeding,\footnote{Article 149(2) of the Japanese Companies Act (Kaisha Hou).} so employees receive the three months wages and a part of their retirement payment at any time independently of the Bankruptcy Proceeding.

If the amount of each payment is greater than 1 million JPY, the receiver must seek leave from the court in advance.\footnote{Article 78(2)\textsuperscript{iii} of the Japanese Companies Act (Kaisha Hou).} Moreover, when it is probable that an employee is in financial trouble despite reimbursement of his or her wage claim or retirement payment that is treated as a preferential claim, and that those payments are not prejudicial to the interest of super-priority claims, the court may permit the receiver to pay those claims in part or in whole, pursuant to Art.101 (1) of the Japanese Bankruptcy Act (Hasan Hou).

In a Special Liquidation (Tokubetsu Seisan) under the Japanese Companies Act (Kaisha Hou), the claim for wages or retirement payment is treated as an Agreement Claim (Kyotei Saiken)\footnote{Article 516 of Japanese Bankruptcy Act (Hasan Hou).} that may be paid at any time independently of the Special Liquidation proceeding.\footnote{Article 515(3) of the Companies Act (Kaisha Hou) specifies that the prescriptions of the claims having statutory liens are not influenced by the commencement of a Special Liquidation proceeding (Tokubetsu Seisan).} However, in the Special Liquidation procedure, the court may order the suspension of proceedings to enforce Agreement Claims, including employees’ claims for wages or retirement payment in response to a petition by the liquidators, company auditors, creditors or shareholders, or ex officio if that suspension suits the general interests of the creditors and those who petitioned the enforcement. Agreement Claims are not likely to suffer undue loss.\footnote{Article 98(1) of the Japanese Bankruptcy Act (Hasan Hou).}

In the procedure under the Japanese Civil Rehabilitation Act (Minji Saisei Hou) [Act No.225 of 1999], which facilitates the quick rehabilitation of corporations that met financial collapse under the control of the court, both wage claims and claims for retirement payment arising before the starting date of the procedure of Civil Rehabilitation (Saisei Tetsuzuki) are treated as general preferential claims (Ippan Yusen Saiken) that are inferior to equitable claims (Kyoeki Saiken) and are paid out of the procedure of Civil Rehabilitation (Article 122(1)(2) of the Japanese Civil Rehabilitation Act, (Act No. 225 of 1999). Equitable Claims (Kyoeki Saiken) are helpful to the common benefit of all the creditors or necessary for the activity of the rehabilitating the debtor company during the procedure of Civil Rehabilitation, such as the claim for the costs of the action requiring the rehabilitating debtor’s claims. In addition, both of these types of claims arising after the commencement of the Civil Rehabilitation procedure (Saisei Tetsuzuki) are treated as equitable claims (Kyoeki Saiken) and are paid on demand (Article 119(1)(2) of the Japanese Civil Rehabilitation Act (Minji Saisei Hou)).

In the procedure under the Japanese Corporate Reorganization Act (Kaisha Kosei Hou) [Act No. 154 of 2000], which was drafted based on Chapter 11 of the US Bankruptcy Code, an employee’s claim arising from the employment relationship between the obligor and its employee is treated as a

\footnotesize{\begin{itemize}
\item Article 98(1) of the Japanese Bankruptcy Act (Hasan Hou) [Act No.75 of 2004. This section was co-authored with Professor Yoshishiro Yamada, Japan, through numerous e-mail exchanges and in-person discussions clarifying the survey answers and requesting more information.]
\item Article 149(1) of the Japanese Bankruptcy Act (Hasan Hou).
\item Article 149(2) of the Japanese Bankruptcy Act (Hasan Hou).
\item Article 2(7) of the Japanese Bankruptcy Act (Hasan Hou).
\item Article 78(2)\textsuperscript{iii} of the Japanese Bankruptcy Act (Hasan Hou) and Article 25 of the Rules of Bankruptcy procedure (Hasan Kisoku) [Rules No.14 of the Japanese Supreme Court of 2004].
\item Article 515(3) of the Japanese Companies Act (Kaisha Hou) [Act No.86 of 2005].
\item Article 516 of Japanese Companies Act (Kaisha Hou).
\end{itemize}}
reorganization security claim (Kosei Tanpo Saiken) that has preference over general reorganization claims (Kosei Saiken), but is inferior to equitable claims (Kyoeki Saiken) (Article 2x of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)). The claim is paid in accordance with the corporate reorganization plan (Kosei Keikaku) (Article 203 of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)). Moreover, claims for wages arising during the six months before the starting date of the Corporate Reorganization procedure (Kosei Tetsuzuki) are treated as equitable claims (Kyoeki Saiken) (Article 127 of Japanese Corporate Reorganization Act), and are paid on demand independently of the corporate reorganization plan (Kosei Keikaku) (Article 132(1) of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)). In addition, employees’ claims for retirement payment are treated as equitable claims (Kyoeki Saiken) and are paid on demand independently from the reorganization plan (Kosei Keikaku), up to a limit of the greater of the amount equal to one third of an employee’s retirement payment and the amount equal to six months’ wages before the starting date of the Corporate Reorganization procedure (Kosei Tetsuzuki) (Article 130(2) of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)). The remainder of the retirement payment arising before the starting day of the procedure is treated as a reorganization security claim (Kosei Tanpo Saiken) and paid in accordance with the corporate reorganization plan (Kosei Keikaku). Wages arising after the starting date of the corporate reorganization proceeding (Kosei Tetsuzuki), as well as severance pay arising after starting date of the proceeding, are treated in whole as equitable claims (Kyoeki Saiken) because those claims are necessary to the management of the reorganizing corporation.229

Japan has a wage protection system called the system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo), which is carried on by the Japan Labour Health and Welfare Organization (Rodosha Kenko Fukushi Kikou) established by the Act of Incorporating Japan Labour Health and Welfare Organization as Independent Administrative Agency (Dokuritsu-Gyosei-Houjin Rodosha Kenko Fukushi Kikou Secchi Hou) (Act No.171 of 2002). The Miharai Chingin Tatekae Jigyo is financed by Industrial Injury Insurance;230 the premiums for Industrial Injury Insurance are collected from employers (Article 30 of the Industrial Injury Insurance Act (Rodosha Saigai Hosyo Hoken Hou), which can be assisted by the state.231 An employee who retired from an insolvent company that is in a Bankruptcy proceeding, in a procedure of Civil Rehabilitation, or in a Corporate Reorganization proceeding, for up to two years from the date six months prior to the commencement of the insolvency procedure, may apply for the replacement payment of unpaid wages if the insolvent company has done business for more than one year before its insolvency.232 The amount of payment replacement made by the Japan Labour Health and Welfare Organization (Rodosha Kenko Fukushi Kikou) is 80% of the employee’s unpaid wages during the six months until his or her retirement and the unpaid retirement payment up to maximum amount depending on the age when he or she retired.233

Thus, it is evident that the Japanese system is highly codified and very nuanced in terms of the type of protection available given the nature of the particular proceeding. As with the Danish system, particular attention is given to claims arising during the period that the debtor company is trying to devise a viable going forward restructuring plan. The Japanese system is viewed as a comprehensive system, protecting employee wage and pension claims through both statutory priorities and the payments guaranteed by the Miharai Chingin Tatekae Jigyo.

Hungary

229 Article 127i of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou).

230 Rodosha Saigai Hosyo Hoken (Article 7 of the Wages Payment Securement Act (Chingin no Shihara Kak zu no Kaku to nikansuru Houitsu) [Act No.34 of 1976]; Article 29(1)iii of Industrial Injury Insurance Act (Rodosha Saigai Hosyo Hoken Hou) [Act No.50 of 1947].

231 Article 3 of the Act regarding Collection of the Premium of Industrial Insurance (Rodohoken no Hokenryo Tyousyu tou nikansuru Houritsu) [Act No.84 of 1969]), and Industrial Injury Insurance (Rodosha Saigai Hosyo Hoken) can be financially assisted by state coffers (Art.32 of Industrial Injury Insurance Act (Rodosha Saigai Hosyo Hoken Hou)).

232 Article 3 of the Enforcement Ordinance of Wages Payment Securement Act (Chingin no Shihara Kak zu tou nikansuru Houitsu Shikorei) [Cabinet Order No.169 of 1976; Art.7 of Wages Payment Securement Act].

233 Article 4 of the Enforcement Ordinance of Wages Payment Securement Act (Chingin no Shihara Kak zu tou nikansuru Houitsu Shikorei); Article 7 of the Wages Payment Securement Act (Chingin no Shihara Kak zu to nikansuru Houitsu).
Hungary also has a dual approach to the protection of employee wage and related compensation claims. Employee wage claims in Hungary have a super-priority over other insolvency claims under the of Act LXVI of 1994 on the Wage Guarantee Fund (1994. évi LXVI. törvény a Bérgarancia Alapiról). The preference extends to wages and the severance pay of employees that have been given notice at the time of liquidation. There is no restriction on the wages that can be claimed, but severance pay is limited to six months’ wages. Hungary has a Sales-Guarantee Fund for wage claims in insolvency. The Fund covers 100% of wages, as well severance pay equivalent to six months’ wages. Employees receive compensation out of the Fund if the liquidator is unable to pay for the employees’ claims by the time of liquidation. The Fund is sufficiently funded because it is state-owned, and funded by employer contributions and general state revenues. Companies are obliged to pay 0.3 % of the gross income of their employees into the fund every month. The state pays 600 million HUF into the Fund every year. The state is subrogated to the claims of employees.

Belgium

Belgium is another example of a hybrid system, and is one in which the particular vulnerability of older workers during in insolvency is given special attention. Belgian law provides for a general priority right for employees’ wage claims on the movable goods of the bankrupt company; this priority right is payable immediately after the rights of the mortgage holders and the rights of the specific priority right holders. Article 19, 3 °bis of the Belgian Law on Priority Rights and Mortgages (Mortgage Law) provides that the employees’ wages, as defined by article 2 of the Law of April 12, 1965 on the salary protection for employees under the Salary Protection Law, benefit from a priority right up to a maximum gross amount of 7,500 Euro. The amount of 7,500 Euro covers wages, indemnities and other benefits payable under the individual employment contract. Excluded from the limitation is the termination indemnity, an indemnity because of an abusive dismissal, or an indemnity because of a dismissal of a protected employee. Also excluded from the priority rights, as these are also explicitly excluded from article 2 of the salary protection law, are holiday pay, the additional indemnity for occupational diseases or employment accidents, or indemnities that are paid in surplus to the social security payments. Every two years the maximum amount of 7,500 Euro is adjusted by Royal Decree, after an advice of the National Labour Council (NLC).

An additional indemnity is due by the employer to elderly employees, who have reached the age of 60 or more at the moment of their dismissal. This additional indemnity to employees older than 60 is due on the basis of the Collective Labour Agreement (CLA) n° 17 concluded within the NLC, or on the basis of a CLA concluded within a Joint Committee (JC), or Sub JC, or at the company level that provides for the same benefits as the CLA n° 17. The method for calculating the amount of the priority right for elderly employees is fixed by Royal Decree on the basis of the monthly amount of this additional indemnity.

234 Dr. Ilona Aszódi, Hungary country contributor, 2008.
235 Ibid.
236 Ibid.
237 Ibid.
238 Ibid.
239 Nora Wouters, Belgium country contributor, 2008.
240 Belgian Law on Priority Rights and Mortgages of December 16, 1851 (Mortgage Law), as amended.
241 Nora Wouters, Belgium country contributor, 2008.
242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid. Subject to the restriction that interest on a claim is no longer due as from the date of the bankruptcy judgment, in accordance with article 82 of the Law on the Closure of Undertakings, gross interest which is due on the gross salary of the employees benefits from a general priority right in accordance with article 19, 3 “bis of the Mortgage Law, ibid., citing the Law on the Closure of Undertakings, Law of June 26, 2002 on the closure of undertakings, as amended.
In accordance with article 19, 4 of the Belgium Mortgage Law, holiday pay benefits have a general priority in a rank just below the salary.\textsuperscript{246} For the amounts payable to the employees above the limits, the employees have a claim in the bankruptcy as an ordinary creditor.\textsuperscript{247} The maximum amount received by the employee is a gross amount minus the social security which is a fixed amount as defined by Royal Decree, that amount currently at a rate of 26.75%. \textsuperscript{248}

In Belgium there is also a Fund for indemnifying employees who are dismissed as a result of the closure of a company (Fonds tot vergoeding van de in het geval van sluiting van ondernemingen ontslagen werknemers-La fonds d’indemnisation des travailleurs licenciés en cas de fermeture d’entreprises). The Fund was established by the Law on the Closure of Undertakings. The Closure Fund intervenes for blue collar workers during a period of one year before and after the closing of the undertaking and for white collar workers during a period of 18 months before and after the closing of the undertaking. The Fund is funded by employer contribution, which is paid to national social security fund (“Rijksdienst voor sociale zekerheid-Office Nationale Sécurités Sociales”). The amount is based on the total amount of the gross salaries paid to the employees (the contribution amounts to 0.15% for companies with less than 20 employees and 0.14% for companies with more than 20 employees) pursuant to article 56 of the Law on the Closure of Undertakings. The funding can be increased through additional financing by the federal government. The money which is initially advanced to the trustees or employers in order to pay an indemnity for the closure of the undertaking must be reimbursed to the Closure Fund, in case there are sufficient assets, pursuant to article 61 § 1 of the Law on the Closure of Undertakings.

**United Kingdom**

In the United Kingdom, the hybrid system is created by the interaction of insolvency and employment legislation. Preferential debts, which include employee pension scheme contributions, up to four months’ arrears of wages to a set maximum, and unpaid holiday pay, are unsecured debts which, under the Insolvency Act 1986 Section 386 and Schedule 6 as amended by Enterprise Act 2002, Section 251,\textsuperscript{249} are to be paid in priority to all other unsecured debts. In addition, section 175(2)(a) provides that so far as the assets of the company available for payment of general creditors are insufficient to meet the preferential claims in full, those debts shall be paid out of any property comprised in or subject to a floating charge.\textsuperscript{250} Accordingly the preferential debts are payable in priority to claims secured by any floating charge.

In company administration proceedings, super-priority attaches at the cessation of the administrator’s tenure of office in respect of any liability arising under a contract of employment that was adopted by the former administrator or a predecessor before cessation, but with the dual provisos that no account shall be taken of a liability that arises, or in so far as it arises, by reference to anything that is done or that occurs before the adoption of the contract of employment, and that no account shall be taken of a liability to make a payment other than wages or salary.\textsuperscript{251} This aspect of super-priority relates purely to the entitlements of the employee coming within the definition of “wages or salary” supplied in paragraph 99(6) of Schedule B1, referable to the period after the adoption of the contract.

\textsuperscript{246} Pursuant to article 90 of the Belgian Bankruptcy Law of August 8, 1997, as amended, (the “Bankruptcy Law”) the employees as defined in article 1 of the Salary Protection Law, whose salary, as indicated in article 2, part 1 of the said law, and the indemnities due to these persons as a result of the termination of their employment, notwithstanding that the termination of their employment contract took place before or after the bankruptcy judgment, benefit from a general priority right in the same rank and for the same amounts as the persons mentioned in article 19, 3°bis of the Mortgage Law. \textit{Ibid.}

\textsuperscript{247} Commercial Court Brussels, October 12, 1940, \textit{Jur. Comm. Brux.}, 364. Article 22 of the Bankruptcy Law provides that the claims with a due date more than one year as from the date of the bankruptcy judgment that do not incur interests are approved as a claim in the bankruptcy minus the interest that is due between the bankruptcy judgment and the due date of the claim; \textit{Nora Wouters, Belgium country contributor, 2008.}

\textsuperscript{248} Royal Decree of December 28, 2005 at a rate of 26.75%, \textit{Nora Wouters, Belgium country contributor, 2008.}

\textsuperscript{249} Insolvency Act 1986 Section 386 and Schedule 6 as amended by Enterprise Act 2002, Section 251.\textsuperscript{250} \textit{Ian Fletcher, Christine McCreathe and Maurice Downey, United Kingdom country contributors, 2008.} Note that the UK sections were co-authored with Professor Ian Fletcher, given the complexity of the UK system. My thanks also to Christine McCreathe and her staff for their helpful e-mails, clarifying and correcting information.

\textsuperscript{251} \textit{Ibid.}, citing by paragraph 99(5) of Schedule B1 to the Insolvency Act 1986, as amended.
of employment by the administrator. 252 If the company goes into liquidation after the end of the administration, any amounts of unpaid salary, etc., that are referable to the period before the company went into administration, and that would qualify as preferential according to the provisions of Schedule 6 to the Insolvency Act 1986, would be payable as preferential debts in any distribution that the liquidator of the company is eventually able to make. However, this supposes that there are sufficient funds available to pay such a dividend after the expenses of the administration have been fully paid as required by paragraph 99(3), and a fortiori after the debts that enjoy super-priority under paragraph 99(4) and (5) have been fully paid, and that the expenses of the liquidation have also been fully provided for. 253

In an administration, no maximum monetary amount is specified in relation to the super-priority enjoyed by claims for wages or salary under contracts of employment adopted by an administrator. 254 The insolvency legislation makes no reference to the length of employment as a qualifying condition for entitlement to preferential or priority status in respect of wages or salary claims.

In liquidation or bankruptcy, preferential status is attached to a prescribed amount of any amount that is owed by the debtor to a person who is or has been an employee of the debtor and is payable by way of remuneration in respect of the whole or any part of the period of four months next before the relevant date, as defined in section 387 of the Insolvency Act 1986. 255 In liquidation/bankruptcy, the prescribed amount for which preferential status is conferred is currently set at £800 per employee. 256

There can be confusion between the Insolvency Act provisions, which concern the preferential status accorded to certain claims in the insolvency of an employer, and the separate statutory scheme whereby direct payment is made to employees of an insolvent employer, under the provisions of s.184 of the Employment Rights Act 1996, by the National Insurance Fund. In addition to the protection that employees have as creditors of an insolvent employer under the Insolvency Act 1986, they also have added protection under Parts XI and XII of the Employment Rights Act 1996, and Section 124 of the Pensions Schemes Act 1993 whereby payment of certain debts are guaranteed, within limits, by the State from the National Insurance Fund, which is the UK’s chosen guarantee institution. This legislation, which implements the EU Insolvency Directive, guarantees a basic minimum of payments to employees of insolvent employers who would normally have to wait some considerable time for payment, or get no payment, as creditors in the insolvency proceedings. 257

The State aims to pay 78% of claims within 3 weeks of receipt and 92% within 6 weeks. Payments are made under the employment legislation irrespective of the prospects of recovery in the insolvency proceedings. 258

The payments guaranteed under the UK employment legislation are as follows: up to 8 weeks wages; up to 6 weeks holiday pay; one weeks’ notice pay for each complete year of service up to a maximum of 12 weeks, subject to income received during the notice period; a tribunal’s basic award for unfair dismissal; a reasonable repayment for any fee or premium paid by an apprentice or articed clerk, and redundancy pay, which is based on length of service in certain age bands, up to a maximum of 30 weeks pay. 259 All the above payments are capped at the statutory limit, which is currently £330, effective 1 February 2008, increased from £310; and the maximum basic award for unfair dismissal (30 weeks’ pay) rose from £9,300 to £9,900 effective the same date. 260 This limit is reviewed annually by BERR and increased or decreased in line with September’s retail price index. 261

The state is subrogated vis a vis the insolvent estate in respect of the amounts that have been paid under the various heads of eligibility. To the extent that any portion of such payments corresponds to a claim of the employee that would qualify as preferential in the employer’s insolvency (e.g. for up to

252 Ibid.
253 Ibid.
254 Ibid.
255 Ibid., by reference to Schedule 6 to the Insolvency Act 1986, Para.9.
258 Ian Fletcher, Christine McCreath and Maurice Downey, United Kingdom country contributors, 2008.
259 See http://www.insolvency.gov.uk/pdfs/guidanceleafletspdf/guideforips.pdf
260 £290 to £330 is 562 CAD to 639 CAD. £8,700 to £9,900 is 16,844 CAD to 19,167 CAD.
261 Ian Fletcher, Christine McCreath and Maurice Downey, United Kingdom country contributors, 2008.
In respect of any other, non-preferential amounts that the state has paid to the employee in the first instance, the State’s subrogation is as an unsecured creditor. An unpaid basic award of compensation for unfair dismissal made by an employment tribunal is payable in full. A compensatory award is not payable.

Arrears of pay, holiday pay and pay in lieu of notice may be subrogated to the UK Secretary of State. The National Insurance Fund (NI Fund) has been set up, under which UK Secretary of State has become liable to pay employees,263 in the case of the redundancy payments, and in the case of compensatory notice pay.264 The most common of these debts are arrears of pay, holiday pay and pay in lieu of notice. The insolvency provisions enable the Secretary of State, within the prescribed limits,265 to pay the specified debts due to employees in an insolvency, whether the debts are preferential or not. The NI Fund is funded by costs to the system, employer or industry tax, and general tax revenue.

In other jurisdictions, there is not a wage guarantee fund creating for insolvency, but there are express provisions in a public insurance scheme that explicitly address employee wage claims during insolvency, creating another form of hybrid system. Switzerland is one example.

Switzerland

In Switzerland, employee wage claims arising during the six month period prior to the opening of bankruptcy proceeding against an employer must be fully paid in priority to other claims; and claims resulting from the early termination of employment during insolvency proceedings are also privileged, with the full amount of the wage claim entitled to preference.266 Employees of an insolvent employer are entitled to request from a public insurance fund the payment of their past four months unpaid wages, after termination of their employment agreement, where the debtor company has not paid these claims.267 Payment under the system includes the employer-guaranteed gratifications. Employees are not entitled to be paid more than four times 8900 Swiss francs.268 The scheme calls for timely payment to employees and they usually receive compensation within two weeks.

Each canton in Switzerland is responsible for the foundation of the public insurance system.269 Employees and employers equally contribute to the funding of the public insurance structure, with employee contributions deducted from wages during companies’ solvent years.270 Pursuant to Article 54 of the Swiss Unemployment and Insolvency Insurance Law, the public insurance fund is subrogated to the rights of the employees. The Swiss confederation and fund’s output also contribute to the funding of the structure and the scheme allows for adaptation of the contributions in the event of economic downturn.271

Some jurisdictions are currently considering amending their legislation to enhance protection of employee wage claims during insolvency, or in some cases, such as in Canada, the legislation has been enacted, but in not yet in force.

Canada

262 £800 is 1,549 CAD.
263 Pursuant to sections 166(1) (b) and 167(1) of the Employment Rights Act 1996.
264 Pursuant to sections 182 and 184(1) (b) of the Employment Rights Act 1996.
266 Vincent Jeanneret, Olivier Hari and Vincent Carron, Switzerland country contributors, 2008; Article 219 al. 4 lit. of the Swiss Debt Enforcement and Bankruptcy Law.
267 Ibid., citing Article 51 and subsequent Articles of the Swiss Unemployed and Insolvency Insurance Law.
268 8,900 Swiss francs (CHF) equals 8,508.40 CAD. Vincent Jeanneret, Olivier Hari and Vincent Carron, Switzerland country contributors, 2008.
269 Ibid., citing Article 77 Swiss Unemployed and Insolvency Insurance Law.
270 Ibid.
271 Ibid.
Canada is moving towards a hybrid system with the proposed creation of the Wage Earner Protection Fund.272 Canada has previously had a fourth ranking priority over unsecured creditors for wage up to a cap of 2,000 CAD. With the proposed amendments, which have been enacted, but are not yet proclaimed in force, there is a new partial super-priority for the wage claims and creation of the wage guarantee fund. Employee claims for wages and vacation pay up to 2,000 CAD, are secured against current assets, specifically, cash, accounts receivable and inventory, to the extent of 2,000 CAD under the *Bankruptcy and Insolvency Act (BIA)*. There is also a new pension super-priority, as discussed in Part VIII of this report.

The Canadian *Wage Earner Protection Program Act* creates the Wage Earner Protection Program (WEPP), which provides for the payment of outstanding wages, capped at 3,000 CAD, to individuals whose employment is terminated as a result of a bankruptcy or receivership. The term "wages" is defined to include salary and vacation pay, but does not include severance or termination pay. Employee claims are reduced by any amount paid to them by a receiver or trustee. The WEPP is funded out of the general tax revenues.

The WEPP provisions allow the program to cover insolvency professionals’ fees under certain conditions where there are insufficient assets in the insolvent company to cover the costs of carrying out those duties related to the operation of the WEPP. Trustees and receivers are required to perform numerous duties to support the operation of the program, including notice and claims amount determinations, and a due diligence defence has been created to protect them from personal liability. The claims of workers under the WEPP are secured against current assets, specifically, cash, accounts receivable and inventory, to the extent of 2,000 CAD.273

The proposed amendments to Canadian insolvency law also specify that restructuring proposals under the *BIA* and plans of compromise or arrangement under the *Companies’ Creditors Arrangement Act (CCAA)* must provide for payment of the priority claims immediately after court approval of the proposal or plan. In this respect, the priority for employee wage and vacation claims is treated consistently, whether the debtor is liquidated or restructured, to prevent forum shopping by insolvent debtors as a means of avoiding their obligations to employees.

The above country examples illustrate the importance that multiple jurisdictions have placed on employee wage and related compensation claims during insolvency, adopting both priority schemes and wage guarantee funds as complementary strategies. What is also clear is that different jurisdictions have chosen different methods to finance wage guarantee funds and to structure the hybrid system such that the priorities granted and the guarantee fund are interrelated and enhance the protection of employees.

### A. Funding Methodology

For hybrid systems, the wage guarantee fund as part of the social safety net protecting employees’ claims is funded in the same combination of ways as discussed above for those regimes that rely exclusively on a wage guarantee fund to offer that protection. Three examples are discussed here, but the country pages in Part XIII provide a more comprehensive record of the sources of funding.

**Luxembourg**

In the Grand Duchy of Luxembourg, which is a hybrid system, wage claims are guaranteed by the Employment Fund (*Fonds pour l’emploi*) within certain limits and on certain conditions, in case of bankruptcy of the employer.274 The guarantee does not apply to insolvency composition proceedings (*procédure de concordat préventif de la faillite*), liquidation of companies ordered by courts (*liquidation judiciaire de sociétés*) or controlled management proceedings (*procédure de gestion*).
contrôlée). The Fonds pour l’Emploi is funded through five sources: a special contribution paid by employers in the private sector, which is calculated on the rateable wages (salaires ou rémunérations cotisables), a rate that is currently 0%; a solidarity tax (impôt de solidarité) corresponding to a surcharge on income tax of the natural persons (impôt des personnes physiques) and of the collectivities (impôt des collectivités); a contribution to be paid by the municipalities; an additional autonomous excise duty (droit d’accise autonome additionnel) levied on certain fuels; and an annual contribution from the State, which is fixed every year by the budget law.

The Luxemburg Fonds pour l’Emploi guarantees claims related to wages and to amounts (indemnités) of any nature whatsoever that are due to the employee at the date of the bankruptcy judgment (jugement déclaratif de faillite), for the last six months of work and that arise from the termination of the employment contract. A cap on the super-priority applies to the guarantee to be provided by the Employment Fund, specifically a maximum of six times the reference minimum salary.

Poland

Poland is an example of a hybrid system and the country contributors most helpfully set out how the guarantee fund is funded in their comprehensive answer to the survey questions. In Poland, wage, pension and other employment related claims are given a priority ranking along with the costs of bankruptcy proceedings and several other specified claims. This first ranking comes after the satisfaction of secured claims such as those secured with mortgages, registered pledges and pledges, because under Article 345-346 of the Polish Insolvency and Bankruptcy Act, only the excess left from realization and satisfaction of the secured claims is included in the bankruptcy estate. A Guaranteed Employees’ Claims Fund has been established to guarantee wage claims, regulated by the Employee Claims Protection Act. The Employees’ Claims Fund receives financing from industry in the form of employer contributions, costs to the system, employer taxes, and general taxes. The country contributors created the following chart to illustrate the funding sources for the wage guarantee fund:

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275 Ibid., they note that the Employment Fund, which is managed by the State, has many other statutory purposes such as the payment of unemployment benefits.
276 Ibid.
278 Albert Moro and Sébastien Schmitz, Luxembourg country contributors, 2008.
280 Ibid.
281 Ibid. Articles 2, 9 of the Polish Employee Claims Act.
Chart 1 illustrates that in Poland almost 40% of the Employee Claims’ Fund is generated through mandatory employer contributions. The Fund recovers money through its debt collection efforts, which makes up more than 33% of the financing of the Fund.

**Romania**

Romania has recently adopted a law establishing a special fund that guarantees protection for wages owing and other similar claims arising at the point of firm insolvency. Law no. 200/2006 creating the Fund entitles employees to a maximum damage claim equivalent to three average wage payments for each employee. The guarantee fund is financed mainly through tax paid by employers for each one of their employees. The tax is established by applying a rate of 0.25% to the amount of income that represents the economic foundation for calculation of the individual contribution due to the social insurance budget for unemployment achieved. The law provides certain measures of enforcement and entitles the administrative authority in charge of the fund to claim debts by following a special urgent procedure. Stan Timoveanu et al observe that there are no stipulations regarding adjustments or other changes to the contributions to the special guarantee fund, observing that the Fund is sufficiently funded.

In sum, a variety of options are possible for financing a wage guarantee fund. The funding structure of wage guarantee funds requires further public policy discussion, specifically, in respect of the issue of who should bear the costs and risks of wage guarantee systems, in terms of drawing financing from the general tax base, funding by industrial sector, global employer contributions or levies, employee contributions, or other sources.

The next part considers another aspect of the employee compensation promise, pension-related claims and their treatment during insolvency.

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283 Stan Timoveanu, Laura Retegan and Adriana Turta, Romania country contributors, 2008.
284 Ibid.
285 Ibid.
286 Ibid.
VIII. The Treatment of Pension Claims during Insolvency

Notwithstanding that the employee population is aging in many parts of the world, some countries have failed to seriously address the problem of under-funded pension plans and the risks to retired and near-retirement employees of firm insolvency. This problem can be an acute one in jurisdictions with employer-sponsored pension plans. In commencing a discussion of these issues, however, it is important to note that for some other jurisdictions, with serious AIDS or other health pandemics, issues regarding the pension promise are not as urgent as issues relating to human morbidity and mortality in the workplace.

Also of note at the outset is that it is extremely difficult to categorize the treatment of pension or superannuation claims during insolvency because of the myriad and complex ways in which pension systems work in various jurisdictions. Some countries have purely state operated pension systems, hence, the insolvency of one debtor employer has little impact on employees’ or pensioners’ retirement income. Others have “superfunds”, which are industry wide pension or superannuation funds, which are not as affected by the insolvency of one company in the sector. Yet other jurisdictions rely primarily on employer-created and funded pension plans. It is this latter category that has faced some challenges.

Where the debtor controls the pension plan, directors and officers often stop making the mandatory contributions to the plan as the firm slides into distress. In a number of other cases, they chronically under-fund the pension promise where pension plan is defined benefit plan.

Numerous jurisdictions of the 62 studied treat pension related claims on the same basis as wage claims in terms of priority or preference. They have created a statutory priority for pension claims, including claims for failure to make remittances to a pension or superannuation fund and for general underfunding of the pension promise. Since amounts contributed to future pension earnings are part of the employee compensation package, this approach makes considerable sense.

In contrast, other jurisdictions treat such claims as unsecured claims, even where wage claims are given a preference. However, these jurisdictions need to be assessed on the basis of whether or not employer-sponsored pension plans form any, or a significant, part of their pension system. Where the system is exclusively state funded or state and industry funded, the impact of any failed contributions by the debtor company at the point of insolvency may not affect the actual pension that the employee will receive. However, where the pension promise is employer-sponsored, employees may face losses from outstanding contributions to the pension plan or from a serious underfunding of the plan, as discussed in the next part.

The study results indicate that guarantee funds for pension claims during insolvency are relatively rare, although broader provident funds that cover both wages and pension claims are more common.

A. Risk Allocation and the Pension Promise

In jurisdictions where there are employer-sponsored pension plans, there is a different risk allocation for debtor companies, depending on whether the pension plan is a defined contribution pension plan or a defined benefit plan. In some instances, managers directly control the funds in the pension plan; and in other cases, these funds are controlled by trustees and fund managers appointed to oversee a distinct pension fund in which the pension contributions are remitted on a regular basis by the employer.

While the real risk of firm insolvency ultimately accrues to the plan’s beneficiaries, under a defined contribution plan, the promise is to invest contributions prudently; and pensioners directly bear the

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risk of poor investment decisions by the pension fund manager or the risk of market decline. This risk is because the pensioner only receives the amount of pension generated by those investment choices and the extent of the debtor company’s promise is to make the agreed upon or statutorily mandated pension contributions.

In contrast, the debtor company as plan sponsor in a defined benefit pension plan is taking the risk in that if investment returns are lower than anticipated and the assets in the plan are not sufficient to pay pensioners their benefits, the company is responsible to make additional contributions to fund the deficiency. The risk falls to the employer to ensure that the level of funding is adequate to meet a predetermined promised level of pension benefits to employees during their retirement years.

When a company becomes insolvent, there are two possible sources of claims arising from its pension plan. First, it may not be current in the remittance of contributions required to pay both the normal cost of the benefits accruing in the plan and the special payments required to extinguish unfunded liabilities. Second, the outstanding balance of any unfunded liabilities may become due immediately if the plan is terminated, although there is typically some delay in payments. In some jurisdictions, once a plan is wound up, the company does not need to fund the deficiency even if the company is ongoing.

The pension promise around which pension plans in many jurisdictions are built has some structural aspects that can lead to its being unfulfilled in the event of a company’s insolvency in jurisdictions in which pension plans are employer-sponsored. In return for services rendered during the plan member’s employment, the sponsoring employer promises to pay benefits to the member for life, following the member’s retirement from employment. Fulfillment of such a promise is premised on the company’s continued existence throughout the plan member’s employment and, thereafter, for the balance of the member’s life, as well as the financial capacity to pay the promised benefits at the time they are due. The firm’s insolvency can destroy those premises because the company that is the plan sponsor may not survive and its assets may be distributed among its creditors.

Pension legislation in some jurisdictions has addressed these risks by requiring pre-funding of the promised benefits; providing plan members with an enforceable claim to their accrued benefits after a short period of service with the employer; and requiring, in concert with federal tax rules, that the assets required to be used for pre-funding the promised benefits be legally separated from those of the company’s creditors in the case of the company’s insolvency. These legislative and regulatory requirements have substantially mitigated the insolvency risk for plan members, but there is still some risk of underfunding at the time of insolvency.

These remaining risks are two-fold. First, a sponsor in financial difficulty may delay remitting required contributions to the pension fund and, if the sponsor becomes insolvent, those unremitted contributions will have to be collected through the insolvency proceeding. Although pension legislation attempts to provide some protection by deeming these contributions to be held in trust, in Canada, the statutory deemed trust has not proved effective in separating the amount of contributions owed from the other assets of the sponsor in insolvency proceedings. These unmortgagee contributions are therefore treated as unsecured claims under Canadian bankruptcy law in the distribution of the sponsor’s assets among its creditors, with the result that the pension fund will recover only a small fraction of the contributions owing. This risk affects both defined benefit and

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288 Ibid.
289 Ibid.
290 Ibid. at 34.
293 Ibid.
294 Ibid.
295 Ibid.
296 Ibid.
297 Ibid.
defined contribution plans. In other jurisdictions, unremitting pension contributions are treated as unpaid wage claims owing, as discussed below.

The second risk, unique to employer-sponsored defined benefit pension plans, is that the fund set aside to pay for the promised benefits will not be sufficient to pay the full amount required to provide the accrued benefits if the plan is terminated as a result of the company’s insolvency. Pension legislation usually requires that the determination of the amounts required to be contributed by the sponsor to the pension fund be calculated by a member of the actuarial profession using accepted actuarial practice. Actuarial practice necessarily involves forecasting numerous future events in order to determine how much must be contributed today to fund benefits payable years, perhaps decades, in the future. Any deviation from that forecast may lead to the assets in the fund being less than the liabilities accrued at a particular point in time. If that point in time occurs concurrently with or after the company’s insolvency, then benefits will not be fully funded.

In Canada, pension legislation in most jurisdictions provides protection against the risk of adjustment to the forecasts by requiring tri-annual assessments of the solvency of the pension fund and, if those assessments indicate that liabilities exceed assets, the company is required to make special payments to the fund over the next five years in order to extinguish the shortfall.

For jurisdictions with employer-sponsored pension schemes, plan members (employees and pensioners) share insolvency risk with the company’s investors. The requirement that the company must make special payments over and above the normal cost of the pension benefits in order to pay off the solvency deficiency can impose significant demands on the company’s cash flow. If these demands coincide with a period of financial stress for the debtor company, they may be the trigger for the company’s insolvency. Economic shocks, such as rapid drops in share price, steadily declining interest rates, and unforeseen events that change expected earnings and/or the cost of benefits, can increase risk to pension plans or can precipitate insolvency proceedings and impose losses on the plan members and beneficiaries in the form of reduced benefits.

In Canada, plan members’ claims for the balance of any remaining deficiency in the fund’s assets and any unremitting contributions are presently treated as unsecured claims in a liquidation and distribution of the sponsor’s assets in an insolvency proceeding. Insolvency and bankruptcy law is aimed at providing an orderly distribution of assets where a debtor company that is a plan sponsor is liquidated, while providing a mechanism that allows debtors, in some circumstances, to attempt to devise a business plan such that it can restructure and carry on business. A restructuring plan may allow the company to continue through the compromise of creditors’ claims and through pension risk allocation in the form of amended plans, extended amortization schedules, letters of credit and termination of plans.

While unremitting pension contributions during bankruptcy do not currently qualify for a preference in Canada, new legislation not yet proclaimed in force will enhance the position of such claims by securing pension contribution arrears with a charge over the assets of the debtor company in both bankruptcies and receiverships. The amendments will also enhance the position of such claims in an insolvency restructuring proceeding, thereby shifting the current risk allocation in favour of greater security for employees and pensioners.

In the US, there are another set of risks associated with insolvency of debtor companies. The US is another jurisdiction where the pension system is largely employer-sponsored. In the US, there is a wide-spread problem of employees investing their retirement savings in the stock of their company.

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298 Ibid.
299 Ibid.
300 Ibid.
301 Ibid. Ontario is one jurisdiction, as example. However, this payment schedule can expose the plan members to a shortfall risk in the event of the sponsor’s insolvency for a period of up to eight years.
302 Ibid.
303 Ibid.
304 Ibid.
305 Ibid.
306 The legislation received Royal Assent on December 14, 2007 and is expected to come into force before the end of 2008.
thus failing to diversify their risk. This trend arose from the cultural and economic norms of the country, where to invest in the company’s future through stock investment was a measure of employee confidence in the company. It is also part of the US norms of the promise of substantial growth economically for the company, the so-named “American dream”. On insolvency, these employees lose their income and at the same time, lose much or all of their pension savings, given that the equity is subordinated to all creditor claims.

This problem of employees investing pension savings in the same debtor company as they are employed is exacerbated when the company itself, through its control of the pension plan, has invested the employees’ pension funds in the company’s stock. This lack of diversification is then highly prejudicial to employee pensions at the point that the firm becomes insolvent. The US was the only country of the jurisdictions studied where this risk is identified as an acute problem.

B. Priority for Pension Related Claims

While the issue of pension deficits and failure of companies to remit pension contributions in a timely fashion is an issue that could be addressed and enforced much earlier in the firm’s financial life cycle, legislative amendments could address one aspect of the current pension insolvency risk. One form of benefit protection for pension fund beneficiaries is to give their claims against plan sponsor assets priority standing, ahead of other creditors, either through a preferred creditor ranking, with priority over other unsecured creditors, or via a ‘super preference’ over secured creditors. A number of jurisdictions, as discussed below, have adopted this approach.

The OECD has observed that the arguments for giving such priority claims include that employees trade current wages for the promise of future pension income, yet they do not necessarily understand the trade off they are making; are exposed to issues of asymmetric information; and are not well placed to undertake a rigorous credit analysis of their plan sponsor.

A number of jurisdictions give priority to pension related claims, mostly for unremitted pension contributions, although in some cases, the priority is for the full amount of unfunded pension liability, called pension deficits in some jurisdictions. For the 42 countries for which this issue was relevant, i.e. jurisdictions that have private employer-sponsored pension systems in which there are remittances to pension or superannuation funds, 64% grant a priority for pension related claims in insolvency, as illustrated by Graph 6.

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307 Stewart, supra, at 4.
Below are examples of the types of priorities granted for pension-related claims in eight jurisdictions in the study. The country pages in Part XIII should be consulted for a full picture of the treatment of pension claims as priority claims during insolvency.

**Australia**

Australia has enacted a priority for pension related claims. The term “pension” is known as superannuation in Australia. Pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth), a minimum of 9% of an employee’s gross wage is to be deducted and remitted to an approved superannuation fund. If an employer fails to provide the amount, then a tax is levied on the employer to cover the shortfall and this is known as the “superannuation guarantee charge”. Employers may choose to contribute more than the 9% required. Access to superannuation funds by an employee is generally not permitted until retirement. The *Corporations Act* grants any unpaid superannuation contributions and any superannuation guarantee charge payable a priority ranking equally with unpaid wages pursuant to s. 556(1)(e) of the *Corporations Act*. Superannuation contributions and superannuation guarantee charges, along with unpaid wages, rank above the other classes of employee claims in s 556(1) of the *Corporations Act*, but behind the classes of claims relating to the administration and/or winding up process. There are no restrictions, except that the amount is capped for excluded employees such as directors.  

**Bermuda**

In Bermuda, the *National Pension Scheme (Occupational Pensions) Act 1998* provides for each employer to maintain a private contributory pension scheme for all Bermudian employees and their spouses. When an employer becomes insolvent, a governmental body called the Pension

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308 For excluded employees, the priority in respect of wages, superannuation contributions and superannuation guarantee charges are capped at $2,000, pursuant to section 556(1A) of the *Corporations Act*.

309 This requirement is in addition to the public schemes provided by the government pension fund under...
Commission may order the winding up of a pension plan in whole or part. Where a pension plan is wound up, the employer is required to pay into the pension fund an amount equal to the total of all the payments that are due or have accrued and not been paid into the pension fund. If any application by a secured creditor against the property of the employer is made or warrant of distress executed, the property or the proceeds of sale cannot be distributed to any person until the court ordering the seizure or sale has made provision for payment into the pension fund of any amount payable by the employer.

Colombia

Under the Colombian insolvency regime, pension claims are entitled to a special preference. In the framework of an insolvency procedure, they are considered claims of a labour nature, and are granted a priority over any other claim, except claims arising from children's maintenance rights. When pension claims originate after the initiation of an insolvency procedure, they are considered administration expenses, and must be paid prior to any other administration expenses of the reorganization or bankruptcy process. Pension claims are granted priority for the entire amount and there are no restrictions on the realization of such claims. In principle, pension contributions in Colombia have to be paid out from the bankruptcy or reorganization estate. However, depending on the kind of company, shareholders may be jointly and severally liable for unremitted pension contributions.

Norway

In a number of the jurisdictions studied, pension claims are treated as wage related claims and thus given the same priority or preference as wages. Norway is a good example. Under the Norwegian Satisfaction of Claims Act, pension related claims are treated in the same way as wage claims, and as such are first ranking preferential claims. The Act Relating to the State Guarantee for Wage Claims in the Event of Bankruptcy provides that pension claims are guaranteed by the state. As with wage claims, the guarantee is limited currently to 133,624 NOK, quite a generous preference.

Another example is the Philippines, where pension claims are treated as wage related claims and granted the same preference as those claims.

Peru

Other jurisdictions allocate preferences for pension claims depending on the type of insolvency proceeding. For example, Peru grants pension claims a super-priority under its General Bankruptcy Law, which provides that in a liquidation scenario, they will have a first priority rank for payment with the result of the liquidation of the debtor's assets and there are no restrictions on realization of payment of such claims. In a restructuring scenario, pension claims are to be paid in accordance with the provisions of the restructuring plan; however, the restructuring plan must contemplate that at least 30% of the total annual payments performed under the restructuring plan, are destined to proportionally pay labour claims, including pension claims.

the Contributory Pensions Act 1970, which is not expected to be a realistic pension for the local population to live on following retirement; Craig Rothwell, Bermuda country contributor, 2008.

Craig Rothwell, Bermuda country contributor, 2008.

Craig Rothwell, Bermuda country contributor, 2008.

Juan Fernando Gaviria and José Alejandro Oliveros, Colombia country contributors, 2008.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Act Relating to the State Guarantee for Wage Claims in the Event of Bankruptcy etc. (14 December 1973 no. 61).

133,624 NOK is 24,560 CAD.


Guillermo Puelles, Peru country contributor, 2008.

Ibid., section 66.4 of the General Bankruptcy Law.
**China**

In China, under its new 2006 *Enterprises Bankruptcy Law*, pension claims rank before any other unsecured claims but after secured claims. Under Article 124, the guarantor and other joint and several debtors of the bankrupt, on conclusion of the procedures for bankruptcy, have joint and several liability for repayment of the creditors’ claims that have not been repaid according to the procedures for bankrupt liquidation and according to law, including pension claims. There is no specific provision under the current laws for treatment of unfunded pension liabilities.

**Canada**

Canada has proposed amendments to its national bankruptcy law to deal with the failure of insolvent companies to remit pension contributions in the period prior to insolvency by granting a super-priority to such claims. Chapter 36, Statutes of Canada, 2007, to be proclaimed in force in 2008, will secure all pension contribution arrears with a charge over the assets of the debtor company. The proposed statutory charge for unpaid pension contributions will apply in bankruptcies and receiverships. The amounts that will benefit from the statutory charge are contributions deducted from employees’ salaries but not remitted to the pension fund; contributions owed by an employer for the cost of benefits offered under the pension plan, excluding amounts payable to reduce an unfunded pension liability; and contributions owed by an employer to a defined contribution plan. Claims not included under the super-priority are claims related to special payments ordered by a pension regulator to liquidate an unfunded liability and claims related to unfunded liabilities directly. Hence, the super-priority would not extend to any unfunded solvency deficiency in a defined benefit pension plan.

The amendments provide that the statutory charge is created in situations where the debtor becomes bankrupt or becomes subject to a receivership, to ensure comprehensive protection of unremitted pension obligations claims. Without similar protection in either case, debtors with large unremitted pension obligations would be encouraged to choose the proceeding that did not include the super-priority.

The proposed Canadian pension contribution arrears charge ranks ahead of all other secured claims except those of unpaid employee wage claims, farmers, fishers, and aqua culturists who have delivered their goods within 15 days of the bankruptcy or receivership, the rights of unpaid suppliers to repossess goods, and amounts referred to in section 67(3) of the *BIA*, namely, the deemed trusts for unpaid employee payroll deductions under the federal *Income Tax Act*, *Employment Insurance Act* and *Canada Pension Plan* or under a substantially similar provision of a provincial statute. Trustees or receivers that dispose of any of the assets subject to the statutory charge for pension

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322 Here, the creditors’ claim shall include the employee’s claim; Jingxia Shi, China country contributor, 2007.

323 Chapter 47, Statutes of Canada, 2005, *An Act to Establish the Wage Earner Protection Program Act*, to amend the *Bankruptcy and Insolvency Act* and the *Companies’ Creditors Arrangement Act* and to make consequential amendments to other Acts (Royal Assent November 2005, not yet proclaimed in force as of May 21, 2008) and Chapter 36, Statutes of Canada, 2005, *An Act to amend the Bankruptcy and Insolvency Act; the Companies’ Creditors Arrangement Act; the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada, 2005, Royal Assent December 2007, not yet proclaimed in force as of May 21, 2008. The above mentioned statutes together constitute a comprehensive set of amendments to the Canadian insolvency legislation. The new provisions 81.3 to 81.6 of the *BIA*, when in force, will create a statutory charge over all assets for unremitted pension contributions and a statutory charge over current assets (defined as cash, cash equivalents, inventory, accounts receivable or proceeds from dealing with those assets) in favour of employees for unpaid wage claims. To the extent that the statutory charges encumber the same assets, the charge for wage claims will have priority.

324 The amount of pension plan contributions secured should be an amount equal to the sum of all amounts that were deducted from the employees, plus accrued “normal cost” as defined in subsection 2(1) in the *Pension Benefits Standards Regulations*, 1985.


326 Chapter 36, s. 81.5(2) and s. 81.6(2), amended *BIA*. 

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contribution arrears are personally liable to the pension fund for the amount of the charge, up to the amount of funds received. This liability risk ensures that trustees and receivers will remit the requisite contributions owing from the proceeds of the sale.

Dominican Republic

Other jurisdictions do not accord any priority for pension related claims. For example, the Dominican Republic’s Social Security Law 87-01 provides that mandatory payments of an employer to the pension managing companies, of monthly pension quotas, management fees, fines and overdue interests shall enjoy the privileges and priorities awarded by the Civil Code and Commercial Code. However, these laws treat these claims as unsecured claims, with no priority. The Social Security Law No. 87-01 imposes penalties and fines to employers that do not transfer pension contributions pertaining to their employees to the corresponding pension fund managers in a timely manner. However, there are no provisions in the law that guarantee the making of such contributions in cases of insolvency or that create special funds to deal with such a situation. Unremitted pension contributions are treated as ordinary unsecured claims.

These examples illustrate the wide variety of methods adopted by different jurisdictions in considering whether to accord any priority or preference for pension related claims. As with wage related claims, another option is to create a pension guarantee fund to deal with pension claims arising on firm insolvency. There are fewer such guarantee funds for pension related claims as there are for wage related claims, although, as noted above, some jurisdictions treat pension claims as wage related claims and hence the claims fall within the wage guarantee fund.

C. Pension Guarantee Funds

There are some countries that have enacted pension guarantee funds or national insurance funds, such as Sweden, Germany, Ontario Canada and the US. Pension guarantee funds are funded the same variety of ways as wage guarantee funds. Caps in the amount that can be recovered under the guarantee fund assists in controlling costs and certainty of scope of liability. Arguably, such limits can also create transparency in employee expectations.

Graph 7 illustrates the jurisdictions that have a pension guarantee fund, a more general insurance or state pension scheme that provides protection for employees during insolvency or no pension guarantee scheme. The graph illustrates that pension guarantee funds are less common than wage guarantee funds; specifically, less than one half the number of jurisdictions have specific pension guarantee funds set up to address pension plan deficiencies during insolvency. However, the majority of countries, 67%, have made express provision to assist employees in protection of their pension claims at the point of insolvency through either a pension guarantee fund or a public pension insurance scheme.

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327 Chapter 36, s. 81.5(3) and s. 81.6(3), amended BIA.
328 Isabel Andrickson and Norman De Castro, Dominican Republic country contributors, 2008.
329 Ibid.
330 Ibid.
There are some jurisdictions that do not provide any kind of guarantee fund for pensions. An example is Botswana. However, it is also important to recall that a number of countries do not have employer-sponsored pension systems, and hence the jurisdictions without a pension guarantee fund or express insurance scheme to cover pension claims on insolvency must be assessed to ascertain whether the lack of such a scheme is not a problem as the pension plans are state sponsored or industry sponsored and thus the debtor company’s insolvent does not place those pensions at risk. Examples include Brazil and Bulgaria.

In terms of the funding base for a pension guarantee fund or pension insurance scheme, there are three principal ways in which such pension protections are funded. Some are dependent entirely on employer/industry levies, with rates adjusted in some jurisdictions on an annual basis to ensure that there is sufficient funding. Some are purely tax based, although these are the minority.

Of the number of funds reported, 41% are funded through a combination of employer/industry contributions or annual levy and the general tax base. 38% are funded exclusively through an employer contribution scheme or industry based levy. 20% are funded solely through general tax revenues. 60% of jurisdictions surveyed place a cap on the amount of pension funding that employees have access to on insolvency. The breakdown is illustrated in Graph 8 below. In all cases, funding is bolstered by at least some limited recoveries to the estate through subrogation of claims and from investment interest on assets of the fund.
In examining these figures, it merits note that in some jurisdictions, such as Ontario Canada, even though the pension guarantee fund is funded by employer contributions, given the pension guarantee language contained in the statute, there is an implicit understanding that the government would fund any shortfall from general revenue. The Ontario statute does not limit the liability of the guarantee to what is just in the Pension Guarantee Fund. The impetus for Ontario’s current regime of pension legislation had its origins in the need for minimum standards regarding adequate funding of private sector pension promises, which was highlighted by the termination of underfunded plans by insolvent plan sponsors and the loss of promised benefits by the affected plan members.

Recently, some high profile insolvency proceedings involving Air Canada, a national airline company, and Stelco, a major steel company, highlighted another facet of the relationship between pension plans and plan sponsor insolvency, as the underfunded pension plans were the major factor in the directors’ decisions to file insolvency proceedings and restructure the debtor company’s liabilities. Thus, both plan members and the company’s investors have a shared interest in ensuring that pension plan liabilities are securely funded.

The pension guarantee funds for five jurisdictions, including the Ontario Canada fund, are summarized below.

**Canada**

In Canada, only one jurisdiction has a pension benefits guarantee fund. The Ontario Pension Benefits Guarantee Fund (PBGF) was created in 1980. Currently, there is no national protection in Canada for pensioners against insolvency risk in the same manner as Ontario offers through its pension guarantee fund.
From its inception to September 2007, the PBGF has paid out claims totalling 883 million CAD, and has recovered 48.5 million CAD from the estates of plan sponsors in the same period. Of the amounts paid out by the PBGF to March 2006, 70% of pension plans for which claims were paid were companies in bankruptcy proceedings. The dollar value of total claims paid in respect of plan sponsors under BIA and CCAA proceedings was 823 million CAD, representing 93% of the value of all claims paid out by the PBGF.

The PBGF essentially acts as an insurance scheme to assist in continued funding of the pension plan where it is underfunded by the debtor company on insolvency. A brief look at how such claims are made to the Ontario PBGF is helpful to understanding the benefit of such pension guarantee funds and their limitations.

Of the Bankruptcy and Insolvency Act (BIA) filings that received payments from the PBGF, 32% of debt companies made a voluntary assignment in bankruptcy while 13% were petitioned by creditors into bankruptcy, triggering pension plan termination. 7% of the bankruptcies for which claims were paid out by the PBGF commenced as Companies’ Creditors Arrangement Act (CCAA) restructuring proceedings and subsequently were placed in bankruptcy, most often on a motion by the creditors. 15% of plan sponsors attempted a restructuring under the BIA proposal provisions prior to being bankrupt and making a claim on the PBGF. There were only two proposals under the BIA that did not end up in bankruptcy that resulted in claims paid out of the PBGF, not surprising because proposals can mean that pension plans are preserved or amended in a going forward restructured plan sponsor.

27% of the cases in which claims were paid by the PBGF involved the appointment of a private receiver. After a private receiver was appointed, 22% of total plan sponsors that had claims to the PBGF were voluntarily or involuntarily placed into bankruptcy, with a plan termination during or after the receivership. 5% appear not to have been placed in bankruptcy after appointment of a receiver. One explanation could be that the plan sponsor was liquidated by the privately appointed receiver without a bankruptcy proceeding, but the pension plans were terminated because they were no longer being funded. The data does not reveal, however, whether the receiver was appointed because of the pension deficiency or some other reason.

The total claims paid out of the Ontario PBGF to plan sponsors in BIA proceedings was 358,807,730 CAD an average of 4,784,103 CAD per debtor company plan sponsor. It is important, however, to look at the median amount paid, and here, the amount paid to pension plans where the plan sponsor was in BIA proceedings was 804,609 CAD. The median may be a more helpful figure in terms of understanding what is happening across all plan sponsors as a few outliers can skew the mean results.

There are only two CCAA proceedings that did not terminate in bankruptcy that have resulted in a claim paid out by the PBGF. Of these two CCAA cases, only the claims of Algoma Steel were significant; the PBGF paid out 464,816,700 CAD in claims to its four pension plans. That figure

332 Ibid. Bankruptcy and Insolvency Act (BIA) and Companies’ Creditors Arrangement Act (CCAA), as discussed earlier.
333 Ibid. at 50.
334 Ibid.
335 Ibid.
336 Ibid. Court-appointed receivers appear to be only infrequently used for these types of cases, specifically, only three cases since 1980, other than one CCAA proceeding that used a court-appointed receiver as it transitioned to bankruptcy.
337 For example, under the “privately appointed receiver” category, Oxford Automotive Canada Ltd.’s four pension plans had claims paid in the order of $25.8 million, whereas the other three plan sponsors with receivers appointed only had claims paid ranging from $51,785 to $125,000, ibid.
represents 53% of the total amount paid out by the PBGF since its inception, all to the one plan sponsor. Of the five proceedings that commenced as CCAA cases and then became bankruptcies, the total claims paid by the PBGF have been 190,704,266 CAD.\textsuperscript{339} While Ontario cases represent 40% of all filings under the CCAA, there is not an accurate indication of the number of pension plans registered in Ontario for which CCAA proceedings were commenced, as Canadian pension legislation generally allows the plans to be filed in the jurisdiction where most of the employees are located.\textsuperscript{340}

The availability of a pension guarantee fund does not, however, mean that employees’ pensions are fully protected on insolvency. Post insolvency proceedings in Canada, there are often lower benefits under a new benefit formula, even though the contributions to the point of insolvency were based on a higher level of benefits in the pension plan.\textsuperscript{341} The new benefit formula imposes a loss on the current pension plan members. Pension beneficiaries do not usually suffer a loss as their benefits are usually locked in.\textsuperscript{342}

In some instances, the pension plan going forward is closed to new members such that employees that are hired by the restructured debtor company after the date of plan amendment do not have access to the pension plan.\textsuperscript{343} Closing plans to future members can reduce the cash drain on the debtor company by reducing the contribution to only those required to keep present members fully funded. To the extent that the debtor was anticipating an increased number of employees, it will save on contributions. However, such an option creates a risk to future employees in terms of their ability to fund their retirement years.\textsuperscript{344} In this respect, insolvency risk is balanced with other considerations such as the adequacy of benefits.

Another strategy used in insolvency proceedings is to amend the pre-insolvency benefits by terminating the defined benefit pension plan and creating a defined contribution pension plan, shifting the investment and insolvency risk to employees and in most cases, generating lower pension benefits for plan members.\textsuperscript{345} It is an insolvency restructuring strategy that reallocates the risks to employees, while capping the insolvency risk; but the strategy may facilitate the debtor company being able to continue operating, and employees continuing to have employment.\textsuperscript{346}

In Canada, pension underfunding has also been addressed through federal Solvency Funding Relief Regulations 2006, which set out new five and ten year rules for funding by special payments sufficient to liquidate solvency deficiency, and similar legislation enacted in some provincial jurisdictions.\textsuperscript{347} The federal pension regulations and some provincial pension regulations have also been amended to permit the use of letters of credit instead of contributions to cover pension shortfalls or deficits.\textsuperscript{348} While a discussion of these measures is beyond the scope of this text, it is

\textsuperscript{339} Ibid.
\textsuperscript{340} Ibid. Moreover, one cannot necessarily conclude that the CCAA is always a positive process for pension plans, because there is a lack of data in respect of the outcome of CCAA proceedings that did not access the PBGF even though there was a pension deficiency.
\textsuperscript{341} Ibid. at 44.
\textsuperscript{342} Ibid.
\textsuperscript{343} Ibid.
\textsuperscript{344} For a full discussion of this issue, see Sarra and Davis, \textit{ibid.}
\textsuperscript{345} Ibid. at 44.
\textsuperscript{346} Ibid.
\textsuperscript{347} Solvency Funding Relief Regulations under the Pension Benefits Standards Act, 1985, SOR/2006-275, 7 November 2006, s. 5. The ten year rule applies only where less than one third of the members and less than one third of the beneficiaries excluding members object, in which case the plan sponsor can defer the five year requirement by special payments sufficient to liquidate the initial solvency deficiency by equal annual payments over a period not exceeding ten years from the day on which the initial solvency deficiency emerged, s. 6.
\textsuperscript{348} Solvency Funding Relief Regulations under the Pension Benefits Standards Act, 1985, SOR/2006-275, 7 November 2006, s. 5. The regulation specifies that despite the Pension Benefits Standards Regulations, 1985, an initial solvency deficiency of a plan may be funded by special payments sufficient to liquidate the initial solvency deficiency by equal annual payments over a period not exceeding ten years from the day on which the initial solvency deficiency emerged. This period is permitted if the plan sponsor obtains letters of credit for each of the first five plan years of funding, for the amount representing the difference between the present value of the remaining special payments and the present value of the remaining special payments that would have been required to be made to liquidate...
important to recognize that multiple strategies are being used to address pension underfunding, and
that not all of these strategies are necessarily beneficial to employee and pensioner claimants.349

Finland

While Finland does not have a super-priority for pension claims, it does have a pension payment
guarantee fund, funded through a mix of industry funding, employer or industry tax and general tax
revenue.350 The fund normally covers up to 60% of the person’s last monthly salary. The pension
payment guarantee fund is strictly regulated by the government in order to ensure adequate
capitalization.351 Unremitted pension contributions are treated as unsecured claims and the state is
subrogated to the pension claims of individuals. The company must cover any under-funding of
pension liabilities in a restructuring, but in a pure bankruptcy proceeding, claims must be filed for
amounts owing.352 Pekka Jaatinen observes that there is not an issue of legacy costs in Finland
because the pension system is in the hands of highly regulated pension institutions.353

Germany

In Germany, there is no direct super-priority for the payment of pension claims. There is however, a
pension payment guarantee fund for pension claims during insolvency, the *Pensions-Sicherungs-
Verein Versicherungsvorlage auf Gegenseitigkeit*, which is industry funded.354 Employees are entitled
to the same level of benefits as the employer would have to pay if it had not become insolvent. The
pension payment guarantee fund is sufficiently funded, on the same financing system as for wage
claims.355 The fund was created by §§ 7 -14 BetrAVG (*Gesetz zur Verbesserung der betrieblichen
Altersversorgung* of 19 December 1974). Unremitted pension contributions of the debtor are to be
honoured by the Pension Security Fund, if earned after the 30th birthday, for at least five years, and
they are treated as ordinary claims.356

United Kingdom

In the United Kingdom, the *Pensions Act of 2004*, effective April 2005, created a new Pension
Protection Fund (PPF), which is a separate entity from the Pensions Regulator.357 The PPF was
established to pay compensation to members of eligible defined benefit and hybrid pension schemes
with a defined benefit element, when there was a qualifying insolvency event in relation to the plan
sponsor on or after April 6, 2005 and where there are insufficient assets in the pension plan to cover
levels of compensation that are at least equal to those provided by the PPF. The PPF also covers
shortfalls in any pension schemes caused by fraud or theft.358 The PPF is funded by compulsory
levies charged to eligible pension schemes. The PPF has three sources of income: the levy on
eligible schemes; the pension scheme assets, including recoveries from the insolvencies through a

349 For a full discussion of these issues, see Janis P. Sarra and Ronald B. Davis, *Analysis of Factors
Leading to Insolvency and Study for the Restructuring and Their Effects on Pension Plan Wind-Ups
350 Pekka Jaatinen, Finland country contributor, 2008.
351 Ibid. Jaatinen observes that in general, every employer has to be a member of one pension institution
and the payment amounts per employee are clearly calculated based on one’s salary.
352 Ibid.
353 Ibid.
354 Peter Gottwald, country contributor, 2008.
355 Ibid.
356 Ibid.
357 Ibid.
359 Pension Protection Fund, *Policy Statement on the Possible Inclusion of Investment Risk as a Risk
claims dividend and income from equity in ongoing restructured companies; and investment returns on the foregoing. 359 By 31 March 2007, the PPF was 88 per cent funded against its liabilities. 360

The UK’s PPF will pay two levels of compensation. A 100% level of compensation is available for people who, at the start of the PPF’s involvement with a scheme, the assessment date, have reached the scheme’s normal pension age or who have retired on ill-health grounds or are in receipt of survivors’ benefit. 361 Only the part of this compensation that is derived from employment on or after 6 April 1997, the date when indexation became a statutory, rather than voluntary, requirement will be increased each year (up to a maximum of 2.5%). 362 The second level, referred to as the “90% level of compensation”, is for the majority of people below the scheme’s normal pension age at the start of the assessment process. It is based on the pension an individual had accrued immediately before the assessment date, again subject to a review of the scheme by the PPF. 363 Stewart notes that “this amount is then revalued in line with the increase of the Retail Prices Index between the assessment date and the commencement of compensation payments (subject to an overall maximum calculated by assuming RPI increased by 5% each year) – this helps to ensure the pension holds its value”, and once revaluation is calculated a cap is then imposed. 364

If a plan member in the UK has retired but has not yet reached the normal pension age of his or her pension scheme or if the person has yet to start receiving payments, the PPF will pay up to 90 per cent compensation. The total level of compensation is subject to an overall cap that is recalculated each year. Between April 2007 and March 2008, the cap at the age of 65 is set at £29,928.56. 365 This amount is £26,935.70 for those receiving compensation at the 90 per cent level. 366 Stewart explains that the cap will be reduced if members receive compensation before reaching 65 or if they have elected to commute part of their pension for a lump sum, because to do otherwise would make their overall compensation package of higher value and create unfairness to other members. 367 Benefits under the PPF are indexed.

More generally in respect of pension guarantee funds, unlike the wage compensation guarantee funds, for pension guarantee funds, there is an issue of the cost of such funds, and need for substantial state subsidization of debtors. The potential under-funding problems have only made their appearance in recent years with the financial distress of some of the so-named legacy industries, which had offered secure pension plans as a key component in the deferred compensation system. Some countries have moved to address potential under-funding problems. For example, the UK fund has broad powers to impose risk-based premiums where it is under-funded. The United States is an example of a jurisdiction facing serious challenges in respect of systemic underfunding of the pension promise.

United States

In the United States, the Pension Benefit Guaranty Corporation (PBGC) was created as part of the Employee Retirement Income Security Act of 1974 (ERISA). 368 Its purpose is to encourage the continuation of private-sector defined benefit pension plans, provide timely and uninterrupted payment of pension benefits, and keep insurance benefits at a minimum. 369 The PBGC covers single and multi-employer defined contribution pension plans, covering 44.1 million US workers participating

360 Ibid.
361 Stewart, supra, at 22.
362 Ibid.
364 26,935.70 GBP is 52,816 CAD.
366 Stewart, supra, at 23.
in 30,330 defined benefit pension plans. Maximum benefits, depending on years of service and age, are 47,659 USD under a single plan sponsor pension plan and 12,870 USD under a multi-employer pension scheme. Early retirement and unvested benefits are not covered. The PBGC will pay guaranteed benefits, to a cap, where a plan is terminated on a distressed termination basis, i.e. where the plan sponsor voluntarily terminates its pension plan having filed for bankruptcy or if the pension costs are an unreasonable burden due to a decline of the number of employees covered. The PBGC can seek an involuntary termination of a pension plan if it determines that, among other things, the plan has not been properly funded, or that PBGC’s possible long-run loss with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The PBGC pays monthly retirement benefits to 683,000 pensioners in 3,595 pension plans that have terminated.

On bankruptcy of a member plan sponsor, the US PBGC becomes the trustee of plan assets and administers payment of the future plan benefits up to a capped amount, based on whether the plan is a single or multi-employer plan. It also assumes all of the claims under the pension plan members’ agreement with the insolvent plan sponsor. The PBGC has the power to place a lien on non-bankrupt plan sponsor’s assets if it misses pension contributions, but is not able to do so for bankrupt companies. With respect to the bankruptcy of a plan sponsor in a multi-employer plan, the insolvency of the plan sponsor does not trigger access to PBGC; rather, the PBGC only becomes involved when the multi-employer plan does not have assets to make the benefits payments, often in the form of loans. The PBGC derives its revenue from premiums, trustee assets and investment income. Since enactment of the Pension Protection Act of 1987, plan sponsors are now liable for the full amount of unfunded benefit liabilities to all plan members and beneficiaries; with the Act imposing a statutory lien on the assets 60 days after a contribution has been missed and the total amount of missed contributions exceed 1 million USD. The amount of the lien is the amount of missed contributions in excess of 1 million USD and the remaining amount of the PBGC’s bankruptcy claims are treated as general unsecured claims.

The US PBGC protects itself from insolvency risk by treating benefits created by plan amendments less than five years prior to bankruptcy differently; specifically, the guaranteed benefits are phased in at a rate of 20% per year. This mechanism assists in preventing the creation of incentives to augment the pension plan promise in the period prior to bankruptcy, such that costs of the promise are shifted to the state.

The difficulty the PBGC faces is that companies file Chapter 11 proceedings in order to shed onerous pension obligations and recommence business at lower costs. Sprayregen and Mazza also observe that the coalescence of a decline in the U.S. stock market, the lowering of interest rates, and an increase in the ratio of pensioners to active workers, has resulted in massively underfunded defined benefit pension plans in the US.

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371 Ibid.
372 The guaranteed amount is capped at approximately $47,000 USD per year and depends on factors such as a pensioner’s age.
375 Recall the discussion in Part 1 of this study that the term bankruptcy in the US refers to both insolvency restructuring and liquidation proceedings.
377 Stewart, supra, note 310 at 14.
379 Stewart, supra, note 310.
380 Ibid. at 14.
381 James H.M. Sprayregen, P.C & James J. Mazza, “Weaving the Safety Net for an Aging World: Lessons Learned from the Pension and Insolvency Systems in the United States United Kingdom, and
on plan sponsors. They note that in 2005, US unfunded pension liabilities were estimated to be 146 billion USD and that three-quarters of the companies on America’s S&P 500 index have defined benefit pension plans. Sprayregen and Mazza suggest that as a result of pension liabilities, some US plan sponsors have used Chapter 11 of the United States Bankruptcy Code to eliminate the effects of these obligations on their balance sheets and remain competitive in the global marketplace.

The PBGC surplus became a deficit when stock returns dropped and large pension plan sponsors entered bankruptcy, particularly after 2000, leaving the PBGC with billions of dollars in additional liabilities. Some commentators suggest this has occurred in the types of assumptions used by plan sponsors concerning everything from the expected retirement age to the expected mortality experience amongst plan members; with the result of adopting the assumptions being lower contribution rates for the sponsor.

As of September 30, 2007, the single-employer and multi-employer programs reported deficits of 13.1 billion USD and 955 million USD, respectively. The PBGC reports that the single-employer program had total assets of over 67.2 billion USD offset by total liabilities of 80.4 billion USD, which include a total present value of future benefits of 69.2 billion USD; and the multi-employer program had assets of approximately 1.2 billion USD offset by approximately 2.1 billion USD in present value of non-recoverable future financial assistance. It reported, however, that notwithstanding these deficits, the PBGC has sufficient liquidity to meet its obligations for a number of years, but that neither program has the resources to fully satisfy the PBGC’s long-term obligations to plan participants.

The US has taken some recent action to reduce the insolvency risk of the PBGC. In 2006, the PBGC adjusted its flat-rate premiums for inflation each year, based on changes in the national average wage index. PBGC’s flat-rate premium for the 2007 plan year was 31 USD per participant for single-employer plans and 8 USD per participant for multiemployer plans. For the 2008 plan year, those amounts are increased to 33 USD for single-employer plans and 9 USD for multimeployer plans.

Changes to ERISA repealed existing funding rules for defined benefit pension plans for plan years beginning after 2007, aimed at enhancing the funding of pension plans. The amending legislation establishes new minimum funding standards for single-employer defined benefit pension plans,
single-employer money purchase plans, and multi-employer plans, including requiring employers to pay certain minimum required contributions. There is, however, some ability to waive the requirements for hardship.\textsuperscript{380}

Notwithstanding these initiatives, there considers to be a serious problem in the US with the underfunding of employer-sponsored pension plans, a problem that crystallizes on debt company insolvency.

D. Provident Funds

A number of jurisdictions in the Pan-Pacific region have Provident Funds, which are broader funds that address pension or superannuation guarantees, both for insolvent and solvent companies; Malaysia, Thailand, Singapore and India are examples, two of which are briefly described here.

Singapore

In Singapore, superannuation and provident fund claims are granted priority under Singapore law, with priority for contributions payable during the 12 months before, on or after the commencement of the winding up of the employer company in liquidation or bankrupt employer.\textsuperscript{391} Singapore has a superannuation fund for all employees, provided for by the Central Provident Fund Act (Cap. 36, Statutes of Singapore).\textsuperscript{392} Both employers and employees are mandated to contribute at prescribed rates; and the rate of contribution is set by the Government based on its assessment of the required level of funds that an employee would need to sustain basic needs upon retirement.\textsuperscript{393} Kannan Ramesh reports that reference is made to the general economic conditions and the ability of employers to sustain the level of contribution.\textsuperscript{394}

India

In India, contributions due from the company to the Provident Fund Account of the worker are maintained under the Employees’ Provident Funds Act, 1952, is a debt entitled to preference within the meaning provided under § 530 of the Companies Act as well as under the Provident Fund Act §11.\textsuperscript{395} The pension is organized under the Employees’ Pension Scheme, 1995, this is a pension guaranteed fund that is supervised and maintained by the Central Government.\textsuperscript{396} The funds made available under this scheme are non attachable to any credit on individual or institution. Recovery of the funds from the employer under this scheme, which has not been contributed, enjoys a super priority over all other debts.\textsuperscript{397} Under the Employees’ Pension Scheme, 1995, the employer has to make a matching contribution of 10% and 12% of the employees’ pay to the Provident Fund Account; and at 8.33% of the employees’ basic wages to the Pension Fund.\textsuperscript{398} This fund also enjoys a priority of payment of contributions over other debts as per §11 of the Act where any employer is adjudicated insolvent or, being a company, an order for winding up is made. The amount due, if any amount is due from an employer, whether in respect of the employee’s contribution deducted from the wages of the employees or the employer’s contribution, is deemed to be the first charge on the assets of the establishment, and notwithstanding anything contained in any other law in force, is to be paid in priority to all other debts.\textsuperscript{399} The limit of the pension fund is capped by the contribution made by the

\textsuperscript{380} Ibid. The amendments allow the Secretary of the Treasury to waive minimum funding standards in the event of a temporary substantial business hardship for single-employer plans or a substantial business hardship in the case of a multiemployer plan if application of the standard would be adverse to the interests of plan participants in the aggregate; require a single-employer maintaining such a plan to provide security to such plan as a condition for granting or modifying a waiver, however, there are limits on the number of waivers that may be granted.

\textsuperscript{381} Kannan Ramesh, Singapore country contributor, 2008.

\textsuperscript{382} Ibid.

\textsuperscript{383} Ibid.

\textsuperscript{384} Ibid.

\textsuperscript{385} Ibid.

\textsuperscript{386} Professor Vaneeta Patnaik, India country contributor, 2008.

\textsuperscript{387} Through its representations on the board and through appointments of public servants; ibid.

\textsuperscript{388} Ibid.

\textsuperscript{389} Ibid.

\textsuperscript{390} Ibid.
employee and the employer to the minimum level prescribed from time to time by the Central Government.\textsuperscript{400}

In sum, the pension issues in insolvency are complex. For a number of jurisdictions, as discussed above, the unfulfilled pension promise poses a real challenge at the point of a debtor company’s insolvency. For a number of other jurisdictions, there is no pension issue, as the system is fully funded separately from companies and their financial health. Considerably more research is required in respect of pension issues at the point of firm distress.

IX. Director and Officer Liability for Social Claims during Insolvency

The imposition of liability on directors and officers for wages and related compensation claims and for unremitting pension contributions during insolvency is not a tool that is expressly utilized in the majority of jurisdictions surveyed.

For those jurisdictions that do impose such liability, the underlying policy premise of a director liability regime is that corporations act only through real people and that corporate law has granted corporations considerable power to engage in wealth creating activity that could cause various harms.\textsuperscript{401} Hence, there needs to be an incentive for those with oversight of the corporation to ensure that harms are minimized or their personal wealth may be at stake. Since employees are particularly vulnerable claimants, some jurisdictions have made these corporate decision makers responsible for ensuring that the employees are paid in the period leading up to insolvency proceedings.

Even where directors are found jointly and severally liable for particular conduct, indemnification by the corporation and insurance purchased on the directors’ behalf often means that directors themselves are not usually ‘out of pocket’ from a finding of director liability. It is only where the corporation is insolvent and there are not sufficient assets or insurance to cover the liability does the threat to directors’ personal assets become a real possibility.

Graph 9 illustrates director and officer liability during insolvency for the countries in the study. It is evident that specific statutorily imposed personal liability is not frequently used. Only 22% report that there is expressly imposed director and officer liability for wage and pension claims arising during the firm’s insolvency.

However, the majority of the jurisdictions surveyed report that there is potential director personal liability, either where the conduct of the directors includes failure to comply with statutory requirements, or where the directors have engaged in gross misconduct or malfeasance in relation to claims. Graph 9 illustrates that 33% of reporting jurisdictions specify that directors and officers can generally be held liable for failure to comply with remedial statutes, including failure to meet wage and related payments under employment standards legislation.

For 17% of the countries, liability will only be imposed where the officer has engaged in gross misconduct, malfeasance or criminal intent or conduct, a very high threshold before any liability will be imposed. Graph 9 also illustrates that 28% of jurisdictions do not place any personal liability on directors and officers for claims that may arise during insolvency proceedings with respect to employees and pensioners.

\textsuperscript{400} Ibid.\textsuperscript{401} Janis P. Sarra and Ronald B. Davis, \textit{Director and Officer Liability in Corporate Insolvency} (Toronto: Butterworths, 2002).
Where there is potential liability for directors and officers, the majority of jurisdictions do not place limits on the amount of liability at risk, as illustrated by columns 1 and 2 of the next graph. Graph 10 indicates that of those jurisdictions reporting on this issue, 28% place a cap on the amount of potential personal liability, whereas 72% report that there is no limit on liability, although as noted above, the nature of conduct for which directors and officers can be held liable varies considerably between jurisdictions.

A number of jurisdictions do allow such claims against directors and officers to be compromised during insolvency restructuring proceedings, as illustrated in columns 3 and 4 of Graph 10. 54% report that restructuring proceedings allow for claims against directors and officers to be compromised or eliminated, whereas 48% report that there is no ability to compromise such claims during insolvency proceedings.
Canada

In most jurisdictions in Canada, directors and officers are liable, under either corporate law statutes or provincial employment standard legislation for six months of employee wages in the period leading up to insolvency.402 Federal, provincial and territorial statutes specify that directors may be held personally liable to the employees of the corporation for wages and related compensation, frequently limited to six months’ wages.403 Such liability, of course, only becomes significant where the corporation has failed to pay, usually in the period leading up to financial distress. While the liability includes wages, vacation pay and other payment for services rendered to the corporation, failure to pay severance pay is not included.404 The courts have held that failure to pay severance is breach of

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402 See, for example, ss. 119, Canada Business Corporations Act, and section 96, Québec Companies’ Act, R.S.Q., c. C-38. There are also very specific obligations in respect of registered pension plans in some Canadian jurisdictions, see for example, ss. 52, 53 of the Québec Supplemental Pensions Plan Act, R.S.Q. c. R-15.1, which provides for director liability for contributions that became due and remained unpaid during the directors’ term of office, with interest, up to a contributory period of six months, unless the fund is managed by the employer, in which case there is no limit. It should be noted that in the context of the liability of directors for employee wages, the six months’ limit represents a quantum limit, not a time span limit (see in this respect Barrette v. Crabtree (succession de), 1993 CarswellQue 25 (S.C.C.)). It should also be noted that although the CBCA (and the Québec Companies’ Act) make directors jointly and severally (or solidarily) liable for employees’ wages, this liability is not automatic but is subject to conditions. In respect of the CBCA, the conditions are found in ss. 119(2) and 119(3) thereof.

403 Related compensation can include vacation pay and guaranteed bonuses; Mills-Hughes et al v. Raynor et al (1988), 63 O.R. (2d) 343 and 730(n) (Ont. C.A.).

404 Incidentally, the employee could put forward a claim for termination or severance as a claim provable in the bankruptcy proceedings, however this claim would not be a preferred claim under s. 136 of the BIA, as such claim does not relate to the 6 months immediately preceding the bankruptcy, and such claim is not “for services rendered” to the bankrupt but rather for the breach of the employment agreement. See in this respect re: Rizzo & Rizzo Shoes Ltd., 1998 CarswellOnt 1 (S.C.C.).
contract and not a debt to employees for services rendered so as to give rise to a claim again
directors. 405 The exception may be where a collective agreement makes severance assimilable to
wages or salaries by creating an entitlement to severance pay on dismissal based on a formula of
service. In such a situation, the Québec Court of Appeal has held directors liable for payment of
severance. 406

The liability in Canada is joint and several or solidarily; thus, employees can look to each of the
directors. 407 Usually, the corporation has indemnified its directors against such liability, and therefore
the liability only becomes significant when the corporation becomes insolvent and there are
insufficient assets to cover the outstanding wages owing. The liability provisions are contained in
Canadian corporate statutes and employment standards legislation. The Canadian Business
Corporations Act provisions are illustrative:

Liability of directors for wages

119. (1) Directors of a corporation are jointly and severally, or solidarily, liable to
employees of the corporation for all debts not exceeding six months wages
payable to each such employee for services performed for the corporation while
they are such directors respectively.

(2) A director is not liable under subsection (1) unless

(a) the corporation has been sued for the debt within six months after it has
become due and execution has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation and dissolution proceedings or
has been dissolved and a claim for the debt has been proved within six months
after the earlier of the date of commencement of the liquidation and dissolution
proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been
made against it under the Bankruptcy and Insolvency Act and a claim for the debt
has been proved within six months after the date of the assignment or bankruptcy
order.

Directors are only liable for wages and other compensation owing in the period that they served as a
director. 408 The director must be sued within two years after ceasing to be a director. There is,
under the CBCA, a due diligence defence, specifically, a director is not liable for outstanding wages if
the director has exercised the care, diligence and skill that a reasonably prudent person would have
exercised in comparable circumstances, including reliance in good faith on financial statements of
the corporation represented to the director by an officer of the corporation, a written report of the
corporation’s auditor, or an expert report. 410 Where the director pays for outstanding wages in a
dissolution or bankruptcy proceeding, the director is entitled to take any preference that the
employees enjoyed for those wages in terms of a claim on the bankruptcy estate and is entitled to
contribution from other directors found liable. 411

405 Barrette v. Crabtree (Succession de), [1993] 1 S.C.R. 1027.
406 Schwartz v. Scott (1985), 32 B.L.R. 1 (Que. C.A.). See also the analysis of the Court in re:
Coopérants, Mutual Life Insurance Society, 1997 CarswellQue 234 (Qué. C.A.).
407 Ibid., section 119.
409 Section 119(3), CBCA.
410 Section 123, CBCA.
411 Note however that notwithstanding s. 119(5) of the CBCA, a director
who paid a wage claim would not be entitled to the indemnity which the employee could receive under
the Wage Eamer Protection Payment Act, and it is unsure whether a director could benefit from the
statutory charge referred to in section 81.3 or 81.4 of the BIA, in view of the wording of sections 81.3(6)
and 81.4(6) BIA, when Chapter 47 Statutes of Canada 2005 and Chapter 36 Statutes of Canada 2007
are proclaimed in force.
In respect of this obligation, Canada imposes more liability than some other jurisdictions. However, it has not generally caused a liability chill as Canadian boards have often adopted a practice whereby directors are given assurances at each board meeting regarding compliance with statutory wage requirements. When corporations are insolvent, directors have an incentive to stay on the board for any restructuring period to ensure that outstanding wage claims are paid. In some Canadian jurisdictions, employment standards legislation also makes the directors potentially liable for outstanding wage and related compensation claims by employees. The Ontario Employment Standards Act permits directors to be prosecuted personally for the contraventions of a corporation in order to deter the corporation’s controlling minds from contravening the legislation.

The reality is, however, that corporations generally indemnify directors against wage claims and related compensation owing, protecting them from any failure of the corporation to pay. In particular, outside directors are less likely to be held personally liable, although prudent practice would suggest that they make duly diligent attempts to ensure compensation obligations are being met. One study of the potential liability of directors in several jurisdictions found that outside directors of publicly held companies were in little danger of personal liability for wages and similar statutory liability. The Ontario Employment Standards Act permits directors to be prosecuted personally for the contraventions of a corporation in order to deter the corporation’s controlling minds from contravening the legislation.

The reality is, however, that corporations generally indemnify directors against wage claims and related compensation owing, protecting them from any failure of the corporation to pay. In particular, outside directors are less likely to be held personally liable, although prudent practice would suggest that they make duly diligent attempts to ensure compensation obligations are being met. One study of the potential liability of directors in several jurisdictions found that outside directors of publicly held companies were in little danger of personal liability for wages and similar statutory liability. Certainly, in insolvency, wage claims are often the first to be met, so that employees will continue to work during a restructuring or pending liquidation or a going-concern sale, and because the liability risk is a driver for directors to ensure such payments are made.

Moreover, the proposed legislative amendments to Canadian insolvency law will codify the ability of directors to receive an indemnification against personal liability as a priority charge on assets of the debtor, as one mechanism to encourage directors to remain during workout proceedings. Pursuant to s. 64.1(1) of the proposed amended BIA, directors in a proposal proceeding, on notice to the secured creditors that are likely to be affected by the security or charge, authorises the court to make an order declaring that all or part of the property of the debtor is subject to a security or charge, in an amount that the court considers appropriate, in favour of any director or officer to indemnify the director or officer against obligations and liabilities arising after the filing of the notice of intention or the proposal. The court may order that the security or charge rank in priority over the claim of any secured creditor; however, the court may not make the order if, in its opinion, the debtor could obtain adequate indemnification insurance for the director or officer at a reasonable cost. Section 64.1(4) specifies that the court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if, in its opinion, the liability was incurred as a result of the director’s or officer’s gross negligence or wilful misconduct or, in Québec, the director’s or officer’s gross or intentional fault. Identical provisions are being enacted for director indemnification under the Companies’ Creditors Arrangement Act (CCAA).

Both the Canadian BIA and the CCAA permit compromise of claims against directors that arose before the commencement of proceedings under the CCAA.

Under the proposed Canadian Wage Earner Protection Program Act (WEPP), discussed above, the federal government would receive the right of subrogation to the employees’ claims for unpaid wages.

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413 Black and Cheffins report that an electronic search did not reveal the imposition of personal liability on an outside director of a public company for wages owing, the authors concluding that while liability for unpaid wages poses dangers for outside directors, the risks seem more theoretical than actual. Brian R. Cheffins and Bernard S. Black, "Outside Director Liability across Countries", European Corporate Governance Institute, Working Paper No. 71/2006.
414 Section 50(13) BIA and section 5.1, CCAA. Jean-Daniel Breton notes, however, that the usefulness of these provisions is very questionable, considering the fact that in general, a restructuring proceeding under the BIA or the CCAA is not a triggering event giving rise to a director’s liability in respect of the claims that are the usual cause of concern for directors (i.e. employee claims and fiscal laws), that the principal claims that are a cause of concern for directors (namely wage claims and payroll source deductions) have to be paid in full in the context of an approved proposal or plan, and that in any event the protection afforded by the provisions of the BIA and CCAA seems to be effective only in situations where the restructuring plan is successful. For an example of the triggering conditions for a directors’ liability to attach, see s. 119(2) of the CBCA (for employee claims) and s. 227.1(2) of the Income Tax Act (for payroll source deductions). Jean-Daniel Breton, Canada country contributor, 2008.
in return for the payment from the WEPP. This right of the Crown to enforce could mean that directors who were not covered by insurance could face a consolidated claim from the federal government for all of the wages owing to employees, for which WEPP payments have been made. It is expected the federal government will first pursue the bankrupt estate for the amount paid to employees under the WEPP, and where there are insufficient assets, may seek the remaining balance from the directors personally. Where employees are owed greater than 3,000 CAD, directors will still be personally liable where employees file a suit against them personally.

**China**

In China, Under Article 6 of 2006 Enterprises Bankruptcy Law, in the hearing of a bankruptcy case, the People's Court is to guarantee the legitimate rights and interests of the employers in the insolvent enterprise and subject its directors and managers to legal liabilities. Further, there is a general provision involving the legal liability of corporate directors, supervisors or senior managers. Under Article 125, where a director, supervisor or senior manager violates his or her obligations of honesty and diligence, and thus leads to enterprise’s bankruptcy, he or she shall be subject to the relevant civil liabilities according to law. None of these persons may, within three years of the day when the procedures for bankruptcy are concluded, assume the post of director or senior manager of any enterprise.

Professor Jingxia Shi observes that while the provision is not specifically about the social claims, it may apply to employee wage and pension claims since the violation of fiduciary duties might result in the bankruptcy of enterprise, which then cause the failure to pay or make contributions towards social claims/or pension funds. Under this situation, Jingxia Shi observes that it can be inferred that corporate directors have personal liability to some degree, but overall, the purpose of this article does not intend to provide for such liability specifically.

**Greece**

Under Greek law, directors are personally and jointly liable, together with the legal entity, for failing to make the compulsory contributions to the Social Security Institution. There is no limit to this liability and such claims cannot generally be compromised or settled during an insolvency workout or insolvency proceeding.

**Finland**

Directors and officers in Finland are potentially liable for social claims during insolvency if payments are not paid; generally the statutory provisions require payments to be delivered every tenth day of the following month, encouraging currency of payment. There is no cap on the potential liability, but such claims can be compromised or settled during an insolvency workout.

**Belgium**

In Belgium, the employer is responsible for the employees who failed to carry out the payments (Article 78 on the Law of Closure of Undertakings). The persons responsible within the company, i.e.

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415 Under the Wage Earner Protection Program Act (WEPP), employees’ unpaid wages for services rendered within the six months prior to bankruptcy/receivership will be paid up to a maximum of $3,000 from the federal government’s Consolidated Revenue Fund, less an amount prescribed by regulation. Section 36(1) of the WEPP. If a payment is made under the WEPP the federal government would be subrogated to the rights the employee would have against the bankrupt or insolvent employer, namely the right to preference under section 136 of the BIA and the proposed new statutory charge under ss. 81.3 and 81.4 of the BIA.

416 Ibid.

417 Professor Jingxia Shi, China country contributor, 2007.

418 Ibid.

419 Ibid.

420 Ibid.


422 Ibid.


424 Ibid.
persons who have decisive power, carry the same liability as the employer, including directors and officers.\textsuperscript{425} Infringement of social security legislation in general, as for example, for the payment of wages, social security payments are subject to criminal sanctions.

Subject to article 269, 271 to 274 of the Belgian Criminal Code, directors and officers are subject to an imprisonment between 8 days to one month and a criminal penalty between 130 Euro and 2,500 Euro in case of failure to reimburse the Closure Fund in accordance with article 76 of the Law on Closure of Undertakings. Article 1, 10° of the Law of June 30, 1971 regarding administrative penalties in case of non-compliance with social laws provides for administrative penalties between 50 to 1 250 Euro payable by the employer in case of failure to reimburse the Closure Fund. These penalties are payable by the employer and not the persons acting on behalf of the employer.\textsuperscript{426}

Claims against directors and officers cannot be compromised or settled during an insolvency workout or insolvency proceeding in Belgium. Compensation is only allowed when provided by law, by agreement or decided in a judgment. In practice, as these claims are mainly claims against the company, there is no need for such compensation.\textsuperscript{427}

Kuwait

Kuwaiti law contains no specific provisions concerning director and officer liability for failure to pay or make contributions towards social claims. However, the directors, managers or liquidators can be held personally liable for certain actions as provided in Article 789 and 791 of the Law of Commerce No. 68 of 1980.\textsuperscript{428} As per Article 791 of the Law of Commerce, where a final adjudication of bankruptcy is entered against a company, its directors and officers can be punished with imprisonment for a period not more than three years where it has been established that they have committed any one of a list of specified acts, including, if they have disposed of the assets of the company after it had suspended payment with the intent to deprive the creditors thereof; if they discharged the debt of a creditor, after the company has suspended payment, to the prejudice of the other creditors, or where they have constituted securities or special privileges to a creditor in preference to the others, even when the same is made for obtaining a composition/scheme; or if they disposed of the assets of the company at lower than the ordinary price, intending to delay the company’s bankruptcy.\textsuperscript{429} Hence, while there is no direct liability for failure to pay wage and related claims, there are serious liability consequences if the directors and officers shifted funds in any of the specified ways, rather than direct them to employees and other creditors.

Most jurisdictions in the study do not impose personal liability on directors and officers for outstanding wage and pension claims. Even where there is the potential for liability, overall, directors are not particularly vulnerable to personal liability during insolvency where they have been duly diligent in their efforts to ensure that employee and wage claims are paid in a timely manner. Where they are held liable, in numerous jurisdictions there is a higher threshold to liability than simply the company’s failure to pay in the period prior to insolvency.

X. Treatment of Collective Bargaining Arrangements

The survey examined a number of aspects of the collective bargaining relationship, including how collective agreements are treated on commencement of insolvency proceedings, what occurs with those agreements with liquidation and restructuring, and what judicial or quasi-judicial body determines disputes.

The majority of jurisdictions have express statutory language that collective agreements continue when the debtor company enters insolvency proceedings. This is distinguishable from the trustee, administrator or other insolvency professional’s ability to terminate employees. Most jurisdictions

\textsuperscript{425} Nora Wouters, Belgium country contributor, 2008.
\textsuperscript{427} Ibid.
\textsuperscript{428} Anupama Nair, Kuwait country contributor, 2008.
\textsuperscript{429} Ibid.
allow the insolvency professional to terminate individual employment contracts as long as they comply with statutory requirements and meet requirements of the collective agreements.

The majority of jurisdictions reported that collective agreements continue after a restructuring, as illustrated by Graph 11 below. On the filing of an insolvency proceeding, 76% of collective agreements remain in force, at least during the initial part of the proceeding, whereas 24% of collective agreements are terminated on filing, as illustrated by the first two columns (in blue) of Graph 11. All countries reported that collective agreements terminate on liquidation of the debtor company’s assets, as there is no business and no workforce remaining, as illustrated by the third column (in red) of Graph 11.

When the insolvency proceeding results in a restructuring of the business, in 84% of jurisdictions, the collective agreement is continued, whereas in 16% of jurisdictions, there is no such guarantee, as indicated in the green columns of Graph 11. Less than one half of the reporting jurisdictions allow the debtor company to renegotiate the terms of the collective agreement with the union during the insolvency proceedings, as illustrated by the final (yellow) column of Graph 11.

Graph 11

Treatment of Collective Agreements During Insolvency

The requirement to renegotiate the collective agreement in those jurisdictions that require such varies. For example, in Argentina, when an insolvent debtor company enters into reorganization proceedings, the debtor and the union must execute an emergency collective agreement within three months of the filing for debt reorganization proceedings and for a maximum of three years. The pre-filing collective agreement is suspended for the three year period from the filing of proceedings.430

430 Martin Campbell, Argentina country contributor, 2008.
Collective agreements in Spain are under the control of the court and negotiations are compulsory during 30 days after the commencement of the insolvency proceeding. Collective bargaining is undertaken between the representatives of workers and the trustees in bankruptcy.

In terms of successor employer provisions, most of the countries responding to the survey have provisions under their labour relations legislation for successor employee status if a debtor corporation is sold as a going concern out of insolvency proceedings. Graph 12 illustrates that successor employers of a going concern sale, regardless of whether it is a result of a restructuring proceeding or going concern liquidation, are bound by the collective agreement of the insolvent debtor corporation. The first three columns of Graph 12 summarize the reported information on successor employers, with the vast majority of reporting countries recognizing successor employer status.

The information on what happens to the collective agreement after the purchaser successor employer is bound is not as complete as it is for other areas of the study, with details for only 30 jurisdictions. The last two columns of Graph 12 indicate that 80% of those 30 jurisdictions require the successor employer to wait a specified period or until the expiry of the existing collective agreement before the successor employer is able to bargain a new collective agreement. This requirement allows parties to adjust to one another in the new bargaining relationship during the period of transition. It also reduces the risk that insolvent businesses are sold only to avoid pre-insolvency obligations to employees. Only in 20% of jurisdictions for which there is information, is the successor employer able to require the terms of the collective agreement to be opened up immediately.

However, these last figures may be somewhat misleading, as the ability to find a purchaser for the distressed business may depend on the trade union’s willingness to bargain new terms and conditions, even where not required to by law. The economic reality may drive workers to accept compromises of their previous standards of wages and benefits in order to preserve their employment over the longer term.

431 Raimon Casanellas Bassols, Spain country contributor, 2008.
432 Ibid.
Within these broad categories, there are quite detailed requirements, as set out in the country pages in Part XIII. Nine examples of the types of protections for collective bargaining arrangements are provided here as illustration of the treatment of collective agreements and successor employer provisions.

**Australia**

In Australia, Part 11 Division 4 of the *Workplace Relations Act* 1996 (Cth) sets out governing provisions relating to the transmission of a collective agreement to a new employer. A new employer is the successor, transmitter or assignee of the whole, or a part, of a business of another person, i.e. the previous employer. The new employer is bound by the collective agreement if immediately before the transmission, the old employer and employees of the old employer were bound by a collective agreement and there is at least one transferring employee in relation to the collective agreement. The new employer will remain bound by the collective agreement until the first of the following occurs: the collective agreement is terminated, subject to some statutory restrictions; there ceases to be any transferring employees in relation to the collective agreement; the new employer ceases to be bound by the collective agreement in relation to all of the transferring employees covered by the collective agreement; or the transmission period, being 12 months after the time of transmission, ends.

**Spain**

433 Part 11 Division 4 of the *Workplace Relations Act* 1996 (Cth).
434 Professor Colin Campbell, Australia country contributor, 2008.
435 Ibid.
436 Ibid., noting, however, that there are restrictions on the termination of transferred collective agreements in s 588(2) of the *Workplace Relations Act*
437 Ibid.
In Spain, successor employers are liable for labour conditions and wages outstanding on purchase of
the debtor company, but the court may exempt the successor employer from liability for the wages
that have been paid out of the wage guarantee fund, the *Fondo de Garantía Salarial*.438

**Canada**

In Canada, collective agreements are continued in the insolvency context and may continue to apply
to the purchaser of all or substantially all of the assets of a debtor company if the purchaser
continues the undertaking and meets specific labour relations criteria.439 A collective bargaining
agent is treated as an interested stakeholder, without further special formal status unless it is also a
creditor in terms of dues remittances owed. In practice, however, unions are frequently required to
bargain with the existing debtor or a potential successor employer for some concessions to the
collective agreement if the company is to continue on a going forward basis.440

In some jurisdictions, collective agreements are terminated, such as in Finland, where there is no
bargaining with unions during insolvency proceedings.441

**China**

In China, when an enterprise goes into bankruptcy and conducts a liquidation proceeding, the
collective agreements terminate with the wind up of the company, although there are no specific
provisions under the bankruptcy laws.442 Article 9 of the *Measures for Economic Compensations due
to Violation or Rescission of Labour Contracts* provides that where an employer has to cut its staff on
the verge of bankruptcy and or its production and business operation are in serious difficulties, it shall
pay economic compensation according to the term of work of those that have been cut.443 For every
full year a worker has worked for the employer, he or she is to be paid compensation equal to 1
month’s wages. Article 10 specifies that where, after rescinding a labour contract, an employer fails
to pay economic compensation to a worker according to the provisions, it shall, in addition to paying
the full amount of the economic compensations, pay additional compensation equal to 50% of the
amount of economic compensation.444

Although there are no specific provisions in Chinese bankruptcy legislation on the treatment of
collective contracts in reorganization proceedings, such contracts may continue in the event that it is
beneficial to the enterprise’s viability.445 However, the enterprise may terminate some employees
according to its business needs. If so, it must give economic compensation under the above
provisions.446 In a reorganization proceeding, the creditors that hold the claims of wages, subsidies
for medical treatment and disability and comfort and compensatory funds as defaulted by the debtor,
the fundamental old-age insurance premiums, fundamental medical insurance premiums that have
been transferred into the individual accounts of employers as well as the compensation for the
employees as prescribed by the relevant laws and administrative regulations, are grouped into one
category to attend the creditor’s meeting to discuss a draft of rectification plan, and vote a draft of
rectification plan.447

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438 Raimon Casanellas Bassols, Spain country contributor, 2008.
439 See for example, *Canada Labour Code*, R. S.C. 1985, c. L-2, s. 43; and *Québec Labour Code*, R.S.Q.,
c. C-27, s. 45.
440 The modifications to the BIA and the CCAA that result from Chapter 47 Statutes of Canada, 2005 and
Chapter 36, Statutes of Canada, 2007, when they are proclaimed in force, will provide for the possibility
of compelling a bargaining process between the insolvent person and the bargaining agent, although
the provisions of the statutes make it clear that the collective agreement can only be modified by
agreement between the insolvent person and the bargaining agent. Section 65.12 of the BIA and
section 33 of the CCAA.
441 Pekka Jaatinen, Finland country contributor, 2007.
442 Professor Jingxia Shi, China country contributor, 2007.
443 Promulgated by the Ministry of Labour on December 3, 1994), *ibid.*
444 Professor Jingxia Shi, China country contributor, 2007.
447 *Ibid.*, Article 82 of 2006 EBL. Under Article 59 (3) of the 2006 EBL, the employees of the relevant
debtor as well as the representatives of its work union, shall attend a creditors’ meeting and therefore
air their views on the relevant issues.
Jingxia Shi observes that China faces some special issues concerning the legacy costs in the bankruptcy of State-owned enterprises (SOEs). SOEs have played a significant role in China’s centrally planned economy; hence the bankruptcy of SOEs gives rise to public concerns regarding increased unemployment. She suggests that at the same time, there is a deeply embedded cultural ethos, “iron rice bowl” ethos, referring to the broadly accepted notion that SOEs would employ and take care of their employees’ lifelong needs, no matter the circumstances are. Under this ethos, the employees of SOEs are the masters of the SOEs, and they are taught to contribute all their life to the SOEs in exchange of the care from the SOEs, including housing, education of their offspring, health care, and other support, in exchange for lower wages. This norm is a more dramatic example of the deferred compensation system that is prevalent in many other jurisdictions. Thus, if the SOEs never experience financial distress, the life of these employees will not encounter difficulties; and despite lower wages, they can rely on the SOEs for providing their life necessities.

However, under the market economy, the SOEs that do not survive the fierce market competition are subject to bankruptcy, which will create new harms for employees of SOEs. There is no specific rule dealing to allow bargaining, modifying or terminating collective agreements during restructuring proceedings. The employees of the relevant debtor, as well as the representatives of its work union, can attend a creditors’ meeting and air their views on the relevant issues. In a reorganization proceeding, the employee creditors are grouped into one category to attend the creditor’s meeting to discuss a draft of rectification plan, and vote a draft of rectification plan, affording employees the opportunity to bargain, modify and terminate collective agreements during restructuring proceedings.

There are no such provisions specifically dealing with successor employee issues; however, in practice, if the enterprise continues to operate, the successor employer, whether the purchasers of the business or insolvency professionals, are strongly encouraged to continue enforcement of collective agreements in order to reduce the social unrest caused by unemployment. This latter point suggests that while China and other jurisdictions may have no statutory protection for trade union successor status, that there may be social or political reasons for recognizing successor employer status that are not reflected in the empirical numbers.

France

In contrast, in France, a company’s insolvency or bankruptcy is not an automatic cause of termination of a collective bargaining agreement and collective agreements continue to apply and employment contracts are continued. The bargaining agent’s mandate continues during the insolvency proceedings and staff representatives are usually heard by the court dealing with the insolvency. At the commencement of the insolvency proceedings, a special staff representative (représentant des salariés) must be appointed; he or she is an employee of the company. The mission of the représentant des salariés is to proof the statement of wage claims (relevé de créances salariales). The représentant des salariés is a protected employee (“salarié protégé”) and he or she cannot be dismissed without the approval of the Labour Administration.

Jean-Michel Lucheux observes that a few years ago, there was a change in legislation concerning the sums guaranteed by France’s wage guarantee fund, as employees and employers, in the event of economic dismissal, had taken advantage of the guarantee by increasing the amount of the severance indemnities, knowing that the company would be unable to pay them and that the AGS

448 Ibid.
449 Ibid.
450 Article 59 (3) of the 2006 EBL.
451 Article 82 of 2006 EBL. Jingxia Shi, country contributor.
452 Jingxia Shi, country contributor.
454 Ibid.
455 L.621-4 of the i
456 Section L.625-1 and L.625-2 of the Commercial Code. Time spent doing this is considered and paid as working time.
would guarantee them. 458 Hence a change was made in the statutes and the AGS no longer guarantees the severance indemnities provided for in a company agreement signed 18 months or less before the launch of insolvency proceedings. 459

No special provision exists in France in respect of allowing bargaining, modifying or terminating collective agreements during restructuring proceedings, but there is general statutory language that enables amendment of collective agreements. 460 In insolvency, the collective bargaining agreement cannot be immediately terminated, and once the decision to terminate one is made, the collective agreement ends 15 months later at most, albeit not completely as the amendment of a collective agreement is possible with the agreement of the trade unions. 461 In the course of insolvency restructurings, part of the company can be sold to purchasers, which will continue the business. They may not be bound by the same collective agreement as the former employer. Then, the question of the applicable collective agreement is raised. 462 The French Labour Code provides that the collective agreement continues during 15 months (notice period of three months plus one year: this period of time can be increased in the collective bargaining agreement). The successor employer has a duty to bargain a substitution agreement (accord de substitution) and if they reach an agreement, this collective agreement will supersede the previous collective agreement. If no agreement is reached during this 15-month period, the employees will have a right to retain acquired individual rights (avantages individuels acquis) set out in the collective agreement, which are then part of their employment contract. 463 Lucheux observes that insolvency law is aimed at protecting companies while labour law is favourable to the employees, sometimes even at the expense of the companies. He observes that it is clear under French law that the employees cannot be treated as mere assets of the companies and have the right to a certain degree of protection. 464 A balance must be found between the interests of the companies and the interests of the employees, which, in his view, has not been found. 465

Mexico

Under the Mexican Bankruptcy Code and under Labour Law article 224.1 & the Constitution art. 123(a) para.23, the collective bargaining relationship is terminated on insolvency. There is one insolvency procedure in Mexico, termed the concurso mercantile, with two successive phases: the conciliatory/restructuring phase among creditors, and the bankruptcy phase. In the first phase, the aim is to save the enterprise. In the second, the business is liquidated, preferably as a whole, or through the sale of individual assets to pay creditors. Under the first phase of the bankruptcy procedure, there are several provisions that recognize the super-priority of the workers' claim. 466 The restructuring phase must recognize this super-priority. It is completely at the discretion of the union whether to agree to a new contract. The general consensus in the case law is that workers cannot be forced to accept any reduction of their benefits. 467 Any collective bargaining agreements carry over to the successor employer. Some companies have successfully emerged from bankruptcy under new ownership & name, but maintaining the former agreements. The labour law requires the maintenance of agreements since it speaks of the enterprise as an economic process rather than a limited partnership. 468

Colombia

In Colombia, although the insolvency regulations do not expressly deal with disposition of collective agreements after insolvency restructuring, collective bargaining agents may act in representation of employees in the context of insolvency proceedings, especially in reorganization procedures for the

458 Lucheux, ibid.
460 Jean-Michel Lucheux, France country contributor, 2007.
461 Ibid.
462 Ibid., reporting that when the application of a collective agreement is jeopardized, section L.132-8 paragraph 7 of the Labour Code applies.
463 Ibid.
464 Ibid.
465 Ibid.
466 Mexico Bankruptcy Code art. 43, para. 9 & art. 65. Thomas Heather, Mexico country contributor, 2007.
467 Thomas Heather, Mexico country contributor, 2007.
468 Ibid.
purpose of the negotiation process. The Colombian Supreme Court has held that successor rights will not be presumed, but will be recognized where the employees demonstrate: (i) a change of employer; (ii) the continuity of the company’s activities; and (iii) the continuity of the employee’s services under the employer’s labour contract.

United Kingdom

In the United Kingdom, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) preserves employees’ terms and conditions when a business or undertaking, or part of one, is transferred to a new employer. This includes the right to representation by a trade union or elected representative. In addition TUPE provides requirements in the Regulations on both the new and transferor employers to consult representatives of the affected workforce before the relevant transfer takes place.

The insolvency provisions of the TUPE 2006 Regulations only apply to transfers where the transferor was insolvent and under the supervision of an insolvency practitioner on or prior to the date of the transfer. If the transfer was before the insolvency the ‘solvent’ TUPE provisions apply. Insolvencies of which primary function is the liquidation of the assets of the transferor to satisfy creditors’ claims are not subject to regulations 4 and 7, i.e. the automatic transfer of contracts, and the unfair dismissal TUPE provisions. These insolvencies are creditors voluntary liquidation, compulsory winding up by the court or bankruptcy. In these types of insolvency the contract of employment automatically terminates at the time of the transfer and liability for payments remain with the transferor and will fall for payment from the State. Continuity of employment is not preserved, even if the employee continues to work for the new employer.

Insolvencies where the primary intention is to rescue the undertaking are subject to specific regulations under TUPE 2006, Reg 8(6). These are commonly referred to as ‘relevant insolvencies’ and include administration, voluntary arrangements, and administrative receivership. In these cases the State will pay certain of the debts owed to employees in order to assist in the rescue of the business. Employees who transfer under these forms of insolvencies will have continuity of employment and as such will not be entitled to a redundancy payment or CNP. Equally, as the contract transfers, the entitlement to accrued holiday pay will continue to accrue with the transferee. However, to assist with the rescue of the undertaking claims for arrears of wages and holiday pay in respect of holidays taken but not paid for, will be paid by the State subject to statutory limits (any extra statutory entitlement will transfer to the transferee).

To assist the rescue of failing businesses, the TUPE Regulations 2006, make special provision where the transferor employer is subject to insolvency proceedings. First, the Regulations ensure that some of the transferor’s pre-existing debts to the employees do not pass to the new employer. Those debts concern any obligations to pay the employees statutory redundancy pay or sums representing various debts to them, such as arrears of pay, payment in lieu of notice, holiday pay or

469 Juan Fernando Gaviria and José Alejandro Oliveros, Colombia country contributors, 2008.
470 Ibid.
471 Ibid.
472 Ian Fletcher, Christine McCrea and Maurice Downey, United Kingdom country contributors, 2008.
473 Ian Fletcher, United Kingdom country contributor, 2008.
474 Ibid.
475 Ibid.
476 Pursuant to chapter VI of Part XI of ERA (Redundancy Payments) and Part XII of ERA (Insolvency Payments), Reg. 8(7), ibid.
477 Ibid.
478 Ibid.
479 Ibid. Where there is a collective redundancy consultation required under the Trade Union and Labour Relations (Consolidation) Act 1992, an employer must inform and consult employees’ representatives when there is a proposal to make 20 or more employees redundant at any one establishment. Representatives can be trade union officials recognized by the employer as able to represent particular types of employees in collective bargaining; or where there is no trade union, an elected representative for the whole workforce; or a combination of trade union officials and elected representatives for different types of employees. For example, a trade union may represent shop-floor workers but not office staff. The office staff should have the opportunity to elect someone to represent them.
a basic award of compensation for unfair dismissal. 480 Second, the TUPE Regulations provide greater scope in insolvency situations for the new employer to vary terms and conditions after the transfer takes place. In a non-insolvency environment, the Regulations place significant restrictions on new employers when varying contracts because of the transfer or a reason connected with the transfer. These restrictions are in effect waived, allowing the transferor, the new employer or the insolvency practitioner in the exceptional situation of insolvency to reduce pay and establish other inferior terms and conditions after the transfer. 481 However, in their place, the Regulations impose other conditions on the new employer when varying contracts. For example, the transferor, new employer or insolvency practitioner must agree on the “permitted variation” with representatives of the employees; thus, information and consultation rights are preserved. 482 The representatives must be union representatives where an independent trade union is recognized for collective bargaining purposes by the employer in respect of any of the affected employees. The new terms and conditions agreed in a permitted variation must not breach other statutory entitlements. A permitted variation must be made with the intention of safeguarding employment opportunities by ensuring the survival of the undertaking or business. 483

**United States**

According to 11 U.S.C. sections 1113 and 1114, collective agreements are continued on insolvency or bankruptcy, but they can be terminated if a “balance of the equities” demonstrates a need for termination. 484 The Bankruptcy Code permits bargaining, modification and termination of collective agreements if this test is met. The collective bargaining agent continues to be the collective bargaining agent during bankruptcy or insolvency and there is almost always a conflict between current workers and retirees. With respect to legacy costs, problems have arisen as companies are filing for bankruptcy and leaving behind legacy costs. Successor liability is often an important issue, especially in light of section 363 of the Bankruptcy Code which empowers the estate, with court approval, to sell property free and clear of liens and other interests. 485 Hence, the treatment of collective bargaining arrangements varies considerably, whether the insolvency workout involves pre-existing debt or equity investors and managers, new purchasers of the business, or liquidation. The labour relations schemes intersect with insolvency law and often create dynamic challenges for resolution of outstanding labour related claims. The country profiles in Part XIII offer a detailed analysis of how these mechanisms interact.

It is also critically important to note that in addition to formal systems that offer protection to employees post-restructuring through labour relations legislation or successor employer provisions under insolvency legislation, there are also informal practices and cultural norms that affect the going-forward employment possibilities for employees when the debtor company becomes insolvent. For example, the bankruptcy laws of the Dominican Republic are less developed than in a number of jurisdictions, based on the French Commercial Code of 1807, with bankruptcy provisions contained in the Commercial Code that have not been amended since 1956. 486 Other than in connection with the amicable settlement process, Dominican bankruptcy law does not provide for a reorganization process for debtors and there have been very few bankruptcy proceedings in the Dominican Republic. 487 Rather than going bankrupt, companies in the Dominican Republic will usually undergo

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480 Ibid. The Regulations also provide for the payment of these sums on the date of the transfer even though they may not have actually been dismissed by the transferor on or before that date, as would normally be a requirement for such payments. In effect, payment of statutory redundancy pay and the other debts will be met by the Secretary of State through the National Insurance Fund. Where employees transfer there is no redundancy or notice entitlement under ERA 1996. Payments for redundancy or notice entitlement will only be payable if the employee is dismissed for economic, technical or organizational reasons.

481 Ian Fletcher, Christine McCreaith and Maurice Downey, United Kingdom country contributors, 2008.

482 Ibid., see TUPE Part 5 for details.

483 In addition, the sole or principal reason for the permitted variation must be the transfer itself or a reason. For more detailed information, please refer to the Department of Trade & Industry website; [http://www.dti.gov.uk/files/file20761.pdf](http://www.dti.gov.uk/files/file20761.pdf).


485 Professor Jay Westbrook, United States country contributor, 2008.

486 Isabel Andrickson and Norman De Castro, Dominican Republic country contributors, 2008.

487 Ibid., observing that and none of them have been completed.
a process of reorganization, mostly handled by creditor banks, whereby most of the business ends up being purchased by another company. In such cases, the employees will usually be transferred along with all their labour benefits to the purchasing company or laid off with the corresponding severance and termination payments made.\textsuperscript{488} It is the banks as the oversight party that influence whether or not a successor employer type of relationship will be established if the informal reorganization results in a going-concern sale of the business.

Hence, it is important to understand both the legal framework and what happens in practice. While employees may not have enforceable rights in some jurisdictions, the risk of job loss or using insolvency proceedings for labour shedding may be heightened or lessened depending on whether a country’s social and economic norms are in favour of protecting employees at the point of firm financially distress.

A. Dispute Resolution Mechanisms

The survey also collected data on what court or tribunal has carriage of the treatment of social claims and collective agreements during insolvency. In Canada, the Court that supervises the restructuring proceedings has tried on occasions to also manage the social claims and collective agreements, but its jurisdiction to do so has been somewhat contested, and it is now fairly well established that the jurisdiction to deal with the status of the collective agreement or the employer is not with the Court that has jurisdiction to supervise proceedings under the \textit{BIA} or \textit{CCAA}.\textsuperscript{489}

The study found that the majority of jurisdictions grant authority to a specialized labour court or administrative tribunal, not the court with carriage of the insolvency proceeding. Graph 13 illustrates the mix of choices in respect of litigation and dispute resolution.

53% of the 51 jurisdictions that provided this information, reported that a specialized labour court or tribunal has the authority to deal with social claims and issues arising out of collective agreements during insolvency; whereas 20% vest that authority with the court that has carriage of the insolvency proceeding and 27% report that either adjudicative authority can deal with the dispute, depending on the nature of the issue.

\textsuperscript{488} Ibid.

\textsuperscript{489} GMAC Commercial Credit Corp – Canada v. TCT Logistics, 2006 CarswellOnt 4621 (S.C.C.) and re: Mine Jeffrey Inc., 2003 CarswellQue 90, (Que. C.A.).
XI. Legislative Reform

Insolvency law, as with most areas of the law, is highly dynamic. Thirteen jurisdictions of the 62 studied have made major reforms to their insolvency laws within the last five years, with statutory amendments that have enhanced the protection of wage and pension claims. There are also a number of reform initiatives currently underway, the most notable recent developments are as briefly described below, in alphabetical order by country. Some of these reforms have been discussed at length in the text or in the country pages.

Australia’s amended insolvency legislation came into force on January 1, 2008. With the introduction of the Corporations Amendment (Insolvency) Act 2007, deeds of company arrangement are now required to maintain the statutory priority for employee entitlements, unless a meeting of employees determines or a court orders otherwise. There is an alternative statutory procedure designed to allow financially-troubled companies to negotiate a compromise with their creditors, a procedure that involves the execution of a negotiated deed of company arrangement under which creditors’ claims against the company are compromised as part of a work-out plan for the company. In the past, a deed of company arrangement could result in a compromise of employee claims that produced a less favourable outcome for employees than would be the case if the company were being wound up, because the deed of company arrangement did not have to incorporate the priority given to employee claims in a winding up. However, since the introduction of the Corporations Amendment (Insolvency) Act 2007, effective 1 January 2008, deeds of company arrangement are now required to maintain the statutory priority for employee entitlements, unless a meeting of employees determines or a court orders otherwise.

Karen O’Flynn, Australia country contributor, 2008.
Professor Colin Campbell, Australia country contributor, 2008.
Ibid.
Ibid. Corporations Amendment (Insolvency) Act 2007, section 444DA.
Nora Wouters reports that in Belgium, there exists a draft bill of October 25, 2007 (Doc.52 0280/001), amending the Law on the Closure of Undertakings, providing for a closure indemnity for employees in small enterprises. Whereas, until now, these employees only have a right to an indemnity in case of bankruptcy of the company, they will, under the draft bill, receive a right in case of definitive closure of the company whatever the reason.

In Canada, the federal Parliament has recently enacted the Wage Earner Protection Payment Act and amended the BIA, CCAA and various other statutes, in an effort to implement significant changes to the insolvency legislation. Chapter 36, Statutes of Canada, 2007 received Royal Assent on December 14, 2007, but is not yet proclaimed in force as of May 21, 2008. Chapter 36 is the culmination of earlier initiatives from 2005 to 2007 to undertake comprehensive amendments to the statutes. The amendments contain considerable enhanced protections for workers, as discussed in part VII. The delay in proclamation is to allow time to draft and implement regulations to accompany the statutes, and to give an opportunity to trustees and stakeholders to prepare for the requirements of the new system. It is expected to be in force between June and December 2008.

China continues to overhaul its insolvency statutory regime against the backdrop of economic reform; and China is currently debating the Law on Labour Contracts, and planning to improve its social safeguard mechanisms toward employees’ rights. China’s 2006 Enterprise Bankruptcy Law became effective 1 June 2007, shifting the priority of wage claims lower than secured creditors by specifying that the assets that are pledged to secured creditors do not belong to the bankruptcy estate, as discussed earlier. Further reforms will align with the new market direction of the insolvency statutory amendments to date.

Croatia, as a future member of the European Union, is required to amend all its insolvency law to enhance provisions on employee claims in insolvency, in accordance with the law of the European Union. Hence, there is major legislative reform being considered in respect of the Stečajni zakon (Bankruptcy Law), but information on reform in respect of treatment of social claims is not yet available officially. Bulgaria also reports that it must align its insolvency laws with EU directives over the next period.

In Cyprus, discussions are currently being held between all interested parties and the Ministry of Employment and Social Services to examine the possibility of amending the Social Insurance Law to increase both contributions to the Social Insurance Scheme and the retirement age, as projections indicate that the social insurance fund with the current rate of contributions is only viable until 2010 and the reserve fund exhausted by about 2040.

In Ghana, there is currently a proposal to review the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180), including an assessment of provisions on the treatment of social claims.

In Hungary, there are plans for a comprehensive insolvency law reform in 2008.

In Israel, there are draft amendments that address the issue of employee rights during restructuring proceedings in an insolvent company. The bill proposes strengthening the protection of employees’ right to job security throughout restructuring procedures. The main reform in the bill requires employers to secure a certain amount of assets, based on the number of employees, in order to protect the employee’s rights in the event of any future debt to an employee, especially due to insolvency.

In Japan, the adjustment of the priority between tax claims and worker claims was introduced by the 2004 revision of Japanese Bankruptcy Act (Hasan Hou). In 2008, taking account of that protection of
employees’ claims in bankruptcy procedure, the government of Japan is considering whether the fund for the replacement payment of unpaid wages in bankruptcy should be capitalized. Also, the government considering amendments to make the pension benefit guarantee cover all the pensions and all the members.

In Korea, there was considerable discussion in the past year regarding reform of pension-related laws, but very recently, proposed legislative reform was rejected by the National Assembly of Korea. This proposed reform is also connected with the General National Pension Plan reform issue and the Government Official Pension Plan reform issue whereby pension system reform proposes to finance the funds by increasing premium rates to be charged.

There are currently proposed changes to the Nigeria Companied and Allied Matters Act 1990 and the promulgation of an insolvency law to deal with all specific issues arising out of insolvency.

Effective 2007, the Republic of Slovenia brought into force a completely new, modern Law on Financial Management, Insolvency Proceedings and Involuntary Liquidation Article 347/2-2, which treats wages and other employee compensation, including employee taxes, are treated as cost of the insolvency proceeding, with 100% payment in priority. Article 347/3-2 specifies that termination pay is to be treated as part of the costs of the insolvency proceeding, with 100% payment of amounts given a priority in proceeding.

The South African Law Reform Commission has been working on a project titled the Review of the Law of Insolvency, Project 63, for many years but new insolvency legislation does not yet seems to be on the horizon.

Overall, the amount of statutory reform in the past five years indicates that protection of employees during insolvency has been identified as a critically important issue that requires special measures contained in labour, insolvency or other statutes.

XII. Final Observations and Conclusion

The study of wage and related compensation claims, pension issues and more generally labour law issues during insolvency is an ongoing project. Numerous jurisdictions seek to find the appropriate balance between encouraging the availability of credit at a cost-effective price and protecting employees’ claims at a time when they are economically vulnerable. Senior creditors often advise that they can live with granting wage and related claims priority, but they require certainty, transparency and consistency in treatment of such claims so that they can appropriate price risk and reward.

The results of this research should enhance our standing of how wage and pension claims are treated by the law in numerous jurisdictions. While the area is very dynamic and thus information changes relatively quickly, one can draw out some general trends in the data collected.

First, in terms of protection of employee wage and related claims, it is clear that the largest number of countries have chosen a hybrid model of both priority for wage claims and the use of a wage guarantee fund or insurance system. Such a choice offers greater protection for employees at a time that they are particularly vulnerable, and creates a structure that reduce incentives for self dealing or shirking by corporate officers in the period leading up to insolvency.

Second, where there is a priority or preference granted to employee wage and related claims, different countries have made different policy choices in respect of the scope, amount and ranking of

503 Professor Yoshiro Yamada, Japan country contributor, 2008.
504 Ibid.
505 Ji Woong Lim, Korea country contributor, 2008.
506 Ibid.
509 André Boraine, South Africa country contributor, 2008.
priority to be given to these claims. In many jurisdictions, there are caps on the amounts of claims that are given a priority in insolvency or bankruptcy, either a cap of the total monetary amount of the claim or a weekly maximum amount that can be claimed. Some jurisdictions place limits on the periods prior to insolvency proceeding for which a preference is given. These monetary amounts vary considerably and must be placed in the context of the purchasing power of the value of the preferred claim in the countries in which the claims arise.

Third, priority over unsecured claimants may offer only limited protection to employees, particularly where the majority of assets are secured prior to the company’s insolvency. Where there is a preference, but placement of the preferred claim on the hierarchy of credit is relatively low, employee claims may not be met as senior secured claimants take all the value of the assets on liquidation. Similarly, in jurisdictions where debtors can defer liquidation for too long, there may be insufficient remaining value to satisfy wage claims, even where there is a higher priority or preference. Hence, the types of protection by priority needs to be placed in the context of the capital structure of debtor companies operating in each jurisdiction, in order to discern how helpful the priority or preference is on the ground.

Fourth, the study reveals that one potential disadvantage of wage guarantee funds as the sole protective mechanism is that it can create the wrong incentive effects. Financially distressed companies may have an incentive to pay other creditors, even those that would rank below employee wage claims, prior to meeting outstanding wage claims in the period just prior to insolvency or bankruptcy, knowing that the wage guarantee fund will cover the employee’s claims if the company ends up in insolvency proceedings. While some of these pre-filing payments to creditors may be eligible to be recovered to the estate under preference or transfer at undervalue provisions of the jurisdiction’s insolvency legislation, the ability to recover these amounts depends on the existence of insolvency statutory provisions that offer such relief; a system of insolvency administration that has the authority to recover such payments, and the will and economic resources to enforce such provisions.

Hence a future research question is whether a wage guarantee fund or insolvency wage insurance system inappropriately transfers costs to the state where the fund or insurance is not employer or sector funded. For jurisdictions that have a highly developed society safety system, it may be that longstanding public policy reflects strong social and political support for costs to be borne across all employers and citizens through the general tax base. In other jurisdictions, with more of a user pays approach, the existence of a fund that is based on general tax revenues may be viewed as an inappropriate transfer of wealth from financially healthy companies to financially distressed companies, without an accountability check in the form of a priority scheme that allows the state to recover amounts from the company on some priority basis.

Fifth, jurisdictions with strong protections for social claims in insolvency are frequently those that have historically had a strong social support system for employees. However, rather than just leave protection to social safety nets, many of these jurisdictions have added the protections in solvency through the priority claims system and the use of specialized guarantee funds. In contrast, in some emerging nations, there are not social supports available to employees on firm failure, creating special challenge in designing a system of protection of employee and pensioner entitlements with one that fosters efficient capital markets. In particular, there are tremendous challenges for social claims for countries moving from planned economies with strong social supports to market economies.

Sixth, for those jurisdictions with employer-sponsored pension systems, pension guarantee funds are less common, even though the employee population is aging in many parts of the world. Numerous jurisdictions assist in protecting such pension claims by treating them as wage claims that have access to statutory preferences and to wage guarantee funds. However, many jurisdictions have not adopted private pension schemes and thus do not face the challenges that countries such as the US face in terms of outstanding pension deficits that place the retirement earnings of employees and pensioners at risk on firm insolvency.

It is extremely difficult to categorize the treatment of pension or superannuation claims during insolvency because of the myriad and complex ways in which pension systems work in various jurisdictions, including state-operated pension systems; industry-wide pension or superannuation
funds; and employer-created and funded pension plans. Where the system is exclusively state funded or state and industry funded, the impact of any arrears in contributions by the debtor company at the point of insolvency may not affect the actual pension that the employee will receive. However, where the pension promise is employer-sponsored, employees may face losses from outstanding contributions to the pension plan or from a serious underfunding of the plan.

There are a number of different methodologies for funding wage and pension guarantee funds. In numerous jurisdictions, the guarantee fund is sector funded or industry funded, with premiums paid by corporations and other business enterprises, based on the risks inherent in the particular sector or industry. Another funding mechanism is to fund the guarantee fund through the general tax base, spreading the risk across the entire economy. An important future research question would be to analyze the effects on employees where the debtor employer has failed to keep contributions current. In some cases, employee claims are unaffected, in others, they are.

Most jurisdictions in the study do not impose personal liability on directors and officers for outstanding wage and pension claims. Even where there is the potential for liability, overall, directors are not particularly vulnerable to personal liability where they have been duly diligent in their efforts to ensure that employee and wage claims are paid in a timely manner. Where they are held liable, in numerous jurisdictions there is a higher threshold to liability than simply the company’s failure to pay in the period prior to insolvency.

The majority of jurisdictions do recognize collective bargaining rights continue after a restructuring, offering employees continued protection of a trade union; however, the treatment of pre-insolvency provisions of collective agreements varies considerably from jurisdiction to jurisdiction and deserves future research inquiry.

Two other issues seem mature for study. The first is the treatment of employee wage and pension claims during cross-border insolvency proceedings where the ranking and treatment of employee claims differs in the jurisdictions involved. When the entities are treated as separate legal entities throughout the proceeding, in most cases, there will not an issue, as employee wage and pension claims will be paid out as per the priority under domestic law of each entity. However, where such proceedings are consolidated, then the assets and liabilities between the entities are eliminated, called pooling in some jurisdictions; and there is a critically important question of which jurisdiction applies in meeting those employee claims. It could create some forum shopping to consolidate in a jurisdiction where employee wage and pension claims have a lower priority. This issue deserves careful scholarly attention.

Another issue raised in the context of feedback on the study was the lending practices of asset-backed lenders and general credit decisions that are apparently made in part on the ranking of employee claims. It was unclear whether this issue was one unique to US lenders or one that could be come an issue in multiple jurisdictions; hence, it should be examined for its impact on the realization of employee claims and on credit markets more generally.

This study provides a comprehensive snapshot of the treatment of employee wage and pension claims and other protection of their interests during a firm’s insolvency. As noted in the introduction, employees are seriously affected by firm failure. The loss of employment and of compensation claims can have serious economic consequences for employees, at a time when their livelihood is at risk. While other creditors suffer risk of losses in insolvency, most creditors, such as banks, debenture holders, and landlords are not at risk of losing their employment at the same time that their claims are not satisfied. In contrast, employees risk the loss of both pre-filing claims and going forward income.

The issue of social claims has received considerable public attention in numerous jurisdictions. The country pages that follow in the next part frequently comment on what the driving force was for the protection of employee wage and pension claims. Globally, there has been recognition that the problems faced by employees on insolvency are somewhat unique, and require special attention in the course of liquidation or restructuring of the financially distressed business. Clearly, there have been different normative choices in respect of how much to value employee claims and the extent to which they should be protected. Such policy discussion squarely raises the issue of the primacy of secured credit. In many jurisdictions, that primacy has been tempered by the recognition that
employees are vulnerable and by the express but limited exceptions to the priority rules such that employees receive some measure of special protection.
XIII. COUNTRY PROFILES

1. Argentina
2. Australia
3. Austria
4. Belgium
5. Bermuda
6. Botswana
7. Brazil
8. Bulgaria
9. Canada
10. Cayman Islands
11. Chile
12. China
13. Colombia
14. Croatia
15. Cyprus
16. Denmark
17. Dominican Republic
18. Estonia
19. Finland
20. France
21. Germany
22. Ghana
23. Gibraltar
24. Greece
25. Guatemala
26. Guernsey, Channel Islands
27. Honduras
28. Hungary
29. India
30. Italy
31. Israel
32. Japan
33. Jersey, Channel Islands
34. Korea
35. Kuwait
36. Latvia
37. Luxembourg
38. Malaysia
39. Mexico
40. Namibia
41. Nepal
42. New Zealand
43. Nigeria
44. Norway
45. Peru
46. Philippines
47. Poland
48. Romania
49. Russian Federation
50. Serbia
51. Singapore
52. Slovenia
53. South Africa
54. Spain
55. Sweden
56. Switzerland
57. Taiwan
58. Thailand
59. United Arab Emirates
60. United Kingdom
61. United States
62. Venezuela
ARGENTINA

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Treatment of Wage Claims

There are two insolvency proceedings in Argentina. The debt reorganization proceedings tend to provide the debtor an opportunity to reach a settlement with its creditors, similar to the United States' Bankruptcy Code Chapter 11. On the other hand, bankruptcy proceedings liquidate the debtors' assets in order to pay the creditors according to their rating, similar to the United States' Chapter 7.

The general rules are as follows. The Argentine Bankruptcy Law sets out in Section 241, subsection 2 that the credits that are owed for wages of the last six months as well as the severance payments, labour accidents, lack of notice for severance and contributions to the unemployment fund will have a special preference over the merchandise, raw materials and machinery of the debtor that are placed at the location in which the employee works. These credits also fall under Section 246, subsection 1, by means of which they are also granted a general privilege over all the debtor’s assets.

In debt reorganization proceedings, the debtor company must file a proposal to a certain amount of categories of debtors. The categorization must group creditors into at least three categories: general, labour general (if any) and preferred creditors, and may also consider subcategories within each of them.

The debtor company must obtain the consent of the majority of creditors in each of the non-secured creditor’s categories and the unanimity in the secured creditor categories in order to obtain the approval of its reorganization plan. Since labour creditors are considered secured creditors, there is usually an out-of-court settlement in order to avoid entering into bankruptcy should these labour creditors not provide their consent.

There is a statutory privilege for labour wages due after the filing of the debt reorganization proceedings. According to Section 240 of the Argentine Bankruptcy Law, all labour wages that are due after the filing of the debt reorganization proceedings or the bankruptcy are considered Conservation Expenses, and are therefore granted the highest ranking of collection against other creditors, with the exception of secured creditors over their secured assets. Payment of these claims is to be made when they become due and without the need for proof thereof.

Section 16 of the Argentine Bankruptcy Law, sets out that the judge hearing the insolvency case shall authorize the prompt payment of any remuneration owed to the workers, compensation for accidents, compensation in lieu of notice, payment of the full month of dismissal, as well as those provided for Labour Laws, which are entitled to a general or special preference, and which shall be preferentially satisfied with the proceeds of the exploitation. For prompt payment to be effected, it is not necessary to prove the claim in the insolvency proceedings or to obtain judgment in a prior labour lawsuit.

Notice of the request for prompt payment shall be given to the receiver within ten days. The request may be rejected, either fully or in part, through a grounded resolution, in the following cases: that the claims are not evidenced in the employer's legal and accounting documents; or that the claims are under discussion or there are doubts as to their origin or legitimacy; or on the basis of suspicion of willful connivance between the worker and the debtor.

The credits shall be paid in full, if there are sufficient funds. If not, 1% of the monthly income of the debtor must be reserved for such payments. The trustee or receiver must prepare a payment plan according to the different proportions and privileges.

The capital amount of the claim falls under the preferential treatment. However, the interest that it accrues falls under the preferential treatment regarding the amount that it has accrued two years.
since the date of non-compliance of the payment, the rest of the interest falls under the non-secured privilege set by the Argentine Bankruptcy Law and will be collected pari passu along the rest of the non-secured creditors.

There are no restrictions on realization of the preferential claim, in terms of length of employment or a cap on amount.

There is no wage protection fund or guaranteed insurance for wage claims during insolvency.

**Treatment of Other Compensation**

There is statutory priority for 100% of vacation pay owed and two years of accrued interest. Argentine Bankruptcy Law Section 246, Sub-section 1 specifies a general privilege over the debtor’s assets and Section 16 requires prompt payment. The remainder of the interest falls under non-secured credits.

There is severance pay for 100% of the capital and two years of accrued interest. Argentine Bankruptcy Law Section 241, Sub-section 2 creates a special preference over the merchandise, raw materials and machinery of the debtor that are placed at the location in which the employee works. Argentine Bankruptcy Law Section 246, Sub-section 1 specifies a general privilege over the debtor’s assets and Section 16 requires prompt payment. The remainder of the interest falls under non-secured credits.

There is termination pay for 100% of the capital and two years of accrued interest. Argentine Bankruptcy Law Section 241, Sub-section 2 grants a special preference over the merchandise, raw materials and machinery of the debtor that are placed at the location in which the employee works. Argentine Bankruptcy Law Section 246, Sub-section 1 of the Argentine Bankruptcy Law grants a general privilege over the debtor’s assets and Section 16 requires prompt payment. The remainder of the interest falls under non-secured credits.

There is conditional travelling and other expenses for 100% of the capital and two years of accrued interest. Argentine Bankruptcy Law Section 246, Sub-section 1 creates a general privilege over the debtor’s assets (only applicable if the expenses are related to the labour relationship). Argentine Bankruptcy Law Section 16 specifies prompt payment and the remainder of the interest falls under non-secured credits.

There is no compensation guarantee fund or insurance program for wages and related compensation.

**Treatment of Pension Claims**

There is no priority for pension claims. There is no pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

**Director and Officer Liability for Social Claims**

There are no specific liabilities for directors and officers set out in bankruptcy legislation in the event of insolvency regarding social claims. However, please notice that the general rules apply. Directors are liable for their administration, according to Section 274 of Law 19,550. One of the scenarios by means of which they are liable is the infringement of the law. In some cases of fraud or violation of public order, directors and shareholders have been considered joint and severally liable. For example, this has been so decided in the event of unregistered employees and consequent failure to pay applicable social security contributions.

There is no cap or limit to such liability and such claims are not dealt with in the insolvency proceeding. The relevant provision is Section 274 of Law 19,550.
Treatment of Collective Agreements

When the company enters into debt reorganization proceedings, collective agreements are rendered without effect for three years from the filing of the proceedings. The labour relationship is governed by both the individual agreements that the parties have executed as well as the law. The debtor and the union must execute an emergency collective agreement within three months of the filing for debt reorganization proceedings and for a maximum of three years. The issue of legacy costs is not applicable to Argentina.

In general situations, the seller and buyer of a business are joint and severally liable for labour and social security obligations existing as of the date of the transfer. However, under a reorganization insolvency procedure, the parties, with the participation of the court hearing the case, may regulate the rights and obligations of the parties.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The Argentine Bankruptcy Law does not suspend nor otherwise affect the rest of the enforceable laws. Section 273 of the Labour Contract Law No. 20,744 ratify the privilege of the workers in the insolvency procedure.

Workers’ claims are analyzed by the corresponding Labour Courts. While the Courts in charge of the insolvency proceedings used to be able to analyze worker claims, a legislative reform has assigned these proceedings to the Labour Courts.

Tax Issues in Respect of Social Claims

Tax evasion for more than ARS$ 100,000\(^{510}\) regarding taxes attributable to a fiscal year has a penalty of prison, according to the Penal Tax Regime, Law No. 24,769. That sanction is aggravated in the event of the amount being greater or if the techniques used to avoid that legal obligation were complex or if tax benefits were used in fraud. Social contributions are included in the Penal Tax Regime.

Legislative Reform

There is not currently any proposed legislative reform in respect of treatment of social claims.

Historical, Political and Social Reasons for the Development of Argentina’s Approach to Social Claims

Argentina’s system has evolved over the last years in order to provide a greater protection to employees in the event of bankruptcy, since it grants to labour creditors a high ranking privilege. However, please notice that there are no pension payment guarantee funds currently in place in the event of bankruptcy.

\(^{510}\) 100,000 ARS is 31,440 CAD.
TREATMENT OF WAGE CLAIMS

The position in Australia with respect to employee entitlements varies depending on the type of insolvency administration and whether the insolvent employer is incorporated or not. In relation to the winding-up (also called liquidation) of companies, section 556(1) of the Corporations Act 2001 (Cth) ("Corporations Act") provides a hierarchy of specified classes of unsecured debts and claims that are to be paid in priority to all other unsecured debts and claims.

The highest-ranking classes of claims are those relating to the administration and/or winding up process (such as the liquidator's fees). These claims are followed by four classes of employee claims set out in section 556(1)(e) - (h), namely wages, superannuation contributions and superannuation guarantee charges, injury compensation, amounts due under industrial instruments in respect of leave of absence and retrenchment payments. Retrenchment payments are defined in s. 556(2) to be amounts payable by virtue of an industrial instrument because of termination of the employment. Many collective agreements in Australia have provisions for such payments on redundancy.

Unpaid wages are in the highest-ranking class of employee entitlements under section 556(1) of the Corporations Act, and are therefore entitled to the highest priority. Only the entitlements of "excluded employees" are restricted under sections 556(1A), 556(1B) and 556(1C) of the Corporations Act. An "excluded employee" is defined in section 556(2) as an employee who has been a director of the company being wound up at any time since 12 months before the winding up commenced, as well as an employee who is a spouse or other relative of such an employee. For excluded employees, claims in respect of wages, superannuation contributions and superannuation guarantee charges are capped at 2,000 AUD. In so as far as the other classes of employee claims that enjoy priority are concerned, claims by "excluded employees" in respect of leave of absence are capped at 1,500 AUD.

Unincorporated employers that are insolvent, such as partnerships, are dealt with under the Bankruptcy Act 1966 (Cth) (s109) which is similar but not the same as under the Corporations Act.

2,000 AUD is 1,785 CAD.
AUD\textsuperscript{513} and retrenchment payments must not include an amount attributable to the period when the employee, or the employee’s spouse or relative, was a director.

Australia has a wage guarantee fund called the General Employee Entitlements and Redundancy Scheme ("GEERS"), which is established by the Australian Government and administered by the Federal Department of Employment and Workplace Relations ("DEWR"). GEERS is intended to provide a basic payment scheme for the unpaid entitlements of employees who have been terminated because of their corporate employer’s liquidation. The moneys are provided by way of advances via the liquidator. GEERS advances are not available when DEWR’s ability to recover the advances is inadequately protected. GEERS is funded through general tax revenue.

Eligible entitlements for payment under GEERS are those that are payable as priority payments under section 556(1)(e) - (h) of the Corporations Act and consist of unpaid wages in the three month period prior to the appointment of the liquidator, annual leave, long service leave, pay in lieu of notice, and redundancy pay up to a maximum of 16 weeks’ wages in respect of liquidations that occur on or after 22 August 2006. Prior to this date, the eligible entitlement was a maximum of 8 weeks. Where the employee has a legal entitlement derived from legislation, an award, a statutory agreement, or a written contract of employment, at the date of the debtor corporation’s insolvency, employees are eligible to receive payments subject to an income cap of 98,200 AUD\textsuperscript{514}. Eligible claimants who earn more than the scheme’s cap will be paid as if they earned a rate equivalent to the scheme’s income cap.

The state is subrogated to the claims of employees in Australia to the extent those claims have been satisfied by it. In circumstances where DEWR has advanced monies through GEERS, the effect of section 560 of the Corporations Act is that DEWR has the same right of priority of payment in respect of the money advanced as the person who received the payment would have had if the payment had not been made.

If an employer is not incorporated (a sole trader or a partnership), the insolvency will be dealt with under the Bankruptcy Act 1966 (Cth). Similar but not identical provisions apply as in a corporate insolvency. Priority is given to employee payments in personal bankruptcy under s109(1)(e)-(g). One difference is that there is a capped amount of priority for wages, superannuation contributions and superannuation guarantee charges. The capped amount is indexed and is currently 3,750 AUD (3,348 CAD) per employee. Another is that no priority is given to retrenchment payments.

**Treatment of Other Compensation**

There is priority for vacation pay, severance pay, and termination pay. Travelling and other expenses incurred by employees do not receive priority. In order of priority under s 556(1)(e)-(h) of the Corporations Act, wages, superannuation contributions and superannuation guarantee charges outrank injury compensation, which outranks amounts due under industrial instruments in respect of leave of absence, which outrank retrenchment payments. Under GEERS, capped unpaid wages, annual and long service leave, payment in lieu of notice and capped redundancy are all capable of being the subject of the advances to the liquidator. However, DEWR’s ability to recover the advances will be no better than the priority position of the employees concerned.

**Treatment of Pension Claims**

The term “pension claims” is known as superannuation in Australia. Pursuant to the Superannuation Guarantee (Administration) Act 1992 (Cth), a minimum of 9% of an employee’s gross wage is to be deducted and remitted to an approved superannuation fund. If an employer fails to provide the amount, then a tax is levied on the employer to cover the shortfall and this is known as the “superannuation guarantee charge”. Employers may choose to contribute more than the 9% required. Access to superannuation funds by an employee is generally not permitted until retirement. The Corporations Act grants any unpaid superannuation contributions and any superannuation guarantee charge payable, a priority ranking equally with unpaid wages (s 556(1)(e) of the Corporations Act).

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\textsuperscript{513} 1,500 AUD is 1,339 CAD.
\textsuperscript{514} 98,200 AUD is 87,683 CAD.
Superannuation contributions and superannuation guarantee charges, along with unpaid wages, rank above the other classes of employee claims in s 556(1) of the Corporations Act, but behind the classes of claims relating to the administration and/or winding up process. For excluded employees, the priority in respect of wages, superannuation contributions and superannuation guarantee charges are capped at $2,000 (section 556(1A) of the Corporations Act). Otherwise, there are no restrictions. GEERS does not provide advances in respect of superannuation contributions and superannuation guarantee charges. Unremitted pension contributions and unfunded or under-funded pension liabilities in terms of the state pension plan are treated as unsecured debts, as distinguishable from superannuation funds.

**Director and Officer Liability for Social Claims**

Pursuant to section 596AB of the Corporations Act, a person must not enter into an agreement or transaction with the intention of preventing or significantly reducing the recovery of the entitlements of employees of a company. A person who breaches section 596AB will be liable to pay compensation under s 596AC of the Corporations Act to the liquidator or an employee in respect of the loss or damage caused by the contravention.

More generally, while there is no express duty imposed on a director to consider the interests of employees, a failure by a director, for example, to ensure that the company made the required remittances to the superannuation funds of the employees might constitute a breach of his or her duties as a director under the Corporations Act or as a matter of general law. There is no cap to the liability for such a breach. This liability can be settled or compromised during an insolvency proceeding.

**Treatment of Collective Agreements**

In Australia during a corporate insolvency, collective agreements do not enjoy any special privilege over and above that of other types of employment contracts. The making of a winding-up order by the court serves as a notice of dismissal to all employees of the company. If the liquidator wishes to retain some or all of the employees, the liquidator can either waive the notice of dismissal, in which case the relevant employees continue under the existing arrangements, or the liquidator can re-employ them on fresh terms. The trade union’s status remains the same during insolvency.

Part 11 Division 4 of the Workplace Relations Act 1996 (Cth) ("Workplace Relations Act") sets out governing provisions relating to the transmission of a collective agreement to a new employer. A new employer is the successor, transmittlee or assignee of the whole, or a part, of a business of another person (old employer). The new employer is bound by the collective agreement if immediately before the transmission, the old employer and employees of the old employer were bound by a collective agreement and there is at least one transferring employee in relation to the collective agreement. The new employer will remain bound by the collective agreement until the first of the following occurs:

- the collective agreement is terminated (note, however, that there are restrictions on the termination of transferred collective agreements in s 588(2) of the Workplace Relations Act);
- there ceases to be any transferring employees in relation to the collective agreement;
- the new employer ceases to be bound by the collective agreement in relation to all of the transferring employees covered by the collective agreement; or
- the transmission period, being 12 months after the time of transmission, ends.

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515 2,000 AUD equals 1,1786 CAD.
Interaction of Insolvency Legislation with Other Social Claims Legislation

All Australian legislation operates together such that insolvency practitioners may be held liable under a variety of statutes including workplace health and safety legislation. To the extent of any inconsistency, Commonwealth laws override State laws. Bankruptcy and insolvency legislation is Commonwealth based.

The Australian Industrial Relations Commission is an independent, national industrial tribunal established under the Workplace Relations Act to assist employers and employees in resolving industrial disputes. Likewise, the Workers Compensation Commission resolves workers compensation disputes between injured workers and employers. The Federal and Supreme Courts, which can supervise insolvency proceedings, may also resolve issues affecting workers depending on the nature of the claims.

Tax issues in respect of social claims

A director may be subject to penalties where his or her company has failed to remit income tax instalments deducted from employee wages or salaries to the Commissioner of Taxation. These effectively make the director personally liable for the shortfall. Pursuant to section 222AOE(b) of the Income Tax Assessment Act 1936 (Cth) (“ITAA”) a director will be relieved of liability under the ITAA if, within 14 days of receiving a notice from the Commissioner in respect of the liability, the director causes the company to pay the tax liability; enter an agreement with respect to the liability with the Commissioner; be placed in administration; or be wound up.

Legislative Reform

At present in Australia, employee entitlements enjoy a degree of protection if a company is being wound up. However, there is an alternative statutory procedure designed to allow financially-troubled companies to negotiate a compromise with their creditors. This procedure involves the execution of a negotiated deed of company arrangement under which creditors’ claims against the company are compromised as part of a work-out plan for the company. In the past, a deed of company arrangement could result in a compromise of employee claims that produced a less favourable outcome for employees than would be the case if the company were being wound up, because the deed of company arrangement did not have to incorporate the priority given to employee claims in a winding up. However, since the introduction of the Corporations Amendment (Insolvency) Act 2007, deeds of company arrangement are now required to maintain the statutory priority for employee entitlements, unless a meeting of employees determines or a court orders otherwise (section 444DA). This operates effective 1 January 2008.

Historical, Political and Social Reasons for the Development of Australia’s Approach to Social Claims

Priority ranking of employee entitlements in the insolvency context was first introduced in Australia for social welfare reasons, namely, to ease the financial hardship caused to the community by the insolvency of the employer. That said, there is no guarantee of payment despite the priority provisions.
Treatments of Wage Claims

Austria does not have any wage preference or super-priority system in place with respect to employee wage claims that have arisen prior to the opening of bankruptcy proceedings over the assets of the employer. Any wage claims arising after the opening of bankruptcy proceedings rank senior to ordinary bankruptcy claims and junior to secured claims of other creditors.

As to claims for severance pay, it should be noted that a receiver, following the opening of bankruptcy proceedings, has the right to terminate any employment contract within the statutory time limits or any time limits set out in a collective agreement or within shorter time limits, which were lawfully agreed on, provided that the receiver observes any termination provisions applicable by operation of law. In this case any claims of the employees for severance pay are treated as bankruptcy claims, even if part of them may have arisen after the opening of bankruptcy proceedings.

Austria has a wage protection fund called the "Insolvenz-Ausfallgefal-Fonds" (IAF). The IAF is funded primarily through a premium payable by employers on their annual unemployment insurance contribution, which is payable by employers pursuant to the Labour Market Policies Funding Act (Arbeitsmarktpolitik-Finanzierungsgesetz). In addition the IAF receives the proceeds from any employee wage claims that were transferred to the IAF after the employee has received payment from the IAF and it has recovered funds, as well as interest payments on the IAF's assets and fines imposed on employers, pursuant to sec. 16 of the Insolvency Wage Protection Act 1977 (Insolvenz-Entgeldsicherungsgesetz 1977) (the "IWPA 1977"). The premium is annually set by the Federal Minister of Economics and Labour in order to ensure balanced accounts of the IAF.

The following claims resulting from an employment relationship are protected by the IAF, even if they are attached, pledged or transferred:

- wage claims: these claims include claims for ordinary wages (Laufendes Entgelt), termination payments (Entgeld aus der Beendigung des Arbeitsverhältnisses), vacation payment (Urlaubsaufzahlung) and corporate pension claims (betriebliche Pensionsansprüche);
- damage claims, which include claims for compensation if the employment relationship was unlawfully terminated by the employer or if it was lawfully terminated during insolvency proceedings as well as other damage claims resulting from a breach of the employment relationship;
- other claims against an employer, which include other claims against the employer that do not fall under the above two categories, but nevertheless have their grounds ultimately in the employment relationship; and
- necessary legal costs, which include a wide range of legal costs incurred by the employee prior to the employer's insolvency.

The claims must validly exist and must not be prescribed or excluded pursuant to exemptions set out in sec. 1, para. 3 of the Insolvenz-Entgeldsicherungsgesetz 1977. An employee must apply for compensation from of the IAF within six months following the opening of bankruptcy proceedings. Compensation will be paid once the IAF has asserted the validity of the employee's claim.

In accordance with the Insolvenz-Entgeldsicherungsgesetz 1977, the Federal Minister of Economics and Labour must ensure that the IAF is able to achieve balanced accounts each year. Accordingly,
the Minister must set the premium payable by the employers annually at a level that provides sufficient funds. Although not funded by state revenue, the IAF is subrogated to the claims of employees.

Treatment of Other Compensation

In Austria, vacation pay, severance pay, termination pay, and traveling expenses may be covered under “other claims against the employer” payable by the IAF.

Treatment of Pension Claims

Pensions are not granted super-priority under Austrian law. Corporate pension claims of employees or damage claims of employees against employers for the non-payment of contributions to pension funds are protected by the IAF regime.

Director and Officer Liability for Social Claims

Under section 67, para. 10 of the Austrian General Social Insurance Act (Allgemeines Sozialversicherungsgesetz), a managing director of a legal entity (juristische person) or a commercial partnership (Personenhandelsgesellschaft) or the legal representative of a natural person is, within the scope of its power of attorney, jointly liable together with the represented person, for the payment of any social contribution payable by such represented person, if any default in such payment is due to a breach of the obligations of the respective representative. There is no cap on this liability. Claims against directors and/or officers may be compromised or settled during an insolvency workout or insolvency proceeding.

Treatment of Collective Agreements

Collective agreements in the sense of an Austrian Kollektivvertrag or a Betriebsvereinbarung are incorporated by reference into the individual employment contracts. As such, the provisions of such collective agreements share the fate of the individual contracts. The function of a collective bargaining agent is not known in Austria. Work council representatives (Betriebsratsvertreter) or labour union representatives (Gewerkschaftsvertreter) have no official function in Austrian insolvency proceedings, although they are sometimes appointed onto the creditors' committee that monitors the bankruptcy receiver. Austria faces no issues with respect to collective agreements and legacy costs.

Interaction of Insolvency Legislation with Other Social Claims Legislation

Generally, all labour-related statutes continue to be applicable in an insolvency situation, until the employment contract is terminated.

With respect to worker claims, usually the courts of first instance (Gerichtshöfe erster Instanz) have the jurisdiction to resolve disputes between employees and employers, whereby in Vienna a specialized court of first instance, called the Arbeits- und Sozialgericht has been established. In case the employer is bankrupt, any monetary claims against it would have to be registered as bankruptcy claims and only if disputed by the receiver or another creditor, separate proceedings would have to be started before a competent court.

Tax issues in respect of social claims

Austria faces no tax issues in respect of social claims.

Legislative Reform

There is currently no legislation reform being considered.

Historical, Political and Social Reasons for the Development of Austria's Approach to Social Claims

There are no specific issues to report.
BELGIUM

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Treatment of Wage Claims

Belgian law provides for a general priority right for employees' wage claims on the movable goods of the bankrupt company. This priority right is payable immediately after the rights of the mortgage holders and the rights of the specific priority right holders.

Article 19, 3 ° bis of the Belgian Law on Priority Rights and Mortgages of December 16, 1851 (Mortgage Law), as amended, provides that the employees' wages, as defined by article 2 of the Law of April 12, 1965 on the salary protection for employees (the Salary Protection Law), benefit from a priority right up to a maximum gross amount of 7,500 Euro. The amount of 7,500 Euro covers wages, indemnities and other benefits payable under the individual employment contract. Excluded from the limitation is the termination indemnity, an indemnity because of an abusive dismissal, or an indemnity because of a dismissal of a protected employee.

Also excluded from the priority rights, as these are also explicitly excluded from article 2 of the salary protection law, are holiday pay, the additional indemnity for occupational diseases or employment accidents, or indemnities that are paid in surplus to the social security payments. Every two years the maximum amount of 7,500 Euro is adjusted by Royal Decree, after an advice of the National Labour Council (NLC).

An additional indemnity is due by the employer to elderly employees, who have reached the age of 60 or more at the moment of their dismissal. This additional indemnity to employees older than 60 is due on the basis of the Collective Labour Agreement (CLA) n° 17 concluded within the NLC, or on the basis of a CLA concluded within a Joint Committee (JC), or Sub JC, or at the company level that provides for the same benefits as the CLA n° 17. The method for calculating the amount of the priority right for elderly employees is fixed by Royal Decree (RD) on the basis of the monthly amount of this additional indemnity.

Subject to the restriction that interest on a claim is no longer due as from the date of the bankruptcy judgment, in accordance with article 82 of the Law of June 26, 2002 on the closure of undertakings, as amended ("the Law on the Closure of Undertakings"), gross interest which is due on the gross salary of the employees benefits from a general priority right in accordance with article 19, 3 °bis of the Mortgage Law.

In accordance with article 19, 4 of the Mortgage Law holiday pay benefits a general priority in a rank just below the salary. Pursuant to article 90 of the Belgian Bankruptcy Law of August 8, 1997, as amended, the employees as defined in article 1 of the Salary Protection Law, whose salary, as indicated in article 2, part 1 of the said law, and the indemnities due to these persons as a result of the termination of their employment, notwithstanding that the termination of their employment contract took place before or after the bankruptcy judgment, benefit from a general priority right in the same rank and for the same amounts as the persons mentioned in article 19, 3 °bis of the Mortgage Law.

Article 22 of the Bankruptcy Law provides that the claims with a due date more than one year as from the date of the bankruptcy judgment that do not incur interests are approved as a claim in the bankruptcy minus the interest which is due between the bankruptcy judgment and the due date of the claim.
For the amounts payable to the employees above the limits, the employees have a claim in the bankruptcy as an ordinary creditor (Commercial Court Brussels, October 12, 1940, Jur. Comm. Brux., 364). The maximum amount received by the employee is a gross amount minus the social security which is a fixed amount as defined by Royal Decree of December 28, 2005 at a rate of 26.75 % (see under 7.1. below).

In Belgium there is a Fund for indemnifying employees who are dismissed as a result of the closure of a company (Fonds tot vergoeding van de in het geval van sluiting van ondernemingen ontslagen werknemers-Le fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises). The Fund was established by the Law on the Closure of Undertakings. The Closure Fund intervenes for blue collar workers during a period of one year before and after the closing of the undertaking and for white collar workers during a period of 18 months before and 3 years after the closing of the undertaking.

The Fund is funded by employer contribution which is is paid to national social security fund (Rijksdienst voor sociale zekerheid-Office Nationale Sécurités Sociale). The amount is based on the total amount of the gross salaries paid to the employees (the contribution amounts to 0.15 % for companies with less than 20 employees and 0.14 % for companies with more than 20 employees) pursuant to article 56 of the Law on Closure of Undertakings. The funding can be increased through additional financing by the federal government. The money which is initially advanced to the trustees or employers in order to pay an indemnity for the closure of the undertaking must be reimbursed to the Closure Fund, in case there are sufficient assets, pursuant to article 61 § 1 of the Law on the closure of undertakings.

The Closure Fund, in case the employer fails, pays:

- **An indemnity for the closure of an undertaking:** This amount is paid in addition to the termination indemnities payable under the Law on employment contracts dated June 3, 1978, as amended. The amount is only payable to employees with an indefinite contract and with more than one year in the company. The contract must not have been terminated for serious fault by the employee. This is a fixed amount which consists of a basic amount and an additional amount, which is calculated on the basis of seniority and age of the employee. A form BC901A must be completed. This indemnity can be combined with a termination indemnity, unemployment benefits and a dismissal indemnity for protected employees. The basic indemnity amounts to 136.57 Euro (as from January 1, 2008) for each year of seniority within the company with a maximum of 2,731.40 Euro. An additional indemnity of 136.57 Euro (as from January 1, 2008) payable for each employee above the age of 45, with a maximum of 2,594.83 Euro.

- **Contractual indemnities:** These indemnities are paid for overdue payments, year end premiums, termination indemnities and holiday pay. Different maximum limits exist depending on the type of payments made (salaries, indemnities and advantages (excluding termination indemnity) = maximum amount of 6,750 Euro; holiday pay = maximum amount of 4,500 Euro; termination indemnity = maximum amount of 24,000 Euro minus the amount paid as salary, indemnity, advantages and holiday pay).

- **A transitional indemnity:** This indemnity is due to the employees whose professional activities have been interrupted due to bankruptcy or voluntary arrangement with the creditors. The transitional indemnity will be paid by the Closure Fund for the period between the date the employee's professional activity is interrupted and the date the employment by the new employer commences. The maximum amount of the transitional indemnity is the maximum amount of the intervention of the Closure Fund for closure of the undertaking per employee (24,000 Euro as from August 1, 2008) minus the salaries, indemnities, advantages and holiday pay paid by the Closure Fund. This amount is paid for the period between the total and partial interruption of the activities of the undertaking and the new employment. A form BC901B must be completed.

- **An additional indemnity in case of early retirement,** payable in accordance with CLA n° 17, amounts to ½ of the difference between the net salary of the employee and the unemployment benefits. The gross amount is limited to 2,776.41 Euro.
In accordance with article 40 of the Belgian Bankruptcy Law the trustee must take a prior and active role in order to assist the employees in filing their claim in the bankruptcy. After the claims are approved, in total or in part, the trustee must immediately transmit these claims to the Closure Fund in order to proceed with the payment to the employees.

Pursuant to article 67 of the Belgian Bankruptcy Law the trustee is obliged, at the latest 3 days prior to the date of verification of claims, to provide each employee with an advice why his or her claim is accepted totally, in part or declined. Except in the event the employee appeals, the claim is included in the list with the claims. Pursuant to article 11 of the Bankruptcy Law the delay for verification of claims can be maximum 30 days as from the bankruptcy judgment. The delay for the closure of the verification of claims is maximum 60 days as from the bankruptcy judgment. Taken into account the 3 days prior notice this leaves the trustee with 57 days to gather all the employee data and make an opinion on the justification of the claim.

Article 68 of the Bankruptcy Law provides that the trustee must immediately transmit the employees’ claims that are approved in total or in part to the Closure Fund for indemnifying employees.

The trustee can with the approval of the supplementary judge (rechter commissaris, juge-commissaire) make the employee an advance payment which may not be more than 80 % of the total gross amount of 7500 Euro.

The Closure Fund is sufficiently funded. The amounts are not absolute amounts but linked to the short term economical situation in Belgium. For the years 2008 and 2009 the Belgian Employers Association (VBO-FEB) arranged for the contributions to the fund to be brought in line with the real needs of the fund which resulted in a reduction of the employers’ contribution with 0,05 % compared to the year 2007. In addition, the federal government can also directly fund certain expenses (Article 56, paragraph 2 of the Law on the closure of undertakings). In exceptional cases, in order to pay for unforeseeable expenses the Closure Fund is allowed in case of absolute necessity to take out loans in order to cover its effective needs (Article 58 of the Law on the closure of undertakings).

In Belgium, the state is subrogated to the claims of employees. In particular, the Law on the Closures for Undertakings provides for:

(i) a legal right of substitution for the Closure Fund (Art.61 § 2 Law on the closure of undertakings);

(ii) a legal priority right for the payment of the indemnity in case of closing of undertakings in accordance with article 19, 3° bis of the Mortgage Law; and

(iii) a legal priority right in a rank after the holiday pay in accordance with article 19, 4° ter and 4° quinquies of the Mortgage Law (Art. 83 of the Law on the closure of undertakings).

The Closure Fund argues that as a result of their subrogation right in case of un-sufficient assets, the assets must be distributed ponds/ponds with the employees for their claims as ordinary creditors.

With respect to the specific payments, please note:

- **The contractual indemnities**: The Closure Fund is substituted in the rights of the employees (rank article 19, 3° bis of the Mortgage Law) for the net amounts paid, the employees’ social security contribution and the withholding tax. For the employers’ social security contributions paid by the Closure Fund, the fund is substituted under article 62, 2° of the Law on the closure of undertakings in the rights of the national social security organization and it has an own general priority right according to article 19,4° ter of the Mortgage Law in a rank after the holiday pay.

- **Holiday pay**: The Closure Fund does not have an own general priority right and is only substituted in the rights of the employees (article 61, § 2, 2° of the Law on the closure of undertakings) for the net amounts in the rank of article 19, 4° of the Mortgage Law. For the employees’ social security contributions the Closure Fund has an own general priority right in
the rank of article 19, 4° ter of the Mortgage Law. For the employers’ social security contributions and withholding taxes on the holiday pay the Closure Fund is substituted in the rights of the national social security administration and the taxes in accordance with rank article 19, 4° ter of the Mortgage Law.

- **Pensions in case of early retirement:** The Closure Fund is paying the additional indemnity in case of closure of the undertaking and in case of failure by the employer. In case the Closure Fund is paying this additional indemnity in case of closure of the undertaking, the Closure Fund is substituted, in accordance with article 61 §2, 2° of Law on the closure of undertakings, in the rights of the employees for the gross amount of the indemnities paid, but as only the net amounts of the additional indemnities paid for early retirement have a priority right in rank 19, 3° bis of the Mortgage Law, the priority right of the Closure Fund is limited to this net amount. For the employees’ social security contributions paid by the Closure Fund the fund has its own general priority right in rank of article 19, 4° ter of the Mortgage Law. For the withholding tax the Closure Fund is substituted in the rights of the legal pension fund and the taxes in the rank of article 19, 4° ter of the Mortgage Law. In case the Closure Fund is paying this additional indemnity in case of failure by the employer, the Closure Fund is substituted, in accordance with article 61 §2, 2° of the Law on the closure of undertakings, in the rights of the employees. For the social security contributions, withholding taxes and taxes the Closure Fund does not have such a subrogation right.

- **Indemnities in case of closure of an undertaking:** The Law on the closure of undertakings provides in article 61 § 1 in a reimbursement obligation and in article 61 § 2 in a right of substitution in the rights of the employees for the net amounts paid by the Closure Fund. For the withholding taxes paid on this amount the fund is substituted in the rights of the taxes in accordance with article 19, 4° ter of the Mortgage Law.

- **The transitional indemnity:** Only the Closure Fund has a payment obligation therefore there only exists a reimbursement obligation by the employer for the gross amount of the indemnities paid. In accordance with article 83, 2° of the Law on the closure of undertakings the Closure Fund has a priority right in rank 19, 4° ter of the Mortgage Law for the social security payments made.

**Treatment of Other Compensation**

In Belgium, vacation pay is preferenced for amounts due for the year prior to the bankruptcy judgment and the current year. Severance pay, termination pay, and travelling and other expenses are also preferenced and are included in the total amount of 7500 Euro (gross).

**Treatment of Pension Claims**

Legal pensions in Belgium are paid by the Belgian government *(Rijksdienst voor pensioenen-Office National des Pensions)* and extra legal pensions are either paid (i) by this governmental body or (ii) by an insurance company in case an insurance contract has been taken out or (iii) by a pension fund. The latter is a separate legal entity different from the employer set up in the form of an OFP i.e. an Organization for Financing Pensions.

**Director and Officer Liability for Social Claims**

The employer, trustee or liquidator must reimburse the Closure Fund that has made payments to the employees. The employer is responsible for the employees who failed to carry out the payments *(Article 78 on the Law of Closure of Undertakings)*. The persons responsible within the company, i.e. persons who have decisive power, carry the same liability as the employer.

Infringement of social security legislation in general, as for example, for the payment of wages, social security payments are subject to criminal sanctions. Subject to article 269, 271 to 274 of the Belgian Criminal Code, the employer, trustees and liquidators are subject to an imprisonment between 8 days to one month and a criminal penalty between 130 Euro and 2,500 Euro in case of failure to reimburse the Closure Fund in accordance with article 76 of the Law on closure of undertakings. Article 1, 10° of the Law of June 30, 1971 regarding administrative penalties in case of non-
compliance with social laws (Law of June 30, 1971), provides for administrative penalties between 50 to 1,250 Euro payable by the employer in case of failure to reimburse the Closure Fund. These penalties are payable by the employer and not the persons acting on behalf of the employer (Art. 3 of the Law of June 30, 1971).

Claims against directors and officers cannot be compromised or settled during an insolvency workout or insolvency proceeding in Belgium. Compensation is only allowed when provided by law, by agreement or decided in a judgment. As these claims are mainly claims against the company there is no need for such compensation.

Treatment of Collective Agreements

Since the judgment of the Belgian High Court (Cour de Cassation/Hof van Cassatie) of June 24, 2004 from the moment a bankruptcy judgment is rendered, the trustee is excused from having to comply with the special measures provided in the CLA with regard to the safeguarding of the employment and the information and negotiation proceedings. A trustee is dismissed from having to comply with the information and consultation proceedings regarding collective dismissal of employees. As a result of this case law, the Law of July 15, 2005, amended the Bankruptcy Law in this respect (Article 16, 46 and 47 of the Bankruptcy Law).

In principle collective bargaining agents in Belgium have a more restricted role in case of an insolvency proceeding compared to a normal restructuring. However they can be engaged in implementing a social plan for the employees of the company. Provided it is not contrary to the benefit of the other creditors, the court can decide, in accordance with article 47 of the Belgian Bankruptcy Law, upon the request of the trustee or any party with an interest and after having heard the special report of the supplementary judge (rechter-commissaris/juge-commissaire) the trustee and the representatives of the works counsel, or in their absence the representatives of the Committee for Safety and Healthy at work, or in their absence the trade unions, to allow the business to continue partially or in total by the trustee, by the debtor or a third party. The trustee can also immediately after the bankruptcy judgment after the consultation of the trade unions or the employees, as a temporary measure, while awaiting a court decision regarding the continuation of the business, continue the business.

Chapter III of the CLA no 32 bis of June 7, 2005, as amended, applies to employees who are transferred in the context of the transfer of an undertaking, business or part thereof following bankruptcy.

The employees benefit from the protective rules only if they are transferred within a period of 6 months following the transfer of the undertaking, business or part thereof and the transfer of the undertaking, business or part of a business occurs within a period of 6 months following the date of the bankruptcy (Art. 11 of the CLA no 32 bis).

Employees who are transferred benefit from the following protection:

1. Collective rights or benefits accepted by or binding on the previous employer are transferred to the transferee (Art. 13 of the CLA no 32 bis). Changes to such collective rights can only be made if a specific procedure is followed (Art. 15 of the CLA no 32 bis); and

2. the seniority acquired under the previous employer, including any period between the transfer and the suspension of operations as a result of bankruptcy shall be taken into account for the purpose of determining the notice period or the indemnity to be paid in case of termination of a new employment relationship by the transferee (Art. 14 of the CLA no 32 bis), unless the employment contract is terminated by the transferee during the probationary period.

Interaction of Insolvency Legislation with Other Social Claims Legislation

According to the general accepted case law the Bankruptcy Law is the lex specialis that has priority over all other special procedural laws, for example (i) the CLA no 9 declaring the national agreements concluded in the NLC and CLA regarding works councils generally binding and (ii) the Royal Decree dated November 27, 1973 with respect to the economic and financial information that must
be provided to the works councils, as amended. (K.RASSCHAERT, F.VEYS, H.VAN HOGENBEMT, in H. BRAECKMANS, E.DIRIX, E.WYMEERSCH, Faillissement en Gerechtelijk Akkoord: het nieuwe recht, 241 and 242).

In accordance with Article 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms, dated 4 November 1950, as amended by Protocol no 11, everyone who has a legal claim under the convention can, after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken by a national court, appeal before the European Court of Human Rights in Strasbourg. For employment related issues this claim will be based on: Prohibition of forced or compulsory labour (Art. 4.2.); The freedom of assembly and association, including the right to form and join trade unions for the protection of its interest (Art. 11); The right to respect for private and family life (Art. 8.1); The prohibition of discrimination on the ground as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status (Art. 14); and The right to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Art.6.1).

Article 574, 2° of the Belgian Code of Civil Procedure provides that the commercial court is competent for all claims directly resulting out of a bankruptcy proceeding or a voluntary arrangement with the creditors, in accordance with the Bankruptcy Law or the Law on the voluntary arrangement with the creditors, where the elements for the solution can be found in the lex specialis that applies on a bankruptcy or a voluntary arrangement with the creditors. On the other hand the employment court has competence regarding individual labour agreements, the individual rights resulting from CLA and disputes regarding the safeguarding of the employees rights in case of a transfer of an undertaking or part of it, as provided in Chapter IV, Title III on the Law regarding a voluntary arrangement with the creditors (Article 578, 1° and 3° of the Belgian Code of Civil Procedure). Therefore disputes regarding the employees’ claim resulting of the employment contract are dealt with by the employment court. After the decision of the employment court the cases are bundled and joined again before the commercial court in order to proceed with the liquidation of the bankruptcy.

Tax issues in respect of social claims

In Belgium, in general, salaries are subject to 13.07 % social security charges and an employer charge in average of 35 % for white-collar workers and 40 % for blue collar workers. Income tax, including communal charges can go up to 55.4 %. According to a recent report of the OECD taxes are the highest in Belgium.

The amount received by the employee under the wage priority right (see 1.1.) amounts to the gross amount of 7,500 Euro minus the social security (which is a fixed amount as defined by Royal Decree of December 28, 2005 at a rate 26.75 % compared to the normal rate). (see 1.1.)

The Closure Fund hardly ever pays the employees the same year as the bankruptcy judgment. The amounts paid by the Closure Fund are mentioned on the payment slip 281.10 under separate taxable overdue payments. These overdue payments are taxable in accordance with Article 171, 5° b) of the Code of Income Tax 1992, as amended. The withholding tax amounts to maximum 34.36 % while in the income tax regime of the taxable person these payments are separately taxable at the average tax rate of the total taxable income during the last previous year that the taxable person had a normal professional activity. The withholding tax must be deducted by the trustee prior to making the payment to the employees (Article 270, 6° of the Code of Income Tax).

Legislative Reform

However not directly relevant for the purpose of this questionnaire, there exists a draft bill of October 25, 2007 (Doc.52 0280/001), amending the Law on the Closure of Undertakings, providing for a closure indemnity for employees in small enterprises. Whereas until now these employees only have a right to an indemnity in case of bankruptcy of the company they will under the draft bill receive a right in case of definitive closure of the company whatever the reason.

Historical, political and social reasons for the development of Belgium’s approach to social claims
At the time of the coming into force of the old bankruptcy law on April 18, 1851 the main interest of
the legislator was to safeguard the financial interest of the lenders and not so much the suppliers.
As a result of the economic recession and social tragedies in the beginning of the 20th century more
attention was paid to the survival of businesses and the economical and social dimension.
The specific laws protecting the interests of employees dates from the sixties, without that these laws
were directly linked to the insolvency of companies.

Since the coming into force of the new bankruptcy law of August 8, 1997, as amended, by the
Framework Law, Programmawet-Loi-programme, of April 8, 2003, special interest was given to the
social aspects and consequences of bankruptcies. The amendments made by the Framework Law of
April 8, 2003 result from the lessons drawn after the bankruptcy of SABENA NV/SA, the Belgian
national airline company.

In 2001, in the aftermath of the SABENA bankruptcy the Closure Fund got an additional assignment
outside the scope of his normal legal activities, namely putting in place a social plan. The social plan
was concluded between the government and the employees associations on November 8, 2001. The
employees who were not transferred from SABENA to DAT on December 15, 2001 received an
additional premium in addition to the legal indemnities. These were gross amounts on which no
social security premiums were due but only a withholding tax of 10.3 %. In case the date of the
closing of a company predates the coming into force of the last amendments to the Law on the
closure of undertakings on April 1, 2007, the provisions of the old law continue to apply. It must be
noted that the Law on the closure of undertakings, as amended, changed the rules with respect to
the priority rights of certain creditors. As a general rule a bankruptcy may not come as a surprise in
companies where there exists a works council on the basis of the annual and periodical information
transmitted to them. A company who has a delay in paying the social security, the VAT, the direct
taxes of the priority creditors or creditors benefiting from a mortgage or a pledge must immediately
inform the works council or the trade unions. Filing for bankruptcy is considered to be exceptional
information which must be transmitted to the works council or the Committee for Health and Safety at
work or the trade union prior to the effective filing as it will have a serious impact on the existence of
the company. This information must not only be provided but also discussed (Article 9 of the
Bankruptcy Law).
BERMUDA

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Treatment of Wage Claims

Section 33(3) of the Bermuda Employment Act 2000 provides that claims of an employee to accrued vacation, earned but unpaid wages, and severance allowance have priority over all claims on the winding-up or insolvency of an employer’s business. The amount of severance allowance payable to an employee on termination of employment is based on the length of employment, but unpaid wages and accrued vacation are not subject to such restrictions.

There is no wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

Accrued but untaken vacation pay is also subject to priority, and ranks equally with earned but unpaid wages. All severance pay should be paid in full unless the assets of the employer’s business available for payment of general creditors are insufficient to meet them, in which case they employees are paid a pro rata amount in equal proportions. Severance pay ranks equally with vacation pay and earned but unpaid wages.

There is no priority for either termination pay or traveling and other expenses.

Treatment of Pension Claims

The National Pension Scheme (Occupational Pensions) Act 1998 provides for each employer in Bermuda to maintain a private contributory pension scheme for all Bermudian employees and their spouses. This requirement is in addition to the public schemes provided by the government pension fund under the Contributory Pensions Act 1970, which is not expected to be a realistic pension for the local population to live on following retirement.

When an employer becomes insolvent, the Pension Commission, a government body, may order the winding up of a pension plan in whole or part. Where a pension plan is wound up, the employer is required by Section 44 of the National Pension Scheme (Occupational Pensions) Act to pay into the pension fund an amount equal to the total of all the payments that are due or have accrued and not been paid into the pension fund. If any application by a secured creditor against the property of the employer is made or warrant of distress executed, the property or the proceeds of sale shall not be distributed to any person entitled to it until the court ordering the seizure or sale has made provision for payment into a pension fund of any amount payable by the employer.

Director and Officer Liability for Social Claims

Corporate directors and officers are liable jointly and severally for contributions that became due while they were directors or officers. This liability is set out in the National Pension Scheme (Occupational Pensions) Amendment Act 2006.

Treatment of Collective Agreements

In Bermuda, on insolvency or bankruptcy, collective agreements continue to govern the individual employees’ terms and conditions of employment in the sense that the contract between the employer

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516 Section 33(3), Bermuda Employment Act 2000, as amended.
and employee will continue to incorporate the terms negotiated under the collective agreement until that contract is terminated or transferred to a new employer. Collective agreements are not themselves enforceable as contracts as the contract is between the employee and employer alone. By Section 33 of the Employment Act 2000, the winding-up or insolvency of an employer’s business causes the contract of employment of an employee to terminate one month from the date of winding-up or the appointment of a receiver. This does not apply however if the business continues to operate.

By Section 5 of the Employment Act 2000, where a business is sold, transferred or otherwise disposed of, the period of employment with the former employer shall be deemed to constitute a single period of employment with the successor employer, if the employment was not terminated and severance pay was not paid pursuant to the Act.

Interaction of Insolvency Legislation with Other Social Claims Legislation

Insolvency claims are heard by the Supreme Court of Bermuda, Magistrates’ Court, for claims up to 25,000 BMD. The Employment Tribunal can resolve worker claims. The Supreme Court supervises the administration of an insolvency proceeding.

Tax issues in respect of social claims

There are no tax issues in respect of social claims in Bermuda.

Legislative Reform

There is currently no legislation reform being considered.

Historical, Political and Social Reasons for the Development of Bermuda’s Approach to Social Claims

Generally, Bermuda is a hybrid of the very different US and British approaches to social claims and employment protection. Until the Employment Act 2000 came into effect on 1 March 2001, there had been no legislation that provided for the protection of employment rights specifically. Even when introduced, the Employment Act 2000 was not a comprehensive statutory code setting out rights, but rather a framework that provided basic minimum employment standards. The National Pension Scheme (Occupational Pensions) Act 1998 was a response to the issue facing most western countries of needing encouragement for workers to save for their retirement in a private scheme and not rely on the government pension scheme.

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517 25,000 BMD is 25,312 CAD.
Treatment of Wage Claims

Employees in Botswana seem to have a preferential claim that ranks before the non-privileged creditors. It is not absolutely clear what is meant with “non-privileged” creditors but it seems to include at least the unsecured creditors. Section 91A(1) of the Botswana Employment Act of 1982 (the “BEA”) specifies that in the event of an employer’s insolvency, an employee’s claims arising out of his employment shall be payable out of the assets of the insolvent employer before non-privileged creditors are paid their shares. This protection is in relation to the following employee’s claims:

(a) wages up to three months prior to the insolvency or to the termination of employment;

(b) payment as a result of work performed during holidays within a period of twenty-four months prior to the insolvency or termination of employment;

(c) claims for any amount due to him or her in respect of other types of paid absence for a period not less than three months prior to the insolvency or to the termination of employment; and

(d) such severance benefits or other terminal benefits as the employee is entitled to.

However, this previously mentioned provision seems to contradict the preference in favour of employees in terms of section 85 of the Insolvency Act of 1929. Apart from specific provisions regulating the payment of secured claims out of the proceeds of secured property, sections 82 to 88 of the Insolvency Act makes provision for the preferential payment of a number of unsecured claims, including a preference ranked in position number four of the order of payment in terms of the Insolvency Act, regarding servants’ wages. Section 85 provides a preference against the free residue in this regard. The amount is restricted to 100 BWP (100 BWP is 16 CAD) for wages in arrear for one month as well as wages for the month current with the sequestration of the employer where the employer is employed on a monthly basis and a similar provision is provided for where the employer is employed as such but on a weekly basis.

The wages must be paid out of available assets and no formal claim needs to be lodged for this part of the claim. The claim for the wages during the month or week of sequestration is subject to the employer still making his or her services available to the liquidator as provided for in section 85(3). Section 85(4) also preserves the right to claim damages against the estate over and above these preferential claims. This would presumably be of a concurrent nature.

Hence, while labour legislation, which overrides other statutes in principle, seemingly grants employee claims a first ranking priority, the Insolvency Act places such claims as fourth ranking amongst the list of statutory preferences or priorities. The priority or preference in terms of the BEA also covers more claims than the preference in terms of the Insolvency Act as well as larger amounts since those in terms of the BEA are not capped. There is however no statutory wage guarantee fund.

Treatment of Other Compensation

As indicated above, employees have a first call on the assets of the insolvent corporation with regard to wage as well as related compensation and severance benefit claims in terms of section 91A of the BEA that ranks above non-privileged creditors but these preferences are not mentioned in the ranking as prescribed by the Insolvency Act of 1929.
Treatment of Pension Claims

Neither the Insolvency Act nor other legislation provides for such a preference for pension fund contributions in arrears in favour of the pension fund. There is also not a State guaranteed fund for private pension funds.

Director and Officer Liability for Social Claims

There is no specific director and officer liability for unpaid social claims in Botswana. Section 481 of the Companies Act of 2004 however contains a general provision in terms of which directors or others can be held personally liable for debts of the company if a court finds that the business is or was being carried on recklessly or with the intent to defraud creditors.

Treatment of Collective Agreements

Under section 37 of the Trade Disputes Act of 2004, every collective agreement shall be binding to the parties thereto and any party who contravenes a collective agreement commits an offence and is liable to a fine of 2000 Pula or imprisonment for 12 months or both. In Botswana, labour legislation is silent in respect of the effect of insolvency on collective agreements.

Under section 28 of the BEA, if a business or enterprise is transferred or partnership transferred and an employee continues to be employed, it is deemed continuous employment with the transferee immediately following the transfer. If a contract of employment between a company and employee is modified by the substitution of a body corporate as the employer, the period of continuous employment immediately preceding the substitution shall be deemed, for the purposes of this Act, to be part of the employee's continuous employment. There is no explicit duty on any new employer to take over all contracts of employment from the old employer when a ‘change of employer’ would occur. There is no clear prohibition against the dismissal of employees by either the old or new employer and there is no indication in the BEA that it would apply to insolvent employers. (Section 25 provides for termination in case of redundancy where the main principle to be applied is the first-in-last-out principle. Section 28 provides for severance benefits on termination of a contract of employment. Section 29 protects some rights of employees when the business is transferred to a new employer, like continuous employment.) Neither the Trade Disputes Act, nor the BEA makes any reference to the applicability of collective agreements in respect of the new employer subsequent to a transfer of a business as a going concern.

The Insolvency Act is silent on the treatment of employment contracts by the trustee. It is submitted that such contracts with individual employees may be terminated by the trustee/liquidator in terms of general principles that apply to unexecuted contracts in general, but still subject to their claims regarding wages etc in arrear. (See in general section 384(4)(f) of the Companies Act of 2004 regarding the powers of a liquidator.)

Interaction of Insolvency Legislation with Other Social Claims Legislation

Insolvency legislation and employment legislation will both apply when insolvency of the employer occurs, but as discussed above it seems that the BEA, that makes provision for a priority regarding wages etc, will apply and enjoy preference in such an instance with regard to the social claims covered by it.

Tax issues in respect of social claims

There are no specific tax issues in respect of social claims, for instance that wages in arrears will be paid tax free to employees out of the insolvent estate.

Legislative Reform

There is currently no immediate legislative reform underway in this regard.
Historical, Political and Social Reasons for the Development of Botswana's Approach to Social Claims

The BEA in 2003 was amended in order to comply with Part II of the ILO Insolvency Convention No 173 of 1992. Botswana only accepted Part II of the ILO Insolvency Convention. The Employment (Amendment) Act of 2003 was brought into force on 22 August 2003.
BRAZIL

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Treatment of Wage Claims

Under Brazil’s Federal Law 11101/05, Law of Restructuring and Insolvency, Article 83, labour-related claims, up to 150 minimum wages per creditor, and occupational accident claims have priority in bankruptcy. The minimum national wage is 380 BRL.518 Other than the cap on the amount entitled to preference, there are no restrictions on the realization of wage claims.

Brazil does not have a wage protection fund or guaranteed insurance scheme. Discharged employees can seek social assistance, receiving monthly 1 minimum national wage paid by the National Institute for Social Security (INSS) for 3-5 months (Federal Law 8.900/94 and Federal Law 8352/1991). However, the Federal Constitution Amendment n. 45/2004, Article 3, has established that a federal law must be passed granting employees access to a future Security Fund for Payment of Wages, to be created by law (similar to UE Directives 80/987, 20.10.80 and 87/164, 2.3.87); see Beltran, Ari Possidonio. Os impactos da Integração Econômica no Direito do Trabalho. Globalização e Direitos Sociais. S. Paulo, ed. LTR, 1998, p. 309-312.

Treatment of Other Compensation

There is no priority in Brazil for holiday pay, severance pay, termination pay, or traveling or other expenses incurred by employees in the period leading up to insolvency.

Treatment of Pension Claims

Pension claims are not paid by employers in Brazil, but by the INSS. During insolvency, the INSS is authorized to prove its credits in the insolvency judicial procedure, having preferential treatment in the same category as tax claims.

Director and Officer Liability for Social Claims

Under certain conditions, such as cases of fraud or management misconduct of the corporation, the Brazilian Civil Code, Article 50, provides for the disregarding of the legal entity, making directors and officers personally responsible for the debts of the corporation, in case of insolvency or bankruptcy. Additionally, there penal consequences for fraud in deducting employee contributions to pension fund and not remitting them (Penal Code, Article 168 (embezzlement) and other special provisions. The liability of directors during insolvency is limitless. Such claims, however, can be settled during the insolvency proceedings.

Treatment of Collective Agreements

Collective agreements are governed by the Consolidação das Leis do Trabalho. Collective agreements continue during insolvency in Brazil. Independent representatives of workers unions, are able to deal with collective bargaining, and they remain in charge of their task even in the case of insolvency or bankruptcy. Collective agreements do not cause problems in the case of insolvency because they are respected by both employers and employees. Concerning legacy costs, in general, cases show that employers are delayed in their payments to the governmental INSS, causing the INSS to go the insolvency or bankruptcy jurisdiction in order to get the delayed payment.

518 380 BRL is 217 CAD.
Interaction of Insolvency Legislation with Other Social Claims Legislation

There are no specific pieces of social claims legislation that affect insolvency legislation.

The Labour Justice is competent to make determinations regarding workers’ claims. It is a special judicial power. After being granted an order by judgment of the labour justice, the debts have to be recognized and dealt with in the insolvency or bankruptcy procedure that is taking place under the state court’s jurisdiction. The state court has the authority to make decisions in such proceedings, despite the fact that federal law regulates insolvency and bankruptcy matters. Many Brazilian States have specialized Trial Courts (1st degree jurisdiction) for insolvency cases and the State of S. Paulo has a Specialized Appeal Court (2nd degree jurisdiction) for such matters.

Tax issues in respect of social claims

There are no tax issues in respect of social claims.

Legislative Reform

There are a number of reforms being considered in Brazil, but none close to being passed into law.

Historical, Political and Social Reasons for the Development of Brazil’s Approach to Social Claims

Brazil’s treatment of social claims comes from the historic social and political movements to protect workers and to stimulate fair relationships among employers and employees. The most important rights have been created by the Labour Law (CLT - Consolidação das Leis do Trabalho, Federal Executive Act n. 5.452/43), the Federal Constitution of 1988 and the Law of Restructuring and Insolvency (Federal Law 11101/05).
BULGARIA

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Treatment of Wage Claims

Article 722, paragraph 1 of the Bulgarian Commercial Act provides that receivables from labour law relations that have arisen prior to the date of the court ruling opening the insolvency proceeding shall rank in priority after the following receivables: (1) receivables secured by a pledge, mortgage, etc.; (2) receivables by reason of which a lien (right to retention) is exercised; and (3) expenses related to the insolvency. Article 722 does not limit the wage claims of employees.

In addition to the priority rule in the Commercial Act, a fund (the “Fund”) securing receivables of employees in case of an employer’s bankruptcy has been created under the Law for Guaranteeing Receivables of Employees on Bankruptcy of the Employer. It guarantees receivables only up to a certain amount and subject to specific conditions, and amounts exceeding the prescribed limit may be claimed in the bankruptcy proceedings described in the Commercial Act according to the priority under Article 722.

Article 14 of the Law for Guaranteeing Receivables of Employees on Bankruptcy of the Employer provides that the revenue of the Fund shall be raised from: (1) obligatory monthly instalments from employers; (2) proceeds from accession to the rights of creditors satisfied by the Fund within the framework of the court proceedings for bankruptcy; (3) sums reimbursed by the employer for receivables under Article 3 paid by the Fund and for insurance instalments made for the account of the employer; (4) revenue from investment of temporarily free monetary resources of the Fund; (5) donations, temporary financial and gratuitous aid; (6) interest and fines; and (7) other sources.

Article 22(1) states that the guaranteed receivables of employees under Article 4, paragraph 1, item 1 shall amount to:

(1) the last three assessed but not paid monthly labour remunerations and monetary indemnifications for the last six calendar months preceding the month when the decision under Article 6 (the court’s decision to institute bankruptcy proceedings) is promulgated, but monthly no more than the maximal size, determined for these cases, of the guaranteed receivables, if the employee has been employed by the employer for a period not less than three months;

(2) the assessed but not paid labour remuneration and monetary indemnifications, but not more than one minimal salary established for the country by the date of promulgation of the decision under Article 6, if by this date the employee has been employed by the employer for a period less than three months.

Article 22(2) indicates that the maximal size of the guaranteed receivables under Article 22 paragraph 1, item 1 shall be determined annually by the Law for the budget of the state public insurance and may not be less than two and a half minimal salaries established for the country by the date of promulgation of the decision.

Article 23(1) of the Law for Guaranteeing Receivables of Employees on Bankruptcy of the Employer states that the guaranteed receivables of employees under Article 4, paragraph 1, item 2 shall equal the last three calculated but not paid monthly labour remunerations and monetary indemnifications during the last six calendar months before the date of termination of the legal employment relationship, but monthly no more than the maximal size, determined for these cases, of the guaranteed receivables, if the employees have been employed by the employer for a period no less than three months. Article 23(2) allows for the maximal size of the guaranteed receivables under paragraph 1 to be determined annually by the Law for the budget of the state public insurance; it may
not be less than two and a half minimal salaries determined for the country by the date of promulgation of the decision under Article 6.

When the receivables of the employees under Article 4, paragraph 1, item 2 are only for assessed but not paid monetary indemnification for the account of the employer, due by virtue of a normative act or a team employment contract, the guaranteed receivable shall equal the unpaid indemnifications, but shall not be more than four times the amount of the minimal salary established for the country by the date of termination of the legal terms of employment, if they have been employed by the employer for a period longer than three months (Article 23(3)). When the employee under Article 4, paragraph 1, item 2 has had been employed by the employer for a period less than three months, the guaranteed receivable shall equal the assessed but not paid labour remuneration or monetary indemnifications, but shall not exceed one minimal salary established for the country by the date of registration of the decision under Article 6.

Article 4 provides that the right to guaranteed receivables applies to employees who were employed with the employer under Article 2 regardless of the term and the duration of the employment if they have not been terminated by the date of promulgation of the decision under Article 6 or have been terminated during the last three months before the date of promulgation of the decision. Employees may benefit from this provision only if their employer has carried out business activities at least 6 months before the initial date of the insolvency (marked by excessive indebtedness) indicated in the decision under Article 6.

Article 20(3) provides that instalments to the Fund shall be due on the paid or determined gross labour remuneration, but shall not exceed the maximal monthly amount of the insurance income determined by the Law for the budget of the state public insurance, and shall be entirely for the account of the employers. The instalment to the Fund shall be for the account of the employer and shall be determined annually by the Law for the budget of the state public insurance, but it may not be more than 0.5 percent of the remuneration under Article 20 paragraph 3 (Article 20(5)).

Article 18 indicates that in the case of a temporary shortage of resources in the Fund for covering urgent payments, short-term interest-free loans from the republican budget may be used with the permission of the Minister of Finance upon a proposal of the supervisory board of the Fund and/or from funds with social orientation up to the size of their reserves by means of an order of the Minister of Finance and the Minister of Labour and Social Policy upon a proposal of the supervisory board of the Fund.

Treatment of Other Compensation

Under Article 722, paragraph 1 of the Bulgarian Commercial Act, vacation pay, severance pay, termination pay, and traveling/other expenses are treated as preference claims, with no limit to the amount entitled to preference. These amounts are entitled to the same preference as general wage claims.

Treatment of Pension Claims

In Bulgaria, the employer is not responsible for making pension payments to its former employees, and therefore there is no super-priority in this respect.

Director and Officer Liability for Social Claims

Director and officer liability for social claims is unknown.

Treatment of Collective Agreements

Collective agreements are treated the same way as individual labour agreements under Bulgarian insolvency law; see Article 3 paragraph 1 of the Law for Guaranteeing Receivables of Employees on Bankruptcy of the Employer.
Interaction of Insolvency Legislation with Other Social Claims Legislation

In general, employee claims are filed with the district court in Bulgaria. They may be appealed before the regional court. Furthermore, should a dispute arise in an insolvency proceeding, the regional court where the insolvency procedure takes place is competent to resolve it.

Tax issues in respect of social claims

In Bulgaria, pension benefits paid by the state are not taxed. Pension benefits received as a result of voluntary pension insurance are taxed when they are paid before the person has reached a certain age (giving him or her the right to retire) if the person has previously reduced his taxable income by subtracting the insurance amount voluntarily paid by him or her. Otherwise, these payments are not taxed.

Legislative Reform

The Law for Guaranteeing Receivables of Employees on Bankruptcy of the Employer is a relatively new act, in force in 2004. Additionally, as a result of its new EU-member status, Bulgaria must implement the European policies in this respect.

Historical, political and social reasons for the development of Bulgaria’s approach to social claims

The historical, political and social reasons for the development of Bulgaria’s approach to social claims are unknown.
There are two principal insolvency statutes in Canada, namely the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA). Other statutes addressing insolvency exist, in respect of financial institutions and farming, but they apply in specific situations, or their use is not widespread.

The BIA addresses bankruptcy (both voluntary and involuntary) and restructuring proceedings, for a broad range of debtors such as individuals, partnerships, cooperative societies, corporations or organizations. "Corporations" exclude certain specific entities, namely banks, authorized foreign banks, railway companies, insurance companies, trust companies and loan companies.

The CCAA addresses restructuring proceedings for a debtor company, or an affiliated group of debtor companies, that has a debt load in excess of $5 million. A debtor company is essentially a company that is insolvent or bankrupt. "Companies" exclude certain specific entities, namely banks, authorized foreign banks, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies.

Some transfers of proceedings from one legislation to the other are possible, but not in all cases, as some conditions need to be met.

Treatment of Wage Claims

Under section 136(1)(d) of the BIA, wage claims of employees are entitled to priority in Canada. Included in the priority are "wages, salaries, commissions or compensation … for services rendered during the six months immediately preceding the bankruptcy to the extent to $2,000" (s.136(1)(d) BIA).

Directors and officers of the insolvent corporation, and close relatives of an insolvent individual, are not entitled to have their wage claims treated as preferred (s. 138 and 140 BIA).

There is currently no priority for wages claim in proceedings under the CCAA, although the amounts due to employees are customarily paid in the normal course, in order to avoid destabilizing the workforce.519

Canada does not currently have a wage protection fund or guaranteed insurance for wage claims during insolvency, but see proposed amendments under legislative reform.

519 An order allowing the debtor company to pay employee related claims may include a wider range of claims than just wages, depending on the situation.
Treatment of Other Compensation

Vacation pay has been found to constitute wages which relate to services rendered in the “period prior to the bankruptcy”. As such, a portion of the vacation pay that relates to the six months before the proceedings under the BIA could benefit from the preference in section 136(1)(d) BIA. It is important to note that the $2,000 limit referred to in section 136(1)(d) is not a limit that applies to each type of claim, but rather is an aggregate limit for all claims that would qualify under the section as wages, salaries, compensation, or commissions for services rendered during the six months preceding the bankruptcy.

As well, an amount of up to $1,000 can be claimed by a travelling salesperson, in connection with expenses properly incurred by the salesperson in and about the bankrupt’s business in the same six months period preceding the bankruptcy (s. 136(1)(d) BIA).

Under both the BIA and the CCAA, employees who have been terminated would be entitled to claim for termination or severance pay, and the legislation in force in the province of employment of the employees or the collective agreement, as the case may be, will provide for minimum standards for severance, termination or pay in lieu of notice. However, the claim for termination, severance or pay in lieu of notice, or similar amount due as a result of the breach of the employer/employee agreement, will not benefit from a priority ranking in a distribution under the BIA.

Treatment of Pension Claims

Canada currently has no pension payment guarantee fund or guaranteed insurance for pension claims during insolvency, except in the province of Ontario. Unremitted pension contributions of the debtor are considered an unsecured claim in a bankruptcy, a proposal under the BIA and in a restructuring under the CCAA.

The BIA does not provide for any priority for pension claims either in a context of a bankruptcy or of a proposal under the BIA. In a context of a proposal under the BIA, the status of the pension plan would not be affected, unless the plan is terminated in the course of the restructuring proceedings: A defined contribution plan could continue, although the unremitted contributions to the plan would be settled as part of the proposal, and the individual plan members would absorb the shortfall. A defined benefit plan could continue, and in such a case the shortfall resulting from the unremitted past contributions would be amortized and corrected prospectively through the periodic actuarial revaluations.

The CCAA does not provide for any priority for pension claims. In a context of a restructuring arrangement or compromise under the CCAA, the status of the pension plan would not be affected, unless the plan is terminated in the course of the restructuring proceedings: A defined contribution plan could continue, although the unremitted contributions to the plan would be settled as part of the proposal, and the individual plan members would absorb the shortfall. A defined benefit plan could continue, and in such a case the shortfall resulting from the unremitted past contributions would be amortized and corrected prospectively through the periodic actuarial revaluations.

As indicated above, there is no priority for pension claims in the BIA and the CCAA. Furthermore, in certain cases the payment of pension plan contributions has been suspended with the Court’s authorization, during the pendency of the restructuring proceedings. See, in this respect re: Ivaco Inc., 2006 CarswellOnt 6292 (Ont. C.A.).

Pension claims will be granted a super-priority under proposed new legislation, as discussed below.

520 See for example the Ontario Employment Standards Act, S.O. 2000, c. 41, or the Québec Act respecting the labour standards, R.S.Q. c. N-1.1.

Director and Officer Liability for Social Claims

There are a number of federal and provincial statutes that provide for the possibility of director and/or officer liability for claims of outstanding wages and related compensation and pension related claims at the point of insolvency. Of those statutes, the Canada Business Corporations Act (CBCA) (see sections 119) and the Québec Companies Act (R.S.Q., ch. C-38, “QCA”) (see section 96) have broadest potential application. There are also various potentially relevant federal and provincial statutes, however these are applicable only in certain well-defined business sectors/undertakings (such as the Québec Supplemental Pension Plans Act (R.S.Q., ch. R-15.1, “SPPA”) (sections 52 and 53) applicable to registered pension plans).

Under the CBCA, the QCA and the SPPA, the limit of directors’ and officers’ liability is stated to be “six months” wages (section 119(1) CBCA and section 96(1) QCA). Under the SPPA, liability is for “contributions that become due and remain unpaid during [the directors’ term in office], with interest, up to a contributory period of six months”, unless the fund is managed by the employer in which case no such six-month limit applies.

The claims against directors can be compromised in restructuring proceedings under both the BIA and the CCAA, provided the claims to be compromised arose before the commencement of proceedings, and the claims relate to obligations of the corporation for which the directors are liable by law in their capacity as directors. Claims that cannot be compromised would include contractual rights (e.g. a personal guarantee given by a director) and claims that are based on an allegation of misrepresentation or wrongful or oppressive conduct by the directors (section 50(13) BIA and 5.1 CCAA).

Treatment of Collective Agreements

In Canada, collective agreements are continued in an insolvency context, and may continue to apply to the purchaser of substantially all of the assets of a distressed or bankrupt debtor if it continues the undertaking and under certain conditions. A collective bargaining agent is treated as an interested stakeholder, without further special formal status.

The treatment of collective agreements and legacy costs are sensitive issues in Canada, and the latter issue of the treatment of unfunded legacy costs has prompted legislators to propose various forms of legislative amendments, none of which have yet been proclaimed into force. The treatment of legacy costs in respect of major restructurings have to date been addressed on an ad hoc basis. For instance, see the regulations respecting the Ontario Pension Benefits Act, two of the three of which are particular to given plans (Algoma Steel and Stelco) and evidence the case-by-case approach that has been used to deal with legacy costs.

There are currently no statutory provisions in the BIA or CCAA that allow for bargaining, modifying or terminating collective agreements during restructuring proceedings.

With respect to successive employer issues, section 45 of the Québec Labour Code (R.S.Q. ch. C-27) and section 43 and following sections of the Canada Labour Code (R.S.C., 1985, c. L-2) provide for the possibility of a purchaser of assets of a debtor employer being considered the successor.

522 Note however that while the statutes attribute a joint and several (or solidary) responsibility for unpaid wages or pension claims if the employer is insolvent, the triggering condition is not merely insolvency, but rather either a bankruptcy; dissolution or liquidation proceedings; or a judgment for the debt for which execution has been returned unsatisfied. More specifically, the inception of restructuring proceedings under the BIA and the CCAA are not triggering conditions that will cause the directors’ liability to materialize.

523 Note however that the usefulness of these provisions is very questionable, considering the fact that in general, a restructuring proceeding under the BIA or the CCAA is not a triggering event giving rise to a director’s liability in respect of the claims that are the usual cause of concern for directors (i.e. employee claims and fiscal laws), that the principal claims which are a cause of concern for directors (namely wage claims and payroll source deductions) have to be paid in full in the context of an approved proposal or plan, and that in any event the protection afforded by the provisions of the BIA and CCAA seems to be effective only in situations where the restructuring plan is successful. For an example of the triggering conditions for a directors’ liability to attach, see s. 119(2) of the CBCA (for employee claims) and s. 227.1(2) of the Income Tax Act (for payroll source deductions).
employer thereof. There is similar labour relations legislation in all Canadian jurisdictions in respect of success or employer provisions and the continuation of collective agreements.

The proposed new amendments to the BIA and CCAA will contain specific provisions concerning collective bargaining agreements in the context of restructuring proceedings.

Interaction of Insolvency Legislation with Other Social Claims Legislation

Canadian constitutional law principles apply to the treatment of other (non-insolvency) statutes that are provincial, inasmuch as both insolvency statutes of wide use, the BIA and the CCAA, are federal statutes and thereby benefit to the extent applicable from paramountcy principles. However, the same cannot be said for federally-prescribed other statutes that must be interpreted in light of the insolvency statutes, such as human rights legislation in the form of the Charter of Rights and Freedoms. The BIA makes specific reference to a number of other statutes and provides for their application or otherwise in respect of insolvent entities subject to the BIA.

The issue of the intersection of one such other statute and insolvency law was addressed in the recent Supreme Court of Canada judgment in GMAC Commercial Credit Corporation – Canada v. TCT Logistics Inc., [2006] 2 S.C.R. 123. The issues affecting workers can be resolved by the court supervising the administration of an insolvency proceeding, subject to the Supreme Court’s discussion in the TCT Logistics, which expressly allows specialized labour relations tribunals to deal with issues that they are granted express authority to determine.

Tax issues in respect of social claims

There are no taxes issues that are particular to social claims. Canada’s taxation structure is based on a system of self-assessment, with some responsibilities for reporting by payor entities. To the extent that a social claim is paid, if the claim relates to an amount that would be taxable income, the recipient has a responsibility to include it in its annual declaration of revenues, and the payor has a responsibility to report the amounts to the governmental authorities. In certain cases, the payor has an obligation to withhold amounts at source and remit the withheld amounts to the governmental authorities.

Legislative Reform

The Canadian insolvency legislation was left virtually unchanged for a long period of time. After several unsuccessful attempts to modify the legislation in the 1970s and 1980s, the legislation underwent a significant modification in 1992, at which time the then existing Bankruptcy Act was renamed the Bankruptcy and Insolvency Act. As part of this reform in 1992, Parliament implemented a process of periodic statutory reviews of the legislation. As a result of this review process, further amendments were made in 1997 to the BIA, and amendments were made to the CCAA.

Also as part of the statutory review process, the federal Parliament enacted a piece of legislation in 2005, which established the Wage Earner Protection Payment Act and amended the BIA, CCAA and various other statutes, in an effort to implement significant changes to the insolvency legislation. This legislation, when enacted, became Chapter 47, Statutes of Canada, 2005. Although enacted, this legislation has not yet been proclaimed in force, since the statute is considered to contain several flaws.524

Due to the importance of the legislation, the legislator introduced legislation in 2007, to correct the perceived flaws of Chapter 47, Statutes of Canada, 2005, and make further amendments considered necessary to improve the efficiency of the insolvency statutes. This legislation, when enacted, became Chapter 36, Statutes of Canada, 2007. Although enacted, this legislation is not yet proclaimed in force, as some time is required to implement regulations to accompany the statutes, and to give an opportunity to the stakeholders to prepare for the new system.


524 This view is expressed by Jean-Daniel Breton, Canada country contributor, 2008.
Amongst the changes that are significant, the New Legislation provides for the following in respect of social claims:

- Establishment of the Wage Earner Protection Payment Act (WEPP), which provides for the possibility of a payment to employees of up to 3,000 CAD in respect of unpaid wages and vacation pay due to the bankruptcy or receivership of the employer. The WEPP payments are restricted to employees (i.e. directors and officers will not be entitled to the benefit) and the payments will be made from the government’s consolidated revenue fund. The government will be subrogated to the rights of the employees, to the extent of the payments made.

- A new statutory security scheme to protect the wage claims of employees and the unremitted pension contributions. The new provisions 81.3 to 81.6 of the BIA will create a statutory charge over all assets for unremitted pension contributions and a statutory charge over current assets (defined as cash, cash equivalents, inventory, accounts receivable or proceeds from dealing with those assets) in favour of employees for unpaid wage claims. To the extent that the statutory charges encumber the same assets, the charge for wage claims will have priority. In respect of both unremitted pension contributions and wage claims, the statutory charge will apply both in the event of a bankruptcy or a receivership, and the statutory charges will be subject to a limited number of other prior rights, charges or deemed trusts (namely, the rights of unpaid suppliers to recover merchandise, the priority claim of farmers, fishermen and aqua culturists, and the deemed trust for unremitted payroll source deductions).

- A new obligation to ensure that certain payments are made for wage claims and pension contributions, as a condition for the approval of a restructuring proceeding by the Court, under both the BIA and CCAA.

- The possibility of compelling a bargaining process between the insolvent person and the bargaining agent in the context of restructuring proceedings under the BIA and the CCAA, although the provisions of the statutes make it clear that the collective agreement can only be modified by agreement between the insolvent person and the bargaining agent (Section 65.12 of the BIA and section 33 of the CCAA).

Historical, Political and Social Reasons for the Development of Canada’s Approach to Social Claims

The most recent reform initiatives are the result of a number of high profile insolvencies that raised the issues of the vulnerability of workers and pensioners at the point of firm insolvency. Moreover, trade unions became active for the first time in many years in both insolvency proceedings and in the legislative reform process, resulting in amendments that will enhance the position of social claimants in insolvency.

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525 The reader should not assume that the concepts discussed herein in respect of the recent statutory reform represent all of the changes that are implemented thereby. There is a comprehensive set of modifications to the insolvency statutes, a description of all of the changes is beyond the scope of this report.
CAYMAN ISLANDS

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Treatment of Wage Claims

The Cayman Islands Labour Law (2007) Article 40 provides for a limited preference for severance pay of one week’s basic wages for each full 12 month period of employment, up to a maximum of 12 week’s pay. All other wage claims are unsecured claims.

There is no wage guarantee fund in the Cayman Islands.

Treatment of Other Compensation

Under the Labour Law, only severance pay is given preference, as described above.

Treatment of Pension Claims

Pensions are not granted super-priority under Cayman Islands law, as pensions are usually private and are held outside the employer’s company.

There is no pension guarantee fund or guaranteed insurance for pension claims in insolvency.

Director and Officer Liability for Social Claims

Companies are required to provide health coverage and pension plans for employees.

Treatment of Collective Agreements

Collective agreements are rare in the Cayman Islands. To the extent they exist, they are terminated on the company going into formal liquidation.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The Labour Tribunal and the Grand Court of the Cayman Islands have the jurisdiction to resolve worker claims.

Tax issues in respect of social claims

The Cayman Islands has no income or corporate tax.

Legislative Reform

There is currently no legislative reform being considered.

Historical, political and social reasons for the development of the Cayman Islands’ approach to social claims
Insolvency laws of the Cayman Islands have been influenced by low unemployment, no income and corporate tax, and a governmental policy of requiring work permits for ex-patriots.

The Cayman Islands is an independent territory of the UK, and to the extent a matter is not domestic, it may be impacted by certain requirements under the EU.
Treatment of Wage Claims

Pursuant to Chile’s Civil Code (Section 2,472, as amended), first class preferred credits consist of: (1) employees’ remuneration, wages and family allowances, the latter of which is a social security benefit funded by the State; (2) social security contributions of employees withheld from such remunerations and wages; and (3) severance pay accrued in favour of employees, whether legal or conventional, as of the date of the claim, up to a maximum of 15 minimum monthly salaries (approximately 4,910 USD) per employee. Employees are common creditors for any amounts in excess of this total.

Under Chile’s Bankruptcy Act, a person may be declared bankrupt whether he, she or it is insolvent or not; therefore, the law governs the effects of bankruptcy, not insolvency. However, in the case of certain specially regulated entities, insolvency proceedings are specifically regulated, as is the case of banks, insurance companies, etc. These regulations are quite similar to the provisions of Chile’s Bankruptcy Act on the effects of a bankruptcy duly declared by a court.

In a bankruptcy scenario, the official receiver or trustee (sindico) must make distributions in favour of the unchallenged first class preferred credits as soon as sufficient funds are available, but it must make a reserve or provision for (i) those same class preferred credits under legal dispute, and (ii) for the subsequent bankruptcy expenses that will be incurred. These first class preferred credits may be paid with the proceeds of the bankruptcy estate without any need for the holders of such credits to file their claims in the bankruptcy proceedings (Section 148 of Chile’s Bankruptcy Act).

The official receiver or trustee must pay administratively the employees’ wages and remunerations eligible as first class preferred credits with the first funds available, provided these credits are duly supported with documentary evidence, whether or not the concerned employees have filed a claim in the bankruptcy proceedings. The same rule applies to severance pay, whether legal or conventional, but up to a maximum limit per employee of 30 days of remuneration per year of service or fraction in excess of six months.

The remaining severance or other indemnities in favour of an employee are payable by the official receiver or trustee against a final and conclusive court judgment. In making the payments set forth in the first two items above, the official receiver or trustee must make sure that the remaining assets of the bankrupt estate are sufficient to pay those credits within the first class that have preference over wages and severance (Section 148 of Chile’s Bankruptcy Act).

There are no restrictions on the realization of the preferential wage claim in Chile.

Chile does not have a wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

In Chile, vacation pay claims have a preference without restriction. Severance pay claims are preference, to a limit of 15 minimum monthly salaries. Termination pay and traveling and other expenses are not preference claims.

Treatment of Pension Claims
Under Chilean law, pension funds are not granted priority during insolvency. Chile’s Pension Fund Regime, in effect since 1980, is quite particular and it is structured in such a way that much before a pension fund manager goes bankrupt or insolvent, the pension funds under management are passed on to another pension fund manager. Moreover, employees can at any time transfer their accounts, which are non-attachable assets, to another pension fund manager.

Chile does not have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

**Director and Officer Liability for Social Claims**

Although there are no specific provisions with respect to director and officer liability for social claims, directors and senior officers, including the CEO and senior managers, can be made liable under the general rules. Each of the directors and senior officers must exercise their duties using the same care and diligence that businesspeople usually use in their own business. If they commit fraud, they will be personally liable for the consequences of their actions and may incur in criminal liability. There is no cap or limit on this liability.

Claims against directors and officers cannot generally be compromised or settled during an insolvency workout or insolvency proceeding.

**Treatment of Collective Agreements**

Collective agreements are not terminated *per se* upon the bankruptcy or insolvency of an employer; they remain unchanged and in full force unless otherwise provided for in the same agreements or are amended by the contractual parties thereto.

In practice, collective agreements are honoured by the official receivers or trustees upon the bankruptcy of the employer, a decision that the general creditors generally support and uphold. On the sale of the enterprise or business unit of the bankrupt, the buyer assumes the employees of same, including the existing collective agreements. Generally, there are no structures giving rise to legacy costs.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Generally, on the continuance of the business of the bankrupt or insolvent company, the labour relations legislation, as well as the employment standards, human rights and occupational health and safety legislation, remain in full force and effect and are required to be duly complied.

During insolvency or bankruptcy, the jurisdiction of Chile’s labour courts remains unchanged; and this jurisdiction is a qualified exemption to the principle that all lawsuits and claims affecting the bankrupt estate must be brought before the bankruptcy court.

**Tax issues in respect of social claims**

Chile faces no tax issues in respect of social claims.

**Legislative Reform**

There is currently no legislative reform being considered.

**Historical, political and social reasons for the development of Chile’s approach to social claims**

Since the early 20th century, Chilean legislation has been enacted so as to procure the best available social protection to employees and their families, as allowed or made feasible by Chile’s economic performance and development. Chile has followed most of the directives and resolutions of the UN International Labor Organization.
Treatment of Wage Claims

The previous preference for wage claims under Chinese bankruptcy law. Article 37 of the 1986 Enterprises Bankruptcy Law (EBL), only applying to state-owned enterprises (SOE’s), was abolished on June 1, 2007. It provided that after the bankruptcy costs and expenses are repaid in priority, the bankruptcy estate was to first be used to repay the employee’s wages and social insurance premiums. Effective June 2007, a new priority was created under Chinese bankruptcy law. Article 113 of the 2006 Enterprises Bankruptcy Law, applying to all enterprises legal person, came into force on 1 June 2007. The Enterprises Bankruptcy Law specifies that the insolvent assets shall, after the costs for bankruptcy proceedings and community liabilities are repaid in priority, be liquidated according to the following sequence:

(1) The wages and subsidies for medical treatment and disability, comfort and compensatory expenses as defaulted by the bankrupt, the fundamental old-age insurance premiums, fundamental medical insurance premiums that shall have been transferred to the employees’ personal account as well as the compensation for employees as prescribed by the relevant laws and administrative regulations;

(2) The social insurance premiums and tax fees as defaulted by the bankrupt other than those as prescribed by the aforesaid provisions.

These two articles establish a wage preference instead of super-priority. This preference favours employees over all other types of unsecured creditors, excluding secured creditors. Under Article 28 of the 1986 Enterprises Bankruptcy Law (EBL), the assets that are pledged to secured creditors do not belong to the bankruptcy estate, which means that in theory the secured creditors enjoy a preferential status in being repaid directly from these assets. However, in practice, almost all bankruptcy cases brought under the 1986 EBL are so-called “policy-oriented bankruptcy”, which are governed by the administrative regulations issued by the State Council of the PRC. In these cases, the employees’ wages and social insurance premiums are given the highest priority in bankruptcy proceedings.

Under Article 109 of the 2006 EBL, secured creditors have a priority claim against the assets pledged to their claims, to the general exclusion of other creditors, including employees and governmental taxing entities. But there is a limited exception to payment priority for secured creditors in Article 132, which provides that on implementation of this new Law, accrued amounts due to employees for wages, medical expenses, and pension expenses before promulgation of this Law may still be settled out of the secured assets referred to in Article 109 in priority to the entitlements of secured creditors. In other words, following the implementation of the 2006 EBL, new secured creditors’ claim will have priority over employees’ current and accrued claims; however, existing secured creditors (at the time of the EBL’s implementation) will still rank lower in priority to the claims of employees. This exception represents a compromise between China’s tradition of providing for the welfare of employees of SOEs and the recognition of and deference to the secured creditors’ interests under the market economy system.

There is no wage protection fund or guaranteed insurance for wage claims during insolvency, although it is under discussion in China.
Treatment of Other Compensation

There is no preference or priority for vacation pay, severance pay, termination pay or travelling or other expenses incurred.

Treatment of Pension Claims

Like wages, pension claims also enjoy preferential treatment in insolvency proceedings, but except in “policy-oriented” bankruptcy cases, they do not have a super-priority status. Under the new 2006 EBL, pension claims rank before any other unsecured claims but after secured claims, with an exception made in Article 132 in the same way as for wage claims above.

There is no pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

Under Article 124 of 2006 EBL, the guarantor and other joint and several debtors of the bankrupt shall, on conclusion of the procedures for bankruptcy, bear the joint and several liability for repayment of the creditors’ claims that have not been repaid according to the procedures for bankrupt liquidation and according to law. Here, the creditors’ claims include the employees’ claims.

There is no specific provision under the current law to address under-funded pension liabilities in insolvency.

Director and Officer Liability for Social Claims

Under Article 6 of 2006 EBL, in the hearing of a bankruptcy case, the People’s Court must guarantee the legitimate rights and interests of the employees of the insolvent enterprise and subject its and operators and managers to legal liabilities.

Further, there is a general provision involving the legal liability of corporate directors, supervisors or senior managers. Under Article 125 of 2006 EBL, where a director, supervisor or senior manager violates his or her obligations of being honest and diligent and thus leads to enterprise’s bankruptcy, the director or officer shall be subject to the relevant civil liabilities according to law. No person under any circumstance as prescribed in the preceding paragraph may, within three years as of the day when the procedures for bankruptcy are concluded, assume the post of director, supervisor or senior manager of any enterprise. Obviously, this provision is not specifically about the social claims, but it may apply since the violation of fiduciary duties might result in the bankruptcy of enterprise, which then cause the failure to pay or make contributions towards social claims/or pension funds. Under this situation, corporate directors may be legally liable to some degree. But overall, the purpose of this article does not intend to provide for such liability specifically.

Treatment of Collective Agreements

When an enterprise goes into bankruptcy and conducts a liquidation proceeding, the collective agreements must terminate since the enterprise itself will end its existence, but there is no clear provisions under the bankruptcy laws. Under the Measures for Economic Compensations due to Violation or Rescission of Labour Contracts, promulgated by the Ministry of Labour on 3 December 1994, Article 9 provides that where an employer must cut its staff since it is on the verge of bankruptcy and in the period of statutory period for rectification, or its production and business operation are in serious difficulties, it shall pay economic compensation according to the terms of work of those employees that have been cut. For every full year a worker has worked for the employer, he or she shall be paid economic compensation equal to one month’s wages.

Article 10 further states that where, after rescinding a labour contract, an employer fails to pay economic compensation to a worker according to the provisions, it shall, in addition to paying the full amount of the economic compensation, pay additional economic compensation equal to 50% of the amount of economic compensation. Article 11 provides that the wage rates for calculating economic compensation as mentioned in the present Measures shall refer to the average monthly wages of the workers during the 12 months prior to the rescission of the contract under the circumstances of the enterprise’s normal production. Where an employer rescinds a labour contract according to Article 9 of the present Measures, if the worker’s average monthly wages are lower than the enterprise’s
average monthly wages, the economic compensation shall be paid at the rate of the enterprise’s average monthly wages. The Law of the PRC on Labour Contracts (Draft, 2006) has the similar provisions in its Article 37 and 39, etc. This Draft is under extensive discussion and solicitation of various opinions currently will be passed into Law in the near future.

Although there are no specific provisions on the treatment of collective agreements in reorganization proceedings, such contracts may continue in the event that it is beneficial to the enterprise’s viability. But the enterprise may cut off some employees according to its business needs. If so, it shall give economic compensation under the above provisions. Under Article 82 of 2006 EBL, in a reorganization proceeding, the creditors, who hold the claims of wages, subsidies for medical treatment and disability and comfort and compensatory funds as defaulted by the debtor, the fundamental old-age insurance premiums, fundamental medical insurance premiums that shall have been transferred into the individual accounts of employees as well as the compensation for the employees as prescribed by the relevant laws and administrative regulations, are grouped into one category to attend the creditors’ meeting to discuss a draft of rectification plan, and vote a draft of rectification plan. Under Article 59 (3) of the 2006 EBL, the employees of the relevant debtor enterprise as well as the representatives of its labour union, shall attend a creditors’ meeting and air their views on the relevant issues.

China faces some special issues concerning the legacy costs in the bankruptcy of State-owned enterprises (SOEs). SOEs once played a significant role in China’s centrally planned economy and accounted for a large majority of the national economy. Therefore, there is a common fear that the bankruptcy of SOEs will lead to severe public concerns such as high unemployment and social unrest. At the same time, there is a deeply embedded cultural ethos, “iron rice bowl”, referring to the idea that SOEs would employ and take care of their employees’ lifelong needs, no matter the circumstances. Under this ethos, the employees of SOEs are the masters of the SOEs, and they are taught to contribute all their life to the SOEs in exchange for the care from the SOEs, including housing, education of their offspring, health care, etc. The price is that their wages are very low. Thus, if the SOEs are not subject to the bankruptcy, the life of these employees will not encounter difficulties. Despite lower wages, the employees can rely on the SOEs for providing their life necessities. But under the market economy, the SOEs that can not survive fierce market competition are subject to bankruptcy, which is directly contrary to the iron rice bowl logic, putting the employees of SOEs at serious risk of loss of employment and economic protection.

This change is the price China will be required to pay during its transition from planned economy to market economy. In addition to the practice in the policy-oriented bankruptcy cases that favour the interests of employees at the expense of other creditors including secured creditors, how to deal with the treatment of employees’ wages and other claims became a most difficult issue in its formulation of 2006 EBL. This issue also arises from the lack of an effective social safeguard mechanism that can guarantee the interests of employees in the case of bankruptcy of debtor employer.

There is no specific rule dealing with the modification of collective agreements during insolvency restructuring proceedings. However, under Article 59 (3) of the 2006 EBL, the employees of the relevant debtor, as well as the representatives of its union, shall attend a creditors’ meeting and air their views on the relevant issues. Also under Article 82 of 2006 EBL, in a reorganization proceeding, the employee creditors are grouped into one category to attend the creditors’ meeting to discuss a draft of rectification plan, and vote on the draft rectification plan. These provisions provide room for employees to bargain, modify and terminate collective agreements during restructuring proceedings. There are no such successor employers’ provisions. But in practice, if the enterprise continues to operate, the successor employer, whether the purchasers of the business or insolvency professionals are strongly encouraged to continue enforcement of collective agreements in order to reduce the social unrest caused by unemployment.

**Interaction of Insolvency Legislation with other Social Claims Legislation**

In theory, in the context of bankruptcy, related legislation is to function together to provide for a comprehensive mechanism of safeguarding the interests of employees. But in China, the current situation is that there is lack of related legislation or effective enforcement of the legislation on social claims. Arguable, the bankruptcy is vested too much weight to protecting the interests of employees. The disproportional role of bankruptcy law in this respect was contested during the formulation of
2006 EBL. Despite a compromise at last, it is obvious that there is a long way to go for China to establish the relevant legislation on social claims in the future.

Under Labour Law of the PRC (Adopted at the Eighth Session of the Standing committee of the Eighth National People's Congress on July 5, 1994), when labour disputes arise between the employers and workers, the parties concerned may, according to law, apply for mediation or arbitration or bring the case before the People's Court or may settle them through consultation (article 77). Article 79 provides that when a labour dispute arises, the parties concerned may apply to the labour dispute mediation committee of their own unit for mediation. Should the mediation fail and one of the parties concerned demands arbitration, it may apply with the labour disputes arbitration committee for arbitration. One of the parties concerned may also file an application directly with the labour disputes arbitration committee for arbitration. If the arbitration ruling is not accepted, the case may be brought before the People's Court.

Under Article 81 of the Labour Law, the labour disputes arbitration committee shall be made up of representatives of labour administrative department, trade union at the same level and the employer. The chair of the labour disputes arbitration committee shall be taken up by the representative of the labour administrative department. Article 83 further provides that if a party to a labour dispute refuses to accept the ruling, the party may bring the case before the People's Court within 15 days commencing from the date when the arbitration award is received. If a party refuses to bring the case before the people's court and refuses to implement the arbitration ruling within the time limited prescribed by law, the other party may apply with the People's Court for compulsory implementation.

According to Article 84 of the Labour Law, if a dispute arises from the conclusion of a collective contract and the parties concerned fail to settle the dispute through consultation, the labour administrative department of the local people's government may organize all parties for settlement. If a dispute arises from the performance of a collective contract and yet the parties concerned fail to settle it through consultation, they may apply for arbitration with the labour disputes arbitration committee. If the arbitration ruling is not accepted, the case may be brought before the People's Court within 15 days starting from the date when the arbitration award is received.

Therefore, in China, a court generally does not directly accept a case concerning workers' claims. Rather, the court only accepts the case that has been decided by an arbitration committee and brought by a party that is dissatisfied with the decision by arbitration committee. Under Article 21 of the 2006 EBL, after the People's Court accepts an application for bankruptcy, the relevant debtor's civil action shall be filed with the People's Court only. Under Article 3 of this Law, a bankruptcy case shall be governed by the People's Court where the relevant debtor is domiciled. But it is uncertain whether a dispute concerning worker claim belongs to civil action. If so, such disputes can be directly brought before the People's Court; if not, it has to be first dealt with by the relevant arbitration committee.

**Tax Issues**

There are no tax issues in relation to social claims.

**Legislation Reform**

Overall, China is experiencing a legal overhauling of its insolvency statutory regime against the backdrop of economic reform. The legislative reform in respect of treatment of social claims is among this overhauling. In particular, China is debating on the Law on Labour Contracts, and also planning to improve its social safeguard mechanisms toward employees’ rights. The legislative reform becomes very important along with the implementation of new 2006 Enterprise Bankruptcy Law that was effective 1 June 2007. China has not devised a direct and uniform legislation on the treatment of social claims thus far. The relevant provisions, if any, may disperse among different laws, regulations, and administrative guidelines.

**Historical, Political and Social Reasons for the Development of China’s Approach to Social Claims**

The description above sets the historical and social context to China’s approach to social claims.
COLOMBIA

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Treatment of Wage Claims

According to Article 2495 of the Colombian Civil Code, modified by article 36 of Law 50 of 1990, which establishes the order of preference of creditors’ claims, all wages, indemnifications, social services benefits or rights are considered to be privileged and must prevail over any other claim, except for children’s maintenance rights (Law 1098 2006), in insolvency or bankruptcy procedures. Under the Colombian insolvency regime (Law 1116 of 2006), there is a distinction between labour claims that originated before the initiation of the insolvency procedure and labour or wage rights originated after the initiation of the process called “administration expenses”.

These administration expenses have a preference in their payments above those subject to the reorganization agreement. Pursuant to Article 36 of Law 50 of 1990, all wages, indemnifications and social benefits or rights are considered to be privileged and are entitled to the preferential treatment in insolvency or bankruptcy proceedings. There are no restrictions on the realization of the preferential wage claims, such as a cap on the amount given preference or the length of the employee’s employment.

Colombia does not have a wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

There is no priority for vacation pay, severance pay, termination pay, or traveling or other expenses incurred by employees in the period leading up to insolvency under Colombian insolvency law.

Treatment of Pension Claims

Under the Colombian insolvency regime, pension claims are entitled to a special preference. When in the framework of an insolvency procedure, they are considered labour claims or claims of a labour nature, and, therefore, they are privileged and must prevail over any other claim (except children’s maintenance rights or claims). When they are originated after the initiation of an insolvency procedure, meaning that they are “administration expenses”, they have to be paid prior to any other administration expenses together with parafiscal contributions of working nature, originated before and after the initiation of the reorganization/bankruptcy process. Pension claims are granted priority for the entire amount and there are no restrictions on the realization of such claims.

In principle, pension contributions have to be paid out from the bankruptcy or reorganization estate. However, depending on the kind of company, shareholders may be liable for unremit pension contributions. In limited liabilities companies, for example, shareholders are deemed to be jointly and severally liable for the labour and pension obligations of the company. Shareholders of corporations, on the other hand, are not deemed to be liable for these kinds of obligations.

According to paragraph 2 of Article 34 of Law 1116 of 2006, there is a possibility of funding pension liabilities with loans. In this case, whenever loans are granted in order to finance the payment of pension liabilities, or for their commutation, said loans shall have the same privilege as the labour claims for which payment has been carried out or commuted.
Director and Officer Liability for Social Claims

Colombian law provides for general liability of corporate directors and officers for social and other kinds of claims during insolvency. Article 82 of Law 1116 of 2006 states that when the bankruptcy estate is deteriorated as a consequence of the gross negligence or fraud of the shareholders, administrators, fiscal auditors, and employees, they will be liable for payment of the missing external liability. Furthermore, shareholders with no knowledge of the action or failure to act or who might have voted against them will not be subject to said liability.

There is no cap on directors’ liability under Colombian law. Claims against directors and/or officers cannot be compromised or settled during an insolvency workout or insolvency proceeding.

Treatment of Collective Agreements

Colombian insolvency regulations do not deal with collective agreements extensively. Article 42 of Law 550 of 1999, which was the previous insolvency regime, together with Law 222 of 1995 stated in respect to collective agreements that:

"Restructuring procedures may include temporary agreements, negotiated directly between the company and the union that is legally allowed to represent the employees, that have as a purpose the total or partial suspension of any economic privilege or prerogative that exceeds the statutory minimums according to Colombian Working Code. Said agreements will last as much as agreed, but not exceeding the term of the restructuring agreement and will prevail over collective bargaining agreements, in force individual labour contracts and arbitration awards.

The execution and performance of these agreements must be previously authorized by the Minister of Labour and Social Security (today Minister of Social Protection), which will answer to the requirement within the next month after its filing."

It is important to note that negotiation of restructuring agreements, concordats and mandatory liquidation of natural individuals and legal entities, as well as restructuring agreements already entered into, and concordats and bankruptcies, continue to be governed by the regulations applicable before law 1116 entered in force. This means that Article 42 is still in force in respect to restructuring agreements entered into before June 28 of 2007.

Collective bargaining agents may act in representation of employees in the context of insolvency proceedings, especially in reorganizations procedures for the purpose of the negotiation process. There is no disposition under Colombian laws regarding successor employer issues in respect of collective agreements after insolvency restructuring. However the Colombian Supreme Court has in several times stated that in order to accept the occurrence of succession of the employer, the employee must demonstrate: (i) the change of employers; (ii) the continuity of the company’s activities; and (iii) the continuity of the employee’s services under his labour contract. The succession of employers, according to Colombian Supreme Court is not presumed. Therefore employees must demonstrate successorship in court, when labour contracts are terminated alleging the inexistence of the labour relation.

Interaction of Insolvency Legislation with Other Social Claims Legislation

There is no special treatment of other social claims legislation in insolvency.

Labour claims, in general, are of the concern of the labour jurisdiction according to labour legislation. However when in the context of an insolvency procedure, the judge supervising the administration of the insolvency proceeding has the jurisdictional capacity to study labour claims originated before the initiation of the insolvency. When labour claims are originated after the initiation of any insolvency procedure only the labour jurisdiction has the jurisdictional capacity to study these claims.

Tax issues in respect of social claims

There are no tax issues in respect of social claims.
Legislative Reform

There are no proposed legislative reforms in Colombia in respect of treatment of social claims.

Historical, Political and Social Reasons for the Development of Colombia’s Approach to Social Claims

The historical, political and social reasons for the development of Colombia’s approach to social claims are unknown.
CROATIA

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Treatment of Wage Claims

Croatian Bankruptcy Law, called Stečajni zakon (Official Gazette Narodne novine nos. 1996/44, 1999/29, 2000/129, 2003/123, 2006/82) provides that all employees’ claims arising out of their employment that were created prior to the opening of bankruptcy proceedings, have the highest priority in bankruptcy among the creditors in bankruptcy (Art. 71(1) Stečajni zakon). The employees are considered as a kind of creditors in bankruptcy. The creditors in bankruptcy are personal creditors of the debtor who, at the time of the opening of the bankruptcy proceedings, have legally based claims against the debtor (Article 70(1) Stečajni zakon). Creditors in bankruptcy are unsecured creditors.

There are three ranks of creditors in bankruptcy, and the claims of the employees present the highest priority. The claims of creditors in bankruptcy shall be paid after the claims of so called creditors of the bankruptcy estate have been paid. The claims of the creditors of the bankruptcy estate includes: the costs of the bankruptcy proceedings and the other obligations of the bankruptcy estate (Article 85(1) Stečajni zakon). These claims can arise (can be created) only after the opening of the bankruptcy proceeding. The secured creditors are paid before of creditors of the bankruptcy estate and before of the creditors in bankruptcy (Article 81-83 Stečajni zakon). Thus, the wages of employees rank after secured creditors and after the creditors of the bankruptcy estate. All wages of the employees, created prior to the opening of bankruptcy proceedings will be paid before other claims of other kind of creditors in bankruptcy (unsecured creditors). There is no time limit.

Croatia has the Fund for the development and employment, which has the function of a guarantee institution for workers’ claims in the event of the employer’s bankruptcy. (Article 1 of Law on insurance of workers’ claims in the event of the employer’s bankruptcy (Zakon o osiguranju potraživanja radnika u slučaju stečaja poslodavca), Official Gazette “Narodne novine”, nos. 2003/114).

This guaranteed insurance exists for following workers’ claims:

1. wages and salaries for the last three months prior to the opening of bankruptcy proceedings or the termination of the employment contract in the amount which corresponds to the lowest monthly wage/salary paid in the Republic of Croatia for a given month;

2. wage and salary compensation for sick-leave that the employer should have paid according law on health insurance in the three months prior to the opening of bankruptcy proceedings or the termination of the employment contract in the amount which corresponds to the lowest monthly wage/salary paid in the Republic of Croatia for a given month;

3. wage/salary compensation for annual leave to which the employee is entitled in the calendar year in which bankruptcy is opened or in which the employment contract is terminated, up to the amount which corresponds to the half of the lowest monthly wage/salary paid in the Republic of Croatia for a given month;

4. severance pay under conditions provided by law in the amount of the half of severance provided by law; and

5. compensation of damages incurred due to injuries at work or job-related illness up to the amount which corresponds to the third of amount which is determined by final judgment. (See Article 3 of Croatian Law on insurance of workers’ claims in the event of the employer’s bankruptcy).
The state gives the necessary money for the realization of those workers’ rights from the state budget (Article 4 Croatian Law on insurance of workers’ claims in the event of the employer’s bankruptcy, the Zakon o osiguranju potraživanja radnika u slučaju stečaja poslodavca).

Treatment of Other Compensation

The priority in Art. 71(1) of the Bankruptcy Law includes all worker’s claims arising out of his or her employment, including also vacation pay, severance and termination pay, and any owed travelling expenses.

Treatment of Pension Claims

Pension claims have the same priority in the bankruptcy as the worker’s wage claims (Article 71(1) Stečajni zakon). The health insurance claims have also the same priority, specifically, amounts that are deducted from the employee’s wage every month automatically by the law.

In Croatia there are state and different pension funds. There is no guaranteed insurance for pension claims in the event of the employer’s bankruptcy.

Director and Officer Liability for Social Claims

There is no special provision on liability of corporate directors and officers for wage and pension claims in Croatian labour law.

Treatment of Collective Agreements

Unfortunately, neither the Croatian Bankruptcy Law (Stečajni zakon) nor the Croatian Labour Law (Zakon o radu), (Official Gazette ‘Narodne novine’ nos. 1995/38, 1995/54, 1995/64, 2001/17, 2001/82, 2003/114, 2004/30) have precise provisions addressing what happens with the collective agreements in the event of the employer’s bankruptcy. Therefore this question in practice is controversial.

Under the framework of the bankruptcy plan, it is possible to provide the purchase of the business of the bankruptcy debtor and the duty of the successor to the debtor to take over some or all debtor’s employees. Under the framework of the bankruptcy plan it is also possible to reorganize the debtor and to continue its business (Art. 213, Art. 213-265 Stečajni zakon).

Interaction of Insolvency Legislation with Other Social Claims Legislation

There is a special Article regarding employment contracts (Art. 120) in Croatian Bankruptcy Act. The opening of bankruptcy proceedings shall not result in the termination of employment contracts with the debtor as an employer. However, the opening of bankruptcy proceedings shall be deemed as a special justified reason for cancellation of employment contracts. After opening of the bankruptcy proceedings, the trustee in bankruptcy, on behalf of the debtor-employer and the employees, may cancel the employment contract, regardless of the agreed duration of the contract or stipulated suspension of the possibility for regular dismissal, and regardless of the legal or contractual provisions regarding protection of the employee. The notice period in required to be one month, unless the Law provides for a shorter period.

If the dismissal has been requested by the trustee, the other party may demand compensation for the damages incurred by the premature termination of employment as a creditor in bankruptcy. If the employee believes that the termination of his or her employment is not legally valid, the employee may demand protection of his or her rights according to the provisions of the Labour Act (Art. 120 (1, 2, 3, 4) Stečajni zakon).

The trustee in bankruptcy may, with the consent of the bankruptcy judge, conclude new, temporary employment contracts in order to finish the commenced business activities and prevent the occurrence of damage. The salaries and other income arising out of the employment shall be determined by the trustee in bankruptcy, with the consent of the bankruptcy judge, and in accordance with the Labour Act and the collective agreement. The salaries and other income arising out of the
employment after the opening of the bankruptcy proceeding shall be settled from the bankruptcy estate. (Art. 120 (5, 6, 7) Stečajni zakon).

By the opening of the bankruptcy proceeding the employees’ rights regarding participation in management decision-making cease to exist. Agreements made with employees’ council shall not bind the trustee in bankruptcy (Art. 121, Sent. 1, 2 Stečajni zakon).

There is no other provision in the Croatian Bankruptcy Act that would limit the application of labour relations legislation, employment standards legislation, human rights legislation and occupational health and safety legislation. The bankruptcy/insolvency representative (trustee) has to respect all this legislation as any other business person.

There are four kinds of the courts in Croatia. First are the courts of general jurisdiction, including municipal courts (the first instance), county courts (the second instance), the Supreme Court of the Republic of Croatia (the third and last instance). These courts judge all disputes, except those where the law explicitly provides for the jurisdiction of another court. Second are the commercial courts, including the commercial court of first instance, the High Commercial Court (second instance), the Supreme Court of the Republic of Croatia (the third and last instance). These courts judge all disputes between commercial subjects, and they have jurisdiction in bankruptcy proceedings, liquidation proceedings, maritime litigation, litigation over patent and intellectual property rights, commercial violation etc. Third are the police courts: First Instance Police Court on municipal level, High Police Court in Zagreb as an appellate court. They judge on physical persons for misdemeanour offices. Finally, there is the Administrative Court. Municipal courts judge on workers’ claims arising out of their employment. Although the vis attractiva concursus is very strong in the Croatian Bankruptcy Law, this rule doesn’t apply to worker’s disputes. The municipal courts retain jurisdiction on worker’s disputes, although the bankruptcy proceeding has been opened against the employer. The commercial court supervising the administration of a bankruptcy/insolvency proceeding cannot resolve workers’ claims (Art. 34(1)(j), Art. 34b(5) of Act on Civil Procedure (the Zakon o parničnom postupku) (Official Gazette “Narodne novine”, 1991/53, 1992/91, 1993/58, 1999/112, 2001/88, 2003/117).

Tax issues in respect of social claims

There are no tax issues unique to social claims in Croatia.

Legislative Reform

Croatia, as a future member of the European Union, has to bring all its law, including provisions on social claims, in accordance with the law of the European Union. Therefore, there is major legislative reform being considered in respect of the Stečajni zakon (Bankruptcy Law), but information on reform in respect of treatment of social claims is not yet available officially.

Historical, political and social reasons for the development of Croatia’s approach to social claims

Croatia, as a part of the former Socialist Federative Republic of Yugoslavia, was a socialistic state for 46 years, and the feeling for the social justice is still strong. The Law of the European Union has now a great impact on Croatian legislative system, including the approach to social claims.
Treatment of Wage Claims

Pursuant to section 300(1) of the Companies Law, Cap.113 and section 38 of the Bankruptcy Law, Cap.5 (Πτώχευσης Νόμος, Κεφ. 5), employee wage claims are given preference in Cyprus. The Companies Law, Cap.113 provides that there shall be paid in priority to all other debts, due wages of the employee, and any amount withheld from the wages of the employee for the payment of liabilities of the employee or otherwise, which the employer has not paid, and also any other amount or benefit of the employee that derives from a contract or employment relation, including any amount due to a recognized union deriving from the industrial relation of employer-employee or otherwise that the employer has not paid. Amounts payable for the leave the employee is entitled to for his or her employment by the company for an employment period of one year are also entitled to preference; however employees who are shareholders of the company are exempt from this priority.

The Companies Law, Cap.113 provides that preferential debts shall rank equally among themselves and be paid in full, unless the debtor company’s assets are insufficient to meet them, in which case they shall abate in equal proportions. So far as the assets of the company available for payment of general creditors are insufficient to meet them, the employee wage claims have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge. The Law provides also that subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the preferential debts shall be discharged forthwith so far as the assets are sufficient to meet them. In the event of a landlord or other person distraining or having distrained of any goods of the company within three months before the date of a winding-up order, the debts to which priority is given by section 300 of the Companies Law shall be a first charge on the goods so distrained on, or the proceeds of the sale thereof.

In 2001 Cyprus enacted the Protection of Employees Rights in the Event of Insolvency of the Employer Law, the Law 25(I) of 2001. In accordance with this Law, a special Fund has been established through which employees are paid the amount due to them in the case of insolvency of their employer. The Fund has a legal personality and can appear in Court either as a plaintiff or a defendant and it can proceed to all necessary measures for its function.

The Fund is financed each month with a transfer of 16.6% of the contributions paid by employers to the Redundancy Fund, which had been set up under the Termination of Employment Law, Law 24 of 1967. On the 9th of March 2001, when the Protection of Employees Rights in the Event of Insolvency of the Employer Law entered into force, the Fund was financed with the transfer of CYP 1,000,000\(^526\) out of the Redundancy Fund. The Fund is under the control and administration of the Director of the Social Insurance Services and the funds are under the scrutiny of the General Auditor of the Republic and are published alongside his report that is prepared in regard to those funds. The funds are invested by the Director under the instructions of the Minister of Finance. The Fund is adequately funded.

\(^{526}\) 1,000,000 CYP is 2,490,960 CAD. Note that the Cyprus currency is now the Euro, as of 1 Jan 2008, after the survey was completed.
According to the Protection of Employees Rights in the Event of Insolvency of the Employer Law, an employee is entitled to the following payments out of the Fund:

1. payment of outstanding claims relating to pay for the last 13 weeks of employment occurring within a period of 78 weeks preceding the date of the onset of the employer’s insolvency.

2. payment of the proportion of the outstanding claims relating to paid leave for the above mentioned 13 weeks in the case where the employer is exempted from the obligation to pay contributions to the Central Holiday Fund.

3. payment of the proportion of the 13th or the 14th salary or the 53rd to 56th weeks wages.

In the calculation of the weekly wage, any amount of that wage which exceeds four times the amount of the basic insurable earnings each year, as this is determined by the Social Insurance Law, Law 41 of 1980, is not taken into account.

According to the Protection of Employees Rights in the Event of Insolvency of the Employer Law, an employee is entitled to a payment out of the Fund if his or her employment was terminated because his or her employer became insolvent, where he or she has been continuously employed by the employer for not less than 26 weeks before the onset of the employer's insolvency. In this case, an ‘insolvent employer’ means an employer in relation to whom an application has been made to the competent court for the issuing of a winding up order in the case of a legal person, or a receiving order in the case of a natural person, and in relation to whom the court has made such an order, or the court has established that the person concerned has ceased to be engaged in any activities, or that the assets of the person concerned are insufficient justifying the issuing of such an order.

Treatment of Other Compensation

Pursuant to Section 300(1) of the Companies Law, Cap.113 and section 38 of the Bankruptcy Law, Cap.5, employee wages and other benefits are given preference. Although these Laws do not specify that holiday pay, severance pay, termination pay, or traveling/other expenses take priority, the terms ‘wages’ and ‘benefits’ cover such items.

Treatment of Pension Claims

According to the Social Insurance Law, Law 41 of 1980, every employer is obliged to pay contributions to the Social Insurance Fund. According to section 300(1) of the Cyprus Companies Law, section 85 of the Social Insurance Law provides that any due contributions from the employer to the Social Insurance Fund shall be paid in priority to other debts according to the Companies Law and the Bankruptcy Law. Therefore, the Social Insurance Law determines that the unpaid contributions to the Social Insurance Fund are part of the benefits and earnings of the employer and therefore are preferential debts.

Since the unpaid contributions to the Social Insurance Fund are regarded as preferential debts, section 300(3) of the Companies Law and section 38(2) of the Bankruptcy Law apply. The Companies Law provides that the preferential debts shall rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

In accordance with the Social Insurance Law, every employed person in Cyprus is compulsorily insured under the Social Insurance Scheme. The Scheme is financed by contributions from employers, insured persons, and the State. The social insurance contribution is determined as a percentage on earnings (wage/salary of earnings) taken into consideration for social insurance purposes known as ‘insurable earnings’. The contributions collected are paid into the Social Insurance Fund established under section 69 of the Social Insurance Law, out of which all social insurance benefits and administrative expenses for the operation of the Social Insurance Scheme are paid. The benefits available under the Social Insurance Scheme include old age pension, invalidity pension, widow's pension, marriage grant, maternity grant, funeral grant, sickness benefit, orphan's
benefit, missing person’s allowance, and benefits for employment accidents and occupational diseases.

The rate of social insurance contributions for employed persons is 16.6% of their insurable earnings. The contribution is shared between the employer, the employee and the State in the rate of 6.3%, 6.3% and 4% respectively. The State contribution is regarded as a separate obligation and therefore the State can not be obligated to pay the contributions that the employer was obliged to pay. In the event that pension contributions are not paid by the debtor corporation, the Social Insurance Fund may initiate criminal proceedings against the debtor corporation and/or its directors.

A Social Insurance Board is established by the Minister of Employment and Social Insurance, which studies and advises on matters relating to the annual budget of administrative expenses, the annual accounts of the Fund, the annual report of the Director, every matter arising from the application of the Law, any proposed amendment of the Law, the investment of the Fund. The Board scrutinizes the activities of the Fund at least every three months.

**Director and Officer Liability for Social Claims**

According to section 80(9) of the *Social Insurance Law*, when evidence indicates that an offence has been committed by a legal person in violation of the provisions of the Law with the consent, complicity or negligence of a director or officer of that legal person, the director or officer as well as the legal person will be prosecuted. There is no cap or limit to the director or officer’s liability in such a case. Claims against directors and/or officers can be compromised and settled during an insolvency proceeding only in the event that the directors or officers comply with the obligation imposed on them regarding the payment of the contribution which they ought to pay to the Social Insurance Scheme.

**Treatment of Collective Agreements**

In Cyprus, collective agreements are terminated on an employer’s insolvency. Employees’ rights deriving out of such agreements take priority since they are regarded as preferential debts. The collective bargaining agent does not have any status in the insolvency proceeding unless it is itself a creditor. However, the union might observe the proceeding.

Collective agreements are not widely used in Cyprus, especially in the private sector, and consequently, no particular issues in respect of collective agreements and legacy costs have been faced.

*The Safeguarding and Protection of Employees’ Rights in the Event of the Transfer of Undertakings, Businesses or Parts Thereof of 2000,* the Law 104(I) of 2000 provides that the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer shall be transferred to the transferee. The transferor and transferee may agree that after the date of transfer, they shall continue to be jointly and severally liable in respect to obligations created before the transfer and that arise from a contract of employment or employment relationship in force at the timer of the transfer. Following the transfer, the transferee shall continue to observe the agreed terms applicable to the transferor under that agreement, or practice, until the date of the termination, or expiry of the collective agreement, or until the entry into force, or application of another collective agreement. The existing agreed terms and conditions of employment shall be preserved for a minimum period of one year. The transfer of an undertaking, business or part of undertakings or business shall not of itself constitute grounds for the dismissal of an employee by the transferor or the transferee.

If the contract of employment, or employment relationship, is terminated due to the fact that the transfer involves a substantial change in the terms of employment to the detriment of the employee, the employer shall be deemed to have been responsible for the termination of the contract of employment, or employment relationship. However, the Law provides that the obligation to comply with the provisions of the pre-insolvency contract of employment shall not apply to a transfer of an undertaking, business or part of an undertaking or business when the transferor is the subject of
bankruptcy, liquidation or other similar insolvency proceedings instituted for the purpose of liquidating the assets of the transferor under the supervision of a competent legal authority.

Interaction of Insolvency Legislation with Other Social Claims Legislation

In general, bankruptcy and insolvency proceedings are regulated by the Bankruptcy Law and the Companies Law. With respect to the rights of employees in such instances, these are protected to the extent provided in The Safeguarding and Protection of Employees' Rights in the Event of the Transfer of Undertakings, Businesses or Parts Thereof of 2000, the Law 164(I) of 2000, the Social Insurance Law, Law 41 of 1980 and the Protection of Employees Rights in the Event of Insolvency of the Employer Law, the Law 25(I) of 2001. There is no other material legislation regarding the rights of employees in the case of insolvency.

The principal forum for adjudicating industrial disputes in Cyprus is the Industrial Disputes Court. The Industrial Disputes Court has exclusive jurisdiction in all cases that arise out of industrial conflict. The Court is the appropriate tribunal to hear cases regarding unfair dismissal, annual holiday claims and claims concerning wages and other benefits. Once there is an action against the employer in the Industrial Disputes Court, then the employees shall wait for the decision of the Court before they file and/or register an application of insolvency before a District Court. It is important to note that the Industrial Disputes Court does not have the jurisdiction to hear and try applications of insolvency. If both actions take place, these can take place in parallel.

Tax issues in respect of social claims

Under Cyprus law, Social insurance, provident fund, medical fund, pension fund contributions, and life insurance premiums are subject to tax deduction.

Legislative Reform

Discussions are currently being held in Cyprus between all interested parties and the Ministry of Employment and Social Services to examine the possibility of amending the Social Insurance Law by means of increasing both the contribution to the Social Insurance Scheme and the retirement age. The problem with the existing pension system is its sustainability, as projections show that the social insurance fund with the current rate of contributions is only viable until 2010 and the reserve fund would be exhausted by about 2040.

Historical, Political and Social Reasons for the Development of Cyprus’ Approach to Social Claims

The first Social Insurance Scheme in Cyprus was introduced in January 1957. It covered compulsorily employed persons, with the exception of certain categories of agricultural workers. Self-employed persons and those workers excepted from compulsory insurance were given the right to be insured voluntarily. The benefits of the 1957 Scheme were marriage, maternity and funeral grants, sickness and unemployment benefits, old age and widow’s pensions and orphan’s benefit. Both contributions and benefits were “flat-rate” irrespective of the insured person’s earnings. The Scheme was financed by three equal contributions from employed persons, employers, and the State. In October 1964, substantial changes were effected to the 1957 Scheme, as regards both its personal and material scope. Thus, compulsory insurance was extended to every person gainfully occupied in Cyprus including the self-employed, while the material scope expanded to include maternity allowance and benefits for industrial accidents and occupational diseases. In January 1973, invalidity pensions were introduced for persons permanently incapable of work, irrespective of cause, sickness benefit was extended to self-employed and unemployment and sickness benefits to married women.

Along with the above improvements, benefit rates were increased and by July 1974, their level was by 292% higher than in 1957. The invasion of Cyprus by Turkey in July 1974 and the occupation of 40% of the island’s territory by the Turkish army not only frustrated any further improvements to the Scheme, but made necessary certain restrictive measures for safeguarding the Scheme against the risk of bankruptcy. Such measures included the reduction of pension rates and the suspension of the rights to unemployment and certain other benefits. The July 1974 levels were restored in 1977. Thereafter, the rates of benefit were increased in 1978, 1979, and 1980 and a new benefit was
introduced, the missing person’s allowance, for the families of persons missing as a result of the Turkish invasion.

The current Social Insurance Scheme, which was put into operation on 6/10/1980, has incorporated the previous flat-rate scheme in a modified structure providing in addition supplementary earnings-related benefits. The benefits provided by the Scheme satisfy and exceed the minimum standards set by the International Labour Organization and the Council of Europe. In order to maintain the purchasing power of the benefits provided by the Scheme, the benefits are revised each year according to the increase of the cost of living index and the annual survey of wages and salaries. The structure of the Social Insurance Scheme achieves social solidarity, not only between the young and the old, the employed and the unemployed, the healthy and the sick, but also between the high-income and the low-income earners.
Treatment of Wage Claims

According to article 95 of The Danish Bankruptcy Act wage claims have a preferential status in case of bankruptcy.

Article 95 reads as follows:

1) Claims for wages/salaries and other consideration for work performed in the debtor’s service, which has fallen due within the period from six months prior to the date of notice and until pronouncement of adjudication order.

2) Claims for compensation as a result of discontinuation of the employment relationship, excluding, however, compensation for claims in respect of wages/salaries and other consideration which would have fallen due more than six months prior to the date of notice.

3) Claims for compensation for dismissal or termination of the employment relationship, provided that such dismissal or termination has occurred within the last six months prior to the date of notice.

4) Claims in respect of holiday pay.

5) Claims as stated in 1) to 3) above for a period earlier than the ones stated under the relevant provisions herein, provided that the creditor, in the opinion of the bankruptcy court, has endeavoured to enforce his claim without undue delay but has been unable to levy an execution capable of being upheld as against the bankrupt estate.

(2) The bankruptcy court may refuse to give priority to connections where such priority would not seem reasonably justified under the terms of payment and employment, granting of respite and any possible financial interest in the operation of the business.”

There is a wage protection fund, Lønmodtagernes Garantifond (the Employees’ Guarantee Fund) for wage claims according to article 95.

The Guarantee Fund was established in 1972 and is employer/industry funded. There is a cap on the amount that can be paid out from The Guarantee Fund. The cap on the amount is actually DKK 110,000 equivalent to approx. EUR 15,000.

In 2005 the possibilities for provisions of funds from The Guarantee Fund were extended to cover in case an employer had presented a notice of suspension of payments according to part 2 of The Danish Bankruptcy Act.

When a company presents a notice of suspension of payments a supervisor is appointed to insure that the company complies with the Danish Bankruptcy Act and with best corporate government practise. The appointed supervisor can apply to The Guarantee Funds up to a total net amount of DKK 55,000 equivalent to approx. EUR 7,500 per employee, equivalent to a maximum of three months net wages and salaries.
Pursuant to the Danish Bankruptcy Act, employees in a company in suspension of payments have a legal right to ask for “sufficient security” regarding the first periodic wages and salaries. In practice, the bank issues the guarantee, but only where the cash is deposited as a counter-security in favour of the bank. This cash drain had previously placed restructuring at risk. The new regulation allows resources from the Fund to be directed to employees, freeing up the company, and the funds can only be used to pay employees. The employees generally receive compensation up to the cap amount that the employee can have his or her full payment prior to the relevant time criteria.

The wage protection fund is currently overfunded due to the relative small numbers of bankruptcies, and the ability to adjust employee contributions. The law creating and governing the Fund is called the Lovbekendtgørelse 2005-10-28 nr. 1043 om Lønmodtagernes Garantifond.

**Treatment of Other Compensation**

There is a priority of preference for vacation pay, severance pay, termination pay and travelling and other employment related expenses, with the same cap as wages. The Danish Employees’ Guarantee Fund covers advance piece-rated pay, payment under pension schemes, holiday pay, termination and severance pay and redundancy payments.

**Treatment of Pension Claims**

Pension claims are also covered under article 95 of the Bankruptcy Act and The Employees’ Guarantee Fund when the pension contributions can be regarded as “payment for work”

**Director and Officer Liability of Social Claims**

Directors and officers are liable according to the general liability rule called “Culpareglen”. The culpa rule is not statutory but in primarily based on case law. There is no specific liability regulation for directors and officers for social claims.

**Treatment of Collective Agreements**

Collective Agreements are continued in insolvency or bankruptcy. A collective bargaining agent can subrogate if and when amounts have been paid to its members. There are no provisions to allow modifying or terminating collective agreements during insolvency restructuring proceedings. There are successor-employer provisions in respect of collective agreements after insolvency restructuring in terms of purchasers of the business that continue to operate the business are bound by the collective agreements in question.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

The insolvency courts/probate courts have jurisdiction to deal with social claims.

**Tax Issues**

The tax relates to the claim and its status.

**Legislative Reform**

There is no proposed legislative reform in Denmark in respect of treatment of social claims.

**Historical, Political and Social Reasons for the Development of Denmark’s Approach to Social Claims**

The approach is influenced by General employees’ protection, the Scandinavian Model values employees highly. The Employee’ Guarantee Fund from 1972 guarantee employees’ wages and salaries, vacation pay and other compensation owed in the case of bankruptcy or other insolvent

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DOMINICAN REPUBLIC

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Treatment of Wage Claims

Article 207 of the Dominican Labour Code provides that all credits relating to wages pertaining to an employee enjoy a general priority over credits of any other nature, except for credits of the Dominican Government or any subdivision (Law No. 16-92 as of May 29, 1992, which constitutes the Dominican Labour Code (Ley No. 16-92 de fecha 29 de mayo de 1992 que constituye el Código de Trabajo de la República Dominicana). There are no restrictions on the realization of these credits and no cap on the amount entitled to priority.

Article 465 of the Dominican Labour Code provides that a guarantee must be set up to insure the payment of (i) up to four months of overdue salaries to employees in case of insolvency of the employer corporation and (ii) all wage claims awarded by a court of law or by arbitral award in case of termination of a labour contract, to a limit of one year of salaries. For such purposes, the guarantee will be set up as an insurance policy contracted by the employer with an insurance company and notified to the Labour Ministry. This guarantee should be funded in a way similar to other insurance policies; specifically, it should be funded by the employer. It is relevant to point out that it has not been implemented yet due to the fact that pursuant to the provisions of Article 738 of the Dominican Labour Code, such Guarantee was to be ruled by means of a Tripartite Agreement among the Dominican State, the workers and the employers; parties who, up to date, has not arrived to such an agreement. (Law No. 87-01 as of May 14, 2001 which creates the Dominican Social Security System (Ley No. 87-01 de fecha 14 de mayo de 2001 que crea el Sistema Dominicano de Seguridad Social).

Please be advised that, in principle, the priority of wages claim is not above secured creditors; nevertheless, in the practice, certain labour courts have judged otherwise.

There is no wage guarantee fund.

Treatment of Other Compensation

In the Dominican Republic, termination pay and severance pay are both priority claims. Except for severance and termination compensation awarded by a court of law, as provided in Article 465 of the Dominican Labour Code, there is no compensation guarantee fund or insurance program for these amounts. Vacation pay and travelling and other expenses do not have preference.

Treatment of Pension Claims

The Dominican Republic’s Social Security Law 87-01 provides that mandatory payments of an employer to the pension managing companies, of monthly pension quotas, management fees, fines and overdue interests shall enjoy the privileges and priorities awarded by the Civil and Commercial Codes. However, these laws treat these credits as any other regular credits, not as priority claims.
The Social Security Law No. 87-01 imposes penalties and fines to employers that do not transfer pension contributions pertaining to their employees to the corresponding pension fund managers in a timely manner. However, there are no provisions in the law that guarantees the making of such contributions in cases of insolvency or that creates special funds to deal with such a situation. Unremitted pension contributions are treated as ordinary unsecured claims.

**Director and Officer Liability for Social Claims**

Directors and officers are not liable for social claims during insolvency.

**Treatment of Collective Agreements**

Unions, which are party to collective agreements, cease to exist, as a matter of fact, according to Article 379 of the Dominican Labour Code, when the employer definitely ceases operations. Therefore, collective agreements will be terminated accordingly.

Regardless of the above, in the Dominican Republic, from a labour viewpoint, any business transfer automatically entails that the successor employer will have to assume all the precedent employer’s obligations before the latter’s employees, including any obligations arising from collective agreements, regardless of the manner in which the transfer of business has operated; therefore, if, in the facts there is a continuation of the exploitation by any successor it will be treated as a business transfer and, the union will not be considered as having ceased to exist as per the provisions of Article 379 above.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Labour Courts are competent to resolve worker claims in all cases.

**Tax issues in respect of social claims**

The Dominican Labour Code provides that termination compensation to employees is not subject to income tax.

**Legislative Reform**

The bankruptcy laws of the Dominican Republic are significantly different from and are less developed than those of the United States. The Commercial Code is based on the French Commercial Code of 1807 and the bankruptcy provisions contained in the Commercial Code have not been amended since 1956. Other than in connection with the amicable settlement process (described below), Dominican bankruptcy law does not provide for a reorganization process for debtors or for an automatic stay on collection or foreclosure efforts by secured creditors. In addition, there have been very few bankruptcy proceedings in the Dominican Republic and none of them have been completed.

Instead of going bankrupt, companies in the Dominican Republic will usually undergo a process of reorganization, mostly handled by creditor banks whereby most of the business ends up being purchased by another company, and the employees will usually be transferred along with all their labour benefits to the purchasing company or laid off with the corresponding severance and termination payments made.

**Historical, political and social reasons for the development of the Dominican Republic’s approach to social claims**

More than 50 years ago, former president and Dictator Rafael Trujillo was having problems with his image in the international community and enhanced several measures to look more open and people-oriented to the international public, especially the United States of America. This was when some of the Dominican Republic’s social claims legislation was developed.
Treatment of Wage Claims

Estonia does not have a priority for wage claims during insolvency. There is some wage protection under the *Unemployment Insurance Act*, which has a section that addresses insolvency, but there is no separate legislation setting up a fund only for insolvency.

Wage claims are governed by section 6 of the *Unemployment Insurance Act*, which grants the right to receive unemployment insurance benefits for persons registered as unemployed pursuant to section 6 of the *Market Services and Benefit Act*. Section 8 of the *Unemployment Insurance Act* places a cap on unemployment benefits of:

1. 180 calendar days if the insurance period of the insured person is shorter than 56 months;
2. 270 calendar days if the insurance period of the insured person is 56–110 months; or
3. 360 calendar days if the insurance period of the insured person is 111 months or longer.

According to section 16 of the Act, on collective termination of employment contracts, an employee has the right to receive unemployment benefits as follows:

- in the amount of one month’s average wages of the employee, if the employee has been continuously employed by or in the service of the employer for up to 5 years;
- in the amount of 1.5 times one month’s average wages of the employee, if the employee has been continuously employed by or in the service of the employer for 5 to 10 years; or
- in the amount of two months’ average wages of the employee, if the employee has been continuously employed by or in the service of the employer for over 10 years.

Estonia has an Unemployment Insurance Fund whose purpose is the payment of unemployment insurance benefits, benefits upon collective termination of employment contracts, and benefits upon the insolvency of an employer pursuant to the procedure provided for in the *Unemployment Insurance Act* and other legislation. This Fund is funded by employer and industry taxes. Under section 44 of the *Unemployment Insurance Act*, on insolvency of an employer, the state represented by the Tax and Customs Board shall, in bankruptcy proceedings, be the creditor regarding unemployment insurance premiums not received within the term. The collected amounts must be transferred to the account of the unemployment fund. The benefits from the Fund are available in the case of unemployment, layoff or severance, and bankruptcy. The *State Pension Insurance Act* also provides for a state pension in the case of incapacity from work.

When assessing claims, the Estonian Unemployment Insurance Fund reviews the application of the employee, checks whether the sum applied for is justified and decides whether the benefit is or is not granted on the tenth day from receiving the application, the latest. The Estonian Unemployment Insurance Fund may extend the time of reviewing the application by 14 days, notifying the applicant about it immediately. The Fund shall send the decision to the applicant by mail within 5 days from the day of making the decision. The Unemployment Insurance Fund withholds 21% of VAT from the
payable benefit, if necessary, 2% of contribution to mandatory funded pension and pays 33% of social tax from the means of unemployment insurance benefit.

The Fund has a legal reserve, provided for under section 34 of the Unemployment Insurance Act. The Ministry of Finance has the right to organize the investment of the legal reserve funds either directly or, on the proposal of the Minister of Financial Affairs, through a representative (external portfolio manager) designated by a resolution of the supervisory board of the unemployment fund. Under section 39 of the Act, if the assets of a trust fund are insufficient, the Unemployment Insurance Fund has the right to take loans, and use as security the things which are in the ownership of the unemployment fund and the unemployment fund has the right to take loans if secured by the state, by a resolution of the supervisory board.

Treatment of Other Compensation

Vacation pay is payable under the Unemployment Insurance Act in an amount equal to one gross monthly wage but not exceeding, the amount equal to one average gross monthly wage in Estonia during the quarter preceding the declaration of the employer as insolvent. Severance pay is payable under the Unemployment Insurance Act in an amount equal to three gross monthly wages, but not exceeding the amount equal to three average gross monthly wages in Estonia during the quarter preceding the declaration of the employer as insolvent. Termination pay is payable under the Unemployment Insurance Act in an amount equal to one gross monthly wage but not exceeding, the amount equal to one average gross monthly wage in Estonia during the quarter preceding the declaration of the employer as insolvent. Travelling expenses are payable under the Unemployment Insurance Act in an amount equal to two gross monthly wages, but not exceeding the amount equal to two average gross monthly wages in Estonia during the quarter preceding the declaration of the employer as insolvent. Termination pay, vacation pay, severance pay and other expenses are of the same importance level as the wage claims in the meaning of social claims during insolvency and bankruptcy.

Treatment of Pension Claims

Pension claims in Estonia do not benefit as a priority claim. A state pension payable on the basis of the Pension Insurance Act provides a monthly financial social insurance benefit in the case of old age, incapacity for work, or loss of a provider, which is based on the principle of solidarity and which is paid from the funds allocated for the expenditure of state pension insurance in the state budget. State pension insurance is organized by the Social Insurance Board which is in the area of government of the Ministry of Social Affairs.

Generally, there are two levels of pension benefits available: (1) a State pension, which provides an old-age pension, pension for incapacity for work, a survivor’s pension, and a national pension and (2) funded pensions, which may be either mandatory funded pensions or supplementary funded pensions. This later group of pensions are private pension plans, but it depends on person’s age. For younger persons the (2) fund is compulsory.

Funds for financing state pension insurance must be prescribed in the annual state budget. If, pursuant to Acts established after the passage of the state budget, the sources for covering expenditure prescribed for state pension insurance decrease or the expenditure increases, sources of compensation for the additional expenditure shall be provided by law. The State Pension Insurance Act provides that the sources for covering expenditure prescribed for state pension insurance in the state budget are:

- the pension insurance part of social tax pursuant to the Social Tax Act;
- disciplinary fines pursuant to the Employees Disciplinary Punishments Act;
- own revenue intended for specific purposes, such as interest, dividends, amounts returned in recourse actions etc;
- allocations from reserves from previous years; and
other funds allocated from the state budget.

In the case of funded pensions, a management company must distribute the assets remaining on liquidation between unit-holders on the basis of the class, number and net asset value of units owned by each unit-holder.

**Director and Officer Liability for Social Claims**

Estonian law provides for the liability of directors and officers for social claims under the *Collective Agreements Act*. Under this Act the maximum penalty is 10,000 kroons. According to section 16 of the Act claims against directors and/or officers may not be compromised or settled during an insolvency workout or insolvency proceeding.

**Treatment of Collective Agreements**

The *Trade Unions Act* provides that the rights and obligations of trade unions and their elected representatives do not change in respect of employers on transfer of the rights and obligations of the employers. The *Collective Agreements Act* provides that on the transfer of an enterprise or an organizationally independent part thereof from one person to another, the collective agreement of the enterprise shall be transferred to the transferee of the enterprise.

However, under the *Employee Trustee Act*, a trustee has the right to:

- examine freely the working conditions, including the organization of work;
- receive the information necessary for the performance of its duties from the employer and consult the employer on the basis of such information;
- suspend the collective termination of employment contracts under the conditions provided for in subsection 893 (6) of the *Republic of Estonia Employment Contracts Act*;
- conduct negotiations with the employer for entering into collective agreement under the conditions and pursuant to the procedure provided for in the *Collective Agreements Act* if there is no trade union at the employer or no employees belonging to the trade union are working at the employer;
- represent employees in the resolution of a collective labour dispute under the conditions and pursuant to the procedure provided for in the *Collective Labour Dispute Resolution Act* if there is no trade union at the employer or no employees belonging to the trade union are working at the employer;
- to notify the interested trade union and association or central association of employers and trade unions of violation of working conditions by the employer;
- have recourse to labour dispute resolution bodies for resolution of disputes arising from the confidentiality of the information obtained or refusal to provide information;
- receive the training for the performance of his or her duties pursuant to the procedure provided for in § 14 of this Act;
- involve experts in the performance of its duties; and
- on agreement with the employer, use the premises of the employer and other resources necessary for the performance of the duties of a trustee.

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530 10,000 EEK is 932 CAD.
Interaction of Insolvency Legislation with Other Social Claims Legislation

In Estonia, on the declaration of bankruptcy of an employer, it is permitted to terminate employment contracts without advance notice to the employees. In such a case the employer is required to submit information regarding the released employees to the employment office of the residence of the employees not later than on the day after the employer notifies the employees of the termination of their employment contracts. If employment contracts are terminated with employees on the declaration of bankruptcy of the employer, the employer must submit information regarding the employees to the employment office on the date following termination of the employment contracts.

The following courts have jurisdiction to resolve worker claims in Estonia: County Courts and Administrative Courts, Circuit Courts, and the Supreme Court shall by way of cassation proceedings.

Tax issues in respect of social claims

There are no tax issues in respect of social claims.

Legislative Reform

There is currently no legislation reform being considered.

Historical, Political and Social Reasons for the Development of Estonia’s Approach to Social Claims

There are no specific issues to report.
FINLAND

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Treatment of Wage Claims

Finland does not grant preference or super-priority to employee wage claims during insolvency.

There is, however, a pay security system designed to ensure the payment of outstanding wages and salaries, based on an employment contract, in the event of the employer’s bankruptcy or insolvency. This system is governed by the Finnish T&E Centre (Employment and Economic Development Centres).

The benefits available under the Finnish pay security system include wages, if they are unpaid three months prior opening the insolvency procedure, which are funded by the government through tax monies allocated in the national budget. The government claim is non-preferential in insolvency proceedings. The pay security system is based on the Finnish Pay Security Act (866/1998, as amended) and respective Pay Security Decree (868/1998). The funds are held under the supervision of T&E Centres and the Ministry of Labour. This system is sufficiently funded through tax revenues. Under the pay security system, the state is subrogated to the claims of employees.

Treatment of Other Compensation

Vacation pay, severance pay, termination pay, and traveling/other expenses incurred by employees in the period leading up to insolvency are not treated preferentially under the Finnish system. However, these amounts may be included as wages under the pay security system.

Treatment of Pension Claims

There is no priority for pension claims under Finnish law. There is, however, a pension payment guarantee fund, funded by industry, employer tax, and general tax revenue. Benefits are available, usually up to an amount of 60% of the employee’s last monthly salary. Contributions to the pension fund are very strictly regulated by the government department of social. In general, every employer has to be a member of one pension institution and the payment amounts per employee are clearly calculated based on salary. The state is subrogated to the pension claims of employees.

During insolvency, unremitted pension contributions receive a dividend as any other non–preferred claims. During restructuring, unfunded or under-funded pension claims have to be covered, whereas in pure bankruptcy one has to lodge a claim for these amounts.

Director and Officer Liability for Social Claims

Directors and officers may be liable for social claims if payments are not delivered to the state/pension institutions on the tenth day of the following month. The liability of directors and officers for such claims is unlimited, and can be settled during insolvency proceedings.

Treatment of Collective Agreements

Collective agreements terminate on insolvency or bankruptcy in Finland. Finnish law does not recognize the collective bargaining agent. There are no major issues with respect to collective agreements and legacy costs in Finland because the country’s pension system is highly regulated.
There are also no successorship issues unless the successor has been involved in the previous insolvency/restructuring process.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Finnish insolvency law does not provide any exemptions to other social claims legislation. Worker claims are handled in the same jurisdiction where the insolvency proceeding is supervised.

**Tax issues in respect of social claims**

There are no tax issues in respect of social claims.

**Legislative Reform**

There is currently no legislation reform being considered.

**Historical, Political and Social Reasons for the Development of Finland’s Approach to Social Claims**

Finland faced a financial crisis in the early 1990s and at that time the legislation was dramatically changed as all preferential claims were given up.
FRANCE

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Treatment of Wage Claims

Section L.143-7 of the French Labour Code provides that wages are guaranteed by the general preference that exists in the French Civil Code (section 2331-4° and section 2375-2°, créances privilégiées). Section L.143-10 provides that wages are guaranteed by a super-priority, which supersedes any other preferential debt (créance super-privilégiée).

All employees and apprentices are granted a general priority on their employer's personal property and real estate assets to ensure the recovery of the following claims: the last six months' wages (provided they were earned before the opening judgment); compensation in lieu of notice; vacation pay; compensation for unfair breach of contract; redundancy payment; compensation in case of dismissal without cause; compensation for end or anticipated breach of fixed-term contract; insecurity of work bonus for temporary employees; compensation for unfair or erratic dismissal of workers victim of an industrial accident or occupational illness.531

The wage claim entitled to super-priority corresponds to the last 60 days of actual work before the judgment. Realization of the preferential claim is not submitted to a condition of length of employment. The super-priority is limited by a monthly cap (section D.143-1 of the Labour Code). For 2007, this cap is fixed at €5,364.532

France has guaranteed insurance for wage claims called Assurance de Garantie des Salaires (AGS). This structure is funded by employer contributions and is sufficiently funded. All employers (legal and physical persons, all undertakers) are liable for guaranteed insurance for wage claims (section L.143-11-1 of the Labour Code). The insurance covers the sums owed for work within a limit calculated according to the length of employment (figures fixed for 2007):

- €64,368533 if the employment contract was entered into 2 years at least before the judgment pronouncing the insolvency;
- €53,640534 if it was entered into between 6 months and 2 years before the judgment; and
- €42,912535 if it was entered into less than 6 months before the judgment.

If an employee's employment contract expired before the judgment pronouncing insolvency, the applicable limit is determined according to the length of employment. The board of directors of the AGS sets the rate of the contributions paid by employers according to the level of advances of funds,

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531 Isabel Didier, Marie-Christine Lafitte, Dominique Haleva, Emilie Codeço, France country contributors, 2007.
532 5,364 EUR is 7,811 CAD. EUR is Euros.
533 64,368 EUR is 93,727 CAD.
534 53,640 EUR is 78,105 CAD.
535 42,912 EUR is 62,484 CAD.
recoveries and employer contributions of the previous year. For 2007, the rate decreased from 0.25% to 0.15%.

The official receiver has to pay the wage claim entitled to the super-priority within 10 days following the judgment pronouncing the insolvency. If the company has no liquid assets, the wage guaranteed insurance (AGS) advances the funds within 5 or 8 days following the statement of wage claims (relevé de créances salariales).

The wage guarantee scheme is a contingency scheme. The redundancy fund can only intervene, under the terms of Article L. 143-11-7 of the Labour Code, if “all or part of the claims cannot be paid out of available funds”. This scheme was created to compensate for the deficiency in the protection of employees, resulting from the following three factors: the length of time needed for operations of liquidation; the existence of claims having precedent over some wage claims; and the financial limits imposed by the available funds.

In the European Union, a directive provides that the Member States have to guarantee the payment of employee wages in the event of their employer’s insolvency (Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer modified by Directive 2002/74/EC of the European Parliament and of the Council).

Although the guaranteed assurance is not funded by the state, AGS is subrogated to the claims of the employees and becomes a creditor of the company. It is a special creditor because it benefits from the preferential treatment granted by the law to employees (section L.143-11-9 of the Labour Code).

In practice, wage slips are presented to the CGEA (Centre de gestion et d’étude de l’AGS - Center of Management and Study of the Redundancy Fund) by the creditors’ representative within a time limit of between ten days to three months. Some amounts have to be paid within a maximum time limit of 15 days following the judgment of opening of the reorganization proceedings. This is the case for super-preferential claims, that is, the wages of the unpaid last 60 days of work (or 90 days for sales representatives), compensation in lieu of notice up to a limit of twice the ceiling of social security contributions, and vacation pay up to the same limit. The other amounts (balance of wages, redundancy pay, and compensation for damages for unfair dismissal or breach of contract for a fixed term) are paid within a maximum time limit of three months and eight days. Other amounts that are not granted by the Fund can be paid several months after the opening of proceedings according to the assets realized.

**Treatment of Other Compensation**

Vacation pay and termination pay receive a super-priority under French insolvency law. Severance pay is entitled to a general preference. The amount entitled to preference and the restrictions on realization of the preferential claim are the same as those concerning the general wage claims because AGS guarantees the payment of all kinds of wage claims due to employees and apprentices. Travelling and other expenses are not given preference.

**Treatment of Pension Claims**

The treatment of pension claims cannot be answered precisely due to the specific nature of the French pension scheme, which is not a funded pension scheme but a pay-as-you-go system. The contributions that are deducted from the wages of the current working population are used to pay current pensions. This system is based on the solidarity between generations: each generation pays for the previous generation’s pensions. The generation born after the war that has reached retirement age and the extension of life expectancy after 60 years will lead to a financial imbalance. However, the Law of 21 August 2003 on the reform of pensions will enable the preservation of the pay-as-you-go system.

The French pension system includes a whole range of schemes organized on an occupational basis. The general scheme (régime général) covers most private-sector employees. One of the aims of the 1945 French social security plan was to set up a single general old-age insurance scheme. This
unification proved difficult as it was impossible immediately to provide employees with a pension high enough to enable unification with the existing schemes.

In view of this situation and the resistance of the self-employed to the social security plan, pension schemes were in practice organized on a socio-occupational basis. So several schemes existed side by side, with membership of them depending on occupational activity, without the person concerned having any choice.

The general scheme with 15 million contributors, i.e. two thirds of the working population and 9 million pensioners, is the main scheme. The other groups of employees (central and local government employees and hospital staff, miners, agricultural workers, railway men and women, and public-sector employees) are covered by special schemes.

For the self-employed, the Act of 1 January 1948 established three independent old-age insurance schemes (self-employed non-professionals [e.g. carpenters, plumbers, etc.] industrialists, shopkeepers and traders, and professional people. The specific nature of jobs in the agricultural sector is still recognized in the agricultural mutual benefit scheme.

For employees covered by the general scheme, the retirement pension system is a two-tier one with a basic scheme and supplementary cover. Supplementary schemes were introduced in order to enhance the basic cover introduced in 1945. Like the basic scheme, the supplementary ones operate on a pay-as-you-go system. Under the Act of 29 December 1972, membership of a supplementary pension scheme, which had until then been optional, became compulsory.

The general social security scheme has 16 funds federated as the CNAVTS (National Employees' Old-Age Insurance Fund). The supplementary cover is provided by funds belonging to two federations: for executives, the AGIRC (General Association of Pensions Institutions for Management Staff), established in 1947, and for non-managerial employees, ARRCO (Association of Supplementary Pension Schemes), set up in 1961. In the case of employees covered by special schemes, these most often combine the basic and compulsory supplementary tiers in a single scheme.

The main rules governing French pension schemes, which are run independently, are set by Parliament; a review of social security resources and expenditure is submitted to Parliament every year as part of the social security finance bill, which is separate from the annual budget bill. All schemes, with the exception of the special scheme for civil servants and State military personnel, are managed on an equal basis by employees' and employers' representatives, with particularly heavy involvement of employers and trade unions in the running of the supplementary schemes.

There are two main types of pension scheme:

1. schemes based on the number of contribution years (calculated in years and quarter years). Almost all the basic schemes and the special schemes for public sector employees operate in this way.

2. schemes based on the number of points obtained. In this case, contributions corresponding to a salary fraction are paid in annually and transformed into units of account which are credited to an employee's individual account. The amount of the pension at the end of an employee's working life depends on the number of points credited to his/her account and the value of the point at that time. Almost all the supplementary schemes operate in this way.

The French pension system is very largely a pay-as-you-go system. It is based on solidarity between the generations. The contributions on wages and salaries paid jointly by employees and employers are used to pay the pensions of retired people in both the basic and supplementary schemes. The funded or "money purchase schemes" [i.e. the pension is dependent on the size of the capital saved] that exist for various groups of people (self-employed non-professionals and shopkeepers and traders, additional schemes in some firms) are generally optional and of limited importance.
The principle of solidarity is involved at various levels. Within each scheme, in order to secure the inclusion of various periods not worked (sickness, maternity, unemployment, etc.) in the calculation of contribution years for retirement pension purposes and guarantee a minimum pension irrespective of the total amount of contributions; and between schemes, through the introduction of financial compensation mechanisms to take account of demographic disparities. Some schemes, such as that for miners, which, as a result of declining activity in their sector, no longer have enough contributors to fund the payment of pensions, receive money from schemes with large numbers of current contributors. At the national level, the State also supports schemes with relatively few current contributors (farmers, sailors, miners, etc.).

Moreover, 1993 saw the creation of the Fonds de solidarité vieillesse [Solidarity fund for the elderly] funded out of general taxation which brings up the income of anyone of 65 years or over whose income or pension is below what is known as the minimum vieillesse [minimum level of income required to live] to that level.

Under the general scheme, in order to claim a full-rate pension, a pensioner must have reached the age of 60 and have paid 40 years of contributions. The same rules apply to self-employed non-professionals, shopkeepers and traders.

Overall statistics include the following: 13.4 million pensioners live in France, 10.4 million of which depend on the general system. The average retirement age is 58 years old, with the average life expectancy remaining at 80 years. 13% of France’s GDP is dedicated to the financing of pensions. There was a 3.5 billion euro deficit for the old age pension in 2007. In 2050, it might reach €52 billion a year, according to the forecasts of the Board of Adjustment of Pensions. Faced with this unbalance and the reforms in perspective, and in parallel to the general regime, funded pension plans are emerging. Employees are free to subscribe to one, which is encouraged by the State through tax incentives.

Director and Officer Liability for Social Claims

In France there is no director and officer liability for the failure to pay social contributions to the social insurances (pensions, invalidity, sickness, etc.). The company, which is the legal person, is responsible for payment of these contributions. It is possible, however, that directors could be held responsible in case of crimes such as fraud or fraudulent use of corporate property (abus de biens sociaux). In the case of insolvency of the company, if it is not sufficiently funded because of management negligence, directors can be condemned to pay part or all of the gap between assets and liabilities (section 651-2 of the Commercial Code, “action en responsabilité pour insuffisance d’actifs”). These payments are not specifically dedicated to social claims. They are included in the assets of the company.

Thus, the managers of a structure in liquidation can become the object of sanctions if:

- They committed management mistakes (Article 651-2 of the Civil Code). In this case, they can be condemned by the Court to pay all or part of the company’s debt. The amounts paid by the managers enter into the assets of the company in liquidation.
  
- They can also be condemned for the following facts (Article 652-1 of the Civil Code):
  - using the company’s assets as personal assets
  - carrying out commercial acts in a personal interest, under the shelter of the company, hiding his or her wrongdoing
  - using goods or funds of the corporation against the interest of the latter, for personal purposes or to favor another company in which the manager had a direct or indirect interest
  - improperly carrying on the activity of a business in deficit, knowing that it will lead to the company’s suspension of payments
The amounts paid by managers enter into the assets of the company in liquidation. But in this precise case, they are shared out to the creditors according to their rank.

Treatment of Collective Agreements

Collective agreements do not automatically terminate on insolvency or bankruptcy in France. Collective agreements continue to apply while a company is in insolvency or bankruptcy. Employment contracts are continued as well.

The mandates of the staff representatives, including the bargaining agent, continue during the insolvency proceedings. Staff representatives are heard by the court dealing with the insolvency. At the start of the insolvency proceedings, a special staff representative (représentant des salariés) needs to be appointed (section L.621-4 of the Commercial Code). He or she is an employee of the company and his or her mission is to prove the statement of wage claims (relevé de créances salariales: section L.625-1 and L.625-2 of the Commercial Code). Time spent doing this is considered and paid as working time. The special staff representative is a protected employee ("salarié protégé"). He or she cannot be dismissed without the approval of the Labour Administration (section L.662-4 of the Commercial Code).

There have been recent changes in the French legislation concerning the sums guaranteed by the AGS. Employees and employers, in the event of economic dismissal, had taken advantage of the guarantee by increasing the amount of the severance indemnities, knowing that the company would be unable to pay them and that in the end, the AGS would guarantee them. To put an end to these frauds, a change was made in the statutes (section L.143-11-3 of the Labour Code). The AGS no longer guarantees the severance indemnities provided for in a company agreement signed 18 months or less before the launch of insolvency proceedings.

There are no special provisions dealing with collective agreements during insolvency. Instead, the general provisions that enable amendments to be made to collective agreements apply. In case of insolvency, it is not possible, from one day to another, to terminate a collective bargaining agreement. Once the decision to terminate is made, the collective agreement ends 15 months later at most, albeit not completely. The amendment of a collective agreement is possible with the agreement of the trade unions.

In the course of insolvency restructurings, part or all of the company assets can be sold to purchasers, which will continue the business. They may not be bound by the same collective agreement as the former employer. Then, the question of the applicable collective agreement is raised.

When the application of a collective agreement is jeopardized, section L.132-8 paragraph 7 of the Labour Code applies. This paragraph provides that the collective agreement continues during 15 months at most (a notice period of 3 months plus one year; this period of time can be increased in the collective bargaining agreement). The successor employer has a duty to bargain a substitution agreement (accord de substitution). If an agreement is reached, this collective agreement will supersede the previous collective agreement. If no agreement is reached during this 15-month period, the employees will have a right to retain acquired individual rights (avantages individuels acquis) set out in the collective agreement. These acquired individual rights will then be part of their employment contract.

Interaction of Insolvency Legislation with Other Social Claims Legislation

Regarding labour relations legislation, the burden on the employer is lessened while the company is in insolvency proceedings (section L.321-9 of the Labour Code). Normally, when the employer proceeds to a collective dismissal on economic grounds, it is required to consult staff representatives. When there are collective dismissals on economic grounds during insolvency proceedings, the duty to consult, which applies to the employer, is lessened. If the employer fails to comply with this procedure, the sanctions are also less strict. Rather than annulling the dismissal, the judge will grant the employees damages.
Regarding individual social claims (a notion that is very largely construed), the Employment Tribunal (Conseil de Prud’hommes) has jurisdiction. The Commercial Court (Tribunal de commerce) has jurisdiction over insolvency proceedings. If social claims are pending before an Employment Tribunal while insolvency proceedings are initiated, the Employment Tribunal retains its jurisdiction. The Employment Tribunal has sole competence to deal with the statement of wage claims. Employees have two months to contest the statement of wage claims before the Employment Tribunal.

**Tax issues in respect of social claims**

No specific tax regulations are applicable regarding social claims and insolvency proceedings. Wages in insolvency proceedings are submitted to tax income. Severance pay is exempted up to the amount of the severance pay provided for in the collective bargaining agreement. The part of the contractual severance pay which exceeds this amount is submitted to income tax. Indemnities granted by the judge for wrongful dismissal are exempted.

There is some concern that with the numerous failing companies, the weight of the insolvency of some is carried by the other companies in terms of tax.

**Legislative Reform**

There is currently no legislation reform being considered. The reform is recent, it is dated 26 July 2005 and came into force on 1st January 2006.

However, there has been a movement in recent years, led by practitioners, that has proposed to lessen the burden imposed by labour law during insolvency proceedings rather than applying ordinary labour law, in particular regarding economic dismissals. These proposals have not received any effect yet.

**Historical, Political and Social Reasons for the Development of France’s Approach to Social Claims**

The meeting of Insolvency law and labour law results in a conflict of logics (“conflit de logique”). Indeed, insolvency law is aimed at protecting companies and labour law is favorable to the employees who have the right to a certain degree of protection. A balance must be found between the interests of the creditors and the interests of the employees, not always achieved in France. For instance, the pre-dismissal meeting is compulsory in French labour law. In case of insolvency that results in liquidation, the employees know at the time of the judgment by the Commercial Court that they will be dismissed. In this case the pre-dismissal meeting is pointless and purely formal and has no meaning for the employees. It is nonetheless compulsory and if the employer does not do it, the employee can claim damages.

The guarantee fund is financed by employer contributions on the earnings used as the base for the calculation of contributions to the unemployment insurance scheme and the board of directors of the fund sets the level of contributions paid by employers and is responsible for the stability of the scheme of guarantee of wage claims. The equilibrium is maintained by the permanent adequacy between the level of funds advanced and recovered, and by the employer contributions. The Fund has to be balanced between the payments made and the deductions from contributions. Up to now, stability has been maintained by acting on the guaranteed ceilings or on the contributions. In 2003, the Fund was in deficit and the guaranteed ceilings were reduced. In 2005, the Fund being a beneficiary, the board of directors of the fund decided to reduce the rate of contribution by 0.10 points. This way, it was reduced from 0.25% (since January 1st, 2006) to 0.15% for the contributions paid from July 1st, 2006.

In parallel, funds paid to employees are advances granted to companies involved in insolvency proceedings. Thus, amounts have to be paid to the Fund on the assets realized, as quickly as possible, while respecting the order of priorities.

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537 Jean Michel Lucheux, France country contributor, 2007.
The wage guarantee insurance scheme was instituted by law 73-1194 of 27 December 1973. An employer organization was created in February 1974, pursuant to the law of 27 December 1973, the “Association for the Management of the Insurance Scheme to cover Employees’ Outstanding Claims” (AGS). After several reforms (convention of 18 December 1993 amended on July 4th, 1996), the AGS entrusted the management of the wage guarantee insurance scheme to the Unédic (French unemployment insurance scheme), through the Unédic AGS delegation, composed of 14 CGEA (Centre of Management and Study of the Redundancy Fund).

**Structure of the French system**

Graph created by Isabel Didier, Marie-Christine Lafitte, Dominique Haleva and Emilie Codeço.

*Redundancy Fund* refers to the wage guarantee fund.
Treatment of Wage Claims

Germany’s bankruptcy legislation is called *Insolvenzordnung of 5 October 1994* (BGBl. I 2866) (amended; in force since 1 January 1999).

Germany does not have a wage preference or super-priority in terms of employee wage claims. The *Insolvency Code of 1994* has abolished any preferences. Wages earned while a preliminary receiver (with power to dispose of the bankrupt’s estate) has been appointed (after application, before opening of insolvency proceedings) are "Masseglaubiger", creditors of the bankrupt's estate, and receive full payment.

Germany has a wage protection fund or guaranteed insurance for wage claims during insolvency, which will pay the net wages for the last three months before the opening of insolvency proceedings, pursuant to the Federal Labour Agency (§§ 183 ff. SGB III). The fund is industry funded. Employees receive compensation if the employer has become bankrupt, if insolvency proceedings do not take place for insufficient assets or in case of complete termination of business if there are no assets.

The wage protection fund is sufficiently funded as the “insolvency money” is financed by appointments to the other enterprises of the same branch.

The employers’ associations demand payments from any enterprise: the share depending on the total sum of wages of all socially insured employees; quarterly advance payments and one final payment. This method ensures adequate capitalization. The statutory provisions create the fund. (§§ 358 – 361 SGB III). Having paid the "insolvency money" the Federal Labour Agency is subrogated to the claims of employees, but without the privilege.

Treatment of Other Compensation

There is no priority or preference for vacation pay, severance pay, termination pay or travelling and other expenses.

Treatment of Pension Claims

There is no direct super-priority for the payment of pension claims. There is however, a pension payment guarantee fund for pension claims during insolvency, the *Pensions-Sicherungs-Verein Versicherungsverein auf Gegenseitigkeit*. It is industry funded.

Employees are entitled to the same level of benefits as the employer would have to pay if it had not become insolvent. The pension payment guarantee fund is sufficiently funded, on the same financing system as for wage claims. The fund is created by §§ 7 -14 *BetrAVG (Gesetz zur Verbesserung der betrieblichen Altersversorgung)* of 19 December 1974). Unremitted pension contributions of the
debtor are to be honoured by the Pension Security Fund, if earned after the 30th birthday, for at least five years. They are treated as ordinary claims.

**Director and Officer Liability for Social Claims**

There is no special liability of corporate directors and officers for social claims during insolvency. If directors protract an insolvency application, they may be liable for all damage suffered by all creditors, §§ 823 sec. 2 BGB (Civil Code) with § 64 sec. 1 GmbHG. By law it is an unlimited liability. There are no special instruments, but the receiver may agree to a compromise of claims against directors and/or officers during an insolvency workout or insolvency proceeding.

**Treatment of Collective Agreements**

Collective agreements are continued under German law agreements between the works council and the employer. The members of the works council stay in office until the enterprise is finally closed. In cases of cutting down activities (closing a factory) the works council has a right of co-determination according to §§ 111 – 113 BetrVG (Betriebsverfassungsgesetz). There are successor employer provisions in respect of collective agreements after insolvency restructuring, in terms of purchasers of the business that continue to operate the business after it files insolvency proceedings. Under § 613a BGB (Civil Code) the successor enters into all labour contracts (in compliance with the EU-Directive 2001/23/EG). There is much debate about details of succession and possibilities to terminate employment contracts despite of § 613a BGB.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Generally insolvency does not lessen any duties arising out of other statutes; the bankrupt may, however, be unable to comply with them. The Labour Courts have jurisdiction to resolve worker claims arising out of insolvency.

**Tax issues**

There are no particular tax issues in respect of social claims in Germany.

**Legislative Reform**

The only proposed legislative reform in Germany in respect of treatment of social claims is with regard to part-time work schemes for seniors and with regard to pension insurances paid out of earned wages are some remaining problems.

**Historical, Political and Social Reasons for the Development of Germany’s Approach to Social Claims**

Germany is a social welfare state. Social Security has always had a high political priority even if there are some cuts in the social net in the last years.
GUERNSEY
CHANNEL ISLANDS

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Treatment of Wage Claims

There is no specific legislation relating to wage claims.

Treatment of Other Compensation

In Guernsey, vacation pay, termination pay, and severance pay entitled to preference on a pro rata basis. Traveling and other expenses are not preference.

Treatment of Pension Claims

Pensions claims are not granted priority over other claims. Entitlement to pension claims depends on the amount of the employees’ contributions, length of employment, the type of pension and the Scheme and most particularly the Insolvency Rules.

There is no pension payment fund in Guernsey.

If a pension provider cannot meet its liabilities or fails to do so, then the member who is suffering a loss or the trustees on the member’s behalf may make a claim against the personalty of the pension provider. There is no precedent for this in Guernsey; however, there is an investigation into the mis-selling of Retirement Annuity Trusts ongoing, so it is a possibility that this issue may arise in the future. Also, in relation to QROPs there is potential to draw down 100% of one’s fund, which may appear attractive, but may leave several pensioners with a shortfall.

Director and Officer Liability for Social Claims

The trustees and the employer sponsoring the pension plan will usually be the ones responsible for meeting pension contributions and payments. This will depend on the Pension Scheme and Rules. If a company, as principal employer, is liable to make a contribution and it fails to do so, then the directors or officers will be personally liable. Their liability will depend on the constitution of the company or the partnership, i.e., whether it is limited by guarantee or a protected cell company, etc. If the individual is declared en desastre, then its pension provider will not usually be obliged to continue to pay out their pension, however, again, this will depend on the Pension Scheme and Rules. If a civil action is successfully brought against a member of a pension scheme, then this will also depend on the Scheme and Rules, however, the trustees would not normally consider this fact when paying out money.

Treatment of Collective Agreements

A collective agreement is one made between an employer or employers’ association and a trade union governing the relationship between the parties. It will only be legally binding on the parties if in writing and if it states it has legal status. Some of the terms and conditions of individual employment of those employees may be covered by a collective agreement.

In Guernsey, when a person is unable to pay his or her debts, the person is said to be en état de désastre. This means that the financial status of the person is disastrous in the sense that his or her liabilities exceed the value of his or her assets. This is a customary law and they are not written down and relates to personalty and not realty. The only consequence for the debtor is that his or her
personatly is liquidated and equally distributed amongst his creditors. The law does not then impede that debtor’s ability to act going forward in his or her day to day life and deal or contract, but desastre does not cancel out the debt and partial payment does not legally satisfy the creditor.

There is also the Preferred Debts (Guernsey) Law 1983.

Collective Agreements are contractual and can be amended, as long as there is full understanding, by mutual agreement. There is no obligation on the employee to agree.

In Guernsey, a successor employer would take on the liabilities of the previous employer and it is the successor’s responsibility to conduct a full enquiry into the potential or real liabilities of the current employer before it purchases a business.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Guernsey employment law is in its infancy and there is no sex or race discrimination legislation. The Employment Protection (Guernsey) Law 1998 gives employees certain rights to employees such as the right to receive notice of termination of employment, and the right not to be dismissed unfairly and for the employer to act reasonably. Very few cases reach the courts and the majority of cases are settled. There is no dedicated employment tribunal or judge. Specialist judges are usually flown over from England as and when the need arises.

Reforms are expected that will allow the Adjudication Tribunal to hear civil claims for wrongful dismissal up to a limit of £25,000. Compensation for unfair dismissal follows a fixed formula under s.20 and 21 of the 1998 law which award is equal to 3 months or 13 weeks pay according to whether the employee was paid monthly or weekly. Compensation may be agreed as settlement outside of court, otherwise the Adjudication Tribunal will decide the level of compensation, which should then be paid promptly into court by the losing party.


The Royal Court of Guernsey resolves all claims. When an employment matter arises, the Court may bring over an English judge who specializes in this area to preside over the case. Guernsey does not have a dedicated employment tribunal or employment judge or court.

**Tax issues in respect of social claims**

Guernsey faces no tax issues in respect of social claims.

**Legislative Reform**

There is currently no legislative reform being considered.

**Historical, political and social reasons for the development of Guernsey’s approach to social claims**

Guernsey law is closely modeled on the laws of England and Wales; however, as Guernsey is a smaller jurisdiction, its requirements are often very different or considerations such as the cost of maintaining an employment tribunal must be considered and affect the laws that are enacted. There is strong reliance on case law and also the laws of Normandy in France, due to the fact that Guernsey used to be resided over by the Duke of Normandie. Several of our laws are in French and, for example Terrien from the 16th Century is still relied on.
GHANA

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Treatment of Wage Claims

The Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) grants priority to certain claims of employees. These rank below fixed charge holders but above floating charge holders. The priority applies to remuneration not exceeding the current value of £150 for a period not exceeding four months before the commencement of the insolvency proceedings. Employees receive their benefits when other creditors in their class are being paid.

Ghana does not have a wage protection fund or guaranteed insurance for wage claims. However, in recent high profile insolvencies of state owned enterprises, the Government has provided funds for the payment of employee severance claims and other entitlements. Employees receiving such payments have subrogated their claims in the insolvency proceedings to the Government.

Treatment of Other Compensation

There is no priority for vacation pay, severance pay, termination pay or travelling or other expenses.

Treatment of Pension Claims

There is no priority for pension claims in Ghana. There is no pension payment guarantee fund or guaranteed insurance for pension claims during insolvency. However, there is a compulsory social security scheme that is funded from employee and employer contributions. Unremitted social security contributions are treated as priority and paid to the Social Security and National Insurance Trust. Provident and other internal funds are treated as unsecured.

Director and Officer Liability for Social Claims

There is no specific liability of directors and officers for social claims during insolvency. However, directors and officers may be held liable for malfeasance or misfeasance in relation to social claims. For instance, directors may be liable if they were found to be negligent in ensuring funding of social claims. Such claims against directors cannot be compromised or settled during an insolvency workout or insolvency proceeding?

Treatment of Collective Agreements

Collective agreements are terminated on the commencement of insolvency proceedings. The collective bargaining agent remains the representative of employees. For instance, the agent will lead the employees in negotiating a severance package.

There are no statutory provisions allowing bargaining, modifying or terminating collective agreements during restructuring proceedings. The parties to the agreement may serve the required notices to reopen negotiations. The Labour Act, 2003 (Act 651) requires the following steps to be taken if the restructuring will result in the termination of employment of some workers:

- Notice to the Chief Labour Officer and the trade union concerned giving the reasons for termination, number and category of workers concerned, etc. This must be done not later than three months before the contemplated date of the restructuring.
- Consult the trade union on measures to avert or minimize the termination.
There are no successor employer issues in respect of collective agreements in terms of purchasers of the business or insolvency professionals as a collective agreement does not survive insolvency proceedings.

Interaction of Insolvency legislation with Other Social Claims Legislation

All applicable legislation is taken into account during insolvency proceedings. For instance, the provisions of the Labour Act, which require that a severance package should be negotiated, are always complied with. The High Court has jurisdiction to resolve worker claims. In Ghana the law does not make provision for supervision of the administration of the insolvency proceedings by a specific court. The High Court has supervisory jurisdiction in all insolvency proceedings and may deal with all matters including resolution of worker claims.

Tax Issues

There are no tax issues in respect of social claims.

Legislative Reform

There is a proposal to review the Ghana Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) and it is expected that the provisions on the treatment of social claims would be considered as part of this revision.

Historical, political and social reasons for the development of Ghana's approach to social claims

Ghana's insolvency law is based on previous UK insolvency legislation. Given that it was passed in 1963, it is outdated. The passage of the Labour Act was influenced by the trade unions.
Treatment of Wage Claims

Under section 305(1)(b) and (c) of the Companies Act, wages of any employee in respect of services rendered to the company are “preferential payments” and, together with compensation awards under the Contract and Tort Act, enjoy super-priority above all other preferential debts where the assets are insufficient to meet all preferential debts equally in full. The only wages entitled to preference are for services rendered in the 12 months before the “relevant date”, namely the date of the winding-up order, in the case of a compulsory winding-up, or the date of the passing of the resolution for voluntary winding-up, in the case of the latter.

There is a cap on the amount of the preferred claim of a maximum of £1,000,\(^{538}\) except that a labourer in husbandry to have a proportion of his or her wages paid as a lump sum at the end of the year of hiring shall have priority for the whole or part as the court may decide, in proportion to the time of service up to the relevant date.

There is no wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

There is no priority for vacation pay, severance pay, termination pay or any outstanding expenses owing from travelling.

Treatment of Pension Claims

There is no priority for pension related claims, nor is there any pension guarantee fund for employees and pensioners facing insolvency.

Director and Officer Liability for Social Claims

If a company as employer is convicted of the offence of failure to pay the contributions due to the funds that provide (a) employment injuries benefit, (b) maternity benefit and death grants, (c) old age pensions, widow’s benefit, widower’s pensions and guardian’s allowance, in addition to the fine payable, the court may order that the total due be paid. Directors and officers of the company are liable for those sums if they knew or could reasonably have been expected to know of the company’s failure to pay. The relevant provisions are Section 48 Social Security (Employment Injuries Insurance) Act (previously “Ordinance”); Regn 7 Social Insurance (Contributions) Regulations; and Regn 6 Social Security (Open Long-Term Benefits) (Contributions) Regulations 1997. The directors can be liable for the entire amount of unpaid contributions.

Although there is no specific statutory language that would allow claims against directors and officers to be compromised or settled during an insolvency workout proceeding, there would appear to be no bar in doing so as long as the rights of other creditors are not prejudiced.

Treatment of Collective Agreements

If, on the closure of the business, the undertaking is transferred to another employer, then, unless the employee opts not to have his or her employment transferred, any collective agreement between the

\(^{538}\) £1,000 is 1,962 CAD.
transferor and the trade union shall continue with the union and the transferee. [Sec 78A Employment Act]. The transferor is required to inform the union well in advance of the transfer of its intentions and the effects if any for employees and to negotiate the effect of any measures to be taken.

The trade union representative recognized by the employer is the person authorized to carry out collective bargaining on a transfer of undertaking. In other cases, have become involved in ensuring that the priority of wages be observed. Gibraltar has not faced issues in respect of collective agreements and legacy costs.

As a matter of company law and separate to the provisions of the Employment Act, as creditors, employees are entitled to vote on any scheme of arrangement [Section 205 Companies Act]. If the scheme involves a reconstruction and the whole or part of the business is going to be transferred the court can order that the transferee company in any such scheme take over the rights and duties of the transferor. [Sec 206 Companies Act]. Outside this and the above-discussed provisions regarding success of employers. There appears to be no reason why the parties should not be free to contract so long as the rights of other creditors are not prejudiced and all employees concur.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The Supreme Court has jurisdiction over all aspects of insolvency proceedings. Claims arising out of the provisions of the Employment Act referred to above for failure to inform or consult are to be laid before the Industrial Tribunal.

Tax issues in respect of social claims

There are no particular tax issues in respect of social claims in Gibraltar.

Legislative Reform

There is currently no proposed legislative reform in respect of treatment of social claims.

Historical, Political and Social Reasons for the Development of Gibraltar’s Approach to Social Claims

Historically Gibraltar has followed the UK model of insolvency law although because of its small size, it has been adapted to consider local norms and requirements.
GREECE

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Treatment of Wage Claims

According to Article 154 c of Law 3588/2007 (the Insolvency Code), employee wage claims are ranked third among preferred creditors in Greece. All wage claims arising in the two years prior to the inception of insolvency proceedings are subject to the preference. However, claims for compensation due to termination of employment relations as well as claims of salaried lawyers for compensation due to termination of contract are not subject to any such restriction.

Greece has established the Fund for the Protection of Employees from Employer’s non-Reliability (the “Fund”) for the protection of wage claims. The Fund is funded by compulsory contributions made by employers (0.15 % on employees’ wages) and state funds, and is self-funded by proceeds from investments of Fund-owned assets. The Fund provides for a maximum benefit of three months wages payable for the six month period before insolvency. Other benefits are included with the wages such as graduate allowance and marital and paternity/maternity benefits. Legal wages provided for in Collective Employment Agreements are taken into account (and not the contractual ones), thus introducing a restriction to the protection. Claims deriving from termination of the employment contract are excluded. The state is subrogated to the claims of employees.

Treatment of Other Compensation

Vacation pay, severance pay, termination pay, and travelling/other expenses also have priority under Greek law. Although there is no statutory provision to this effect, these amounts are included in the definition of “wages” and are therefore treated to the same general preference as third ranking among preferred creditors. Such claims are limited to amounts arising in the two years prior to insolvency.

Treatment of Pension Claims

In Greece, only pension claims in relation to the Social Security Foundation (which is only one, albeit the largest, of the tens of public and semi-public pension funds in existence) have priority. Such claims rank 6th in priority according to Article 154 of the Insolvency Code (Law 3588/2007). As with wages, these claims are limited to amounts arising in the two years before insolvency.

Greece does not have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

Director and Officer Liability for Social Claims

Under Greek law, directors are personally and jointly liable, together with the legal entity, for failing to make the compulsory contributions to the Social Security Institution. There is no limit to this liability and such claims cannot generally be compromised or settled during an insolvency workout or insolvency proceeding.

Treatment of Collective Agreements

Collective Employment Agreements according to Greek law are not employment contracts, since they do not establish employer – employee relations. They are agreements between collective bodies representing on one side employees and on the other employers, which institute the minimum
regulations for the protection of employees (minimum salaries etc.). Therefore insolvency or bankruptcy procedures have no influence on such collective agreements in any way.

Interaction of Insolvency Legislation with Other Social Claims Legislation

Employment contracts are not automatically terminated on insolvency, although the liquidator/Syndic has the power to terminate them. Employment standards, human rights, and occupational health and safety legislation are not affected by insolvency. Matters relating to insolvency proceedings are determined by the insolvency court.

Tax issues in respect of social claims

There are no tax issues in respect of social claims.

Legislative Reform

There is currently no legislation reform being considered. The last reform was made in September 2007.

Historical, Political and Social Reasons for the Development of Greece’s Approach to Social Claims

The historical, political and social reasons for the development of Greece’s approach to social claims are unknown.
GUATEMALA

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Treatment of Wage Claims

Guatemala has a wage preference or super-priority in terms of employee wage claims. In 1952 Guatemala ratified the 1949 International Labour Organization Protection of Wages Convention, which establishes in Article 11 that in the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations. Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share of the assets. The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations.

Article 101 of the Guatemalan Labour Code, Decree 1441 establishes that credits generated by wages or monetary compensation due to workers derived from the termination of their employment agreements, are privileged, once they are recognized by the Labour and Social Security Courts. Said credits are deemed first-class credits in universal proceedings and they should be preferred before any other credits, except for secured credit defined as first-class credits established by the Civil Code (mortgages and pledges) and some others, such as common judicial expenses, conservation expenses, management of the assets object of the insolvency, the debtor’s burial expenses and the expenses necessary for the repair and construction of real estate. Article 101 establishes that the privilege set therein will be applicable over the amount of credits or compensations equivalent to six months of wages or less.

Article 82 of the Guatemalan Labour Code establishes that in case of insolvency, bankruptcy, or judicial or extrajudicial liquidation of the business the General Labour and Social Security Inspection shall graduate the amount of the business’ obligations, which will be a minimum of two days wages and a maximum of four months wages, per worker. Notwithstanding Article 101 and 82, due to the protective nature of the Guatemalan labour provisions, judges will most likely consider that the worker is entitled to a maximum of six months wages.

Article 82 of the Guatemalan Labour Code indicates that if the insolvency or bankruptcy were declared negligent or fraudulent, the employer should pay the worker a compensation for the time of the services were rendered equivalent to a month’s wages for each year of continuous services. As per Article 84 of the Guatemalan Labour Code, said payment should be proportional, if services have been rendered for less than a year.

Guatemala does not have a wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

All outstanding vacation pay and severance pay is unconditionally given priority over other claims. Termination pay up to six months of wages is also the subject of unconditional preference. Traveling and other expenses do not receive priority.

Treatment of Pension Claims

Pensions are not entitled to preference under Guatemalan law. Pension claims are subject to the conditions set forth by the Guatemalan Institute of Social Security. A minimum time of contribution

539 ILO Convention No. C95.
as well as an age limit is required for the different pension rights. Said institute will recognize the years that the worker has contributed.

Guatemala does not have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

**Director and Officer Liability for Social Claims**

There is no specific director and officer liability for social claims. Nevertheless, if the insolvency were fraudulent or negligent the directors and officers would be liable criminally and civilly for the damages and losses caused. This would have to be declared by a court of law. Article 171 of the Guatemalan *Commerce Code* establishes the general director’s liability. It states that the directors are liable before the entity’s creditors for any damages and losses caused by their fault. The only limit on a director or officer’s liability is the extent of their personal assets.

Claims against directors and officers cannot specifically be compromised or settled during an insolvency workout or insolvency proceeding. Nevertheless, Article 177 of the Guatemalan *Labour Code* establishes that creditors can ask for the revocation of a resolution of the general shareholders meeting that approved the execution of a settlement agreement with the directors.

**Treatment of Collective Agreements**

Collective agreements are terminated upon insolvency or bankruptcy due to the absolute impossibility to fulfill the agreement as per what is established in Article 85 of the Guatemalan *Labour Code*. In Guatemala, unions have the exclusive right to negotiate collective bargaining agreements as per Article 49 of the *Labour Code*.

Article 23 of the Guatemalan *Labour Code* establishes a general provision that states that the substitution of the employer does not affect the existing employment agreements, to prevent damages to be caused to workers.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

In Guatemala, the Labour Court has exclusive jurisdiction to resolve worker claims. Therefore, said claims and issues cannot be resolved by the Civil or Criminal Courts that have jurisdiction over the insolvency proceeding.

**Tax issues in respect of social claims**

There are no tax issues in respect of social claims.

**Legislative Reform**

There is currently no legislation reform being considered.

**Historical, Political and Social Reasons for the Development of Guatemala’s Approach to Social Claims**

There are no specific issues to report.
Treatment of Wage Claims

Honduras has a system of wage preference established in the Commerce Code (Código de Comercio) and Labour Code (Código del Trabajo). Under this system, all wages are entitled to preference. The Labour Code establishes a 15 year term of employment as the cap for calculating an employee's severance payment.

Honduras does not have a wage protection fund or guaranteed insurance for wage claims during insolvency.

The law guarantees payment of salaries (14 per year), social security, and employee training programs and housing programs (to which both employee and employer contribute).

Treatment of Other Compensation

In Honduras, both vacation pay and severance pay are entitled to preference. Termination pay and traveling and other expenses are not given a preference.

Treatment of Pension Claims

Pension claims are also given priority under Honduran law. The priority applies to all pension claims, and there are no restrictions on realization of payment of such claims.

Honduras does not have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency. The government, social security system, and bar associations have pension funds but not specifically related to insolvency of private companies.

There are no specific provisions in the Honduran Commerce Code addressing the treatment of unremitted pension funds in relation to the bankruptcy estate. There are certain assets that remain in the bankruptcy estate until payment by trustee, so the trustee may receive any unremitted contributions. In Honduras, private pension funds are approved by the tax authority.

Director and Officer Liability for Social Claims

The Honduran Labour Code establishes that in the case of bankruptcy, salaries and other compensation are to be paid by the trustee within 30 days of having been filed for in the Labour Courts. Salaries for one year prior to bankruptcy, complete compensation are included in this amount.

Claims against directors and officers can be compromised or settled during an insolvency workout or insolvency proceeding as long as employees agree and labour authorities are present.

Treatment of Collective Agreements

There are no specific provisions in the Honduran Commerce Code in relation to the treatment of collective agreements and the bankruptcy estate. There are certain provisions that allow for the continuance of the bankrupt company under the trustee’s administration until liquidation, restructuring, or reorganization; and in this case agreements may be continued if applicable until
liquidation. The *Labour Code* generally allows for the modification and termination of collective agreements under certain conditions qualified by labour authorities.

Bankruptcy proceedings are rare in Honduras, so the issue of legacy costs rarely arise.

There is a general provision in the Honduran *Labour Code* by which successor employer is deemed to continue labor relations and responsibilities of previous employer, who is liable for six months after transacting the company.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

The Honduran *Labour Code* is the main statute containing general provisions in relation to salaries and compensation in the case of insolvency, complemented by other general provisions of the *Commerce Code*, which is the statute that specifically governs bankruptcy proceedings.

According to the *Labour Code*, it is the Labour Court that must recognize the workers’ credits for salaries and compensations. Civil Courts conduct Honduran bankruptcy proceedings and must therefore recognize Labour Court rulings in this regard for recognition and privilege of labor obligations of the bankrupt estate.

**Tax issues in respect of social claims**

Honduras faces no tax issues in respect of social claims.

**Legislative Reform**

There is a movement to reform bankruptcy legislation that might affect treatment of social claims in Honduras. So far no specific project has been submitted to Congress, but there are intentions to do so in the future.

**Historical, political and social reasons for the development of Honduras’s approach to social claims**

Honduran labour legislation was enacted systematically in the 1950s, after large-scale strikes in the U.S. banana companies dominating the economy at that time. The *Labour Code* was enacted in 1959. Therefore, Honduran labour legislation is mainly structured with a view to capital conflicts with employees and maintaining a balance, mainly against the employee.
HUNGARY

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Treatment of Wage Claims

Employee wage claims in Hungary have a super-priority over other insolvency claims under the law of Act LXVI of 1994 on the Wage Guarantee Fund (1994. évi LXVI. törvény a Bérgarancia Alapról). The preference extends to wages and the severance pay of employees who have given notice by the time of liquidation. There is no restriction on the wages that can be claimed, but severance pay is limited to 6 months’ wages.

Hungary has a Sales-Guarantee Fund for wage claims in insolvency. The Fund is funded by costs to the system. The Fund covers 100% of wages, as well severance pay equivalent to six months’ wages. Employees receive compensation out of the Fund if the liquidator is unable to pay for the employees’ claims by the time of liquidation. The Fund is sufficiently funded because it is state-owned. Companies are obliged to pay 0.3 % of the gross income of their employees into the fund every month. The state pays 600 million HUF into the Fund every year. The state is subrogated to the claims of employees.


Treatment of Other Compensation

Severance pay claims are also given a preference during insolvency. There is no priority for vacation pay, termination pay, or traveling and other expenses. Severance pay claims to a maximum of six months’ wages are treated the same as wage claims.

Treatment of Pension Claims

In Hungary, pensions claims are not generally given priority because there are no private pension-programs. There is only one common pension system, which is partly state owned, and the pension funds are fully state guaranteed. For the “early” pensioners, those who retire before reaching the pensionable age, and for the disability pensioners, those who had an accident at work, the state guarantees a pension through the state pension system. For the “early” pensioners and for the disability pensioners, the state pays the same amount as the insolvent company would pay. There are no restrictions on realization of payment of these claims.

Director and Officer Liability for Social Claims

Directors and officers are liable for unpaid social security contributions to the state funds. If they fail to do so, they have criminal liability, according to the Criminal Code and face a monetary penalty or prison sentence (Act IV of 1978 on the Criminal Code, 1978. évi IV. törvény a Bűntető Törvénykönyvről). There is no limit on directors’ and officers’ liability. Claims against directors or officers cannot be compromised or settled during an insolvency workout or insolvency proceeding in Hungary because the criminal process is separate from the insolvency process.

Treatment of Collective Agreements
Collective agreements can be cancelled during an insolvency proceeding. If the collective agreement is cancelled, there generally is no litigation. Pre-insolvency collective agreements are cancelled in all cases before the arrival of successor employers.

Legacy costs are not a central issue, as there are practically no such agreements Hungary.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Other social claims legislation such as the Labour Code contains provisions dealing with insolvency *(Act XXII of 1992 on the Labour Code, 1992. évi XXII. törvény a Munka Törvénykönyvéből).*

**Tax issues in respect of social claims**

Hungary faces no tax issues in respect of social claims.

**Legislative Reform**

There are plans for a comprehensive insolvency law reform, which may affect the sphere of social claims as well.

**Historical, political and social reasons for the development of Hungary’s approach to social claims**

The change of the political-social system in 1989-1990, specifically, the change from the socialist regime to the market economy, has influenced the development of Hungary’s insolvency law.
INDIA

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Treatment of Wage Claims

In India, workers have ranked equally with secured creditors since 1985, while white collar workers rank below secured creditors, but equally with governmental tax and fiscal claims [Companies (Second Amendment) Act 2002, (enacted but not yet in force); pursuant to section 529, § 529A and § 530 of the Companies Act]. These debts would be paid in preference to all other debts in the winding up of a company and shall be paid in full unless the assets of the company are not sufficient to meet them, in which case they shall be reduced in equal proportions. The workers of the company are considered to be co-mortgagee for the mortgage holding secured creditor with equivalent charge on the same security. The sale proceeds of such sale of security is to be shared as per § 529 (1). Thus the order of priority in paying off debts in a winding up shall be—

- Worker dues and debts due to secured creditors
- Costs and expenses of winding up
- Preferential debts
- Floating charge
- Unsecured creditors

Among the unsecured creditors, the state claims are preferential to all other claims under the unsecured category, specifically state claims payable within twelve months prior to a winding up older.

In India, the ranking of wage claims is divided into two groups, workers and white collar employees. Workers rank equally with the secured creditors on a pari passu basis, while white collar employees rank equally with government claims and they rank below the secured creditors’ and workers’ claims. Benefits are part of the debt as defined in the statute. The government dues and the employee dues are labelled as preferential payments, as they rank ahead of unsecured claims.

There is no insurance scheme or wage guarantee fund. The priority amount includes wages or salaries not exceeding four months in the year prior to bankruptcy or a cap set by the Central Government, which is 20,000 INR. This amount was brought into force in 1997. The preference includes accrued holiday pay, amounts owed under the Employees State Insurance Act, workers’ compensation legislation and pension fund benefits. Employee claims are also ranked equally among taxes and fiscal claims. However, India is considering moving to a combined system, adding a compensation fund to employee insolvency protection measures.

There is no wage guarantee fund currently, however, proposed amendments to India’s Companies Act 2002, enacted but not yet in force, provide for a Rehabilitation Fund to be established, which will provide interim payments of workers’ claims pending rehabilitation. Section 441A to 441G - Levy by way of cess and formation of Rehabilitation and Revival Fund.

About the levy and collection, it would be on the turnover or gross receipts of companies. It would be used for the purposes of rehabilitation or revival or protection of assets of the sick industrial company, and the levy would be by way of cess at such rate not less than 0.005 percent and not

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540 20,000 INR is 503 CAD.
541 Of The Companies Act 1956 (THE COMPANIES (SECOND AMENDMENT) ACT, 2002).
542 Has not yet been operationalised at the field level - though this proposed fund will take care of the interim payment of wages to the workers protection of assets and for other rehabilitation works.
more than 0.1 percent on the value of annual turnover of every company or its annual gross receipt, whichever is more as the Central Government may from time to time specify by way of notification in the official Gazette.

Every company shall pay to the Central Government the cess within three months from the close of every financial year, and shall furnish, in the prescribed form to the central government and the Tribunal, the details of its turnover and gross receipts with payment of cess. The proceeds of the cess so levied and collected under section 441A shall first be credited to the Consolidated Fund of India and the central governments or the parliaments by appropriation made by law in this behalf, pay to the Tribunal, from time to time, out of such proceeds (after deducting the cost of collection) such sums of money as it may think fit for being utilised for the purposes of the Fund. The fund shall contain, all amounts paid by way of cess, any grants by the Central Government for the purposes of this Fund, any amount given to the Fund from any other source, any income from investment of the amount in the Fund, and any amount that might be refunded by the company under section 441G. This fund would be applied by the Tribunal for the purposes of making interim payment of workmen’s dues due to the workmen, for the protection of assets of the sick industrial company or for the revival or rehabilitation of such company.

Any company not paying the said cess would be deemed as arrears due to the government and would be recovered by the Tribunal. The Tribunal may conduct an inquiry and if it deems fit impose on the company which is in arrears, a sum not exceeding ten times the amount in arrears.

Where the fund has been applied by the Tribunal for any specified purposes, such amount of the fund shall be recovered from the company after its revival or rehabilitation or out of sale proceeds of its assets after discharging the statutory liabilities and the payment of dues to the creditors.

Treatment of Other Compensation

All accrued holiday remuneration being payable to an employee on the termination of his or her employment before or by the effect of the winding up would be ranking below the wages or salary of any employee due for a period of not more than four months or 20,000 INR (presently). The Workmen’s Compensation Act, 1923 specifies that wages include any privilege or benefit that is capable of being estimated in money, other than travelling allowance or the value of any travelling concession or contribution paid by the employer of a workman towards any pension or provided fund or a sum paid to workers to recover any special expenses entailed on him or her by the nature of his or her employment.

Retrenchment and lay-off compensation payable under the Workmen’s Compensation Act, do not qualify as a preferential payment, however any and all amounts due in respect to any compensation or liability for compensation under the Workmen’s Compensation Act, 1923 in respect of death or disablement of any employee of the company is put at par with the holiday remuneration, and it does find mention in the preferential payment, all the claims mentioned in § 530 ranking pari passu amongst themselves.

Travel expenses do not form part of wages and hence do not fall under claims.

Treatment of Pension Claims

Contributions due from the company to the Provident Fund Account of the worker are maintained under the Employees’ Provident Funds Act, 1952, is a debt entitled to preference within the meaning provided under § 530 of the Companies Act as well as under the Provident Fund Act §11.

The pension is organized under the Employees’ Pension Scheme, 1995, this is a pension guaranteed fund that is supervised and maintained by the Central Government, through its

543 However, if the Tribunal is satisfied that the default was for any good and sufficient reason, (no explanations provided for this) no penalty shall be imposed.
544 NCLT- National Company Law Tribunal – yet to be formed.
545 Has been bought into effect from 1995 under the Employees’ Provident Funds Act, 1952. available at http://epfindia.nic.in/legal_provision.htm.
representations on the board and through appointments of public servants. The funds made available under this scheme are non attachable to any credit on individual or institution. Recovery of the funds from the employer under this scheme, which has not been contributed, enjoys a super priority over all other debts.

The Employees’ Pension Scheme, 1995 under this scheme, the employer has to make a matching contribution of 10% and 12% of the employees’ pay to the Provident Fund Account, and at the 8.33% of the employees’ basic wages to the Pension Fund. This fund is run by the Central Board appointed under § 5A of the Act, this is a board of trustees, which is recognized as a body corporate.

This fund also enjoys a priority of payment of contributions over other debts as per §11 of the Act where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due if any amount is due from an employer, whether in respect of the employee’s contribution deducted from the wages of the employees or the employer’s contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts.

The limit of the pension fund is capped by the contribution made by the employee and the employer to the minimum level prescribed from time to time by the Central Government.

**Director and Officer Liability for Social Claims**

The liability is on the assets of the company, without extending to the corporate directors.

**Treatment of Collective Agreements**

Once insolvency or bankruptcy has been declared, each claim must be proved. It is only such claims that are considered by the court. Collective agreements pre-bankruptcy are not statutory recognized.

**Interaction of Insolvency Legislation with Other Legislation**

The statutes relating to labour legislations’ do have an interaction, however, so far as employment standards, human rights, and occupational health and safety legislations are concerned, they do not overlap or interact with the insolvency provisions.

Worker claims have to be proved and settled through the court supervising the insolvency proceeding.

**Tax Issues**

There are no particular tax issues in respect of social claims in India.

**Legislative Reform**

§ 14 insolvency of employer under the *Workmen’s Compensation Act* –

1. where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then in the event of the employer then in the event of the employer becoming insolvent or making a composition or scheme of arrangement with his creditors or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in any law for the time being in force relating to insolvency or the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the workman then they would have been under to the employer.
Historical, Political and Social Reasons for the Development of India's Approach to Social Claims

Most of the Acts date back to the 1950's, hence were done in the back drop of a newly found democracy and a welfare state mechanism. All of these social security legislations do have an important position. The growth of industrial jurisprudence in India subsequent to 1950 bears a close resemblance to the growth of constitutional law and the fundamental rights guaranteed to the citizens of India. The interests of the employees have received constitutional guarantees under the Directive Principles as did the interests of the employers under Article 19 of the Constitution of India. While social claims, in themselves are deeply entrenched in the laws on insolvency that forms a part of the Companies Act, the multitude of forums for redressal has been the bane.
ITALY

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Treatment of Wage Claims

Pursuant to Article 2751 bis of the Italian Civil Code, a general privilege on movable property is granted to claims relating to remuneration due, at the time of the opening of the insolvency procedure, in any form, to employees. The only claims that rank ahead of the Article 2751 bis claims are those related to the expenses of the insolvency procedure.

However should the trustee of the insolvency procedure maintain the business of the company after the declaration of insolvency and, as a result, employees keep on carrying on their activity for the insolvent company, their credits rank after the expenses of the insolvency procedure but before the claims of the employees due at the time of the opening of the insolvency procedure.

The whole of wage claims and all its items benefit from the preferential treatment mentioned. Under Italian Law, there are no restrictions on the amount of claims that is given preference, nor are there restrictions on length of employment in order to qualify. As a consequence, neither the length of the employment relationship nor the amounts due affect the enforcement of the claim.

Nevertheless, pursuant to Article 2948 of the Italian Civil Code, interest and all sums that are paid periodically or by annual or more frequent installments are subject to five-year statutory limitation. As a consequence, all the credits deriving from remunerations due are subject to the above limitation.

The same principle applies as to credits deriving from unpaid social security contributions.

Italy has a wage protection fund, the Fondo di garanzia, which is managed by the INPS, the Italian National Authority for Social Security Contributions. The Fondo di garanzia is financed by employers’ contributions. In case of employer's insolvency, the fund pays to employees the whole severance indemnity treatment (T.F.R.) accrued at the time of the opening of the insolvency procedure plus all the other credits deriving from the employment relationship, which were accrued during the last three working months. The Fondo di garanzia provides the above guarantees also if the employer fails to pay fund's contributions.

Once the employees’ credits are formally recognized as admitted claims, (which is fifteen days after filing date of the list of creditors if not appealed), employees or their relatives are entitled to request the payment of the relevant sums to the Fund. The credit vis-à-vis the Fondo becomes due within sixty days from the request.

The resources of the Fondo di garanzia cannot be used in other ways rather than the one set forth by the law, and thus there are not funding problems. The legislator may vary employers’ contributions to the fund in order to guarantee the balancing of the accounts. The Fondo di garanzia is regulated by Law no. 297 of 1982 and by Legislative Decree no. 80 of 1992, which implemented EEC directive 80/987.

After the payments, the Fondo di garanzia is subrogated to the claims of employees towards the employer with the same priority. Therefore such amounts are then subject to the discipline set forth by article 2751 bis of the Italian Civil Code. For further details in this respect, please refer to paragraph 1.1 above.
Treatment of Other Compensation

Vacation pay, severance pay, termination pay and travelling and other expenses incurred by employees in the period prior to insolvency are given a priority for the full amount. All these amounts are deemed to be a part of employee’s remuneration. As a consequence, all these compensations are subject to the priority set forth by article 2751 bis of the Italian Civil code on the same basis on the wage claim preference.

Treatment of Pension Claims

The Italian pension scheme provides for a compulsory regime managed by INPS and an optional supplementary pension regime managed by private entities (i.e. pension funds and life insurance policies with pension purposes). INPS is a public entity that is not subject to insolvency under Italian law; rather, the INPS will increase of thresholds for eligibility to a pension or increase the required contributions rather than risk INPS illiquidity. In contrast, supplementary pension schemes are subject to liquidation that may result in a limitation of liability of the debtor and a consequent reduction of the claim of the participants.

There is not, under Italian law, a provision on priority of pension claims. This is due to the fact that INPS is not subject to insolvency and, above all, to the segregation principle applicable to the assets managed by the private pension managers. In this case, the participant employees who have paid their contribution to the private pension scheme can be satisfied with the assets managed by the private pension manager. These participants have priority on these assets and rank pari passu only with administrative fees of the pension manager. There might be the case that participants will suffer a reduction of their claims.

Under Italian Law, there is not a pension payment guarantee fund or a guaranteed insurance for claims during insolvency. In case of insolvency of an employer, the pension claim of an employee entitled to pension is enforceable against INPS and against the complementary fund. In this respect, once the employees meet the requirements to get the complementary pension, the pension scheme pays, as single premium, the value of the individual position accrued to an insurance company, which will manage life annuities in favor of the participant.

The situation is different in the case in which participants are not entitled to pension at the moment of declaration of insolvency of their employer. Such insolvency has an indirect effect on the entitlement of the employee to the pension scheme provided by INPS: (i) if the employer has not paid social contributions; and (ii) if the employment relationship is terminated because of insolvency. As a result, the employee may experience difficulty in meeting the criteria necessary to make him or her eligible for the INPS pension scheme.

As far as the complementary scheme is concerned, they are divided in the following categories. First are closed pension funds, which are established by national collective agreements between employers and unions of a specific industry sector. These funds are the only funds that, in case of liquidation of an employer, are subject to the appointment of an extraordinary commissioner by the Ministry of Labour for the winding up of the closed pension fund. Such winding up may end up into a liquidation. The second type of fund is open-ended pension funds, established by investment firms, insurance companies, banks and asset managers and the third type are life insurance contracts with pension purposes. These latter two types of funds are not affected by the liquidation of the employer whoever the employee may experience the effects described in the paragraph above.

Under article 2751 bis (1), the claim of the employees for damages suffered in relation to the failure by the employer to remit social contributions, including pension contributions (that is the relevant claim of the pension entity is time barred and, as a result, the employee is not entitled to pension in relation to the period of time where contributions were not paid and are time barred) has a general privilege on movable property of the employer. This claim ranks after the expenses of the procedure, which rank first, but pari passu with (i) wages and (ii) claims for unlawful dismissal.

The above claims are followed by professional and agents fees which rank pari passu with one another. Then farmer and artisan’s claims follow. After these claims, pursuant to article 2753 of the Italian Civil code, claims deriving from the employer’s failure in payment the compulsory social
security contributions that have not time barred, have a general privilege on the movable property of
the employer. INPS is the only subject legally entitled to file such claims.

**Director and Officer Liability for Social Claims**

Claims against directors and officers can be compromised or settled during an insolvency
proceeding, with the authorization of the committee of creditors, in the case of Bankruptcy, or prior
opinion of the Surveillance Committee in case of Extraordinary Administration. However claims
originated by the insolvency procedure have priority on claims pre-existing to the same procedure.

**Treatment of Collective Agreements**

National Collective Bargaining Agreements (NCBAs) are not affected by insolvency or bankruptcy of
a sole employer. Therefore, in case the employment relationship continues, regardless of the
insolvency, the NCBAs apply, as far as any undertaking collective bargaining agreement, if any.

While the National Collective Agency Bargaining Agreements are not affected by insolvency or
bankruptcy, termination of individual agency relationship depends on the decision of the trustee.
There have been no legacy cost issues in Italy in respect of collective agreements. There are no
statutory provisions that allow bargaining, modifying or terminating collective agreements during
restructuring proceedings.

The successor employer must continue to apply the NCBA applied by the former employer until the
expiry date of the same, unless replaced by a NCBA of the same level, which is already applied by
the purchaser.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

The criminal liability of the bankruptcy trustee in relation to health and safety of workplace can be
limited by power of attorneys which, nonetheless, must meet requirements provided under Italian
case law. All the claims related to insolvency and bankruptcy must be filed before special sections of
Civil Courts (i.e. Sezioni Fallimentari).

**Tax issues in respect of social claims**

With respect to tax issues, please note that (i) any judicial deed regarding employees is exempt from
registration tax and that (ii) the trustee acts as a withholding agent and must withheld the relevant
amount of taxes due by each employee whose salary/severance indemnity or other amount is paid
by the trustee itself.

**Legislative Reform**

There is currently no proposed legislative reform.

**Historical, Political and Social Reasons for the Development of Italy’s Approach to Social
Claims**

On declaration of insolvency, the debtor loses control of its assets whose liquidation will be carried
out by the receiver in conjunction with the creditor's committee. The receiver is subject to the
surveillance of the delegated judge who authorizes extraordinary activities. There are no liability
issues for the receiver should the activity of the company in liquidation will be terminated. Should the
activity be maintained, the receiver will be liable for the payment of wages and social contribution
plus for health and safety of the workplace as it was the former employer.

The issue of paying wages or contributions or pension fund can be considered in light of the
opportunity to maintain the business of the insolvent company. In other worlds if a receiver does not
pay contribution or wages because of its negligence or willful misconduct, having funds to pay them,
the receiver is responsible vis-à-vis the employee since it must act with diligence. Different is the
case of a trustee who cannot pay wages or social contribution to employees who continued to work
after the declaration of insolvency since the trustee has no money left for this purpose.
In Bankruptcy the maintenance of the activity of an insolvent company is authorized by the judge if from its termination there will be a serious prejudice, provided that its continuation will not affect creditor's rights. In other words even if the maintenance of the activity will generate costs (such as wages or social securities), these costs may be sustained to the extent they add value to the liquidation of the estate improving the recovery of the existing creditors at the date of the declaration of insolvency.

In Extraordinary Administration, the activity is maintained if there are serious chances of financial and business recovery of the insolvent company. Such chances will result into a sale of the going concern or in a restructuring of the company admitted to Extraordinary Administration. If such prospects are deemed to be in place during the activity of the insolvent company, then such activity may also bring a negative result. Since creditors, whose claims originated after the admission to the Extraordinary Administration (employees and suppliers), must be paid ahead of creditors existing at the time of the declaration of insolvency, the loss generated by the activity of the extraordinary administration will impair the recovery of those creditors (who can also be employees) whose claims for wages or contributions preexist to the insolvency.

Bankruptcy is a procedure more creditor-oriented, whilst Extraordinary Administration is a procedure aimed at protecting the business and, in particular, the level of employment. The Extraordinary Administration procedure states that in case of sale of the going concern, the purchaser is obliged to maintain for at least two years the activity and the level of employment provided in the sale and purchase agreement. This provision is not contemplated in Bankruptcy where it is stated the possibility (known also in the Extraordinary Administration procedure) to agree with Trade Unions a reduction of employees to be transferred with the sale of the going concern. This is an exception to Italian labour law since in case of transfer of going concern all employees must follow the relevant business.

The relevant provisions are Art. 38 Bankruptcy law and Art. 38 Extraordinary Administration Law. There is no provision establishing any expressed cap or limit to the liability of the receiver.
In the event of insolvency, section 354(A)(1)(A) of the Israeli Companies Ordinance [New Version] – 1983 (Companies Ordinance) places employee wages as the first priority among other guaranteed creditors of the company (after certain types of subordinations). In the event of bankruptcy, section 78 of the Bankruptcy Act (1980 - Laws of Return Year 5740) determines super-priority of employee wage claims. The National Insurance Law sets a parallel arrangement in section 182, according to which the National Insurance Institute is liable for wage claims that were approved by the trustee / liquidator. Additionally, according to section 4 of the Severance Pay Law - 1963 (Severance Law), an employee whose employment is terminated due to an event of liquidation is entitled to severance payment as if he or she was dismissed by the company. Section 27 of the Severance Law adds that such severance pay shall be deemed as wages payable in precedence to all other debts. Furthermore, the Israeli courts have ruled that payments prior to the notice period shall also have priority, and shall be paid together with wages in cases of insolvency/bankruptcy.

The portion of the wage claims which is entitled to preferential treatment is that which is protected by the Wage Protection Law – 1958 (i.e. any money or benefit that the employee is entitled to receive from the employer in return for work, which is incurred following the contractual agreement between them) including severance pay and prior notice, provided that this amount does not exceed the amount decided upon in the law, which is updated according to the fluctuations in the average salary in the market (the "Cap") (currently 7,909 ILS or approximately USD 1,800). According to Section 27 of the Severance Law the amount of severance pay and wages paid in the event of insolvency shall not in the aggregate exceed 150% of the amount described in the Cap. According to the National Insurance Law, the super priority is limited to 10 times the average salary.

The National Insurance Law establishes the National Insurance Institute ("NII"), which is a national fund for social claims. The NII has approximately a dozen insurance branches that are funded by the government and by monthly contributions by the citizens of Israel. One of these branches deals with the issue of employee rights in the event of an employer's bankruptcy/insolvency, and is addressed in chapter H, s.182 of the National Insurance Law [Consolidated Version] – 1995. In the scope of this insurance branch, every employee and employer contributes a certain percentage of each employee's monthly salary. An employee, whose employer was (i) declared insolvent by the court or (ii) appointed a trustee or liquidator, shall be entitled to the benefits of this insurance branch, and shall receive a payment of wages, severance pay and prior notice as relevant to the employee's term of employment, (to the extent that the employee contributed all the necessary funds throughout his or her term of employment). Once the NII transfers any payment to the employee on account of Chapter

Please note that the Bankruptcy Ordinance handles persons (as opposed to companies and/or employees) who file for bankruptcy.

This payment has the same priority as wages, they will both only be paid out after certain other subordinations, which are: (i) statutory tax subordinations; (ii) contractual liens towards contractors; and (iii) promised debt under permanent (specific) subordinations, and "floating" subordinations which developed before the company's liquidation.

Please note that the exchange rate between the ILS [Israeli Shekel] and the USD is continuously changing. Today the exchange rate is: 1 USD = 3.602 ILS.

The section refers to two separate incidents: In the event of insolvency, if payment is made by the liquidator under the Severance Law - the amount of severance pay and wages shall not in the aggregate exceed 150% of the Cap. However, if payment is made by the NII (meaning that the liquidator does not have the ability to make these payments) then the super priority shall be limited to 10 times the average salary in the market.
H of the National Insurance Law, the employee’s right to such payments from his or her employer is transferred to the NII with certain limitations, such as the NII won’t be entitled to any amounts that exceed the Cap, even if the employee was originally entitled to such amounts from his or her employer.

According to Section 9 of the Wage Protection Law, wages and any other benefits included in an employee’s salary, which is paid on a monthly basis, should be paid by the last day of each month. However, wages will only be considered “delayed” after a delay of nine days, where after the employee would be entitled to compensation for such delay. Therefore, the common practice is to pay wages no later than the 9th day of the following month in respect of which the wage is being paid.

Treatment of Other Compensation

In Israel, the employee’s preferential claim entitles him or her to both wages (including those prior to notice) and severance pay (the latter is calculated based on the length of the employee’s employment with the company). However, the Israeli definition of “Wages” in the Wage Protection Law includes all benefits that the employee is entitled to receive from the employer in return for work, which is incurred following the contractual agreement between them. Therefore, vacation pay and expenses would come into account in the scope of “wages”, up to the cap, as stated above. Delay of payment compensation and delay of severance payments compensation are not preferenced, and employees have the right to claim these as regular debtors from the company. Employees must prove that the payments resulted from his employment and that he is entitled to them with due to the insolvency.

Treatment of Pension Claims

According to section 184 of the National Insurance Law, and according to the Company Ordinance and the Bankruptcy Act, pension fund payments are given preferential treatment during insolvency proceedings. The preference is limited to twice the average salary. According to section 184 of the National Insurance Law, the NII would transfer any omitted contributions of the employer to the employee's pension fund, up to the average monthly salary in the market multiplied by two, for each employee. The employee can claim the un-preferenced amount (between the payments he is entitled to from the National Insurance Institute and the payments which he is entitled to from the employer), from the company's liquidator.

Director and Officer Liability for Social Claims

According to chapter 15 of the Companies Ordinance, in the event of liquidation, directors and officers may be liable for the company's debts in the event that they were fraudulent or acted to deceive the company's creditors. In addition, if the director/officer handled the company's finances in bad faith, stalled payments, or took any other unfaithful or illegal action during negotiations on behalf of the company, they would be liable to reimburse the debt they created, or to compensate the company as the court sees fit. Furthermore, the Companies Law – 1999 provides several general provisions that refer to directors and officers’ responsibilities such as Sections 252 and 254, which determine the company's functionaries’ general fiduciary duties. On breach of such duties, the company's functionaries could be found personally liable. Additionally, Section 373-374 of the Companies Ordinance determines personal liability of corporate directors and officers in cases of fraud or non-bona fide acts (without limitation). The provisions of Chapter 15 of the Companies Ordinance apply to cases of liquidation and are not relevant in cases of an insolvency workout.

Treatment of Collective Agreements

The treatment of collective agreements during insolvency is a complex issue in Israeli law. There is a school of thought that suggests that if an insolvent company enters into a restructuring proceeding,
then the collective agreements will remain intact, with necessary changes on both sides (so as not to foil the proceedings). However, in the case of liquidation, any collective agreements are terminated, and the decision to dissolve will be seen as notice of termination to the employees, due to the change in the company's situation. The liquidator may choose to enter into a new collective agreement. There is an opinion that in the event that a company is attempting a restructuring proceeding, the collective bargaining agent would maintain its status as a party to deliberations with respect to employee's rights and terms of employment, only to the degree that this involvement won't render the company impotent to make progress in the proceedings. In the event that the company is not seeking a restructuring proceeding, the collective agreement is terminated, and therefore, the bargaining agent looses its status. However, before a decision not to enter into a restructuring procedure is made, the employee organization, as a party that may be harmed by this decision, is entitled to be heard by the court.

Under Israeli law, legacy costs can be dealt with in a variety of ways. For example, there have been instances in which payments were made by the company in advance to a third party, namely the pension fund. The pension fund then makes payments to the employee, and is not affected by the company's insolvency/bankruptcy. In addition, there have been instances in which companies have been required to provide collateral, in order to prevent any monetary problems regarding the employees in the case of insolvency/bankruptcy.

With respect to successorship, according to section 18 of the Collective Law, if a factory changes hands, then the collective agreements shall remain intact between the employees and the new employer.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

The Bankruptcy Ordinance – 1980 (the “Bankruptcy Ordinance”) handles persons (as opposed to companies) who file for bankruptcy. The Bankruptcy Ordinance addresses employment law with respect to independent employers. The provisions of the Bankruptcy Ordinance address the issue of precedence of employee's wages in principally the same manner as the Companies Ordinance.

*Basic Law: Human Dignity and Liberty* (the “Basic Law”) enacted in 1992 was intended to protect main human rights in the State of Israel. Section 3 of the Basic Law states that "there will be no violation of the property of a person". Israeli courts and Literature have interpreted "property" in this section as including a person's right to a secure workplace and any compensation or benefits from such workplace. Section 8 of the Basic Law grants the rights which are addressed in the Basic Law a super legal status, whereby laws and actions brought before a court of law would be interpreted and then treated in accordance with such rights.

The District Courts have jurisdiction over corporate insolvency issues, and the Labour Courts have jurisdiction over employment issues. However, in the event that (i) a court order regarding the liquidation of a company has been issued; or (ii) a temporary liquidator is nominated to the company, then according to section 267 of the Companies Ordinance and section 24(A1) of the Labour Court Law – 1969, the District Court alone will reside over any employment aspects of such case. The District Courts can, but rarely do, permit the Labour Courts to deliberate with respect to any employment issues which may arise during the deliberations.

**Tax issues in respect of social claims**

All payments of employee’s social claims are subject to taxation according to the relevant payment (wage claim; severance pay; pension fund pay etc.).

**Legislative Reform**

There is a bill, dated 2006, which addresses the issue of employee rights during restructuring proceedings in an insolvent company. The bill proposes strengthening the protection of employees' right to job security throughout restructuring procedures. The main reform in the bill requires employers to secure a certain amount of assets (according to the number of employees) in order to protect the employee's rights in the event of any future debt to an employee, especially due to insolvency.
Historical, political and social reasons for the development of Israel’s approach to social claims

The Israeli Ministry of Social Welfare began its work in June 1948, carrying on the mission of the Social Welfare Department established in 1931 under the British mandate, which operated until the establishment of the state of Israel in 1948. The National Insurance Law and the Social Welfare Service Law, passed by the Knesset (the Israeli parliament) in 1958, authorized a broad range of welfare programs, including old age and survivors' pensions, maternity insurance, workers' compensation provisions, and special allowances for large families. The Histadrut (the general federation of laborers in Israel) was also a principal provider of pensions and a supplier of insurance. Today the NII aims to provide weak population groups and families in temporary or long-term difficulties with a financial basis for subsistence.

Chapter H of the National Insurance Law was enacted in 1975 in an attempt to increase the social security of employees in cases of turmoil in the workplace, by creating a new branch of the NII, referred to as – the Insurance of Employee's right in cases of Bankruptcy and Liquidation. Before the enactment of chapter H, employee wages were the employer's responsibility, and in most cases of insolvency/bankruptcy, the employer could not make these payments. Chapter H changed the wage preference and super priority of employee wages which existed in Israel, and secured these payments to employees and to their external pension funds. The approach to social claims in Israeli law is a clear social approach aimed to distinguish employees from any other creditors, and its purpose is to insure employees social rights in insolvency proceeding.
Treatment of Wage Claims

Japan grants a wage preference to employee claims arising during insolvency. These claims are on a priority basis over unsecured claims and, in certain cases, over secured claims. A claim of an employee is treated as a statutory lien (Sakidori Tokken) according to Article 306 and Article 308 of the Japanese Civil Code (Min Pou) [Act No. 89 of 1986 revised by Act No. 147 of 2004]. The treatment of wage claims and claims for retirement payment varies depending on the insolvency procedure, as Japan has four different insolvency procedures. First, the Bankruptcy procedure treats the case of terminating the business of an insolvent company. Second, the procedure of Special Liquidation under the Japanese Companies Act (Kaisha Hou) [Act No. 86 of 2005] addresses the case in which a corporation is dissolved, and it is likely that the corporation does not have enough assets to pay its creditors. This procedure allows for movement to one of the other insolvency procedures. Third, the Civil Rehabilitation procedure treats the less serious financial deadlock of a company and helps to achieve the rehabilitation of the company where a going forward business plan is possible, leaving the company's business management under the control of the court. Fourth, the Corporate Reorganization procedure treats the reorganization of the company under the lead of creditors and the control of the court. In addition, in Japan, retirement payments paid at the age for mandatory retirement are treated as wages.

In the Bankruptcy Procedure, according to Article 308 of the Japanese Civil Code (Min Pou), an employee's wage and retirement payment claims are treated as preferential claims (Yusenteki Hasan Saiken) (Article 98(1) of the Japanese Bankruptcy Act (Hasan Hou) [Act No. 75 of 2004]). In addition, claims for wages arising during the three months prior to the beginning of the Bankruptcy Procedure are treated as super-priority claims (Zaidan Saiken) (Article 149(1) of the Japanese Bankruptcy Act (Hasan Hou)). Furthermore, the partial claim for retirement payments equal to three months' wages just before retirement is treated as a super-priority claim (Zaidan Saiken) (Article 149(2) of the Japanese Bankruptcy Act (Hasan Hou)). If the amount of the retirement payment is less than the amount of three months' wages just prior to retirement, the claim for retirement payment is treated as a super-priority claim (Zaidan Saiken) whose amount is equal to the three months' wages before retirement. Super-priority claims can be paid on demand independently of the Bankruptcy Proceeding (Article 2(7) of the Japanese Bankruptcy Act (Hasan Hou)), so employees can get the three months wages and a part of their retirement payment at any time independently of the Bankruptcy Proceeding. If the amount of each payment is greater than 1 million JPY, the receiver must to get leave from the court in advance (Article 78(2)xxiii(3) of the Japanese Bankruptcy Act (Hasan Hou) and Article 25 of the Rules of Bankruptcy procedure (Hasan Kisoku) [Rules No. 14 of the Japanese Supreme Court of 2004]. Moreover, when it is probable that an employee is in financial trouble despite reimbursement of his or her wage claim or retirement payment that is treated as a preferential claim, and that those payments are not prejudicial to the interest of super-priority claims, the court may permit the receiver to pay those claims in part or in whole (Art.101 (1) of Japanese Bankruptcy Act (Hasan Hou)).

This treatment of wage claims and claims for retirement payments was adopted in Japan in 2004. In the bankruptcy procedure (Hasan Tetsuzuki) brought before 2004, the wage claims were treated as preferential claims in whole (Article 39 of the former Japanese Bankruptcy Act (Hasan Hou) [Act No. 71 of 1922 repealed by Act No. 75 of 2004]), in addition, until 2004, tax claims were treated as super-priority claims in whole because Article 8 of the National Tax Collection Act (Kokuzei Tyousyu Hou) [Act No. 147 of 1959] provides that tax claims have the top priority over other claims; tax claims were

553 1,000,000 JPY is 9,235 CAD.
therefore treated as super-priority claims (Article 47(2) of the former Japanese Bankruptcy Act (Hasan Hou)). Indeed, at that time, most of the bankrupt’s estate was credited to payment of tax claims, and creditors were not left with much remaining. Consequently, since 2004, only a tax claim that is less than one year overdue or does not become due at the beginning the bankruptcy proceeding is treated as a super-priority claim (Zaidan Saiken) (Article 148(1)iii of the Japanese Bankruptcy Act(Hasan Hou), and the other tax claims are treated as preferential claims (Yusenteki Hasan Saiken) (Article 98(1) of the Japanese Bankruptcy Act (Hasan Hou)). In addition, if the bankruptcy estate is not sufficient to pay out super-priority claims (Zaidan Saiken), the estate is paid out to the super-priority claimants (Zaidan Saiken Sya) on a pro rata basis after paying the expenses of the administration of the bankruptcy estate (Article 152(1)(2) of the Japanese Bankruptcy Act (Hasan Hou). Therefore, the new 2004 Japanese Bankruptcy Act (Hasan Hou) enhances the protection of employees’ claims.

When the Bankruptcy Procedure (Hasan Tetsuzuki) begins, the receiver (Hasan Kanzai Nin) may make a proposal for cancellation of employment contracts, and the termination of employees will become effective two weeks after the proposal is made (Articles 631 and 627 of the Japanese Civil Code (Min Pou)). If employees are required, the receiver has the option of continuing existing employment contracts or terminating these contracts and reemploying those employees under different contracts (Article 53 (1) of the Japanese Bankruptcy Act (Hasan Hou)). In both of these cases, claims for wages arising after the start of the Bankruptcy Procedure are treated as super-priority claims and are paid at any time independently of the Bankruptcy Procedure. However, in practice, the receiver (Hasan Kanzai Nin) tends to terminate all employment contracts and reemploy as many employees as are required because, if not, the employees’ wages of continuation of existing contracts are treated separately depending on whether they are occurred after or before the beginning of the Bankruptcy Procedure.

In a Special Liquidation (Tokubetsu Seisan) under the Japanese Companies Act (Kaisha Hou), the claim for wages or retirement payment is treated as an Agreement Claim (Kyotei Saiken) that may be paid at any time independently of the Special Liquidation proceeding (Article 515(3) of the Japanese Companies Act (Kaisha Hou) [Act No.86 of 2005]). Article 515(3) of the Companies Act (Kaisha Hou) specifies that the prescriptions of the claims having statutory liens are not influenced by the commencement of a Special Liquidation proceeding (Tokubetsu Seisan). However, in the Special Liquidation procedure, the court may order the suspension of proceedings to enforce Agreement Claims, including employees’ claims for wages or retirement payment in response to a petition by the liquidators, Company Auditors, creditors or shareholders, or ex officio if that suspension suits the general interests of the creditors and those who petitioned the enforcement the Agreement Claims are not likely to suffer the undue loss (Art. 516 of Japanese Companies Act (Kaisha Hou)).

In the procedure under the Japanese Civil Rehabilitation Act (Minji Saisei Hou) [Act No.225 of 1999], which facilitates the quick rehabilitation of both individuals and corporations that met financial collapse under the control of the court, both wage claims and claims for retirement payment arising before the starting date of the procedure of Civil Rehabilitation (Saisei Tetsuzuki) are treated as general preferential claims (Ippan Yusen Saiken) that are inferior to equitable claims (Kyoeiki Saiken) and are paid out of the procedure of Civil Rehabilitation (Article 122(1)(2) of the Japanese Civil Rehabilitation Act, Act No.225 of 1999). Equitable Claims (Kyoeiki Saiken) are helpful to the common benefit of all the creditors or necessary for the activity of the rehabilitating debtor during the procedure of Civil Rehabilitation, such as the claim for the costs of the action requiring the rehabilitating debtor’s claims. In addition, both of these types of claims arising after the commencement of the Civil Rehabilitation procedure (Saisei Tetsuzuki) are treated as equitable claims (Kyoeiki Saiken) and are paid on demand (Article 119(1)(2) of the Japanese Civil Rehabilitation Act (Minji Saisei Hou)).

In the procedure under the Japanese Corporate Reorganization Act (Kaisha Kosei Hou) [Act No. 154 of 2000], which was drafted based on Chapter 11 of the US Bankruptcy Code, an employee’s claim arising from the employer-employee relationship between the obligor and its employee is treated as a reorganization security claim (Kosei Tanpo Saiken) that has preference over general reorganization claims (Kosei Saiken) but is inferior to equitable claims (Kyoeiki Saiken) (Article 2x of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)), and is paid in accordance with the corporate reorganization plan (Kosei Keikaku) (Article 203 of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)). Moreover, claims for wages arising during the 6 months before the starting date
of the Corporate Reorganization procedure (Kosei Tetsuzuki) are treated as equitable claims (Kyoeki Saiken) (Article 127 of Japanese Corporate Reorganization Act), and are paid on demand independently of the corporate reorganization plan (Kosei Keikaku) (Article 132(1) of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)). In addition, employees' claims for retirement payment are treated as equitable claims (Kyoeki Saiken) and are paid on demand independently from the reorganization plan (Kosei Keikaku) up to a limit of the greater of the amount equal to one third of an employee’s retirement payment and the amount equal to six months’ wages before the starting date of the Corporate Reorganization procedure (Kosei Tetsuzuki) (Article 130(2) of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)). The remainder of the retirement payment arising before the starting day of the procedure is treated as a reorganization security claim (Kosei Tanpo Saiken) and paid in accordance with the corporate reorganization plan (Kosei Keikaku). Wages arising after the starting date of the corporate reorganization proceeding (Kosei Tetsuzuki) as well as severance pay arising after starting date of the proceeding are treated in whole as equitable claims (Kyoeki Saiken) because those claims are necessary to the management of the reorganizing corporation (Article 127ii of the Japanese Corporate Reorganization Act (Kaisha Kosei Hou)).

Japan has a wage protection system called the system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo), which is carried on by the Japan Labour Health and Welfare Organization (Rodosha Kenko Fukushi Kikou) established by the Act of Incorporating Japan Labour Health and Welfare Organization as Independent Administrative Agency (Dokuritsu-Gyosei-Houjin Rodosha Kenko Fukushi Kikou Seicchi Hou) (Act No.171 of 2002). The system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo) is financed by Industrial Injury Insurance (Roudousha Saigai Hosyo Hoken) (Article 7 of the Wages Payment Securement Act (Chingin no Shiharai no Kakuho tou nikansuru Houritsu) (Act No.169 of 1976); Article 8 of Enforcement Ordinance of Wages Payment Securement Act (Chingin no Shiharai no Kakuho tou nikansuru Houritsu) (Act No.169 of 1976); Cabinet Order No.169 of 1976), and Industrial Injury Insurance (Rodosha Saigai Hosyo Hoken) can be financially assisted by state coffers (Article 32 of Industrial Injury Insurance Act (Rodosha Saigai Hosyo Hoken Hou)).

An employee who retired from an insolvent company that is in a Bankruptcy proceeding, in a procedure of Civil Rehabilitation, or in a Corporate Reorganization proceeding, for up to two years from the date six months prior to the commencement of the insolvency procedure may apply for the replacement payment of unpaid wages if the insolvent company has done business for more than one year before its insolvency (Article 3 of Enforcement Ordinance of Wages Payment Securement Act (Chingin no Shiharai no Kakuho tou nikansuru Houritsu Shikorei) (Cabinet Order No.169 of 1976); Article 7 of Wages Payment Securement Act).554

The amount of payment replacement made by the Japan Labour Health and Welfare Organization (Rodosha Kenko Fukushi Kikou) is 80% of the employee’s unpaid wages during the six months until his or her retirement and the unpaid retirement payment up to maximum amount depending on the age when he or she retired (Article 4 of Enforcement Ordinance of Wages Payment Securement Act (Chingin no Shiharai no Kakuho tou nikansuru Houritsu Shikorei); Article 7 of the Wages Payment Securement Act).

554 If the insolvent corporate entrepreneur meets the following terms, a retired employee may apply for the replacement payment of unpaid wages when the insolvent company is under voluntary liquidation or in de facto bankruptcy with a certification by the president of the Labour Standards Inspection Office (Article 2 (1) iv and (2) of Enforcement Ordinance of Wages Payment Securement Act (Chingin no Shiharai no Kakuho tou nikansuru Houritsu Shikorei) (Cabinet Order No.169 of 1976); Article 7 of Wages Payment Securement Act):

1. The capital of the corporate entrepreneur is less than 300 million JPY [3 million CAD], and the number of its full-time employees is less than 300, and the business operated by it is except those provided by the following clauses.
2. The capital of the corporate entrepreneur is less than 100 million JPY [1 million CAD] and the number of its full-time employees is less than 100, and the business operated by it is wholesaling.
3. The capital of the corporate entrepreneur is less than 0.5 million JPY [0.5 million CAD] and the number of its full-time employees is less than 50, and the business operated by it is a service industry.
4. The capital of the corporate entrepreneur is less than 0.5 million JPY [0.5 million CAD] and the number of its full-time employees is less than 50, and the business operated by it is retail trading.
Securement Act (Chingin no Shiharai Kaku to nikansuru Houritsu)). In detail, the cap of the replacement payment to the employee who retired from an insolvent company at 45 years old or older is 2.96 million JPY, the cap for an employee who retired from an insolvent company between age 30 and 45 is 1.76 million JPY, and the cap for an employee who retired from an insolvent company before age 30 is 0.88 million JPY. However, if the total amount of unpaid wages and unpaid retirement payment is less than 20 thousand JPY, the amount is not covered by this system (Article 4(2) of the Enforcement Ordinance of Wages Payment Securement Act (Chingin no Shiharai Kaku to nikansuru Houritsu Shikorei) ; Article 7 of the Wages Payment Securement Act (Chingin no Shiharai Kaku to nikansuru Houritsu)).

To apply for the replacement payment of unpaid wages, the retired employee must certify that his or her employer company has been in insolvency by the certification issued by the receiver. The deadline of the application is two years after the date of the start of the insolvency procedure (Article 17(3) of the Enforcing Regulations of Wages Payment Securement Act (Chingin no Shiharai no Kakuho tou nikansuru Houritu Sikokisoku) [Ordinance No.26 of the Ministry of Labour in 1976]). After screening the application document to determine whether it fulfills the conditions, the Japan Labour Health and Welfare Organization (Roudosha Kenko Fukushi Kikou) pays the unpaid wages as the subrogation of the employee’s employer to his or her bank account.

The system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo) is financed by Industrial Injured Insurance (Rodo Saigai Hosyo Hoken). This system was started in 1976, and since this time, the state account for Industrial Injured Insurance has had a strong financial basis, and the Japanese government has decided that the Replacement Payment of Unpaid Wages will be financed by that special account for Industrial Injured Insurance. However, the Japanese business community has insisted that the government reconsider the financial basis of the system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo) because premiums to the Industrial Injured Insurance are paid only by employers. There is not currently a viable alternative financial basis for the system, so Industrial Injured Insurance (Rodo Saigai Hosyo Hoken) remains the only source of financing for the system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo). In 2006, the total amount of replacement payments for unpaid wages was approximately 20.4 billion JPY, the number of persons paid was 40,888, and the number of insolvent companies whose employees used this system was 3,014 (Kousei Rodo Hakusyo 2007 [Document in Japanese, translated title is White Paper on Welfare and Labour of 2007]). The total income of the Industrial Injured Insurance (Rodo Saigai Hosyo Hoken) is currently 1 trillion 186 billion JPY, the total amount of payments of insurance benefits and replacement payments is 1 trillion 111 billion JPY, and the amount of the accumulated reserve fund is 7 trillion 775 billion JPY (Kousei Rodo Hakusyo 2007).

Contributions to the fund are paid by employers as part of the premiums for Labour Injured Insurance (Rodo Saigai Hosyo Hoken). Labour Injured Insurance (Rodo Saigai Hosyo Hoken) is mandatory insurance, so, if an employer does not pay its premiums, the government can execute the estate of the employer compulsorily, applied in conformity with the procedure in case of failure to pay national tax (Article 26 (3) of the Premium of Labour Insurance Collection Act (Rodohoken no Hokenryo no Tyosyu tou nikansuru Houritsu) [Act No.84 of 1969]; Article 2 of the Harmonization between Disposition for Failure to Pay Taxes and Compulsory Execution Procedures Act (Taino-Syobun to Kyosei-Shiko tono Tetsuzuki no Tyosei nikansuru Horuritsu) [Act No. 94 of 1957]). The premiums of Labour Injured Insurance are varied because the risk of employee injury varies depending on the employer’s business. For example, an employer whose business is in the construction of a hydroelectric power plant has to pay 11.8% of the total salaries paid to employees as a premium, and a bank has to pay 0.45% of the total salaries paid to its employees as a premium (Article 16 and Annexed table 1 of the Enforcement Regulation of Premium of Labour Insurance Collection Act

555 2,960,000 JPY is 27,353 CAD.
556 1,760,000 JPY is 16,264 CAD.
557 880,000 JPY is 8,132 CAD.
558 20,000 JPY is 185 CAD.
559 20.4 billion is 204,000,000 CAD.
561 1 trillion 186 billion JPY is 11.86 billion CAD.
562 1 trillion 111 billion JPY is 1.11 billion CAD.
563 7 trillion 775 billion JPY is 7.775 billion CAD.
Independent of unpaid wage claims, there is an Unemployment Insurance system in Japan. Unemployment Insurance (Koyohoken) is a mandatory required insurance with the state acting as the insurer, the employer and employee as the policyholder, and the employee as the person covered. Unemployment Insurance premiums are paid by both employees and employers equally. Every retired or fired employee who wants to get a new job is paid benefits from Unemployment Insurance (Koyohoken); the amount of the benefit depends on the length of the employment. The fund of Unemployment Insurance has become weak because of the recent recession in Japan, so premiums have been raised. Since April 1st of 2007, the premiums are 1.5% ±0.4% of the employee’s annual salary before deduction of tax.

### Treatment of Other Compensation

In Japan, there is no system of vacation pay, except that an employee can get paid vacation time (Article 39 of the Labour Standard Act (Rodo Kijun Hou)[Act No.49 of 1947]). Therefore, those amounts equal to vacation pay are considered part of unpaid wages. Severance pay is treated the same as retirement pay in Japan, and is covered by the system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo). Ordinarily, termination pay is also treated the same as retirement pay, and is covered by the system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo). Claims for traveling and other expenses are treated the same as wage claims. However, traveling and other expenses are not covered by the system of Replacement Payment of Unpaid Wages (Miharai Chingin Tatekae Jigyo).

### Treatment of Pension Claims

In Japan, pension claims to the company can form statutory liens in accordance with Article 306 and Article 308 of the Japanese Civil Code (Min Pou). Therefore, the Corporate Reorganization Act (Kaisya Kosei Hou) only expressly stipulates that one third of the amount of a pension claim is treated as an equitable claim (Kyoei Saiken) (Article 130(3) of the Japanese Corporate Reorganization Act) and is paid at any time independently of the Corporate Reorganization Plan (Kosei Keikaku) (Article 132(1) of the Japanese Corporate Reorganization Act (Kaisya Kosei Hou)). In a Corporate Reorganization procedure (Kosei Tetsuzuki), the remainders of the pension claims are treated as reorganization securities claims (Kosei Tanpo Saiken) and are paid prior to the general reorganization claims (Kosei Saiken). In addition, in a Civil Rehabilitation procedure (Saisei Tetsuzuki) and in the procedure of Special Liquidation under the Companies Act (Tokubetuseisan), pension claims are paid on demand independently of the each procedure in similar way as the treatment for wage claims. Nevertheless, in the Bankruptcy procedure (Hasan Tetsuzuki), pension claims are not treated as super-priority claims (Zaidan Saiken) but as preferential claims (Yusenteki Hasan Saiken). Consequently, pension claims are treated in a similar way to the treatment of wage claims except in a Bankruptcy procedure (Hasan Tetsuzuki).

There are four types of defined-benefit pension plans in Japan for companies in the private sector, and the insolvency of a corporation affects the pension claim in different ways depending on the type of the each pension plan.

First, there is a company pension (Jisha Nenkin); each type of which is voluntarily decided by the company and its employees. In many cases, the pension plans are based on labour agreements and provide defined benefits to pension holders. The abovementioned treatment of pension claims is applied to this type of company pension. However, pension claims have a weak position in insolvency proceedings in Japan. It is thought that employees who have not satisfied the conditions in order to get the pension from the employer at the start of the insolvency proceeding do not have any claims because pension claims are not occurred at that time. In addition, in this type of pension plan, the pension fund is managed by the company and the assets of the pension fund are under the charge of the company. Therefore, the insolvency of a company directly affects types of pensions.
Second, there is a type of Tax-qualified Pension Plan (Tekikaku Nenkin), whose mechanism satisfies the condition provided by the Corporate Tax Act (Houjin Zei Hou) [Article 20 of Additional Rules of Corporate Tax Act [Act No.34 of 1965, revised by the Act No.50 of 2001]]. The companies that establish this pension plan get a tax exemption concerning contributions to the fund. In a tax-qualified pension plan (Tekikaku Nenkin), the company trusts the fund of the pension to such a financial institution as a trust company or a life insurance company. In addition, the employer company receives benefits from the financial institution and pays defined benefits to its retired employees. However, the Corporate Tax Act (Houjin Zei Hou) provides the conditions for exempting tax on contributions to the fund, so the mechanism of the pension plan and the treatment of pension claims in insolvency are not clear. Therefore, tax-qualified pension plans are going to be abolished after the date of 1st of April, 2012, and contributions to them will not receive tax exemption after that date (Article 20(4) of the Additional Rules of Corporate Tax Act (Houjin Zei Hou)). The tax-qualified pension plans are planning to switch over to the other types of pension plans.

When a company goes bankrupt, the pension fund trust is terminated, and the trustee of the pension fund pays cancel returns (Kaiyaku Henrei Kin), which means returns occurs the termination of the trust, to the employees via the company. The amount of cancel returns (Kaiyaku Henrei Kin) are equal to the amount of employee’s shares of the residuary assets of the pension fund. However, the cancel returns are usually much less than the amounts that employees would get from their pensions if the company were not bankrupt. Employees can register the claim for the remaining amount of the pension claims as claims provable in bankruptcy. In insolvency proceedings, the claim for the remaining pension is treated in the same way as that of the first type of pension plan.

Third, since 2002, the Defined Benefit Corporate Pension (Kakutei Kyufu Kigyo Nenkin) has emerged (Defined- Benefit Corporate Pension Act (Kakutei Kyufu KigyoNenkin Hou) [Act No. 50 of 2001]). Prior to this, under the severe economical environment, there were some cases in which pension funds were not assured enough at the time of bankruptcy.

Therefore, the Defined-Benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou) provides that an annual checkup must be done, and, if a shortfall of revenue is found, the employer has the obligation to resolve the shortfall by raising premiums, etc. Indeed, the Defined-Benefit Corporate Pension Act (Kakutei Kigyo Nenkin Hou) enhances the protection of pension claims.

There are two types of Defined-Benefit Corporate Pensions: Contract-type corporate pensions (Kiyaku-gata Kigyo Nenkin) and Foundation-type corporate pensions (Kigyo Nenkin Kikin). Contract-type corporate pensions (Kiyaku-gata Kigyo Nenkin) are based on the pension agreement between employees and the employer, and the employer makes a contract with trust companies, life insurance companies, etc. in order to manage the pension fund and to pay benefits to the beneficiaries. In Foundation-type corporate pensions (Kigyo Nenkin Kikin), a foundation is established as a corporate entity independent of the employer. Management and operation of the pension fund as well as benefit payments are handled by the foundation.

When the employer-corporation is bankrupt, both Contract-type corporate pensions (Kiyaku-gata Kigyo Nenkin) and Foundation-type corporate pensions (Kigyo Nenkin Kikin) should be terminated because the Defined-Benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou) provides that corporate pensions are to break up if it is impossible to maintain the pension funds and if the Minister of Health, Labour and Welfare has approved its breakup (Article 85(1) of the Defined-benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou)). In the liquidation of a corporate pension, the residual assets of the pension plan are distributed to the members of the pension plan. When the residual assets of the pension are more than the amount that the pension plan would pay the members as benefits if it were to exist, the members can get the full amount of their pension claims. However, when the residual assets of the pension are less than the amount that the pension would pay, the distribution to the members is done by one of two methods. The first method is the distribution to the members of the pension in proportion to the amount that each of the members would get if the pension were not terminated. The second method is a two-stage distribution. First, the residual assets are distributed to the members who have received benefits at the date of termination on a pro rata basis to the amount that each of the members would get the benefits if the pension were not terminated, and second, if the residual assets remain after the first-stage distribution is complete, it is distributed to the members who have not satisfied the requirement to get benefits on pro rata base. If the members who had already received benefits at the date of the
employer-company's bankruptcy desire to join the pension program offered by Pension Fund Association (Kigyo Nenkin Kikin Rengokai), they can join it by transferring their shares of the residual assets of the pension fund to the fund operated by Pension Fund Association (Article 91-3 (1) (2) of Defined-Benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou)).

Unlike the Tax-qualified pension plan, members of the Defined-Benefit corporate pension (Kakutei Kyufu Kigyo Nenkin) do not have a pension claim to the company. Of course, if the employer-company has not paid the contribution until the date of its bankruptcy, the foundation or the trustee of the corporate pension has a claim for unpaid contributions, however, such claims are treated as general claims.

The foundation-type Defined-Benefit corporate pension funds (Kigyo Nenkin Kikin) are thought to be broken up before the employer-companies become bankrupt and their financial straits are not serious because Defined-Benefit corporate pension can be broken up when three-fourths of members of a board of representatives approve it and the Minister of Health, Labour and Welfare authorize it (Article 85(1) of Defined-Benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou)) ; the board of representatives is composed of the members that are elected by the employer and the members that are elected by the employees, equal in number (Article 18(3) of Defined-Benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou)). In addition, the corporate pension will be broken up if it is impossible to maintain the pension fund and the Minister of Health, Labour and Welfare approves its breakup (Article 85(1) of Defined-benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou)). The contract-type Defined-Benefit corporate pension (Kiyaku-gata Kigyo Nenkin) are also terminated by the insolvency of the employer-company (Article 86iii of Defined-Benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou)). In those procedures, an employer-company should contribute the difference between the residuary asset of the pension and the amount that the pension would pay if it were not to be terminated (Article 87 of the Defined-Benefit Corporation Pension Act (Kakutei Kyufu Kigyo Nenkin Hou)). The corporation or the trustee of the corporate pension has a claim for the contributions to the employer company, however, such claim are treated as a general claims and not preferred.

Finally, there is an employees' pension fund (Kousei Nenkin Kikin) based on the Employee's Pension Insurance Act (Kousei Nenkin Hoken Hou) [Act No. 115 of 1954]. The Employee's Pension Insurance Service is operated by the government of Japan and premiums are paid by employers and employees equally. Employees' pension funds (Kousei Nenkin Kikin) have offered partial services of Employees' Pension Insurance. The employees' pension fund (Kousei Nenkin Kikin) provides a proxy service for the Old-Aged Employees' Pension in the Employees' Pension Insurance Scheme. The employer-companies are exempted from paying the Government premiums to be used for pension payment and other services such as proxy for the Employees' Pension Insurance (Article 83(1) of the Employees' Pension Insurance Act (Kousei Nenkin Hoken Hou)). The employees' Pension Fund has paid part of the payment of the Old-Aged Employees' Pension, and the benefits received were 50% higher than those paid as the Old-Age Employees' Pension. When the employer-company is bankrupt and has not paid contributions to the employees' pension fund, the claims for unpaid contributions are not granted preference.

Similar to the Defined-Benefit corporate pension, when the employer-corporation is bankrupt, the Employees' pension fund should be terminated. In the liquidation of a corporate pension, the residual assets of the pension are distributed to the members of the pension in accordance with the articles of association of the employees' pension fund. If the members who already received benefits from the fund at the date of the employer-company's bankruptcy desire to join the pension program offered by Pension Fund Association, they can join it by transferring their shares of the residual assets of the pension fund to the fund operated by Pension Fund Association.

In addition, in the other types of insolvency procedures, in first two types of pension cases, the treatment of the pension claims are similar to those of claims for unpaid wage. In contrast, in the last two types of pension cases, the funds' claims for the contribution are not granted preference.

In Japan, there is a pension payment guarantee fund only for the employees' pension fund (Kousei Nenkin Kikin). There are no guarantee systems for the other types of pension plans. The pension payment guarantee fund for the employees' pension fund is operated by the Pension Fund Association (Kigyo Nenkin Rengokai). The Pension Fund Association (Kigyo Nenkin Rengokai) is the
foundation that deals with the taking over of pension payments to the members who leave the pension fund and whose pension funds are broken up. Almost all of the employees' pension funds and the Defined-Benefit pension funds are members of the Association. The cost of the guarantee system is burdened by the employees' pension funds that join Pension Fund Association as members. The guarantee fund is funded by costs to the system and by employer/industry tax. All employees' pension funds participating in the Pension Fund Association have to make contributions to the pension guarantee fund. The contributions are recalculated every five years, taking into account the incidence rate of the broken up fund, the level of savings in the fund, and other factors affecting the finances of the fund (Article 80 of the articles of the association of the Pension Fund Association). Currently, the balance of the fund is in the black. On the 31st of March, 2007, the fund had 31.3 billion JPY. 

Regarding employees' pension funds (Kousei Nenkin Kikin), there are two problems. First, there is the difficulty of dissolving employees' pension funds. Employees' pension funds may be dissolved by the four-fifths approval of the board of representatives or transferred into the Defined-Benefit corporate pension funds when one-seconds approval of all the members, and in both of these cases the Minister of Health, Labour and Welfare approves it (Article 145-4ii and Article 145(1)I of the Employees' Pension Insurance Act (Kousei Nenkin Hoken Hou)); the board of representatives is composed of the members who are elected in equal numbers by the employer and the members who are elected by the employees (Article 117(3) of the Employees' Pension Insurance Act (Kousei Nenkin Hoken Hou)). In that procedure, the employees' pension funds (Kousei Nenkin Kikin) have to transfer the pension reserves to the government, which the pension managed as the proxy of the government. The government set the programmed ratio of investment return regarding the substitutional portion of pension and in 2007, the ratio is 6.82% per year; these ratios are varied every year. The government requires the pension reserves as if it was increased by the each year's programmed ratio (Article 4 of Additional rules and Article 85-2 of Orders of the Employees' Pension Fund (Kousei Nenkin Kikin Rei) [Cabinet Order No. 324 of 1966]). This transfer payment is called Daiko Henjo. When the employer companies and its employees dissolve the employees' pension funds (Kousei Nenkin Kikin) or transfer them into the Defined-Benefit corporate pension funds (Kigyo Nenkin Kikin), they have to contribute money or listed financial products to the employees' pension fund if the pension fund's assets are less than the amount required to transfer the government. Indeed, the contribution to dissolve the employees' pension fund is so burdensome that the employer-company has difficulty in dissolving it.

Second, in the case that several employer-companies have jointly established the employees' pension fund, decrease of the fund's member-companies causes the financial difficulty of the member-companies. That joint employees' pension fund is established by the employer-companies within the same type and field of business or the affiliated companies. When a member-company withdraws from the employees' pension fund, it has to pay the contribution equivalent to the amount of increase of the contribution that the other member companies should pay that is caused by its withdraw. However, the contribution is a burden to the withdrawing company and may cause the insolvency of the company. In addition, the increase of the contribution is also a burden to the other member-companies, and in some case, the other companies start having financial difficulties. Consequently, fears of financial difficulty on one company impacts on the other companies via employees' pension fund.

**Director and Officer Liability for Social Claims**

In Japan, corporate directors and officers are generally not liable for social claims during insolvency. On the 29th of December, 2007, the Act of Special Exceptions on the Employees' Pension Insurance Benefit and the Employees' Pension Insurance Premium Collection (Kousei Nenkin Hoken no Hoken-Kyufu oyobi Hokenryo no Noufu no Tokurei tou nikansuru Hontsu) entered into force (Act No.131 of 2007). This Act provides that the Pension Fund Association may encourage the directors and officers of corporations to pay the unpaid contributions to it. The Act provides that the directors and officers of an insolvent company may pay the unpaid contributions if the company collected the premium from its employees and did not pay the contribution to the employees' pension fund (Article 8 of the Act of Special Exceptions on the Employees' Pension Insurance Benefit and the Employees' Pension Insurance Premium Collection (Kousei Nenkin Hoken no Hoken-Kyufu oyobi Hokenryo no Noufu no Tokurei tou nikansuru Hontsu)). If the Pension Fund Association recommends that directors and officers pay the unpaid contributions, and they do not do so, the Pension Fund...
Association may disclose their names on the Internet (Article 9 of the Act of Special Exceptions on the Employees’ Pension Insurance Benefit and the Employees’ Pension Insurance Premium Collection(Kousei Nenkin Hoken no Hoken-Kyufu oyobi Hokenryo no Noufu no Tokurei tou nikansuru Houritu)).

Claims against directors and/or officers may not be compromised or settled during an insolvency workout or insolvency proceeding in Japan.

**Treatment of Collective Agreements**

The treatment of collective agreements during insolvency depends on the procedure used. In a Corporate Reorganization procedure (Kosei Tetsuzuki) or in a Civil Rehabilitation procedure (Saisei Tetsuzuki), they are continued (Article 61(3) of the Japanese Corporate Reorganization Act (Kaisya Kosei Hou); Article 49(3) of the Japanese Civil Rehabilitation Act (Minji Saisei Hou)). In a Bankruptcy procedure (Hasan Tetsuzuki), the receivers (Hasan Kanzai Nin) have the option to either continue or cancel collective agreements (Article 53(1) of the Japanese Bankruptcy Act (Hasan Hou)). However, it is thought that the receiver cannot cancel a collective agreement if the labour union insists and proves that the collective agreement does not harass the bankrupt proceeding. In addition, in a Special Liquidation procedure under the Japanese Companies Act (Kaisya Hou), collective agreements are terminated because the employment contracts have already been terminated by the dissolution of the company.

In a Bankruptcy procedure (Hasan Tetsuzuki), the receiver (Hasan Kanzai Nin) takes over the obligations of the bankrupt company as an employer. The collective bargaining agent can negotiate with the receiver (Hasan Kanzai Nin) regarding the terms of the collective agreement. However, the terms which the collective bargaining agent may negotiate are limited because the discretion of the receiver (Hasan Kanzai Nin) is limited. For example, the collective bargaining agent may not negotiate the share of the division of unpaid wages treated as a preferential claim (Yusenteki Hasan Saiken). On the contrary, the terms in which the receiver (Hasan Kanzai Nin) has discretion may be negotiated. For instance, the terms of the unpaid wages treated as super-priority claims (Zaidan Saiken) may be negotiated. In addition, the collective bargaining agent may negotiate for the receiver to apply to the court in order to pay unpaid wages that are treated as preferential claims (Yusenteki Hasan Saiken) and the policy of changing the bankrupt’s estate into money, etc.

With respect to legacy costs, the reduction of the pension benefits is a controversial issue. In Japan, the change the amount of the pension benefit is carried out by the agreement of labour union, and the agreement of the two-thirds members who have not gotten the benefit and whose pension are going to reduction in the Defined-Benefit Corporate Fund (Kigyo Nenkin Kikin)(Article 4 of the Enforcement Ordinance of the Defined-Benefit Corporate Pension Act (Kakutei Kyufu Kigyo Nenkin Hou Sikourei) [Cabinet Order No.424 of 2001]; Article 6 of the Enforcement Regulation of the Defined-Benefit Corporate Pension Act (Kakutei Kigyo Nenkin Hou Sikoukisoku) [Ordinance No,22 of the Ministry of Health, Labour, and Welfare of 2002]). If the benefits regarding the members who have already gotten the benefits are reduced, the two-thirds those members’ agreement is also needed. In addition, the members who have gotten the benefits and desire the lump sum of the benefits if the reduction is not done are given those lump sum. In the Employees’ Pension Fund (Kousei Nenkin Kikin), the reduction of the benefit is done by the same procedure. Therefore, many pension funds reduce the pension benefits, especially regarding the members who have not gotten the benefit.

On the contrary to these pension plans, Tax-qualified pension plans (Tekikaku Nenkin) and self-established corporate pensions (Jisya Nenkin) have not fixed procedure of the reduction of the benefit. However, they execute the reduction of the pension concerning both of the members who have not gotten the benefit and the members who have gotten the benefit with the approval of the board of representatives. However, the members who have already retired and received pension benefits do not participate in that procedure, so they have brought actions to deny the reduction of the pension

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benefits. In judiciary law, the courts insist that the reductions of the pension benefit may be done only when the reductions are needed and done on the reasonable reasons. X v. Matsushita Electric Industrial (28th of November, 2006) Judgment of Osaka High Court 1973 Hanrei Jiho 75, aff’d (6th of December, 2004), Judgment of Otsu District Court 1892 Hanrei Jiho 62 denied the claims and admitted the reduction of the pension benefit. In contract, in X v. Waseda University (26th of January, 2007), Judgment of Tokyo District Court 939 Rodo Hanrei 36 admitted the claim and denied the reduction of the pension benefit because Waseda University did not have the financial difficulty such that it could not pay the pension benefit that was prescribed in the agreements of pension before the reduction.

There are no statutory provisions to allow bargaining, modifying or terminating collective agreements during restructuring proceedings.

There are some successor employer provisions in respect of collective agreements after insolvency restructuring, in terms of purchasers of the business that continue to operate the business after it files insolvency proceedings, depending on the types of insolvency procedures. In bankruptcy procedures (Hasan Tetsuzuki) and in special liquidation (Tokubetsu Seisan) under Japanese Companies Act (Kaisya Hou), the receiver or liquidator are engaged only in changing corporate assets into money and distributing money for the creditors. Therefore, theoretically, the receiver or liquidator cannot create collective agreement between the employees and a new employer. In contrast, the Corporate Reorganization Procedure (Kosei Tetsuzuki) and in Civil Rehabilitation procedure (Saisei Tetsuzuki), the receiver can change collective agreements after insolvency restructuring. However, in judiciary law, the court judged that the changes of the collective agreements that have a negative effect on the wage claims and the claim for retirement payment may be effected only when those changes are so strongly needed and have so strongly reasonable basis that the employees need to endure those changes. 567 The purchaser of the business after insolvency restructuring basically takes over the collective agreement in whole. When the purchaser is willing to change it, the purchaser may do so only the same situation when the receiver does so.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

In Japan, labour law and human right legislation are not dealing with problems in the context of bankruptcy and/or insolvency except the Industrial Injured Insurance Act, which provides the replacement payment of unpaid wages.

In Japan, the court supervising the administration of an insolvency proceeding is the district court that has the territorial jurisdiction, to which the head office address of the insolvent company belongs (Arts 4 and 6 of Japanese Bankruptcy Act; Arts 4 and 6 of Civil Rehabilitation Act; Art. 5 (1) and Art.6 of Corporate Reorganization Act; Art.868 (1) of Japanese Companies Act). 568 On the other hand, the suits to resolve worker claims belong to the territorial jurisdiction, to which the defendant address belongs; and the defendant in those cases is the insolvent company. Therefore, the district court that has the territorial jurisdiction to which the head office address of the insolvency company belongs. Consequently, the district court supervising the administration of an insolvency proceeding has the jurisdiction to resolve worker claims. However Judges taking charge of each case are different.

**Tax issues in respect of social claims**

In the 2004 revision of Japanese Bankruptcy Act (Hasan Hou), the priority of the tax claims was decreased at the same time as the priority of employees’ wage claims was enhanced.

Until 2004, those claims are treated as preferential claims in whole (Art.39 of former Japanese Bankruptcy Act (Hasan Hou) [Act No. 71 of 1922 repealed by Act No.75 of 2004]). In addition, until 2004, tax claims were treated as super-priority claims in whole because art. 8 of National Tax Collection Act (Kokuzei Tyousyu Hou)(Act No.147 of 1959) provided that tax claims have the top

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568 If the parent company of the liquidating company is in the special liquidation proceeding, in the bankrupt proceeding, in the Corporate Reorganization proceeding, or in the Civil Rehabilitation proceeding, the creditors, the shareholders, the corporate auditors or the liquidators of the liquidating company may also apply to the district court that supervises the administration of the parent company’s insolvency proceeding to start the special liquidation proceeding of the liquidating company (Art.879 (1) of Japanese Companies Act).
priority to the other claims, and tax claims were treated as super-priority claims (Art.47 (2) of former Japanese Bankruptcy Act (Hasan Hou)). Indeed, at that time, most of bankrupt estate was credited to payment to tax claims, and creditors did not get the enough dividends. Consequently, Since 2004, only a tax claim that is less than one year overdue or does not fail due at the time of starting the bankruptcy proceeding is treated as a super-priority claim (Art. 148 (1) iii of Japanese Bankruptcy Act (Hasan Hou)), and the other tax claims are treated as preferential claims (Art.98 (1) of Japanese Bankruptcy Act (Hasan Hou)). In addition, if the bankruptcy estate is not enough to be paid to super-priority claims, the dividends are paid to the super-priority claimers on the pro rata basis of each amount of the claims after paying the expenses of the administration of bankruptcy estate (Art.152 (1) (2) of Japanese Bankruptcy Act (Hasan Hou)). Therefore, 2004 Japanese Bankruptcy Act (Hasan Hou) enhances the protection of employees' claims.

Legislative Reform

The adjustment of the priority between tax claims and worker claims was introduced by the 2004 revision of Japanese Bankruptcy Act (Hasan Hou). Now, taking account with that protection of employees' claims in bankruptcy procedure, the government of Japan is considering whether the fund for the replacement payment of unpaid wages in bankruptcy should be capitalized. Also, the government is discussing what should be done to make the pension benefit guarantee cover all the pensions and all the members.

Historical, political and social reasons for the development of Japan's approach to social claims

The treatments of the workers’ claims, including the claim for pension benefits, are based on the view that all of the workers' claims are compensation for work; however the legal relationship among employees, employer and pension fund is not clear. Therefore, the protection of the pension claims in insolvency is weak. In addition, only the strong companies such as publicly held companies have made the defined-benefit pension funds and were thought not to be insolvency. Japan previously thought that the protection of the pension claims in insolvency proceeding was not a serious problem. Financial difficulty of the National Pension System that is government-supported pension is now so serious that making that protection is not a public policy concern. However, the academics are insisting the strengthening the protection.
JERSEY, CHANNEL ISLANDS

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Treatment of Wage Claims

The Wage Preference in treatment of employee wage claims is as follows:

Priority status under Article 32(1)(b) of the Bankruptcy (Désastre) (Jersey) Law 1990, as amended. The prescribed amounts for the purpose of Article 32(1)(b) are:

(a) for clause (i) wages or salary for services rendered to the debtor during the 6 months immediately preceding the declaration - £3,500 and
(b) for clause (ii) holiday pay and bonuses - £1,000

Maximum priority claim is for a maximum period of six months immediately preceding the initiation of a bankruptcy. The balance of any such claim is treated as an unsecured (ordinary) claim.

There is no wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

Vacation pay has a statutory preference up to a cap of £1,000 for six months on a pro-rata basis. There is no priority for severance pay or termination pay or for travelling and related expenses and such claims are treated as unsecured ordinary claims.

Treatment of Pension Claims

Generally speaking monies paid into pension schemes do not form part of a bankrupt’s property divisible among creditors, and thus do not fall in the hierarchy of claims.

Director and Officer Liability For Social Claims

There is no specific liability of corporate directors and officers for social claims during insolvency, but liability can be incurred for wrongful and fraudulent trading and similar conduct. The relevant statutory provisions are Articles 44 and 45 of the Bankruptcy (Désestres) (Jersey) Law 1990, as amended. The only limit to such liability is the extent that the court feels to be justified.

Such claims against directors and/or officers can be compromised or settled during an insolvency workout or insolvency proceedings.

Treatment of Collective Agreements

In principle, collective agreements generally fall to the ground on insolvency or bankruptcy. However, rarely, it might be possible for them to be re-negotiated as part of a reorganization.

Interaction of Insolvency Legislation with Other Social Claims Legislation

All labour relations legislation, employment standards legislation, human rights legislation, and occupational health and safety legislation are accommodated to the extent possible.

3,500 GBP is 6,877 CAD.
1,000 GBP is 1,965 CAD.
The Royal Court of Jersey exercises a supervisory jurisdiction over the Viscount in a désastre (bankruptcy) and over insolvency office-holders.

**Tax Issues**

Income Tax claims have priority status in a désastre for the current year and the preceding year.

**Legislative Reform**

Claims limits were reviewed and increased in August 2006.

**Historical, Political and Social Reasons for the Development of Jersey’s Approach to Social Claims**

As part of the natural evolution of désastre (bankruptcy). This process was originated in the Royal Court in the 19th Century and was placed on the modern statutory footing by the passing of the Bankruptcy (Désastre) (Jersey) Law 1990, as amended.

Jersey is a peculiar of the British Crown, but does not form part of the United Kingdom, being an independently administrated jurisdiction; nor is it part of the European Union. From 2005, it has had a Chief Minister as Head of Government. The Island’s parliament, The States of Jersey, passes all domestic legislation subject to, in the case of primary legislation, the approval of Her Majesty in Council.
KOREA

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Treatment of Wage Claims

Article 37 of the Labour Standards Act of Korea (LSAK) provides for preferential treatment of employee wage claims. In addition, the Wage Claim Guarantee Act of Korea (WCGAK) guarantees payment of employees’ wage claims prescribed in the above-mentioned provision. Wages from the three months prior to insolvency as well as accident compensation allowance are entitled to preference over secured claims by pledges or mortgages, taxes/public charges, and other claims. There are no restrictions on realization of the preferential claim in terms of the minimum length of employment or minimum number of workers in the company. The only restriction is with respect to the amount paid.

Under Article 15 of the WCGAK, the Minister of Labour establishes a wage claim guarantee fund to apply to wage claims paid by the government instead of employers who have failed to pay amounts (i.e., wages of the last three months and accident compensation allowance) in accordance with Article 6 (Payment of Wages, etc. in Arrears) of the WCGAK. This fund is established with financial resources consisting of recovered amounts by the exercise of a subrogation right by the Minister of Labour, charges from employers, borrowings from financial institutions, and profits accruing from the management and operation of the fund (Article 16).

Only wages of the last three months, accident compensation allowance, and retirement allowance for the last three years (amounts equal to an average wage of 90 days) are guaranteed by the fund, and the Minister of Labour provides a cap on the guaranteed amount in terms of the type of wages and the age of the worker. Under the current cap, the maximum amount guaranteed is 10,200,000 Korean Won.571

Normally, employees are given a retirement allowance or severance pay at the time of retirement. The retirement allowance system under which an employer pays retiring employees a retirement allowance is provided for in another law stipulating retirement benefits (Article 34 of the LSAK). Under the current retirement allowance law, employers are required by law to pay a retirement allowance equal, in amount, to at least 130 days’ average wages to their employees who have worked for a period of 1 full year (Article 8, Paragraph 1 of the Employee Retirement Benefit Security Act of Korea, hereinafter the “ERBSAK”). Under Article 8, Paragraph 2 of the ERBSAK, an employer, on request of its employee, may pay in advance part of the severance pay corresponding to the period of such employee’s continuous employment with the employer before his or her retirement. After the above interim settlement amount is paid, the number of years for employment necessary for calculation of the amount of severance pay payable thereafter starts being counted from the time of settlement.

Payment of retirement allowance is a legal requisite, and thus, all retiring employees are entitled to the severance pay of at least 30 days’ average wages, which is the statutory minimum amount, even if the employer fails to adopt or implement the severance pay system or pays a smaller amount than the legally set minimum amount, whether or not the concerned employer is subject to application of penalties, etc. In case of non-payment of this retirement allowance, the employee concerned is entitled to a claim on this unpaid amount, which is deemed as the same, in nature, as the wage claim.

571 10,200,000 KRW is 10,761 CAD.
protected and guaranteed under Article 2, Paragraph 3 of the WCGAK. Wage claim guarantee fund payments under the WCGAK amounted to as much as 181,500,000,000 Won as of 2007.\footnote{181,500,000,000 is 191,483 CAD.}

Under Article 7, Paragraph 1 of the WCGAK, if the Minister of Labour has provided the subrogated payment for an employee, the claim for unpaid wages, etc., of the concerned employee against the concerned employer is transferred to the Minister of Labour. According to Paragraph 2 of the same Article, the priority of wage claims under Article 37, Paragraph 2 of the Labour Standards Act and the priority of retirement allowance (or severance pay) under Article 11, Paragraph 2 of the ERBSAK continue to exist for the rights transferred under the above Paragraph 1.

**Treatment of Other Compensation**

Under Korean law, there is priority given to severance pay, for amounts of up to three months’ salary. Severance pay is generally treated in preference to other claims. However, only retirement allowance for the last 3 years is entitled to preference over secured claims by pledges or mortgages, taxes/public charges, and other claims. There is no priority for vacation pay, termination pay, or traveling/other expenses.

**Treatment of Pension Claims**

There is no legislation stipulating the super-priority of retirement pension claims under the Retirement Pension Plan. In the case of the Retirement Pension Plan, the relevant fund is not established inside the company but by financial institutions outside the company, which means there is no risk of retirement pensions not being paid due to the employer’s bankruptcy. However, in case the Retirement Pension Plan is either abolished or suspended, the current severance pay system is applied for the period after the said abolishment or suspension.

In the case where the severance pay system is implemented, it is required to set up a system under which an amount corresponding to at least 30 days’ average wages is paid as the severance pay to a retiring employee who has continuously worked for the same employer for 1 full year (Article 8, Paragraph 1). In the case where the Retirement Pension Plan is implemented, protocols provided in Article 12 and Article 13 of the ERBSAK must be prepared. In the case of adopting the Defined Benefit Retirement Pension Plan, to be qualified to the pension under the above plan, employees should be at least 55 years old with the subscription period of not less than 10 years. If these conditions are satisfied, pensions will be paid for 5 or more years, and the lump-sum payment will be paid to those subscribers who fail to satisfy the annuity requisites or who wish to receive his or her pension in a lump sum (Article 12, Sub-paragraph 6).

There is currently no pension payment guarantee fund or guaranteed insurance for pension claims during insolvency. However, the Korea Deposit Insurance Corporation is working on introducing a protection system for the payment of pensions. It is unclear whether such a protection system will actually be implemented eventually.

Unfunded or under-funded pension liabilities are treated as general unsecured liabilities in insolvency. Although wage claims and retirement allowance are treated as common benefit claims in insolvency, pension claims are not included in such common benefit claims.

**Director and Officer Liability for Social Claims**

Directors may be held liable for failure to pay social claims, pursuant to director’s liability to third persons under the *Commercial Code of Korea*. Such liability would be determined in accordance with the general principles of the director’s liability to third persons. There is no specific provision regarding the liability of directors for failure to pay social claims. There is no cap on the potential liability of directors.

Generally, directors and officers are liable for social claims only under extreme circumstances of gross negligence or criminal intent, in which case there would be criminal and civil liability. This liability arises under the Federal Tax Code, the General Law of Mercantile Corporations, the Federal
Criminal Code, the Federal Civil Code, and the Civil Code of Individual States. While there have been no cases in which such claims could be compromised or settled during an insolvency workout or insolvency proceeding, it is possible to settle such claims.

**Treatment of Collective Agreements**

No information.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

In practice, Korean bankruptcy courts regard a collective agreement as a contract between the concerned parties, i.e., a bilateral contract under which parties thereto bear obligations that are of mutual consideration. Accordingly, as with other types of bilateral contracts, the collective agreement between the employer and the employee is not subjected to automatic termination even if insolvency or bankruptcy is declared against the concerned employer. Rather, it continues to maintain its effect as agreed.

Whether collective agreements are terminated by the administrator or not depends on the type of insolvency proceedings. In a bankruptcy proceeding, the administrator is entitled to terminate an executory contract, which includes a collective agreement pursuant to Article 335 of the Debtor’s Rehabilitation and Bankruptcy Act of Korea (“DRBAK”) considering that collective agreement may cause trouble or undue delays in the bankruptcy administrator’s execution of its duties, and that the purpose of bankruptcy proceeding is to dissolve and wind up a corporate entity. However, the administrator can not terminate collective agreement in the rehabilitation proceeding since such proceeding aims at the rehabilitation of the company (Article 119 of DRBAK).

In general, the collective bargaining agent is a trade union in Korea. Bankruptcy is not included in Article 28 of the Trade Union and Labour Relations Adjustment Act of Korea, which stipulates the grounds for termination of trade union, and thus even if a company is declared as bankrupt, the trade union of the company is not dissolved automatically, unless declaration of bankruptcy is separately provided for in the by-laws as a ground for dissolution of trade union. In the case of enterprise-based unions, it is often the case that trade unions are dissolved prior to the employers’ filing of application for bankruptcy proceedings, by reporting dissolution of trade union or by making a resolution for dissolution. But if the union at enterprise level is not terminated even after the declaration of bankruptcy, or if a non-enterprise level unit trade union, e.g., industrial trade union, decides to do so, then either of them may demand the administrator enter into collective bargaining. Meanwhile, there is a different view that the administrator has no discretion and no obligation to enter into collective bargaining since the administrator in bankruptcy proceeding is under the supervision of court and executes his/her duties under the permission of auditor or court (“Practical Guidelines for Bankruptcy Cases” compiled by Seoul District Court).

Korean courts have stated that in the case of a company in reorganization proceedings, which is equivalent of corporate rehabilitation proceedings under the Debtor’s Rehabilitation and Bankruptcy Act of Korea, pay raises, payment of severance pay, and promotion of a staff who is manager or holds a higher position and salary decision for such staff must obtain permission of the court, and broadly designated all acts that do not belong to the ordinary business of the company in reorganization as the matters that require the court’s permission (Decision rendered by Kwangju District Court on Dec. 18, 1998, Case No. 98 Pa 1315). There is a controversy over the issue as to whether or not the administrator must obtain the court’s permission to engage in collective bargaining or enter into collective agreements, more specifically, whether or not the administrator’s such act ‘falls outside the ordinary business of the company in reorganization’. On this issue, the position of the Ministry of Labour of Korea has been that the act of execution of collective agreements does not belong to the ordinary business of company in reorganization and therefore, the administrator’s rejection to engage in collective bargaining is reasonable (August 11, 2000, Trade Union 01254-707).

There are no statutory provisions that allow for bargaining, modifying or terminating collective agreements during restructuring proceedings. However, it is the prevailing view that wage issues should be determined in accordance with collective bargaining. The fact that the administrator should obtain the court’s approval for activities that are not in the ordinary course of business does not mean that the administrator is not obligated to participate in collective bargaining. Since the administrator
cannot terminate collective agreements in the rehabilitation proceeding, the company is bound by its collective agreements unless the administrator enters into a new collective agreements with amendments or the collective agreements expire.

In the case of a business transfer after insolvency proceedings, the rights and obligations under the relevant employment contract are generally succeeded to by the transferee unless expressly provided otherwise in the relevant contracts. Even where the transferee enters into a contract that provides the denial of succession of collective agreement, such contract would be deemed invalid unless it satisfies the requirement of 'justifiable cause for dismissal' under the Article 30 of the Labour Standards Act of Korea. In this regard, business transfer itself does not satisfy the requirement of 'justifiable cause for dismissal'.

Article 31 of the Labour Standards Act of Korea restricts dismissal of employees for managerial reasons. If there is an urgent managerial necessity, an employer may dismiss its employees, and if it is for transfer, acquisition, and/or merger of a business, it is deemed that there is an urgent managerial necessity (Article 31, Paragraph 1). Even in this case, the employer must exert every effort to avoid dismissal of such employees, and select employees to be dismissed in accordance with reasonable and fair dismissal standards. If there is a trade union consisting of the majority of its employees, the concerned employer must notify this fact to the trade union before 50 days from the scheduled dismissal date and must consult with such trade union.

Related parties may file a law suit in connection with social claims with the civil court and the worker may file an application for remedy with the Labour Relations Commission ("LRC") pursuant to LSAK. In addition, any of the parties may challenge an order of remedy or dismissal decision issued by the LRC through filing an application for review of said order or decision with the Central Labour Relations Commission ("CLRC"). Further, any of the parties concerned may file an administrative suit with the administrative court against a decision on review issued by the CLRC. In such cases, the appellate court will be the High Court, and the last court to handle the final appeal will be the Supreme Court of Korea. The court supervising the administration of an insolvency proceeding has no special jurisdiction to resolve worker's claims.

Tax issues in respect of social claims

The tax burden on retirement income is very low with an effective tax rate of 9-15% due to tax benefits such as a 45% deduction. For pension payments, tax is deferred until the receipt of pension payments. Upon receiving pension payments, tax benefits such as tax exemption or income deduction are also granted. Starting in 2008, the Earned Income Tax Credit ("EITC") will be available. The purpose of the EITC system is to encourage low-income earners to gain employment by granting tax credits.

Legislative Reform

There was much discussion on the legislative reform of pension-related laws, but very recently, the proposed reform was rejected by the National Assembly of Korea. This proposed reform is also connected with the General National Pension Plan reform issue and the Government Official Pension Plan reform issue. The pension system reform proposes to finance the funds by increasing premium rates to be charged.
Treatment of Wage Claims

Kuwait’s Civil Law No. 67 of 1980 regulates general and special privileges for certain preferential creditors over the debtor’s property. As per Article 1074 of the Civil Law, the following payments will rank in priority over all the movable and immovable property of the debtor.

(a) Costs of legal proceedings incurred in the common interest of all creditors for the preservation, sale and distribution of the security of the debtor.
(b) Any amounts due to the State of Kuwait by way of taxes, duties or any other dues that are privileged in accordance with the stipulations laid down under the law.
(c) Expenses incurred towards preservation of the security.
(d) Labour amounts owing up to the last six months.

The amounts due to employees for wages due during the previous six months shall have priority over the entire property of the debtor whether movable or immovable. Such claims will rank immediately after the costs of legal proceedings, which are the costs incurred in the interest of all creditors for the preservation, sale and distribution of the property of the debtor, amounts due to the public treasury, specifically taxes, duties or other dues of any kind, and expenses for the preservation of, and repairs to the property; as between them such claims are paid ratably.

If the employer’s funds are not sufficient to pay for all the claimants, then each one of the claimants shall be entitled to get some amount of the outstanding payment in proportion to their salary.

Kuwait does not have a wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

In Kuwait, claims for vacation pay, termination pay, and travelling and other expenses are given a preference. This preference attaches to payments due in the last six months of employment. This preference will rank after the costs of legal proceedings, amounts due to the public treasury and expenses for preservation and repairs of the property. Severance pay does not have priority.

Treatment of Pension Claims

The citizens of Kuwait are entitled to apply for a pension as per the Social Security Scheme provided by the Government of Kuwait exclusively to the Kuwaitis, regulated by the Law No.61 of 1976 regarding Social Security. Employers are required to make monthly contributions equal to 10% of the salaries of their employees to the Public Institution of Social Securities towards the pension fund. However, this pension scheme is offered by the Government of Kuwait to the Kuwaiti citizens and there is no possibility of any pension claims raised during the liquidation of a company.

Director and Officer Liability for Social Claims

Kuwait law contains no specific provisions concerning director and officer liability for failure to pay or make contributions towards social claims. However, the directors, managers or liquidators shall be liable for certain actions as provided in Article 789 and 791 of the Law of Commerce No. 68 of 1980. As per Article 789 of the Law of Commerce, where a final adjudication of bankruptcy is entered against a company, its directors, managers or liquidators shall be punished with imprisonment for five years, where it is established that they have committed any of the following acts after the company
suspended payment: (a) concealed, destroyed or changed the books of the company; (b) embezzled
or concealed part of the company assets; (c) knowingly admitted debts that are not due from
the company; (d) advertised untrue things regarding the subscribed or paid up capital, distributed
fictitious profits or took over remunerations exceeding the amount stipulated in the law, the
Memorandum or Articles of Association of the company.

Further, as per Article 791 of the Law of Commerce, where a company has been finally adjudicated
bankrupt the directors, managers or liquidators thereof shall be punished with imprisonment for a
period not more than three years where it has been established that they have committed any of the
following acts:

(a) if they failed to keep commercial books that are adequate to reflect the true financial situation
of the company;
(b) if they abstained from providing, or willfully provided, incorrect particulars required by the
Judge Commissaire or bankruptcy manager;
(c) if they have disposed of the assets of the company after it had suspended payment with the
intent to deprive the creditors thereof;
(d) if they discharged the debt of a creditor, after the company has suspended payment, to the
prejudice of the other creditors, or where they have constituted securities or special
privileges to a creditor in preference to the others, even when the same is made for obtaining
a composition/scheme;
(e) if they disposed of the assets of the company at lower than the ordinary price, intending to
delay the company's suspension of payment or adjudication of bankruptcy or rescission of
the composition/scheme, or in order to achieve these objectives they have resorted to
unlawful means to obtain monies;
(f) if they spent large amounts in acts of gambling or speculation on other than what is required
for the business of the company;
(g) if they have participated in or approved activities that breach the law or the Memorandum or
Articles of Association of the company.

Treatment of Collective Agreements

As per Article 196 of Kuwait’s Civil Law, a contract is the law of the contracting parties and neither
party thereto may separately rescind it or amend its stipulation except to the extent of the limits
allowed by the agreement or that the law provides otherwise. Therefore, the continuation or
termination of the collective agreement on insolvency or bankruptcy will depend upon the terms of
the agreement. Claims concerning collective agreements will not have any special preference unless
such rights are set as privileged right under the provision in law. As per Article 1061 of the Civil Law,
no right is privileged except by virtue of a provision in law.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The Private Sector Labour Law No. 38 of 1964 stipulates the specific procedures for filing labour
claims against employers. As per Article 96 of the Private Sector Labour Law, the employee should
initially refer the dispute to the Ministry of Social Affairs and Labour. On receiving the complaint, the
Ministry will call the two parties of the dispute for a meeting in view of settling the matter amicably. If
the dispute is not settled amicably within two weeks from the date of referral of the dispute by the
employee, the Ministry must refer the dispute to the Court of First Instance, Labour Circuit ("Labour
Court"), along with a memorandum including a summary of the dispute, the evidence of the two
parties and the comments of the Ministry. The court shall fix a date for hearing within three days
from the date of receiving the application. The employer and the employee shall be duly notified of
the hearing. The case is heard in a summary manner.

The procedures for pursuing the employee claims during liquidation are the same as the above
except that the complaint has to be initiated against the liquidator and not against the company.

Tax issues in respect of social claims

Kuwait faces no tax issues in respect of social claims.
Legislative Reform

There is currently no legislative reform being considered.

Historical, political and social reasons for the development of Kuwait’s approach to social claims

There is little precedence of social claims in Kuwait.
LATVIA

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Treatment of Wage Claims

According to Article 137(4) of the Insolvency Law (Maksātnespējas likums), the claims of employees have priority over other claims, except claims of the Insolvency Administration with regard to financial resources assigned to cover the costs of the insolvency process and except claims for payment of other costs of the insolvency process. Preferential treatment relates to all wage claims of employees without any limit.

The claim of an employee should be submitted to the administrator within the time limit set by the court, which could not be shorter than one month and longer than three months. If the employee delayed the deadline set by the court then the employee may submit his/her claim within one year but not later than the date when the creditors adopt a decision about the completion of a bankruptcy procedure. In latter case his or her claim is added to a register of the claims of creditors but he or she loses voting right at the meeting of creditors.

According to Article 5(1) of the Law on Protection of Employees in Case of Insolvency of Employer (Likums par darbinieku aizsardzību darba devēja maksātnespējas gadījumā), claims of employees are satisfied as preferential in following amount:

1. work remuneration for the last three months of the legal employment relationship in the twelve months before the insolvency of the employer came into effect;
2. reimbursement for annual paid leave the right to which has been acquired in the twelve months before the insolvency of the employer came into effect;
3. reimbursement for other types of paid leave in last three months of the legal employment relationship in the twelve months before the insolvency of employer came into effect;
4. severance pay in the minimal amount prescribed by law;
5. reimbursement for damages for the whole unpaid time period;
6. reimbursement for damages for the four subsequent years.

The Employee Claims Guarantee Fund (Darbinieku prasījumu garantijas fonds) is established according to the Law on Protection of Employees in Case of Insolvency of Employer in order to protect employees in case of insolvency. The Fund is funded by employers’ mandatory payments. According to the Public Report of the Insolvency Agency of the Republic of Latvia for the year 2006, total implementation of the Guarantee Fund is 90% from the regular income of the guarantee fund, i.e. LVL 1.5 million. If the total amount of the claim of the employee is larger than the amount reimbursed by the Employee Claims Guarantee Fund, then the balance is required to be reimbursed according to the general requirements of the Insolvency Law.

According to the Public Report of the Insolvency Agency of the Republic of Latvia for the year 2006, the claims of employees in amount of 1,349.2 thousand LVL were satisfied from the Employee Claims Guarantee Fund. Total implementation of the fund is 90% from the regular income of the fund, i.e. LVL 1.5 million. There were 2,598 claims of employees at 95 enterprises were satisfied in 2006.

575 1,500,000 LVL is 3,152,994 CAD.
576 1,349,200 LVL is 2,836,013 CAD.
577 1,500,000 LVL is 3,152,994 CAD.
According to Article 6(2) of the Law on Protection of Employees in Case of Insolvency of Employer, a state duty should be paid to the state budget by each employer that could be declared as an insolvent legal person or insolvent credit institution. Each year, the Government of the Republic of Latvia updates the amount of the state duty. For the year 2008 the amount of the state duty is set 0.25 LVL per month for each employee.

Treatment of Other Compensation

There is a priority for vacation pay for the last three months of the legal employment relationship in the twelve months before the insolvency of the employer came into effect. There is also a priority for severance pay for the following amounts: one month average earnings if the employee has been employed by the relevant employer for less than five years; two months average earnings if the employee has been employed by the relevant employer for five to ten years; three months average earnings if the employee has been employed by the relevant employer for ten to twenty years; and four months average earnings if the employee has been employed by the relevant employer for more than twenty years.

Both vacation pay and severance pay claims should be included in the register of creditors by the administrator.

There is no priority for termination pay. Traveling and other expenses for the last three months of the legal employment relationship in the twelve months before the insolvency of the employer came into effect are entitled to preference. These claims should be included in the register of creditors by the administrator.

The following types of compensation are all entitled to the same level of preference:

1. work remuneration;
2. reimbursement for annual paid leave;
3. reimbursement for other types of paid leave;
4. severance pay in connection with the termination of a legal employment relationship;
5. reimbursement for injury in connection with an accident at work or an occupational disease.

Treatment of Pension Claims

Latvia has both a public and a private pension system. All employers are obliged to participate in the public pension system and they must pay a certain amount of mandatory social insurance payments for each employee. Concerning the private pension system, there are various private pension funds and the employer is free to choose whether to participate or not.

In the case of debt of the mandatory social insurance payment to the state budget, the claim of the respective state authority for payment of the mandatory social insurance payments is to have priority after satisfaction of the employees’ claims under the Law on Protection of Employees in Case of Insolvency of Employer.

In the case of debt of contributions to a private pension fund by the employer, the claims for such contributions do not have any priority and should be recovered according to general procedure and manner under the Insolvency Law.

According to Article 12 of the Latvian Law on Private Pension Funds (Likums par privātajiem pensiju fondiem), the financial resources paid to a private pension fund by him or her or in favour of him or her shall not be included in the property of an insolvent company and these financial resources are not the property of the insolvent company.

According to Article 26(1) of the Law on Private Pension Funds, if the manager of funds or the holder of funds of the pension fund has been recognized insolvent and bankruptcy procedures have been initiated, or the manager of funds or holder of funds have been deprived of the relevant license, a

new manager of funds or holder of funds shall be appointed by a decision of the board of directors of the pension fund and the assets of the fund shall be transferred to the new manager of funds or holder of funds.

According to Article 26(2) of the Law on Private Pension Funds, if an employer who makes contributions has been recognized insolvent and bankruptcy procedures have been initiated, the pension plan of employees and the relevant collective participating contract shall be terminated unless the new employer takes over all rights and obligations of the previous employer. Participants in the pension plan may continue the pension plan together with the new employer.

According to Article 26(3) of the Law on Private Pension Funds, if an employer who makes contributions has been recognized as insolvent and bankruptcy procedures have been initiated, a participant may terminate participation in the pension plan and request the transfer of the accumulated funds to another pension plan.

There is no specific pension payment guarantee fund or guaranteed insurance for pension claims during insolvency in Latvia, other than the system described above.

**Director and Officer Liability for Social Claims**

According to Article 137 of the Commercial Law (Komercikums), corporate directors and officers are generally not liable for any liabilities of the company. However, they are liable for losses that they have caused to the company unless they prove that they have acted, as would an honest and careful manager. A creditor of a company who cannot gain satisfaction for its claim against the company may bring an action for the benefit of the company against the corporate directors and officers of the company, who have incurred losses for the company, but have not compensated them. The liability of the corporate directors and officers of the company are not limited under the law. This liability is not involved in the insolvency process of the company and directors and officers should cover damages from their own property.

Private pension schemes have been introduced in practice only recently in Latvia. Few companies participate in private pension schemes. Trade unions are weak and only starting to grow and develop now in Latvia. For this reason there is not any considerable case law or general practice concerning issues related with collective agreements or legacy costs.

**Treatment of Collective Agreements**

Collective agreements continue on insolvency or bankruptcy in Latvia. According to Article 97(1) of the Insolvency Law, if any agreement including a collective agreement, concluded by a debtor is not executed or partially executed on the day of initiation of insolvency proceedings, the administrator shall be entitled to require execution from the other contracting party or unilaterally withdraw from the agreement. Otherwise, general contract and labour law applies to bargaining, modifying or terminating the collective agreement. The status of the collective bargaining agent does not change during an insolvency proceeding.

According to Article 141 of the Insolvency Law, a restructuring of the company is possible in a recovery procedure. According to Article 114 of the Insolvency Law, the recovery is a solution of the state of insolvency proceedings, which manifests itself as a complex of particular financial, lawful and organizational measures, the purpose of which is prevention of a debtor’s potential bankruptcy and renewal of its paying capacity. All the methods of settlement are allowed in a recovery.

The rules of the Commercial Law apply to restructuring of the insolvent company unless they are not in conflict with the provisions of the Insolvency Law concerning restructuring within the framework of recovery.

According to Article 337 of the Commercial Law, restructuring is a process in which one type of company (the restructured company) is restructured into a different type of company (the acquiring company). In the case of restructuring, all the rights and obligations of the restructured company are transferred to the acquiring company, *inter alia* the rights and obligations from collective agreements.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

All other statutes continue to apply after the initiation of bankruptcy and/or insolvency proceedings, as far as their application does not contradict with the special norms of Insolvency Law.

According to Article 26 of the Civil Procedure Law (*Civilprocesa likums*), an employee must submit any claims against his or her employer at the regular court in accordance with the place of residence, if the employer is a natural person, or in accordance with the registered address, if the employer is a legal person, of the employer. However, as an exception, the employee may bring his or her claim in a court in accordance with the place of residence or place of work of the employee as provided by Article 28(7) of the Civil Procedure Law.

**Tax issues in respect of social claims**

If an insolvent company did not pay state mandatory social insurance payments for an employee into the state budget and if in the case of bankruptcy of the company, tax authorities cannot collect unpaid mandatory payments from the property of the bankrupted company, the employee may not receive any social benefits for the unpaid part of the mandatory payments.

**Legislative Reform**

There is currently no legislation reform being considered.

**Historical, Political and Social Reasons for the Development of Latvia’s Approach to Social Claims**


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LUXEMBOURG

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Treatment of Wage Claims

In the Grand Duchy of Luxembourg, within certain limits and under certain conditions wage claims benefit from (i) a super-priority (super-privilège) together with (ii) a general privilege (privilège général) for the remainder of said claims that are not covered by the super-priority. This matter is regulated by Article 2101 of the Luxembourg Civil Code (Code civil) and by Article 545 of the Luxembourg Commercial Code (Code de commerce)(Comm.C.).

Article 2101 paragraph (2) Code civil provides inter alia that wage claims that relate to the last six months of work, as well as employees' claims relating to amounts (indemnités) of any nature whatsoever arising from the termination of an employment contract (or of an apprenticeship contract) are exercised and have to be paid prior to any other preferential claims, including those that are guaranteed by the Treasury privilege (privilège du trésor) up to a maximum amount that is equal to six times the social reference minimum salary (salaire social minimum de référence)(i.e. 6 x € 1,609.53)581 (current monthly reference minimum salary as 1st March 2008) = € 9,657.18).582 Pursuant to Article 2101 paragraph (1) 4° Code civil, the remainder of said claims that is not covered by the above-mentioned super-priority is covered by a general privilege.583 In this case, however, certain other preferential claims (such as, for instance, legal costs) have priority over these wage claims. In case of bankruptcy ("faillite") of the employer, Article 545 C.Comm. expressly refers to Article 2101 Code civil regarding employees' claims.

In the Grand Duchy of Luxembourg, wage claims are guaranteed by the Employment Fund (Fonds pour l'Emploi) within certain limits and on certain conditions, in case of bankruptcy of the employer. This guarantee does not apply in case of other insolvency proceedings regulated by Luxembourg law such as composition proceedings (procédure de concordat préventif de la faillite), liquidation of companies ordered by courts (liquidation judiciaire de sociétés) and of controlled management proceedings (procédure de gestion contrôlée). It has to be noted that the Employment Fund, which is managed by the State, has many other statutory purposes such as the payment of unemployment benefits.

The Employment Fund is funded by different sources and in particular by:

1. A special contribution to be paid by the employers from the private sector and which is calculated on the rateable wages ("salaires ou rémunérations cotisables"). Currently, the rate of this contribution is however 0 %;

2. A solidarity tax ("impôt de solidarité") corresponding to a surcharge on income tax of the natural persons ("impôt des personnes physiques") and of the collectivities ("impôt des collectivités");

581 1,609.53 EUR is 2,510.71 CAD.
582 9,657.18 EUR is 15,064.24 CAD.
583 The "degree" symbol indicates the section within paragraph 1 of this article.
3. A contribution to be paid by the municipalities;

4. An additional autonomous excise duty ("droit d'accise autonome additionnel") levied on certain fuels;

5. An annual contribution from the State, which is fixed every year by the budget law.

Pursuant to Article L. 126-1 of the Luxembourg Labour Code (Code du Travail) ("LC") the Employment Fund guarantees claims related to wages and to amounts ("indemnités") of any nature whatsoever that are due to the employee at the date of the bankruptcy judgment ("jugement déclaratif de faillite"), for the last six months of work and that arise from the termination of the employment contract. The same cap on amount as the one foreseen by Article 2101 Civ.C. for the super-priority applies to the guarantee to be provided by the Employment Fund (i.e. maximum 6 times the reference minimum salary).

It has to be noted that pursuant to Article L. 125-1 LC, the employment contract is terminated with immediate effect, by operation of law ("de plein droit") in case of bankruptcy of the employer. In such a case, the employee is entitled to (i) the conservation of his wage relating to the month during which the bankruptcy has occurred and to the following month, and to (ii) half the monthly amounts ("mensualités") he or she would have been entitled to in case of termination of his or her employment contract with notice period. This provision however specifies that said amounts cannot exceed the total amounts that the employee would have been entitled to in case of termination of his or her employment contract with notice.

As a general principle, employees may benefit from the guarantee provided by the Employment Fund in case of bankruptcy of their employer provided that their wage claims cannot be partially or totally settled by the available funds of the bankrupt employer within 10 days as from the bankruptcy judgment ("jugement déclaratif de faillite").

As a general principle, the supply of the Employment Fund is foreseen every budget year and can be reduced or suspended by the annual budget law when it is to be foreseen that at the end of the budget year preceding the one which is concerned with said annual budget law, the balance of the fund will reach or exceed an amount that corresponds to the average expenditures of the reference year and of the two preceding years. In case the means of the funds are temporarily insufficient, the law provides that repayable loans from the State can be foreseen by the budget.

Article L. 126-1 (8) LC provides that the Employment Fund - which is managed by the State - is subrogated to the claims of employees to whom it has settled said claims.

Treatment of Other Compensation

Vacation pay, severance pay, termination pay, and traveling and other expenses benefit from the super-priority and the general privilege foreseen by Article 2101 Civ.C. These claims also benefit from the guarantee from the Employment Fund within the limits and under the conditions as described above.

Treatment of Pension Claims

In the Grand Duchy of Luxembourg, retirement pensions (pensions de retraite) are entirely paid by the State to the retired employees. As their former employers are not liable for the payment of said pensions, there is no super-priority or privilege for this type of social claims.

This being said, Luxembourg law foresees the possibility for the employer to set up, within its undertaking, a complementary pension scheme (régime de pension complémentaire) on a voluntary basis. In broad outline, the employer can choose between two types of financing: an internal or an external one. By choosing the internal financing, the employer constitutes itself the reserves in order to pay the additional pension to the employees concerned when the conditions are fulfilled (e.g. when they reach the required age to benefit from this complementary pension). In this case, the reserves
are therefore entered in the balance sheet of the undertaking and are part of its assets. The external financing means that the amounts used by the employer for the setting up of the complementary pension scheme are invested into an external financing vehicle such as a collective insurance (assurance de groupe) or a pension fund (fonds de pension).

In order to protect the beneficiaries of a complementary pension scheme funded by an internal financing, employers are legally obliged to conclude an insurance against insolvency with an insurance organization (organisme d’assurance) or an insurance company (compagnie d’assurance), which have to be previously approved (agrées) by the government.

In case of insolvency of the employer, the beneficiaries of the complementary pension scheme are entitled, towards the insurance organization/company, to an amount equalling their vested rights (droits acquis). This insolvability insurance not only applies in case of bankruptcy of the employer but also in case of composition proceedings (procédure de concordat préventif de la faillite), of liquidation of companies ordered by courts (liquidation judiciaire de sociétés) and of controlled management proceedings (procédure de gestion contrôlée).

In case of external financing, there is no need to cover the insolvency risk of the employer as the reserves that are intended for the financing of the complementary pension scheme are not part of the bankrupt’s estate and remain available, to a certain extent, to fulfill the obligations undertaken by the employer regarding the complementary pension scheme.

Since employers are legally obliged to conclude an insurance against insolvency in case of internal financing of the complementary pension schemes there is therefore no fund set up to deal with this matter.

The statutory basis for the complementary pension schemes in the Grand Duchy of Luxembourg is the Law of 8 June 1999 on complementary pension schemes, as amended (Loi modifiée du 8 juin 1999 relative aux régimes complémentaires de pension). The above-mentioned insurance against insolvency is regulated by Articles 21 to 28 of said law.

**Director and Officer Liability for Social Claims**

Under Luxembourg law corporate directors (administrateurs) and corporate managers (gérants) may be held liable for any type of claims during insolvency. In other words, there are no specific rules regarding social claims.

In the case of bankruptcy, the two situations foreseen by Luxembourg law are as follows: First, in the case of bankruptcy of a company, any of its directors or managers, whether a legal (de droit) or factual (de fait) director/manager, apparent or hidden (apparents ou occultes), remunerated or not, may personally be declared in bankruptcy in the event that he or she has (i) done business for his or her private interests, in the guise of the company or (ii) used the assets of the company as if they belonged to him or her, or (iii) abusively continued, for his or her private interest, a loss-making undertaking, which must have led to the suspension of payments of the company (Article 495 Comm.C.). It has to be noted that in this case, the personal assets of said director/manager will be used to settle the debts of the company.

Second, in the case of lack of assets, the relevant court may decide, at the request of the bankruptcy receiver (curateur), that the debts have to be borne, totally or partly, by the corporate directors/managers (dirigeants sociaux), whether legal (de droit) or factual (de fait) directors/managers, apparent or hidden (apparents ou occultes), remunerated or not, provided that it is evidenced that they have committed serious and characteristic faults (fautes graves et caractérisées) that have led to the bankruptcy (Article 495-1 Comm.C.).

Furthermore, the Law of 10 August 1915 on commercial companies, as amended (Loi du 10 août 1915 concernant les sociétés commerciales telle que modifiée)("LSC") contains two provisions regarding the liability of the directors of public limited companies (administrateurs de société anonymes) and regarding the liability of the managers of private limited companies (gérants de société à responsabilité limitée). First, in respect of directors’ liability, Article 59 LSC provides that they shall be jointly and severally liable both towards the company and any third parties for damages
resulting from the violation of said law or the articles of the company and that they shall nevertheless be discharged from such liability in the case of a violation to which they were not a party provided no misconduct is attributable to them and they have reported such violation to the first general meeting after they had acquired knowledge thereof. Second, in respect of managers' liability, Article 192 LSC expressly refers to Article 59 LSC and provides that the managers shall be liable in accordance with Article 59 LSC.

Pursuant to Article 495-1 Comm.C., the court may decide that the debts of the company will be partly or totally borne by the corporate manager. Such claims against directors and/or officers may be compromised or settled during an insolvency workout or insolvency proceeding provided that the creditors concerned agree thereon.

Treatment of Collective Agreements

According to Article L. 125-1 LC, the employment contract is terminated with immediate effect, by operation of law (de plein droit) in case of bankruptcy (déclaration de faillite) of the employer. The bankruptcy receiver (curateur) may however decide to continue the business activities of the undertaking subject to the relevant court's authorisation and thus keep the undertaking's employees at this end. In this case new employment contracts need to be concluded with the bankruptcy receiver.

In the case of composition proceedings (procédure de concordat préventif de la faillite), of liquidation of companies ordered by courts (liquidation judiciaire des sociétés) and of controlled management proceedings (procédure de gestion contrôlée), the employment contracts are not terminated by operation of law and thus continue.

Under Luxembourg law, there are two types of collective labour agreements ("conventions collectives de travail"). First are those that apply to a specific undertaking and second, are those that apply to a group of undertakings whose operations or activities are similar (de même nature) or which constitute together an economic and social entity. In addition, any collective agreement may be declared, through a Grand Ducal regulation (règlement grand-ducal), as binding (déclarée d'obligation générale) on all the employers and employees from the profession, from the activity, from the economic field or from the economic sector concerned.

There are no specific statutory provisions regarding continuation or termination of collective employment agreements ("conventions collectives de travail") on insolvency or bankruptcy. As a general principle any collective agreements continue to apply on insolvency or bankruptcy regarding the employees whose employment contracts have not been terminated, including, in case of bankruptcy, the above-mentioned employees whose employment contracts have been terminated by operation of law and who have concluded a new employment contract with the bankruptcy receiver pursuant to Article L. 125-1 LC.

Under Luxembourg law, there are no specific statutory provisions regarding bargaining, modification or termination of the collective labour agreements during restructuring proceedings. As a result, general provisions of the Luxembourg Labour Code on collective labour agreements apply. These statutory provisions do not expressly forbid the parties to a collective labour agreement to bargain, modify or terminate it during such proceedings. However, in practice, no bargaining, modifying or termination procedure regarding collective labour agreements that only apply to the undertaking concerned by restructuring proceedings, are undertaken during such proceedings.

In case of any transfer of undertaking or of a part of it, the transferee (i.e. the successor employer) has to maintain the benefit of the applicable collective labour agreement, until the expiration of this collective labour agreement or until a new collective labour agreement is concluded (Article L. 127-3 (3) LC).

Regarding insolvency restructuring, Article L. 127-5 (1) LC expressly provides that the above-mentioned provision applies in case of any transfer of undertaking or part of it in the event that the transferee (i.e. the initial employer) is subject to a bankruptcy proceeding, or to a similar insolvency proceeding (procédure d’insolvabilité analogue) that has been ordered in view of the liquidation of the transferee's assets, or to a controlled management proceeding. Pursuant to Article L.127-5 (2) LC,
the transferee, the transferor or the person who exercises the authority of the transferor (la personne qui exerce les pouvoirs du cédant) (e.g. the bankruptcy receiver) may however, in this case, agree, with the employees' representatives and the trade unions that are representative on a national level, to modify the working conditions in order to preserve the employment by ensuring the survival of the undertaking or the part of the undertaking.

It must also be noted that pursuant to Article L. 125-1 LC, which provides that the employment contract is terminated with immediate effect, by operation of law (de plein droit) in case of bankruptcy (déclaration de faillite) of the employer, the terminated employment contracts come back into effect by operation of law (renaissent de plein droit) in the case of a transfer of the undertaking of the employer within three months of the termination of the employer's business.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Under Luxembourg law there are no specific statutory provisions that affect the application of other social claims statutes to insolvency. As a general principle said statutory provisions therefore continue to apply in case of bankruptcy and/or insolvency.

Under Luxembourg law the court supervising the administration of insolvency proceedings (i.e. bankruptcy proceeding, composition proceeding, liquidation of companies ordered by courts and controlled management proceeding) is the commercial section of the District Court (Tribunal d’Arrondissement siégeant en matière commerciale).

As a general principle, the commercial section of the District Court has jurisdiction to settle any disputes arising from any claims that relate to the debtor concerned by such a proceeding, unless said claims, due to their nature, do not fall within the jurisdiction of this court. In such a case, the commercial section of the District Court has to refer the matter concerned to the relevant competent court. As a result, disputes relating to the existence and to the extent of social claims are not settled by the commercial section of the District Court but by the Labour Courts (Tribunaux du Travail) which have inter alia exclusive jurisdiction regarding disputes arising from employments contracts (and apprenticeship contracts) and from complementary pension schemes.

**Tax issues in respect of social claims**

There are no particular tax issues in respect of social claims.

**Legislative Reform**

A government bill ("projet de loi") entitled "Government bill setting out punctual measures for the prevention of bankruptcy and fight against organised bankruptcies" (projet de loi portant des mesures ponctuelles en matière de prevention des faillites et de lutte contre les faillites organisées) was presented to the Parliament ("Chambre des Députés") on 19 May 2003 (government bill no 5157). Nevertheless this government bill, which is still in process of examination, does not refer to the treatment of social claims.

It has however to be noted that the Labour Chamber (Chambre du Travail), which gave its opinion on this government bill on 7 November 2003, advocated that the following legal measures regarding employees claims should be taken. First, an obligation for the employers to constitute a bank guarantee for payment of salaries in case of economic difficulties; and second, it recommended an increase of the cap on amount relating to (1) the super-priority as regulated by Article 2101 Civ.C. and to (2) the guarantee provided by the Employment Fund to the employees in case of bankruptcy. At this time, the Government and the Parliament have not taken these suggestions into account.

**Historical, Political and Social Reasons for the Development of Luxembourg’s Approach to Social Claims**

Originally, the treatment of social claims under Luxembourg law and in particular, the granting of legal privilege and priorities to workers was justified by a humane care for the latter. This concept is somewhat outdated today. Today it is more the will for social protection based on the respect and the
dignity of work which justifies the foundation of the super-priority and of the general privilege as currently existing under Luxembourg law.

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Treatment of Wage Claims

In Malaysia, employee wage claims are given priority respectively over secured and unsecured creditors during insolvency under section 31 of the Employment Act 1955 and section 292 of the Companies Act 1965.

Under s.292 of the Companies Act 1965, debts must be paid in the following order of priority:

(a) costs and expenses of the winding up, including the liquidator's costs and remuneration;
(b) preferential debts, which include employee related compensation such as wages and salaries, vacation pay and contributions to provident funds;
(c) federal taxes; and
(d) claims of unsecured creditors.

The amount that can be claimed by any employee is not more than Ringgit Malaysia 1,500\(^{584}\) or such other amount as may be prescribed from time to time in respect of services rendered by him to the company within a period of four months before the commencement of the winding up.

In Malaysia, the Employees' Provident Fund provides a convenient framework for employers to meet their statutory and moral obligations to their employees. Under s.51 of the Employees' Provident Fund Act 1991, wages owing to workers are protected from any debt or claim. Further, under the Companies Act, provident funds are given priority over unsecured creditors.

The amount of the contribution to the Employees' Provident Fund is calculated based on the monthly wage of an employee. The current rate of contribution is 23% of the employee's wages of which 11% is from the employee's monthly wage while 12% is contributed by the employer.

Treatment of Other Compensation

In Malaysia, vacation leave, termination pay and traveling expenses owed are all given priority under the Employment Act 1955 and the Companies Act 1965 respectively over secured and unsecured creditors.

Treatment of Pension Claims

Contributions to the Employees Provident Fund due from the employer in respect of the 12 months immediately preceding the date of appointment of the receiver are given statutory priority under the Companies Act 1965.

Note that the Employees Provident Fund is a compulsory programme governed by the Employees Provident Fund Act 1991 that provides retirement benefits for private sector employees through management of their savings in an efficient and reliable manner. Currently, employees contribute 11% of their monthly income while the employer contributes 12% of the employees' income to the fund.

\(^{584}\) 1500 Ringgit is 460.95 CAD.
Contributions to the Employee Provident Fund are treated as preferential debts and must be paid after payment of winding-up expenses. Malaysia does not have a pension payment guarantee fund or insurance system for pension claims during insolvency.

**Director and Officer Liability for Social Claims**

In Malaysia, directors and officers are personally liable for failure to remit contributions to the Employee Provident Fund: The Employees Provident Fund Board is entitled to take an action against directors and officers to recover contributions payable under the *Employees Provident Fund Act 1991* summarily as a civil debt. The proceedings for the recovery of such contributions as civil debts may be instituted by any officer who is authorized in that behalf by the special or general directions of the Chair of the Employees Provident Fund Board and any such officer may conduct such proceedings.

Such claims against directors and officers are not compromised or settled during insolvency proceeding because the claim and process is by the Employees Provident Fund authority.

**Treatment of Collective Agreements**

On the winding up of a company, it would appear that the collective agreement will also terminate. Whether there is recognition of a successor employer will depend on the terms in the collective agreement, the nature of the insolvency proceedings and also whether the appointment of insolvency professionals bring about the termination of the contract of employment of the employees.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Upon insolvency, the legislation such as human rights, employment standards and health and safety will come into play in order for the general protection of the employees. Having said that, priority will be accorded to the employees’ contractual relationship with the employer subject to Malaysian Employment Act. Occupational Health and Safety legislation is a paramount consideration in Malaysian Employment Law but the purpose is defeated where insolvency renders the employer incapacitated to do further business.

The Malaysian Labour Office, Industrial Tribunal and the Industrial Court have the jurisdiction to resolve employees-employers dispute. However, their jurisdiction is subject to the supervision of the High Court under judicial review pursuant to Order 53 Rules of the High Court.

**Tax Issues in Respect of Social Claims**

Other than the fact that certain social claims paid by the employer and the employee are tax deductible up to a certain limit, there are no other particular tax issues.

It is proposed in Malaysia’s 2008 Budget that any sum of gratuity received on reaching the compulsory retirement age of 50 but before 55 and that person has served 10 years or more with the same employer shall be exempted from tax subject to the condition that the compulsory retirement age is provided for in the employment contract or collective agreement between the employer and employee.

**Legislative Reform**

There is currently no proposed legislative reform in Malaysia in respect of treatment of social claims.

**Historical, political and social reasons for the development of Malaysia’s approach to social claims**

[still to be submitted]
MEXICO

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Treatment of Wage Claims

Article 123 of the Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos) affords a constitutional preference for workers regarding unpaid salaries during insolvency. Seniority payments are mandatory, and accrue as of fifteen years of service, pursuant to article 162 Federal Labour Law (Ley Federal del Trabajo) and are similarly protected. The Mexican Insolvency Statute (Ley de Concursos Mercantiles) includes the same provision, article 224(1). The only wage claims subject to preferential treatment are seniority payments and wages that accrued in the two years of employment prior to the insolvency. Pursuant to the Federal Labour Law, absolute priority is given to workers. Liquidation of assets can be requested to satisfy claims after bankruptcy has been declared.

There is no wage protection fund or guaranteed insurance for wage claims during insolvency. The only items protected are the two years of salary prior to the bankruptcy, the wages earned during the bankruptcy proceedings while the company was still operational, and the seniority premium. Given that workers are given absolute preference, they are regarded as an integral part of the solution to the firm’s financial distress. As a result, compensation usually occurs during the bankruptcy proceedings if the company is still operational.

Treatment of Other Compensation

There is no priority for vacation pay outstanding. There is a priority for severance pay to a maximum of three months salary; termination pay in respect of both the above-noted outstanding wages owing in the period two years prior to insolvency plus a seniority premium. Absent a specific approval of the Court, traveling expenses are not applicable as generally, workers and union representatives are not able to travel during bankruptcy and therefore only the bankruptcy trustee would have a claim under this category. The trustee’s claim would be junior to that of the workers.

Treatment of Pension Claims

Pensions are exempt from the bankruptcy estate. If there is an additional pension fund contracted by the company, claims can be made against it in accordance with the rules applicable to that particular fund, based on level of expertise, seniority, etc. Claims can also be made against the mandatory private pension fund, which is not part of the bankruptcy estate. Under the old system, pensions were also not considered during bankruptcy proceedings. There is no pension guarantee fund.

There exists a hybrid pension system generally in Mexico, depending on whether the worker has a claim against the social security interest, which was funded until 1996. The Social Security Law (Ley del Seguro Social) dates from December 21, 1995, replacing the prior statute of March 12, 1973. The Law for the Retirement Saving System (Ley del sistema de ahorro para el retiro) (May 23, 1996) governs the mandatory savings fund. The non-mandatory savings fund is governed by the Social Security Law. Under the 1973 law, the pension system was funded by the company, worker and the state. Under the mandatory savings fund of 1996, it is funded only by the worker and the company, with the exception of Government employees.
Unremitted pension contributions are treated as ordinary claims. Unfunded or under-funded pension liabilities are treated as ordinary claims in insolvency, but any contributions under the social security system are considered fiscal claims entitled to preference, theoretically ranking after secured mortgage and pledged creditors.

Director and Officer Liability for Social Claims

Generally, directors and officers are liable for social claims only under extreme circumstances of gross negligence or criminal intent, in which case there would be criminal and civil liability. This liability arises under the Federal Tax Code (Código Fiscal de la Federación), the General Law of Mercantile Corporations, the Federal Criminal Code (Código Penal Federal), the Federal Civil Code (Código Civil Federal), and the Civil Code of Individual States (Códigos Civiles). While there have been no cases that the author is aware of in which such claims could be compromised or settled during an insolvency workout or insolvency proceeding, it is possible to settle such claims.

Treatment of Collective Agreements

Collective agreements terminate on the declaration of bankruptcy (declaración de quiebra) in Mexico. As a consequence, the collective bargaining agent has no status during the insolvency proceeding. There are few bankruptcy cases dealing with issues with respect to collective bargaining agreements. Workers do have some bargaining power, however, in an insolvency proceeding. Workers attempt to extend constitutional and bankruptcy statutory protections to all areas of negotiation during the proceeding. Since the workers can call a strike that could cripple the company, their wishes are very much considered. Legacy costs are given little consideration during bankruptcy proceedings.

Under the Bankruptcy Code and under Labour Law Article 224.1 & the Constitution, Article 123(a) Para. 23, the relationship is terminated. There is one insolvency procedure in Mexico, the concurso mercantile, with two successive phases: the conciliatory/restructuring phase among creditors and the bankruptcy phase. In the first phase, the aim is to save the enterprise. In the second, the business is liquidated, preferably as a whole, or through the sale of individual assets to pay creditors.

Under the first phase of the bankruptcy procedure, there are several provisions, specifically, Bankruptcy Code Art. 43, Para. 9 & Art. 65, that recognize the super-priority of the workers’ claim. The restructuring phase must recognize this super-priority. It is completely at the discretion of the union whether to agree to a new contract. The general consensus in the interpretations of the Federal Judiciary, is that workers cannot be forced to accept any reduction of their benefits. After an insolvency restructuring, where the business is sold as a going concern, any collective bargaining agreements carry over to the successor employer. Some companies have successfully emerged from bankruptcy under new ownership and name, but maintain the former agreements. The labour law requires the maintenance of agreements since it speaks of the enterprise as an economic process rather than a limited partnership. Where the business is liquidated and assets sold, the collective agreement is terminated.

Interaction of Insolvency Legislation with Other Social Claims Legislation

There are a broad set of labour laws and regulations arising from the Ley federal de trabajo that refer to everything from individual and collective relations between the workers and the employer to the working conditions, safety, profit-sharing, hours of work, social security, and mandatory workers’ savings. All of these laws continue to apply during the bankruptcy proceeding. The federal court has exclusive jurisdiction in civil matters, including claims affecting workers and pensioners. A separate bankruptcy court does not exist. Workers can also file before the local or federal labour boards.

Tax issues in respect of social claims

There are many issues, depending on the compensation afforded under the labour law. For instance, there are exemptions for most of the protected claims to the extent that workers earn less than approximately five times the minimum daily salary on an annual basis, approximately 5 USD per day.
**Legislative Reform**

There is currently no legislation reform being considered on this specific area of the law.

**Historical, Political and Social Reasons for the Development of Mexico’s Approach to Social Claims**

Article 123 of the 1917 Constitution recognized new social rights and was considered revolutionary for the rights given to popular organizations, farm workers and businesses. The country conducted business under a closed economic system that allowed no imports until 1976-1982, where the economy began to open to the outside. The 1928 elections were marred by the murder of one federal electoral candidate, but nevertheless heralded the arrival of a stable government and political arena. In 1931 the federal labour law was updated to provide additional protections to workers.

Mexico lived under a “guided democracy” that was *de facto* led by a one party government until 2000. The party was based on three key constituencies: labour, farm workers, and popular organizations. Patronage was an important method to ensure support. Over time, workers came to represent the foundation of the Mexican revolutionary movement, but they were controlled by large union leaders. As a result, workers were awarded important benefits. The nationalization of the oil industry could not have been accomplished without the support of workers. The 1968 student movement almost brought down the government, and led to a completely overhaul of the 1931 labour law. Some observers criticized these changes for their effects on Mexico’s competitiveness.

More generally, the Mexican system is modeled after that of Chile, which created an excellent structure to promote mandatory savings. These savings are well-protected and extremely regulated. The system is functioning well. As mentioned before, workers’ funds are outside the bankruptcy proceeding, which means that the workers’ interests are protected during insolvency.
NAMIBIA

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Treatment of Wage Claims

Under section 100 of the Namibian Insolvency Act of 1936, employees acquire a statutory preferential claim, or priority, for a certain portion of salary or wages and bonuses, limited to two months, in arrears. The remaining amounts are unsecured claims, termed concurrent claims. Employees also acquire a statutory right to claim compensation for the premature termination of their contracts of employment under section 38 of the Namibian Insolvency Act. Section 38 also grants employees an unliquidated unsecured claim for compensation for any loss they may have suffered by reason of such premature termination of the contract of employment.

Claims for wages in arrear rank amongst the scale of statutory preferences where employees rank in position number six, directly after funeral and deathbed expenses, sequestration and administration costs, (section 97(2)-(3)), specified sheriff charges incurred for legal proceedings before sequestration, (section 98(1)-(2)), a number of statutory claims like compensation for occupational injuries and diseases and amounts payable to pension funds which claims rank pari passu and abate in equal proportion if necessary, (section 99(1)(a)-(f)). Salary and wages then rank next, prior to preferential claims regarding taxes, claims secured by general mortgage bonds and unsecured, non-preferential claims, i.e. concurrent claims. (It is to be noted that the funeral and deathbed priority will only apply where the employer is an individual and not in case of a company for instance. In the latter instance the wage claim will rank in position number four.)

Certain provisions of the Namibian Labour Act of 2007 (the “NLA”), which Act has been accepted during December 2007, and is set to come into operation soon also deals with social claims in insolvency and related matters. Section 32(1) deals with the automatic termination of contracts of employment one month after sequestration or liquidation of the employer. If the NLA comes into operation without an amendment to section 38 of the Insolvency Act, section 32(1) will be in conflict with the Insolvency Act in this regard.

Section 32(3) of the NLA makes provision for a preferential right in favour of employees whose contracts have terminated in respect to “any remuneration due or monies payable to the employee” in terms of the NLA. Since these preferences override any other law, it seems that they will prevail at least over the preferences created under the Insolvency Act, and hence may rank first in the order of preferences as explained above. It might, however, well be that a super-priority that will even override secured claims has been introduced since the NLA does not define the term “preference”. Section 32(3) clearly states that “despite the provisions of any law to the contrary, an employee whose contract is terminated in the circumstances referred to in subsection (1) is a preferential creditor in respect of any remuneration due or monies payable to the employee in terms of this Act.” (Section 1 defines “remuneration” the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee; NLA, Part B deals with the calculation of wage rates.)

Apart from section 11(1) that sanctions every employee’s right to monetary wages to which he or she is entitled, section 35(3) of the NLA also grants a statutory right to severance pay of 1 week for every completed year of service to employees under certain conditions.

In terms of section 100 of the Insolvency Act, employees have preferential claims up to a maximum of 5,000 NAD (5,000 Namibian dollars is 659 CAD) for salary or wages in arrears but not exceeding
two month's salary or wages due and owing prior to date of sequestration. They also have preferential claims for bonuses due in respect of leave or holiday not exceeding 21 days provided that not more than 2,500 NAD shall be paid out (2,500 NAD is 330 CAD). Claims exceeding these limits are of a concurrent nature. The claims referred to in section 100(1) and (2) rank pari passu and abate in equal proportion, if there are not sufficient funds in the free residue to pay them in full. Likewise, the Insolvency Act will also need some adjustment to reflect the position regarding social claims as provided for by the NLA.

The free residue consisting of the proceeds of unencumbered assets and surplus income derived from encumbered assets is used to pay the creditors with preferential claims, and thereafter to pay the unsecured (concurrent) creditors. Preferential claims are those which enjoy priority by operation of law and which are paid in accordance with the prescribed order of preferences. Certain claims of employees against the estate of the insolvent employer rank as a statutory preferential claim to a limited extent.

The Insolvency Act places certain social claims regarding wages etc in arrear in the sixth ranking position where the insolvent employer is an individual and in the fourth ranking position in case of a company amongst the list of statutory preferences or priorities. When the 2007 NLA comes into operation, the provisions of this act will override any other law, including the Insolvency Act in this regard, and employees will then seemingly enjoy a super-priority although the status of the preference created by the NLA is not outlined in full.

Should the claim of a particular employee exceed the preferential amount he or she will have the right to claim the balance of his or her claim as a concurrent creditor at the end of the free residue payment queue. Although employees who lodge a claim for the preferential portion of their claims will usually not be held liable to make contributions for any shortfall to pay the sequestration/liquidation and administration costs of the estate, they may become liable to make contributions for those claims that they prove as concurrent claims. (See section 106 of the Insolvency Act.)

An amendment to the Insolvency Act will seemingly be needed to align sections 38 and 100 thereof with the new provisions in the Labour Act regarding the termination of contracts of employment as well as those regarding the preferences for social claims. (The 2007 NLA has replaced the 2004 Labour Act which act has never become fully operational.)

There is no central wage guarantee fund for employee compensation claims on insolvency.

Treatment of Other Compensation

The prescribed preferences for wages and bonuses in arrears in terms of the Insolvency Act are somewhat limited. However, as mentioned above, the NLA states that "despite the provisions of any law to the contrary," that employees are preferent creditors in relation to monies payable in terms of this Act which provisions are clearly broader than the provisions of the Insolvency Act.

Treatment of Pension Claims

Section 99 of the Insolvency Act also grants a preference in favour of a pension fund regarding pension contributions in arrears. There is not a State guarantee fund to guarantee pensions payable from private pension funds.

Director and Officer Liability for Social Claims

There is no special provision that makes directors or other officers of a company directly liable for wages etc in arrears. However, section 424 of the Companies Act of 1973 contains a general provision in terms of which directors or other officers can be held personally liable for debts of the company if a court founds that the business is or was being carried on recklessly or with the intent to defraud creditors.

Treatment of Collective Agreements
Section 70 of the NLA provides that collective agreements bind the parties and their members (such as trade union members) and that collective agreements vary every contract of employment, unless the contract of employment contains conditions of service that are more favourable to the employee than those contained in the collective agreement.

The NLA does not address the issue of whether collective agreements continue in an insolvency context or whether it also applies to new employers who may have taken a business over as a going concern under solvent or insolvent circumstances.

Namibian labour legislation does not specifically prescribe that all contracts of employment must be transferred from the old employer to the new employer if a business is sold as going concern. However, section 34(7) of the NLA does provide that if “there is a disguised transfer or continuance of an employer’s operation or were dismissed in terms of this section” that the employees may approach the Labour Court for appropriate relief which may include restoration of the operation, reinstatement or an award for lost of future damage. From this provision it may be gleaned that if a business is transferred as a going concern as part of bankruptcy proceedings the Labour Court may be requested to restore the operation.

Although it is clear that contracts of employment will in terms of the NLA be terminated automatically one month after sequestration or liquidation, it is less clear whether the section will also terminate collective agreements, such as recognition agreements or bargaining council agreements, on the same basis between the employer and it employees.

With regard to collective agreements a distinction should in general be drawn between collective agreements that only apply to the employer and employees of a particular employer and those that apply within a broader context to all employees and employers in a particular industry for instance. In so far as the provisions of collective agreements form part of individual contracts of employment, such individual contracts will also terminate as prescribed if the employer’s estate is sequestrated or liquidated. (Section 70(3) prescribes that a collective agreement is deemed to have been incorporated into the contract of employment of an employee.) It is nevertheless submitted the insolvency of one employer will not cause a collective agreement that apply to a whole industry in general to terminate.

Interaction of Insolvency Legislation with Other Social Claims Legislation

As indicated above, both the Insolvency Act as well as the NLA deals with aspects of wages and other compensation payable to employees but at present these provisions seem to be not well aligned in all respects.

Private pension funds are also not guaranteed by the State.

Tax issues in respect of social claims

There are no pertinent tax issues in respect of social claims.

Legislative Reform

The Namibian Labour Act of 2007 has recently been reformed, without much reference regarding the interaction between labour and insolvency law, and the recently passed legislation is likely to come into effect during 2008 although an amendment act to the Insolvency Act might address some of the aspects.

Historical, Political and Social Reasons for the Development of Namibia’s Approach to Social Claims

With Namibia’s independence from South Africa, it retained significant portions of South African Law. During the past few years Namibia published two new Labour Acts, one in 2004 and the latest one in December 2007 with the view of replacing the Labour Act of 1992 as well as the 2004 Act. The 2007 NLA covers most labour related issues, such as fundamental rights and protection, including a prohibition against child labour and forced labour, basic conditions of employment, termination of
employment, health and safety matters, and collective labour law issues. A new Companies Act has been proposed in 2004 as well but it is also not in operation yet and it will leave the corporate bankruptcy system largely intact. There is no immediate further elaborate reform process regarding the above insolvency related issues underway.
NEPAL

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Treatment of Wage Claims


The Insolvency Act provides preferential treatment to the whole amount of outstanding wages and remuneration of workers and employees. Vacation pay, gratuity, or provident fund payable to workers and employees is to be settled only after the payment of wages and remuneration. However, remuneration and allowance payable to the directors of an insolvent company are excluded from such preferential treatment. The Bank and Financial Institution Act and Insurance Act treat all the wage claims of employees and workers in the same way and do not exclude the claim of directors.

There are no restrictions on realization of the preferential claims, nor is there a cap on the amount that can be claimed and that is entitled to the preference.

Nepal does not have a wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

Nepal’s Insolvency Act does not explicitly mention severance pay, termination pay, and travelling and other expenses. However, it speaks of both gratuity and provident fund. Gratuity is paid at the termination of service whereas provident fund is paid to permanent employees after retirement from service.

Treatment of Pension Claims

The Labour Act and Labour Rules do not provide for any pension scheme. The labour laws have only provided for gratuity and provident fund. Only the workers or employees who have served the company for at least three years are entitled to gratuity. Similarly, only the employees or workers resigning from the service of the company either voluntary or because of old age are entitled to gratuity. The workers or employees terminated from service due to misconduct are not paid such gratuity. Only permanent employees are entitled to provident fund, which, as noted above, is paid to such employees on retirement.

Companies are required to deduct 10 % of the monthly salary of permanent employees each month and deposit this amount to provident fund by contributing 100% of the amount so deducted. The amount of the provident fund can be withdrawn only after the retirement from service.

Nepal does not have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

Director and Officer Liability for Social Claims

Under the Labour Act, a director or officer of a company may be fined up to Rs. 10,000 for failure to comply with the provisions of the Act or Rules. This includes the failure to make contributions...
towards provident fund or provide gratuity. But, there is no clear provision making directors or officers liable for social claims during insolvency; the provisions of the Labour Act are applicable notwithstanding the financial status of the debtor.

The Insolvency Act does not make directors or officers liable for the failure to pay social claims. The Act has not covered the liability of directors arising from the failure to make contributions towards provident fund or gratuity. Hence, in the absence of clear provisions, it seems that the directors and officers of a company cannot be made personally liable for the failure to make contribution towards social claims or provident fund.

Treatment of Collective Agreements

The Insolvency Act 2006 provides that after the initiation of the liquidation process of an insolvent company, the service of employees and workers are terminated. Since the services of employees or workers come to an end, collective agreements are terminated.

In Nepal there are two types of collective bargaining agent. In the case of a company where there is an authorized trade union in the company, the authorized trade union has the power to engage in collective bargaining and to enter into collective agreements on behalf of the employees and workers. Workers and employees may appoint their representative for the purpose of collective bargaining.

The laws of Nepal are not clear as to the status of the collective bargaining agent in the context of insolvency proceedings. However, from analogy it seems that the agent can represent workers and employees, lead negotiations with management, and have their say in the insolvency proceeding, including the rescue process of the company, unless the services of employees and workers are terminated in the liquidation process.

The Courts of Nepal have not experienced any issues with respect to legacy costs at this time.

Collective agreements are generally not modified for two years from the end of collective bargaining. Although laws are not express in this regard, it can be inferred that collective agreements can be bargained, modified or terminated during restructuring process.

There are no successive employer issues in respect of collective agreements after restructuring unless otherwise agreed between management and workers/employees. The Labour Law provides that a change in ownership of a company should not unfavorably affect rights and benefits of employees and workers.

Interaction of Insolvency Legislation with Other Social Claims Legislation

Under the Insolvency Act, the Commercial Bench has jurisdiction to hear and decide cases relating to insolvency. Under the Labour Act, the Labor Office has jurisdiction in respect of cases involving the issue of payment of social claims. The Labour Court has appellate jurisdiction.

Tax issues in respect of social claims

Nepal faces no tax issues in respect of social claims. All the social claims above the exemption level including gratuity and provident fund are subject to tax.

Legislative Reform

There is currently no legislative reform being considered.

Historical, political and social reasons for the development of Nepal’s approach to social claims

Nepal does not have a comprehensive and sophisticated legal framework dealing with social claims in the context of insolvency. This is because Nepal is a small economy and is in the process of reforming various commercial laws.
It has been approximately two years since the enactment of a separate insolvency law in Nepal. All of the previous laws relating to social claims in the context of insolvency provided preference for social claims over other liabilities. Workers and employees have played an important role in every political change in Nepal. Worker and employees are strongly organized and also affiliated to political parties through their national level trade unions. This may be one key reason for priority of social claims. The Commercial laws of Nepal are also influenced by laws of India and UK.
NEW ZEALAND

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Treatment of Wage Claims

A number of New Zealand acts covering differing circumstances provide essentially similar protection to employees. Broadly speaking, the protection is located in the legislation regulating the particular insolvency or enforcement process being employed. The principal enactments are:

(a) The Property Law Act 2007 (regulating the enforcement by a secured creditor of certain security interests other than through the appointment of a receiver who is appointed as agent of a debtor company);

(b) The Receiverships Act 1993 (regulating the enforcement of security interests over an incorporated debtor through the appointment of a receiver as agent of the debtor);

(c) The Insolvency Act 2006 (regulating the distribution of an unincorporated bankrupt’s assets by the Official Assignee);

(d) The Companies Act 2003 (regulating the distribution of the assets of a company in liquidation (i.e. bankruptcy).

The complexity of this structure has produced a number of anomalies and lacunae that are beyond the scope of the survey, and here, only the Companies Act 2003 is addressed. The substantive law under the other legislation mentioned is intended to produce essentially the same outcome.

Section 312 and Schedule 7 of the Companies Act 1993:

In simple terms, under s.312 and schedule 7 of the Companies Act, a liquidator of a company is required to accord employees the following preference:

Wages for the 4 months preceding liquidation, holiday pay, redundancy entitlements, deductions from wages and various other payments up to an aggregate maximum of currently $16,420 (periodically inflation adjusted) must be paid after liquidation costs but before other unsecured creditors. If there are insufficient unencumbered assets to meet this preference, these employee claims rank in priority to security interests over inventory and accounts receivable except for security interests that are duly perfected purchase money security interests over inventory or that are perfected security interests arising from the transfer of an account receivable for new value. Essentially this means that employees rank up to the statutory maximum before the holder of a general security interest over inventory or accounts receivable but behind purchase money security interests in inventory and factors’ claims to accounts receivable and behind all security interests over all other assets (including, somewhat anomalously, chattel paper).

There is no wage protection fund or state insurance for wage claims in New Zealand.
Treatment of Other Compensation

Holiday pay and severance and termination pay are protected as set out above. There is no express statutory protection for expense claims, though in limited circumstances these may give rise to a common law lien.

Treatment of Pension Claims

There is no express protection for pension claims in insolvency. However, most if not all employer superannuation schemes would be registered under the Superannuation Schemes Act 1989. Registration under that act involves compliance with various requirements, such as trust and reporting requirements, that should insulate an employer superannuation scheme from the employer's insolvency. The author is not aware of any New Zealand example of an employer funded superannuation scheme that has become insolvent as a result of the employer's insolvency. Nevertheless, the insolvency of an employer may leave a scheme without funding for future, as yet unaccrued, benefits – though as the employees will generally be dismissed at the time of insolvency it is unlikely additional benefits will continue to accrue for any significant period after the date of insolvency. Also, it is not uncommon for an insololvency administrator to attempt to claim any surplus in an over-funded defined benefit superannuation scheme and this can result in litigation.

There is no guarantee fund or insurance system for superannuation schemes.

Pension contributions deducted from an employee's wages are protected in the manner set out in as wages claims above. Although they do not appear to be limited to deductions made in the 4 months preceding insolvency, they are part of the $16,420 aggregate maximum preference entitlement. In 2007, New Zealand introduced a new scheme to encourage retirement saving, known as Kiwisaver. Existing employees can opt into the scheme and new employees, unless they opt out, are required to contribute 4% if salary. These specific pension deductions are not caught by the cap of $16,420. Nevertheless, the new scheme is being introduced over 4 years from 2008 for employers to match contributions. This starts at 1% in 2008, 2% in 2009 and so on up to a maximum of 4%. These contributions are not secured.

Director and Officer Liability for Social Claims

There is no express personal liability on directors and officers for employee claims. However, there are general duties on directors under ss. 135 and 136 of the Companies Act for reckless and fraudulent trading. The author is not aware of any cases where these provisions have been used expressly to compensate employees. If any claims were made against directors for reckless or fraudulent trading, they could be compromised during an insolvency administration.

Treatment of Collective Agreements

Both collective and individual employment contracts are regulated by the Employment Relations Act. There is no express protection in insolvency in that legislation. At common law, an employment contract will generally automatically terminate when a company is put into liquidation and this remains the law in New Zealand. On the other hand, the appointment of a receiver does not automatically terminate employment contracts. Under s. 32 of the Receiverships Act, a receiver is given 14 days from the date of appointment to give notice terminating an employment contract, otherwise the receiver is personally liable for wages (which would include holiday pay and possibly pay in lieu of notice), but not other benefits, that accrue during the receivership. A receiver is under a common law duty not to cause a company to commit a criminal offence but although a breach of an employment contract attracts a pecuniary penalty under the Employment Relations Act, it is not clear whether this imposes a duty on a receiver not to cause a company to breach an employment contract.

The Employment Relations Amendment Act (no 2) 2004 amended Employment Relations Act 2000 by the addition of new Part 6A. This new part introduced new provisions that provide for continuity of employment for employees where their employer's business is sold or the services the employees
provide to the employer are contracted out elsewhere. New sections 69A-O introduced enterprise transfer regulations into NZ as recognised that such measures were common place in Europe. Basically employees are divided into 2 categories. Specified employees include those in the cleaning services and food place services in any workplace, laundry services in the education, health and residential care sectors, etc. Such employees are given rights on a proposed restructure if the work they perform is to be performed by or on behalf of another person, to elect to transfer to that new employer. The sections are to include more general protections relating to the process in restructuring affected all other types of employees too.

Interaction of Insolvency Legislation with Other Social Claims Legislation

To the extent that other legislation imposes criminal sanctions, an insolvency administrator would be under a common law duty not to cause the insolvent party to commit a criminal offence. However, there is a tension between this principle and the principle that an insolvency administrator should not be required to incur indebtedness for which the administrator is personally liable. For example, under s.32 of the Receiverships Act, a receiver is personally liable for debts incurred post receivership but the courts are very reluctant to require a receiver to take on such indebtedness to meet even statutory obligations of the debtor. The position therefore is probably that if the debtor has funds that can be used to avoid criminal liability under, for example, occupational health and safety legislation, a receiver should use the funds for that purpose but a receiver will not be required to borrow to do so.

Prior to insolvency there is a structure of employment tribunals and courts to resolve worker claims but post insolvency these are likely to be dealt with by the High Court, which is the court that will be supervising the insolvency administration.

Tax issues in respect of social claims

Employers are required to deduct taxes from employee wages. To the extent that an employer fails to do so, the Inland Revenue Department (the Tax Office) is a preferential creditor under the same structure outlined above for employees but ranking behind employees. In theory, under New Zealand tax legislation the employee is also liable for deductions not duly made by the employer but in practice the Inland Revenue is unlikely to pursue such claims against employees.

Legislative Reform

There have been recent legislative amendments to the various enactments giving preferential treatment to employee claims in insolvency, intended to rectify flaws in the regime, and academic commentators have suggested reforms, but there are no proposals for substantive reform presently under active consideration.

The New Zealand Law Commission in its *Priority Debts in the Distribution of Insolvent Estates: an Advisory Report to the Ministry of Commerce*, Wellington, 1999, suggested two principal justifications for giving employees preferential status. First, as a member state of the International Labour Organisation, New Zealand should aim to comply with the Protection of Workers’ Claims (Employer Insolvency) Convention 1992. Secondly, the Commission identified a community expectation that employees should be protected on the basis of their vulnerability and inability to take meaningful steps to protect themselves from employer insolvency.

The Law Commission in this Report also suggested at para 89:

“It seems to us timely to consider, in the context of the insolvency law review, whether the establishment of a Wage Earner Protection Fund would be a better means of securing the protection for the vulnerable employees at whom the priority is directed. Many funds operate around the world, and empirical evidence as to the advantages and disadvantages of a fund no doubt exists. We recommend that the Ministry of Commerce considers this issue. We are happy to further assist if required.”
However the Ministry of Economic Development did not support this suggestion.586

Historical, Political and Social Reasons for the Development of New Zealand’s Approach to Social Claims

Historically, and until the coming into force of the Personal Property Securities Act 1999 on 1 May 2002, New Zealand broadly followed the English and Australian models for protecting employee claims in insolvency. The protection mechanism was to give employees, who are one class of a number of classes of creditors whose claims are given preferential treatment, a limited priority over other unsecured creditors and over creditors secured by a floating charge. The New Zealand law substantially diverged from the English and Australian position first when those other jurisdictions abolished the preferential treatment of certain Crown claims (the Crown preference remains in New Zealand despite calls for its abolition) and secondly when New Zealand enacted a Personal Property Securities Act.

The Personal Property Securities Act rendered the floating charge redundant and so it was necessary under the new secured transactions law to restructure the mechanism by which employees and others were given preferential treatment. As all security interests were treated alike under the new law, it was no longer possible to give employees priority over floating charges but not fixed charges, in effect, all charges under the Personal Property Securities Act are fixed charges. Designing a new mechanism to provide the desired protection for employee claims proved to be problematic and there have been a number of amendments made since the Personal Property Securities Act was enacted. The answers to the survey questions are based on the latest New Zealand position following the coming into force of the Companies Amendment Act 2006 and related legislation.

586 See para 7.2.4 of: (see the link to the MED site): http://www.med.govt.nz/templates/MultipageDocumentPage_6137.aspx#P171_27290.
NIGERIA

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Treatment of Wage Claims

Preference for wage claims in Nigeria is established in section 494 of the Companies and Allied Matters Act 1990. The preference extends to the actual wage or salary of the employee, vacation pay, and any accrued workers’ compensation. While there are no legal restrictions on the realization of the preference claim, in practice where the assets realized in the course of the liquidation are not sufficient to meet the preferential clauses, employees may not be paid the entire amount.

Nigeria has no wage protection fund or guaranteed insurance for wage claims during insolvency. Employees are paid compensation and benefits after the assets of the company have been realized in a liquidation or when the assets of the company are sold in receivership.

Treatment of Other Compensation

There is a priority for vacation pay, but the amount subject to the priority is not stated in legislation. There is no priority for severance pay, termination pay, or traveling expenses.

Treatment of Pension Claims

Pensions are not granted a super-priority in Nigeria; instead they are governed by the Pension Reform Act 2004. There is no pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

Director and Officer Liability for Social Claims

Directors are liable for breach of duty with respect to the company; however there is no specific liability for social claims.

Treatment of Collective Agreements

In Nigeria, during a liquidation the liquidator does not continue collective agreements as its powers are restricted to the realization and distribution of the assets of the company. In a receivership, the receiver is not compelled to continue such agreements and would usually not continue them.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The provisions of the Companies and Allied Matters Act 1990 take priority to the exclusion of other statutes with respect to social claims in insolvency. Most other acts dealing with labour relations do not make provisions for the treatment of such relations during insolvency.

The Federal High Court, which is the country’s equivalent of a commercial court, has jurisdiction to resolve worker claims. Such issues can be resolved by the court in a court-ordered liquidation.

Tax issues in respect of social claims

There are no tax issues in respect of social claims.
Legislative Reform

There are currently proposed changes to the Nigeria Companied and Allied Matters Act 1990 and the promulgation of an insolvency law to deal with all specific issues arising out of insolvency.

Historical, Political and Social Reasons for the Development of Nigeria’s Approach to Social Claims

Nigeria’s approach to insolvency law was borne out of a realization that a new Companies Act was required after the Companies Act 1968 in order to respond to the evolution and development of economic and commercial activity.
NORWAY

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Treatment of Wage Claims

According to the Satisfaction of Claims Act (8 June 1984 no. 59) section 9-3, claims for wages or other remuneration for work in the debtor's service are first degree preferential claims. Wages and pensions have the same priority under this section of the Act. If the assets of the estate are insufficient to cover wages and pensions, the Act Relating to the State Guarantee for Wage Claims in the Event of Bankruptcy etc. (14 December 1973 no. 61) section 1 decides - as a main rule - that the state guarantees claims for wages and pensions. However, the guarantee is limited to an amount equal to two times the basic amount. This amount is decided by the Parliament every year, currently NOK 66,812.667 approximately EUR 8,400 and US$ 12,350. Hence the priority is for two times the basic amount, and thus is currently NOK 133,624.668

Treatment of Other Compensation

The treatment of vacation pay, severance pay, termination pay, and traveling and other expenses is unknown.

Treatment of Pension Claims

Under the Satisfaction of Claims Act, (8 June 1984 no. 59, section 9-3) pension claims are treated the in the same way as wage claims, and as such are preferential claims of the first degree. The Act Relating to the State Guarantee for Wage Claims in the Event of Bankruptcy etc. (14 December 1973 no. 61) provides that pension claims are guaranteed by the state. As with wage claims, the guarantee is limited to two times the basic amount, or NOK 133,624.669

Director and Officer Liability for Social Claims

Director and officer liability for social claims is unknown.

Treatment of Collective Agreements

The treatment of collective agreements is unknown.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The interaction of insolvency legislation with other social claims legislation is unknown.

Tax issues in respect of social claims

The existence of tax issues in respect of social claims is unknown.

Legislative Reform

The existence of any proposed legislative reform is unknown.

667  66,812 NOK is 12,280 CAD.
668  133,624 NOK is 24,560 CAD.
669  133,624 NOK is 24,560 CAD.
Historical, Political and Social Reasons for the Development of Norway’s Approach to Social Claims

The historical, political and social reasons for the development of Norway’s approach to social claims are unknown.
PERU

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Treatment of Wage Claims

Peru has a wage preference or super-priority with regard to employee wage claims. Pursuant to the Constitution (article 24) and the Law about Labour Privileges, Legislative Decree N° 856 (article 2), employee wage claims are preferred in comparison with all other claims indebted by an employer. Complementarily, article 42 of the General Bankruptcy Law - Law N° 27809 (hereinafter the GBL), sets forth that employee wage claims (compensations and social benefits) have the first level of priority in dissolution and liquidation proceedings.

The preferential treatment is entitled to the entire wage claims, including principal, interests and expenses specifically related to these claims (e.g. judicial fees, etc.).

Currently, there are no restrictions on realization of the preferential claim in Peru. Peru does not have a wage protection fund or guaranteed insurance for wage claims during insolvency.

Treatment of Other Compensation

There is vacation pay entitlement that is the total amount, including vacation pay and additional compensation. The high-level employees are only entitled to the vacation pay, not to the additional compensation.

There is severance pay that is the total amount. In case the layoff isn’t based in a "fair cause", the employer must recognize a severance pay. There is termination pay which is the total amount. The compensation for time of services (CTS) is deposited in a banking account each semester by the employer during the labour relation. When the relation finishes, the employee is entitled to withdraw the CTS. There is no pay for travelling and other expenses.

With the exception of the compensation for time of services (CTS), which is equivalent to a monthly compensation per year, there is no other wage or compensation guarantee fund or insurance program.

Treatment of Pension Claims

Peru grants pension claims a super-priority. It is not a privilege based on a certain amount of money. It is a super-priority status set forth in the General Bankruptcy Law, which provides: (i) in a liquidation scenario, full compensation for pension claims (along with other labour related claims) in a first priority order with respect to any other claims against the debtor; and (ii) in a restructuring scenario, the obligation to pay labour claims (including pension claims) an amount not less than 30% of the total annual payments performed by the debtor within the restructuring plan.

There are no restrictions on realization of payment of such claims.

Peru does not have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

Unfunded or under-funded pension liabilities are included in the broader category of labour claims. In a liquidation scenario, they will have a first priority rank for payment with the result of the liquidation of the debtor’s assets. In a restructuring scenario, pension claims shall be paid in accordance with the provisions of the restructuring plan. However, the restructuring plan must contemplate that at
least 30% of the total annual payments performed under the plan, are destined to proportionally pay labour claims (including pension claims) (Section 66.4 of the GBL).

**Director and Officer Liability**

There is not a specific statutory provision regarding the liability of directors and officers for social claims. However, there is a general rule (Section 51.2 of the GBL) by which directors and officers during the insolvency proceeding shall be liable for violation of applicable laws or the debtor’s bylaws and for any acts committed with gross negligence, wilful misconduct or abuse of faculties. Therefore, if the lack of payment of pension plans is caused due to the directors or officers’ gross negligence or wilful misconduct, they may be personally liable for the damage caused to the employees and workers. There is no cap or limit to such liability.

A claim against a directors and officers of an insolvent debtor will be outside the insolvency proceeding and shall not be affected by it. In principle, a claimant against the directors or officers can settle her dispute at any time, regardless the status of the insolvency proceeding.

**Treatment of Collective Agreements**

There is no specific provision regulating collective agreements in the GBL. In a liquidation scenario, all the debtor’s agreements shall be terminated and all activities shall be ceased. An exception is that there is a chance to liquidate a debtor under an “ongoing business” scheme for one year from the commencement of the liquidation proceeding. There are no provisions regulating the possibility of bargaining, modifying or terminating collective agreements during restructuring proceedings. However, in a restructuring scenario, the collective agreement continues and it may be amended in accordance to the regular channels of collective bargaining provided for in the applicable labour legislation.

Please note in this case, however, that the restructuring plan to be approved by the creditor’s meeting can vary the terms and conditions (but not the amounts) of payment by the debtor of the labour debt past due and delinquent (as to the date of commencement of the insolvency proceeding), and such new terms and conditions may validly differ from those provided in the collective agreement. Nonetheless, the collective agreement shall survive and shall continue regulating the workers labour terms and conditions after the commencement of the insolvency proceeding.

In an insolvency proceeding, the labour creditors shall appoint a representative before the creditors meeting. There are not any special features regarding collective bargaining or collective agreements during the insolvency proceeding.

It is not customary for Peruvian corporations to have legacy regimes at all. In practical terms, there are only legacy costs in corporations owned by the workers, the so called “cooperativas” where such pension regimes have led those corporations to an economic insolvency and subsequently bankruptcy.

There are not specific regulations on successor employer issues in respect of collective agreements after insolvency restructuring, in terms of purchasers of the business or insolvency professionals that continue to operate the business after insolvency proceedings. However, in general terms, when the acquisition of the insolvent’s business is through the purchase of shares from the debtor’s shareholders, the acquirer shall be the new owner of the debtor and all collective agreements shall continue to exist.

If the acquisition of the business is accomplished within the debtor’s liquidation proceeding, then it must be taken into account that: (i) If the purchaser only acquires assets, there will not be any collective agreements issues, as the collective agreement shall remain in the debtor’s company; (ii) if the purchaser acquires assets under an “ongoing business” basis (e.g. acquisition of a fishing plant, where the acquirer wants to keep the current workers of such plant), the purchaser may be forced to assume all pre-existent labour claims associated with the ongoing business. In such cases, to avoid such risk, purchasers have requested that a specific spin-off is performed to divest the debtor’s assets in order to subsequently purchase only the shares of the divested company, thus limiting the purchaser liability for social claims to the value of the assets of the divested company.
Interaction of Insolvency Legislation with Other Social Claims Legislation

The GBL, in its Fifth Complementary and Final Provision, indicates that the employer (liquidator) is authorized to perform a “collective layoff”, concluding the labour relations with all employees, when the Creditors Meeting has approved a Liquidation Agreement in a dissolution and liquidation proceeding. This collective layoff does not imply any severance pay in favour of the employees.

In general, the judicial authorities specialized in labour legislation (judges and courts) have jurisdiction to resolve worker claims. However, as an exception, the administrative authority in charge of insolvency proceedings (INDECOPI) can resolve disputes regarding the amount or origin of claims owed in favor of employees from distressed companies. INDECOPI’s decisions can be challenged before judicial authorities specialized in administrative legislation.

Tax Issues

There are no particular tax issues in respect of social claims in your jurisdiction.

Legislative Reform

There are not current proposed reforms on this matter that could be successful or accomplished in the short or mid term.

Historical, Political and Social Reasons for the Development of Peru’s Approach to Social Claims

Peru has always had a deeply rooted policy in favor of social claims and protection of workers’ rights. Despite the liberalization process initiated in the 90’s, which resulted in a certain flexibility of labour regulations, the Peruvian Constitution expressly states that the main obligation of any employer is the payment of its workers’ wages and social benefits. This “super-priority” rule provided at a constitutional level has been unavoidably observed and respected in all subsequent laws and regulations, including those related to bankruptcy issues.

The inexistence of enough working places and opportunities, the still elevated rates of unemployment, make difficult for workers to easily migrate from one job to another. From this point of view, if regulations do not preserve the possibility of recovery of social claims in favor of the workers, they could be left in an unbearable situation: loosing their jobs in an insolvent company and without possibility of having pension funds or social benefits as a “cushion” until they get a new place to work in. This is, without entering in the debate of the actual benefits of this regulation, one of the main policy reasons supporting the super-priority granted to labour claims in our legislation.

One important issue is the differentiated regime for distribution of payments of social claims under a restructuring proceeding and under a liquidation proceeding. During the restructuring proceedings, payments of labour claims are distributed on a simple proportional basis; this is, the total amount to be paid for labour claims is divided and distributed equally among all the workers, regardless the actual amount of each worker’s claim. Differently, under a liquidation procedure labour claims are paid on a “pro-rata” basis, and therefore whenever the liquidator has monies to distribute among the workers, distribution shall be made considering each worker’s claim proportion with respect to the total amount of labour claims owed by the insolvent and, therefore, each worker shall receive a different amount depending on the size of their claim (articles 66.4 and 88.3 of the GBL).
Treatment of Wage Claims

The New Civil Code of the Philippines creates a priority for wage claims in conjunction with the Labour Code. According to the Code, after taxes owed to the government, wage claims enjoy preferential treatment. The relevant provisions are Articles 2241-2244, Civil Code and Article 110 of the Labour Code.

In order for Article 110 of the Labour Code to find application, there must be bankruptcy or judicial liquidation proceedings instituted against the employer. Furthermore, under Articles 2241 and 2242 of the Civil Code, a mortgage credit is a special preferred credit that enjoys preference with respect to a specific/determinate property of the debtor. On the other hand, the worker’s preference under Article 110 of the Labour Code is an ordinary preferred credit. While this provision raises the worker’s money claim to first priority in the order of preference established under Article 2244 of the Civil Code, the claim has no preference over special preferred credits.590

The preferential right of workers and employees under Article 110 of the Labour Code may be invoked only upon the institution of insolvency or judicial liquidation proceedings. Indeed, it is well-settled that “a declaration of bankruptcy or a judicial liquidation must be present before preferences over various money claims may be enforced.” But debtors resort to preference of credit, giving preferred creditors the right to have their claims paid ahead of those of other claimants, only when their assets are insufficient to pay their debts fully. The purpose of rehabilitation proceedings is precisely to enable the company to gain a new lease on life and thereby allow creditors to be paid their claims from its earnings. In insolvency proceedings, on the other hand, the company stops operating, and the claims of creditors are satisfied from the assets of the insolvent corporation. The present case involves the rehabilitation, not the liquidation, of petitioner-corporation. Hence, the preference of credit granted to workers or employees under Article 110 of the Labour Code is not applicable.591

Next to taxes owed to the government, wage claims enjoy preferential treatment. According to Article 110 of the Labour Code, in the event of bankruptcy or liquidation of an employer’s business, workers are to enjoy first preference as regards their wages, and other monetary claims. Under the Labour Code of the Philippines, in a business closure, employees will be entitled to receive as separation pay equivalent to ½ month’s pay for every year of service. However, where the closure was a result of severe business losses, the company is excused from paying any separation pay. Article 283 provides that in case of retrenchment to prevent losses and in cases of closures or cessation of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one month pay or to at least one-half month pay for every year of service, whichever is higher.

The Philippines does not have a wage protection fund or guaranteed insurance for wage claims during insolvency.

590 Barayoga vs. APT, GR No. 160073.
591 Rubberworld vs. NLRC, GR No. 126773, April 14, 1999.
Treatment of Other Compensation

Under the Labour Code of the Philippines, in a business closure, employees will be entitled to receive severance pay equivalent to ½ month’s pay for every year of service. However, where the closure was a result of severe business losses, the company is excused from paying any severance pay.

Treatment of Pension Claims

There is no distinction in Philippine laws between a pension claim and a general wage claim. Hence, pension claims receive the same preference as wage claims. There are certain rules in respect of a Philippine type of receivership, which allows suspension of payments of creditors’ claims, including claims of employees for their pensions, even if the matter is already pending before the court.

The Social Security System guarantees pension payment in the Philippines, specifically, ss. 12, 12-A, and 12-B of Social Security Law, Republic Act (“RA”) 1161, as amended by RA 8282. The system is funded through employer/industry tax and is sufficiently funded. The contributions come from both the employer and employee based on the salary/wage rate of the employee concerned. Failure to comply with this requirement on the part of the employer may entail stiff penalties, including criminal liability. The government also contributes and guarantees the solvency of this fund. (s. 18, Employee’s Contributions and s. 19, Employer’s Contributions, Section 20, Government’s Contributions, Social Security Law, Republic Act 1161 as amended by RA 8282).

The Labour Advisory on Retirement pay law also states that the PAG-IBIG Fund can be considered as a substitute retirement plan of the company for its employees provided such scheme offers benefits that are more or less than what the employee is entitled to under RA 7641.

Director and Officer Liability for Social Claims

Under Article 248 of the Labor Code, officers and agents of the corporation, association or partnership who have actually participated in, authorized or ratified unfair labor practices may be held criminally liable. Under Article 248 of the Labour Code, officers and agents of the corporation, association or partnership who have actually participated in, authorized or ratified unfair labor practices may be held criminally liable. A corporate officer of a Philippine corporation becomes personally liable for certain corporate acts under the following circumstances:

1. When he or she willfully and knowingly votes or assents to patently unlawful acts;
2. When he or she is guilty of gross negligence or bad faith in the conduct of the corporate affairs; or
3. When he or she acquires personal or pecuniary interest which is in conflict with his duty as such officer.

In Chua vs. National Labor Relations Commission, the SC ruled that labor claims cannot proceed independently of a bankruptcy liquidation proceeding, since these claims “would spawn needless controversy, delays, and confusion.

During insolvency, just like any other claim against the company, directors, officers and shareholders may be held accountable for the portion of their subscription which remains unpaid; assuming the corporate assets are insufficient to satisfy all claims. This is provided for in the Corporation Code of the Philippines and the rules on Insolvency (Act No. 1956).

Claims against directors and/or officers may be compromised or settled during an insolvency workout or insolvency proceeding in the Philippines. The cap to such liability is to the extent of their equity in the corporation subject to the insolvency.

Treatment of Collective Agreements

Under Philippine receivership and insolvency rules, the enforcement of provisions in the collective bargaining agreements regarding claims is suspended. Unless designated as an assignee, liquidator or receiver, by the appropriate court or the Securities Exchange Commission, as the case may be, the collective bargaining agent will just be like any ordinary representative of an ordinary creditor.
during insolvency. While there is no express statutory language, the collective agreement itself or any court approved recommendation by an assignee, liquidator or receiver may provide the same effect.

With respect to legacy costs, one issue that had arisen in the Philippines is the fact that these costs do not fall as an exception during receivership proceedings which renders useless the provisions of the Civil Code and the Labour Code on preference of credits.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

Some confusion results from the fact that despite the clear mandate of the Philippine Constitution and the Civil Code on preferential treatment of wage/pension related claims, actual application of these laws and the existence of provisions in the Labour Code that exempt the company from paying severance/termination pay in case of severe business loss resulting in closure, or the rules on corporate rehabilitation which allows suspension of payments by the debtor company to any of its debtors, including employee claimants renders these ‘protective’ legislation useless. In the case of Rubberworld vs. NLRC et al, the Supreme Court ruled that all actions for claims against the corporation pending before any court, tribunal or board shall ipso jure be suspended, including labour claims pending before the NLRC. In Chua vs. National Labor Relations Commission the Supreme Court ruled that labor claims cannot proceed independently of a bankruptcy liquidation proceeding. The National Labor Relations Commission has jurisdiction to resolve worker claims. Article 217 of the Labor Code. However, the court hearing a receivership proceeding can declare all other proceedings in other tribunals suspended as long as it considered as a monetary claim against the company under receivership. Voluntary and Involuntary Insolvency proceedings are within the jurisdiction of the Regional Trial Court (RTC). Jurisdiction over suspension of payment proceedings of corporations was originally with the SEC under PD 902-A but it is now with the RTC by reason of the amendment introduced by Subsection 5.2 of the Securities Regulation Code.

**Tax issues in respect of social claims**

In the Philippines, retirement or social security system benefits are exempt from taxes

**Legislative Reform**

There is currently no legislative reform being considered.

**Historical, political and social reasons for the development of Mexico’s approach to social claims**

The Philippine Constitution mandates protection to the interests of labour. Hence, historically, the Philippine branches of government have enacted, implemented or interpreted laws that tend or appear to observe this mandate. Section 18, Article II and Section 3, Article XIII of the 1987 Philippine Constitution.
Treatment of Wage Claims

Article 342 the Act of 28 February 2003, the Polish Law on Bankruptcy and Corporate Recovery (Journal of Laws 2003 No. 60, item 535 with further amendments; the “Bankruptcy Act”), ranks claims against a debtor-company in the following order:

First ranking are the costs of bankruptcy proceedings, claims arising from contributions in respect of retirement pensions, other pension insurance and sickness insurance, claims arising from employment relationships, claims of agricultural producers arising from certain delivery agreements for the preceding two years, annuities and compensation for health impairment, alimony claims, claims arising from the actions of the bankruptcy trustee or administrator, claims under mutual contracts concluded by the bankrupt prior to the declaration of the bankruptcy that were performed upon the bankruptcy trustee’s demand, claims on the basis of unjust enrichment of the bankruptcy estate and claims arising from the actions made in the course of the bankruptcy proceedings at the court supervisor’s consent,

Second ranking are tax and other public tributes and social security premiums (if not satisfied in the first category) due for one year immediately preceding the declaration of bankruptcy together with accrued interest and enforcement costs.

Third ranking are other claims not satisfied in the higher ranking categories, together with interest due for one year immediately preceding the declaration of bankruptcy, contractual damages and costs of court proceedings and enforcement.

Fourth ranking is interest not paid out in the higher ranking categories, in accordance with the ranking of priorities in which the principal amount is satisfied, court and administrative fines and donations and legacies.

In addition, the remuneration of employees employed in the bankrupt’s enterprise, due for a period following the declaration of bankruptcy, and severance pay and damages related to the termination of the contracts of employment, due to these employees, constitute the costs of bankruptcy proceedings (Article 230 item 3 of the Bankruptcy Act). Accordingly an employee’s claims such for wages or a pension are satisfied from the bankruptcy estate under category number one (Article 342 of the Bankruptcy Act) – before many other kinds of claims.

Pursuant to Article 343 section 1 of the Bankruptcy Act, claims of the same rank may be satisfied, subject to certain conditions, upon funds incoming to the bankruptcy estate. Pursuant to Article 344,

The authors note that the foregoing is a restatement of the pertinent provisions, and not an exact translation of the law.
if the sum allocated for distribution is not sufficient to satisfy all the dues in full, dues from the remaining categories are satisfied only after the full satisfaction of the dues of the preceding categories, and when the assets are not sufficient to satisfy in full all the dues in the same category, such dues may be satisfied pro rata to the amount thereof. However, in practice, claims secured with, among others, mortgages, registered pledges and pledges will in be satisfied with an ultimate priority, e.g. from the funds received as a result of the sale of the encumbered asset (less the costs of any such sale), because under Article 345-346 of the Polish Insolvency and the Bankruptcy Act only the excess left from realization and satisfaction of the secured claims from the collateral is included in the bankruptcy estate and divided pursuant to Article 342 of the Bankruptcy Act. For the purpose of voting on the arrangement, the creditors who are entitled to dues under an employment relationship and farmer’s dues, are assigned to a separate category of creditors (a creditors list). (Art. 278 of the Bankruptcy Act).

The preferential treatment of employment-related claims under Polish insolvency law is not limited as to amount and duration of employment.

A Guaranteed Employees’ Claims Fund (the “Fund”) has been established to guarantee wage claims. The Fund is regulated by the Employee Claims Protection Act. The Fund receives financing from industry, costs to the system, employer taxes, and general taxes. The main income of the Fund comes from employer taxes that are not strictly a tax, but rather, pursuant to Article 9 of the Employee Claims Act, an individual and mandatory contribution of every employer. These mandatory contributions only apply to business entities as defined in Article 2 of the Employee Claims Act.

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THE SHARE OF DIFFERENT INCOME SOURCES IN THE TOTAL INCOME EARNED BY THE GUARANTEED EMPLOYMENT BENEFITS FUND IN 2006

<table>
<thead>
<tr>
<th>Source</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank interest</td>
<td>7.2%</td>
</tr>
<tr>
<td>Contributions from employers</td>
<td>39.8%</td>
</tr>
<tr>
<td>Debt collection</td>
<td>33.6%</td>
</tr>
<tr>
<td>Other</td>
<td>19.4%</td>
</tr>
</tbody>
</table>

In the event of declaration of insolvency of an employer, the Fund pays remuneration claims to employees for up to three months on their request, if termination was effected no later than nine months before insolvency. However, the total amount paid to the employee may not exceed three times the national average wage from the previous quarter as announced by the Central Statistical Office, i.e., approx. PLN 8,100. 8,100 PLN is 3,291 CAD.
remuneration and certain other elements such as e.g. cash equivalent for unused vacation leave, or compensation for early notice of termination due to insolvency. All other employment-related claims (bonuses etc) are subject to standard employment claims handling procedure during insolvency as described herein. Employees can also claim the remainder of their due work-related claims in the course of the bankruptcy procedure and are ranked in the first category of claims to be fulfilled from the funds of the insolvency estate. Bankruptcy proceedings tend to take a long time to complete and the wait periods for insolvency estate funds payment are very long.

Fulfillment of further employee’s claims not compensated by the Fund is effected via standard bankruptcy proceedings process i.e. employees may file motions similar to those filed by other creditors of the insolvent company and then general rules of insolvency procedure apply. Although the Fund is normally fully able to fulfill its duties, in the event of big, mostly state owned or state controlled, entities being declared insolvent, the Fund usually does not have the means to pay all the employees’ claims. Such a situation occurred in the past when a major Polish shipyard declared bankruptcy and

Fund was unable to pay the claims of several thousand employees. Auxiliary budget grants were then given to the Fund to alleviate the problem. Should a major employer declare bankruptcy in the future, the situation would most probably be repeated. In 2006, the Fund exceeded its budget by 1.8%.

The state is not subrogated to the claims of employees in any way. However, having paid the employees claims, the Fund subrogates the employee as creditor in the amount of those paid claims during the insolvency procedure, also having the employee's preferential status. The Fund, though also funded by state revenue is the sole entity subrogating the claims of the employees during bankruptcy proceedings in the event of payment of relevant funds to the employees from the Fund.

Treatment of Other Compensation

Under Polish law, vacation pay, severance pay, termination pay, and traveling and other expenses are all granted priority along with other wages and remuneration for employees’ work. These claims are subject to the same general conditions as wage claims.
Treatment of Pension Claims

Poland grants super-priority to the entirety of claims concerning social security contributions. This preference is not limited as to amount or by the duration of employment.

There is no separate fund guaranteeing pension claims, but the Guaranteed Employees’ Claim Fund applies to social security contributions. The contribution to the Fund is set forth every year in the state revenue (0.10 % of the basis of the calculation of the pension contribution in 2008). Such contribution is paid by employers.

Unremitted pension contributions are listed in the first class category of the receivable debts and dues that can be satisfied before claims of lower categories. Pension contributions cannot be subject to arrangement in the course of the bankruptcy proceedings unless a competent authority agrees so. The only allowed arrangement in respect of pension contributions is to pay pension contributions in installments.

It is possible for an employer to establish additional occupational pension programs for its employees. Such programs have a pre-funding nature in that the employer funds the pension promise. In such additional programs, the basic contribution is financed by the employer, however an employee may declare a supplementary contribution. Such programs may be established in the following manner:

1. A pension fund;
2. An agreement regarding an employer contributing an employee’s contributions to an investment fund;
3. A group life insurance contract between employees and an insurance company in the form of group life insurance with an insurance capital fund;
4. Foreign management.

The collected contributions are exclusively the property of the employee; therefore, they are not affected by the insolvency of the employer. Additional guarantees regarding the security of the
contributions result from the fact that such program is managed by professional, external, financial institutions. It should be noted that payments from the social security system are limited and relatively low.

**Director and Officer Liability for Social Claims**

Under Polish law, corporate directors and the liquidators are generally liable for a lack of due diligence. Thus, if they fail to observe the legal requirement to motion for bankruptcy, they can be fined, or even imprisoned. However, it must be emphasized, that it is general liability resulting from the Commercial Companies Code of 15th September 2000 (Journal of Laws 2000 No 94 item 1037 as amended) (hereinafter the “Commercial Companies Code”), not specified separately by the bankruptcy provisions. In the event that enforcement proceedings (including insolvency proceedings) against a company are unsuccessful, its corporate directors are liable for the company’s obligations on a subsidiary basis. Such obligations also concern state levies and taxes and pension payments. Therefore should pension claims not be satisfied from the funds of the insolvency estate, corporate directors would be liable with all their assets for the unfulfilled claims (including social security premiums).

A corporate director could exonerate himself or herself if there is evidence that the director filed the motion for declaration of bankruptcy in due time, or was unable to file such motion due to reasons not attributable to him or her, or that despite non-filing of such motion, a creditor has not been damaged.

Polish law does not set any limitations to the compensation for damages suffered by the company due to the actions of its directors. These are not liquidated damages depending on the discretion of the respective court. With respect to criminal liability, the provisions of Polish law specify the prison punishment and the fine that can be imposed. The type and extension of the penalty depends on specific case and court’s decision. However, the cap for the fine is, in general, PLN 72,000 and for the prison sentence, the maximum is five years.

Claims against the members of the management board are settled under separate proceedings from the insolvency proceedings.

**Treatment of Collective Agreements**

In the case of insolvency or bankruptcy, collective agreements are not terminated by the operation of law. They may only be terminated by a unanimous declaration of the parties to the agreement, on the expiry of its term and on the expiry of the period of notice of termination given by one of the parties. However, there are other applicable provisions of the Labour Code, which allow the termination of the employment relationships on insolvency or bankruptcy. Therefore, even employees who are subject to special treatment/protection under their employment contracts may be made redundant upon insolvency or bankruptcy.

The collective bargaining agent, called a trade union in Poland, has no rights in insolvency proceedings. However, in practice the collective bargaining agent may exert influence on an employer and request higher redundancy payments. Polish law does not provide for legacy costs in the sense of special costs for particular industries.

In the case of a takeover of the whole or a part of a business by a new employer, employees are covered by the provisions of a collective agreement for a period of one year. However, as the new employer is not a party to the collective agreement, it cannot terminate it. Notwithstanding, the new employer may propose to such workers more advantageous terms than those resulting from the agreement. After a period of one year the collective agreement expires but the conditions resulting from it constitute a part of the employment agreements and may be changed by a modification notice.

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595  72,000 PLN is 29,254 CAD.
596  Article 41 section 1 of the Labour Code provides that: “if the employer declares bankruptcy or it is under liquidation, the provisions of Articles 38, 39 and 41, or any special provisions on protection of employees against notice to terminate or termination of the contract of employment shall not apply.” according to information provided by the Fund in its annual financial summary, see [http://fgsp.gov.pl/BIP/sprawozdanie2006.pdf](http://fgsp.gov.pl/BIP/sprawozdanie2006.pdf).
Interaction of Insolvency Legislation with Other Social Claims Legislation

The welfare of the employees of the bankrupt entity is thoroughly protected under Polish law and the provisions of, for example, the European Convention of Human Rights must be observed. However, the Labour Code provides for specific rules on termination of employment contracts in the case of bankruptcy, or liquidation. If a contract of employment for an indefinite period is to be terminated only because of bankruptcy or liquidation, the employer can shorten the statutory three-month period of notice of termination to one month, but the employee is still entitled to the same pay for the entire 3 months, which will be paid for the first month and compensation for the remaining two months. The remaining two months are included in the length of employment, which becomes important in calculating other benefits to which an employee is entitled. Additionally an employer terminating an employment contract for an indefinite period because of bankruptcy or liquidation is not obliged to give a written notice to the enterprise’s trade union representing their intention to terminate the employment or giving the reasons for such termination. However, in such a case the employer is still obliged to give reasons for termination to the employee. Such reasons could be, for example, the bankruptcy or liquidation of the employer and consequently the liquidation of the employee's post.

In the case of bankruptcy or liquidation of the employer, an employment contract for a definite period, or to perform a specific task, can be terminated by giving two weeks notice. Moreover, in case of the bankruptcy or liquidation of the employer, the provisions on protection of specific groups of employees generally do not apply. Therefore, it is for example possible to terminate an employment contract:

Tax issues in respect of social claims

In Poland, a bankrupt entity continues to remain an entity with rights and obligations, and it is also the owner of assets that it is merely unable to manage or to represent. In matters concerning the bankruptcy estate, transactions on the account of the bankrupt shall be undertaken as a result of management and disposition decisions by the official receiver. The official receiver performs the obligations and entitlements of the employer in relation to employees. Pursuant to Polish tax regulations, the official receiver shall thus be required to make payments from the bankruptcy estate for employee remuneration, and thereby to collect down-payments for personal income tax and for social security contributions in this respect. For this purpose, the official receiver should pass the amounts collected against personal income tax and social security contributions to, respectively, the revenue office and the social security office proper to the place of registered office of the bankrupt.

Further, within a deadline of the end of February of the year succeeding the taxation year, the official receiver should draw-up a PIT-11 report and pass this to the employee and the revenue office proper to the place of residence of the employee. From the date of declaration of bankruptcy, the official receiver must file accounting settlement documents (transfer of down-payments against personal income tax, payments in respect of social security contributions and monthly reports) for the persons in relation to whom he fulfils the obligation of payer. The official receiver of the bankruptcy estate is also responsible for the accuracy and non-defectiveness of the tax records and books.

Legislative Reform

There are no pending legislative reforms, however, the issues related to social claims are of a sensitive nature and each political party has a different vision of the way the social claims system could function in Poland. Bearing in mind the very recent parliamentary elections held in October 2007 and the rule of discontinuance of the parliamentary proceedings (i.e. once a new parliament is elected, all unfinished bills, with very few exceptions, expire), new proposals in may be worked upon in the Parliament in the near future.

Historical, Political and Social Reasons for the Development of Poland’s Approach to Social Claims

The development of legislation relating to social claims in Poland has largely been associated with the transformation from a centrally-steered economy to a free market economy. Before 1989, due to the nationalization of most large production facilities, social security was available only to persons
employed under employment contracts. As a result of the opening of the economy and creating the opportunity of setting up own businesses, the need arose to include the persons earning their living under social security insurance. The adoption in 1997 of the Constitution of the Republic of Poland, which stipulates that “a citizen shall have the right to social security whenever incapacitated for work as a result of sickness or disability as well as having reached retirement age. The scope and forms of social security shall be specified by statute”, was a key milestone in the development of the legislation in this area.
TREATMENT OF WAGE CLAIMS

Romania has recently adopted a regulation (Law no. 200/2006) that establishes a special fund that guarantees protection for wage damages and other similar claims. Other relevant stipulations regarding a protection system for employees in the event of insolvency of their employer are Law no. 85/2006, the Labour Code, and the Civil Procedure Code, Law no. 19/2000. Every Collective Labour Contract concluded and applicable to various labour branches or at a national level contains stipulations regarding the higher level of preference granted by the State to employee wage claims.

Law no. 200/2006 entitles employees to a maximum damage claim equivalent to three average wages for each employee. The amount of the average wage is established and published by The National Institute of Statistics during the month in which the employer’s insolvency has been declared by a definitive court decision. The limitation of wage claims to a lesser amount than three average wages is stipulated by article 14 of Government’s Decision no. 1850/2006, which is applicable only in those cases when the amount claimed by the employee is less than the amount estimated by the liquidator or the person performing similar tasks.

Romanian legislation has not established a certain level of benefits available for employees in the event of insolvency of the employer, but there are some aspects that are clearly determined. On one hand Law no. 200/2006 clearly establishes a limitation for wage claims to three average wages per employee and points out the categories of retribution that the employee is entitled to (remaining unpaid wages, vacation payment, compensation payments as settled by the collective agreement or employment contract, and remaining unpaid indemnity for the periods in which activities were suspended). On the other hand, due to the type of contributions constituting the special fund, a maximum or minimum limit cannot be specified.

Employees can receive legal compensation by following a special procedure provided by Law no. 200/2006. In order to claim legal benefits employees must notify the claim to the liquidator or to the person performing a similar task appointed by the Court during insolvency proceedings and then present another petition to the administrative authority which is in charge of the fund.

Contributions to the fund consist mainly of tax paid by the employer for each one of its employees. The tax is established by applying a rate of 0.25% to the amount of income that represents the economic foundation for calculation of the individual contribution due to the social insurance budget for unemployment achieved by each employee. The law provides certain measures of enforcement and entitles the administrative authority in charge of the fund to claim debts by following a special urgent procedure. There are no stipulations regarding adjustments or other changes to the contributions to the special guarantee fund. Since the fund is relatively new, there is not yet information about whether or not it is sufficiently funded.

TREATMENT OF OTHER COMPENSATION

There is priority for vacation pay in those cases where the employee, though entitled to vacation and related payments, has not taken time of from work for vacation in the past 1 year of his employment. Vacation pay is entitled to the same preference as wages. There is also priority for termination pay, but only in the event of insolvency of the employer and only if the employer has contributed to the constitution of the guarantee fund. Severance pay and travelling expenses do not have preference.
Treatment of Pension Claims

Romania grants preference for pension claims, meaning that every person that has been employed under a legal employment contract for a certain amount of time is entitled to a pension that is paid by an administrative authority, The National Pension Office, which manages the public pension system and by a Private Pension System, if the employer and the employee have contributed to that particular fund. For now, the national pension system is based on a public fund (Law no. 19/2000 represents the most important statute in the matter of public pension claims) that is in course of transformation into a mixed system (Law no. 411/2004 contains provisions for the mandatory private pension fund).

There is no specified level of priority established by the law, but pension claims are granted, to a minimal amount for every pensioner that has worked under an employment agreement for a certain amount of time or in certain working conditions. The pension fund consists of both employers’ and employees’ contributions, the difference between the two being provided by the way those contributions are collected: the employee’s contribution is withheld from his or her monthly wage, while the employer pays its contribution and the amount retained from the employee directly to the fund, based on a social insurance statement.

Romanian legislation establishes various conditions and limitations on the realization of pension claims, some of them regarding the length of the employment contract, age and the monthly wage, some regarding specific aspects regarding the level of difficulty of labour or the state of health of the employee.

The pension claims are granted directly from the public pension fund and they are not affected by the employer’s state of insolvency. The level of benefits available varies depending on the value of the “pension point” and the length of time that the employee and the employers have contributed. The public insurance system supplies the pension fund and grants every person a certain pension indemnity, but its amount is unsatisfactory in most cases due to the small number of working persons (active employees) and the increasing number of pensioners.

Contribution to the public pension fund depends on numerous factors, such as the amount established by government for the “pension point”, the amount of the monthly wage or the level of the average or minimum national wage, the duration of employment contracts.

The public fund (Law no. 19/2000 represents the most important statute in the matter of public pension claims) is in the course of transformation into a mixed system (Law no. 411/2004 contains provisions for the mandatory private pension fund).

Under Romanian legislation the former employee does not have the legal means at his or her disposal to claim his or her pension directly from his employer. Therefore, the employee can take legal action against the National Pension Office, if necessary, for any adjustments or changes regarding the calculation of the amount that the employee is entitled to receive. On the other hand, employers are compelled to make the contribution to the public fund by the penalty system established by articles 30 and 31 from Law no. 19/2000.

Director and Officer Liability for Social Claims

Romanian legislation, such as Law no. 85/2006 for insolvency proceedings, contains few stipulations regarding social claims and pension funds, establishing a higher level of preference for such claims and, to some extent, a more simplified procedure for wage claims. Also, this regulation entitles unpaid employees to start the insolvency procedure by claiming remaining payments as old as six months. Article 138 stipulates general cases of liability for directors, officers and any other person who, by their action or lack of action has produced or contributed to the employer’s failure in bankruptcy or insolvency, but liability for failure to make or pay contributions is not stipulated, other than legal penalties for payment delay. Some special rules are provided by Romania’s Labour Code (Law no. 53/2003) and Law no. 19/2000 regarding the public pension system and other social insurance rights as they establish special proceedings and a level of preference for all contributions the employers have to pay. Liability caps are established during insolvency proceedings by the Court of Law, after the examination of the evidence.
Compromising or settling claims against directors and officers during insolvency proceedings is not prohibited by law, although the insolvency procedure is very complex and once initiated, the employer should not be able to terminate it unless it reaches compromises with all the creditors engaged in the procedure, employees or other categories.

Treatment of Collective Agreements

Law no. 130/1996 establishes the general rules concerning the collective agreements. The legal right to participate to the collective negotiations belongs to the employers or the employers’ organization, on one side and to the trade union or the employees’ representatives, on the other side.

Collective agreements in Romania are terminated in the event of the employer’s judicial liquidation as established by Romania’s Labour Code in article 245. According to the doctrine, the liquidation date is considered to be the date when the court has established by an irrevocable decision to start the liquidation of the debtor’s goods. Law no. 85/2006 regarding the insolvency procedure provides that two delegates of the employees can participate at the creditors meetings held during the insolvency procedure. There are no special provisions regarding the trade unions’ or employees’ representatives’ role – the Romanian equivalent of the collective bargaining agent – in the event of an employer’s insolvency. Law no. 67/2006 on the protection of the employees’ rights in case of transfer of the enterprise, unit or parts of the Enterprise or unit transposes into Romanian legislation Directive 2001/23/CE of March 12, 2001, establishing the transfer to the assignee of the individual labour agreements and of the employees’ rights deriving from the applicable collective labour agreement. However, this law is not applicable in the case of the insolvency of the assignor.

Romania has not faced any legal issues with respect to collective agreements and legacy costs due to the fact that collective agreements are settled by representatives of both the employers and the employees. During restructuring proceedings, the law does not provide special conditions for modifying collective agreements. But, in this period collective agreements can be modified in the general condition envisaged by the Law no. 130/1996 related to collective agreements. Regarding the modification of the collective agreements, article 33 of the same law establishes that the collective agreements terminate on the date of dissolving or juridical liquidation of the company. Also, the collective agreements can terminate in case of reorganisation of the company.

In cases of insolvency, if a restructuring plan is adopted, the company continues to exist and there are no issues related to collective agreements because the restructured entity must observe all the rights granted by the collective agreement applicable to the employees. But, article 33 of the Law 130/1996 establishes that in relation to the modality of the reorganisation, the collective agreement can terminate in case of reorganisation of the company.

Interaction of Insolvency Legislation with Other Social Claims Legislation

There are no specific provisions governing the interaction of insolvency legislation with other social claims legislation. However, certain derogatory aspects are established by article 86 from Law no. 85/2006 regarding the liquidator’s abilities to dismiss employees without observing common regulations, such as the Labour Code and the Collective Labour Agreement applicable.

Wage claims represent one category of claims that must be paid off at the end of insolvency proceedings and, therefore, Law no. 85/2006 establishes a certain preference for this kind of claim and a simplified procedure in order to establish a certain level of protection for the employees, but all claims are solved by the same court that declares the employer’s insolvency, the Commercial Litigation section of the Tribunal.

Tax issues in respect of social claims

Social claims have special regulations, and, usually, employees do not pay any kind of court fees or any other taxes. There is only one case in which employees must pay tax in order to start a proceeding in wage related claims established by article 3 point 12 from Law no. 85/2006 for
insolvency petitions against the employer initiated by the employee, which has a reasonable and steady amount (lei 39\(^{587}\) or approx. USD 20).

**Legislative Reform**

Legislative reform was initiated in 1999 along with the National Adhesion to the E.U. Programme, which provides a basis for legislative improvement regarding social insurance issues. However, there are still many aspects regarding social claims and legal proceedings that must be improved in order to guarantee payment of social claims and to ensure a minimum degree of protection of the employees in the event of insolvency of the employer.

**Historical, political and social reasons for the development of Romania's approach to social claims**

Romania has been governed by a totalitarian regime led by the Communist Party until December 1989. Therefore, for almost half a decade the reference points of social policy have been based on the centralization of all domains and the taking over of the social politics exclusively by the state. The public, state-funded social insurance system has worked for almost 50 years. This type of politics granted a reasonable social protection system for almost all categories. The totalitarian social politics pursued goals such as: 100% employment rate, the diminution in profits and private property, and the gratuitousness of education and medical services. In first decade following the collapse of the communist regime, Romania found itself in a difficult situation because of the necessary transition period to be passed from a socialist economy to a capitalist one. The first major social phenomenon Romania faced in the beginning of the 1990s was the massive rate of unemployment and lack of financial resources, the bankruptcy of major public, state-funded companies, and failure of public social insurance systems. In 1990 a major change was initiated with the recognition of private property and private companies, but legal procedures that allowed people to associate in order to make profits were still very complicated and time-consuming. Starting in 1995, social politics began to evolve towards establishing a legal basis for private insurance and by the end of the year 2000 social politics had become a major concern of the government. This tendency is still present in the current political agenda and all parties concerned are trying to create a working social protection system adapted to European legislation.

\(^{587}\) 39 RON is 16 CAD.
RUSSIAN FEDERATION

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Treatment of Wage Claims

In the Russian Federation, claims of employees for outstanding wages during insolvency rank second in priority after claims for damages to health.

There are four rankings of claims in insolvency, in the following order: harms to health; workers’ claims, including both pension and wage claims; secured creditors and then unsecured creditors. There is no cap or limit on the amount of claim that is given a priority.

Treatment of Pension Claims

Pension claims rank second in priority during insolvency.
Treatment of Wage Claims

Pursuant to Bankruptcy Proceedings Act, wage claims are given a priority in the settlement of creditors in accordance with Article 35 of the Act: Bankruptcy creditors, depending on their claims, are classified into ranks. The creditors of lower rank can only be satisfied after the creditors of higher rank. The creditors of the same rank are satisfied in proportion to the amount of their claim.

The rank of bankruptcy claims is as follows:

1) the first rank of claims comprises claims based on expenses of the bankruptcy proceedings and includes all claims considered to be expenses of the bankruptcy proceedings according to this law;

2) the second rank of claims comprises unpaid net salaries of employees of the bankruptcy debtor in the amount of the yearly minimum wage for the year before starting the bankruptcy proceedings, as well as unpaid contributions for pension and disability insurance for two years before starting the bankruptcy proceedings;

3) the third rank of claims comprises all public income claims which became due in the last three months before starting the bankruptcy proceedings, except contributions for pension and disability insurance of employees; and

4) the fourth rank of claims comprises the claims of other bankruptcy creditors.

The Bankruptcy Act in Article 35 establishes 4 classes of claims (4 priority categories) with the following general rules of priority in settlement applicable to all classes:

- The creditors of a class lower in priority may have their claims paid only after the creditors of higher ranking classes have had their claims paid; and
- The creditors of the same class shall be settled in proportion to the amount of their claims.

Wage claims are classified into the second and the fourth class.

The fourth class of claims generally comprises the claims of other bankruptcy creditors (excluding the public revenue claims which became due in the last three months prior to the opening of the bankruptcy proceedings – third class of claims), thus including:

- Differences between the minimum wages and net wages calculated for the last year prior to the opening of the bankruptcy proceedings, and other unpaid salaries, and
- Remaining unpaid contributions for pension and disability insurance of employees (excluding contributions included in the second class of claims).

Wage claims have partial preference in ranking (they are classified into the second class of claims), the restrictions relating to the following:

- a minimum wage for the last year prior to the opening of the bankruptcy proceedings, and
- unpaid contributions for pension and disability insurance of employees for the last two years prior to the opening of the bankruptcy proceedings.
According to the mentioned Article 35 of the Bankruptcy Proceedings Act, the first rank of claims, that is, the top ranking class of claims, comprises claims based on expenses of the bankruptcy proceedings and includes all claims considered to be expenses of the bankruptcy proceedings according to this law.

Article 35 specifies:

The Rank of Bankruptcy Claim Satisfaction

Bankruptcy creditors, depending on their claims, are classified into ranks. The creditors of lower rank can only be satisfied after the creditors of higher rank. The creditors of the same rank are satisfied in proportion to the amount of their claim.

The rank of bankruptcy claims is as follows:

1) the first rank of claims comprises claims based on expenses of the bankruptcy proceedings and includes all claims considered to be expenses of the bankruptcy proceedings according to this law;

2) the second rank of claims comprises unpaid net salaries of employees of the bankruptcy debtor in the amount of the yearly minimum wage for the year before starting the bankruptcy proceedings, as well as unpaid contributions for pension and disability insurance for two years before starting the bankruptcy proceedings;

3) the third rank of claims comprises all public income claims which became due in the last three months before starting the bankruptcy proceedings, except contributions for pension and disability insurance of employees; and

4) the fourth rank of claims comprises the claims of other bankruptcy creditors.

Secured Creditor is defined in Article 38 as:

Creditors with security rights or rights to satisfy their claims from a specified assets or rights that are registered in registries or other public books, are secured creditors.

Secured creditors shall be accorded their full rights to satisfaction from the asset or proceeds of the sale of the asset except that the realization of these rights can be temporarily postponed in accordance with provisions of Articles 47 and 73 of this law.

Creditors with the right of retention of assets who have physical possession of the asset do not have to surrender the asset to the bankruptcy debtor until their secured claim is satisfied.

The creditors in paragraph 1 and 2 of this Article are not bankruptcy creditors, but if the value of their claim is larger than the amount obtained by selling the asset or a right, they shall satisfy the remaining part of their claim as bankruptcy creditors.
Secured claims acquired through enforcement proceedings or creating a charge within 60 days before the day of starting bankruptcy proceedings for the purpose of enforcement or security shall cease to be valid.

The secured creditors have a right to proportional satisfaction from the bankruptcy estate as bankruptcy creditors if they decline their secured claims by a written statement to the bankruptcy judge and the bankruptcy administrator or if they cannot, through no fault of their own, satisfy their secured claim."

Therefore, the ranks of creditors (4) relate to the bankruptcy creditors, in terms of the law. However, secured creditors are not bankruptcy creditors. The claims of secured creditors are satisfied from the sale of assets over which they acquired their security rights. However, if the value of the claim of secured creditors is larger than the amount obtained by selling the asset or a right, they shall satisfy the remaining part of their claim as bankruptcy creditors. On the other hand, bankruptcy estate available for distribution to creditors, in accordance with the above ranks, comprises all assets collected during administration (monetary assets increased by interest, assets obtained by selling shares and stocks and other movable and immovable assets). Therefore, there is a super-priority for wage claims over unsecured claims, but not over secured claims, if the estate comprises only a secured immovable asset, etc.

Serbia has a wage guarantee fund called the Solidarity Fund of the Republic of Serbia established, as a new legal entity, by the Labour Law, which came into force on 23rd March 2005 (Articles 127-147 of the Labour Law). The Solidarity Fund is sufficiently funded by the budget of the Republic of Serbia.

Article 125 of the Labour Law provides that any employee shall be entitled to the payment of:

(1) compensation of salary during temporary inability to work pursuant to health insurance regulations that was payable by the employer pursuant to this Law, in the last nine months before the bankruptcy procedure was opened;

(2) compensation of damages for unused annual holiday pay by the fault of the employer, for the calendar year in which the bankruptcy procedure was opened, should he/she have been entitled to that immediately prior to the opening of the bankruptcy procedure;

(3) retirement gratuity for retirement in the calendar year in which the bankruptcy procedure was opened should he/she have met the requirements for retirement before the opening of the bankruptcy procedure; and

(4) compensation of damages pursuant to the court ruling passed in the calendar year in which the bankruptcy procedure was opened, for injury at work or occupational disease, should this ruling have become valid before the opening of the bankruptcy procedure.

Employees are entitled to the payment of contributions for compulsory social insurance and compensation of earnings referred to in paragraph 1, item 1 of Article 125, in accordance with regulations governing the compulsory social insurance.

Employees are entitled to the payment of contributions for compulsory social insurance and compensation of earnings referred to in paragraph 1, item 1 of the said Article 125, in accordance with regulations governing the compulsory social insurance.

Article 125 of the Labour Law, Paragraph 1 specifies that in the case of bankruptcy, any employee shall be entitled to the payment of:

1) salary and compensation of salary during temporary inability to work pursuant to health insurance regulations that was payable by the employer pursuant to this Law, in the last nine months before the bankruptcy procedure was opened; salary and compensation of salary are paid in the amount of minimum salary;
2) compensation of damages for unused annual holiday by the fault of the employer, for the
    calendar year in which the bankruptcy procedure was opened, should he/she have been
    entitled to that right before the opening of the bankruptcy procedure; paid in the amount of
    minimum wage;

3) retirement gratuity for retirement in the calendar year in which the bankruptcy procedure
    was opened should he/she have met the requirements for retirement before the opening of
    the bankruptcy procedure; paid in the amount of three average salaries in the business
    sector of the Republic of Serbia;

4) compensation of damages pursuant to the court ruling passed in the calendar year in
    which the bankruptcy procedure was opened, for injury at work or occupational disease,
    should this ruling have become valid before the opening of the bankruptcy procedure; paid in
    the amount set in the court ruling.

The means for establishment and launch of the Fund are provided from the Budget of the Republic of
Serbia (Article 125 para 2 of the Labour Law).

There is a legal subrogation according to Article 300 of the Law on Obligations. After the payment to
the employees, it takes their role of a creditor in accordance with the creditor ranks; it is important
that this is done before the decision was passed on the main distribution of the bankruptcy estate in
the bankruptcy proceedings.

According to the Serbian law, the above types of compensation are liabilities which are classified into
the fourth rank of claims, providing they are determined by a court decision or other relevant
documents. These types of compensation are paid through the Solidarity Fund. To ensure that
employees do not wait for the main distribution of the bankruptcy estate to take place, which could be
an excessive procedure, the Solidarity Fund was established by the Labour Act. When the
Bankruptcy Administrator, upon the receipt of claim applications recognizes the rights of employees,
in accordance with Article 125 of the Labour Act, employees apply to the Solidarity Fund. The Fund
then passes the decision approving these rights and pays off employees. Then the Fund, according
to the legal subrogation - Art 300 of Obligations Act, and at the latest until the decision was passed
on main distribution, appears as a creditor instead of the employee, whose claims have already
been satisfied by the Fund.

Treatment of Other Compensation

There is no priority or preference for vacation pay, severance pay, termination pay, or travelling and
other expenses in Serbian legislation. They are classified in the fourth class of claims, in accordance
with Art 35 of the Bankruptcy Proceedings Act.

Treatment of Pension Claims

In Serbia, the payment of pensions is the responsibility of the state, i.e. of the National Pension Fund.

In Accordance with Article 35 of the Bankruptcy Act, the second class of claims comprises unpaid
contributions for pension and disability insurance of employees for two years before starting the
bankruptcy proceedings. The fourth class of claims comprises the remaining unpaid contributions for
pension and disability insurance of employees, excluding those contributions included in the second
class of claims.

Director and Officer Liability for Social Claims

There is no liability of corporate directors and officers for social claims during insolvency.

Treatment of Collective Agreements

In Serbia, collective agreements are rarely used in practice and they are not taken into consideration
in bankruptcy proceedings. Pursuant to Article 63 of the Bankruptcy Proceedings Act, the opening of
bankruptcy proceedings is cause for cancelling labour contracts between the debtor and its employees. The bankruptcy law is regarded as a *lex specialis* in relation to the labour law.

If a reorganization plan provides for the continuation of a collective agreement that was signed by the company undergoing reorganization, and the plan is voted by the creditors, such collective agreement shall remain in force.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

All of the above mentioned laws are applied in bankruptcy, unless certain provisions of those laws are in conflict with the provisions of the bankruptcy legislation. The *Bankruptcy Proceedings Act* is the *lex specialis*.

**Tax issues in respect of social claims**

Serbia faces no tax issues in respect of social claims.

**Legislative Reform**

There is currently no legislative reform being considered.

**Historical, political and social reasons for the development of Serbia’s approach to social claims**

Since 2004, Serbia has a new law and relevant by-laws regulating bankruptcy proceedings. Claims for unpaid wages and contributions of employees are now classified into the second and fourth class of claims. Pursuant to the old law, total liability for wages and contributions was defined as an expense of the bankruptcy proceedings. As such, it was paid before any payments were made to other creditors. There were a number of reasons leading to the changes in the regulation, the most important being:

- lack of creditors’ bodies (creditors’ assembly, creditors’ committee) and inability of creditors to decide on relevant aspects of the proceedings;
- low transparency and level of publicly available information of the proceedings;
- extensive proceedings, reducing the possibilities for creditors to receive higher distribution; and
- a practice was created of “working insolvencies” without any proper grounds, leading to the loss of value of the bankruptcy estate and lower distribution to creditors.
SINGAPORE

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Treatment of Wage Claims

Section 328 of the *Companies Act* (Cap. 50) (Statutes of Singapore) provides for the priority of wage claims in Singapore. Wages and salaries for five months or 7,500.00 SGD\(^{598}\) whichever is the lower, are subject to the preference. Retrenchment benefits, ex-gratia payments, workmen’s compensation and superannuation contributions also enjoy priority to varying degrees. Other than the cap on the amount of wage claims treated to preference, there are no other restrictions on the realization of such claims.

Generally, employees receive compensation or benefits when they are retrenched. The entitlement to retrenchment benefits are usually provided for in the contract of employment and/or in collective agreements where the employee is unionized.

There is no wage guarantee fund for employees to compensate for wages and related compensation owing at the point of company insolvency.

Treatment of Other Compensation

Singapore grants priority to vacation pay, with no cap on the amount entitled to priority. Severance pay and termination pay are also entitled to priority, to a maximum amount of 7,500.00 SGD\(^{599}\) or 5 months salary, whichever is the lower. Travelling/other expenses are not granted preference.

Treatment of Pension Claims

Superannuation and provident fund claims are granted priority under Singapore law. Priority extends to contributions payable during the 12 months before, on or after the commencement of the winding up of the employer company in liquidation or bankrupt employer. There is no restriction on the realization of such claims with respect to length of employment.

Singapore has a superannuation fund for all employees, provided for by the *Central Provident Fund Act* (Cap. 36) (Statutes of Singapore). Both employers and employees are mandated to contribute at prescribed rates. The rate of contribution is set by the Government based on its assessment of the required level of funds that an employee would need to sustain basic needs upon retirement. Reference is made to the general economic conditions and the ability of employers to sustain the level of contribution.

Singapore does not have a specific pension payment guarantee fund or guaranteed insurance for pension claims during insolvency, as the Central Provident Fund covers both solvent and insolvent situations. Contributions made to the Central Provident Fund does not form the corpus of assets available for creditors in the bankruptcy of individuals save that when such sums have been withdrawn upon the withdrawal age being reached.

**Director and Officer Liability for Social Claims**

Under section 340 of the *Companies Act* (Cap. 50) (Statutes of Singapore), directors and officers are liable to social claims during insolvency if they have been carrying on insolvent/fraudulent trading.

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\(^{598}\) 7,500 SGD is 5,274 CAD.

\(^{599}\) 7,500 SGD is 5,274 CAD.
There is no cap on the liability for such claims. It is highly unlikely that these claims could be settled during insolvency proceedings since the workouts would usually extend to liabilities of directors incurred under personal guarantees issued to secure the company’s indebtedness and not liabilities arising out of malfeasance.

**Treatment of Collective Agreements**

The treatment of collective agreements under Singaporean law is unknown.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

When there is a conflict between insolvency legislation and other social claims legislation, the insolvency legislation generally prevails. The Supreme Court of Singapore has jurisdiction to resolve worker claims.

**Tax issues**

Tax enjoys a super-priority in Singaporean insolvency proceedings, ranking after insolvency costs and employee entitlements.

**Legislative Reform**

Legislative reforms for Singapore have been discussed and are confidential at this time.

**Historical, Political and Social Reasons for the Development of Singapore’s Approach to Social Claims**

Generally, Singapore’s approach to social claims has been driven by a tri-partite compact between the State, the employer and the employee, and the economic needs of the country.
SLOVENIA

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Treatment of Wage Claims

In the Republic of Slovenia, there is a statutory preference for wage claims under the Law on Compulsory Settlement, Bankruptcy and Liquidation, Articles 160/2 and 4. The priority is for the basic wages determined in the collective agreement plus unpaid wages above (article 160-4) owed for the period three months prior to the commencement of the bankruptcy proceeding. (Article 160/2 – 1). There are no restrictions on the amount of the preferential claim other than the three month period. Effective 2007, these claims are treated as a cost of the bankruptcy proceedings.

In the Republic of Slovenia there is a Special Fund of the Republic of Slovenia for social claims (labour and employment claims). See the Law on Public Protection and Alimony Fund (Official Gazette, Number 25/97 – 61/06). This law implemented the Directive EC 80/987/EEC from October the 20th, 1980. This Fund is a legal person. The bankruptcy proceeding can’t be commenced against this Fund as a debtor.

The rights of the employees are an entitlement to:

- unpaid wages for last last three months before the termination of employment
- unpaid compensation for wages for paid absence for last three months before the termination of employment
- compensation for wages for unused leave of absence for last year
- compensation money under conditions laid down by Law on labour relations
- alimony money.

Treatment of Other Compensation

There is a preference for 100% of unpaid vacation pay outstanding, which is treated as a cost of the bankruptcy proceeding and thus given top priority. There is a partial preference for severance pay and termination pay with the amount and conditions determined in the Law on Labour Relations. Effective 2007, wages and related compensation, including termination pay to 100% are treated as a cost of bankruptcy and given first priority in insolvency proceedings. There is no priority for travelling or other employment related expenses owing.

Treatment of Pension Claims

There is no statutory priority for pension-related claims in the Republic of Slovenia, nor is there any pension guarantee fund of insurance system.

Director and Officer Liability for Social Claims

Directors and officers are not personally liable for any failure in the part of the debtor company to part wage related or pension claims.
Treatment of Collective Agreements

Collective Agreements are continued on bankruptcy. In the case of bankruptcy or involuntary liquidation, the trustee is entitled to terminate employment of the employees when work is not needed any more because if the commencement of insolvency proceedings. (Article 103 of the Law on Labour Relations). In the case of selling a debtor in bankruptcy as a legal person, i.e. selling the business as a whole rather than liquidation, or in the case of compulsory settlement, which is financial reorganization, the employees whose work has been terminated have the preferential right to employment, pursuant to Articles 104 and 105 of the Law on Labour Relations.

There are successor employer provisions in terms of the purchasers of the business that continue to operate the business after it files insolvency proceedings. Pursuant to Article 73 of the Law on Labour Relations, the purchaser is a successor employer and bound to the provisions of the collective agreement.

There is a duty to inform the labour union and a duty of consultation with the union and a duty of consultation with the union before taking the decision to terminate the labour relations with employees in the case of insolvency proceedings.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The Bankruptcy Statute is Lex Specialis, but the Law on Labour Relations has put out of force those provisions of the bankruptcy statute that governed the employment issues regarding the termination of labour relations. The District Court has the jurisdiction to open insolvency proceedings, determined by the registered office of the debtor company. However, there is a specialized Court for Labour and Social Relations that has jurisdiction over labour relations and wage and other issues that arise during the insolvency.

Tax Issues

There are no known tax issues in respect of social claims.

Legislative Reform

Effective 2007, the Republic of Slovenia brought into force a completely new, modern Law on Financial Management, Insolvency Proceedings and Involuntary Liquidation Article 347/2-2 of the new statute specifies that wages and other employee compensation, including employee taxes, are treated as cost of the insolvency proceeding, with 100% payment in priority. Article 347/3-2 specifies that termination pay is to be treated as part of the costs of the insolvency proceeding, with 100% payment of amounts given a priority in proceeding.

Historical, Political and Social Reasons for the Development of Slovenia’s Approach to Social Claims

The Republic of Slovenia has undergone a transition from the former Yugoslav extremely social model to a capitalistic German-based model of insolvency law, undertaking legislative reform that is also sensitive to domestic norms.
SOUTH AFRICA

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Treatment of Wage Claims

The South African Insolvency Act of 1936 (Act No. 24 of 1936) is not a unified act since some other debtors like companies are for instance wound up in terms of other legislation, like the Companies Act of 1973. Many of the provisions of the Insolvency Act will however apply to such other debtors if their assets are insufficient to pay the outstanding debt at the time of winding-up. The estate of an individual who is also an employer will be sequestrated in terms of the Insolvency Act and a trustee will be appointed, whilst the company under liquidation will be managed by a liquidator. In the last instance the liquidator will have to apply provisions of both the Companies Act as well as the Insolvency Act when the company is unable to pay its debt.

South Africa grants a statutory priority for outstanding wages owing at the point insolvency of the employer. Effective as from 1 September 2000, section 98A of the South African Insolvency Act of 1936 improved the statutory preferences granted to employee claims. Their claims are placed after secured creditors and specified other preferential claims but ahead of preferences in favour of certain State claims (priorities) like taxes in arrear, certain claims secured by general mortgage bonds and unsecured, non preference claims that are termed concurrent claims in South African law.

The South African Insolvency Act specifies that statutory acknowledged secured creditors are to obtain payment from the proceeds of their securities on a priority basis. The proceeds of unencumbered assets as well as surplus income derived from an encumbered asset will form the free residue which is used to satisfy remaining unsecured claims in the prescribed order of preference. Employee wage and related claims rank fifth in priority after funeral costs, deathbed expenses, sequestration/liquidation and administration costs and certain specified sheriff charges incurred for legal proceedings before sequestration. (In the case of a company-employer the wage preference will rank in position number three.) The order after these preferences regarding wages etc is as follows:

Salary and wages of employees and related claims in arrears. The benefits included under this heading are:
- wages in arrears for a period not exceeding three months, to a maximum of 12,000 ZAR.

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600 This information was reworked by permission of the Publishers from 'A Plea for the Development of Coherent Labour and Insolvency Principles on a Regional Basis in SADC Countries', in International Insolvency Law: Ashgate, (2008), pp. 267-293.

601 These type of claims will of course only apply to an insolvent individual who has people in his or her employ.

602 Since 1 September 2000, this claim has moved up a notch in the priority list in terms of the Judicial Matters Second Amendment Act (122 of 1998). The ex-employees' preference was previously governed by the Insolvency Act, section 100(1) which ranked those preferential claims directly after the statutory claims listed in section 99.

603 It is submitted that the limitation of this amount would fall foul of the ILO Insolvency Convention.
• payment in respect of any period of leave or holiday due to the employee that has accrued as a result of his or her employment by the insolvent company in the year of insolvency or the previous year, with the maximum amount allowable being 4,000 ZAR;  

• any payment due in respect of any other form of paid absence for a period not exceeding three months prior to the date of liquidation, to a maximum of 4,000 ZAR;  

• any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, wage-regulating measure or as a result of termination under section 38 of the Insolvency Act, to a maximum of 12,000 ZAR;  

• a maximum amount of 12,000 ZAR payable in respect of any contributions payable by an insolvent, including contributions payable in respect of his employees, to any pension or provident fund, medical aid or unemployment fund or any similar scheme or fund.

The claim for salary or wages enjoys preference above the claims for leave, other paid absence and severance or retrenchment pay, which rank equally and abate in equal proportions if necessary. These preferential claims under section 98A in the Insolvency Act, rank equally and abate in equal proportions if necessary. The balance of any claims not covered by section 98A will be claimed concurrently with that owed to the general unsecured or concurrent creditors.

Employees are entitled to unemployment benefits during the period of suspension of the contracts of employment. An employee whose contract of employment has been suspended or terminated will now become entitled to claim compensation from the insolvent estate of his or her former employer for loss suffered by reason of the suspension or termination of a contract of service prior to its expiration. This claim will be the employee’s weekly or monthly salary minus benefits received from the Unemployment Insurance Fund. It could also include damages suffered as a result of the termination of a contract of service prior to its expiration in terms of the original terms of the contract.

Any balance still due and payable to an employee after the preferential portion of his or her claims has been paid will be treated as a concurrent claim. It is important to note that where there are insufficient assets to pay the costs of sequestration or winding-up and administration that ranks third in the order of payment, all concurrent creditors must in principle make contributions towards settling the short-fall in this regard. Thus, where an employee has proved a concurrent claim over and above his preferential claims he may also be saddled with a claim by the liquidator in this regard.

There is no wage guarantee or protection fund in South Africa.

Treatment of Other Compensation

As noted above, the statutory preference under section 98A of the South Africa Insolvency Act applies equally to a claim for leave or holiday pay, to a maximum of 4,000 ZAR, which accrued in the year of or prior to the insolvency. It also applies to claims for payment for other forms of absence, for a period not exceeding three months before the date of sequestration to the same maximum. Equal ranking preference is granted to claims for severance or retrenchment pay in the amount of at least one week’s remuneration for each completed year of continuous service with that employer.

4,000 ZAR is 519 CAD.

This wage priority is followed by some other statutory preferences and then unsecured creditors who enjoy no statutory preference, being the concurrent creditors.

Year of insolvency denotes the calendar year, rather than a 12 month period preceding the date of sequestration.
12,000 ZAR, where the employment terminates within the meaning of section 38 of the Insolvency Act.\textsuperscript{610}

For purposes of these provisions, employee excludes an independent contractor, but includes a person who in any manner assists in the “carrying on or in conducting the business of the insolvency firm, including those persons not in permanent employment with the debtor company”. Directors and members (shareholders) of close corporations are excluded from the preference.

After the direct employment related claims, there are some other statutory preferential claims under section 99 of the Insolvency Act, specifically, compensation under the Occupational Injuries and Diseases Act of 1993; amounts owing to the South African Revenue Services in terms of the Income Tax Act of 1962 for income tax deducted from an employee’s salary; amounts owing by the insolvent as an employer in terms of the Occupational Diseases in Mines and Works Act of 1973; or unemployment insurance contributions due to the Unemployment Insurance Fund in terms of the Unemployment Insurance Contributions Act of 2002.

**Treatment of Pension Claims**

There is a statutory preference to a maximum amount of 12,000 ZAR payable in respect of any contributions payable by an insolvent employer, including contributions payable in respect of his employees, to any pension or provident fund, medical aid or unemployment fund or any similar scheme or fund, ranking with the wage priority claim in an insolvency as indicated above.

There is no pension guarantee fund in South Africa.

**Director and Officer Liability for Social Claims**

There is no specific provision that makes directors or officers of a debtor company personally liable for failure of such company to pay social claims. Section 424 of the Companies Act of 1973 however contains a general provision in that directors or other officers can be held personally liable for debts of the company if a court finds that the business is or was being carried on recklessly or with the intent to defraud creditors.

**Treatment of Collective Agreements**

In South Africa, collective agreements supersede individual contracts of employment. Generally, collective agreements contain minimum conditions of service such as minimum wages for different job categories and specifications in respect of how much overtime is to be paid. Collective agreements are continued in the insolvency context, as long as the employer (or employers’ organization) and the trade union are still in existence.

Section 38 of the Insolvency Act provides for the initial suspension of contracts of service between insolvent employers and their employees. This would typically resolve the problem if the business was sold out of the insolvent estate. All contracts of employment could then be transferred to the new employer.\textsuperscript{611} After the suspension one of two things could occur. The trustee or liquidator could terminate some or all of the contracts of employment after following a retrenchment procedure, or the contracts would terminate automatically after the window period of 45 days after the appointment of the final trustee or liquidator, typically between 3 and 6 months after the initial sequestration. As part of the retrenchment procedure, section 38(5)(a) of the Insolvency Act requires that the trustee or liquidator should consult with “any person with whom the insolvent employer was required to consult, immediately before the sequestration in terms of a collective agreement defined in section 213 of the Labour Relations Act of 1995 (Act No. 66 of 1995.)

There are currently no provisions in the Insolvency Act or the Labour Relations Act regarding the renegotiation or modification of collective agreements during the insolvency process. It is

\textsuperscript{610} Section 38 of the Insolvency Act; section 41(2) of the Basic Conditions of Employment Act of 1997.

\textsuperscript{611} After the suspension, the trustee or liquidator is not obliged to remunerate them but the employees are entitled to unemployment benefits in terms of the Unemployment Insurance Act of 2001.
nevertheless submitted that in so far as some terms of a collective agreement may form part of an individual contract of employment, that the trustee may terminate the individual contract as provided for in terms of section 38 of the Insolvency Act as discussed above. Since some collective agreements often apply to more than one employee and different categories in a specific industry, it is however submitted that the trustee will not be entitled to terminate the operation of such collective agreements that applies to that industry in general.

Section 197A(1) of the Labour Relations Act applies to the transfer of a business if the old employer is insolvent, or where a scheme of arrangement or compromise is entered into to avoid the winding-up or sequestration of the employer for reasons of insolvency. Once determined that section 197A(1) is applicable, section 197A(2) specifies that “despite the Insolvency Act 1936” and “unless otherwise agreed in terms of section 197(6)” that “the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer’s provisional winding-up or sequestration,” and further that “all the rights and obligations between the old employer and the and each employee at the time of the transfer remain rights and obligations between the old employer and each employee.”

Section 197(5), which applies to the transfer of businesses as going concerns in both the solvent and insolvent situations, provides that subsequent to the transfer of a business as going concern, the new employer is bound by any collective agreements that may have bound the old employer immediately before the date of transfer.

Interaction of Insolvency Legislation with Other Social Claims Legislation

Section 197(2) of the Labour Relations Act provides for the automatic transfer of all contracts of employment (with all rights and obligations) from the old employer to the new employer in the event of the transfer; secondly, section 187(1)(g) makes it an “automatically unfair dismissal” if an employee is dismissed if the reason for the dismissal is “a transfer, or a reason related to a transfer”; and thirdly, section 197(6) provides that any agreement regulating the transfer must be concluded with the employee representatives after disclosure of all relevant information during the negotiation of such an agreement.

Tax issues in respect of social claims

There are no special tax issues in respect of social claims discussed above.

Legislative Reform

The South African Law Reform Commission (the “SALRC”) has been working on a project titled the Review of the Law of Insolvency, Project 63, for many years but new insolvency legislation does not seem to be in sight soon. The last formal proposals of the SALRC published in February 2000 propose the scrapping of a number of the current preferences and an improved preference for wage and related claims for employees. Apart from this proposal, there is currently no immediate further legislation regarding the reform of social claims in insolvency under consideration.

Historical, Political and Social Reasons for the Development of South Africa’s Approach to Social Claims

Article 5 of the Southern African Development Community’s (SADC) Treaty specifies that a main objective of SADC is “to promote sustainable and equitable economic growth and socio-economic development through deeper cooperation and integration”, including promoting social security, freedom of collective bargaining and gender equality, and the promotion of workplace democracy. The draft Code of Social Security for SADC was finalized in 2004, however, it is is silent on

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612 Labour Relations Act, section 197A(2)(a).
613 Ibid., section 197A(2)(c).
614 The establishment of SADC occurred through a treaty, signed on 17 August 1992 in Windhoek, Namibia.
14 August 2001, Heads of State and Government signed an Agreement Amending the SADC Treaty.
transfers of businesses as going concerns and assistance to employees when employers become insolvent. 615

Shortly after South Africa’s first democratic elections during 1994, South Africa enacted a modern Labour Relations Act of 1995 which acts regulate collective bargaining, the right to strike, unfair dismissal law and transfers of undertakings as going concerns. Although not a European Union member, South African policy makers were strongly influenced by the European Directive.

During 2000 - 2003 some improvements regarding the rights of employees in insolvency were introduced by moving the wage priority up in the ladder of payments and by increasing the amounts to be claimed as such, as well as by improving the priority claim for pension fund contributions by the insolvent employer. The position with regard to the treatment of contracts of employment and the transfer thereof to a new employer when the business is transferred as a going concern under insolvent circumstances, was also improved.

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Treatment of Wage Claims

According to Article 84.2.1, Ley 22/2003, de 9 de Julio, Concursal, the Spanish Bankruptcy Code, (Ley Concursal), super-priority is given to wage claims arising in the last 30 days of employment over all claims. General preference is given to all wages under Ley Concursal Article 91.1. These claims are restricted to amounts equalling three times the legal minimum wage.

Spain has a wage guarantee fund called the Fondo de Garantía Salarial. The Fondo de Garantía Salarial receives industry funding and is sufficiently funded. Contributions are computed as a percentage of the social security paid by employers. The fund provides for the payment of wages, up to 120 days, and for the payment of severance pay up to 12 months, limited to triple the legal minimum wage. The fund is ruled by the Real Decreto 505/1985 de 6 de marzo sobre organización y funcionamiento del Fondo de Garantía Salarial.

Treatment of Other Compensation

In Spain, vacation pay, and severance pay, and termination pay claims have the same preference as wage claims. Travelling and other expenses do not have priority.

Treatment of Pension Claims

Pensions are not granted super-priority under Spanish law because pension funds are always deposited in another company. This company is only allowed to look after the funds and can never manage them.

Director and Officer Liability for Social Claims

There is no director and officer liability for social claims in Spain.

Treatment of Collective Agreements

Collective agreements in Spain are under the control of the court. Negotiations are compulsory during 30 days after the commencement of the insolvency proceeding. Collective bargaining is done between the representatives of workers and the trustees in bankruptcy.

With respect to legacy costs, the minimal protection is 20 days of salary for each year worked with a limit of one year.

Successive employers are liable for labour conditions and wages debited, but the court may exempt the liability for the wages in charge of the Fondo de Garantía Salarial, in case of liquidation of the company.

Interaction of Insolvency Legislation with Other Social Claims Legislation

Bankruptcy affects labour relations legislation in Spain.

Collective agreements and claims are resolved by the court supervising the insolvency proceeding, but individual claims are resolved by the labor courts (Juzgados de lo Social).
Tax issues in respect of social claims

The minimal protection against insolvency is tax free.

Legislative Reform

Spain’s Bankruptcy Code (Ley Concursal) was implemented in 2004 and no legislative reform is being proposed.

Historical, political and social reasons for the development of Spain’s approach to social claims

The historical, political and social reasons for the development of Spain’s approach to social claims are unknown.
SWEDEN

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Treatment of Wage Claims

Under Swedish law, a right of priority applies to wage claims which accrued prior to the petition for bankruptcy or reorganization, and for wage claims for a maximum of one month after the District Court's decision. Wage claims for the period thereafter are not covered by a right of priority.

Employees in Sweden are protected in situations of insolvency by a State wage guarantee. The wage guarantee may be paid in connection with both company bankruptcy and company reorganization. Decisions regarding the right to wage guarantee payments in bankruptcy are determined by the bankruptcy administrator and, in connection with reorganization, by the reorganization administrator. All employees are entitled to wage guarantee payments. However, an exclusion applies to those who own, or during the preceding six months owned, a significant part of the company and, in addition, have had a significant influence over its operations. The maximum total amount which is covered by the wage guarantee is four times the statutory base amount, presently SEK 161,200.16

The wage guarantee covers wages which are earned up to three months prior to the petition for bankruptcy or reorganization, as well as wages for the first month subsequent to the District Court's decision to grant a petition for bankruptcy or reorganisation. The wage guarantee also covers wages during a notice of termination period, provided that no work is performed for the company in bankruptcy or reorganization during the notice of termination. Where work is performed, the company shall be liable to pay wages. The wage guarantee covers a period not longer than the statutory notice of termination period. In the event that a longer notice of termination period has been agreed upon, such is not covered by the wage guarantee.

Treatment of Other Compensation

Holiday claims and costs for the placement of the debtor into bankruptcy have a right of priority. Costs related to seeking to have the employer placed into bankruptcy may also be compensated by the wage guarantee.

Treatment of Pension Claims

A right of priority for pension claims exists in Sweden.

The predominant model for pension undertakings in Swedish companies is that monthly payments are made for each employee to an insurance company which undertakes liability to make future pension payments to the employees. Thus, companies do not carry any pension liability on its balance sheet. Previously, however, companies were responsible, and thus pension liability concerning more senior or retired employees may occur to a limited extent. The wage guarantee may be paid in respect of pension claims made not later than six months prior to the petition for bankruptcy or reorganization and the immediately following six months. Undertakings from the employer to pay premiums for pension insurance may also be covered.

In respect of pension rights in accordance with collective agreements, in most cases the employee has assigned to an insurance company the right to claim premiums. Such premiums are not covered by the wage guarantee; however, the employee's right to future pension payments is not affected in such cases by the defaulted payment.

161,200 SEK is 25,163 CAD.
Director and Officer Liability for Social Claims

Director and officer liability for social claims is unknown.

Treatment of Collective Agreements

The treatment of collective agreements is unknown.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The interaction of insolvency legislation with other social claims legislation is unknown.

Tax issues in respect of social claims

The existence of tax issues in respect of social claims is unknown.

Legislative Reform

There is currently no proposed legislative reform.

Historical, Political and Social Reasons for the Development of Sweden’s Approach to Social Claims

The historical, political and social reasons for the development of Sweden's approach to social claims are unknown.
SWITZERLAND

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Treatment of Wage Claims

According to Article 219 al. 4 lit. of the Swiss Debt Enforcement and Bankruptcy Law (“SDBL”), employee wage claims arising during the six month period before the opening of bankruptcy proceeding against an employer must be fully paid in priority to other claims. Claims resulting from the early termination of an employment agreement during insolvency proceedings are also privileged. The full amount of the wage claim is entitled to preference.

According to Article 51 and subsequent Articles of the Swiss Unemployed and Insolvency Insurance Law, the employees of an insolvent employer are entitled to request from a public insurance fund the payment of their past four months unpaid wages, after termination of their employment agreement. Employees and employers equally contribute to the funding of the structure, and employee contributions are deducted from wages.

In Switzerland, each canton is responsible for the foundation of a public insurance (Article 77 and following of the Unemployed and Insolvency Insurance Law). Under Swiss law, employees have the right to be fully paid and to receive a maximum indemnity covering the four months prior the opening of an insolvency proceeding, during which the wage has not been paid by the employer. Payment includes the employer-guaranteed gratifications. Employees are not entitled to be paid more than four times 8900 Sfr. Employees usually receive compensation within two weeks.

The contributions are proportional to salary and the employer retains a part every employee’s wages each month. The Swiss confederation and fund’s output also contribute to the funding of the structure. An adaptation of the contributions is envisaged in the event of economic downturn. If, at the end of the year, the fund does not meet certain financial guarantees, the federal council must lower the rate of the contributions. According to Article 54 of the Swiss Unemployment and Insolvency Insurance Law, the public insurance fund is subrogated to the rights of the employees.

Treatment of Other Compensation

In Switzerland, vacation pay, severance pay, termination pay, and traveling and other expenses are all priority claims. The “secured wages”, as contractually amounted, including overtime, gratifications, indemnity for work instrumentation, and travelling expenses, are entitled to preferential treatment. The damages allocated to an employee by the Court in case of non-valid early termination are also privileged.

Treatment of Pension Claims

If an employer does not make contributions to the pension plan, the insurance institution is entitled to raise a claim against the employer in order to recover the amount of contributions. If the employer does not pay the contributions and is insolvent or goes bankrupt, the insurance institution has a priority claim pursuant to 219/4 let. b Swiss Debt Enforcement and Bankruptcy Law. It is important to note that the employee has no claim against either the employer or against the insurance institution. The entire amounts of unpaid contributions are entitled to preference, and there are no restrictions on the realization of such claims.
If the insurance institution is itself insolvent, the Federal Pension Act (LPP) makes mandatory the creation of a pension payment guarantee fund, which pays the benefits instead of the insurance institution in case of insolvency. The pension payment guarantee fund is funded by the pension institutions affiliated (59/1 LPP). In some cases, the Swiss Confederation can extend a loan to the insurance institution (59/4 LPP).

Each Swiss Canton is in charge of the appointment of a special supervising authority. The authority must ensure that the fund is adequately capitalized and funded. The insurance institution is also a public entity which is placed under a political supervision, and the Swiss Government can enact rules concerning the management of the fund.

Director and Officer Liability for Social Claims

The non-payment of social claims is a criminal offence. Directors and officers who do not pay social claims during an insolvency proceeding are personally liable. The statutory provisions providing for this liability are 87 AVS, 70 AI, 25 LAPG, 76 Federal Pension Act, and 112 LAA. There is no cap on the amount of the liability, however, such claims against directors and officers may be compromised or settled during an insolvency workout or insolvency proceeding.

Treatment of Collective Agreements

In Switzerland, two kinds of collective agreements coexist: branch and company collective agreements. Branch collective agreements, concluded between an employer’s branch association and employees’ associations, cannot be terminated during an insolvency proceeding. The sole way for a bankrupt company to terminate a branch agreement is to leave the concerned employer’s association. However, the Swiss Federal High Court has decided that such a termination is not effective until the normal termination of the agreement. In a company collective agreement, the bankruptcy’s official receiver is entitled to decide to terminate the agreement.

Bargaining agents have no decisional power and no influence on insolvency proceedings. If the employer intends to proceed to collective dismissal, bargaining agents are only entitled to be informed of the situation and of what is happening in the near future. They have the right to be consulted, in order for them to give an advice about some reorganization prospects.

According to Article 333 al. 1 bis Swiss Code of Obligations (SCO), a successor employer must comply during one year with the collective agreement concluded by the previous employer, except normal termination of said agreement.

Interaction of Insolvency Legislation with Other Social Claims Legislation

An employer’s insolvency authorizes an employee to immediately terminate the employment agreement after an unsuccessful guarantees request (Article 337 of the SCO). The contracting partners of an insolvent debtor are also entitled, under certain circumstances, to early or immediately terminate some agreements.

In Switzerland, civil procedure rules are different in each canton. According to Article 343 of the SCO, the cantons shall provide for a simple and expeditious procedure for disputes arising of no more than 30’000 Sfr. Generally speaking, most of the Swiss cantons have set up special Courts, specialized in work disputes (Prud’hommes). In the Canton of Geneva, the bankruptcy or composition moratorium courts are not allowed to do so.

Tax issues in respect of social claims

Switzerland faces no tax issues in respect of social claims.

Legislative Reform

There is currently no legislative reform being considered.
Historical, political and social reasons for the development of Switzerland’s approach to social claims

Traditionally, employees have been considered a weak contracting party. This is why Swiss laws generally attempt to protect employees. The goal of instituting a privilege for the employees' claims was to avoid having the state pay all employee claims itself.
TAIWAN

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Treatment of Wage Claims

The preferential treatment of wage claims in Taiwan is prescribed in Article 28 of the ROC Labour Standards Act ("LSA"). According to Paragraph One, Article 28 of the LSA, where an employer is winding up or liquidating the business or adjudicated bankrupt, the employees shall have a preferential right ("Preferential Right") to claim payment of wages payable under the employment contracts that have been overdue for a period not exceeding six months. The amount of the wage claim is capped at six months of the employee’s wages and the claim is preferential to the regular claims of the employer’s creditors but secondary to the mortgage claims, pursuant to the ruling issued by the Labour authorities dated May 21, 1985 (Ref. No. Tai - 74- Nai - L ao - 294903).

A wage payment fund, the Arrear Wage Payment Fund (the "Fund") is prescribed in Paragraph Two, Article 28 of the LSA.

When an employee applies for repayment of arrear wage debt, the government authority in charge of the Fund, the Bureau of Labour Insurance ("BLI"), shall make a decision within 30 days of receipt of the application. According to Paragraph Two, Article 28 of the LSA, an employer shall make a monthly deduction at a fixed rate of the insurance-wage of employees and deposit the same in the Fund established by the Council of Labour Affairs ("CLA") for the purpose of paying the arrear wages referred to Paragraph One, Article 28 of the LSA. The current contribution rate of the Fund is 0.025%. When the Fund has reached a certain sum, either the ratio shall be reduced or the collection of such payment shall be suspended. If the employer contributes to the Fund every month pursuant to Article 28 of the LSA, its employees can apply for the full amount of the six-month wages arrear wages payable by the BLI for a period of six months preceding the date of winding up or liquidation of the business or being adjudicated bankrupt.

When the BLI has to investigate the account books, authorization documents and other documents together with other personnel from the local labour authority or the labour inspection authority before the final decision is made, its response may be delayed by another 15 days. Although the Fund is contributed to by all employers in Taiwan, after the BLI repays the arrear wage debt according to Article 28 of the LSA, the BLI may in its own name exercise the right to top-priority compensation to request repayment of the Fund from the employer, liquidator, or the supervisory personnel for the bankrupted property within a time limit. If the payment is made after the time limit, interest at the 1-year-time-deposit rate shall be charged.

Treatment of Other Compensation

Vacation pay, severance pay, termination pay, and traveling and other expenses do not receive priority over other claims.

Treatment of Pension Claims

In Taiwan, there are no specific provisions with respect to super-priority for employees’ pension claims over the employer's creditors' claims during insolvency or bankruptcy. Nevertheless, pursuant to the Labour Pension Act ("LPA"); applicable to all local employees hired on or after July I,
2005), an employee's entitlements and claims for the pension payment under the defined contribution scheme shall not be used in any transfer, mortgage, debt offset, or pledge in favor of the employees' creditors. In addition, the Labour Insurance Act also contains similar provisions stipulating that the rights for the insurance benefits provided under the Labour Insurance scheme shall not be transferred, mortgaged, offset, or pledged in favor of the employees' creditors.

Article 56 of the LSA provides for the retirement reserve fund (the "Reserve Fund"), a defined benefits pension scheme applicable to the employees hired before June 30, 2005 who have not switched to the defined contribution pension scheme provided under the LPA. The Reserve Fund is paid only for the employees' seniority under the pension scheme prescribed in the LSA and may be claimed by employees during insolvency.

The Reserve Fund is funded through industry contributions. Pursuant to the LSA, employers are required to allocate and set aside, on a monthly basis, 2% to 15% of the total payroll of the employees under the defined benefits scheme as the Reserve Fund with the government-designated agency (i.e., Bank of Taiwan, "BOT") to finance the payment of retirement benefits for employees' seniority under the pension scheme provided under the LSA. The factors for an employer to take into consideration in determining the allocation rate mainly are (1) the seniority of employees under the pension scheme of the LSA; (2) the wage structure; and (3) the labour turnover rate in the current five years. As long as the employer appropriates the Reserve Fund within the range of the appropriation rate (2% to 15%), it is in compliance with the LSA. In practice, the Reserve Fund is usually under-funded, because if there is any shortage of the Reserve Fund for paying the retirement benefits to the eligible employees, the employer should make it up for the full amount of retirement benefits from its expenses in that year pursuant to the LSA. In any shortage of the Reserve Fund in paying the retirement benefits to the employees, the pension claims for the shortfall would not have super-priority over other claims.

Benefits are paid under the Reserve Fund through a lump-sum payment based on the employees' retirement age and seniority under the pension scheme prescribed under the LSA. For the pension scheme prescribed in the LPA, the eligible employees may claim damages against the employer for the un-remitted pension contributions. The claims for damages for un-remitted pension contributions have no preference in insolvency.

**Director and Officer Liability for Social Claims**

Taiwan's local labour authorities may impose an administrative fine on the employing entity and the responsible person thereof for noncompliance, i.e., for not paying or making contributions toward the Fund for arrear wages or the Reserve Fund for retirement benefits; but there are no specific provisions concerning the liability or punishment during the company's insolvency. Nevertheless, pursuant to the Protective Act for Mass Redundancy of Employees ("Protective Act"), the CLA may prohibit the chair of the board of directors and/or the responsible person in fact of the business entity from going abroad in certain situations.

According to Article 12 of the Protective Act, where a business entity delays the payment of pension, severance pay, or wages to the employees in the course of implementing a mass redundancy plan and fits any of the following descriptions, and further fails to make the payments within a time limit fixed by the local labour authority, the CLA may request, by an official letter, the authority in charge of border control to prohibit the chair of the board of directors and the responsible person in fact of the business entity from going abroad:

1. The business entity has more than 10 but fewer than 30 employees and the total delayed payment is up to NT$3,000,000; 617
2. The business entity has more than 30 but fewer than 100 employees and the total delayed payment is up to NT$5,000,000; 618
3. The business entity has more than 100 but fewer than 200 employees and the total delayed payment is up to NT$10,000,000; 619

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617 3,000,000 TWD is 94,410 CAD.
618 5,000,000 TWD is 157,350 CAD.
619 10,000,000 TWD is 314,700 CAD.
The business entity has more than 200 employees and the total delayed payment is up to NT$20,000,000.

In Taiwan, claims against directors and/or officers cannot be compromised or settled during an insolvency workout or insolvency proceeding.

Treatment of Collective Agreements

Pursuant to Article 27 of the Collective Agreement Act, the rights and obligations prescribed in a fixed-term collective agreement should not be affected when the employer is insolvent or bankrupt unless otherwise agreed upon. However, a collective agreement with a non-fixed term will lose its validity when the termination notice issued from a dissolved organization expires.

A labour union is a legal entity under the Labour Union Act and will not be affected when the other party is undergoing insolvency proceedings. In recent years, the labour unions in Taiwan prefer to request the employers to cash out senior employees' seniority by using the formulas for retirement benefits set forth under the LSA (i.e., the retirement benefits are calculated at two monthly average salary for each full year of seniority for the first 15 years and one monthly average salary for each additional year of seniority, up to a maximum of 45 monthly average salary) during the process of a merger or an acquisition.

Pursuant to Article 27 of the Collective Agreement Act, except as otherwise agreed, the rights and obligations under a collective agreement of an organization that is a party to the agreement shall, in the event of a merger or spin-off of the organization, be transferred to the new organization organized due to the merger or spin-off..

Interaction of Insolvency Legislation with Other Social Claims Legislation

The Employee Welfare Fund Act (EWFA) provides that employees' welfare funds shall have preferential right to payment of debts. Where enterprise organizations are declared bankrupt, if the employees' welfare funds have not been set aside and allocated pursuant to the EWFA, they shall be as soon as possible, to the full amount in accordance with the EWFA, to which the creditors shall not object on any grounds. In that situation, supervisors of companies, trustees of properties declared bankrupt, or liquidators of bankrupt properties shall, in the performance of their duties, examine and verify whether the employees' welfare funds are set aside and allocated pursuant to the EWFA.

Taiwan’s Labour Union Act provides that when a debtor of a labour union goes bankrupt, the labour union shall have the preferential right to claim its property.

The court in whose jurisdiction the employees' workplace or the employing entity is located has jurisdiction over the employees' claims. In general, the court would not supervise the administration of an insolvency proceeding.

Tax issues in respect of social claims

There are no tax issues in respect of social claims.

Legislative Reform

There is currently no legislation reform being considered.

Historical, Political and Social Reasons for the Development of Taiwan’s Approach to Social Claims

In general, the Taiwan labour laws and regulations are based on international conventions approved by the International Labour Organization ("ILO"), the legislation of other countries, and the policies enshrined in the Constitution. For example, the wage claims protection prescribed in Article 28 of the LSA was based on the ILO’s Protection of Wages Convention, 1949 (No. 95).

20,000,000 TWD is 629,400 CAD.
THAILAND

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Treatment of Wage Claims

Thailand has a priority system for wage claims during insolvency. Such claims rank equally with taxes and have priority over unsecured creditors but not secured creditors. The amount entitled to priority is limited to four months’ wages, to a maximum of 100,000 Baht.621

There is also a wage guarantee fund in Thailand, called the Employees’ Provident Fund (the “Fund”) [กองทุนสงเคราะห์ลูกจ้าง], created under the Labour Protection Act 1998, which is funded by both employer and employee contributions. These sources of funding are sufficient for the Fund’s needs. The benefits available under the Fund include unpaid wages not exceeding 60 times the amount of the monthly payment.

Treatment of Other Compensation

Severance pay is granted the same priority as wage claims, up to 60 times the employee’s daily pay, if the employee has worked for more than 6 years continuously or up to 30 times the daily pay, if the employee has for worked more than 120 days but less than 6 years. Vacation pay is also granted the same priority as wages.

Treatment of Pension Claims

Thailand has a super-priority for pension claims on the same basis as wage claims (ranking equally with taxes), since pensions are deemed to be wages under Thai law. The cap for pension claims is the same as the cap for wages claims.

Pension claims are subject to the social security fund in Thailand, established by the Social Security Act 1990 (พระราชบัญญัติกองทุนประกันสังคม พ.ศ. 2533), which is funded equally by employer, government, and employee contributions. The pension payment guarantee fund is sufficiently funded.

Unfunded or under-funded pension liabilities are treated in the same manner as wage claims in a Thai insolvency.

Director and Officer Liability for Social Claims

In Thailand, there is no liability of corporate directors and officers for wage and pension claims during insolvency.

Treatment of Collective Agreements

With respect to bankruptcy cases, collective agreements will be terminated except where the official receiver decides to continue them. With respect to reorganization cases, collective agreements generally will continue except if the plan of arrangement indicates otherwise. Under the Bankruptcy Act 1940, section 122 and section 90/42, collective agreements may be modified or terminated during a restructuring proceeding.

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621 100,000 Baht is 3,083 CAD.
Interaction of Insolvency Legislation with Other Social Claims Legislation

Under Thai labour law, the labour court has jurisdiction over worker claims.

Tax issues in respect of social claims

The existence of any tax issues in respect of social claims is unknown.

Legislative Reform

There is currently no proposed legislative reform.

Historical, political and social reasons for the development of Thailand’s approach to social claims

The historical, political and social reasons for the development of Thailand’s approach to social claims are unknown.
UNITED ARAB EMIRATES

Contributor:
Alexander Inglis

Treatment of Wage Claims

The United Arab Emirates (U.A.E.) does not a wage preference or super-priority in terms of employee wage claims. There is no wage protection fund or guaranteed insurance for wage claims during insolvency. However, in non-insolvent circumstances there are benefits available. Under the national pension and social security scheme, which took effect in the public sector in May 1999 (and which only applies to U.A.E. national employees), nationals who have contributed to the scheme will be eligible for retirement benefits, disability benefits and compensation on death. Current end-of-service entitlements for government employees have been transferred to the new program.

During insolvency, employees are required to register as a creditor in accordance with U.A.E. Federal Law No. 18 of 1993 (the Commercial Transactions Code), which contains the bankruptcy law. Upon declaration of a debtor as bankrupt and appointment of a trustee in bankruptcy, notice is given to all creditors to register their claims.

Local creditors are required to register their claims within ten days of publication and creditors resident outside the U.A.E. are required to register their claims within one month. The trustee in bankruptcy would verify the documents submitted by the creditors and prepare a schedule of debts and lodge the same with the court. A copy of the schedule along with a statement of the amounts that the trustee intends to accept as debt owed will be sent to every creditor and the bankrupt. The creditors may file objection to the amounts contained in the schedules.

The judge supervising the bankrupt's estate will decide on these objections and prepare a final schedule of debts with the amounts that have been accepted. The judge supervising the bankrupt's estate will designate the manner in which the assets are to be sold. The sale proceeds will be deposited with the court cashier or in a bank account designated by the judge supervising the bankrupt's estate. Fees and expenses incurred towards administration of the bankrupt's estate will be deducted from the sale proceeds. Thereafter, the amounts due to preferred creditors will be paid and the remainder will be distributed to the unsecured creditors in proportion to debts due to them.

The General Authority for Pensions and Social Security (GAPSS) is an independent entity which invests employer and employee contributions to fund and operate the social security program above. This scheme is governed by Federal law No. 7 of 1999 concerning pensions and social security and only operates in respect of U.A.E. nationals. The Government allocated the required capital of Dh 500 million622 in the 1998 budget for the establishment of the authority, which commenced functioning as an investment body on 15 December 1998.623

Treatment of Other Compensation

There is no priority for vacation pay, severance pay, termination pay, or traveling expenses.

Treatment of Pension Claims

Pension claims are not granted a super-priority in U.A.E. There is no pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

Director and Officer Liability for Social Claims

Directors are not specifically liable to remunerate or recompense specific entities/people in the event of insolvency but can be liable of an offense under the Commercial Transactions Code (Commercial

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622  500,000,000 AED is 135,750,000 CAD.
623  Detailed information on the scheme is available at www.U.A.E.gov.ae.
Transactions Law Federal Law No. 18 of 1993) and subject to a penalty of imprisonment and/or a fine.

Claims against directors and/or officers cannot be compromised or settled during an insolvency workout or insolvency proceeding. Instead, directors’ liability is determined by the relevant court.

Treatment of Collective Agreements

This issue is not applicable to U.A.E. law.

Interaction of Insolvency Legislation with Other Social Claims Legislation

In the U.A.E. the issue of bankruptcy and insolvency is not considered distinct from other legislation.

Employment relationships are governed by U.A.E. Federal Law No. 8 of 1980 Regulating Labour Relations, as amended (the Labour Law), which imposes certain minimum standards on termination, working hours, vacation time, safety standards and other issues. Article 6 provides that disputes are settled by the competent Labour Departments, failing which the matter will be referred to the courts. In the case of Bankruptcy this is declared through a judgment rendered by the specialized civil court.

Tax issues in respect of social claims

There are no tax issues in respect of social claims.

Legislative Reform

There is currently no legislation reform being considered.

Historical, Political and Social Reasons for the Development of the U.A.E.’s Approach to Social Claims

Labour Law - Labour Law is predominantly concerned with the process of emiratisation to ensure the pro-active employment of local citizens. It has been pursued aggressively by the Ministry of Labour and Social Affairs.  

Insolvency - The Commercial Transactions Code devotes an entire chapter to bankruptcy, which is the first comprehensive legislation in the U.A.E. on the subject of Bankruptcy. Prior to enactment of the Commercial Transactions Code, creditors of bankrupt persons were often faced with a race to the courthouse with other creditors in order to obtain satisfaction of their claims. The Commercial Transactions Code chapter on bankruptcy governs the procedures and effects of bankruptcy in the U.A.E. and should provide a mechanism for the orderly evaluation and distribution of assets of a bankrupt entity.

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Treatment of Wage Claims

 Preferential debts, which include employee pension scheme contributions, up to four months’ arrears of wages to a set maximum, and unpaid holiday pay, are unsecured debts which, under the Insolvency Act 1986 Section 386 and Schedule 6 as amended by Enterprise Act 2002, Section 251, are to be paid in priority to all other unsecured debts. In addition, section 175(2)(a) provides that so far as the assets of the company available for payment of general creditors are insufficient to meet the preferential claims in full, those debts shall be paid out of any property comprised in or subject to a floating charge. Accordingly the preferential debts are payable in priority to claims secured by any floating charge.

In company administration proceedings, by paragraph 99(5) of Schedule B1 to the Insolvency Act 1986, as amended, super-priority attaches at the cessation of the administrator’s tenure of office in respect of any liability arising under a contract of employment that was adopted by the former administrator or a predecessor before cessation, but with the dual provisos that no account shall be taken of a liability that arises, or in so far as it arises, by reference to anything that is done or that occurs before the adoption of the contract of employment, and that no account shall be taken of a liability to make a payment other than wages or salary. It is important to note that this aspect of super-priority relates purely to the entitlements of the employee coming within the definition of “wages or salary” supplied in paragraph 99(6) of Schedule B1, referable to the period after the adoption of the contract of employment by the administrator. If the company goes into liquidation after the end of the administration, any amounts of unpaid salary, etc, that are referable to the period before the company went into administration, and that are referable to the period before the company went into administration, and that would qualify as preferential according to the provisions of Schedule 6 to the Insolvency Act 1986, would be payable as preferential debts in any distribution that the liquidator of the company is eventually able to make. However, this supposes that there are sufficient funds available to pay such a dividend after the expenses of the administration have been fully paid as required by paragraph 99(3), and a fortiori after the debts that enjoy super-priority under paragraph 99(4) and (5) have been fully paid, and that the expenses of the liquidation have also been fully provided for.

In an administration, no maximum monetary amount is specified in relation to the super-priority enjoyed by claims for wages or salary under contracts of employment adopted by an administrator. The insolvency legislation makes no reference to the length of employment as a qualifying condition for entitlement to preferential or priority status in respect of wages or salary claims.

In liquidation or bankruptcy, by Schedule 6 to the Insolvency Act 1986, Para.9, preferential status is attached to a prescribed amount of any amount that is owed by the debtor to a person who is or has been an employee of the debtor and is payable by way of remuneration in respect of the whole or any part of the period of four months next before the relevant date, as defined in section 387 of the Insolvency Act 1986. In liquidation/bankruptcy, the prescribed amount for which preferential status is

625 Insolvency Act 1986 Section 386 and Schedule 6 as amended by Enterprise Act 2002, Section 251.
conferred is currently set at £800 per employee: Insolvency Proceedings (Monetary Limits) Order 1986 (S.I.1986/1996),Art.4.

There can be confusion between the Insolvency Act provisions, which concern the preferential status accorded to certain claims in the insolvency of an employer, and the separate statutory scheme whereby direct payment is made to employees of an insolvent employer, under the provisions of s.184 of the Employment Rights Act 1996, by the National Insurance Fund. In addition to the protection that employees have as creditors of an insolvent employer under the Insolvency Act 1986, they also have added protection under Parts XI and XII of the Employment Rights Act 1996, and Section 124 of the Pensions Schemes Act 1993 whereby payment of certain debts are guaranteed, within limits, by the State from the National Insurance Fund, which is the UK’s chosen guarantee institution. This legislation, which implements the EU Insolvency Directive 80/987/EEC as amended by Directive 2002/74/EC, guarantees a basic minimum of payments to employees of insolvent employers who would normally have to wait some considerable time for payment, or get no payment, as creditors in the insolvency proceedings. The State aims to pay 78% of claims within 3 weeks of receipt and 92% within 6 weeks. Payments are made under the employment legislation irrespective of the prospects of recovery in the insolvency proceedings.

The payments guaranteed under the employment legislation are as follows: up to 8 weeks wages; up to 6 weeks holiday pay; one weeks' notice pay for each complete year of service up to a maximum of 12 weeks, subject to income received during the notice period; a tribunal’s basic award for unfair dismissal; a reasonable repayment for any fee or premium paid by an apprentice or articled clerk, and redundancy pay, which is based on length of service in certain age bands, up to a maximum of 30 weeks pay. All the above payments are capped at the statutory limit, which is currently £330, effective 1 February 2008, increased from £310; and the maximum basic award for unfair dismissal (30 weeks’ pay) rose from £9,300 to £9,900 effective the same date. This limit is reviewed annually by BERR and increased or decreased in line with September’s retail price index.

The State is subrogated vis a vis the insolvent estate in respect of the amounts that have been paid under the various heads of eligibility. To the extent that any portion of such payments corresponds to a claim of the employee that would qualify as preferential in the employer’s insolvency (e.g. for up to £800 wages), the State stands as a preferential creditor for the same amount. In respect of any other, non-preferential amounts that the State has paid to the employee in the first instance, the State’s subrogation is as an unsecured creditor. An unpaid basic award of compensation for unfair dismissal made by an employment tribunal is payable in full. A compensatory award is not payable.

Arrears of pay, holiday pay and pay in lieu of notice may be subrogated to the UK Secretary of State. The National Insurance Fund (NI Fund) has been set up, under which UK Secretary of State has become liable to pay employees according to sections 166(1) (b) and 167(1) of the Employment Rights Act 1996, in the case of the redundancy payments, and sections 182 and 184(1) (b) of that Act, in the case of compensatory notice pay. The most common of these debts are arrears of pay, holiday pay and pay in lieu of notice. The insolvency provisions enable the Secretary of State, within the prescribed limits, to pay the specified debts due to employees in an insolvency, whether the debts are preferential or not. The NI Fund is funded by costs to the system, employer or industry tax, and general tax revenue.

When payments have been made, the Secretary of State assumes the rights of each employee and becomes a single creditor of the employer. The priority of the Secretary of State's claim depends on the priority of each payment made to the employee. Once payment in full has been received from the NI Fund, the employee has no further rights in the insolvency in respect of that element of his/her claim. Subrogation to the UK Secretary of State will ensure that payments are made generally within two months of the date of appointment of the Insolvency Practitioner. This timeframe may be less in an uncomplicated case but considerably extended where claims are contested. The Redundancy Payments Office (RPO), on behalf of the Secretary of State, pays 72% of claims within 3 weeks of receipt of the claim from the Insolvency Practitioner and 92% of claims are settled within 6 weeks.

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627 £290 to £330 is 562 CAD to 639 CAD. £8,700 to £9,900 is 16,844 CAD to 19,167 CAD.
628 £800 is 1,549 CAD.
Basically it depends on how quickly the Insolvency Practitioner sends the forms and the required information to the RPO.

The NI Fund was first established by section 35 of the National Insurance Act 1946 as a fund maintained under the control and management of the Minister. All contributions paid by employers and insured persons were to be paid into this fund, and out of it were to be paid all claims for benefit and certain other sums payable under various statutes. The fund was continued in being for these purposes by section 83 of the National Insurance Act 1965. Section 83(4) of that Act provided for accounts of the National Insurance Fund to be prepared, for them to be examined and certified by the Comptroller and Auditor General and for copies of these accounts together with his report thereon to be laid before Parliament.630

Where an employee is paid from the NI Fund, the State takes over the employee’s rights to recover that amount of the debt under Sections 167 and 189 of the Employment Rights Act 1996. The State has the same rights as the employee to be paid in priority to the employer’s other creditors. Employees’ priority claims under the Insolvency Act 1996 are all accrued holiday pay to which the employee became entitled in the 12 months before the insolvency date; and wages up to £800 in the four months immediately before the insolvency date.

For preferential claims only, the requirement for the State to be paid in full before the employee is paid was removed [Employment Rights Act 1996, s. 189(4) was repealed]. However, the requirement to add together the State and employee’s preferential claims and treat them as one debt for the purpose of computing the preferential dividend remains [Employment Rights Act 1996, s. 189(3)]. The need for apportionment between the Secretary of State’s and the employee’s preferential claims for wages arises because of the legal requirement for the claims to be treated as one for calculation of preferential debt statutory and the statutory limit on the amount payable, which is £800 on the wages payable in the four months immediately before the insolvency date. Any debts that fall outside of the four-month period are out of scope for preferential purposes and do not need to be added to the employees gross claim for calculation purposes. The State would expect an amount equivalent to the percentage of the employees gross claim paid from the NIF on behalf of the employer. For example, if the State has paid 25% of the wages debt then they can expect 25% of the dividend, with the employee receiving the balance.

Treatment of Other Compensation

All holiday pay owing has priority, provided that the amount is owed by way of accrued holiday remuneration in respect of a period of employment before the relevant date, as defined in s.387, to a person whose employment by the debtor has terminated: Insolvency Act 1986, Sched.6, para.10. There is priority for severance pay for an amount equal to one week’s pay after one calendar month’s service rising to one week per year of service up to a maximum of twelve weeks (new earnings will be taken into account). Termination pay is also subject to priority up to a maximum of £9,900. The calculation of the preferential element depends on the type of compensation and the claims are pari passu with general wage claims. Any claims that exceed the maximum permitted preferential claim become unsecured claims. There is no priority for traveling expenses. These payments are not preferential under The Insolvency Act 1986.

Treatment of Pension Claims

Unfunded or under funded pension liabilities are unsecured creditors in insolvency proceedings. In the UK, pension deficiency claims do not enjoy priority, but any sum that is owed by the debtor plan sponsor payable by way of plan sponsors’ contribution to an occupational pension scheme or to the government pension scheme with respect to any employee constitutes a preferential debt in the liquidation or bankruptcy of the plan sponsor. Any sum that is owed by the insolvent plan sponsor and is a sum to which Schedule 4 of the Pension Schemes Act 1993 applies, according to the section addressing contributions to occupational pension schemes, is preferential.631 The preference applies to unpaid contributions to personal pension schemes as well as occupational schemes.

631 Welfare Reform and Pensions Act 1999, which applies to all cases where the bankruptcy petition was
In addition to the protection that employees have as creditors of an insolvent employer under the Insolvency Act 1986, they also have added protection under the Pensions Schemes Act 1993 whereby payment of certain debts are guaranteed, within limits, by the State from the National Insurance Fund.

Unpaid pension contributions are also a guaranteed payment, providing they fell to be paid in the 12 months immediately prior to the insolvency date. The following contributions are preferred: unpaid contributions on behalf of an employee, i.e., contributions that have been deducted from the pay of the employee, but that have not been paid into the resources of the scheme, up to a maximum of the amount deducted from the employee’s pay with respect to his or her other contributions to the scheme during the 12 months ending on the day before the plan sponsor became insolvent; unpaid contributions payable by the plan sponsor on its own account, to a limit of whichever is the least of the balance of the plan sponsor’s contributions relating to the 12 months ending on the day before the plan sponsor became insolvent; the amount certified by an actuary as necessary for the scheme to meet its liability on dissolution for payment of benefits to the employees and an amount equal to 10% of the total pay of the employees concerned for the 12 months ending on the day before the plan sponsor became insolvent, subject to the statutory limits on payments.632

Where an employee is paid from the NI Fund, the State takes over the employee’s rights to recover that amount of the debt under section 127 of the Pension Schemes Act 1993. These rights include any right of priority conferred under insolvency legislation.

Other priority claims are certain occupational pension contributions (private pension schemes are excluded as they are not contracted out from SERPS); employees contributions deducted from pay in the four months preceding the insolvency date. Employer’s contributions from schemes contracted out of the State earning related pension scheme to the extent of the level by which the NI contribution is reduced in relation to the 12 months preceding the insolvency date.

The priority of rights among pension claimants has also been revised in the UK, and there is an express statutory priority order established by law that overrides the priority order in pension scheme rules. The legislation and its regulations give priority to current pensions and future increases in pension benefits ahead of the accrued pension rights of active, working members of the pension scheme.633 The administrator of a pension scheme can, within certain limits, make a claim on the national insurance fund with respect to any pension scheme contributions unpaid by the plan sponsor at the date of the plan sponsor’s insolvency.634

Further amendments to statutory priorities for schemes that commenced winding up on or after April 6, 2005 when the PPF commenced operations were put in place, specifically: any liability for pensions or other benefits to the extent that this does not exceed the corresponding PPF liability; remaining voluntary contributions not covered; and any other scheme benefits not covered.635 The objective was to eliminate the distinction between how well off individual scheme members are if the pension scheme winds up than they would be if the PPF were instead to assume responsibility for the scheme and pay compensation to members.636

In the UK, where the scheme’s liabilities exceed its assets, the shortfall becomes a debt owed by the plan sponsor to the trustees of the scheme and if the plan sponsor becomes insolvent, the trustee's

632 Source: http://www.insolvency.gov.uk/pdfs/guidanceleaflets/pdf/guideforips.pdf. Hence, these payments include the actual amount deducted from employees wages but not paid into the pension scheme, and for employer's contributions to the pension scheme it is the lesser of, a) the amount paid, or b) an amount certified by an actuary (except for money purchase schemes), or c) an amount equal to 10% of the employees' wages paid or payable during the 12 month period.

633 Stewart at 22.

634 Pension Schemes Act 1993, ss. 123-128.

635 Stewart at 22.

636 Ibid.
claims, other than those for some unpaid contributions, rank equally with all other unsecured creditors. The trustee of the pension scheme may, however, make a claim for contributions due but unpaid by a plan sponsor to the state operated national insurance fund through the Redundancy Payments Directorate of the Insolvency Service, subject to the statutory limits on payments.

Unpaid employees’ contributions are payable by the national insurance fund up to the actual amount deducted from wages during the twelve months prior to the date of insolvency and unpaid plan sponsors’ contributions for the twelve-month period prior to the insolvency date are also payable but are subject to monetary limits depending on the type of pension scheme. All payments, no matter what type of scheme, are subject to limit. The state is then subrogated to the claims with the same preferred status; specifically, pension contribution claims ranked as preferred claims, after secured creditors with security over assets or property but before secured creditors with floating charges.

The Pension Protection Fund (PPF) is a pension guarantee fund that is funded by compulsory levies charged to eligible pension schemes. A 100% level of compensation is available for people who, at the start of the PPF’s involvement with a scheme, the assessment date, have reached the scheme’s normal pension age or who have retired on ill-health grounds. The second level, is for plan members that have retired but not reached the normal pension age of his or her pension scheme, the PPF will pay up to 90 per cent compensation.

Director and Officer Liability for Social Claims

Directors may find themselves subject to the following consequences as a result of their actions in the period before a company becomes subject to an insolvency procedure (such as liquidation or receivership):

1. **Disqualification Order**, is an order that may be made against a director or a person that carried out the functions of a director or a shadow director. A disqualification order will declare that he or she is unfit to be concerned in the management of a company. During the time such an order is in force, the person subject to the order may not be a director or be involved in the promotion, formation creation or management of a company; be a liquidator or administrator of a company or be a receiver or manager of a company’s property without the leave of the court.

2. **Misfeasance or Breach of Duty** - a director or person involved in the management of a company may have an order made against him or her requiring him or her to pay amounts to compensate the company for losses arising from his or her breach of fiduciary duty or misfeasance.

3. **Fraudulent Trading** - a director who is knowingly a party to the carrying on of a business with the intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, commits a criminal offence and, if the company goes into liquidation, may also be liable to make a contribution to the company’s assets.

4. **Wrongful Trading** - a director who allows a company to continue trading when there is no reasonable prospect that it will avoid going into insolvent liquidation may be required to contribute to the company’s assets.

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638 Ibid. at 22.

639 Ibid. at 22.

640 Under the Company Directors Disqualification (CDDA) Act 1986, Section 6 (4) as amended the minimum disqualification period is 2 years and the maximum 15 years.

641 Companies Act 2006, s.993; Insolvency Act 1986, s.213.

Claims can be compromised or settled during an insolvency workout such as ‘Administration’ or ‘Company Voluntary Arrangement’ but only with the agreement of creditors. Administration is a procedure that places a company under the control of an insolvency practitioner and the protection of the court with a hierarchy of objectives of rescuing the company as a going concern, achieving a better result for the creditors as a whole than would be likely if the company were wound up without first being in administration, or, if the administrator thinks neither of these objectives is reasonably practicable, realizing property in order to make a distribution to secured or preferential creditors. While a company is in administration, creditors are prevented from taking any actions against it except with the permission of the court. For an administration proposal to succeed, it must be accepted by a majority in excess of 50% in value of creditors present in person or by proxy and voting on the proposal.\footnote{Insolvency Rules 1986 Rule 2.43 (1). Note also r.2.43(2). On entitlement to vote at a meeting of creditors, see r.2.38.}

A company voluntary arrangement (CVA) is a procedure that enables the company to put a proposal to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs. A composition is an agreement under which creditors agree to accept a certain sum of money in settlement of the debts due to them. The procedure is extremely flexible and the form which the voluntary arrangement takes will depend on the terms of the proposal agreed by the creditors. A CVA may be used as a stand-alone procedure or as an exit route from an administration. It may also be used where a company is in liquidation, but this is extremely rare. The proposal will be made by the directors, the administrator or the liquidator, depending on the circumstances. The proposed arrangement requires the approval of a majority in excess of 75% in value of the creditors present in person or by proxy and voting on the proposal, and once approved is legally binding on the company and all its creditors, whether or not they voted in favor of it.\footnote{Insolvency Rules 1986, r.1.19(1); Insolvency Act 1986, s.5.}

Treatment of Collective Agreements

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) preserves employees’ terms and conditions when a business or undertaking, or part of one, is transferred to a new employer. This includes the right to representation by a trade union or elected representative. In addition TUPE provides requirements in the Regulations on both the new and transferor employers to consult representatives of the affected workforce before the relevant transfer takes place.

The insolvency provisions of the TUPE 2006 Regulations only apply to transfers where the transferor was insolvent and under the supervision of an insolvency practitioner on or prior to the date of the transfer. If the transfer was before the insolvency the ‘solvent’ TUPE provisions apply. Insolvencies of which primary function is the liquidation of the assets of the transferor to satisfy creditors’ claims are not subject to regulations 4 and 7, i.e. the automatic transfer of contracts, and the unfair dismissal TUPE provisions. These insolvencies are creditors voluntary liquidation, compulsory winding up by the court or bankruptcy. In these types of insolvency the contract of employment automatically terminates at the time of the transfer and liability for payments under chapter VI of Part XI of ERA (Redundancy Payments) and Part XII of ERA (Insolvency Payments) remain with the transferor and will fall for payment from the State - Reg 8(7). Continuity of employment is not preserved, even if the employee continues to work for the new employer.

Insolvencies where the primary intention is to rescue the undertaking are subject to specific regulations under TUPE 2006, Reg 8(6). These are commonly referred to as ‘relevant insolvencies’ and include administration, voluntary arrangements, and administrative receivership. In these cases the State will pay certain of the debts owed to employees in order to assist in the rescue of the business. Employees who transfer under these forms of insolvencies will have continuity of

\footnote{684} highlighted the personal risks for directors in allowing a company to continue trading when there is no reasonable prospect of avoiding insolvency. The court held that the directors were wrong in their view that the company had reasonable prospects and were therefore exposed to a number of serious consequences including personal liability for the company’s debts.

\footnote{643} Insolvency Rules 1986 Rule 2.43 (1). Note also r.2.43(2). On entitlement to vote at a meeting of creditors, see r.2.38.
employment and as such will not be entitled to a redundancy payment or CNP. Equally, as the contract transfers, the entitlement to accrued holiday pay will continue to accrue with the transferee. However, to assist with the rescue of the undertaking claims for arrears of wages and holiday pay in respect of holidays taken but not paid for, will be paid by the State subject to statutory limits (any extra statutory entitlement will transfer to the transferee)."

Where there is a collective redundancy consultation required under the Trade Union and Labour Relations (Consolidation) Act 1992, an employer must inform and consult employees’ representatives when there is a proposal to make 20 or more employees redundant at any one establishment. Representatives can be trade union officials recognized by the employer as able to represent particular types of employees in collective bargaining; or where there is no trade union, an elected representative for the whole workforce; or a combination of trade union officials and elected representatives for different types of employees. For example, a trade union may represent shopfloor workers but not office staff. The office staff should have the opportunity to elect someone to represent them.

To assist the rescue of failing businesses, the TUPE Regulations 2006, make special provision where the transferor employer is subject to insolvency proceedings:

First, the Regulations ensure that some of the transferor’s pre-existing debts to the employees do not pass to the new employer. Those debts concern any obligations to pay the employees statutory redundancy pay or sums representing various debts to them, such as arrears of pay, payment in lieu of notice, holiday pay or a basic award of compensation for unfair dismissal.® In effect, payment of statutory redundancy pay and the other debts will be met by the Secretary of State through the National Insurance Fund. Where employees transfer there is no redundancy or notice entitlement under ERA 1996. Payments for redundancy or notice entitlement will only be payable if the employee is dismissed for economic, technical or organizational reasons.

Second, the TUPE Regulations provide greater scope in insolvency situations for the new employer to vary terms and conditions after the transfer takes place. In a non-insolvency environment, the Regulations place significant restrictions on new employers when varying contracts because of the transfer or a reason connected with the transfer. These restrictions are in effect waived, allowing the transferor, the new employer or the insolvency practitioner in the exceptional situation of insolvency to reduce pay and establish other inferior terms and conditions after the transfer. However, in their place, the Regulations impose other conditions on the new employer when varying contracts:

- The transferor, new employer or insolvency practitioner must agree on the “permitted variation” with representatives of the employees. Those representatives are determined in much the same way as the representatives who should be consulted in advance of relevant transfers. In other words, information and consultation rights are preserved.

- The representatives must be union representatives where an independent trade union is recognized for collective bargaining purposes by the employer in respect of any of the affected employees. Those union representatives and the transferor, new employer or insolvency practitioner are then free to agree variations to contracts, though the speed of their negotiations may be faster than usual in view of pressing circumstances associated with insolvency.

- In other cases, non-union representatives are empowered to agree to permitted variations with the transferor, new employer or insolvency practitioner. However, where agreements are reached by non-union representatives, two other requirements must be met. First, the agreement that records the permitted variation must be in writing and signed by each of the non-union representatives, or by an authorized person on a representative’s behalf where it is not reasonably practicable for that representative to sign. Second, before the agreement is reached.

646 The Regulations also provide for the payment of these sums on the date of the transfer even though they may not have actually been dismissed by the transferor on or before that date, as would normally be a requirement for such payments.

647 See TUPE Part 5 for details.
signed, the employer must provide all the affected employees with a copy of the agreement and any guidance that the employees would reasonably need in order to understand it;

- The new terms and conditions agreed in a “permitted variation” must not breach other statutory entitlements. For example, any agreed pay rates must not be set below the national minimum wage.

- A “permitted variation” must be made with the intention of safeguarding employment opportunities by ensuring the survival of the undertaking or business.\(^{648}\)

Successor employer issues can largely be managed if the insolvency options are carefully assessed and the appropriate insolvency procedure chosen. The changes to the TUPE Regulations described above have increased the amount of flexibility available to insolvency practitioners in planning business recoveries and maximizing asset recoveries in liquidations.

**Interaction of Insolvency Legislation with Other Social Claims Legislation**

The TUPE Regulations are designed to clarify what a transfer is and when it occurs but it will still be dependent on the individual circumstances. However, they substantially increase the requirements in terms of notification of information to a transferee. Previously a transferor was under no obligation to give information and this created serious problems for the transferee. Now there will be a requirement to provide specific information, which includes details of employees’ terms and conditions including their age, their disciplinary record and any grievances raised in the preceding two years. It will be required that this information should be given at least two weeks before the date of the transfer.

Employers will not be able to contract out of this obligation and if they fail to comply with the requirement to provide this employee liability information, a complaint can be made by the transferee to an Employment Tribunal and that Tribunal can make an award of not less than £500\(^{649}\) per employee.

Claims are heard by Employment Tribunals and Employment Appeal Tribunals. Courts are used for enforcement of awards made.

**Tax issues in respect of social claims**

The most important tax issue in respect of social claims is the changes to UK insolvency law that removed certain priority claims of Government. The Enterprise Act 2002, which applies to all cases where the petition for a winding-up order or bankruptcy order was presented on or after 15 September 2003, has significantly reduced the types of creditors to whom preferential status is available, with the Inland Revenue and HM Customs & Excise being most affected. The categories of preferential debts no longer treated as preferential are liabilities to the exchequer such as deductions of income tax from officers and employees under the Pay As You Earn scheme\(^{650}\) that have been, or should have been made, and deductions made, or which should have been made, from subcontractors of debtors engaged in the construction industry\(^{651}\), Value Added Tax, customs duties, Landfill tax and Insurance Premium tax, Excise duty on Beer, Air passenger duty, Betting, bingo, gaming and lottery duty and Social Security contributions.

**Legislative Reform**

In December 2006, a research study titled ‘The Impact of the Enterprise Act 2002 on Realizations and Costs in Corporate Rescue Proceedings’, written by John Armour, Audrey Hsu, and Adrian

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\(^{648}\) In addition, the sole or principal reason for the permitted variation must be the transfer itself or a reason. For more detailed information, please refer to the Department of Trade & Industry website; [http://www.dti.gov.uk/files/file20761.pdf](http://www.dti.gov.uk/files/file20761.pdf).

\(^{649}\) 500 GBP is 980 CAD.

\(^{650}\) Income Tax (Earnings and Pensions) Act 2003, section 684.

\(^{651}\) Finance Act 2004, sections 58 to 72.
Walters observed ‘creditor governance in insolvent companies: concentrated creditor governance in insolvency, in the form of strong control rights concentrated in the hands of a single secured lender, does on average at least as good a job at preserving jobs and generating recoveries for creditors as does the new administration procedure, which allocates greater control to dispersed unsecured creditors’. Creditor governance in insolvency is one of the strongest policy foundations of UK insolvency law.

The Green Paper “Modernizing labour law to meet the challenges of the 21st century” is a consultation document that has been published by the European Commission. Its purpose is to start an open EU-wide debate on how labour law impacts on labour market flexibility and how to facilitate new ways of working and promote employment. The paper poses fourteen questions on how labour law can be adapted to ensure flexibility and security for all. The Government will be considering these questions with a view to responding to the formal consultation. Labour law includes the law and regulations on the transfer of undertakings in insolvency and non insolvency environments. Although protection of employee rights has recently been strengthened and revised (see discussion on TUPE above), further changes are likely as Trans European national and EU law is consolidated.

Historical, political and social reasons for the development of the UK’s approach to social claims

The Enterprise Act 2002, which applies to all cases where the petition for a winding-up order or bankruptcy order was presented on or after 15 September 2003, has significantly reduced the types of creditors to whom preferential status is available.

The Pensions Act 2004 made provisions for the Financial Assistance Scheme (FAS), which offers help to some people who have lost out on their pension because the scheme they were a member of was under-funded when it started to wind up and the employer is insolvent or no longer exists. However, not all members of all schemes that meet this qualifying condition will receive assistance from the FAS. The FAS does not attempt to replicate the rules or benefits of any particular scheme but provides assistance to those who have lost out and are in most urgent need. The Financial Assistance Scheme Regulations (2005) were approved by UK Parliament on 19 July 2005 and the scheme came into operation on 1 September 2005. The scheme was developed with the advice of pensions professionals, trade unions, industry organizations, business, and members of affected pension schemes and the Regulations were subject to public consultation. The Financial Assistance Scheme (Miscellaneous Amendments) Regulations (2006) which extended the Scheme to people within 15 years of their normal retirement age on 14 May 2004 came into force on 15 December 2006. FAS is administered by the Department for Work and Pensions and is managed by a national FAS Operational Unit (FAS OU).
UNITED STATES OF AMERICA

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Treatment of Wage Claims

The United States grants priority to pre-proceeding wage claims over other unsecured claims under 11 U.S.C. section 507(a)(4), for 100% of amounts owing up to a maximum of 10,000 USD for wages and under section 507(a)(5) up to 10,000 USD per employee for employment benefits. With inflation, the amount is now 10,950 USD as at May 2008.

There is no wage protection fund or guaranteed insurance for wage claims during insolvency. Wage and benefit claims arising during a proceeding are normally administrative claims and entitled to the priority of section 507(a)(2).

Treatment of Other Compensation

Vacation pay, severance pay, and termination pay are all included within the wage priority noted above up to the maximum of 10,000 USD. Traveling and other expenses are not preferenced unless they are classified as earnings.

Treatment of Pension Claims

In the United States, pension claims are not granted a super-priority. Pension funds are generally private, albeit tax subsidised. There is however, a pension guarantee fund, the PBGC. The PBGC is funded by employer and industry tax. The administrator of the fund is required to determine the solvency of the fund and set calculations of taxing levels. Although the fund is currently making payments, it is underfunded and its ability to make future payments is a contentious political issue.

Unremitted pension claims are treated as general unsecured claims or priority claims under 11 U.S.C. section 507(a)(5) unless the PBGC has perfected a lien. Unfunded or underfunded pension liabilities are usually treated as general unsecured or priority claims in conjunction with but subordinated to the wage priority.

Some governmental and other claims may be subrogated to social claims in bankruptcy, but it does not seem to be a significant factor. Overall, this area is highly specialized, involving both state and federal law, especially tax law, as well as insolvency law, so more detailed answers would require a focus on this area alone.

652 Several dollar amounts in the Bankruptcy Code are adjusted for inflation every three years. The figure in the text is correct as of May, 2008. The next adjustment will be in April, 2010.
653 For more information about the fund see http://www.pbgc.gov/workers-retirees/benefits-information/content/page13181.html and http://www.pbgc.gov/workers-retirees/find-your-pension-plan/content/page789.html.
Director and Officer Liability for Social Claims

There is no director and officer liability for social claims in the United States. However, certain officers or directors may be personally liable if the company misappropriates money withheld from employee wages for payroll or income tax purposes. In addition, if they sit on the governing board of a pension or similar fund, they may be liable as a fiduciary if they act improperly.

Treatment of Collective Agreements

According to 11 U.S.C. sections 1113 and 1114, collective agreements are continued on insolvency or bankruptcy, but they can be terminated if a “balance of the equities” demonstrates a need for termination. The Bankruptcy Code permits bargaining, modification and termination of collective agreements if this test is met.

The collective bargaining agent continues to be the collective bargaining agent during bankruptcy or insolvency and there is almost always a conflict between current workers and retirees.

With respect to legacy costs, problems have arisen as companies are filing for bankruptcy and leaving behind legacy costs. Successor liability is often an important issue, especially in light of section 363 of the Bankruptcy Code which empowers the estate, with court approval, to sell property free and clear of liens and other interests.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The interaction of insolvency legislation with other social claims legislation is unknown. Generally, the trustee in bankruptcy must operate the business of the estate within applicable state law. 28 U.S.C. §959(b).

There are other forms of worker protection even as to pre-proceeding claims. The Federal Hot Goods law forbids sale of goods made by unpaid labourers, some states impose constraints and penalties on businesses who do not pay their employees, and so on.

Tax issues in respect of social claims

In the United States, companies receive tax relief for providing certain kinds of social claims, and employees receive tax exempt status for certain of their social claims, such as pension plans.

Legislative Reform

Labour groups in the Unites States have indicated that they are planning to propose changes to the bankruptcy laws, but such plans have not yet been unveiled.

Historical, Political and Social Reasons for the Development of the United States of America’s Approach to Social Claims

The United States historically has not emphasized workers’ economic rights and the social safety net in the United States is smaller, with bigger gaps, than in most other developed countries. The limited protections in the Bankruptcy Code presumably reflect similar views. On the other hand, consumer bankruptcy in the United States has been far more generous than any other in the world. Even following the restrictive 2005 amendments to the Bankruptcy Code, United States law may still be the most generous in granting a discharge. While a discharge does not put food on the worker’s table, it does help protect the worker from collection of debts that were reasonable when made but have become unpayable because of a lost job.
VENEZUELA

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Treatment of Wage Claims

Venezuela has wage preference or super-priority in terms of employee wage claims. This preference is provided in articles 158 through 160 of the Venezuelan Organic Labour Law (Ley Orgánica del Trabajo) (LOT). All wage claims involving salary, severance and termination benefits, indemnity and other credits that an employer owes to an employee with respect to the employment are entitled to preferential treatment. Article 158 of the LOT provides a super-priority with respect to the payment of “any credit owed to employees equivalent up those salaries of the last six (6) months, and for severance benefits equivalent up to ninety (90) days of salary”. After the employees have executed this preference and the employer has not yet paid in full, the employees will have a security interest over the employer’s assets.

Venezuela does not have wage protection fund or guaranteed insurance for wage claims during the insolvency.

Treatment of Other Compensation

There is a statutory priority for vacation pay, severance pay, termination pay and travelling and other employment expenses owing to employees. These benefits are considered as a credit owed to employees with occasion to their employment and as such are protected by the general preference provided to salaries and other employment benefits provided in the LOT. There is no specific amount entitled to preference nor is this preference allowed under specific conditions. Generally, these employment benefits will have priority over any other credit in the event of insolvency or bankruptcy of the employer. Venezuela does not have a compensation guaranteed fund or insurance program for any of the above types of compensation.

Treatment of Pension Claims

Pension claims also fall within the preference provided in article 158 of the LOT. Please note however that pensions are rare in Venezuela and may only apply if provided for in a collective bargaining agreement. There are no limits on pension claims super-priority and no restrictions on realization of payment of such claims.

Venezuela does not have a pension payment guaranteed fund or guaranteed insurance for pension claims during insolvency. These payments will be guaranteed by the employer’s assets.

There are no special regulations regarding remittance of pension contributions in the event the debtor becomes insolvent. In this case the employee/creditor will have priority as other employees. Unfunded or under-funded pension liabilities are treated as any other employment credit, subject to preference in the event of employer insolvency. The beneficiaries of these pensions will have preference over the employer’s asset for the collection of these funds.
Director and Officer Liability for Social Claims

Corporate directors and officers are not liable for social claims during insolvency.

Treatment of Collective Agreements

Collective Agreements are continued in the event of insolvency or bankruptcy. However the employer has the right to propose to its employees certain changes to help in this situation. In this case the employer must present an application for these changes to the Labour Inspector. The collective bargaining agent’s status does not change in the context of an insolvency proceeding.

There has only been one case of an employer with a collective agreement and legacy costs. This company was recently purchased by the Venezuela government and is complying with its obligation under the agreement.

The LOT allows an employer to request an authorization to amend the collective agreement when the employer is going through “economics circumstances that endanger the activity or existence of the company” (Article 525 LOT).

There are no regulations with respect to successor employers or insolvency professionals that continue to operate the business after it files insolvency proceedings. Generally, the successor employer will have to apply the collective agreement, unless the Labour Inspector has previously authorized the suspension or termination of the agreement.

Interaction of Insolvency Legislation with Other Social Claims Legislation

The only treatment of social claims in the context of bankruptcy and/or insolvency is found in the LOT. No other statute among those relating to labour and employment discuss these issues. The Venezuelan Civil Courts supervising the administration of an insolvency proceeding have jurisdiction to resolve worker claims. In any other case, the Venezuelan Labour Courts have jurisdiction to resolve worker claims.

Tax issues in respect of social claims

There are no particular tax issues in respect of social claims in Venezuela.

Legislative Reform

There is currently no proposed legislative reform in Venezuela in respect to the treatment of social claims.

Historical, Political and Social Reasons for the Development of Venezuela’s Approach to Social Claims

There is no specific reason for the development of Venezuela’s approach to social claims. Since the 1940s Venezuela has been a country very protective of its employees, and therefore has followed the social protection trends of Europe.

654 The Venezuelan Commercial Code (Código de Comercio) provides the general rules on bankruptcy or insolvency of a business organization.
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Appendix 2  Survey Questionnaire

COUNTRY QUESTIONNAIRE

Country: _________________________________
Contact Name _________________________________
E-mail address _________________________________

Please answer the following questions with as much detail as possible. Where possible, identify the statutory, legal or regulatory basis for the information.

Name and contact information of person completing the Questionnaire:

1. TREATMENT OF WAGE CLAIMS
   1.1. Does your country have a wage preference or super-priority in terms of employee wage claims (identify the relevant statute or regulation giving rise to the preference, if applicable)?

   __________________________________________________________________________

   1.2. If so, what portion of the wage claims is entitled to preferential treatment?

   __________________________________________________________________________

   1.3. Are there restrictions on realization of the preferential claim (e.g. length of employment, a cap on amount)?

   __________________________________________________________________________

   1.4. Does your country have a wage protection fund or guaranteed insurance for wage claims during insolvency?

   __________________________________________________________________________

1.5. If so, what is the funding structure? (check one or more that apply)

   Industry funded
   Costs to the system
1.6. What level of benefits are available?
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

1.7. When do employees generally receive compensation or other benefits?
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

1.8. Is the wage protection or guaranteed insurance fund sufficiently funded?
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

1.9. How are contributions to the fund computed and what adjustments, if any, are allowed or required to ensure that the fund is adequately capitalized or funded?
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

1.10. What is the statutory / legal basis for the fund (please cite section and statute, please append the provisions to this questionnaire if possible)
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

1.11. If funded by state revenue, is the state subrogated to the claims of employees?
__________________________________________________________________________
__________________________________________________________________________

2. TREATMENT OF OTHER COMPENSATION

2.1. Is there priority or preference for the following, and if so, in what amount and under what conditions?

<table>
<thead>
<tr>
<th></th>
<th>Priority Yes / No</th>
<th>Amount entitled to preference</th>
<th>Preference allowed under what conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Vacation pay</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
2.2. If there is a wage or compensation guarantee fund or insurance program, are any of the above types of compensation (vacation, severance, termination, travel, etc) entitled to the same preference as general wage claims?

__________________________________________________________________________
__________________________________________________________________________

3. TREATMENT OF PENSION CLAIMS

3.1. Does your country grant pension claims a super-priority?

__________________________________________________________________________

3.2. If so, how much?

__________________________________________________________________________

3.3. Are there restrictions on realization of payment of such claims (e.g. length of employment, a cap on amount)?

__________________________________________________________________________

3.4. Does your country have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency?

__________________________________________________________________________

3.5. If so, what is the funding structure? (check one or more that apply)

<table>
<thead>
<tr>
<th>Industry funded</th>
<th>Costs to the system</th>
<th>Employer or industry tax</th>
<th>General tax revenue</th>
</tr>
</thead>
</table>

3.6. Level of benefits available

__________________________________________________________________________
__________________________________________________________________________
3.7. Is the pension payment guarantee fund or guaranteed insurance for pension claims sufficiently funded?

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

3.8. How are contributions to the pension payment guarantee fund or guaranteed insurance for pension claims computed and what adjustments, if any, are allowed or required to ensure that the fund is adequately capitalized or funded?

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

3.9. What is the statutory / legal basis for the fund (please cite section and statute, please append the provisions to this questionnaire if possible)

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__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

3.10. If funded by state revenue, is the state subrogated to the pension claims of employees?

__________________________________________________________________________
__________________________________________________________________________

3.11. How are unremitted pension contributions of the debtor treated in insolvency?

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

3.12. How are unfunded or under-funded pension liabilities treated in insolvency?

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__________________________________________________________________________
__________________________________________________________________________

4. LIABILITY FOR SOCIAL CLAIMS

4.1. Is there liability of corporate directors and officers for social claims during insolvency (explain)? For example, are directors and officers liable for failure to pay or make contributions toward social claims and / or pension funds?
4.2. If so, what are the statutory provisions (please attach them if possible as well)

4.3. Is there a cap or limit to such liability?

4.4. Can such claims against directors and/or officers be compromised or settled during an insolvency workout or insolvency proceeding?

5. TREATMENT OF COLLECTIVE AGREEMENTS

5.1. How are collective agreements treated on insolvency or bankruptcy? Are they continued or terminated?

5.2. What is the status of the collective bargaining agent in the context of an insolvency proceeding?

5.3. What issues has your jurisdiction faced in respect of collective agreements and legacy costs?655

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655 Legacy costs are those pension and retirement payments that a company is committed to make for retired workers under any form of retirement plan or agreement that exists or existed. Such costs are referred to as “legacy costs” because such plans were typical of a past period but generally are non-existent or much less generous in today’s more competitive markets.
5.4. What statutory provisions are there, if any, to allow bargaining, modifying or terminating collective agreements during restructuring proceedings?

__________________________________________________________________________
__________________________________________________________________________

5.5. Are there successor employer issues in respect of collective agreements after insolvency restructuring, in terms of purchasers of the business or insolvency professionals that continue to operate the business after it files insolvency proceedings?

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6. INTERACTION OF INSOLVENCY LEGISLATION WITH OTHER SOCIAL CLAIMS LEGISLATION

6.1. What is the treatment of other statutes in the context of bankruptcy and/or insolvency, such as labour relations legislation, employment standards legislation, human rights legislation, and occupational health and safety legislation?

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__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

6.2. Which court has jurisdiction to resolve worker claims and can such claims and issues affecting workers be resolved by the court supervising the administration of an insolvency proceeding?

__________________________________________________________________________
__________________________________________________________________________

7. TAX ISSUES

7.1. Are there particular tax issues in respect of social claims in your jurisdiction?

__________________________________________________________________________
8. LEGISLATIVE REFORM

8.1. Is there proposed legislative reform in your jurisdiction in respect of treatment of social claims? If so, what are the proposed changes and what is the status of the reform process?

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

9. MORE GENERAL POLICY QUESTIONS

9.1. What are the historical, political and social reasons for the development of your jurisdiction’s approach to social claims?

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__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

9.2. Are there issues in respect of treatment of social claims that we have not addressed in this questionnaire?

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