INSOL INTERNATIONAL

CLAIMS PRESENTATION AND RESOLUTION IN INSOLVENCY PROCEEDINGS

INSOL INTERNATIONAL

International Association of Restructuring, Insolvency & Bankruptcy Professionals

Claims Presentation and Resolution in Insolvency Proceedings

Copies of this report are available from:

INSOL International
2-3 Philpot Lane, London, EC3M 8AQ, UK
Tel: +44 (0)20 7929 6679 Fax: +44 (0)20 7929 6678

Email: heather@insol.ision.co.uk
www.insol.org

Price £100.00 plus postage & packing

Published September 2008

INSOL INTERNATIONAL

International Association of Restructuring, Insolvency & Bankruptcy Professionals

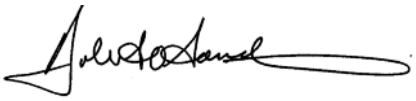
It is my sincere honour to introduce this important and excellent publication "Claims Presentation and Resolution in Insolvency Proceedings".

Creditors are the paramount beneficiaries of any restructuring or insolvency proceeding and we as insolvency practitioners well understand and appreciate how important it is for creditors to have their claims presented, approved and settled in an expeditious and just manner. To that end, it is vital that the insolvency and restructuring laws of a country have in place a robust framework of rules and procedures that achieves this objective. When comparing the different country chapters in this publication, it is quite apparent that the law and practices amongst different countries are quite varied and sometimes rather unusual. There are, however, similarities that are also clear.

Within a set structure, this book explores the methods by which claims are presented, defended against, and resolved in different insolvency systems around the world. Specifically, it looks at the formalities of claims presentation, the types of claims that can be presented and the remedies available to creditors. Further, it looks at the defences available to the debtor, the process for resolving claims, and the availability of alternative dispute resolution mechanisms.

I would like to congratulate and thank the project leader Harold Horwich, of Bingham McCutchen LLP for co-ordinating and leading this project through to its publication. Hal has spent a significant amount of his time as editor, which we appreciate very much.

I hope our members will consider this book a valuable contribution to their library.



Robert O. Sanderson
President
INSOL International

INSOL INTERNATIONAL

International Association of Restructuring, Insolvency & Bankruptcy Professionals

Foreword

Insolvency systems are a collective exercise designed to share the hardship of insufficient assets in an equitable manner consistent with public policy. Notwithstanding the collective nature of insolvency proceedings, there is no issue more important to the individual creditor than the establishment of its claim in the proceeding. This book examines the law and procedure for the presentation and allowance of creditor claims in fifteen jurisdictions. We have examined the requirements for filing proofs of claim, as well as the procedure for challenging and sustaining claims where they are contested.

While there are common themes throughout, the array of differences is even more impressive. Each of the systems obeys an internal logic which we have tried to capture through a consistent organization in each article. For this reason, we have used topic headings rather than questions since the variations among systems do not accommodate the question and answer format.

I would like to thank the authors who contributed their time and energy. For many, it was a challenge to describe their systems under the headings which we designated. They showed tireless patience in making revisions and tapering their square pegs to our round holes.

We hope that the insolvency community finds this book to be a useful starting point in understanding the requirements for presenting their claims in jurisdictions around the world.

Harold S. Horwich
Bingham McCutchen LLP

INSOL International
GROUP THIRTY-SIX

Allen & Overy LLP
Alvarez & Marsal LLC
Baker Tilly
Begbies Global Network
Bingham McCutchen LLP
Cadwalader, Wickersham & Taft LLP
Chadbourne & Parke LLP
Cleary Gottlieb Steen & Hamilton LLP
Davis Polk & Wardwell
Deacons
De Brauw Blackstone Westbroek
Deloitte & Touche LLP
Ernst & Young
Ferrier Hodgson
Freshfields Bruckhaus Deringer
Goodmans LLP
Grant Thornton
Greenberg Traurig LLP
Huron Consulting Group LLC
Jones Day
Kaye Scholer LLP
Kirkland & Ellis LLP
KPMG LLP
Kroll
Linklaters
Lovells LLP
Norton Rose LLP
Pepper Hamilton LLP
PPB
PricewaterhouseCoopers
RSM Corporate Advisory Services
Skadden, Arps, Slate, Meagher & Flom LLP
Shearman & Sterling LLP
Vantis
Weil, Gotshal & Manges LLP
White & Case LLP

Contributors

Country	*Contributor*
Australia	Dr. David Goldman & Michael Rose Deacons
Brazil	Luiz Fernando Valente de Paiva, Christopher Andrew Jarvinen, & André Moraes Marques Pinheiro Neto Advogados
Canada	Howard A. Gorman & Lara B. Mason Macleod Dixon LLP
China	John Marsden, Atticus Zhao & Eric Dong Mayer Brown JSM
France	Marc André Lawyer
Germany	Christoph G. Paulus Schultze & Braun, Achern Humboldt-Universität zu Berlin
India	Sanjay Bhatt & Abhishek Kumar Kesar Dass B & Associates New Delhi
Italy	Raffaele Lener & Raffaella Raffaele Freshfields Bruckhaus Deringer
Japan	Hideyuki Sakai Bingham McCutchen Murase Sakai Mimura Aizawa Foreign Law Joint Enterprise Lisa Valentovish Bingham McCutchen LLP
Mexico	Thomas S. Heather White & Case S.C.
New Zealand	Mike Whale & Ellen Wah Lowndes Associates
Singapore	Chee Yoh Chuang RSM Chio Lim
The Netherlands	Desirée Staal De Brauw Blackstone Westbroek N.V.
United Kingdom	Christopher Mallon & Claire Mamo Skadden, Arps, Slate, Meagher & Flom (UK) LLP
United States of America	Harold S. Horwich & Stephen M. Hryniewicz Bingham McCutchen LLP

Contents

Australia

The Australian law relating to corporate insolvency is set out in Chapter 5 (External Administration) of the *Corporations Act 2001* (Cth) (the "Act"). The law relating to personal bankruptcy is set out in the *Bankruptcy Act 1966* (Cth). This chapter is limited to corporate insolvency. For the purposes of this chapter, references to an "External Administrator" are references to an insolvency practitioner appointed to administer an insolvent administration and distribution of assets, being either a liquidator (appointed by the Court or creditors) or a deed administrator (appointed by creditors).

A. Claims presentment

1. Proofs of claim

The formal requirements in relation to proof and ranking of claims are contained in Division 6 of Chapter 5 of the Act. It is usually a process between the creditor and External Administrator, only involving Court adjudication if there is a contest (described below).

A proof of debt or claim may be prepared by either the creditor personally, or a person authorised by the creditor. Where a person authorised by the creditor prepares the proof, that authorised person must state their authority and means of knowledge of the debt or claim (Regulation 5.6.40).

A creditor is not entitled to receive any more than the amount of the provable debt, and any interest payable on that debt. Under section 554(1) of the Act, the amount of debt or claim against a company (including a debt or claim that is for or includes interest) is to be computed for the purposes of the winding up as at the "relevant date." The relevant date will generally be the date the External Administrator was appointed under Part 5.6 of the Act. A discount rate is prescribed under Regulation 5.6.44 at 8% per annum from the date the principal payment was due, discounted to the "date of the declaration of the dividend." Note that the Regulation is not entirely consistent with section 554B that refers to a discounting of future payments back to the relevant date. Interest is not claimable after the relevant date (section 563B of the Act).

In order to assert a claim, a creditor must have a provable debt. This is a prerequisite to voting in meetings of creditors. A person will not be entitled to vote as a creditor at a meeting of creditors unless the debt or claim has been admitted wholly or in part by the External Administrator, or where the creditor has lodged with the chairperson of the meeting particulars of the debt or claim, or formal proof of the debt or claim (Regulation 5.6.23). In addition, a creditor may be entitled to vote at a meeting of creditors when the chairperson of the meeting exercises the power to admit the proof of debt or claim for the purposes of voting. This is done through the mechanism of an "informal proof of debt."

Subject to certain exceptions, generally the distributions of a company will be shared proportionately to the total debt amongst classes of creditors according to the "pari passu" principle. The process for a creditor to prove the debt and rank equally for a share in any proceeds of a liquidation replaces the creditor's right to pursue the debt outside the administration process. The exceptions are that certain creditors have priority (e.g., employees and certain insurance creditors) and a creditor may be bound by any agreement whereby the creditor subordinates a claim in favour of other creditors.

A dividend in the winding up of the company will be paid to those creditors whose debt or claim has been admitted by the External Administrator at the date of distribution of dividends (Regulation 5.6.63). Only those debts which are provable may be paid as a dividend in a winding up. If an External Administrator requires a debt or claim to be proved formally, it must be proved formally. Where a debt is required to be proved formally, the External Administrator may fix a date on or before which a creditor must submit particulars of the debt or claim (Regulation 5.6.39). Formal requirements are discussed below.

The formal proof of debt or claim must contain detailed particulars of the debt or claim sought to be proved and in the case of a debt, include a statement of account, and specify the voucher, if any, by which the account can be substantiated (Regulation 5.6.50).

However, if there is no such requirement, then the debt or claim may either be proved formally, or in some other way in accordance with the regulations. Whilst formal proofs are normally required for dividend purposes, the External Administrator may admit the debt or claim in the absence of formal proof (Regulation 5.6.47). In order to reject an informal claim, the External Administrator must first require that formal proof of that debt or claim be submitted (Regulation 5.6.47).

If the creditor is successful in proving the debt, then the creditor is admitted to proof. Unless otherwise ordered by the Court, creditors must bear the costs of proving the debt or claim, and of amending that proof (Regulation 5.6.51). A proof of debt or claim must contain certain prescribed information, including whether the creditor is a secured creditor, the value and nature of the creditor's security (if applicable) and whether the debt is secured in whole or in part (Regulation 5.6.41). The creditor must, in preparing the proof of debt or claim, allow for all discounts for which an allowance would have been made if the company were not being wound up (Regulation 5.6.42).

2. Effect of security

A secured creditor must, for the purposes of voting, state in the proof of claim or debt the particulars of the creditor's security, the date when it was given and the creditor's estimate of the value of the security, unless the creditor surrenders the security (Regulation 5.6.24(1)).

A secured creditor will be entitled to vote only in respect of the balance, if any, due to the creditor after deducting the value of the creditor's security as estimated by the creditor in accordance with Regulation 5.6.41 (Regulation 5.6.24(2)). Should a secured creditor vote in respect of the whole of the debt or claim, the creditor is taken to have surrendered the security unless, on application to the Court, the Court is satisfied that the omission to value the security has arisen from inadvertence (Regulation 5.6.24(3)).

The above provisions will not apply in a meeting of creditors convened under Part 5.3A of the Act dealing with voluntary administration of the company. Similarly, the above provisions do not apply to a meeting of creditors held under a deed of company arrangement. This reflects the view that the purpose of a deed of company arrangement is to help the company become solvent, and that any exercise by a creditor of their security may prevent this. Accordingly, the secured creditor is entitled in those circumstances to vote for the full debt or claim without becoming disentitled to the underlying security.

3. Types of claims

Under section 553(1) of the *Corporations Act*, debts admissible to proof include "all debts payable by, and all claims against, the company" which are "present or future, certain or contingent, ascertained or sounding only in damages" where "the circumstances giving rise" to them "occurred before the relevant date." This therefore means that, generally, a claim, however loosely defined, must exist as at the relevant date.

A “debt” refers to a liquidated amount whereas a “claim” can be for an unliquidated or unascertained amount, including for personal injury and other tortious claims. The phrase “all debts payable” includes not only those debts which are payable at the relevant date, but also those debts which will be payable at a future date or which would become payable upon the occurrence of a contingency.

Notwithstanding this broad definition, there are certain claims which are not provable in a winding up. If a debt is not legally enforceable, such as a debt arising from an illegal transaction, it will not be provable. Other claims that are not provable include statute barred debts and Court imposed penalties.

In addition, debts which are barred by operation of a limitation period at the commencement of the liquidation would also not be provable. However, if at the commencement of the liquidation the debt was not barred by operation of a limitation period, it will not cease to be provable simply as a result of the operation of that limitation period throughout the course of the liquidation.

4. Unmatured, contingent and unliquidated claims

There is little practical difference between unliquidated claims and contingent claims. Both types of claim have a value which is not immediately ascertainable with any accuracy, and which will be fixed at some time in the future. As such, reference in this paper to contingent claims includes both unliquidated and contingent claims.

The winding up of a company has the effect of accelerating the amount payable to a creditor to the relevant date for determining the commencement of the External Administration.

a. *Contingent claims*

By virtue of the definition in section 553(1), contingent claims are admissible to proof. A contingent debt is a debt which becomes payable upon the occurrence of a contingency. However, there is not a definition which adequately covers all possible contingent debts. In *Federal Commissioner of Taxation v Gosstray* [1986] CLR 876 at 878, Tadgell J said “*a contingent creditor, like an elephant, is rather easier to recognise than define*.” They may include claims in negligence, defamation claims, damages for breach of contract or misleading conduct.

The mere fact that a claim is contingent – that is, there is uncertainty as to whether the debt exists at all, or that the claim is payable on the happening of a contingency will not prevent a claim from being provable. However, in order to prove the claim, the External Administrator must estimate the value of the debt, or refer the question to the Court. Regulation 5.6.23 provides that a person must not vote as a creditor at a meeting of creditors in respect of an unliquidated or contingent debt or claim, or a debt the value of which has not been established, unless a just estimate of its value has been made. It has been suggested by the Court (*Re Zambena Pty Limited* 13 ACSC 1020 per Cohen J) that an External Administrator, acting as chairman of a meeting of creditors, would be justified in refusing to accept as just an estimate which puts a value, other than a nominal value, on a contingent debt claimed by a guarantor where there is nothing to indicate an amount which has actually been called upon under the guarantee. In such circumstances, the Court has indicated that a nominal figure would be a just estimate in the circumstances.

If, prior to the distribution of the dividend in the winding up, the contingency underlying the creditor's claim occurs, the creditor could submit an amended proof identifying the satisfaction of the relevant contingency.

b. *Future obligations*

In the case of a provable claim not payable until a later date, the amount admissible is the amount which is payable on a future date reduced by the discount rate contained in Regulation 5.6.44 as mentioned above. This discount rate is presently 8% per annum, calculated from the declaration of the dividend to the time on which the debt would have become payable according to the terms on which it was contracted.

5. Stay of proceedings

As a general rule, the appointment of an External Administrator places a stay on the commencement or continuation of litigation against the company. The Federal Court and various Supreme Courts have discretion to grant leave for litigation to be commenced or continued. In deciding whether to grant leave the Court will consider the interests of creditors as a whole and the most efficient means of resolving any issue in the dispute.

B. Defences

1. Bar dates

An External Administrator may fix a date on or before which a creditor must submit particulars of the debt or claim (Regulation 5.6.39). This period must be not less than 14 days after the day on which notice is given. Notice will be given where the External Administrator has advertised the date in a daily newspaper circulating generally in each state or territory in which the company has a registered office or carries on business. This advertisement must be in accordance with Form 533.

In addition, where the External Administrator specifies a day on or before which creditors of the company whose debts or claims have not been admitted must formally prove the debt or claims, and the creditor fails to comply with that requirement, the creditor is excluded from the benefit of a distribution made before the creditor's debt or claim is admitted, and is also excluded from objecting to that distribution (Regulation 5.6.48).

If a creditor does not put in its claim on time it may lose its rights to receive a dividend paid out before the time the proof of debt is submitted. The creditor is generally entitled to a catch-up dividend before further distributions are paid to other creditors.

2. Defences

The defences which the Company may apply will be those ordinarily available to a defendant before the Court. The External Administrator will take that defence into account in adjudicating the claim, exercising office in a 'quasi-judicial' capacity. This is elaborated in the next section.

C. Claims adjudication procedures

1. Standing to object

In the usual course, the External Administrator adjudicates on all claims submitted by a creditor. However, creditors may appeal against the adjudication to the Court (see 3.6 below).

2. Burdens of proof

In determining whether to admit or reject a proof of debt or claim, an External Administrator is said to act in a quasi-judicial capacity, as a result of which the practitioner is to act according to standards no less than those applicable to the Court or a judge (*Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332, 338-340). That is, the External Administrator must determine the amount to admit solely on the law, and not as a matter of discretion: *Westpac Banking Corp v Totterdell* (1997) 25 ACSR 769. An External Administrator is obliged to apply the general law subject to any modifications expressed in the *Corporations Act* and Regulations. The External Administrator has a positive obligation to seek responses from potential creditors known to the External Administrator, even if the creditor does not submit a proof of debt in response to the formal invitation.

An External Administrator must within 28 days after receiving a request in writing from a creditor to do so, or within such other time as allowed by the Australian Securities and Investments Commission (Australia's corporations regulator), admit all or part of the formal proof of debt or claim submitted by the creditor, or reject all or part of the formal proof of debt or claim, or require further evidence in support of the proof (Regulation 5.6.53). If the External Administrator fails to deal with the proof within this time, the creditor who submitted the proof may apply to the court for a decision in respect of that proof.

3. Jurisdiction

At first instance the External Administrator will have jurisdiction to determine whether any claim against the company will be allowed or disallowed. The duties of the External Administrator in the claims adjudication process are set out in paragraph C.5 below.

In the event that a decision of the External Administrator is appealed, then this appeal will be heard by either the Federal Court of Australia, or the Supreme Court of a State or Territory, by a single judge without a jury.

As set out in paragraph A.5 above, the appointment of an External Administrator places a stay on the commencement or continuation of litigation against the company.

4. Discovery

Discovery as against the company will only become relevant if the External Administrator's proof of debt adjudication is appealed to the Court and the Court gives directions for discovery.

A creditor is entitled to include material in support of the proof of debt or at a later time.

5. Claim adjudication

In arriving at a just estimate of the claim, "ordinary approaches as to the assessment of damages" are to be employed: see *Khoury & Sons v Zambena Pty Limited* [1999] NSWCA 402, cited with approval by Barrett J in *Selim v McGrath* (2003) 47 ACSR 537 at [102]. The obligation of the External Administrator or chairperson in making a just estimate of value is to accept the position of a creditor if the material in support of that creditor's claim provides "reasonable grounds, within that context, for ascribing a particular figure to the particular claim": *Selim v McGrath* at [103].

Where the External Administrator rejects all or part of a proof, the External Administrator must within 7 days, notify the creditor of:

a. The grounds of that rejection in accordance with Form 537;

b. The right of the creditor to appeal to the Court against the rejection; and

c. That failing such appeal, the creditor's claim will be assessed in accordance with the External Administrator's endorsement on the creditor's proof.

Where an External Administrator considers that a proof of debt or claim has been wrongly admitted or rejected, the External Administrator may revoke that decision in part or in whole, or amend the decision by varying the amount of the admitted claim. Where the External Administrator revokes a decision to admit a proof of debt or claim and rejects all of it, or reduces the amount of the admitted debt or claim, the creditor must immediately pay to the External Administrator the amount received as a dividend for the proof in so much as that amount exceeds that which the creditor is currently entitled to (Regulation 5.6.55).

6. Costs of litigation

The costs of an appeal against the decision of an External Administrator will be borne by the creditor unless the Court otherwise orders (Regulation 5.6.51).

7. Appeals

A proof of debt or claim must be prepared by the creditor or a person authorised by the creditor (Regulation 5.6.40) and the creditor must bear the cost of proving or amending the proof of that claim (Regulation 5.6.51). The Court has discretion to award costs. This means that an External Administrator may be made personally liable for costs where a creditor is successful in appealing the decision of the External Administrator to the Court.

The usual order after a successful appeal to the Court by a creditor against the External Administrator's rejection of proof is that the costs of the application (but not of the proof of debt) be taxed or assessed on a party-party basis and paid out of the company's assets.

As outlined above, there exists a statutory right of appeal against a decision of an External Administrator in respect of a proof of debt or claim. Where an External Administrator rejects a creditor's formal proof of debt or claim, that creditor may, within the time specified in the notice of rejection, or such greater time as the Court allows, appeal to the Court against the rejection of that proof or claim (Regulation 5.6.54). The application to the Court must be made, subject to any extension of time, within 14 days from the date on which the External Administrator serves the notice of rejection on the creditor.

In addition, where an External Administrator fails to deal with the proof within the 28 day period specified in the Regulations, a creditor may apply to the Court for a decision in respect of that proof (Regulation 5.6.53).

It is something of a misnomer to use the word 'appeal' to describe the Court process ensuing from the disgruntlement of a creditor with the External Administrator's adjudication. In fact, the Court action will proceed as a hearing de novo. The External Administrator will be required to act in an adversarial manner and defend the position adopted in the proof of debt ruling.

Brazil

In Brazil, the law governing corporate insolvency proceedings comes primarily from the *Lei de Falências e Recuperação de Empresas* (Law Nº 11.101) ("New Bankruptcy and Restructuring Law" or "NBRL"). The NBRL is a federal statute that came into force on June 9, 2005. It replaced the prior bankruptcy law that had been in existence for over 60 years (Decree-Law No. 7661 of June 21, 1945).

In order to understand the process of claims presentation and resolution under the NBRL, it is necessary to become familiar with several aspects of the statute. The NBRL created two new legal proceedings, the Out-of-Court Reorganization (*Recuperação Extrajudicial*)[1] and the Judicial Reorganization (*Recuperação Judicial*).[2] Both of these insolvency proceedings authorize debtors to obtain court approval for reorganization plans negotiated with creditors. The NBRL also preserved a revised, court-supervised Bankruptcy Liquidation (*Falência*).

The principal actors in all three insolvency proceedings include: (1) the debtor; (2) the court-appointed Judicial Administrator (*Administrador Judicial*) who polices the debtor throughout a Judicial Reorganization or replaces the debtor's management and assumes responsibility for administering the debtor's estate upon the court decreeing a Bankruptcy Liquidation; (3) the Creditors Committee (*Comitê de Credores*) that creditors have the option to appoint to supervise both the debtor and the Judicial Administrator; and (4) the individual creditors affected by the insolvency proceeding.

In order to resolve important matters, the NBRL provides for the calling of a general meeting of creditors ("GMC"). (Art. 35.) Issues that the GMC may decide include: (1) approval, rejection or modification of the debtor's proposed plan; (2) forming, or replacing members of the Creditors Committee; or (3) any other matter that may affect the creditors' interests. (Art. 35.)

The NBRL deals with the insolvency of business persons (*empresários*) and legal entities engaged in business (*sociedades empresárias*). (Art. 1.) However, certain business enterprises do not qualify for either an Out-of-Court Reorganization or a Judicial Reorganization, including government-owned entities, mixed capital companies, government-owned or private financial institutions, credit unions, purchasing pools, private pension entities, health care plan companies, insurance companies, special savings companies and other comparable entities pursuant to Brazilian law. (Art. 2.) In contrast, many of the business enterprises prohibited from commencing either an Out-of-Court Reorganization or a Judicial Reorganization, including most of the above mentioned entities, are subject to a Bankruptcy Liquidation. (Art. 197.)

---

[1] An Out-of-Court Reorganization is somewhat analogous to a "pre-packaged" chapter 11 case under the U.S. Bankruptcy Code because the company files the proposed pre-packaged plan with its petition to initiate the proceeding.

[2] The Judicial Reorganization embodies many features similar to a chapter 11 case under the U.S. Bankruptcy Code.

A. Claims presentment

1. Proofs of claim

Section II of the NBRL ("Verification and Proof of Claims") sets forth the general requirements for presenting and resolving claims in Judicial Reorganizations and Bankruptcy Liquidations. (Arts. 7-20.) In contrast, the NBRL does not promulgate specific rules regarding claims in Out-of-Court Reorganizations because this type of insolvency proceeding deals with the consensual resolution of claims that have already been acknowledged by a debtor. However, a creditor opposing the approval of an Out-of-Court Reorganization pre-packaged plan must attach to its objection proof of its own claim (Art. 164, ¶ 2.) In addition, the NBRL permits creditors to challenge the claims included in the Out-of-Court Reorganization pre-packaged plan in order to demonstrate that the debtor failed to obtain the minimum percentage required for court approval of the plan.

A creditor may file a proof of claim. (Arts. 7, 10.) In a Bankruptcy Liquidation, certain entities that are liable with a debtor to a creditor, or that have secured such creditor (solvent co-obligors, guarantors, or partners with unlimited liability) may file a proof of claim if the creditor fails to do so within the statutory period. (Art. 128.)

Generally, in order to assert a claim, a creditor should file a proof of claim. However, there are exceptions to the general rule. In Judicial Reorganizations and Bankruptcy Liquidations, the Judicial Administrator must publish a notice in the official press containing, among other information, an itemized schedule listing each creditor and its address as well as the amount and priority of the creditor's claim. (Art. 7, ¶ 2.) The schedule published by the Judicial Administrator constitutes *prima facie* evidence of the validity of each scheduled claim. If a scheduled claim is not challenged, the court will order the debtor to include the claim in the official list of claims. (Arts. 14; 15.I.) Accordingly, the holder of an unopposed claim does not need to file a proof of claim.

In order to minimize the burden of the claims process on creditors, the NBRL requires a debtor to provide the Judicial Administrator with an accurate list of claims held against it. A debtor filing a Judicial Reorganization that fails to do so, without a relevant lawful reason or if it is not grounded on a court decision, may be removed from the administration of the company (Art. 64.IV.d) and its acts may be considered as bankruptcy crimes penalized with confinement if it is demonstrated there was intention to mislead, which includes the informing of a false claim or omitting a claim (Arts. 171; 175.) Similarly, a creditor that submits a false proof of claim may also be convicted of a bankruptcy crime penalized with confinement if the creditor had the intent to do so. (Art. 175.)

There does not exist an official proof of claim form.[3] Rather, a proof of claim represents a written statement satisfying the requirements of Article 9 of the NBRL. Pursuant to Article 9, a proof of claim must include: (1) the creditor's name and address; (2) a description, amount and priority of the claim as of the filing date of the petition for a Judicial Reorganization or the decree of a Bankruptcy Liquidation; (3) the documents evidencing the claim and a description of any other documents the creditor intends to produce in support of the claim; (4) a description of the guarantee (if any) provided by the debtor and relevant documents; and (5) a description of the security rights (if any) held by the creditor. (Art. 9.(I)-(V).)

If the claim, or interest in property of the debtor securing the claim, is based on an instrument or a document, the original or certified copy (if the original is attached to the case file of another proceeding) of such writing must be filed with the proof of claim. (Art. 9, Sole Para.) If a creditor asserts a security interest in the property of the debtor, the creditor's proof of claim must be accompanied by evidence of perfection of the security interest.

The NBRL requires creditors to file proofs of claim directly with the Judicial Administrator. (Art. 7.) In several recent cases, however, courts overseeing insolvency proceedings (such as the first instance (trial-level) bankruptcy courts of the judicial district of the City of São Paulo) have permitted creditors to file proofs of claim or evidence in support of their claims directly with the clerk of the court in which the debtor's case is pending. The clerk of the court then forwards the filed proof of claim and supporting documents to the Judicial Administrator. In one very particular case, a court has also authorized the electronic filing of proofs of claim asserting post petition claims.

As a general rule, a claim may not be filed on behalf of a class of creditors, such as a class action lawsuit. There are exceptions to this rule. For example, the fiduciary agent of holders of a certain group of debentures, bonds or notes may file a proof of claim on behalf of the note holders.[4] (Law 6.404/1976, Art. 68.)

---

[3] In this chapter, the term "proof of claim" is broadly defined to include a creditor's initial presentation of its claim as well as any other document filed by the creditor in support of a claim's validity, amount or priority.

[4] Even though the NBRL does not expressly establish the standing of fiduciary agents to sue a debtor, there is one case in which the Court of Appeals of the State of São Paulo has recognized such standing to sue the fiduciary agent.

2. Types of claims

a. *Pre-petition claims*

Although the NBRL does not define the term "claim," the statute recognizes at least eight broad categories of prepetition claims, including: (1) labor and occupational accident claims; (2) secured claims; (3) tax claims; (4) special privilege claims;[5] (5) general privilege claims;[6] (6) unsecured claims;[7] (7) contractual fines and pecuniary penalties for breach of administrative or criminal laws (including those of a tax nature); and (8) subordinated claims.[8] A tort claim (such as for personal injury) may be asserted against a debtor as an unsecured claim.

Certain types of potentially significant claims are not subject to Out-of-Court Reorganizations and Judicial Reorganizations, including claims arising from: (1) taxes; (2) labor or occupational accidents; (3) the owner (or committed seller) of real property (*imóvel*) where the relevant agreement contains an irrevocable or irreversibility clause (including real estate developments); (4) the owner in a sale contract with title retention (*reserva de domínio*); (5) advances of money on an export exchange contract (*Adiantamento sobre Contrato de Câmbio* (ACC)); (6) the owner of a chattel mortgage on movable or immovable goods, such as a fiduciary sale agreement (*alienação*/*cessão fiduciária*); or (7) a leasing contract (*arrendador mercantil*).[9] (Art. 161, ¶ 1.)

Except for claims arising from labor and occupational accidents, the types of claims exempted from Out-of-Court Reorganizations are also excluded from Judicial Reorganizations. (Art. 49, ¶ 3.) With respect to Bankruptcy Liquidations, three types of claims are excluded from it, including claims: (1) related to the owner of a chattel mortgage on movable or immovable goods; (2) arising from a leasing agreement; or (3) derived from advances of money on an ACC. (Art. 86.II.)

---

[5] Special privileged claims include claims: (1) arising under article 964 of Law No. 10406 of January 10, 2002 ("Brazilian Code of Civil Procedure"); (2) so defined under other civil and commercial laws; or (3) having a valid lien on the collateral of the debtor. (Art. 83.IV.)

[6] General privileged claims represent claims: (1) arising under article 965 of the Brazilian Code of Civil Procedure: (2) that are unsecured claims in its essence and that, due to obligations undertaken by the debtor during a Judicial Reorganization that qualify as extra-composition claims, are converted into credits with special privilege; or (3) defined in other civil and commercial laws. (Art. 83.V.)

[7] Unsecured claims are defined as claims: (1) not provided for in the other items of Article 83 of the NBRL; (2) representing the balances of claims not settled with the proceeds from disposal of the assets offered as collateral; or (3) that are labor-related and exceeding the limit of 150 minimum wages. (Art. 83.VI.)

[8] The NBRL defines subordinated claims to include claims: (1) provided for by statute or arising under a contract; or (2) of stockholders, partners and non-employee senior managers. (Art. 83.)

[9] Although the NBRL excludes from an Out-of-Court Reorganization the claims described in "(1)" to "(7)," there exists legal doctrine in Brazil supporting the right of creditors holdings claims described in "(3)" to "(7)" to adhere voluntarily (i.e., subject themselves) to the terms of an Out-of Court Reorganization plan.

b. *Extra-composition claims (post-petition claims)*

In addition to pre petition claims, the NBRL includes special provisions related to so-called "extra-composition claims" (*créditos extraconcursais*). These claims (sometimes referred to as "post petition" claims) may arise in a Bankruptcy Liquidation and include: (1) compensation payable to the Judicial Administrator and its assistants, and labor-related or occupational accident claims for services rendered after the decree of a Bankruptcy Liquidation; (2) sums provided to the bankruptcy estate by creditors; (3) expenses with schedules, management, asset realization and distribution of the proceeds, as well as court costs of the bankruptcy proceedings; and (4) court costs with respect to actions and enforcement suits found against the bankruptcy estate. (Art. 84.(I)-(IV).)

If the Bankruptcy Liquidation resulted from the conversion of the case from a Judicial Reorganization, the extra-composition claims also include claims arising from obligations undertaken by the debtor during the Judicial Reorganization (such as the claims of lenders and suppliers of goods and services). (Arts. 67; 84.(V).)

Extra-composition claims have preference of payment over all other ranked claims. (Arts. 83; 84.)

3. Unmatured, contingent and unliquidated claims

All claims that are subject to a Judicial Reorganization or a Bankruptcy Liquidation and existing on the date that a debtor files its petition qualify for the insolvency proceeding, even if unmatured. (Art. 49; 77; 80; 83; 84.) In addition, a Judicial Reorganization plan and an Out-of-Court Reorganization plan may not contemplate accelerated maturity of debts. (Art. 161, ¶ 1.)

The granting of the processing of a Judicial Reorganization or of an Out-of-Court Reorganization alone does not accelerate claims. However, Brazilian law enforces so-called *ipso facto* clauses in contracts that provide for the acceleration of debt or termination of the agreement upon the happening of an insolvency event, such as the processing of a Judicial Reorganization.[10] The approval of a Judicial Reorganization or of an Out-of-Court Reorganization does not accelerate claims. In contrast, the decreeing of a Bankruptcy Liquidation accelerates the maturity of the indebtedness of the debtor and partners with unlimited joint liability (with ratable reduction of interest). (Art. 77.)

[10] There are legal writings that support the thesis that this clause, under certain conditions, may be considered abusive. If this thesis is accepted by the courts, the acceleration of the debt or the termination of the agreement may not be recognized.

Creditors can assert claims that are contingent or unliquidated. (Arts. 5, ¶ 1; 6; 49.) In the event that the claim arises from a lawsuit pending against the debtor, the creditor can request the court in which the lawsuit is pending to estimate the claim in order to request the court to order the debtor to set aside an amount to satisfy a claim that is contingent or unliquidated. (Arts. 6, ¶ 3; 10, ¶ 4; 16; 149.I.) These rules apply for tort claims such as claims for personal injury.

In a Judicial Reorganization, differently from what the old law established, the issue of converting foreign-currency denominated claims into the Brazilian currency (*Real*) exists only where the creditor holding the claim wishes to vote at a GMC. (Art. 38, Sole Para.) Such claims are converted into the Brazilian currency at the exchange rate prevailing on the day before the GMC only for the purpose of permitting the creditor to vote at the GMC. (Art. 38, Sole Para.) However, for purposes of receiving distributions from the estate, the claim is still expressed in the currency established in the contract entered into between the parties.

In a Bankruptcy Liquidation, foreign-currency denominated claims are converted into Brazilian Reals according to the foreign exchange rate existing on the date of the decree of the Bankruptcy Liquidation. (Art. 77.) This conversion applies to set the creditor's claim for all purposes in the Bankruptcy Liquidation, including distributions. (Art. 77.)

4. Claims for equitable remedies

Under the NBRL, a claim includes an equitable right to performance that gives rise to a right of payment.

B. Defenses

1. Bar dates

Upon the granting of the processing of a Judicial Reorganization or the decreeing of a Bankruptcy Liquidation, the court will order the debtor to publish a notice (*edital*) in the official press containing, among other information, an itemized list of creditors. (Arts. 52 ¶ 1.II, III; 99.III, IV.) The itemized list must provide a description, an amount and the priority of each claim. In the event that the debtor fails to include a claim on the creditor list, or if a creditor disagrees with the amount or priority of its listed claim, the NBRL provides such creditor a 15-day period from the date of the publication of the official notice to submit a proof of claim or documents in support of the amount or priority of the listed claim. (Art. 7, ¶ 1.)

Upon the expiration of the 15-day period for creditor submissions, the NBRL provides the Judicial Administrator a 45-day period to verify alleged claims based on the debtor's accounting books and commercial documents, as well as the proofs of claim or other documents submitted by creditors. (Arts. 7, ¶ 2; 104.VIII.) The Judicial Administrator is authorized to retain professionals or specialized companies to assist in the process of claims verification. (Art. 7.)

At the conclusion of the 45-day claim verification period, the NBRL requires the Judicial Administrator to publish a revised list of creditors. (Art. 7, ¶ 2.) The notice accompanying the revised list of creditors must state the place, time and common term for creditors to have access to the documents forming the basis for the revised list of creditors. (Art. 7, ¶ 2.) The publication of the revised schedule of creditors creates a 10-day period during which the debtor, the debtors' partners, the Creditors Committee, other creditors or the Public Attorney's Office may file an objection to the lawfulness, amount or priority of any scheduled claim. (Art. 8.) There is one specific case in which a debtor undergoing a Judicial Reorganization actually filed an objection to a claim that it previously included on the creditors list. If a party in interest files an objection to a scheduled claim, the court will open a separate proceeding within the insolvency case and handle the dispute as a contested matter. (Arts. 8, Sole Para.; 13; 15.)

If a creditor attempts to file a proof of claim after the expiration of the 15-day period for creditor submissions, it is considered a late claim and triggers different provisions of the NBRL, depending on whether (i) the creditor files the late proof of claim before or after the official ratification of the general list of creditors and (ii) the late claim was filed in a Judicial Reorganization or in a Bankruptcy Liquidation. If the creditor files a late claim prior to the official ratification of the general lists of creditors, the late claim will be processed pursuant to articles 13 to 15 of the NBRL (see below, "Claims Adjudication Procedures"). (Art. 10, ¶, 5.) In contrast, where the creditor files the late claim after the official ratification of the general list of creditors, the creditor may petition the court for rectification of the general list of creditors so as to include the creditor's claim. (Art. 10, ¶, 6.).

The creditor that proves a late filed claim in a Judicial Reorganization does not have the right to vote in an assembly of creditors, and therefore, loses the right to vote upon a plan that could alter the payment conditions of its claim. In a Bankruptcy Liquidation, the creditor that proves a late filed claim loses the right to any distributions that have already been made from the estate but may, with respect to future distributions, request the Judicial Administrator to reserve sufficient amounts for satisfaction of its claim in the same manner as other claims in its class.

2. Defenses

a. *Non-bankruptcy defenses*

In Judicial Reorganizations or Bankruptcy Liquidations, the debtor or Judicial Administrator can assert any defense to a claim that the debtor could have asserted outside of the insolvency proceeding. However, the NBRL alters a defense based upon the expiration of the statute of limitations. Pursuant to Article 6 of the NBRL, the granting of the processing of a Judicial Reorganization or the decreeing of a Bankruptcy Liquidation tolls the statute of limitations for actions against the debtor. (Art. 6.) In a Judicial Reorganization, the tolling may not exceed a non-extendable, 180-day period. (Art. 6, ¶ 4.) In the event that a Judicial Reorganization plan is confirmed by the court, there is a novation of the claim and the statute of limitation regarding this new claim will begin to be counted as of the day in which the new claim is due under the terms of the plan.

b. *Bankruptcy defenses*

An interested party may contest the alleged priority or amount of a particular claim. Also, the debtor, other creditors, the Judicial Administrator, the Creditors Committee, or the Public Attorney's Office may also seek the disallowance or exclusion of a claim based on the existence of fraud, deceit or simulation involving the credit. (Art. 6, ¶ 4.)

The NBRL does not provide for the equitable subordination of claims.

Any act by a debtor with the intent to injure creditors may be revoked as long as it is demonstrated that the debtor and a third-party contracting with the debtor engaged in fraudulent collusion resulting in actual loss to the estate. (Art. 130.)

The NBRL also lists some specific acts performed prior to a Bankruptcy Liquidation that are considered ineffective with regard to the bankrupt estate, whether or not the contracting party was aware of the debtor's condition of economic and financial crisis and whether or not the debtor intended to defraud creditors. (Art. 129.)

C. Claims adjudication procedures

The adjudication process related to challenged claims resembles civil litigation. (Arts. 8, Sole Para.; 10, ¶¶ 5, 6; 13; 15.) First, the court will open a separate proceeding within the main insolvency case (analogous to an "adversary proceeding" under the U.S. Bankruptcy Code) for each contested claim. (Arts. 8, Sole Para.) The parties will then submit pleadings and evidence in support of their positions. (Arts. 11; 12; 13.) The court will evaluate the merits of the competing arguments, scheduling evidentiary and judgment hearings, if necessary. (Arts. 15.IV.) Finally, the court will render its decision, and if it finds that a valid claim exists, the court may order the debtor to set aside an amount to satisfy the claim. (Art. 16.)

1. Standing to object

A party in interest may object to a claim. Parties in interest include the debtor, other creditors, the Judicial Administrator, the Creditors Committee and the Public Attorney's Office. (Art. 8.)

An objection to a proof of claim must be filed with the court and supported by documents, if any, in the possession of the objecting party. (Art. 13.) In its objection, the party opposing the claim should indicate the evidence it deems necessary for the court to evaluate the merits of the objection. (Art. 13.) The NBRL does not prescribe official forms for objecting to a claim.

After a party files an objection to a list claim, the creditor (and/or debtor) has five days to file an answer. (Art. 11.) In support of its answer, a creditor (and/or debtor) should attach any relevant documents in support of its position. (Art. 11.) Once the five-day period to answer an objection has elapsed, the court will summon the debtor and the Creditors Committee (if any) to comment on the answer within five days. (Art. 12.) At the end of the five-day comment period, the court will summon the Judicial Administrator to issue an opinion within five days regarding the merits of the dispute. (Art. 12, Sole Para.) The Judicial Administrator may attach to its opinion any report prepared by a professional or specialized company, as well as any documents in the debtor's possession regarding the challenged claim. (Art. 12, Sole Para.)

2. Burdens of proof

As a general rule under the Brazilian Code of Civil Procedure, a plaintiff possesses the ultimate burden of proof. (Brazilian Civil Code of Procedure, Art. 333.I.) However, a claim scheduled by the Judicial Administrator that is not opposed by any party constitutes *prima facie* evidence supporting the claim's validity, amount and priority and the creditor need not file any document in support of its claim.

If a party objects to a scheduled claim, it possesses the burden to produce sufficient evidence to call into question the validity of the claim. In certain circumstances, in view of the lack of documents available to the opposing party, and even though the NBRL is not clear on this matter, it is possible to allow that the creditor that had its credit opposed would then have the burden to demonstrate that its credit was correctly listed by the debtor, under penalty of the exclusion of its credit or the non-inclusion of its credit in the general list of creditors.

In very rare cases, the judge may transfer the burden of proof from the objector to the party asserting the claim.

3. Jurisdiction

In general, the court overseeing the Judicial Reorganization or Bankruptcy Liquidation has jurisdiction to approve the validity, amount and priority of the claims scheduled by the Judicial Administrator. (Arts. 14; 15; 16; 76.) Exceptions to this rule include: (1) labor and tax claims; (2) claims arising in actions where the claimant is asserting a nonfixed amount or indemnification; and (3) certain other claims arising from suits in which the debtor is the plaintiff. (Arts. 14; 15; 16; 76.) The first two exceptions are due to the nature of the claims, there being a provision in the Brazilian Federal Constitution that establishes the jurisdiction of specialized courts to judge and recognize such claims.

If litigation related to a claim is pending in another court at the time of a Bankruptcy Liquidation, that litigation is generally stayed throughout the Bankruptcy Liquidation. (Art. 6.) In the case of a Judicial Reorganization, however, the stay period is limited to a non-extendable term of 180 days commencing on the date the court grants the processing of the Judicial Reorganization. (Art. 6, ¶ 4.) There are recent precedents in the sense that, once the 180 days are passed without the approval of the plan, the creditor may initiate or continue its individual enforcement/foreclosure lawsuit, choosing, or not, to submit to the plan that may be approved. These precedents are recent and do not indicate a definitive position of the courts about this matter. Labor-related actions against the debtor will proceed in the specialized courts that handle such claims until the respective claims are ascertained and then the amount of the claim will be added to the approved schedule of creditors in the amount awarded by the court. (Art. 6, ¶ 2.)

If a claim still has to be declared/established by a constitutive decision, either rendered through arbitration (where the agreement giving rise to the claim provides for the arbitration of disputes) or by an ordinary court, the bankruptcy court overseeing the debtor's case will allow the parties to proceed to arbitration or an action in the ordinary court. If the creditor obtains a constitutive decision in its favor and also presents proof of its claim to the bankruptcy court, it will fall to

the bankruptcy court to determine whether to include the creditor's claim in the general list of creditors. However, the bankruptcy court is prohibited from re-examining the merits of a constitutive decision rendered through arbitration, by an ordinary court with respect to unliquidated claims filed prior to the filing of a Bankruptcy Liquidation, or by another court that has jurisdiction on the specific subject decided, such as the labor courts (the only courts in Brazil with jurisdiction to decide on labor matters, such as, to establish the existence and amount of labor claims).

With respect to mediation provisions in agreements, courts will order the parties to proceed to mediation. Many judges overseeing cases under the NBRL favor mediation as a way of resolving disputes and will often order parties to engage in mediation during the course of proceedings.

4. Discovery

Discovery is permitted in each proceeding opened by the court to resolve contested claims**.** In these proceedings, all of the tools of discovery permitted by the Brazilian Code of Civil Procedure are available to the parties, including depositions, questioning of witnesses, expert investigations and the production of documents. (Art. 189.) However, the NBRL empowers the court to render its judgment on the dispute based solely upon the pleadings and evidence submitted by the parties, without ordering further discovery, if that is the case. (Art. 15.II.) The NBRL does not authorize the judge to deny the right of the parties to produce evidence, if such evidence is essential to the recognition of its rights. In exceptional cases, the judge may reject the opposition indicating that the parties would have to discuss the matter in an ordinary proceeding.

5. Claim adjudication

As mentioned above, a court overseeing a Judicial Reorganization or a Bankruptcy Liquidation has jurisdiction to conduct the hearing to resolve disputes regarding most types of claims.

Orders from other courts requesting the court overseeing a Judicial Reorganization or a Bankruptcy Liquidation to set aside a certain amount to satisfy claims that are contingent or unliquidated are generally recognized. Also, when a final decision is rendered by the other court, the court administering a Bankruptcy Liquidation has to accept that claim. Claims that have been reduced to judgment by another court may only be disallowed in very exceptional cases.

6. Costs of litigation

According to the organic structure of the Brazilian Courts, the costs of litigation may range from state to state. However, in the main states of the country (from an economic point of view), such as the state of São Paulo, there are no court costs for the filing of timely proofs or differences of claim or oppositions. In principle, the claimant will only incur court costs in the case of the presentation of a late claim or, in some Brazilian states, in the case of the filing of an appeal.

With regard to attorneys' fees, each party bears its own costs. The defeated party may in some cases be required to pay the reasonable attorneys' fees of the prevailing party.

7. Appeals

The list of scheduled claims filed by the Judicial Administrator is not subject to appeal. If a party disagrees with a scheduled claim, the party must file an objection to the claim within the statutory period. (Art. 8.)

On the other hand, the court's decision relating to a contested claim is appealable. (Art. 17.) Such appeal will be heard by the State Court of Appeals pursuant to the general rules of the Brazilian Code of Civil Procedure. When the appeal is received, the reporting judge may determine the stay of the effects of the challenged decision or may order enrollment or modification of the amount or rating in the official schedule of creditors, for purposes of exercise of voting rights at GMCs.

Judgments of the State Court of Appeals are appealable to (1) the Superior Court of Justice (in case such judgment violates a federal law or is in conflict with decisions rendered by other State Courts), and/or (2) the Supreme Court of Justice (if the challenged decision violated a disposition of the Brazilian Constitution).

Canada

In Canada, the two principal insolvency statutes around which the Canadian insolvency regime is centered are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA").

Corporate reorganizations usually proceed under the CCAA,[1] which has been described as the Canadian equivalent to Chapter 11 proceedings under the *United States Bankruptcy Code*. Generally, the CCAA is considered to have fewer rules and to be more creditor friendly than its American counterpart as proceedings typically move more quickly and with greater creditor involvement in the restructuring proceedings.

The CCAA permits compromises or arrangements to be made between an insolvent company[2] and its creditors or any class of them. A CCAA proceeding is usually commenced voluntarily by the debtor company. Any plan must be approved by a majority in number representing two-thirds in value of each class of creditors and then approved by the Court. One of its purposes is to provide a structured environment in which large insolvent companies can continue to carry on business and retain control over their assets while their creditors and shareholders and the court consider a plan or compromise.[3] As a general rule, CCAA reorganizations tend to involve larger businesses with complex financial structures where a more flexible reorganizational framework is required as the debtor, or a related group of debtors, must owe more than $5,000,000.00 for there to be a filing under the CCAA.

The CCAA is a very short piece of legislation as compared to the BIA or the U.S. Bankruptcy Code. The brevity of the CCAA legislation gives the supervising Courts extensive judicial discretion and the ability to rely upon inherent jurisdiction. Where the CCAA is silent with respect to any matters, the governing Courts often, but not always, incorporate concepts or practices enacted in relation to a BIA liquidation proceeding.

The CCAA permits the court to stay all proceedings taken or that might be taken against the debtor company under the BIA.[4]

---

1 Reorganization proceedings are allowed under the BIA but are typically only used for smaller matters and are not considered herein.

2 The CCAA applies to (1) companies incorporated under a federal Act, (2) companies incorporated under a provincial Act, and (3) companies, wherever incorporated, having assets or doing business in Canada.

3 Re Blue Range Resource Corp. (2000), 192 D.L.R. (4th) 281 (Alta. C.A.), 2000 ABCA 239

4 CCAA, ss. 11(3)(a) and 4(a)

Under the CCAA, when a stay order is made under s. 11, the appointment of a Monitor[5] is mandatory. The Monitor is an officer of the Court appointed to report to the Court and affected creditors and often is further appointed to assist the debtor in formulating a Plan of Reorganization.

Liquidation proceedings (more similar to U.S. Chapter 7 proceedings) are usually initiated by creditors. Secured creditors often proceed through an appointment of a Receiver or Receiver-Manager while unsecured creditors can apply to the Courts for the appointment of a Trustee in Bankruptcy. In either case the insolvency professional will usually realize upon the debtor's assets, either on a going concern or liquidation basis, and will distribute any funds to the creditors in accordance with the governing legislative priorities and registered security. Applications can be made to the Courts under the BIA to adjudicate disputes, vest property or otherwise assist in the insolvency proceeding.

A. Claims presentment

1. Proofs of claim

In a bankruptcy proceeding, the trustee is required to call a meeting of creditors to discuss the affairs of the bankrupt, affirm the trustee's appointment, appoint inspectors and give general direction.[6] This meeting must be within 21 days of the trustee's appointment and the trustee must send notice of this meeting to every known creditor together with a proof of claim form and a proxy. The trustee must send the notice at least ten days before the meeting of creditors.[7] In the same time period, notice of the meeting must be sent to the bankrupt.

Creditors are required to file with the trustee standard form proofs of claim setting forth the details of their claim against the debtor in order to participate in the insolvency process.[8] In the proof of claim form,[9] the creditors are required to give particulars[10] of their claim including any security or priority that might be claimed.

The debtor is required to provide the trustee with a list of creditors. If a debtor does not include a creditor on the list of creditors for the trustee, and the creditor only becomes aware of the bankruptcy after an absolute discharge, the bankrupt is personally liable for the dividend amount that the creditor would have received under the distribution by the trustee.

---

5 CCAA, s. 11.7. The duties of the Monitor are set out in s. 11.7(3) and are often expanded in the CCAA proceeding. The Monitor is typically a licensed trustee in bankruptcy.

6 BIA, s. 102(1)

7 Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368, Rules 6(2)(b) and 108(2)

8 BIA, s. 124(1)

9 A proof of claim must have a statement of account attached to it and which is marked as schedule "A".

10 A creditor must comply with para. 4 of Form 31 and indicate the nature of the claim; i.e., unsecured, preferred or secured. A creditor can, however, file a claim both as a secured and preferred creditor.

In a receivership, the Receiver gives notice of the receivership to all known creditors. If there are sufficient assets to allow for distribution to unsecured creditors, an application is made to the Court for an order establishing a claims process including the time for filing of claims, the possible creation of a claims bar date and a process for the determination of any disputed claims.

Similarly, in CCAA reorganizations, it is common for the debtor or the Monitor to seek an order from the Court establishing a claims filing procedure including the form of the claim, the deadline for filing the claim with the Monitor and procedures for contestations and appeals.

The existence, timing and particulars of any claims process in a CCAA proceeding or receivership vary in each case and creditors must take care to follow any proceedings to protect their rights.

Typically, claims are filed with the debtor and/or the appointed insolvency practitioner. It is only if there is an unresolved dispute concerning the claim that the claims will be filed with the Court to adjudicate any disputes as to the existence, quantum or priority of any disputed claims.

2. Types of claims

According to section 2 of the BIA, "Claim provable in bankruptcy," "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor. Provable claims[11] are "*all debts & liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."* This definition includes tort claims. Essentially, a creditor who has a claim that arises between the date of the application for a bankruptcy order and the date of the bankruptcy order has a claim provable.

If an obligation has been incurred before bankruptcy, the fact that the claim has crystallized after bankruptcy is immaterial – the creditor has a provable claim. If a claim occurs during bankruptcy (i.e., if while bankrupt the bankrupt incurs an obligation) it is not a provable claim, but is a claim that survives bankruptcy. To be a provable claim, a debt or liability must be due either at law or in equity by the bankrupt to the person seeking to prove a claim.

Claims provable in receivership or CCAA proceedings are essentially the same as the claims which would be provable in BIA proceedings.[12] The CCAA defines a "claim" as any indebtedness, liability or obligation of any kind that, if unsecured, would be a claim provable in bankruptcy within the meaning of the BIA.

---

[11] BIA, s.121(1)

[12] CCAA, s. 12

3. Unmatured, contingent and unliquidated claims

Creditors can assert claims that are contingent[13] or unliquidated. All debts and liabilities, present or future, to which the debtor is subject, constitute claims for the purposes of the BIA whether the claim is contingent or unliquidated.[14] The BIA requires the trustee to determine whether any contingent or unliquidated claim is a provable claim[15] and, if so, the trustee must value it.[16] A contingent claim or a claim for unliquidated damages is only a provable claim for the amount at which it has been valued by the trustee.[17] The trustee must provide a notice of the determination to the creditors. 135(3).[18]

If a contingent claim is too remote and speculative then it will not meet the definition of a provable claim under section 121.[19] There must be some element of probability about the contingent liability. It is too difficult to value a claim today if the lawsuit on which the claim is based could take years to establish. However, in *Re Confederation Treasury Services Ltd. (Bankrupt),*[20] the Ontario Court of Appeal noted that while there may be claims that are so remote and speculative in nature that they cannot properly be considered as contingent claims, a potential liability arising out of pending litigation does not fall into that category.

In valuing a contingent or unliquidated claim, the trustee must consider all the relevant circumstances and arrive at what it believes is a fair and reasonable valuation. As these claims are often not calculable by mere arithmetic, the rules allow an appointment to the court for help. As a creditor cannot vote until its contingent or unliquidated claim is valued, the trustee may allow a claim for voting purposes and then seek direction to the court for valuation purposes.[21]

A receivership proceeding usually follows the claims definitions under the BIA.

---

[13] Claims that may or may not ever ripen into a debt, according to whether some future event does or does not happen.

[14] BIA, s. 121

[15] BIA, s. 109(1): a person is only entitled to vote at a meeting of creditors if he or she has a provable claim.

[16] BIA, s. 135(1.1): Provides a summary procedure for determining whether a contingent or unliquidated claim is a provable claim.

[17] BIA, ss. 121(2) and 135(1.1)

[18] The notice of determination is given in para. B of Form 77

[19] See Re Claude Resources Inc. (1993), 22 C.B.R. (3d) 272

[20] (1997), 96 O.A.C. 75, 443 C.B.R. (3d) 4 (Ont. C.A.)

[21] In Auctioneer's Assn. (Alberta) v. Hunter (2002), 31 C.B.R. (4th) 178 (Alta. Master), the court having found that a claim was a contingent claim referred for trial the issue whether the claim could be valued and, if so, to make the valuation.

Similarly, although the CCAA does not provide for it, the monitor will usually evaluate creditors' claims. A creditor whose claim has been disallowed or who disagrees with the valuation of the claim can apply to the Court for a ruling on the validity or quantum of the claim.[22] The onus is on the claimant to prove its claim and the claimant must show that the claim is not speculative or remote; however, it need not establish that success is probable.[23]

4. Claims for equitable remedies

Pursuant to section 183(1) of the BIA, the court sitting in bankruptcy is a court of equity, and has jurisdiction to grant equitable relief,[24] including relief from forfeiture. The bankruptcy court can in an appropriate case make an order for specific performance.[25]

The trustee may deal with proprietary claims; that is, claims where the creditor claims the return of property held by the bankrupt.[26] A person or a creditor can reclaim property from the trustee that was in the bankrupt's possession at the date of bankruptcy. Alternatively, the trustee may notify a person that the bankrupt was holding property that may belong to that person. The trustee has a duty under the BIA to approve or disapprove claims, including trust claims.

For a constructive trust to be imposed for wrongful conduct, the following conditions must be satisfied: (1) the bankrupt must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the property in the hands of the bankrupt must be shown to have resulted from deemed or actual agency activities of the bankrupt in breach of his or her equitable obligation to the claimant; (3) the claimant must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the bankrupt remains faithful to their duties; and (4) there must be no factors that would render imposition of a constructive trust unjust in all the circumstances of the case. *Soulos v. Korkontzilas*.[27]

---

[22] CCAA, s. 12(2)

[23] Re Air Canada (CUPE) (2004), 2 C.B.R. (5th) 23 (Ont. S.C.J.)

[24] A bankruptcy court is a court of equity and is bound to give equitable relief to suitors entitled to thereto. Re Heron & Co. (1933), 15 C.B.R. 39 at 51 (S.C.)

[25] Re Western Canada Pulpwood & Lumber Co. (1929), 11 C.B.R. 28; affirmed (1929), 11 C.B.R. 125 (C.A.); Canadian Credit Men's Trust Assn. v. Edmonton Lumber Co. (1930), 11 C.B.R. 376 Alta. S.C.)

[26] Section 81 of the BIA deals with proprietary claims, claims where the creditors claim the return of property held by the bankrupt. These claims deal with trust funds, leased equipment, consignment goods and goods subject to conditional sales contracts.

[27] (1997), 46 C.B.R. (3d) 1 (S.C.C.)

B. Defences

1. Bar dates

In a bankruptcy, in order to vote at a meeting of creditors, a creditor must lodge a proof of claim with the trustee before the time appointed for the meeting.[28] However, the provisions regarding the time for lodging proofs of claim with the trustee are directory only.[29] After the first meeting of creditors, the trustee may send a notice to every person with a claim of which the trustee has notice or knowledge but who has not proved a claim that, if the creditor does not prove its claim within thirty days after the mailing of the notice, the trustee will proceed to declare a dividend without regard to that person's claim.[30] The court may extend the time for filing a proof.[31] While a creditor must file a proof of claim in order to receive a dividend, there is no time limit on the filing of claims, the creditor is merely deprived from sharing in any dividend declared prior to the filing of a proof of claim.[32]

Although there is no express provision in the CCAA for the making of a claims bar order,[33] in CCAA reorganizations, the claims filing procedure normally contains a claims bar date by which all claims must be filed. A claims bar order is made by the judge in charge of the proceedings. The debtor company is directed to send notice of the order to all creditors.

In *Re Blue Range Resource Corp.*,[34] a claims bar order was made by the court. Although two creditors did not file their claims in the time period fixed by the order, they successfully applied for an extension of time for filing their claims[35]. The Court of Appeal held that in determining whether or not to grant permission for the late filing of claims, the court should apply the following test:[36]

(i) Was the delay caused by inadvertence and if so, did the claimant act in good faith?

(ii) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

(iii) If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

---

[28] BIA, s. 109(1)

[29] Re London Bridge Works Ltd., 8 C.B.R. 73, [1926] 4 D.L.R. 1121 (Ont. S.C.); Re Morine, 16 C.B.R. 219, [1935] O.W.N. 94 (S.C.)

[30] BIA, s. 149(1)

[31] BIA, s. 149(2)

[32] BIA, s. 150

[33] CCAA and receivership proceedings are virtually identical in practice on this issue.

[34] (2000), 192 D.L.R. (4th) 281 (Alta. C.A.)

[35] See Re Blue Range Resource Corp. (2000), 2000 CarswellAlta 1145 (C.A.); additional reasons at (2001), 2001 CarswellAlta 1059 (C.A.); leave to appeal refused (2001), 2001 CarswellAlta 1209, 2001 CarswellAlta 1210 (S.C.C.)

[36] 2000 CarswellAlta 1145 (C.A.) at para. 26

(iv) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

As such, claims bar orders are not generally as rigid in Canada as they are in U.S. proceedings notwithstanding the typical dire consequences threatened in most claims bar orders.

2. Defences

a. *Non-bankruptcy defences*

In the United States, under the doctrine of equitable subordination, the bankruptcy court, as a court of equity, can postpone the claims of one creditor to those of other creditors, where the creditor has engaged in some kind of inequitable conduct that has secured for it an unfair advantage or that has resulted in injury either to creditors or to the debtor.

In Canada, there is no express provision under the BIA or CCAA that gives the court jurisdiction to subordinate the rights of one creditor where its conduct is inequitable although Canadian courts are courts of equity. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*,[37] the Supreme Court of Canada left open the question whether the doctrine of equitable subordination exists in Canadian law.

The Supreme Court stated that as applied in the United States, the doctrine has three requirements:

(i) The claimant must have engaged in some type of inequitable conduct;

(ii) The misconduct must have resulted in injury to the creditors; and

(iii) Equitable subordination of the claim must not be inconsistent with the express provisions of the bankruptcy statute.

The lower courts have both accepted and rejected[38] the doctrine based on the facts of each particular case and its possible application in Canada is still evolving. Canadian courts recognize equitable set-off and it is available under the BIA and CCAA.[39]

---

[37] (1992), 16 C.B.R. (3d) 154 at para. 92, 5 Alta. L.R. (3d) 193

[38] AEVO Co. v. D & A Macleod Co. (1991), 7 C.B.R. (3d) 33, 4 O.R. (3d) 368 (Gen. Div.). In C.C. Petroleum Ltd. v. Allen (2002), 35 C.B.R. (4th) 22, the court applied the doctrine of equitable subordination and subordinated a general security agreement held by two of the guiding minds to the claims of creditors who had taken proceedings under s. 38 of the BIA. However, on appeal, the court held that it was an open question as to whether the trial judge had jurisdiction to equitably subordinate the secured claims of the guiding minds of the corporation to the unsecured claim of a supplier, and ordered that the portion of the judgment regarding equitable subordination be deleted (2003), 46 C.B.R. (4th) 221.

[39] See s. 97(3) of BIA and s. 18.1 of CCAA

b. *Bankruptcy defences*

Trustees, Receivers or CCAA debtors in conjunction with their Monitor can advance any defence available to the debtor.

In addition, the insolvency practitioner can also often advance defences to secured creditor claims where there is a deficiency or irregularity in the security documents or registration. Defences for set-off or abatement of claims can be advanced.

C. Claims adjudication procedures

The claims adjudication process in bankruptcy is formal and resembles civil litigation. Rule 3 of the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368 (the "Rules") states that if the BIA and the Rules contain no provisions regarding the procedure to be followed in a particular situation, reference may, under Rule 3, be had to the practice in civil actions or matters in the provinces where the proceedings are being taken. The provisions of the CCAA may be applied together with the provisions of any Act of Parliament or of the legislatures of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.[40]

The issues are developed through pleadings, document exchange and examination for discovery are available, the case can be developed through motion practice, and there is a formal trial in which testimonial and documentary evidence is presented in accordance with the rules of evidence applicable in other civil litigations.

1. Standing to object

In a bankruptcy, the trustee has a duty to examine every proof of claim and satisfy him or herself and the inspectors that the claim should be allowed or disallowed. If the trustee is not satisfied with the proof of claim or proof of security, the trustee may require further evidence in support of the proof.[41] If in doubt, the trustee should apply to the court for directions.

Under section 135(2), the trustee may disallow, in whole or in part: (a) any claim, (b) any right to priority under the applicable order of priority contained in section 136, or (c) any security. There is no time limit for serving a notice of disallowance. The trustee must provide notice to a person whose claim was subject to a

[40] CCAA, s. 20

[41] BIA, s. 135(1)

determination or whose claim was disallowed,[42] setting out the reasons for the determination or disallowance.[43]

If a trustee declines to disallow proofs of claim, the court may on the application of a creditor or of the debtor expunge or reduce the proof of claim.[44]

Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name.[45]

In a receivership or a CCAA proceeding, the claims procedure is set by Court Order. Typically, creditors are required to file their claims by a set date in a form provided. If the debtor/Receiver/Monitor disputes the claim, they will usually negotiate with the claimant to reach a resolution. If no resolution can be negotiated, usually there is a form for the debtor/Receiver to reject all or a portion of the filed claim. Where the creditor does not agree with the rejection/reassessment, the disputing creditor files an appeal application to the Court supervising the insolvency proceeding.

In larger proceedings, the Court may appoint independent claims officers to mediate or adjudicate disputed creditor claims.[46] Also, in certain larger proceedings, a creditors' committee or other large affected creditors may be given standing to participate in disputed claims litigation.

2. Burdens of proof

Usually, the creditor advancing the disputed claim has the burden of going forward.

The trustee's right and duty when examining a proof of claim is to require satisfactory evidence that the debt is a valid debt. In deciding the validity of a claim, *certainty* is not the test. If the method used in calculating the amount of the claim is reasonable and evidence in support of the claim is relevant and probative, the claim should be admitted.[47] Thus, a proof of claim that is properly filed constitutes prima facie evidence of the validity and amount of the claim. Unless there is evidence as to the invalidity of the claim or the excessiveness of its amount, the claimant need offer no further proof of the merits of its claim.

---

[42] BIA, s. 135(2)

[43] BIA, s. 135(3)

[44] BIA, s. 135(5)

[45] BIA, s. 38. An order under s. 38 must provide for notice being given to other creditors of the order so that they are given an opportunity to join, providing they agree to share the costs.

[46] This practice is still relatively rare in Canadian proceedings.

[47] Re HDYC Holding Ltd. (1995), 35 C.B.R. (3d) 294 (B.C.S.C.); appeal allowed (1997), 50 C.B.R. (3d) 85 (C.A.)

Monitors and Receivers usually apply a similar standard in assessing creditor claims.

Where a claim has been rejected and the affected creditor appeals to the supervising Court, it will be required to establish its claim on a balance of probabilities; similar to the standard in a civil claim.

3. Jurisdiction

The BIA and CCAA provide the provincial Superior Courts[48] with all necessary jurisdiction to authorize and sanction all acts required to be done in the course of the administration of an insolvency proceeding.

Although bankruptcy is under the jurisdiction of the Federal government, the judicial administration of the bankruptcy process is carried out by the Superior Courts of each of the provinces. The court sitting in bankruptcy enjoys exclusive jurisdiction in the review of claims (unless such jurisdiction is assigned to another party or claims officer).

The supervising Court governs all aspects of an insolvency proceeding including the extension of stays, the sale and vesting of property, and determination of disputed claims. Proceedings move on an expedited basis in recognition of the "real-time" necessity for determination of issues affecting any restructuring or liquidation proceeding.

4. Discovery

Section 163(1) permits a bankruptcy trustee to examine anyone who has knowledge of the affairs of the debtor.[49] For example, the trustee will be permitted to examine a defendant in an action brought before the bankruptcy of the debtor if it appears that the trustee has a *prima facie* right to attack a transaction for the benefit of the estate.

By s. 163(2), the court, on the application of the Superintendent, any creditor or other interested person and on sufficient cause being shown may order the examination of the trustee, the bankrupt, an inspector, a creditor or any other person for the purpose of investigating the administration of the bankrupt estate. In order to conduct an examination under s. 163(2), an order must be obtained.

---

[48] For example, the Ontario Superior Court of Justice or Alberta Court of Queen's Bench.

[49] BIA, s. 163(1) permits the trustee to examine: (1) the bankrupt; (2) any person reasonably thought to have knowledge of the affairs of the bankrupt; and (3) any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt.

The evidence of any person examined under ss. 163(1) and (2) shall, if transcribed, be filed in court, and may be read in any proceedings before the bankruptcy court under the BIA to which the person examined is a party.[50]

5. Claim adjudication

Disputed claims in any Canadian insolvency proceeding are usually determined by application based upon filed affidavits. In most provinces, affected parties are entitled to cross examine under oath,[51] affiants who file affidavits contrary to their position. All filed affidavits and cross examination transcripts are provided to the supervising Court to determine any disputed creditor claim.

At the hearing, affected counsel are provided the opportunity to file written argument and make oral submissions. In rare circumstances where timing or other circumstances require, witnesses may be presented and cross examined at the hearing before the Court.

Disputes related to claims are typically determined by the Court in a summary, expedited proceeding.

The procedure adopted by the Court usually includes exchange of affidavits, cross examination of affiants and an expedited hearing including oral argument by counsel.

Canadian insolvency practitioners and Courts have developed a practice of comity and will usually adopt and recognize any judgment of another Court recognizing or establishing an underlying claim. This is especially true where the debtor has attorned to the underlying Court proceeding and where the judgment is from a similar Court system such as that of another province, the United States or any commonwealth country.

An exception may arise where the foreign judgment is penal rather than civil in nature.

The creditor claimant would usually reference the foreign judgment as *prima facie* confirmation of the debt in their claim or any appeal proceeding.

6. Costs of litigation

In a typical litigation proceeding, the Canadian Courts usually follow the “English rule” and award costs to be paid by the unsuccessful litigant to partially off-set the costs incurred by the successful party.

---

[50] BIA, s. 163(3)

[51] The cross examinations are usually conducted orally and transcribed in a pre-hearing examination (deposition).

In insolvency proceedings, the Court has a wide discretion to order costs as against any, or any unsuccessful, party. Where a legitimate insolvency claim dispute required resolution or parties are partially successful in advancing their claim, many Canadian insolvency Courts are more likely to use their discretion not to award costs against any party.

The court can and often will grant a higher award in costs against a person who misuses the bankruptcy court for an improper purpose.[52]

7. Appeals

Under the BIA, an appeal from the supervising judge to the Court of Appeal[53] is made pursuant to section 193 and from the Court of Appeal to the Supreme Court of Canada pursuant to section 194. An appeal to a Court of Appeal must be brought within ten days after the decision of the order or decision appealed from.[54] The filing of the notice of appeal stays execution of the judgment; however, section 195 of the BIA permits a judge of the appellate court to vary or cancel the stay if it appears the appeal is not being prosecuted diligently.

An appeal from an Order in a receivership is also to that province's Court of Appeal in accordance with the province's *Rules of Court*.

Section 13 of the CCAA states that a person dissatisfied with an order or a decision made under this Act may appeal it. This right of appeal is not automatic. Leave to appeal from an order made under the CCAA can be authorized by the judge who made the order, a judge of the Court of Appeal or by the Court of Appeal.

Appeal Courts give a great deference to the supervising Trial Justice in any CCAA leave application. The criteria in considering a leave to appeal a CCAA Order have been established as follows:

a. Whether the point on appeal is of significance to the practice;

b. Whether the point raised is of significance to the action itself;

c. Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

d. Whether the appeal will unduly hinder the progress of the action.[55]

---

[52] BIA, s. 197(3), Re Dallas/North Group Inc. (2001), 27 C.B.R. (4th) 40 (Ont. C.A.).

[53] An appeal lies to the Court of Appeal having jurisdiction from any order or decision of a judge of the court where the point at issue involves future rights, the judgment is likely to affect other cases of a similar nature in bankruptcy proceedings, the property involved in the appeal exceeds in value ten thousand dollars, the grant or refusal of discharge involves total unpaid claims of creditors in excess of five hundred dollars, and in any other cases by leave of a judge of the Court of Appeal.

[54] Rule 31 of the Bankruptcy and Insolvency General Rules

[55] Re Calpine Canada Energy Limited, 2007 ABCA 266 (Alta. C.A.) at para. 13

Reference materials

F. Bennett (2008), *Bennett on Bankruptcy*, 10th ed., (Toronto: CCH)

L. Houlden, G. Morawetz, and J. Sarra (2007), *The 2008 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell)

S. Lazar (1997-), *The Law of Bankruptcy and Insolvency in Canada* (Markham: Lexis Nexis, loose leaf) Butterworths

China

In the People's Republic of China (the "PRC"), bankruptcy law mainly refers to the *PRC Enterprise Bankruptcy Law* (the "Bankruptcy Law"), which was adopted on August 27, 2006 and came into effect on June 1, 2007. The Bankruptcy Law focuses on the bankruptcy of all enterprises with legal personality (企業法人), such as state-owned enterprises ("SOEs"), private enterprises and foreign invested enterprises. (Article 2 of the Bankruptcy Law). There exists a carve out for about 2100 SOEs which are permitted to be closed or go into bankruptcy by the end of 2008 in accordance with the relevant regulations of the State Council rather than the Bankruptcy Law. These are commonly referred to as Policy Bankruptcy (政策性關閉破產) and will not be considered in the context of this chapter. (Article 133 of the Bankruptcy Law). The Bankruptcy Law also deals with bankruptcy petitions against financial institutions, including commercial banks, securities companies and insurance companies etc. Such petitions may not be filed by debtors or creditors but only the Financial Institutions Regulatory Authorities of the State Council (國務院金融監督管理機構). (Article 134 of the Bankruptcy Law). In addition, the Bankruptcy Law may *mutatis mutandis* govern the liquidation of entities other than enterprises with legal personality as provided in other laws. (Article 135 of the Bankruptcy Law). The bankruptcy of individuals, however, is not covered by the Bankruptcy Law.

The bankruptcy petition is required to be filed with the court (the "Bankruptcy Court" see point C3) at the place of the debtor's domicile which refers to the place of the major office of the debtor or its registered address in the event of no such office. (Article 3 of the Bankruptcy Law). The further allocation of judicial power over bankruptcy between the District Court and the Intermediate Court (which is a superior court to the District Court) is as follows: the District Court has the jurisdiction over the bankruptcy of the enterprises registered in the Administration for Industry and Commerce of the district (in Chinese "區/qu") or county (in Chinese "縣/xian") level, and the Intermediate Court has the jurisdiction over the bankruptcy of the enterprises registered in the Administration for Industry and Commerce of the city (in Chinese "市/shi") and above level. (Article 2 of the 2002 Provisions of the Supreme Court).

The Bankruptcy Law offers three forms of bankruptcy relief: liquidation, reorganization and conciliation.

A. Claims presentment

1. Proofs of claim

Under the Bankruptcy Law, the creditors that wish to participate in the distribution of the proceeds of the liquidation of the debtor's property must file a claim to an administrator (the "Administrator") appointed by the Bankruptcy Court. (Article 48 of the Bankruptcy Law).

After receiving such claim, the Administrator shall register the claim, and examine whether or not the claim presented is factual and valid and shall make a claims list stating the detailed information of claims of creditors (the "Claims List").

As an exception, individual employees need not file a claim to the Administrator for salaries, medical and disability subsidies, pension expenses, expenses of basic pension insurance and basic medical insurance, and compensation (the "Employee Claims"). On the contrary, the Administrator is required to produce a list of the Employee Claims and inform the employees by bulletin. In addition, the individual employees may ask the Administrator to make corrections in case of objection to the records on the list and if no corrections have been made, the individual employees may initiate a litigation with the Bankruptcy Court. (Article 48 of the Bankruptcy Law).

The requirements as to form, content, and procedure for the claim are:

(i) Form: there is no statutory language governing the form for filing the claim except in writing and there is no official form for filing the claim;

(ii) Content: when filing such claim, the creditors shall state the amount of the claim, whether or not such claim is secured and provide supporting evidence. In the meanwhile, the creditors with a joint and several claim shall also state it. (Article 49 of the Bankruptcy Law);

(iii) Procedure: creditors are required to file the claim within the time limit (between 30 days and three months) decided by the court as of the issuing date of the public notice of the acceptance of the bankruptcy petition. (Article 45 of the Bankruptcy Law).

2. Types of claims

Based on whether or not a claim is secured, claims can be classified into secured claims and unsecured claims (that is "general claims"). This is a significant classification. There are still other types of claims under the Bankruptcy Law, like unmatured claims, contingent claims and unliquidated claims, etc.

a. *Secured claims*

As is customary, a claim is a secured claim if the creditor holds a collateral right against a specific property of the debtor. Generally, the claim is secured only to the extent of the value of such creditor's interest.

The time when the holder exercises the rights it has as secured creditor under the Bankruptcy Law depends on the form of bankruptcy relief. In case of liquidation, the holder could exercise its collateral right after the issuance of the ruling of bankruptcy; in case of conciliation, the time is when the court approves the petition for conciliation; however, in case of reorganization, the right has to be stayed during the whole period of reorganization unless there is probability that the collateral is exposed to be damaged or the value of such collateral may be decreased dramatically. (Articles 109, 96 and 75 of the Bankruptcy Law).

There is a significant exception in relation to the collateral right against a specific property of the debtor. Employee Claims arising before the date of the promulgation of the Bankruptcy Law (27 August 2006) that have not been paid after the payments specified in Article 113 shall be paid from the secured property. (Article 132 of the Bankruptcy Law).

b. *Unsecured claims*

A claim is unsecured if the creditor has not obtained a collateral right or is unsecured to the extent that the value of the collateral is less than the amount of the creditor's claim or the creditor abandons such collateral right.

Under the Bankruptcy Law, the debtor's property distributed to the holder of unsecured claims is subject to:

(i) Encumbered property or the proceeds thereof which must satisfy the holders of secured claims first; and

(ii) The administrative expenses of the bankruptcy proceedings which must also be satisfied when incurred.

The administrative expenses of the bankruptcy proceedings comprise bankruptcy costs (破產費用) and payments for common interests (公益債務). If there is no sufficient fund to satisfy all administrative expenses, bankruptcy costs shall be paid first. (Article 43 of the Bankruptcy Law).

Under the Bankruptcy Law, the items of bankruptcy costs and payments for common interests are listed in Article 41 and 42, respectively. The bankruptcy costs consist of:

(i) Litigation fees of the bankruptcy case;

(ii) Expenditures for the management, appraisal and distribution of the debtor's property; and

(iii) Expenses for the administrator to perform its functions, its remuneration and expenses for engagement of workers.

The payments for common interests include:

(i) The debt that is generated from performing the ongoing contracts on the administrator's or the debtor's request;

(ii) The debt that is generated from the voluntary service for the debtor's property;

(iii) The debt that is generated from the unjust enrichment of the debtor's property;

(iv) The salaries and social security paid in order to continue the debtor's business operation and other debts incurred in pursuance thereof;

(v) The debt that is generated from the damages to a third person by the administrator or the relevant persons in their performing of duties; or

(vi) The debt that is generated from the damages to a third person caused by the debtor's property.

The order of distribution to the holder of unsecured claims is:

(i) Employee claims;

(ii) Social security expenses (other than those specified in (i)) and taxes owed by the debtor; and

(iii) Other unsecured claims. (Article 113 of the Bankruptcy Law).

The Bankruptcy Law requires that the various priority classes are paid in the above order. In other words, each priority claim is to be paid in full before the next priority claim is paid at all. If there is no sufficient fund to pay all claims within a special class, then generally all claims entitled to that priority shall be paid pro rata.

3. Unmatured, contingent and unliquidated claims

Under the Bankruptcy Law, unmatured claims are deemed to be matured when a bankruptcy petition is accepted, but the interest shall stop accruing as from the acceptance date of the bankruptcy petition (the "Acceptance Date"). (Article 46 of the Bankruptcy Law). In other words, a claim for the interest thereafter will be disallowed.

The situation that a claim is contingent or unliquidated at the time of the Acceptance Date does not affect the filing of such claim. (Article 47 of the Bankruptcy Law). However, before the Bankruptcy Court temporarily fixes the amount of such claim, such creditor may not exercise any voting right.(Article 59 of the Bankruptcy Law).

4. Claims for equitable remedies

Claims for equitable remedies do not appear to be recognised in the PRC. Under the Bankruptcy Law, the Administrator is entitled to make the decision on whether or not to continue to perform the ongoing contracts at its own discretion. (Article 53 of the Bankruptcy Law). If the Administrator decides to terminate the contract, the counterparty may file a claim for the damages incurred. If the Administrator makes an adverse decision, the payment under such contract has the priority of a claim for common interests.

B. Defences

1. Bar dates

As mentioned before, creditors are required to present their claims to the Administrator within the time limits fixed by the court as of the date of the court's issuing the public announcement of the acceptance of the petition for bankruptcy. (Article 45 of the Bankruptcy Law).

The aforesaid time limits are not strict bar dates, because in the event that a creditor fails to present its claims within such time limits, the creditor is still allowed to present its claims before the final distribution. However, the claim is only entitled to its pro rata share of future distributions and is not entitled to the benefit of prior distributions and the creditor shall bear costs for examining and confirming such claim. (Article 56 of the Bankruptcy Law).

2. Defences

a. *Non-bankruptcy defences*

The Administrator or, if the debtor remains in control of the company, the debtor may assert any defences that were available to the debtor and the Bankruptcy Law does not place any limit on what defences are available. (Item 7 of Article 25 and Article 73 of the Bankruptcy Law). However, the *Provisions on Some Issues Concerning the Trial of Enterprise Bankruptcy Cases of the Supreme Court* (the "2002 Provisions of the Supreme Court") stipulates that claims in respect of which the statute of limitation has expired shall not be allowed. (Article 61 of the 2002 Provisions of the Supreme Court). What is more, an Administrator or a debtor, as the case may be, can assert defences to claims based on fraud, coercion by its counterparty or with other elements resulting in the claim's defect in accordance with the Contract Law and other civil and commercial laws of the PRC.

b. *Bankruptcy defences*

Under the 2002 Provisions of the Supreme Court, certain claims may not be asserted. Article 61 of the 2002 Provisions of the Supreme Court provides that the following claims are not bankruptcy claims:

(i) Fines and other charges imposed on the bankrupt enterprise by administrative and judicial authorities;

(ii) Late payment fines on payable amounts not paid by the debtor, including doubled late payment interest payable as a result of the debtor's failure to satisfy a judgment and late payment fines on labour insurance premiums, incurred after acceptance of the bankruptcy case by a court;

(iii) Interest accrued after the bankruptcy declaration; or

(iv) The expenses incurred by creditors in participating in the bankruptcy proceedings.

The Bankruptcy Law sets forth that where the creditor owed debts to the debtor before the Acceptance Date, the creditor may request to set off such debts through the Administrator, provided that none of the following setoffs may be made:

(i) That the creditor has obtained a third party's claim against the debtor after the petition for bankruptcy;

(ii) That the creditor has undertaken the debts for the debtor while knowing that the debtor is unable to pay its debts as they come due or that the petition for bankruptcy of the debtor has been brought to the court (except for debts undertaken by creditor as prescribed by law or for debts which were incurred more than a year prior to the petition) or

(iii) That the creditor has obtained the claims against the debtor while knowing that the debtor is insolvent or that the petition for bankruptcy of the debtor has been brought to the court (except for debts undertaken by creditor as prescribed by law or for debts which were acquired more than a year prior to the petition). (Article 40 of the Bankruptcy Law).

C. Claims adjudication procedures

Generally, claims adjudication procedures shall apply the Bankruptcy Law first and where the Bankruptcy Law has not prescribed such procedures, the relevant provisions of the *PRC Civil Procedure Law* (the "Civil Procedure Law") shall apply. (Article 4 of the Bankruptcy Law).

1. Standing to object

The Bankruptcy Law provides that where the debtors or creditors have objected to the claims contained in the Claims List, lawsuits may be instituted with the Bankruptcy Court for confirming such claims (the "Claims Confirming Lawsuit"). Either a creditor or a debtor is entitled to object to a claim by bringing an action (Article 58 of the Bankruptcy Law). In addition, the Bankruptcy Law stipulates that after an Administrator is appointed, such Administrator shall perform such duties, *inter alia*, as participating in a lawsuit, an arbitration or other legal proceedings on behalf of the debtor (Article 25 of the Bankruptcy Law). Therefore, in the course of the Claims Confirming Lawsuit, it is the Administrator that participates in such litigation on behalf of the debtor whether such debtor is a plaintiff or a defendant.

A creditors' committee is not entitled to object to a claim. Such a committee's duties include:

(i) Supervising the management and handling of the debtor's property;

(ii) Supervising the distribution of the bankrupt's property;

(iii) Proposing to convene the creditors' meeting; and

(iv) Performing other functions authorized by the creditors' meeting. (Article 68 of the Bankruptcy Law).

It needs to be pointed out that a creditor has the right to object to either a claim of its own or claims of other creditors contained in the Claims List.

2. Burdens of proof

Under the Civil Procedure Law and the *Several Provisions of the Supreme Court on Evidence in Civil Proceedings* (the "Provisions on Evidence"), the doctrine of burdens of proof is "*He who asserts must prove.*" The Provisions on Evidence provides that any party to a civil case shall be responsible for producing evidence in support of the facts on which its own claim(s) or the facts on which its defence to the claim(s) of the other party are based.

Therefore, the plaintiff shall introduce evidence supporting its claim, and the defendant shall also produce evidence if it raises a defence. Thus, when a creditor or debtor (as a plaintiff) initiates a Claims Confirming Lawsuit with the court in a bankruptcy case, it has to produce evidence to support its claim. Meanwhile, a creditor or debtor (as a defendant) shall also be responsible for producing evidence in support of the facts on which its defence to the claim(s) of the plaintiff are based. If a creditor or debtor (as a plaintiff) fails to produce sufficient evidence to support its claim, it normally shall bear unfavourable consequences in accordance with "*preponderance of the evidence.*"

3. Bankruptcy court

Under the Bankruptcy Law, the Bankruptcy Court, which is not a separate court in the PRC but a professional group specialized in trying bankruptcy cases in almost every court, has the exclusive power to adjudicate all civil actions in connection with the debtor that arise after the Acceptance Date. (Article 21 of the Bankruptcy Law). The litigation concerning the debtor instituted before the Acceptance Date, shall be suspended on the Acceptance Date and shall proceed in the original courts after the Administrator takes over the debtor's property. (Article 20 of the Bankruptcy Law).

4. Discovery

There are no general discovery obligations under the Civil Procedure Law. The Provisions on Evidence, however, provide for the exchange of evidence before hearing. The exchange of evidence requires parties to share their own supporting evidence without being requested by the other party. Failure to do so can preclude that evidence from being used at trial. In addition, where evidence exists demonstrating that one party is in possession of evidence but refuses to provide it without good cause, and the other party claims that such evidence is unfavourable to the party in possession of the evidence, an inference that the other party's claim is valid may be drawn. (Article 75 of Provisions on Evidence).

5. Claim adjudication

Where the debtor or a creditor raise an objection against a claim contained in the Claims List, such claim shall be resolved by litigation in the Bankruptcy Court. As stated above, the Bankruptcy Court shall conduct a trial to resolve the claim in dispute in accordance with the Bankruptcy Law and the Civil Procedure Law. Eventually, the court shall make a judgment rather than a ruling over the dispute. The judgment shall be made only confirming whether such claims are true in fact and accurate in amount according to the *Provisions of the Supreme Court on Several Issues Concerning the Application of Laws for Enterprise Bankruptcy Cases Pending at the Time of Implementation of the Enterprise Bankruptcy Law of the PRC* (the "Provisions of the Supreme Court on Bankruptcy Cases Pending"). (Article 58 of the Bankruptcy Law, Article 9 of the Provisions of the Supreme Court on Bankruptcy Cases Pending). If a judgment that has adjudicated the underlying claim is made by a foreign court, there is a need to go through the recognition proceeding under the Civil Procedure Law. (Article 5 of the Bankruptcy Law). If such judgments/rulings are from the PRC courts, there is no need for recognition.

6. Costs of litigation

Costs of litigation mainly include the litigation fees paid to a court and attorney's fee charged by an attorney. Under the Civil Procedure Law and the *Measures for the Payment of Litigation Fees*, the losing party shall generally bear the litigation fees. Such litigation fees include:

(i) Case acceptance fee;

(ii) Application fees; and

(iii) Traffic expenses, accommodation expenses, living expenses, and subsidies for private affair leave of witnesses, authenticators, interpreters and adjustment makers for their appearing in the court at appointed dates. (Article 6 of the *Measures for the Payment of Litigation Fees*).

As for attorney's fee, each party usually bears its own attorney's fee, and in some circumstances, the losing party may be ordered to bear the counterparty's attorney's fee.

7. Appeals

Judgments in relation to the claims made by a court in a bankruptcy case are appealable to an appellate court. The Civil Procedure Law provides that if a party disagrees with a judgment made by a court of first instance, he has the right to lodge an appeal with the appellate court within 15 days (or 30 days for the appellant with no domicile within the territory of the PRC) from the date on which the written judgment was served. (Articles 147 and 249 of the Civil Procedure Law). A court of second instance reviews both the facts and the applicable law pertaining to the appeal.

England

A. Claims presentment

1. Proof of debt

When a company is being wound up (and also, in certain circumstances, when the company is in administration) a person claiming to be a creditor of the company and wishing to recover his debt in whole or in part must submit his claim, in writing, to the relevant insolvency office holder. The creditor's claim must be in the form of a "proof of debt", whether in the format prescribed by the *Insolvency Rules 1986* ('IR') (Form 4, Schedule 4 of the IR) or a substantially similar form, which should be made out by or under the directions of the creditor, and signed by him or a person authorised to sign on his behalf.

A proof of debt must contain the following details:

a. The creditor's name and address, and, if a company, its company registration number;

b. The total amount of his claim (including any VAT) as at the date when the company went into liquidation;

c. Whether or not that amount includes outstanding uncapitalised interest;

d. Particulars of how and when the debt was incurred by the company;

e. Particulars of any security held, the date when it was given and the value which the creditor puts upon it;

f. Details of any reservation of title in respect of goods to which the debt refers; and

g. The name, and address and authority of the person signing the proof (if other than the creditor himself).

The proof must also specify any documents by reference to which the debt can be substantiated. Although it is not essential that such documentation be attached to the proof or submitted with it, the insolvency office holder may call for any documentary or other evidence to be produced to him where he thinks it necessary for the purpose of substantiating the whole or any part of the claim made in the proof.

A separate process is available with respect to Company Voluntary Arrangements (CVA) and Schemes of Arrangement. In both these cases, the procedure for the presentation of claims will either be set out by the court or be provided for in the relevant documentation.

2. Types of claims

All claims by creditors are provable as debts against the company whether they are present or future, certain or contingent, ascertained or sounding only in damages.

A “debt” or “liability” in relation to the winding up of a company comprises:

a. Any debt or liability which the company is subject to at the date which it goes into liquidation;

b. Any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; and

c. Any interest provable thereon.

Claims arising in tort are provable in the winding up of a company if:

a. The cause of action has accrued at the date on which the company goes into liquidation; or

b. All the elements necessary to establish the cause of action exist at the date the company goes into liquidation except for actionable damage.

3. Unmatured, contingent and unliquidated claims

If, at the date of the winding up order, the debtor’s liability to a particular creditor is dependant upon the happening of some event which may or may not occur, the liability is said to be contingent. Provided that it was incurred before the making of the winding up order, such a liability is provable in the debtor’s liquidation, although an allowance would need to be made for the fact that the contingency may not happen and thus the liability may never be incurred.

The insolvency office holder is required to estimate the value of any contingent liability. However, such valuation may be revised by reference to any change in circumstances or upon new information becoming available to the insolvency office holder. The insolvency office holder is required to inform the creditor of his estimate and any revision thereto.

The leading case of *Hardy v Fothergill* (1888) 13 App Cas. 351 (HL) held that the mode of entering a proof in relation to a contingent liability is for the creditor's claim to be stated as of the date the winding up order is granted and, if by the time the proof is lodged the contingency has already happened, the task of assessing the true value of the claim at the date of the winding up order becomes relatively straightforward.

4. Claims for equitable remedies

A creditor may make a claim for an equitable remedy such as constructive trust if, for example, they can establish that the debtor dishonestly obtained funds which now form part of their estate. In such a case, the creditor can file a proof of debt to recover the full amount which they claim has been dishonestly obtained by the debtor.

However, a creditor cannot make a claim for an equitable remedy such as specific performance as such claims are not capable of being quantified by either the creditor or the insolvency office holder.

B. Defenses

1. Bar dates

The English insolvency legislation does not generally recognise the concept of "bar dates." However, shortly after his appointment, an insolvency office holder will invite creditors to submit a proof of debt. The insolvency office holder will usually fix a time limit (generally not less than 21 days) within which creditors can submit their proof. Any claims submitted after the specified deadline will be admitted at the insolvency office holder's discretion.

A creditor who has not proved his debt before the declaration of any dividend is not entitled to disturb the distribution of that dividend or any other dividend declared before his debt was proved. However, once he has proved his debt to the satisfaction of the insolvency office holder, a creditor becomes entitled to be paid out of any money available for the payment of further dividends, any dividend or dividends which he has failed to receive.

2. Defenses

a. *Non-bankruptcy defenses*

The English insolvency legislation does not recognise the concept of "equitable subordination."

A creditor wishing to be treated as such for the purpose of voting and dividends is required to prove for his debt. In the event that the insolvency office holder is unable to verify the existence and / or quantum of a creditor's claim, that claim will be rejected, either in whole or in part. In such a case, the creditor has 21 days within which to defend the claim which is usually done by furnishing the insolvency office holder with additional documentation verifying the claim. Accordingly, it is a matter for the creditor, and not the debtor, to defend the nature and quantum of any claim.

Debts incurred prior to the liquidation / administration but payable in the future under executed contracts (i.e., contracts under which payment has already been earned by performance) are admitted to proof at full value; but where the debt has not become due at the date of declaration of any dividend it is discounted for the purpose of calculating the dividend entitlement. Contingent claims must be estimated and admitted to proof at the estimated amount.

Irrespective of the above, creditors are free to agree among themselves that the secured or unsecured claim of one of them shall be subordinated to the claims of the others. In England there are now two decisions recognising the validity of subordination agreements. In the first, *Re Maxwell Communications Corp (No 2)* [1994] 4 BCLC 1, the court held that to deny the validity of a subordination agreement could have the most serious consequences, particularly in view of the widespread recognition of the efficacy of such agreements in insolvency in foreign jurisdictions and of the fact that in many cases a company could not continue to trade and obtain credit unless some of its creditors were willing to subordinate their indebtedness.

In the second case, *Re SSSL Realisations (2002) Ltd* [2005] 1 BCLC 1, the court held that the validity of a subordination agreement was not affected by the fact that the subordinated creditor was also in liquidation. To these considerations one might add that the IR expressly recognises the right of a creditor to assign his right of dividend to another creditor. This would typically occur in cases where the first creditor had agreed to be subordinated to the second. It would therefore be strange if the subordination agreement pursuant to which such an assignment was made were held to be invalid.

b. *Bankruptcy defenses*

It is a matter for the creditor, and not the debtor, to defend the nature and quantum of any claim they file with the insolvency office holder. However, a debtor is able to mitigate a claim if, before it went into liquidation there had been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation. This right to setoff is available in both administration and liquidation and operates as a result of substantive law. That is, it is an automatic right and not dependant on the taking of any procedural steps either by the creditor or the debtor.

At the time a company goes into liquidation or administration, the legislation also allows for the avoidance of any transactions entered into by the debtor which were either at an undervalue, which resulted in the giving of a preference to any person or where there is fraud of the creditors. Claims in relation to any such transactions may also be available to set off against a particular creditor claim.

C. Claims adjudication procedures

1. Standing to object

An insolvency office holder may reject a proof in whole or in part but must provide reasons to the relevant creditors. A creditor may appeal to the court against a rejection within 21 days of receiving notice of it. At any creditors' meeting the insolvency office holder has the power to admit or reject a creditor's proof for the purpose of his entitlement to vote; and the power is exercisable with respect to the whole or any part of the proof. However, the insolvency office holder's decision in this regard is subject to the creditor's right of appeal to the court.

So far as a creditor admitted to vote in a creditors' meeting is concerned, where the relevant insolvency office holder is in doubt as to whether a proof should be admitted or rejected for voting purposes, he should mark it as "objected to" and allow the creditor to vote at the creditor's meeting (as if his proof of claim had been admitted). This vote can subsequently be declared invalid if the creditor is unable to provide sufficient evidence to substantiate the claim and the objection to the proof is sustained.

2. Burden of going forward

The burden of proof is on the creditor throughout the claims process. It is a matter for the creditor to establish the nature and quantum of the debt they are owed by the company and, in the event that this claim is rejected, the creditor has the burden of applying to the court to have this decision reversed or varied.

3. Burden of proof

It is a matter for the creditor to establish the nature and quantum of the debt they are owed by the company and, in the event that this claim is rejected, the creditor has the burden of applying to the court to have this decision reversed or varied. For the purposes of any such appeal, the usual standard of proof applicable to civil matters applies; namely, the balance of probabilities.

4. Jurisdiction

All applications made under the IR are heard in the Companies Court. As a general rule all petitions, claims and applications should be listed for initial hearing before a registrar or district court judge. The registrar may then refer to the judge any matter which he thinks should properly be decided by a judge, and the judge may either decide the matter or refer it back to the registrar with such directions as he thinks fit.

5. Discovery

A creditor's proof must specify any documents by reference to which the debts can be substantiated. Although it is not essential that such documents be submitted with the proof, the relevant insolvency office holder may call for any documentation or other evidence to be produced to him where he thinks it necessary for the purpose of substantiating the whole or any part of the claim made in the proof. In the event that the creditor is unable to provide sufficient evidence (whether documentary or otherwise) upon request by the relevant insolvency office holder, their claim will usually be rejected either in whole or in part.

6. Claim adjudication

All proofs are initially adjudicated by the relevant insolvency office holder. This is an out of court process. It is only in the event that a proof is rejected, either in whole or in part, that a creditor may appeal to the court. On appeal, the court will consider the merits of the insolvency office holder's decision to reject the claim on the basis of the documentation provided by the creditor in substantiation of their claim.

7. Costs of litigation

Every creditor bears the cost of proving his own debt. In the event that a creditor appeals against the decision of an insolvency office holder with respect to its proof, the insolvency office holder is not liable for the costs of making such an application to the court unless the court makes an order to that effect.

Alternatively, in the case of a meritorious appeal, the court may order that both parties draw their costs from the estate.

8. Recognition of claims adjudicated by other courts

A creditor can make a claim on the basis of an unsatisfied judgment handed down prior to the commencement of the liquidation. In such cases, the insolvency office holder has discretion to determine whether or not to accept the judgment as a valid claim in the liquidation.

9. Appeals

As noted above, the relevant insolvency office holder has the authority to reject a creditor's proof either in whole or in part. If a creditor is dissatisfied with the insolvency office holder's decision with respect to his proof (including any decision on the question of preference), he may apply to the court for the decision to be reversed or varied. The application must be made within 21 days of his receiving the notice of rejection.

All appeals are heard in the Companies Court. As a general rule they will be listed for initial hearing before a registrar or district court judge. The registrar may then refer to the judge any matter which he thinks should properly be decided by the judge, and the judge may either dispose of the matter or refer it back to the registrar with such directions as he thinks fit.

France

Insolvency proceedings in France are governed by Loi 2005-845 du 26 juillet 2005 – Décret N° 2005-1677 du 28 décembre 2005 (Law 2005-845 of July 26, 2005 - Decree No. 2005-1677 of December 28, 2005).

A creditor, whether domestic or foreign, may only initiate a procedure by petitioning (seizing) the Commercial Court located in the jurisdiction of the debtor's registered office or his Center of Main Interest (COMI). The Court, which ascertains that the debtor is indeed in default of payment, designates a judicial auxiliary officer (Receiver/Liquidator). A Receiver (Mandataire Judiciaire) is appointed in each case. If the business can continue trading, a judicial administrator (Administrator-Receiver) is also appointed who will either supervisor or replace the debtor in the continuance of its operations. If business was not continuing when the Court opened the proceedings, the Receiver is also most often appointed as a Liquidator (sometimes a Liquidator is appointed who is not the same Insolvency Practitioner as the Receiver); the same may occur when the business cannot continue after opening proceedings.

A. Claims presentment

The First Division of the French Supreme Court (*Cour de Cassation*) by way of decision dated September 29, 2004, described the requirement of registering claims in insolvency proceedings as "a principle of law and order both domestic and international."

In order to participate in the distribution of dividends, creditors must declare their claim at the opening of insolvency proceedings (Art L 622-24, Art R 622-21). An unbroken line of cases provides that all creditors, irrespective of citizenship, may prove claims (file their claims declarations) in proceedings opened in France, and establishes the principle of non discrimination and equality of treatment between French and foreign creditors. Foreign creditors have an extended time limit (an additional 2 months) to file their claims.

A creditor who has petitioned for the opening of insolvency proceedings must file claims declarations, which will be the subject of verification by the Receiver/Liquidator, except if the debtor has no assets.

Notwithstanding the legal provisions in force, there are exceptions that excuse certain creditors from reporting their claims.

1. Notice and declarations of claim

The Receiver/Liquidator must inform the creditors holding securities (such as bonds) of the debtor (those appearing on the list provided by the debtor), as well as those listed in the legal registers (pledges on personal or movable property, Trade Registers, mortgages registered, Land Registers), to register their claims within the appointed time frames. Published contracts can include a sales contract with provisions on published property, a business run by management agreement contract, a contract on patents or copyright on trademarks.

The Receiver/Liquidator must ensure that appropriate records are kept substantiating that secured creditors have been notified by registered letter. Unsecured creditors are not required to receive notice of the need to file proofs of claim so, in the absence of payment; they must remain vigilant by watching the legal announcements.

A claim form can be printed from the Court Clerk's Web site at: (http://www.greffes.com/_infos_generales).

The declaration of claim can be submitted by regular mail or registered mail. The creditor must furnish all information required by the French Commercial Code, as follows:

- Amount of the claim as at the opening day of the proceedings, including future amounts falling due and their corresponding due dates, as well as interest accrued as of the opening day of the proceedings, including incidentals, penalties and eventual damages and interest;

- The class, preferential right or the security category under which the claim falls;

- All necessary information and documents proving the existence and amount of the claim if it does not derive from a security interest, or an evaluation of the security if its value has not been ascertained;

- Method of calculation of interest if the rate is not indicated; and

- Jurisdiction initially seized if the claim is the subject of a pre-existing dispute.

The creditor must attach to his declaration all supporting documents (purchase orders, delivery slips, signed contracts, etc.).

The declarations must be prepared in French or in a foreign language with a translation to French. (LYON Court of Appeal in its two decisions dated March 15 and September 7, 2001). The European Regulation stipulates that the creditor may file in the language of his native country. Nevertheless, a translation to French may be requested.

The declaration cannot be made on an estimated or provisional basis (with the exception of claims emanating from the Treasury (Government/Receiver General) or from the national insurance/social security agencies). The amounts must be shown in Euros. When the claim concerns another currency, the conversion rate used must be that effective on the opening judgment date of the proceedings. The claim must be certified true and valid by the creditor unless it relies on a writ of execution.

Documents may be provided as copies, although it is possible that the originals may be requested along with their translation.

The claim must be delivered to the Receiver/Liquidator and not to the Administrator-Receiver.

A creditor who is a natural person must file the claim in his own behalf. If the creditor is a body corporate, the declaration of claim must be filed by the legal representative or other official who must provide proof of delegation of authority from his company specific to the declaration at hand.

The question of powers is very important; a number of claims have been rejected in the past because irregularities in the delegations of authority have rendered the claims invalid. The French Supreme Court (*Cour de Cassation)* in its plenary meeting on January 26, 2001 noted that claims declaration rests on the same authority required as that in instituting court proceedings. Thus, a claims declaration can be established by a lawyer, but if it is not, its originator must provide proof of a special delegation (such as a board of directors' resolution) given by the representative of the body corporate.

In the absence of a delegation, proof of this authority may be given after the declaration, for example, as in the case of an objection before the insolvency judge (official receiver). In that situation, proof of delegation existing when declaration was filed must be provided by the creditor.

The declaration must be signed by its author who must provide his name and title.

The Commercial Division of the French Supreme Court, (decisions dated November 21, 2006 (n° 1288FS and 1285FS)) has ruled that, in the absence of a signature on the declaration, proof of the identity of the claimant can be made by any means right up to the day that the insolvency judge rules.

2. Types of claims

The following types of creditors are exempt from having to file a declaration of claim:

- French salaried workers claims (Article L622-24 Paragraph 1).

- Claims accepted as due (into the liability accounts) in a first procedure. The law is intended to protect the interests of creditors since the law decides that following cancellation of the Rescue plan, or continuation and the opening of the new procedure, the creditors affected by the first plan are exempt from declaring once again their claims and securities in the new procedure. The claims which are registered under this plan are, therefore, admitted by right and with good reason, less the amounts already paid out to the creditors (Article L 626-27III).

- Alimony claims subsequent to the opening of proceedings. Judgments for alimony and child support are not required to be submitted through a declaration of claim.

- Claims by depositors/bailors in bank insolvencies (see Article L613-30 of the Economic and Monetary Code).

The following types of creditors are required to file a declaration of claim:

- Holders of all other claims arising before the opening judgment of a Rescue procedure, receivership or liquidation, including the privileged claim arising in the context of a conciliation procedure for money loaned or credit extended during such a procedure.

- Claims subsequent to an opening judgment that have not been paid on their due date and which are considered necessary to the continuity of the proceeding. Claims resulting from a renewable performance or services contract should be submitted for the entire amounts due, past due and falling due.

- Claims based on securities (such as stocks and bonds) and Claims based on published contracts (such as mortgages, leases and other recorded transactions).

The claims declaration is equivalent to an action before the courts. When it is accepted finally, it becomes equivalent to a writ of execution. The creditor can use this writ as a basis to pursue the matter in litigation should the bankruptcy court decide at the closing of the proceedings to allow the resumption of individual legal actions.

3. Unmatured, contingent and unliquidated claims

They must be estimated.

B. Defenses

1. Bar dates

Claims must be filed within a two-month deadline, increased by another two months for creditors residing outside of France. The two-month deadline starts to run upon publication of the opening of the proceedings in the BODACC Series A (Official Bulletin of Civil and Trade Announcements). A subscription may be obtained at www.journal-officiel.gouv.fr Numerous business intelligence sites offer an internet subscription at a rate of €80.

However, time limits differ according to the nature of the claim, and are extended by an extra two months for those creditors residing outside of France. If the creditor is the holder of securities or of a published contract, the period does not start to run until it has received notice from the Receiver/Liquidator.

The time limit for claims existing prior to the proceedings starts to run from the date of publication in the BODACC of the opening judgment of a receivership. In practice, the creditor has about five months, when taking into account the delays in publishing in the BODACC, or about one month following the entry of the judgment commencing the proceedings.

If a creditor misses a bar date, the creditor should request a ruling from the insolvency judge that it shares no culpability for having missed the bar date. The statement should also mention the exclusion of the creditor's name from the list of creditors handed over to the Receiver/Liquidator. (Article L622-26) even though, up to the present time, the Supreme Court has ruled that an intentional omission in bad faith does not justify eliminating the effect of the bar order.

The deadline for requesting relief from the bar order is now six months (previously, one year from opening judgment) and begins to run from the date of publication of the BODACC containing notice of the opening of proceedings. A decision of the Paris Court of Appeal dated December 17, 1999 held that the creditors residing outside of France would enjoy an extension of two months to request the lifting of a bar order.

Bar date exceptions include:

- For those, who are holders of securities or of published contracts, who have been properly notified by the Receiver/Liquidator, the 2 month extension only starts from the date that the creditors have been notified.

- For renewable contracts continued following the opening of insolvency proceedings the delay is one month starting from the date of cancellation by right or by notification of the decision pronouncing the cancellation.

- The victim of a criminal offence who is claiming for damages as a private individual also has two months to declare his claim starting from *the date of the final decision* in the criminal proceedings which sets the amount (previously an estimate had to be declared).

2. Defenses

The Receiver/Liquidator has all of the same defenses to the claim that the debtor would have had such as statute of limitations, failure of consideration, etc.

C. Claims adjudication procedures

During the claims verification phase, the Receiver/Liquidator will review the format/propriety of the declaration; verify that it was filed within the time frame allowed, and determine the validity, amount and identification/type of the claim. A statement of claims established by the Receiver/Liquidator will be registered with the Court Clerk within the set time frame ordered by the Court. The Clerk will publish a list of the claims registered and their status in the BODACC from which point all creditors then have one month to request changes or modifications to the admission of their claims. There is no extension of time limits for foreign creditors.

1. Standing to object

The Receiver/Liquidator, creditors and the debtor all have standing to object to a claim.

2. Undeclared claims

The absence of a claims declaration does not lead to the discharge (extinguishment) of the claim, as was the case before the Rescue Law came into effect (January 1, 2006).

The consensus of opinion is that the only penalty raised in Article L 622-26 is that henceforth the claim will not be admitted to payments and dividends. If the creditor has been barred, the claim will not participate in the distributions, and the creditor will be prevented from proceeding even against collateral security. The bar order may extinguish the claim for all purposes, but the law on this issue is uncertain in France.

3. Discovery

The process for objecting to a claim is the same in insolvency proceedings as it is in other civil or commercial cases. Either party can compel production of documents and take depositions of witnesses. The judgment of another court on the claim cannot be challenged.

4. Claims adjudication

The creditor whose claim is objected to, is informed with a letter by the Receiver/Liquidator. The creditor must answer not later than 30 days to the Receiver/Liquidator. If he does not, he is not allowed to reject proposition of non-admission or only part of admission of the claim proposed by the Receiver/Liquidator to the Juge Commissaire. If an agreement is not reached between the Receiver/Liquidator and the creditor, the matter is brought for adjudication before the Juge Commissaire. The creditor has the burden of proof on his claim. The rules are the same like any other civil or commercial process. The creditor and the Receiver/Liquidator are allowed to appeal the decision of the Judge before the Court which had opened the insolvency proceeding and to appeal the decision of the Court before the Court of Appeal.

If a proceeding on a claim is already pending before a Jurisdiction before the opening of the insolvency proceeding, the matter will proceed in that court. However, the matter cannot proceed in that court if the creditor has not declared his claim in the insolvency.

5. Appeals

The decision of the Insolvency Judge is subject to appeal within 10 days from the date of notification of the judgment.

6. Outcome of the security of a foreclosed creditor

If a creditor's claim has been barred, the claim will nevertheless continue to exist and with it the eventual guaranties. When a secured claim has not been barred, it will continue to have the right to its underlying security. Whether such claim is subject to contest, and whether the underlying collateral remains beyond the reach of creditors during the insolvency proceeding are open questions. These questions are important as concerns retention of the pledge that the creditor enjoys, since in order to hold a lien one must also be creditor. In France, the only way to remove the right of retention is through payment of the debt. A lien will remain effective in Rescue or Restructuring proceedings but not in those of liquidation. The barred creditor beneficiary of a lien could then not oppose the liquidation proceedings in the same way that a barred guarantor/creditor could not request the legal attribution of his pledge.

Germany

In Germany, bankruptcy law is regulated primarily in the Insolvency Ordinance (Insolvenzordnung) from 1999. The use of the term 'insolvency' rather than 'bankruptcy' as in the predecessor ordinance (Konkursordnung) indicates a general shift in the statute's perspective: away from the 'running together' (concurrere in Latin) of the creditors towards the debtor's inability to satisfy his or her creditors. As an indication of this shift, Germany follows a Unitarian approach; i.e., there is only one insolvency proceeding which, ultimately, and depending on the creditors' decision which, in turn, is based on a report of the administrator, will be treated as a liquidation or as a reorganisation proceeding. The Ordinance deals with the insolvency of both individuals and business entities, whereby special rules apply in case of consumers' insolvencies.

Since Germany belongs to what the comparatists of law call "the Codification family" (as opposed to e.g., the Common Law family) some of the topics in the following chapters need some adjustment to the peculiarities of this family. The main difference is that there is no special category of equitable remedies or defenses; as a matter of fact, however, comparable rules are usually included in the statutory body of the Insolvency Ordinance.

A. Claims presentment

1. Proofs of claim

The formal requirements for presenting claims in an insolvency case are set forth primarily in s. 174 of the Insolvency Ordinance ("InsO"). It reads as follows:

(1) The creditor's claim of the insolvency proceedings must be filed in writing with the insolvency administrator. Such filing shall be accompanied by copies of the documents evidencing the claim.

(2) Upon its filing the reason and the amount of the claim shall be indicated, as shall the facts from which, according to the creditor's understanding, it emerges that it is based on an intentionally committed tort.

(3) Subordinated creditors shall file their claims only if specifically requested by the insolvency court to do so. Upon filing such claims their lower-ranking status shall be indicated, and the creditor's lower rank shall be marked.

(4) Claims may also be filed by submitting electronic documents provided that the insolvency administrator has expressly agreed to such electronic transmission of documents. In such case documents showing such claims must be submitted forthwith in their original form.[1]

Pursuant to s. 175 InsO, it is the insolvency administrator's duty to keep a schedule into which all filed claims are to be registered and which finally serves as the basis for the verification procedure and the judicial review. The entry into this schedule is preliminary in that it needs confirmation in the so-called verification meeting; if no one objects to the respective claim, it is confirmed. Given these facts, the filing correspondence has to be sent to the insolvency administrator. The filing can be done by the creditor itself or by a proxy who has to attach the legitimation document.

The right to file their claims is granted (a) to all insolvency creditors as defined in s. 38 InsO (i.e., those personal creditors who have a liquidated claim against the debtor on the date of the opening of the proceeding), (b) to all subordinated creditors as defined in s. 39 InsO (i.e., those creditors whose claims are ranked behind the general unsecured creditors as defined in s. 38 InsO), and (c) to those secured creditors who hold additionally a personal claim against the debtor. As to the subordinated creditors, para. 3 of s. 174 InsO clarifies that they are permitted to file only when and if explicitly permitted to do so by the insolvency court; if at all in practice, this will happen in the rare cases when a full satisfaction of all the general unsecured creditors plus, additionally, a surplus can be expected. Pursuant to s. 52 InsO, the secured creditors as described *supra* at (c) are to receive a dividend on their claim only to the extent that they are unsatisfied through the realisation of their security; this implies that they are permitted to file their claim *in toto* but the insolvency administrator will indicate in the schedule that this is a secured claim.

Para. 1 of s. 174 InsO indicates that, generally speaking, the only specific form requirement for a filing is that it has to be "in writing." Para. 4 extends this to an electronic filing when and if the insolvency administrator permits to do so. More often than not, individual insolvency administrators have prepared a particular form for such filing which they then send to all known creditors of the case at hand. Nevertheless, the writing requirement is generally fulfilled also by means of sending a fax to the insolvency administrator. It is common understanding that filings have to be made in German language unless there is a filing from a creditor who has its "habitual residence, domicile or registered office in a Member State" of the EU Regulation; for those creditors, art. 42 para. 2 of this Regulation provides the opportunity to file also in the language of such Member State.

[1] This translation (and the subsequent ones) of the Insolvency Ordinance is, partially, taken from Braun (ed.), Commentary on the German Insolvency Code, 2006.

Practical considerations make it advisable to read the second sentence of para. 1 of the above quoted section not as a "shall" provision but rather to understand it as imposing a formal requirement for any filing. Even though the omission of attaching the relevant documents does not invalidate a filing, an undocumented claim in the schedule usually provokes other creditors or the insolvency administrator to object to the validity of the claim in the verification meeting. It is a not yet fully settled question whether the originals of such documents have to be presented or whether it suffices to attach mere copies; the opinions among courts and scholars are divided (which makes it important to inquire with the respective insolvency administrator in advance).

Para. 2 of s. 174 InsO specifies the contents of a filing. Accordingly, the basis for the claim has to be specified in order for it to be valid; if the filing is incomplete in this regard, the insolvency administrator will reject the entry into the schedule and the creditor has to file again – this time in compliance with the requirements. The precision of the reason's description should be guided again by the consideration that it serves as a basis for the claim's potential acknowledgement or objection in the verification meeting. Therefore, the presentation merely of an invoice usually will not suffice; on the other hand, at this stage there is no legal examination as to the claim's merits so that there is no inevitable necessity to present full evidence of the legal validity of the claim. Nevertheless, the determination of the claim's reason should be prepared carefully; since, according to the Federal Supreme Court in Civil Law Matters (Bundesgerichtshof, Zeitschrift für das gesamte Insolvenzrecht 2001, 1050), this determination cannot be changed in case of a later declaratory dispute about the verification of this claim. The emergence of a different reason than the one given in the original filing requires a new filing.

With respect to the amount of the claim, generally speaking, it should be determined in Euros. However, s. 45 InsO provides that money claims presented in foreign currency are to be converted into Euro as of the exchange rate from the day of the opening of the insolvency proceeding at the place of payment. In case that the filing of a claim shall include the payment of interests, the requirement of specifying the exact amount is alleviated; it suffices that the creditor indicates the date from which such interests are to be calculated and the percentage rate (which, as the case might be, should be justified through relevant documents).

The particular claims of tort and subordinate creditors as dealt with in para. 2 and 3 of s. 174 InsO are addressed in the following sections.

2. Types of claims

As indicated already supra, claims which can be filed in an insolvency proceeding are all liquidated claims held by personal creditors against the debtor of the insolvency proceeding. This excludes claims which, for instance, can be fulfilled only and exclusively by the debtor itself or with assets which do not form part of the estate (exempted goods) or claims which are by their nature "in rem" (as opposed to "in persona"). In contrast, this definition includes tort claims; pursuant to the above quoted s. 174 para. 2 InsO, it is even the creditor's explicit obligation to state the reasons why he or she believes this claim to be a claim of delict (tort claim). This qualification need not be a precise legal interpretation; it just has to present all the facts from which a lawyer can deduct the likelihood of the tort character of this claim. The latter is important insofar as, pursuant to s. 302 InsO, tort claims are not subject to the discharge rule for debtors (however, since discharge applies only in case of a natural person's insolvency, the tort qualification has no negative side-effect in cases where a legal entity is the debtor of the insolvency proceeding).

3. Unmatured, contingent and unliquidated claims

Pursuant to s. 41 InsO, the opening of an insolvency proceeding has the effect of accelerating claims. Thus, any obligation that has a maturity date after the filing of an insolvency case automatically becomes due and payable as of the date of the commencement of the insolvency case. However, this effect is true only with respect to the debtor – *inter partes* – (and not to the degree that the creditor would now be permitted to a set-off, s. 95 para. 1 InsO); it does not extend to third parties such as a guarantor or surety (Bundesgerichtshof, Neue Juristische Wochenschrift 2000, 1409).

With respect to interest, para. 2 of s. 41 InsO states:

> "If such claims do not bear interest, they shall be discounted at the statutory rate of interest. Thereby, they shall be reduced to the amount corresponding to the full amount of such claim if the statutory rate of interest for the period from the opening of the insolvency proceedings to its maturity is added."

Whereas this norm rules only on non-interest claims, practice has developed a formula of how to proceed in cases of unmatured interest bearing claims. Accordingly, the amount to be filed is calculated by multiplying the nominal amount of the claim times 36.500, divided by 36.500 plus the sum of the statutory interest rate (= 4 %, cf. s. 246 of the Civil Law Code, Bürgerliches Gesetzbuch) and the number of days from the opening of the proceeding till the original maturity date.

Creditors of a claim subject to a resolutory condition can assert their claims unless such condition has already occurred, s. 42 InsO; i.e. they participate in the insolvency proceeding as any other insolvency creditor as well. There is no such explicit rule about claims subject to a condition precedent; however, some other rules implicitly confirm that such creditors, too, have the right to file their claims and even to vote (if so permitted by the voting creditors and the insolvency administrator). But whenever a dividend (or part of it) is distributed, the respective sum will be withheld by the insolvency administrator until the condition realizes.

Unliquidated claims (such as, for instance, specific performance from a sales contract) and claims with an unspecified money amount can be asserted by the creditors; pursuant to s. 45 InsO, they have to determine the amount of their claim on the basis of the estimated value of such claim at the date of the opening of the proceeding (whereby this estimation might become subject to objection from other stakeholders during the verification meeting).

4. Claims for equitable remedies

With respect to equitable remedies and defenses, see the remarks at the beginning of this chapter about the fundamental differences between the Continental and the Common Law System. As a general rule, however, it can be said that any claim can be asserted the fulfillment of which affects the estate of the insolvency proceeding (as specified in ss. 35, 36 InsO). This includes, as a matter of fact, specific performance as well as any money claim such as payment of damages for breach of contract; it excludes such claims the fulfillment of which does not concern the assets which form the estate (i.e. exempted goods) and claims which are to be fulfilled by the debtor in person – such as forbearance or performance of labor, etc.

B. Defenses

1. Bar dates

The deadline for filing claims is determined by the insolvency court in the opening decision; pursuant to s. 28 InsO, this time period shall be between two weeks and three months. The specified date, however, does not exclude later filings; it can be made up until the final closing of the case. The disadvantages of such later filing are, firstly, that the respective creditor might possibly have to bear the expense (a moderate sum) for an additional verification meeting. Additionally, if the filing and verification takes place after preliminary distributions of the dividend, a creditor who files a claim late will lose this part of the payment.

2. Defenses

a. *Non-bankruptcy defenses*

The insolvency administrator, any creditor and the debtor itself is entitled to raise objections against a claim which has been filed in the aforementioned manner. Such objections can be based on any objection that the debtor could have raised outside the insolvency proceeding – as, for instance, the non-existence of such claim or that it has already been satisfied, or that the interest rate is invalid because it contravenes 'good morals' (as specified in s. 138 of the Civil Law Code), etc. In this context, it should be noted that pursuant to s. 204 para. 1 no. 10 of the Civil Law Code the filing of a claim has the effect of tolling the statute of limitations; thus, if this time had not run out at the time of such filing, the respective objection will not be heard.

b. *Bankruptcy defenses*

The above mentioned stakeholders are also entitled to raise specific insolvency law related objections. This includes, for instance, the allegation that the value of an unliquidated claim has been incorrectly estimated (see *supra* at A 3) or that the claim is, in fact, a subordinated claim. With respect to the latter category of claims, it has already been stated *supra* that s. 174 para. 3 InsO allows their filing only when and if the insolvency court explicitly permits to do so. This relates to those creditors which are listed in s. 39 InsO; it reads as follows:

(1) The following claims shall be satisfied ranking below the other claims of creditors of the insolvency proceeding in the order given below, proportionately to their amount when and if they rank with equal status:

1. Interest accruing on the claims of the creditors of the insolvency proceedings from the date of opening proceedings;

2. Costs incurred by individual creditors of the insolvency proceedings due to their participation in the proceedings;

3. Fines, administrative penalties, coercive penalty payments, as well as such incidental legal consequences of a criminal or administrative offence binding the debtor to pay money;

4. Claims to the debtor's gratuitous performance of a consideration;

5. Claims to the refund of loans borrowed from a partner and replacing equity capital, or claims with equal status.

(2) Claims which the creditor and the debtor agreed to be non-privileged in insolvency proceedings shall be satisfied after the claims mentioned at subs. 1 if the agreement does not provide otherwise.

(3) Interest accruing on the claims of subordinated creditors of the insolvency proceedings, and the costs incurred by such creditors due to their participation in the proceedings shall rank with equal status as the claims of such creditors.

In practice, the most prominent object of dispute is no. 5 of para. 1 of this norm. This is true not so much with respect to the conversion of a loan from a shareholder to the company into a kind of functional equity; this is definitely settled and widely accepted by the economic actors. What is disputed again and again are the multitude of attempts to circumvent this legal consequence by achieving the result of an ordinary loan (as contrasted to a subordinated one) with the help of other constructions, including the involvement of third parties. The relevant norm gives as a rule that circumventing measures, too, are to be treated like the plain loans replacing equity. This inspired the imagination (and still does so) of many lawyers to find ways around this rule. It should be noted that sooner or later (presumably still in 2008) the whole concept will be extended to all companies and partnerships, while up to now it is more or less constrained to the Gesellschaft mit beschränkter Haftung (GmbH, i.e. company with limited liability).

C. Claims adjudication procedures

The claims adjudication process in an insolvency proceeding is dependent on the objection during the verification meeting of anyone who has the standing to do so. All insolvency creditors are permitted to participate but they need not. The same is true for the debtor. In contrast, the insolvency administrator and a court official must be present. If, in this meeting, no objection is raised, the entry into the schedule of the insolvency administrator gets final and serves henceforth as an entitlement for voting, receiving the dividends and, after the closing of the insolvency proceedings, as an enforceable deed; i.e., the basis for the enforcement of a money judgment. But if someone raises objections, the further steps are dependent on who objects and whether the claim is already verified through what German Civil Procedure Law calls a “title” (executable deed); i.e., a judgment or a comparable confirmation pursuant to s. 794 of the Civil Procedure Code. Such objection may ultimately lead to a lawsuit before a court which has to decide in a declaratory judgment whether or not this particular claim is entitled to an entry in the schedule (and, thus, to the participation in the insolvency proceedings).

1. Standing to object

Pursuant to s. 179 InsO, any insolvency creditor as well as the insolvency administrator is entitled to object to the validity of a claim; s. 184 InsO extends this entitlement to the debtor. In practical terms, however, it is almost exclusively the insolvency administrator who raises objections. This can be done in various forms: apart from an outright rejection of the claim, the insolvency administrator might acknowledge that part of a secured claim which, presumably, will remain unsatisfied, or this person might object only partially or preliminarily. Generally speaking, there is no form requirement for such objection except that it has to be raised during the verification meeting; the fact that there is an objection – as well as none – will be marked in the schedule by the court official who has to be present at this meeting. The creditors of claims which have been objected to will be notified by the court; it is then up to them how they react to this, if at all.

2. Burdens of proof

There are no fixed rules about the burden of proof. It suffices that if someone objects to the claim, there is a procedure to follow. Since the initial filing is done with the insolvency administrator who lists the files in the (preliminary) schedule, such office holder examines the justification of such claim. Therefore, one might say that there is a factual presumption for the claim's validity when and if the insolvency administrator does not object. But if the objector's arguments are strong enough to raise doubts, the claim will be marked in the schedule as objected.

3. Jurisdiction

German insolvency law confers upon the insolvency court mainly supervisory tasks; there is no *vis attractiva concursus* (i.e., the power to decide about (more or less) all insolvency related disputes). The insolvency court is relevant in this context only insofar as its location determines the venue of the court with jurisdiction. Accordingly, the judicial claim verification is to be decided by the courts with the respective jurisdiction, cf. s. 180, 185 InsO – for instance, a contract or tort claim by the civil law courts, a tax claim by the financial courts, a social security claim by the social security courts, etc.

These courts get involved upon motion. If either the insolvency administrator or another creditor has objected, it is up to the creditor of this claim to initiate the lawsuit against the objecting party – aiming at a declaratory judgment about the justification of the entry into the schedule. However, if the claim is based on an already existing money judgment, the prosecution of the dispute is incumbent on the objecting party. If, instead, the debtor objects to the claim, the creditor will nevertheless participate in the ongoing insolvency proceeding and will receive any distribution made therein. Pursuant to s. 184 InsO, nevertheless, this creditor is given the right to sue the debtor during the proceeding. Since the entry into the schedule without objection from the debtor serves as an enforceable judgment after the closing of the insolvency proceeding, a creditor will take the opportunity to sue the debtor when and if there is a chance of prospective future satisfaction through, for instance, after-acquired goods of the debtor. In case of the objecting debtor, too, the burden of activity is shifted back to the debtor when the creditor's claim is based on an enforceable judgment.

4. Discovery

German Civil Procedure Law and Insolvency Law offer nothing comparable to the U.S. American type of discovery. Insofar, the clear answer to this point is: no, there is no discovery. Instead – and in sharp contrast to the U.S. model – investigation into the facts is done not through the parties and their lawyers alone but under the strict auspices of the judge (for a thorough comparison of these divergent approaches, cf. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985)). This is to say that the parties and/or their lawyers have to present their evidence to the judge who evaluates it in the context of the whole evidence taking procedure (which itself forms part of the trial). In civil law matters, the standard of proof is, pursuant to s. 286 of the Civil Procedure Code, almost full conviction of the judge; this person has to be convinced that a party's allegations are true or not (one might want to compare this standard with the U.S. criminal standard of "beyond a reasonable doubt").

5. Claim adjudication

As pointed out *supra*, under 3), the German insolvency law confers no *vis attractiva concursus* on its insolvency courts. For that reason, there are no insolvency-specific rules for a respective lawsuit before a civil law court, labor law court, administrative law court, financial law court, or social security law court. Depending on the legal nature of the respective claim, any one of these types of courts might have jurisdiction; in that case, it will adjudicate on the basis of its own procedural law.

6. Costs of litigation

The aforementioned differences will continue when it comes to the determination of the litigation costs. The different procedural statutes differ also with respect to the distribution of costs, as well as the exact amount of these costs. However, since for the present context the main interest might be assumed to lie on the adjudication of claims through the civil law courts, it shall be mentioned that the "German rule" of cost bearing is in sharp contrast to the "American rule." In Germany, generally speaking, the losing party has to come up with all costs – including the lawyer's fees of the winning party and the costs of the lawsuit. For this reason, it is advisable to communicate with the objecting party before the dispute goes to court (rather than suing immediately upon objection); more often than not, such communication might clarify why, for instance, the insolvency administrator raised the objections and whether they can be cured (e.g., through presenting the original documents, etc).

7. Appeals

As with respect to the aforementioned costs, there is no general statement possible under German law about the possibility of an appeal against the claim adjudication decision. This depends on the conditions as set out in the respective procedural law. Generally speaking, there is throughout such possibility but certain restrictions might apply such as the value of the claim.

India

The Companies Act, 1956 ('Act') provides for provisions for winding up of companies. The jurisdiction to wind up a company is vested with the company courts set up in the high court of each state. Though after making the order of winding up, the company court is empowered to relegate the proceedings to the district court within whose jurisdiction the registered office of the company in liquidation is located, this power is rarely exercised. The Companies (Court) Rules, 1959 (Rules) provide *inter alia* for the procedure to be followed in the winding up proceedings.

It is proposed to vest the jurisdiction of winding up of companies with the National Company Law Tribunal (NCLT) a special tribunal to be set up under the Companies (Second Amendment) Act, 2002. This amendment is currently under legal challenge before the Supreme Court of India and its implementation remains stayed.

An application for the winding up of a company can be by way of a petition presented (a) by the company; or (b) by any creditor or creditors including contingent or prospective; or (c) by any contributory or contributories; or (d) by the Registrar of Companies; or (e) in a case falling under Section 243[1] of the Act, by any person authorized by the central government in that behalf.

Generally, the liquidation proceedings are triggered by creditors or on the recommendations made by Board for Industrial & Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985 failing attempts to restructure a company.

The winding up can be by an order of court or voluntary. The court may wind up a company if:

(a) The company has by special resolution resolved that it be wound up;

(b) The company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

[1] If any such company or other body corporate is liable to be wound up under this Act and it appears to the Central Government from any such report as aforesaid that it is expedient so to do by reason of any such circumstances as are referred to in sub-clause (i) or (ii) of clause (b) of section 237, the Central Government may, unless the company or body corporate, is already being wound up by the Tribunal, cause to be presented to the Tribunal by any person authorised by the Central Government in this behalf (a) a petition for the winding up of the company or body corporate, on the ground that it is just and equitable that it should be wound up; (b)an application for an order under section 397 or 398; (c) both a petition and an application as aforesaid.

(c) It is unable to pay its debts[2];

(d) A default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(e) The number of members is reduced in the case of a public company below seven and in the case of a private company below two;

(f) The court is of the opinion that it is just and equitable that the company should be wound up.

The additional grounds for winding up of a company inserted by the 2002 amendment are;

(a) If the company has acted against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(b) If the company has defaulted in filing with the Registrar its Balance Sheets and Profit & Loss Account or annual returns for five consecutive financial years; or

(c) If the NCLT comes to the conclusion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that it is not possible to revive the company in future and that it is just and equitable that the company should be wound up.

On hearing a petition, the company court may dismiss it or adjourn it conditionally/unconditionally, make any order of winding up, pass any interim order or make any other order as it may deem fit, including appointment of provisional liquidator (PL).

An official liquidator (OL) appointed by the central government is attached to each company court and is a full-time officer of the government. Where a winding up order has been made or where a PL has been appointed, the liquidator takes into his custody or under his control all the property, effects and actionable claims to which the company is or appears to be entitled. All the

[2] A company shall be deemed to be unable to pay its debts - if a creditor to whom the company is indebted in a sum exceeding five hundred rupees, has served on the company a demand by registered post at its registered office requiring it to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum; or if execution or other process issued on a decree or order of any court in favor of a creditor of the company is returned unsatisfied; or if it is proved to the satisfaction of the court that the company is unable to pay its debt. (By way of 2002 Second Amendment, the amount has been raised from Rupees Five Hundred to Rupees One Lakh.)

property and effects of the company are deemed to be in the custody of the court as from the date of the order for the winding up of the company.

After the 2002 amendment came into effect, even professional firms of accountants, lawyers, cost accountants, company secretaries or a combination thereof would be eligible for appointment as OL.

A high level committee set up the government in its report (2005) recommended a new insolvency law based on the UNCITRAL legislative guide. A new insolvency law based on the recommendations is expected to be tabled in the Indian Parliament later this year.

A. Claims presentment

Section 528 of the Act requires all debts against the company in liquidation to be proved. The procedure for dealing with claims is set out in the Rules. Rules 147 to 179 provide a comprehensive process and procedure for estimating and finally assessing the company's liabilities. The procedure requires the liquidator to first fix a date[3] for inviting and filing of claims by creditors; and after they are all received, he is required to examine and adjudicate them within three months (or such extended time as the court may allow) and file a report to the court in writing. The creditor dissatisfied with a decision of the liquidator can appeal to the court. On the basis of such report prepared by the liquidator, the court passes an order directing payment of dividends out of the proceeds realized from the sale of assets of the company.

1. Proofs of claim

Every creditor is required to prove his debt unless in a particular case the court directs that any creditor or class of creditors shall be admitted without proof.[4] A debt may be proved by delivering or sending by post to the liquidator, an affidavit verifying the debt made by the creditor or by a person authorized by him in a prescribed format. If the affidavit is made by a person authorized by the creditor, it shall state the authority and means of knowledge of the deponent.

---

[3] Rule 147. Subject to the provisions of the Act, and in a winding-up by the Court, subject to the directions of the Court, the Official Liquidator in a winding-up by the Court shall, and the Liquidator in any other winding-up may, fix a certain day, which shall be not less than 14 days from the date of the notice to be given under the next succeeding Rule, on or before which the creditors of the company are to prove their debts or claims and to establish any title they may have to priority under section 530, or to be excluded from the benefit of any distribution made before such debts or claims are proved, or, as the case may be, from objecting to such distribution.

[4] Rule 149. (1) In a winding-up by the Court every creditor shall, subject as hereinafter provided, prove his debt, unless the Judge in any particular case directs that any creditors or class of creditors shall be admitted without proof. (2) Formal proof of the debts mentioned in paragraph (*d*) of sub-section (1) of section 530 shall not be required, unless the Official Liquidator shall in any special case otherwise direct, in a winding-up by the Court.

An affidavit proving a debt must contain or refer to a statement of account showing the particulars of the debt, and specify the vouchers, if any by which the same can be sustained. The affidavit should state whether the creditor is a secured creditor, or a preferential creditor, and if so, set out the particulars of the security or of the preferential claim. The affidavit shall be in a prescribed form (No. 66).

The value of all debts and claims against the company are estimated according to their value at the date of the order of the winding-up of the company or where before the presentation of the petition for winding up, a resolution has been passed by the company for winding up, at the date of passing of such resolution. A creditor proving his debt must deduct therefrom all trade discounts.

On any debt or certain sum payable at a certain time or otherwise, where interest is not reserved or agreed for, and which is overdue at the date of the winding-up order, or the resolution, as the case may be, the creditor may prove for interest at a rate not exceeding four per cent per annum up to that date from the time when the debt or sum was payable if the debt or sum is payable by virtue of a written instrument at a certain time. If payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of demand until the time of payment[5].

A debt has to be proved and must be a debt proved in praesenti. In relation to the future debts, unless the company is carrying on the business for the beneficial winding up of the company through the official liquidator, future debts are not admissible unless they are claims of secured creditors as continuing obligations or are proved and subject to discount principles. Secured claims are normally proved outside of winding up unless the security is waived or given up and the secured creditor proves in winding up. If a claim for liquidated damages or unliquidated claim for damages is pending then a suit of such a nature can be required to be continued by the company court and upon adjudication the judgment debt would be admitted as a claim against the company. This would be subject to the leave of the company court. Interest claims have also to be filed before the company court as part of the proof.

Periodical payments like rent or other payments which fall due at stated periods are regulated by Rule 157. Persons entitled to the rent or payments may prove for a proportionate part thereof up to the date of winding up order or resolution as if the rent or payment accrues from day to day. If the liquidator remains in occupation then the liquidator shall remain liable for the rent during the occupation.

[5] Rule 156 of the Companies (Court) Rules, 1957.

Under Rule 158, a creditor may prove for a debt not payable at the date of winding up as if it were presently payable and may receive dividends equally with other creditors deducting only therefrom a rebate of interest at the rate of 4% per annum computing from the date of declaration of the dividend to the time when the debt would have become payable according the terms on which it was contracted.

A creditor is liable to produce any negotiable instruments on the basis of which its claim is filed. Alternatively, the claim has to be filed with an affidavit verifying the debt and any voucher substantiating the debt.

2. Types of claim

The term claim is not defined under the Act. However, claim as defined in *Black's Law Dictionary, Fifth Edition* as "to demand as one's own or as one's right. Also, it is a means by or through which claimant obtains possession or enjoyment of privilege or thing".

The object of winding up is to realize the assets, and discharge the liabilities and then, if there be any surplus, to pay it off to the shareholders, according to their respective interests. In order to ascertain the liabilities, section 528[6] of the Act requires that all persons having claims of whatever nature against the company, should submit proof of what is due to them. Every kind of liability whether, *present or future, certain or contingent*, and however difficult of valuation, is provable and has to be proved. Every kind of liability is proved unless declared by a court to be incapable of valuation.

The prospective value of a mere possibility, such as loss of future commission that might be earned but for the winding up, is not a provable debt. But any liability of the company existing at the time of the winding up and not barred under the statute, though it may not be actual debt due, may be proved.

Section 528, which is very wide, requires debts of all descriptions to be admitted to proof. For example, the liability of a company to pay certain minimum charges under an existing agreement for supply of electricity after electricity was disconnected was a debt provable in winding up against the insolvent company. The liquidator was therefore bound to admit this as a debt provable in winding up. Even a preferential claim for damages in respect of property obtained by company by fraud can be entertained and disposed of by the liquidator and need not be relegated to a suit.

---

[6] In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of insolvency), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value.

In the case of the winding up of an insolvent company, the provisions of section 529 of the Act are attracted. The section introduces into winding up the insolvency rules as regards debts and liabilities provable.

3. Unmatured, contingent and unliquidated claims

Tortuous liability arises from the breach of a duty primarily fixed by law. This duty is towards persons generally and its breach is redressible by an action for unliquidated damages. Unliquidated claims for damages in torts can be asserted. Although, there is no specific provision under the Act which deals specifically with them, however, such claims can be admissible. Where the winding up operates as a breach of an agreement, the aggrieved party can prove for damages likely to arise from such breach. As a corollary, any person who has guaranteed performance by the company and who on winding up is liable as such to a third party can prove his claim even prior to actually paying the third party.

4. Claims for equitable remedies

Amounts in the nature of trust moneys held by the company do not form part of the company's assets in the hands of the liquidator and they are payable in priority to the claims of the creditors. Property or moneys which can be identified as belonging to or held by the company in trust for other persons may be followed and recovered from the liquidator.[7] A fair test of whether a sum of money is to be held as a trust fund or not is to ask whether it was intended that it should remain a segregated fund or whether it should become the property of the company. Even a trust money would not be entitled to interest from the date of commencement of winding up if the company is insolvent.

B. Defenses

1. Bar dates

The official Liquidator fixes a certain day, to be not less than 14 days from the date of the notice given in a newspaper, on or before which the creditors of the company are to prove their debts or claims and to establish any title they may have priority under the Act, or to be excluded from the benefit of any distribution made before such debts or claims are proved, or, as the case may be, from objecting to such distribution. (Rule 147).

---

[7] Palmers Company Law 21st Ed. Page 775; *Dinshaw & Co. (Bankers) Ltd. v. Mst. Krishna Piary, (1941) 11 Com Cases 244 (Mad).*

The liquidator may make such investigation as he may think necessary into the claims presented. He must, then, admit or reject the proof in whole or in part. Such decision of accepting or rejecting a proof, either wholly or in part must be communicated in writing to the creditor concerned by post under certificate of posting where the proof is admitted and by registered post for acknowledgment where proof is rejected wholly or in part. It is not necessary to give notice of the admission of a claim to a creditor who has appeared before the liquidator and the acceptance of whose claim has been communicated to him or his agent in writing at the time of acceptance. Where the liquidator rejects a proof, wholly or in part, he must state the grounds of the rejection to the creditor in prescribed form (Form No. 69). Notice of admission of proof should also be in the prescribed form (Form No. 70). The liquidator can set off time barred debts due from the creditor against debts due to him.

A creditor can appeal against the decision of the liquidator not later than 21 days from the date of service of the notice, if he is dissatisfied with the decision of the liquidator in respect of his proof. The appeal is required to be made supported by an affidavit setting out the grounds of such appeal, and notice of the appeal is required to be given to the liquidator. On such appeal, the court has all the powers of an appellate court under the Code of Civil Procedure in respect of rules of evidence and summoning powers, etc.

The liquidator must, within three months from the date fixed for the submission of proofs or such further time as the court may allow, file in court a certificate in prescribed form (Form No. 71) containing a list of the creditors who submitted to him proofs of their claims in pursuance of the advertisement and the notices issued, the amounts of debt for which they claimed to be creditors, distinguishing in such list the proofs admitted wholly, the proofs admitted or rejected in part, and the proofs wholly rejected. The proofs, with the memorandum of admission or rejection of the same in whole or in part, as the case may be, endorsed thereon, must be filed in court along with the certificate.

If any creditor fails to file proof of his debt with the liquidator within the time specified in the advertisement, such creditor may apply to the court for relief, and the court may, thereupon, adjudicate upon the debt itself or direct the liquidator to do so.

2. Defenses

The object of winding up of the company by the court is to facilitate the protection and realization of its assets with a view to ensure equitable distribution thereof among those entitled and to prevent the administration from being embarrassed by a general scramble among creditors and others. Section 446 of the Act safeguards the assets of the company in winding up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding up court. Once the winding up order has been passed, no proceeding can continue or be freshly commenced except by leave of court. There is no prohibition of any proceedings taken by company against others.

C. Claims adjudication procedure

1. Standing to object

The liquidator can hold such investigation as he may think necessary into the claims made. The liquidator may, thereafter, admit or reject the proof in whole or in part. A creditor being dissatisfied with the decision of the liquidator in respect of his proof may appeal to the court against the decision, not later than 21 days from the date of service of the notice upon him of the decision of the liquidator.

2. Examination of proof of debt

The liquidator examines every proof of debt lodged with him and also the grounds of the debt. He may call for the production of the vouchers if any referred to in the affidavit of proof or require further evidence in support of the debt. The liquidator can fix a day and date at which the creditor is required to attend or to produce further evidence. A notice is thereafter sent to the creditor in prescribed form by pre-paid registered post so as to reach him not later than 7 days before the date fixed.

It is the power of the liquidator to summon any person whom he may deem capable of giving information respecting the debts to be proved in liquidation. He may require such a person to produce any documents in his custody or power relating to such debts. He must tender with the summons such sum as appears to the liquidator sufficient to defray the traveling and other expenses of the person summoned for one day's attendance. Where the person summoned fails without lawful excuse to attend or produce any documents in compliance with the summons or avoids or evades service, the liquidator may apply to the court for the issue of a warrant for the apprehension of such person and the production before him of such documents as may be required, or for other appropriate orders.

Unless the court orders otherwise, the creditor bears the cost of proving his debt. The liquidator is duty bound either to accept or reject the proof in support of the claims filed by the creditors either in whole or in part. Every decision of the liquidator accepting[8] or rejecting[9] a proof, either wholly or in part has to be communicated to the creditor concerned by post under postal certificate where the proof is admitted and by registered post for acknowledgment where the proof is rejected. It is not necessary to give notice of the admission of a claim to a creditor who has appeared before the liquidator and the acceptance of whose claim has been communicated to him or his agent in writing at the time of acceptance.

The liquidator is not required to give reasons when he accepts the proof but when he rejects a proof, he must state the grounds of rejection in prescribed form. Notice of admission of proof is also given in prescribed form.

3. Burden of proof

The burden lies on a creditor of the company to prove debt or claim and to establish any title they may have to priority[10], or to be excluded from the benefit of any distribution made before such debts or claims are proved, or, as the case may be, from objecting to such distribution.

Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the liquidator available for distribution of dividend, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

---

[8] 148. (1) The Liquidator shall give not less than 14 days' notice of the date so fixed by advertisement in one issue of a daily newspaper in the English language and one issue of a daily newspaper in the regional language circulating in the State or Union Territory concerned, as he shall consider suitable. Such advertisement shall be in Form No. 63.

[9] The Liquidator shall also give not less than 14 days' notice of the date fixed, in a winding-up by the Court, to every person mentioned in the statement of affairs as a creditor, who has not proved his debt, and to every person mentioned in the statement of affairs as a preferential creditor, whose claim to be a preferential creditor has not been established or is not admitted, or, where there is no statement of affairs, to the creditors as ascertained from the books of the company, and, in any other winding-up, to each person who, to the knowledge of the Liquidator, claims to be a creditor or preferential creditor of the company and whose claim has not been admitted, to the last known address or place of abode of such person. Such notice shall be in Form No. 64 or 65, as the case may be, and shall be sent to each creditor by pre-paid letter post under certificate of posting.

[10] All the Rules hereinafter set out as to the admission or rejection of proofs shall apply with the necessary variations to any claim to priority as a preferential creditor.

4. Jurisdiction

The High Court is the competent court of jurisdiction under the Act. The role of the court in matters of settlement of claims generally starts after the liquidator files a certificate in Form No. 71 containing a list of the creditors who submitted to him proofs of their claims in pursuance of the advertisement and the notices referred to in Rule 148, the amounts of debt for which they claimed to be creditors, distinguishing in such list the proofs admitted wholly, the proofs admitted or rejected in part, and the proofs wholly rejected. The proofs, with the memorandum of admission or rejection of the same in whole or in part, as the case may be, endorsed thereon, shall be filed in court along with the certificate. The list of the creditors of the company cannot be added to or varied except under orders of court. If any creditor fails to file proof of his debt with the liquidator within the time specified in the advertisement, such creditor may apply to the court for relief, and the court may, thereupon, adjudicate upon the debt itself or direct the liquidator to do so.

Rules 171 to 175 apply to proceedings in a winding-up in the district court which are different from procedure before company court. Within two months of the date fixed for the submission of proofs or within such extended time as the district court may allow, the liquidator is required to make out and file in the court a list verified by his affidavit of all the debts and claims sent to him. He makes a distinction in such a list of the debts and claims or parts thereof which are in his belief justly due and proper to be allowed without further evidence, with the reasons for his belief, and which of them ought to be proved by the creditors, and shall also file with the list all the proofs and the evidence received by him from the several creditors in connection with their claims. He shall at the same time take out a summons for the settlement of the list of creditors by the court. The summons is posted before the court for directions together with the list of creditors and the affidavit verifying the same, filed by the liquidator. Upon the hearing thereof, the court may allow such of the debts and claims or such parts thereof as in the opinion of the court do not require further proof, and shall require further proof of such of the debts and claims or parts thereof as in the opinion of the court require to be proved by the claimants. The court shall fix a date for the adjudication of the claims which are to be proved, and shall adjourn the summons to the date so fixed.

The liquidator shall give notice by registered post individually to each of the creditors who are required to prove their debts or claims to come in and prove before the court on the date fixed. The liquidator shall also give notice of the admission of their claims by post individually to the creditors whose claims have been admitted. The court shall, after hearing such evidence as may be tendered, adjudicate upon the claims and settle the list of creditors.

5. Discovery

The liquidator may call for the production of the vouchers if any referred to in the affidavit of proof or require further evidence in support of the debt. If he requires further evidence, or requires that the creditor should attend the investigation in person, he shall fix a day and time at which the creditor is required to attend or to produce further evidence.

6. Claim resolution

The liquidator may summon the creditor or any person whom he may deem capable of giving information respecting the debts to be proved in liquidation and may require such person to produce any documents in his custody or power relating to such debts.

7. Cost of litigation

Unless otherwise ordered by the court, the creditor bears the cost of proving his debt.[11] (Rule 162)

8. Appeal

If a creditor is dissatisfied with the decision of the liquidator in respect of his proof, the creditor may, not later than 21 days from the date of service of the notice upon him of the decision of the liquidator, appeal to the court against the decision. On such appeal, the court shall have all the powers of an appellate court. The decision of company court can be challenged before an appellate court in high court under the Act.

[11] Rule 162 of the Company (Court) Rules, 1957

Italy

The Italian legislation primarily governing the insolvency of corporate entities is as follows:

a. Royal Decree 16th March 1942 No. 267 on Insolvency (*Fallimento*), Composition with Creditors (*Concordato Preventivo*) and Compulsory Administrative Liquidation (*Liquidazione Coatta Amministrativa*), as subsequently amended and supplemented. Important amendments have recently been introduced by: (a) Law Decree 14th March 2005 No. 35 as subsequently converted into Law 14th May 2005 No. 80; (b) Legislative Decree 9 January 2006, No. 5 and (c) Legislative Decree 12th September 2007, No. 169 (the Insolvency Act);

b. The Civil Code (in particular, articles 2272-2283, 2308-2312, 2484-2496 for the liquidation of partnerships and companies and article 2221 for the insolvency of a commercial activity) (the Civil Code);

c. Several provisions of the Legislative Decree 1st September 1993 No. 385, apply where banks and financial institutions are subject to Compulsory Administrative Liquidation (the Banking Law).

Italian insolvency proceedings differ from the common law insolvency procedures in several respects. There is no general winding-up procedure for companies. Separate rules for voluntary liquidation and insolvency are contained in the Civil Code and the Insolvency Act, respectively. It is also a distinctive feature of Italian law that individuals who are not entrepreneurs cannot be declared insolvent; therefore, only entrepreneurial entities as defined in the Civil Code are subject to insolvency proceedings, save for two categories of entrepreneurs:

a. Public entities and other entities (such as banks, insurance companies or other financial institutions) which carry out public services and which are subject to specific insolvency procedures such as Compulsory Administrative Liquidation;

b. Entrepreneurs (i.e., business entities) who meet the following cumulative requirements:

   (i) They have made capital investments in the business calculated over the average of the last three years or since the beginning of the activity if less, for an overall annual amount of less than €300,000;

(ii) They have, in any manner whatsoever, achieved gross revenues, calculated over the average of the last three years or since the beginning of the activity if less, for an overall annual amount of less than € 200,000;

(iii) They have an overall amount of (both matured and unmatured) debts of less than € 500,000.

The limits referred to in (i), (ii) and (iii) may be updated every three years by Ministry of Justice decree, on the basis of the average variation of the National Institute of Statistics (ISTAT) indexes for consumer prices for blue-collar and white-collar workers during the period in question. Moreover, there is no declaration of bankruptcy if the overall amount of the outstanding debts mentioned in the pre-bankruptcy investigation papers is less than € 30,000. Such amount is periodically updated by Ministry of Justice decree on the basis of the average variation of the National Institute of Statistics (ISTAT) indexes for consumer prices for blue-collar and white-collar workers during the period in question.

A. Claims presentment

1. Proofs of claim

The formal requirements for presenting claims in an insolvency case are set forth in Chapter IV, Sub chapter 5, of the Insolvency Act.

A creditor or a third party which wants to obtain the restitution of, or file a claw-back action in relation to, moveable and/or immoveable properties may file a proof of claim (*domanda di ammissione al passivo*). A proof of claim must contain:

a. An indication of the proceedings in which he intends to participate and the details of the creditor;

b. The sum which the creditor is owed, or a description of the asset for which the creditor is filing a restitution or claw-back action;

c. A brief account of the facts and the legal grounds on which the claim is based;

d. Any security and a description of the asset on which such security is to be enforced, and

e. A fax number, email address or an address for service in a municipality in the district where the court is situated, for the purpose of subsequent notices.

The claimant is not required to provide original documents. A proof of claim will be inadmissible if any of the requirements contained in (a), (b) or (c) above is omitted or absolutely uncertain. If the requirement set forth under letter (d) is omitted or absolutely uncertain, the credit will be considered to be unsecured. If the requirement set forth under letter (e) is omitted any notices subsequent to that by which the receiver announces the enforceability of the creditors' list and rank order will be addressed to the court clerk's office.

In order to assert a claim, a creditor must file a proof of claim and there are no exceptions to this general rule.

A proof of claim is a written statement setting forth the creditor's claim. The proof of claim must conform to article 93 of the Insolvency Act, as outlined above. The proof of claim must be executed by the creditor or the creditor's legal adviser.

At the party's request the court may order the court clerk to make a copy of the bearer or order securities submitted with the proof of claim, to note the claim on the copy and to return it to the creditor. Before the last insolvency law reform, any documents not submitted with the claim could be filed up to fifteen days prior to the hearing set for the examination of the creditors' list.

Proofs of claim must be filed with the clerk of the court where the case is pending and article 93 of the Insolvency Act permits proofs of claim to be filed by electronic means. Implementation of electronic filing of proofs of claim remains very sporadic.

2. Types of claims

"Claim" is broadly defined in the Insolvency Act to mean: (a) a priority claim i.e., a claim arising from the activities of the debtor during the bankruptcy, (b) a secured claim i.e., a claim held by a creditor who has a (legal, judicial or conventional) mortgage on immoveable property, a pledge on moveable property or a (general or special) lien on moveable property and (c) an unsecured claim i.e., a claim held by a creditor who does not have a (legal, judicial or conventional) mortgage on immoveable property, a pledge on moveable property or a (general or special) lien on moveable property.

With regard to the claim arising from a tort, if the cause of the claim occurred before the declaration of bankruptcy, the creditor may file a proof of claim (*domanda di ammissione al passivo*).

According to article 43 of the Insolvency Act, the legal actions started against the Company before the declaration of bankruptcy are interrupted at the time of the declaration. The claimant/defendant could decide to drop the legal actions and to file a proof of claim or could resume the legal action against the receiver provided that the legal action was not directed to obtain a compensation for damages from the bankruptcy. Therefore, only legal actions which are directed to obtain a declaratory judgment could be resumed against the receiver (for example, a claimant/defendant could resume against a receiver a proceeding directed to obtain solely the verification of the unfair competition acts committed by the Company before the declaration of bankruptcy).

If the cause of the tort claim occurs, instead, after the declaration of bankruptcy, the creditor can neither file a proof of claim nor start a legal action against the receiver because, as a general rule, the claims that arise in the future are not claims for bankruptcy purposes, unless they arise from the activities of the debtor during the bankruptcy. These last claims are normally paid in full when they fall due.

3. Unmatured, contingent and unliquidated claims

Any obligation that has a maturity date after the filing of a bankruptcy case will be admitted conditionally and the relative sums will be set aside in accordance with the procedure set forth by the court pending its maturity date.

Creditors can assert claims that are contingent but not claims that are unliquidated. Contingent claims are claims that are subject to a condition precedent or condition subsequent. They are admitted on a conditional basis and the relative sums will be set aside in accordance with the procedure set forth by the court pending fulfilment of the condition. If the condition is fulfilled, the supervising judge will, at the request of the receiver or the interested party, issue an order which will amend the creditors' list and the claim will be considered to be upheld. If the condition is not fulfilled, the sums set aside will be divided among the other creditors.

4. Claims for equitable remedies

Not applicable.

B. Defences

1. Bar dates

Under article 93 of the Insolvency Act, proofs of claim must be filed no later than 30 days prior to the hearing set for the examination of the creditors' list. Article 101 lists the following exceptions to the 30-day rule:

a. A proof of claim filed after the 30-day deadline before the hearing set for the examination of the creditors' list and no later than twelve months (or eighteen months in the case of particularly complex procedures) from the date on which the order enforcing the creditor's list is issued, will be considered a late claim. A claim being late filed is not admissible. It can only receive a distribution if all timely filed claims are paid in full.

b. Once such a deadline has expired, a proof of claim is only admissible if the creditor can prove that the delay was due to reasons beyond its control.

2. Defences

a. *Non-bankruptcy defences*

All of the defences that would be available to the debtor outside of bankruptcy are available to the receiver or an objecting creditor.

b. *Bankruptcy defences*

If the receiver has a claim against a creditor, the receiver may assert that claim as a defence against the claim asserted by the creditor.

Article 56 of the Insolvency Act allows the creditors to setoff sums owed to the insolvent company against amounts owed by the company to them, though their credits are not overdue before the opening of the procedure.

Nevertheless, in case of credits which are not yet overdue, setoff operations are not allowed where the credit has been assigned to creditors by means of an inter vivos act executed after the debtor has been placed into the concerned procedure or during the previous year before the beginning of the said procedure.

The prerequisite for the applicability of the right to setoff is that the debt and credit to be setoff against each other are liquid or may be made liquid promptly and easily and are of the same nature (homogeneous).

The principles of setoff apply to all insolvency procedures.

The Insolvency Act provides for the ranking of claims, according to which claims are paid in the following order: (a) priority claims (*crediti prededucibili*) i.e., claims arising from the activities of the debtor during the proceedings; (b) secured claims (*crediti privilegiati*) i.e., claims held by a creditor who has a (legal, judicial or conventional) mortgage (*ipoteca*) over immoveables, a pledge (*pegno*) over moveables or a (general or special) lien (*privilegio*), and finally (c) unsecured claims (*crediti chirografari*) i.e., claims held by a creditor who does not have a mortgage, a pledge or a lien.

C. Claims adjudication procedures

The claims adjudication process in insolvency is formal and resembles civil litigation. Following the submission of the proof of claim, the receiver examines all the claims and then draws up a provisional list of creditors and the rank order (*stato passivo*).

The receiver files the provisional list of creditors with the court clerk's office at least 15 days before the hearing set for the examination of the creditors' list and he will provide notice to the creditors and the bankrupt party.

The creditors, holders of rights on the assets and the bankrupt party may examine the provisional list and submit any written comments up to five days before the hearing.

1. Standing to object

Receivers and creditors whose claims have been admitted, admitted conditionally, partially admitted or rejected may object to a claim. The debtor may not object to a claim (See Supreme Court, 3rd December 1991, No. 12987; Supreme Court, 14th April 1983, No. 2599 and Supreme Court, 14th May 1981, No. 3172).

The Insolvency Act provides for three different types of objections to a claim:

a. Challenging the creditors' list (*opposizione allo stato passivo*): creditors whose claims have been admitted conditionally, partially admitted or rejected may object to a claim and request that their claim be verified. The challenge of the creditors' list is made vis-à-vis the receiver;

b. Challenging admitted claims (*impugnazione dei crediti ammessi*): creditors whose claims have been admitted may object to a claim of another creditor. The challenge is made vis-à-vis the creditor whose claim has been admitted and the receiver also takes part in the proceedings;

c. Revocation of claim (*revocazione del credito*): receivers and creditors whose claims have been admitted, admitted conditionally, partially admitted or rejected may object to any claim they discover was admitted to the creditors' list on the basis of false documents, wilful misconduct, error or the lack of knowledge of decisive documents which came to light subsequently. The revocation of the claim is made vis-à-vis the creditor whose claim has been admitted or vis-à-vis the receiver if the claim has been rejected. In the first case, the receiver also takes part in the proceedings of revocation of the claim made vis-à-vis the creditor.

The objections to a claim are made by filing an application with the court clerk's office. Such application has to contain:

a. The name of the court, the supervising judge and the bankruptcy;

b. The details identifying the applicant and an address for service in a municipality in the district of the court that has declared the bankruptcy;

c. A description of the facts and the legal grounds on which the challenge is based together with the pleadings;

d. A specific indication of the evidence which the applicant intends to produce and the documents to be produced. The originals do not have to be produced.

The court sets a date for a hearing in chambers and gives the applicant a deadline for the notification of the application and the order setting the date of the hearing to the party in relation to which the application has been submitted, to the receiver and to the bankrupt party. There must be at least thirty days between the notification and the hearing.

The party in relation to which the application has been submitted has to file a statement at least ten days before the hearing. Such statement must contain the procedural and substantive objections which cannot be raised *ex officio* (i.e., directly by the supervising judge), and an indication of the means of evidence and the documents produced.

The creditors which intend to take part in the proceedings also have to file a statement by the same deadline.

During the hearing, the court hears the evidence admitted, in the presence of the parties, and may also instruct a single member of the court to hear the evidence admitted.

If necessary, the court may also acquire information *ex officio* and may direct the production of further documents.

The bankrupt party may ask to be heard.

The court allows, either entirely, partially or even provisionally, the claims which have not been contested by the receiver or by the creditors present. In the event that the court has not issued a final order, it will issue a reasoned non-appealable order within twenty days of the hearing.

The clerk's office serves the order on the parties which may lodge an appeal before the Supreme Court within the next thirty days.

2. Burdens of proof

A creditor who submits a proof of claim has a burden to prove the grounds of his claim or his preferential rights (mortgage, pledge or lien).

Only written evidence is admitted. If the failure to produce the title is due to reasons beyond the creditor's control, the application may be admitted conditionally.

3. Bankruptcy court

Jurisdiction over bankruptcy proceedings is vested in the court of first instance located where the company has its principal place of business. The court is comprised of three judges. Any transfer of the main headquarters of the company during the year preceding the procedure for the declaration of bankruptcy will not affect jurisdiction.

Moreover, entrepreneurs whose registered office is abroad may be declared bankrupt in Italy even if they have been declared bankrupt abroad (subject to international agreements and EU legislation) and any transfer of the registered office abroad will not rule out Italian jurisdiction, if it occurs following the filing of the application for the declaration of bankruptcy by the debtor or any of the creditors or following the application for bankruptcy by the public prosecutor.

In larger jurisdictions, the court will have a specific section dealing solely with bankruptcy matters.

In principle, the court has general jurisdiction over bankruptcy proceedings: there is a supervising judge (*giudice delegato*), who is appointed by the court and who is responsible for the conduct of proceedings and for the supervision of the receiver (*curatore*). The receiver is appointed by the court at the same time as the declaration of insolvency is made.

4. Discovery

A party may generally ask the supervising judge to compel the other party to produce the documentary evidence and oral testimony that it will produce at trial.

The debtor may take part in the hearing and is also entitled to be heard by the supervising judge.

In the case of applications for the claw-back or restitution of moveable and/or immoveable properties, the provisions of the code of civil procedure will apply and, as a result, the applicants may not use witness evidence to prove their rights on the debtor's moveable properties (Article 621 Code of Civil Procedure).

5. Claim adjudication

The supervising judge may uphold, either wholly or partially, or reject or declare inadmissible the creditor's claim. Any claim which is declared to be inadmissible may still be re-submitted. A claim is inadmissible if any of the requirements listed above is omitted or absolutely uncertain. To resubmit a claim, the creditor must file a new proof of claim which contains the above mentioned indications. The effect of resubmitting a claim is the same outlined in point A.1. The claim is resubmitted to the same supervising judge. The order by which the supervising judge upholds the claim also specifies the ranking of any preferential right.

Once the supervising judge has completed his examination of all the claims, he will draw up the list of creditors and the rank order which he will then enforce by decree.

6. Costs of litigation

Each party generally bears its own costs. However, the costs of litigation incurred by the debtor are considered to be priority claims and are normally paid in full when they fall due.

7. Appeals

Judgments of the bankruptcy court may be challenged before the Court of Appeal. The debtor and any interested party are entitled to appeal against the judgment, by filing an application within thirty days and such period of time will run:

a. With regard to the bankrupt undertaking, from the date on which the judgment is notified to the bankrupt;

b. With regard to the interested parties, from the date on which the judgment is registered in the companies' register.

However, judgments may not be appealed more than one year from the publication of the judgment.

The submission of an appeal does not automatically suspend the effects of the challenged judgment. However, the party or the receiver may ask the Court to suspend the liquidation of the assets if there are serious grounds for doing so.

Within five days of the filing of the application, the President of the Court of Appeal sets the hearing within forty-five days of the date on which the application was filed.

During the hearing, the Court of Appeal first hears both parties together and obtains, even *ex officio*, the evidence required to reach a decision. At the end of the discussion, it then issues a judgment. In cases of particular complexity, the court can reserve its right to file the reasons for the judgment within fifteen days.

Japan

In Japan, four types of bankruptcy procedures exist. Insolvency proceedings can be implemented through any one of the following four distinct insolvency law regimes:

- Bankruptcy Law of Japan (Law No. 75, June 2, 2004) (*Hasan Ho*);
- Special Liquidation Law (Art. 510-574 of Corporation Law) (*Tokubetsu Seisan in Kaisha Ho*);
- Civil Rehabilitation Law (Law No. 225, December 22, 1999) (*Minji Saisei Ho*); and
- Corporate Reorganization Law (Law No. 154, December 13, 2002) (*Kaisha Kosei Ho*).

The proceeding is selected based upon the attributes of the debtor and whether the outcome will be a reorganization or liquidation. Bankruptcy and Special Liquidation are liquidating procedures, with Bankruptcy being the most common procedure for liquidating a business. Civil Rehabilitation is the more common restructuring procedure. Corporate Reorganization is used most frequently in relation to high profile, large scale restructuring cases. Since Special Liquidation is less significant in practice, this article will focus on the other three procedures.

In Bankruptcy cases, the court appoints an insolvency practitioner (lawyer) as trustee. In Corporate Reorganization cases, the court, in practice, appoints two trustees (one insolvency practitioner and one non-lawyer). In Bankruptcy and Corporate Reorganization, trustee(s) have primary responsibility for leading the proceeding. In Civil Rehabilitation cases, the proceeding is ordinarily led by the debtor, with supervision by the court-appointed supervisor (an insolvency practitioner).

A. Claims presentment

1. Claims subject to the proceedings

In Bankruptcy, only unsecured claims are subject to the proceeding. Therefore, secured creditors and holders of administrative claims may exercise their rights outside of the proceeding.

More narrowly, in Civil Rehabilitation, only unsecured *ordinary* claims are subject to the proceeding. Unsecured priority claims, such as labor claims, are, like secured claims, exempt from the proceeding.

In Corporate Reorganization, both secured and unsecured (both priority and ordinary) claims are subject to the proceeding, and those claims are stayed while the case is pending. Administrative claims, however, may be exercised outside of the proceeding.

Creditors with claims exempt from the proceeding may exercise those claims at their discretion (absent a contrary injunction) and are not required to file proofs of claims in the proceeding. Creditors with claims subject to the proceeding may exercise their rights only in accordance with each proceeding's laws and rules.

2. Proofs of claim

In any Bankruptcy, Civil Rehabilitation or Corporate Reorganization, in order to participate in the proceeding, creditors are required to file proofs of claims with the court. In Bankruptcy and Corporate Reorganization, each claim is examined by the trustee and other creditors. In Civil Rehabilitation, claims are examined by the debtor (or trustee, if appointed) and other creditors.

At the commencement of each proceeding, the court (in the commencement order) establishes the period within which creditors must file their claims. The commencement order is served upon all creditors known to the court. The claim period must be more than 2 weeks, but less than 4 months, from the date the commencement order is entered in the proceeding. If there is a creditor known to the court who is not a resident of Japan, such claim period shall not be less than 4 weeks after the date of the commencement order. In Bankruptcy, creditors are permitted to file claims after the expiration of such claim period, until the end of the claim examination hearing (if held) or the expiration of the claim examination period. Creditors eligible for later filings are discussed in Section B1 below (Bar dates).

In Civil Rehabilitation, in addition to the creditors filing their respective claims, the debtor is required to file with the court a statement of claims known to the debtor. In the event that the debtor fails to state known creditors' claims, such claims will not be forfeited (even if such creditor fails to file its own proof of claim). The priority of those claims, however, will be subordinated to other ordinary claims, and be paid after the debtor's full performance of all the other obligations under the plan.

3. Shareholders

In Bankruptcy proceedings, since the debtor is dissolved through the proceeding and the shareholders will eventually lose their interests (except for the exceptional occasion where the estate is found solvent, and the residual assets are distributed to shareholders) shareholders are not eligible to participate, and thus do not file a proof of interest.

In both Civil Rehabilitation and Corporate Reorganization, since shareholders are determined by the shareholders' ledger, shareholders are not required to file a proof of interest. [Corp. Reorg. Law Art. 165.2]

In Civil Rehabilitation, shareholders do not participate in the proceeding except for limited occasions relating to the assignment of the debtor's assets as a going concern. Under the Corporation Law of Japan (Law No. 86, July 26, 2005) (*Kaisha Ho*), such an assignment by a solvent debtor is subject to shareholder approval by super-majority. The Civil Rehabilitation Law, however, provides that if the debtor is insolvent, the court may approve an assignment of assets without shareholder approval. Shareholders may, however, challenge such court approval as a part of the Civil Rehabilitation proceeding.

Similarly, Corporate Reorganization proceedings distinguish between solvent and insolvent debtors. If the debtor is solvent, shareholders are granted voting rights and other rights in the proceeding, but if the debtor is insolvent, shareholders are not entitled to participate in the proceeding.

4. Forms' formalities

A filing must be made in writing and the minimum requirements are prescribed in each statute. [Bkrpt. Law Art. 111; Civ. Rehab. Law Art. 94.1; Corp. Reorg. Law Art. 138.1] However, no particular forms are specified.

The court sends to each creditor a form of proof of claim with the notice of commencement of the proceeding and the commencement order. The period for filing claims is also indicated in the notice. Creditors are required to complete the form and file it with the court in advance of the deadline. In practice, the court may instruct that the proof of claim be sent to the trustee in the case of Bankruptcy and Corporate Reorganization, or to the debtor in the case of Civil Rehabilitation.

In Bankruptcy, supporting evidence of a claim must be submitted together with the proof of claim. Conversely, in the cases of Civil Rehabilitation and Corporate Reorganization, supporting evidence need only be submitted upon the request of the debtor or the trustee.

In all proceedings, a corporate creditor must prove the authority of the signatory to execute the proof of claim. This authority would be evidenced by a certificate of company registration issued by the Japanese Legal Affairs Bureau. If an attorney prepares and signs the proof of claim on behalf of a creditor, evidence of such attorney's authority is also required.

5. Types of claims

The claims to be filed under the aforementioned procedures are those that have accrued prior to the commencement of the proceeding. In Bankruptcy proceedings, this includes all categories of unsecured claims. [Bkrpt Law Art. 2.5, 111.1, 111.2] In Civil Rehabilitation proceedings, this includes unsecured claims (except priority unsecured). [Civ. Rehab. Law Art. 84.1, 94.1, 94.2] In Corporate Reorganization proceedings, it includes all unsecured claims and claims secured by the debtor's property. [Corp. Reorg. Law Art. 2.8, 138.1, 138.2]

Damage claims arising from torts can also be filed. However, the right to request that another party refrain from performing an act cannot be filed, unless that right has been converted to a damage claim due to the debtor's default.

6. Unmatured, contingent and unliquidated claims

Bankruptcy accelerates claims. Therefore, any obligation that is an unmatured claim becomes due and payable at the commencement of the Bankruptcy case. [Bkrpt. Law Art. 103.3] Contingent claims may be filed, but are not eligible for distribution unless the contingency has occurred and the claim has become unconditional. Creditors holding contingent claims will be excluded from a distribution, unless the claim has become unconditional, final and non-appealable before the statement of distribution has been made by the court clerk.

Unliquidated claims, such as damage claims due to torts, may be filed in estimated amounts. Also, the holder of a contractual right, such as the right to demand delivery of goods, may file a claim in the proceedings for the estimated value of such right.

Unmatured, contingent, and unliquidated claims are filed in Civil Rehabilitation and Corporate Reorganization proceedings as they are without giving effect to acceleration.

Besides the claim amount, the amount of voting rights is determined in accordance with the value of each claim as the law provides. In Civil Rehabilitation and Corporate Reorganization proceedings, the voting right of contingent and unliquidated claims is determined by the estimated value of each right. If such amount is disputed, the court determines the amount of voting allocated to each creditor. Such determination for voting does not affect the court's power to finally determine the claim amounts eligible for distribution or payments.

7. Claims for equitable remedies

Japanese jurisprudence does not distinguish between legal and equitable remedies. As long as such remedies are convertible to monetary claims through a valuation mechanism, they may be filed in Bankruptcy, Civil Rehabilitation and Corporate Reorganization proceedings. Claims that cannot be valued, such as the right to demand specific performance, or to demand that a party refrain from performing an act, cannot be filed as claims, unless the claim has been converted to a monetary damage claim due to the debtor's pre-commencement breach.

B. Defenses

1. Bar dates

In the case of Bankruptcy, the bar date is not the expiration of the filing period, but is the end of the claim examination period, after which a creditor is precluded from filing claims in the absence of cause (not attributable to such creditor). Claims not filed during this period will be forfeited upon completion of the case in corporate Bankruptcy and upon the discharge order in the case of individual Bankruptcy.

A creditor that was unable to file its claim due to a cause that is not attributable to the creditor may file its claim within a non-extendable one month period from extinguishment of the cause. Claims that accrue after the end of the claim examination period, but which are subject to the proceeding may also be filed within a non-extendable one month period after such claim accrued. For example, the claim of a creditor arising due to the trustee's exercising the right to reject an executory contract must be filed within one month of the trustee's rejection. The late filing creditor shall bear any related court costs.

In Civil Rehabilitation and Corporate Reorganization proceedings, the rules for late filing and after-accrual are similar. Claims that have not been filed before the court order authorizing the Plan for voting are excluded from distribution.

The debtor in Civil Rehabilitation is required to set forth in the Plan a claims modification standard which will be applied to all the unsecured claims subject to the case. This standard will be applied as well to the claims of creditors who were prevented from filing the claims before the voting order due to causes not attributable to the creditor or whose claims arose after the voting order.

2. Equitable defenses

The trustee or the debtor can assert any defense to a claim that the debtor could have asserted outside of bankruptcy.

Japanese law does not provide for equitable subordination in any of the proceedings. However, the Corporate Reorganization Act requires that, for the court to confirm the Corporate Reorganization Plan, the Plan should be fair and equitable. [Corp. Reorg. Law Art. 199.2.2] As a result, in Corporate Reorganization proceedings, the trustee often formulates a Plan which treats a parent company's claim less favorably than the claims of other creditors if the trustee deems that the parent was responsible for the failure of the debtor. Directors and officers may have claims against the debtor but the trustee also often formulates a Plan whereby the directors and the officers are treated less favorably. So, while the Civil Rehabilitation Act requires that the Plan shall treat creditors equally, it also permits the Plan to treat creditors differently where equity would be served. Accordingly, sometimes Civil Rehabilitation Plans provide less favorable treatment for directors and officers.

In Bankruptcy, no provisions refer to fairness or equity, nor do they provide that claims of officers and directors, or a controlling shareholder of a debtor may be treated less favorably. It should be noted, however, that some judicial precedent has allowed such less favorable treatment.

3. Insolvency-based rights

Bankruptcy and Corporate Reorganization trustees, and a supervisor (or trustee, if appointed) in Civil Rehabilitation, are vested with the power to recover preferences and fraudulent conveyances arising prior to commencement of each proceeding. [Bkrpt. Law Art. 160 & thereafter; Civ. Rehab. Law Art. 127 & thereafter; Corp. Reorg. Law Art. 86 & thereafter] The debtor in Civil Rehabilitation has no such power.

Creditors are precluded from exercising setoff on some occasions. Japanese law grants creditors fairly broad setoff rights. The Bankruptcy Act, the Civil Rehabilitation Act and the Corporate Reorganization Act also permit a creditor to setoff its pre-commencement claims against its pre-commencement obligation. In Civil Rehabilitation and Corporate Reorganization, however, setoff

is to some extent restricted so that it will not jeopardize the restructuring of the debtor. For example, a creditor cannot exercise a setoff right after the expiration of claim filing period. [Civ. Rehab. Law Art. 92. 1; Corp. Reorg. Law Art. 48. 1] Also, each statute prohibits creditors from exercising a setoff right on certain occasions due to equity. For instance, each Act prohibits an obligor/creditor from setting off the obligation against a claim it acquired after the debtor fell into financial crisis with the obligor/creditor's knowledge. [Bkrpt. Law Art. 71; Civ. Rehab. Law Art. 93; Corp. Reorg. Law Art. 49]

C. Claims adjudication procedures

1. Standing to object

Bankruptcy and Corporate Reorganization trustees, and the debtor in Civil Rehabilitation (or trustee, if appointed) examine the claims filed in the proceedings and submit Statements of Allowed/Disallowed Claims in writing indicating whether each claim is allowed or disallowed. [Bkrpt. Law Art. 117.1; Civ. Rehab. Law Art. 101.1; Corp. Reorg. Law Art. 146.1]

Creditors who have filed their own claims are entitled to challenge other creditors' claims (as listed in the Statement of Allowed/Disallowed Claims) by submitting a written objection during the claim examination period. [Bkrpt. Law Art. 118.1; Civ. Rehab. Law Art. 102.1; Corp. Reorg. Law Art. 147.1] In Bankruptcy cases, the court can conduct a claims examination hearing instead of setting forth a claims examination period. The debtor in Civil Rehabilitation is also required to recognize allowed claims known to it by including all such claims in the statement of allowed/disallowed claims (notwithstanding whether each creditor has filed the claim).

The trustee and the debtor, as the case may be, are required to file the Statement of Allowed/Disallowed Claims with regard to the filed claims before the claim examination period starts to run (or claim examination hearing, if applicable in a Bankruptcy case). The creditors, therefore, have an opportunity to review the statement before the creditors' deadline for filing objections. Also, in Bankruptcy cases, if a claim examination hearing is held, creditors may object to another creditor's claim at such hearing.

The debtor may also raise objections against creditor claims in Bankruptcy, Corporate Reorganization, and Civil Rehabilitation proceedings where a trustee has been appointed. Such objection by the debtor does not prevent the claim from being finally allowed, but prevents the claim from becoming final and non-disputable in the event the Plan is not confirmed.

2. Process

a. *Fast track decision*

If an objection is filed against a creditor's claim, such creditor must bring a fast track court procedure against all of the objecting parties in order to establish the claim. [Bkrpt. Law Art. 125.1; Civ. Rehab. Art. 105.1; Corp. Reorg. Law Art. 151.1] the procedure must be filed within one month of the expiration of the claim examination period. The court will hear the creditor and all parties challenging the claim (and others, if the court deems it necessary) in a summary procedure, and render a decision quickly.

b. *Challenging a fast track decision*

Either party may file a lawsuit to challenge the fast track decision within a non-extendable one month period after receipt of service of such decision.
A creditor whose claims have been objected to and denied may challenge the fast track procedure by listing all of the objecting parties as defendants. An objecting party seeking to challenge a fast track decision where a creditor's claims have been objected to but allowed must file a lawsuit against the creditor. In the latter case, if two or more objecting parties filed lawsuits against a creditor, the court consolidates the procedure of all those lawsuits.

c. *Assumption of pending lawsuit*

Any lawsuit pending between a creditor and the debtor is stayed upon commencement of any insolvency proceeding. If an objection is then filed with respect to a claim subject to the pending lawsuit, in order to have such claim allowed in the insolvency proceeding, the creditor must file a motion against all objecting parties to assume the pending lawsuit.

d. *Scope of assertions*

The goals of fast-track proceedings, proceedings to challenge fast-track decisions and proceedings for assumption of lawsuits are identical: to determine the validity, the amount and the priority of the claim. Creditors whose claims have been objected to, can assert only such matters that have been stated in the schedule of creditors, which the court clerk prepares based upon the proof of claim that each creditor has filed. [Bkrpt. Law Art. 128; Civ. Rehab. Art. 108; Corp. Reorg. Law Art. 157] Since determination of permissible matters for assertion is made from a substantive viewpoint, the claim type may be changed as long as the new claim asserted in the proceeding is based upon the same underlying facts.

e. *Claim based on final judgment or immediately enforceable deed*

If a creditor has a final judgment, or has any form of deed entitling the creditor to immediately enforce the claim, the debtor or other objecting party can challenge the claim only by filing a lawsuit that the debtor could have pursued. If a lawsuit is pending when the insolvency proceeding begins, the objecting party must assume the lawsuit within one month of the expiration of the claim examination period. The deed referred to above includes a notarial deed that contains the obligor's consent to compulsory execution upon its failure to perform monetary obligations when due, which entitles the creditor to immediate enforcement by a court marshal. Final judgment includes not only such judgment that orders payment by a defendant to plaintiff but also a judgment dismissing a petition to confirm non-existence of a claim.

f. *Arbitration award*

The Arbitration Act grants an arbitration award the same enforceability as a final and non-appealable judgment. [Art.45.1] Accordingly, it is regarded as the equivalent to a final judgment.

If the debtor and a creditor have entered an agreement containing an arbitration clause, there is no established case law as to whether such a clause is binding. Leading law professors, however, confirm the enforceability of an arbitration provision in this context.

g. *Foreign final and non-appealable judgment*

A foreign final and non-appealable judgment is effective in Japan insofar as it meets the following requirements [Civil Procedure Code, Art. 118]:

(i) The foreign judgment was rendered by a court that has jurisdiction over the parties and subject matter;

(ii) Service of process has been made through a method comparable to procedure for service of process under Japanese law (other than service by publication);

(iii) The foreign judgment is not contrary to Japanese public policy or good morals; and

(iv) Reciprocity exists with respect to the enforcement of a Japanese judgment in the relevant foreign country.

The question exists whether foreign judgments need official recognition by Japanese courts to be recognized in insolvency proceedings. To enforce a foreign judgment over a defendant's assets in Japan, the prevailing party is required to obtain an execution judgment. [Civil Execution Act, Art. 24.1] Again, no precedent exists here, but leading law professors believe that such an execution judgment is not required for a foreign final and non-appealable judgment to be treated as a "final judgment" for the above purposes.

3. Burdens of proof

A creditor whose claim has been disallowed is entitled to challenge such decision by first filing a request for a court order through a fast-track procedure. The party which has lost in the fast-track procedure can file for formal civil litigation. In both procedures, no specific rules are provided as to the burden of proof, and the same rule of allocation of the burden of proof as in an ordinary civil lawsuit shall apply.

4. Bankruptcy court

Japan does not have a Bankruptcy Court *per se*. The court houses in large cities such as Tokyo and Osaka are divided into different civil sections, some of which specialize in handling certain kinds of cases. For example, Civil Sections 8 and 20 of the Tokyo District Court handle bankruptcy and restructuring proceedings.

The court presiding over each case also has jurisdiction over the fast-track decision procedure. If the fast-track decision is challenged and civil litigation has been filed to challenge the decision, the ordinary civil court has jurisdiction.

5. Discovery

The Japanese Civil Procedure Code does not have discovery rules as seen in the U.S. It provides for a document production order and interrogatories, with limited scope. The Civil Procedure Code provides that to obtain the document production order, the requesting party shall specify the documents. [Art. 221.1] It should be noted that internal documents made solely for the use of the document holder are outside the scope of a production order. The law provides no sanctions in respect of interrogatories.

6. Hearings

A hearing is not held unless an objection is filed and the fast track procedure is initiated. In the fast-track procedure, the court hears the parties in the manner it believes appropriate. Once the lawsuit has been filed to overturn the fast-track decision, the procedure is an ordinary civil lawsuit and the court must hold a hearing for arguments.

7. Attorney fees

Under Japanese case law, even prevailing plaintiffs are not generally granted a judgment to recover attorney fees. Torts is perhaps the only exception to the rule. In tort case judgments, Japanese case law has often granted reasonable attorney fees. The Civil Procedure Code of Japan provides that the losing party bears lawsuit costs, but lawsuit costs include only limited expenses such as postage, court appointed expert's fees, and do not include attorney fees.

8. Recognition of claims adjudicated by other courts

See Supra – Claim based on final judgment or immediately enforceable deed.

No particular procedure is required to gain recognition of another court's judgment. Such judgment is offered by the creditor filing the same with the proof of claim.

Mexico

The current Commercial Insolvency Law became effective on May 13, 2000. It replaced a long standing and ineffective Bankruptcy Law, which only remains in effect with respect to proceedings initiated prior to the effective date of the Commercial Insolvency Law. The Commercial Insolvency Law has been amended only once on December 27, 2007, by making it clear that a debtor may resort directly to bankruptcy (i.e. avoiding reorganization) and regulating a pre-arranged reorganization.

The Commercial Insolvency Law is a complex statute, which will require continued careful application and interpretation by the Federal Courts, which now have exclusive jurisdiction over insolvency proceedings. The Commercial Insolvency Law provides for the use and training of experts in the field of insolvency and the creation of an entity to coordinate their efforts, which is the Federal Institute of Specialists in Commercial Insolvency (*Instituto Federal de Especialistas de Concursos Mercantiles*, known by its acronym in Spanish, IFECOM). The specialists who have a role in proceedings under the Commercial Insolvency Law are:

(a) The visitor (*visitador*), whose duties are similar to that of an on-site auditor and who participates in the proceeding up to the judge's declaration of insolvency (*sentencia de declaración de concurso mercantil*).

(b) The mediator or conciliator (*conciliador*), who is appointed in such declaration and who has broad powers to mediate, to take steps to protect the enterprise as an ongoing concern or to immediately begin bankruptcy.

(c) The receiver (*síndico*), who may or may not be the mediator and whose principal function is to proceed with the sale of assets.

A. Claims presentment

The Commercial Insolvency Law (*Ley de Concursos Mercantiles*) has simplified the formality for filing claims. In fact, the Law provides as an obligation of the mediator to recognize and file any claim against the Estate (whether arising from trade creditors, banks, contractual commitments, tax, labor or similar obligations) by means of a provisional list and once the creditors have had a five-day term to file objections thereto, a definitive list upon which the Federal Judge shall render a judgment. However, the Company has the obligation to give the on-site auditor (*visitador*) and the mediator access to its corporate books and financial statements. Creditors may file any claim (contractual or even tort claims included), as long as they are reasonably documented, and an award or judgment has been issued.

Each potential creditor (creditors are subject to recognition) must issue a formal power of attorney to its attorney in fact.

For purposes of filing a claim with respect to a syndicated loan agreement, a trust indenture (for example, with respect to a private placement or a bond issuance) or with regard to any other type of a collective credit, the claim must be filed by the relevant agent or trustee, although the relevant credits may be "individualized" for purposes of voting with respect to a reorganization plan, unless the specific agency agreement or trustee indenture stipulate otherwise, and such circumstance is evidenced to the court. It is noted that the Courts have expressed their preference for claims to be filed by the agent or trustee.

All claims are filed with the Federal District court asserting jurisdiction. There are no official forms for filing claims, although the *IFECOM,* does require the mediator to organize all claims for recognition with the relevant Court in certain forms.

Any documented claim may be filed, whether by virtue of a contract, promissory note, tax notice, union communication, contract, written declaratory judgment (for example, a claim for damages) or a final arbitration award. A Federal Judge hearing an insolvency (*concurso*) matter will not rule upon any claim for personal injury, but will recognize a claim arising from a final judgment in a court from a competent jurisdiction. It is noted that any document which is not filed in the Spanish language, must be accompanied by a translation prepared by an expert translator duly registered with the judicial authorities. In addition, powers of attorney and other documents issued outside of Mexico must be appostilled.

Pursuant to the Commercial Insolvency Law, potential creditors may file claims for the recognition of their credits (i) within twenty days following the publication of the declaration of insolvency; (ii) within the aforementioned five-day term such potential creditors have to file objections to the provisional list prepared by the mediator; and (iii) when filing an appeal against the judgment that recognizes creditors and establishes preferences (*sentencia de reconocimiento, graduación y prelación de créditos*).

As a result of the filing of a voluntary petition (or involuntary, if accepted by the relevant Federal Court) all monetary contractual and other obligations that become by law due and payable. Consequently claims derived from agreements such as those documenting a derivative or a swap may be filed with the Court.

Under the Commercial Insolvency Law, netting is mandatory to parties to a transaction recognized by the Law, pursuant to terms agreed upon in the relevant

contract, on the date of the declaration of insolvency, with respect to liabilities and rights arising from master or specific agreements entered into in connection with financial derivative transactions, *reportos* (Mexican law-governed repurchase transactions), securities lending transactions and other equivalent transactions. This provision reflects the "freedom to contract" theory, and makes the Commercial Insolvency Law consistent with the laws of countries with netting legislation in effect.

Mexico does not have equitable remedies. Nevertheless, specific performance under bilateral agreements may be ordered by the Court. For instance, the continuation of leases or performance under a supply agreement. Nevertheless, counterparties have a right to request arrangements, such as advances or deposits, which will allow the necessary comfort that the debtor will perform.

B. Defenses

Bar dates are not specifically set. Up to the time when a final Court order is issued with regard to either *(i)* a reorganization plan *(convenio concursal)* or *(ii)* a bankruptcy judgment (whereupon the insolvency proceeding enters the liquidation stage), a creditor may file for recognition. In such regard, the Commercial Insolvency Law provides that potential creditors may not file any claims once the period for appealing the judgment that recognizes creditors and establishes preferences (*sentencia de reconocimiento, graduación y prelación de créditos*) has lapsed. In the event a claim is filed after this date, it will be rejected by the Court.

Equitable defenses are not available to the debtor. Nevertheless, a debtor may have a defense based on a contractual subordination, although it is unclear in the law. Defenses are limited and include payment, performance or any evidence of release from any claim presented. The debtor may also assert insolvency-based recovery claims in the same proceeding.

Cases filed under the Commercial Insolvency Law have yet to include any instance of contractual subordination. However, it is expected that absent a violation of public policy, Courts will respect subordination.

C. Claim adjudication procedures

Any recognized party in an insolvency proceeding may object in the first instance to claims that have been filed. In other words, the mediator, the office of the attorney general, any creditor or the insolvent company may object to any claim filed before the Court hearing the case. Moreover, any ruling in such respect may be further appealed before a Federal Circuit Court. Going forward, a claim recognized as valid by the federal judge in question, will be considered as such and if there is a challenge to the contrary, the burden of proof is on any claimant to the contrary. In such a case, there must be documentary evidence of an irrefutable nature.

A claim recognized as valid by the Court may be challenged by:

(i) Filing an appeal against the resolution that admits such a claim;

(ii) During the five-day period potential creditors have to file objections to the provisional list prepared by the mediator; and

(iii) Appealing judgment that recognizes creditors and establishes preferences (*sentencia de reconocimiento, graduación y prelación de créditos*).

If the latter is not successful, the challenge of recognized claims by means of a constitutional challenge (*juicio de amparo*) is not uncommon.

As mentioned, the Federal Court hearing the case has full authority to decide on any claim. Discovery is not permitted or otherwise recognized in Mexican procedures. Once all documentary filings with respect to claims have been made by the mediator, the Federal Court analyzes the relevant claims and issues a ruling as to the final list of recognized creditors, although it has the authority to call for a hearing. The procedure is conducted mainly in written form.

If a claim is resolved by litigation rather than settlement, the Court hearing the case has full authority to determine who will support the costs of litigation. As mentioned, final judgments from other courts which may have ruled on a claim prior to the declaration of insolvency will be recognized by the Bankruptcy court. Otherwise, all claims are ruled upon by the Federal Court having competent jurisdiction. Appeals are permitted and are filed before the Court or the competent Circuit Court depending on the type of matter.

Netherlands

Dutch insolvency law is for the most part laid down in one statute, the Dutch Bankruptcy Act (*Faillissementswet*, the "BA"). The BA, which dates back to 1893, has been amended several times and deals with the bankruptcy of both individuals and legal persons. When financial, securities or credit institutions (banks) and insurers are concerned, additional and sometimes deviating rules apply. As of May 31, 2002, the EU Insolvency Regulation has direct effect and, if applicable, provides rules on competent jurisdiction, conflict of law and rules of substantive law.

A. Claims presentment

Creditors whose claims arose prior to the adjudication of the debtor's bankruptcy (the so-called "pre bankruptcy creditors") have an interest in submitting their claims against the bankrupt estate. Upon adjudication of a debtor's bankruptcy, these creditors generally no longer have the individual right to demand payment from the bankrupt estate or take recourse against its assets. The only way to ensure their ability to share (*pro rata parte*) in the proceeds of the bankrupt estate is upon admission of their claim after "verification." Verification in this context means the investigation of the validity of a claim. In general, this investigation takes place prior to and at a meeting of creditors scheduled for that purpose. In practice, this creditors' meeting is called a "verification meeting" (*verificatievergadering*).[1]

If, upon investigation, the existence and the amount (and, if applicable, any preferential right) of a submitted claim have been established, such a claim will be admitted to the bankruptcy. If a claim is disputed and the creditor concerned does not agree with the challenge of his claim, legal proceedings, reference proceedings (*renvooiprocedure*), will generally be initiated to determine whether or not the claim will be admitted.

1. Formal requirements

The formal requirements for submitting claims against the bankrupt estate are set forth in Chapter I, Subchapter 5 (articles 108 through 137) BA. The parties eligible for submitting a claim against the bankrupt estate are, first of all, the pre bankruptcy creditors. Also eligible are individuals or entities that are liable with the bankrupt debtor (such as a co-debtor, surety or guarantor) to a certain creditor and who have a (conditional) recourse claim against the bankrupt debtor, albeit that such recourse claim will usually only be admitted to the extent it does

[1] Another important matter at a verification meeting is the discussion about voting on a composition plan (if submitted).

not conflict with the claim of the creditor.[2] In addition, a party who is not a creditor of the bankrupt debtor but only has a right of recourse against certain parts of his assets (e.g., if the debtor is a third-party pledgor) can submit its claim, exclusively in order to be acknowledged as having a preferred ranking with respect to the proceeds of these assets.

Parties that generally have no need to submit their claims for verification are, among others, secured creditors[3], estate creditors[4] and parties who are not creditors of the bankrupt debtor but have a claim to recover property on the basis of an ownership right and creditors with claims that concern rights or obligations comprised in the bankrupt estate but that do not seek the performance (e.g., payment) of an obligation by the bankrupt estate.

There are no official forms for filing claims. Pursuant to article 110 BA, claims must be filed with the bankruptcy trustee (*curator*) in the form of a bill or other written statement showing the nature and amount of the claim with documentary evidence or copies thereof and (if applicable) a statement as to whether a preferential right, pledge, mortgage or lien is claimed.

2. Types of claims

Pursuant to articles 108 and 110 BA only "claims" (*schuldvorderingen*) can be filed for verification. The BA does not provide for a clear definition of the word "claim." It is generally used to describe a creditor's entitlement to a specific right which is in principle susceptible of transfer and subject to execution. Another requirement is that only claims "eligible for verification" can be filed. Generally speaking, only claims that came into existence prior to the bankruptcy adjudication are eligible for verification.[5] This excludes, by definition, estate claims, which are claims that arose after adjudication of the bankruptcy.

Not all claims that came into existence prior to the bankruptcy adjudication are eligible for verification. Only claims that concern the performance (e.g., payment) of an obligation by the bankrupt estate are eligible for verification, irrespective of what the legal basis of the obligation is (either statute, contract or tort), whether the claim is subject to a condition and whether the subject of the obligation consists of payment of a sum of money or something else (such as the delivery of goods[6]). This means that tort claims can be filed as well.

---

2 See article 136 section 2, sub a-c BA (no such conflict exists, for example, if the creditor is not entitled to submit his claim or, although entitled to do so, does not submit his claim).

3 i.e., pre bankruptcy creditors whose claims are secured with a right of pledge or mortgage over goods of the bankrupt debtor. They qualify as "*separatist"* and may foreclose on their collateral as if no bankruptcy exists.

4 Estate creditors have a claim that gives them an immediate right against the bankrupt estate which should be paid immediately from the proceeds of the bankrupt estate.

5 There are a few exceptions to this rule; e.g., article 37a BA.

6 However, for verification purposes, such claims have to be converted into claims for payment of money.

3. Unmatured, contingent and unliquidated claims

Creditors can submit claims that are unmatured, contingent or unliquidated. The Bankruptcy Act provides special provisions for the verification of such claims. These provisions describe, more in particular, the amount for which these claims will be verified (i.e., admitted to the bankruptcy) and how this value is determined by the court. The court will verify (i) claims with an uncertain maturity date, (ii) unliquidated claims (or claims having an indeterminate or uncertain value[7]) and, generally, (iii) claims subject to a condition precedent for their estimated value at the time of the bankruptcy adjudication (see articles 131 sub 1 BA, 133 BA and 130 BA). Claims with a maturity date that is within one year after the bankruptcy adjudication will be considered due and payable (*opeisbaar*) as of the date of the bankruptcy adjudication and will be verified for their full amount (i.e., no estimate of its value at the time of the bankruptcy adjudication takes place (see article 131 sub 2 BA). A claim subject to a condition subsequent will also be verified for its full amount (see article 129 BA).

4. Claims for equitable remedies

This concept is not seen in the Netherlands. All claims that came into existence prior to the bankruptcy adjudication and that concern the performance (e.g., payment) of an obligation by the bankrupt estate, are eligible for verification, irrespective of what the legal basis of the obligation is (either statute, contract, tort or the legal concept of reasonableness and fairness), whether the claim is mature or subject to a condition and whether the subject of the obligation consists of payment of a sum of money or something else.

B. Defenses

1. Filing date and limitation period

If distribution to pre bankruptcy creditors is expected by the bankruptcy trustee, he will request the court-appointed supervisory judge (*rechter commissaris*[8]) to set a date for the verification meeting. The supervisory judge will, at the same time, also set the latest possible date for the submission of claims, which date is at least 14 days prior to the date of the verification meeting (article 108 BA). As soon as the supervisory judge has set these dates, the bankruptcy trustee then notifies all known creditors hereof (article 109 BA).

---

[7] e.g., a claim for damages on the basis of a breach of contract or tort in a pending (but as a consequence of the bankruptcy suspended) lawsuit against the bankrupt debtor, whereby the amount of damages has not yet been determined by the court.

[8] A *rechter commissaris* is entrusted with the supervision of the administration and liquidation of the bankrupt estate.

The dates for filing claims as set by the supervisory judge in accordance with article 108 BA are strict and claims filed after that date should, in principle, not be admitted to be investigated at the verification meeting. Consequently, the existence or amount of such claim cannot be verified nor established and creditors will not share in the proceeds of the bankrupt estate. However, there are exceptions to this rule. The most important one can be found in article 127 BA. Other exceptions can be found in articles 186, 173a sub 5, 173c sub 3 and 178 BA.

Pursuant to article 127 sub 1 BA, claims filed with the bankruptcy trustee less than 14 days but not less than two days prior to the date of the verification meeting, will be admitted to the verification meeting upon request of the creditor, unless the bankruptcy trustee or any of the (other) creditors present at the verification meeting objects. Claims filed after that date will in principle not be admitted (article 127 sub 2 BA).[9] In addition, creditors who reside outside the Netherlands can file their claims on the date of, or even at the verification meeting, provided they are able to demonstrate that they were prevented from filing their claim earlier due to the fact that they reside outside the Netherlands (article 127 sub 3 BA). The supervisory judge will ultimately decide the admissibility of such claim in case of an objection to an admission (sub 1) or a disagreement about the reason why a foreign creditor was prevented from filing his claim on time (sub 3).

Creditors of claims that (i) have not been filed within the limitation period set forth in article 108 BA and (ii) do not fall within the exceptions of article 127 sub 1 and 3 BA (i.e., creditors whose claims have not yet been the subject of verification; see Dutch Supreme Court, November 11, 1994, *NJ* 1995, 115), may still have an opportunity to have their claims verified. Article 186 BA describes how.[10]

In addition, creditors who filed their claims after the limitation period referred to in article 108 BA has lapsed but who cannot invoke article 127 BA may have the opportunity to have their late-filed claims verified in an additional meeting of creditors on the basis of articles 173a sub 5, 173c sub 3 or 178 BA.

2. Defenses

There are in principle no limitations as to what parties are able to assert when contesting a claim. They may dispute the existence, the amount and/or the conditions of a claim. Also, the explanation of an agreement, the applicable law or the characterization of a claim (for instance, the question of whether a claim should be considered an estate claim, in which case the claim is not eligible for verification) can be subject for debate.

---

9 However, in practice, some bankruptcy trustees still allow such claims for purposes of efficiency.

10 This is done by filing a petition in opposition against the distribution plan.

The bankrupt debtor may contest a claim, provided he substantiates his challenge by describing the grounds on which his challenge is based. However, such challenge has effectively no meaning in the bankruptcy: it cannot prevent a claim from being admitted to the bankruptcy.[11] In addition, the bankrupt debtor is not entitled to assert claims on behalf of the bankrupt estate against the creditor whose claim he disputes. The bankruptcy trustee is exclusively authorized to act on behalf of the bankrupt estate.

In principle, the bankruptcy trustee can assert any defense to a claim that the bankrupt debtor could have asserted outside bankruptcy. However, in the event that a limitation period for submitting a claim were to lapse sometime after the date of the bankruptcy adjudication, a challenge of a claim based on the expiration of such limitation period will not succeed. The bankruptcy adjudication has the effect of extending the limitation period until six months have elapsed after the end of the bankruptcy (article 36 BA).

The bankruptcy trustee is also (exclusively) entitled to assert counterclaims on behalf of the bankrupt estate against a creditor whose claim he disputes. Such counterclaim can be based on, for instance, statute, agreement, undue payment or tort provisions. The bankruptcy trustee may also assert insolvency-based recovery claims. For example, he may invoke the nullity of acts on the basis of fraudulent preference (*action pauliana*; see Wessels *Insolventierecht V*, p. 109). Generally, the counterclaims may be asserted by the bankruptcy trustee in the same legal proceedings where the dispute of a claim is being resolved.

Any counterclaim a disputing creditor may have against a creditor whose claim he disputes cannot be asserted in the same legal proceedings where the dispute of a claim is being resolved. A disputing creditor may, however, contest the admission of a claim on grounds derived from the provisions regarding fraudulent preference (see article 49 BA).

C. Claims adjudication procedures

Generally, the district court determines whether claims against the bankrupt estate that are disputed at the verification meeting by the bankruptcy trustee and/or one or more creditors will be allowed and admitted to share in the proceeds of the bankrupt estate. Such decision will take the place of (but has the same legal effect as) the admission of a claim in a verification meeting. The legal proceedings in which this takes place are in practice reference proceedings (*renvooiprocedure*).

In principle, the rules for ordinary civil litigation are applicable, albeit that no writ of summons is required for the commencement of reference proceedings.

[11] Article 126 BA.

Considering the fact that the outcome of the verification meeting generally determines whether legal proceedings on allowing (disputed) claims should take place, this will be covered under the verification meeting in the discussion of the claims adjudication procedure.

1. Standing to object

In his preliminary investigation of the claims, the bankruptcy trustee will determine which of the filed claims he is willing to allow or dispute. He places all claims he is willing to allow on a list of provisionally allowed claims. The claims he intends to dispute are placed on a separate list (in practice called the "list of provisionally disputed claims"), which list includes the grounds on which the claims are disputed (see article 112 BA). The bankruptcy trustee must ensure that a copy of both lists is available for inspection by the public at the office of the clerk of the district court for a period of seven days before the verification meeting (article 114 BA). He must also notify all known creditors that these lists have been made publicly available.[12]

During the verification meeting, each creditor whose name appears on either of the two lists has the right to object to a claim, for instance by disputing its validity, the alleged priority ranking or the alleged lien. The right of creditors to object to a claim exists regardless of whether the bankruptcy trustee has placed such claim on the list of provisionally allowed claims or provisionally disputed claims (article 119 BA). Creditors that hold late-filed claims but who fall within the exceptions of article 127 sub 1 and 3 BA also have the right to object to a claim.

There are no high demands or formal requirements imposed on creditors who wish to object to another creditor's claim at the verification meeting. Creditors only have to make clear at the verification meeting, which can be done orally, what exactly they object to, but do not need to substantiate this. Therefore, they do not need to describe the grounds on which their challenge is based. Substantiation needs to take place in the legal proceedings to which disputed claims are, in principle, referred to by the supervisory judge. In case of completely unsubstantiated or chicanerous objections, the supervisory judge has the discretion to decide that a claim will be conditionally allowed and admitted in order to prevent a delay in the administration of the bankruptcy (see article 125 BA, MvT, Van der Feltz II, page 117 and District Court of 's Hertogenbosch, October 3, 2007 (*JOR* 2007/321)).

The bankrupt debtor may also dispute the validity or the alleged priority ranking of a claim but is required to substantiate his challenge by giving a brief description of the grounds for his challenge (see article 126 BA). However, by

[12] In some bankruptcies (such as KPNQwest and Jomed), bankruptcy trustees also publish these lists on the internet.

challenging a claim the bankrupt debtor cannot prevent this claim from being admitted to the bankruptcy. The only consequence of a challenge by the bankrupt debtor is that if the claim is admitted to the bankruptcy, this admission will not be final and binding against the bankrupt debtor. He is in principle still able to challenge this claim after the bankruptcy has been terminated (see articles 196 and 197 BA).

During the verification meeting, the bankruptcy trustee has the right to retract a provisional allowance or a provisional dispute of a claim, or require a creditor, whose claim is not disputed either by the bankruptcy trustee or by any of the creditors, to affirm under oath that his claim is sound (after such oath, the claim will be admitted to the bankruptcy).

Claims that have not been (or no longer are) disputed at the verification meeting, will be entered to a list of creditors of admitted claims, which list is included in the official record of the meeting (article 121 sub 1 BA). The admission of a claim recorded in this official record is final and binding in the bankruptcy (article 121 sub 4 BA). This means that the creditor of the admitted claim has the irrevocable right to share in the proceeds of the bankrupt estate to the extent of his admitted claim. The official record of the verification meeting constitutes an entitlement to enforcement against the bankrupt debtor (article 196 BA).

2. Burden of going forward

Unless the supervisory judge is able to reconcile the parties contesting a claim with the creditor of the disputed claim, he will refer claims that have been disputed at the verification meeting by the bankruptcy trustee and/or one or more creditors to a hearing of the district court (*terechtzitting*) as he so determines, without any writ of summons being required for the commencement of such (reference) proceedings (see article 122 BA). The supervisory judge announces the date, time and place of the hearing at the verification meeting. This information will also be minuted in the official record of the verification meeting, which record will be made available for inspection free of charge at the office of the clerk of the district court (see article 137 BA).

3. Burden of proof

As previously stated, the rules for ordinary civil litigation are in principle applicable, including its rules of evidence. The main rule is that the burden of proof rests with the contending party. This means that the creditor seeking the admission of his claim has the burden of proof regarding the validity and amount of his claim. However, he is not obliged to produce further supporting evidence of his claim than he would have to produce to the bankrupt debtor in ordinary civil litigation (article 123 BA). The party disputing the claim will have to describe

on what grounds the claim is challenged and will need to substantiate this, for instance by providing (documentary) counter-evidence as to the invalidity of the claim or the incorrectness of the amount. He may present the same grounds on which his challenge was based in the verification meeting but may also present other/new grounds. The creditor seeking the admission of his claim is not entitled to change his claim during the legal proceedings.[13] Courts are free to shift the burden of proof if reasonableness and fairness so require. In principle, the district court will ultimately weigh all the evidence presented when deciding on whether to admit the disputed claim to the bankruptcy.[14]

4. Jurisdiction

The question whether a disputed claim against the bankrupt estate will be admitted to the bankruptcy is not one that is exclusively decided in reference proceedings (within the meaning of article 122 BA) or in proceedings on the basis of article 186 BA, by the district court that adjudicated the bankruptcy.

If a disputed claim was already the subject of legal proceedings before the commencement of the bankruptcy, these proceedings are automatically stayed upon the bankruptcy adjudication. In that case, the supervisory judge will order that the stayed proceedings be continued before the same court. In this case the person disputing the verification (the bankruptcy trustee or a creditor) will become a party to the (continued) proceedings instead of the bankrupt debtor (see article 29 BA).[15]

Since the decision of the Dutch Supreme Court of April 16, 1999 (*JOR* 1999/156), the prevailing opinion is that if an agreement between the bankrupt debtor and the creditor provides that a dispute under the agreement is to be resolved by another court, by mediation, or should be arbitrated, the parties should not be referred to the district court that adjudicated the bankruptcy but, instead, should be ordered to proceed to this other court, to mediation or to arbitration. This would in any event be the case if a claim has been disputed by the bankruptcy trustee. It has been argued that the same applies if a claim is being disputed by a creditor, but there is no conclusive case law on this.

It is also possible to have another court determine the admissibility of a claim in ordinary legal proceedings that are initiated by the bankruptcy trustee against a third party who asserts the claim as a counter-claim.[16]

---

13 See Hof Amsterdam February 24, 2005, *JOR* 2005/130

14 Article 151 sub 2 DCCP.

15 In such continued proceedings, the bankruptcy trustee or (disputing) creditor may invoke the nullity of acts performed by the bankrupt debtor in the proceedings before he was declared bankrupt if it is proved that the bankrupt debtor deliberately prejudiced the creditors by such acts and that this was known to the creditor whose claim is disputed (see article 31 BA).

16 Dutch Supreme Court, November 8, 1991, *NJ* 1992, 174 (*Nimox*/*Van den End*).

5. Discovery

The Dutch legal system does not provide for a US style discovery procedure, granting parties general access to each others documents. However, the Dutch legal system does provide for several more specific ways to obtain inspection of documentation. Inspection of documentation may be claimed, for instance, on the basis of section 843a DCCP or on the basis of article 3:15j of the Dutch Civil Code.

6. Hearing

The legal proceedings in which disputed claims are resolved largely take place in writing, although there is always an opportunity, generally towards the end of the proceedings, for a hearing and/or oral pleadings. Dutch courts may ask parties to appear at an earlier stage, after the defense statement has been filed[17], in order to find out more about the case and to asses whether a second round of written statements (reply and rejoinder) are required. Such hearing is called "*comparitie*." A *comparitie* is often used by the courts to urge parties to come to a settlement. Oral pleadings are primarily meant to allow the parties to explain the issues in more detail or stress the most important issues of the matter. The available time will be limited. The parties are allowed to provide additional documents (e.g., new evidence) prior to the *comparitie* or oral pleadings, provided always that the other party has the opportunity to respond to any new document.

7. Costs

If a disputed claim is resolved by litigation rather than settlement, the court has the authority to order the losing party to pay the litigation costs of the prevailing party, or to have each party pay its own expenses. However, if a creditor of a disputed claim prevails in this litigation, he may still be ordered to bear the litigation costs. This could be the case if such litigation is a result of the fact that the creditor has not timely substantiated his claim in a sufficient manner, for instance at the verification meeting or (upon referral to reference proceedings) in his statement of claim, or because of his refusal to cooperate in timely providing sufficient additional information or documentation to support his claim.[18] Generally, the litigation costs that are calculated by the court do not reflect the actual costs incurred (such as actual attorneys' fees).

---

[17] Article 131 DCCP.

[18] Article 111 BA.

8. Recognition of other court orders

If another Dutch court than the one that declared the bankruptcy has adjudicated the disputed claim, this judgment will, as a matter of law, be recognized. The Dutch Supreme Court has decided, in a matter regarding a forum clause, that article 122 BA does not create an exclusive jurisdiction of the district court that adjudicated the bankruptcy.[19]

Pursuant to Dutch law, Dutch courts will normally give binding and conclusive effect to foreign judgments provided the foreign court has observed fundamental principles of due process (i.e., the process rights of the party against whom recognition is sought are not infringed) and the public policy of the Netherlands is not infringed by the decision. However, a foreign judgment does not, in itself, provide an entitlement to enforcement against the bankrupt debtor. If the foreign judgment is enforceable in the Netherlands on the basis of a treaty or statute, such entitlement to enforcement can only be effected upon receipt of an order for its enforcement (*exequatur*) pursuant to articles 985 and further of the DCCP. The Dutch district court that adjudicated the bankruptcy will be authorized to secure this order. If there is no statute or treaty, the case must in principle be relitigated (on the merits) by the Dutch court (see article 431 DCCP). This will take place in the (suspended) reference proceedings before the district court. However, in practice this means that the court will adopt the foreign decision as its own if such decision is capable of being recognized under the standards set out above.

9. Appeals

The admission of a claim at the verification meeting and a decision by the supervisory judge to conditionally admit a disputed claim are not appealable.[20] A referral by the supervisory judge of a disputed claim to legal proceedings is not appealable. However, a decision by the supervisory judge to refuse to refer a disputed claim to legal proceedings, is appealable to the district court.[21] Judgments from the district court that resolved the disputed claims are appealable. An appeal has to be brought before the court of appeal in the judicial district of the court of first instance. Judgments of the court of appeal are appealable before the Dutch Supreme Court. The task of the Supreme Court is limited to the question as to whether the lower court misapplied Dutch law or failed to comply with procedural requirements which must be observed on penalty of nullification. The Dutch Supreme Court relies on the facts that have been established or found by the lower court and does not take new factual statements into consideration.

Appeals are initiated by serving and filing a writ of summons. Appeals must be lodged within a period of three months after the decision of the lower court was rendered. This three-month period cannot be extended.

---

19 Dutch Supreme Court, April 16, 1999, *JOR* 1999/156.

20 Article 67 BA.

21 District Court of 's Hertogenbosch, October 3, 2007 (*JOR* 2007/321).

New Zealand

The New Zealand law relating to corporate insolvency (and restructuring), other than receiverships and statutory management, is set out in Part XIV (Compromises with Creditors), Part XV (Approval of Arrangements and Compromises by the Court), Part XVA (Voluntary Administration) and Part XVI (Liquidations) of the Companies Act 1993. The law relating to personal bankruptcy and creditor compromises is set out in the Insolvency Act 2006. This chapter deals with the corporate insolvency proceedings.

Compromises with Creditors

The board of a company and (with the leave of the High Court) any creditor or shareholder may propose a compromise under Part XIV of the Act if the proponent has reason to believe that the company is or will be unable to pay its debts. The compromise may involve cancelling all or part of a debt of the company or varying the rights of its creditors or the terms of the debts. The objective is either to enable the company to trade out of its problems or provide creditors with a better distribution than they would receive under any other insolvency process. Creditors vote on the proposed compromise at a meeting called for that purpose. If the proposal is approved by the requisite majority, it is binding on the company and all of its creditors to whom notice of the proposal were given. Classes of creditors are provided for. Generally, the compromise provides for an administrator to be appointed to oversee or manage the implementation of the compromise.

Court Approved Arrangements and Compromises

An arrangement includes a reorganisation of the share capital of the company. The Court has a wide discretion to approve arrangements or compromises, and to determine the process by which they are considered by interested parties and implemented. This procedure is rarely used for insolvent companies as the creditors' compromise procedure or voluntary administration procedures can be utilised more efficiently in most situations.

Voluntary Administration

This regime was introduced in November 2007. The objectives are very similar to the objectives of the creditors' compromise procedures. A secured creditor holding a charge over all or most of the company's property may appoint an administrator if the company is not in liquidation, as can a company if it is insolvent or may become insolvent. The High Court may also appoint an administrator on the application of a creditor, the liquidator (if the company is in liquidation) or the Registrar of Companies. The administrator must investigate the company's affairs and hold a 'watershed' creditors' meeting within 25 working days of the date of their appointment. At that meeting, creditors may approve a Deed of Company Arrangement, resolve that the administration come to an end and the company return to the control of its directors, or resolve that the company be placed in liquidation.

Liquidation

This is the process used to end the life of an insolvent company. Liquidation of a company commences with the appointment of a liquidator by special resolution of the shareholders, by the board of directors in circumstances specified in the Constitution, or by the High Court on the application of the company, a director or shareholder, a creditor or the Registrar of Companies.

In this chapter the term administrator will be used to refer to an insolvency practitioner appointed to administer an insolvent administration and distribution of assets, in the role of either a liquidator, a compromise manager, or an administrator appointed under the voluntary administration regime and, if applicable, an administrator under the Deed of Company Arrangement subsequently approved by creditors. References to sections are references to sections in the Companies Act 1993 ("Act") and, unless otherwise stated, references to regulations are references to the Companies Act 1993 Liquidation Regulations 1994 ("Regulations").

A. Claims presentment

1. Proofs of claim

In a liquidation, an unsecured creditor wishing to file a claim against the company must do so in a form prescribed by the Regulations. The creditor must list full particulars of the claim and identify any documents that evidence or substantiate the claim. The claim is filed with the administrator. The administrator may require the production of any documents identified (section 304).

A secured creditor has a number of options (section 305). It may:

a. Realise property subject to a security interest, if entitled to do so; and/or

b. Value the property subject to the security and claim in the liquidation as an unsecured creditor for any balance due.

The secured creditor may also surrender the security for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.

The administrator has power to require a secured creditor to elect which of the options the creditor wishes to exercise and, in the case of valuation or surrender of the security, exercise the option within a 20 working day period. A person who fails to comply with the notice is taken as having surrendered the security to the administrator (section 305(8) & (9)).

A creditor who has surrendered a security or is taken to have done so may, with the leave of the Court or the liquidator at any time before the liquidator has realised the secured property, withdraw the surrender and rely on the security or submit a new claim (section 305(10)).

If a secured creditor values the security and claims as an unsecured creditor for any balance, the valuation and any claim must be in the form prescribed by the Regulations. The claim must contain full particulars of the valuation and any claim, full particulars of any security including the date on which it was given, and details of documents that substantiate the valuation and the security. The claim is filed with the administrator. The administrator may require production of any of those documents (section 305(4) & (5)).

It is an offence for a person to make or authorise the making of a claim that is false or misleading in a material particular, knowing it to be false or misleading. It is also an offence to omit or authorise the omission from a claim of any matter knowing that the omission makes the claim false or misleading in a material particular (sections 304(6) & 305(11)).

The procedures set out above apply to claims made for the purpose of voting at creditors' meetings and to obtain a distribution in the liquidation.

The procedure for making a claim in relation to a creditors compromise or voluntary administration for the purposes of voting at creditors' meetings is not prescribed. The exception is that the administrator in a voluntary administration may estimate the amount of a creditor's claim that is for any reason uncertain. On the application of the administrator, or other creditor who is aggrieved by an estimate made by the administrator, the Court must determine the amount of a claim as it sees fit (section 239AK). In all other respects, generally speaking the procedures prescribed for liquidations are followed.

The procedure for making a claim under a creditor's compromise or a Deed of Company Arrangement to participate in and obtain a distribution under the arrangements will generally be set out in the relevant documents. If they are not set out in a Deed of Company Arrangement, the same procedures as apply in a liquidation must be followed (Companies (Voluntary Administration) Regulations 2007).

2. Types of claims

With very limited exceptions, any debt or liability, present or future, certain or contingent, whether an ascertained debt or a liability for damages, is admissible in a liquidation (section 303). The exceptions include monetary penalties payable to the Crown which are imposed on a company by a Court for the breach of any enactment, fines imposed on a company for the commission of an offence, and related costs ordered to be paid by the company – insolvency does not limit or affect the recovery of those fines and penalties (sections 303(2) & 308).

Claims unenforceable in New Zealand Courts (such as for foreign taxes) are not admissible. Any debts barred under the Limitation Act 1950 at the date of commencement of the liquidation are also inadmissible. However, time under that Act ceases to run against a creditor from the date of liquidation.

The amount of a claim based on a debt or liability denominated in a currency other than New Zealand currency must be converted into New Zealand currency at the rate of exchange on the date of the commencement of the liquidation. If there is more than one rate of exchange on that date, the average rate applies (section 306).

The amount of a claim must be ascertained as at the date of commencement of the liquidation (section 306). Admissible claims include not only those which are payable at the date of liquidation, but also those which are payable at a future date or which would become payable upon the occurrence of a contingency. However, any debt or liability to which the company may become subject after liquidation must relate to an obligation incurred before the date of liquidation.

Liquidation has the effect of accelerating claims. A claim in respect of a debt that, but for the liquidation, would not be payable until a date that is six months or more after the date of commencement of the liquidation is to be treated as a claim for the present value of the debt. That present value is calculated by applying a discount of the maximum interest rate that applies to judgment debts (section 309). At present, that interest rate is 8.4% per annum.

The amount of a claim may include interest up to the date of commencement of the liquidation if there is a contractual entitlement to interest or, in the case of a judgment debt, at the rate payable on that debt (section 311).

Tortious claims can be admitted in a liquidation. However, except in very limited circumstances, claims for personal injury are not admissible as New Zealand has a "no fault" statutory personal injury compensation scheme administered by the Accident Compensation Corporation.

Generally speaking, the types of claims admissible in liquidation are also admissible under the other insolvency procedures.

3. Unmatured, contingent and unliquidated claims

Claims which are subject to a contingency, or are for damages or for some other reason are of an uncertain amount, are dealt with the same way in a liquidation. The administrator may make an estimate of the amount of the claim or refer the matter to the High Court for a decision on the amount. On the application of the administrator, or of a claimant who is aggrieved by an estimate made by the liquidator, the High Court must determine the amount of the claim as it sees fit (section 306). If prior to a distribution to creditors the circumstances have changed so that the amount of the claim is readily ascertained, the creditor can submit an amended claim.

A creditor cannot vote at a creditors' meeting in a liquidation in relation to a claim that is subject to a contingency, or is for damages or is of an uncertain amount, unless the value of the claim has been estimated by the liquidator or determined by the Court (Regulation 21).

4. Claims for equitable remedies

A creditor may make a claim for an equitable remedy such as a constructive trust against a company in liquidation in the same way as such a claim could be made prior to liquidation. It may be necessary to commence proceedings against the company (and possibly the administrator) to establish the claim. In a liquidation, those proceedings cannot be commenced unless the administrator agrees or the Court orders otherwise (section 248).

B. Defences

1. Bar dates

In a liquidation, the administrator may fix a date on or before which creditors are to make their claims and establish any priority their claims may have under the liquidation regime (Regulation 12). The date must not be less than 10 working days from the date the notice was given. The administrator must give public notice of the date fixed. Public notice constitutes an advertisement in the New Zealand Gazette and at least one issue of a newspaper circulating in the area of the company's (principal) place of business.

A creditor who fails to make a claim before the date fixed by the administrator is excluded from the benefit of any distribution made before the claim is lodged. However, if the creditor subsequently makes a claim and that claim is admitted, the creditor is entitled to "catch up" before further distributions are made and receive the benefit of any distribution from which the creditor was previously excluded - if any assets are available (Regulation 13).

If a creditor fails to establish any priority for their claim before the day fixed, that creditor cannot object to any distribution made before the priority of their claim is established. However, if a claim has been admitted (but the priority not established) the liquidator can make an assumption about the priority and act accordingly. Again a creditor who subsequently establishes priority may "catch up" provided there are assets available (Regulation 14).

Procedures for the making of claims and cut off dates found in creditors' compromises and Deeds of Company Arrangement are often very similar to those that are prescribed by the Act or the Regulations for liquidations. It is not uncommon to find that the liquidation provisions are incorporated by reference into the compromise document or the Deed of Company Arrangement. However, occasionally administrators under these documents are given more flexibility and discretion about accepting claims and determining cut offs.

2. Defences

a. Bankruptcy defences

New Zealand insolvency legislation does not recognise the concept of "equitable subordination." However, before a liquidation, creditors are free to agree among themselves to subordinate or rank their claims against a company. The administrator must give effect to the arrangement in a liquidation of that company (section 313(3)).

The Act provides that if at the date of the liquidation there are mutual credits, mutual debts or other mutual dealings which give rise to monetary obligations between a company and a person who seeks to have a claim admitted in the liquidation of that company, any amount due from one party must be set off against an amount due from the other and only the balance may be claimed in the liquidation or is payable to the company, as applicable. However, setoff may not occur in relation to transactions made within a specified period before the date of liquidation (generally six months for unrelated parties and two years for related parties) which result in credit being given, unless the creditor proves that at the time of the transaction it did not have reason to suspect that the company was unable to pay its debts as they became due (section 310).

Certain claims cannot be setoff – for example, amounts payable by a shareholder for the issue of a share or in satisfaction of an outstanding call on a share (section 310(4)).

Where mutuality is lacking, it may still be possible to assert an equitable setoff if the necessary relationship exists between the claims of the parties.

The Act contains provisions for the administrator of a company in liquidation to avoid transactions entered into by the company which were at an undervalue, which have a preferential effect or where there is a fraud on creditors. A creditor can probably not claim a setoff of monies which they are ordered to repay in these circumstances against a debt owing to them by the company at the beginning of liquidation (*Re BP Fowler Limited* [1937] 3 All ER 781).

Creditor Compromises and Deeds of Company Arrangement generally have provisions dealing with setoff. It is common to include provisions having the same effect as the statutory setoff rules that apply in a liquidation.

C. Claims adjudication procedures

1. Standing to object

In a liquidation the administrator has an obligation as soon as practicable after a claim is filed either to admit or reject the claim in whole or in part. If the administrator wholly or partly rejects the claim, he or she must promptly give written notice of the rejection to the creditor. The administrator should give reasons for the rejection. If the administrator subsequently considers that a claim has been wrongly admitted or rejected, the administrator may revoke or amend that decision and must record the amended decision in writing.

Generally, creditors make claims in an insolvency administration for two purposes – to enable them to vote at creditors' meetings, and to establish their entitlement to a distribution in the proceeding (if there is to be one).

In a liquidation, the chairperson of a meeting of creditors (generally the liquidator) has power to admit or reject a claim for voting purposes, but that decision is subject to appeal to the Court. Where the chairperson is uncertain whether a claim should be admitted or rejected, he or she must allow the creditor to vote subject to the vote being declared invalid if the claim is subsequently rejected for the voting purposes (Regulation 20). A secured creditor can vote at creditors' meetings only if he or she surrenders its security to the administrator for the general benefit of creditors. However, the secured creditor can vote in respect of any unsecured portion of its debt if it has valued its security (Regulation 22).

In a liquidation, a creditor who is aggrieved by the administrator's decision to partially or wholly reject its claim may, with the leave of the Court, apply to the Court to reverse or modify that decision. That action must be taken within 30 days of the creditor being notified of the administrator's decision.

It would appear that the Court should decide any such application on the merits of the evidence before it and should not merely decide if the administrator was right or wrong (*Winstone (Northland) Limited v Watson* [1988] 4 NZCLC 64,174).

In some circumstances, an application for review will be inappropriate for example, where there is a dispute over express or implied warranties or where the claims or counterclaims are complex and contentious. In those cases, the proper course is for the claimant to seek leave to commence an action against the company to establish the validity and/or quantum of the claim (see for example *Pacific Produce Co Limited v Franklin Co-op Growers Limited (in liq)* [1969] NZLR 65).

In relation to a creditors' meeting held under the voluntary administration regime, the administrator may estimate the amount of a creditor's claim that is for any reason uncertain – a creditor who is aggrieved by an estimate may apply to the High Court to determine the amount of the claim (section 239AK(4)).

If creditors under a creditors' compromise are dissatisfied with the administrator's decision on their claim, depending on the terms of the compromise the creditor may be able to apply to the Court for a review of the administrator's decision. However, the compromise may provide some other form of dispute resolution. Similar considerations apply in relation to Deeds of Company Arrangement under the voluntary administration regime. There is also a very wide power in the Court to make any order it thinks appropriate about how the voluntary administration

regime is to operate in relation to a particular company (section 239ADO). The extent to which this power can be used to deal with matters arising under a Deed of Company Arrangement is not clear. However, the Court also has reasonably wide powers of supervision of a deed administrator (section 239ADS).

2. Burdens of proof

The responsibility for making a claim is primarily that of the creditor. The burden of proof is on the creditor throughout the claims process. The standard of proof is that applicable to most civil matters – the balance of probabilities.

In a liquidation, it would appear that the administrator is under a duty to take all reasonable steps to establish whether persons are entitled to claim against the company and should write to potential claimants inviting them to make their claims (*Re Armstrong Whitworth Securities Co Limited* [1947] 2 All ER 479; *Pulsford v Devenish* [1903] 2 Ch 625). The administrator may have an obligation to follow up with those who do not submit claims in response to a formal notice. An administrator, being under a duty to investigate claims, is liable for the negligent admission of a wrong proof (*Re Home and Colonial Insurance Co* [1930] 1 Ch 102).

3. Jurisdiction

All applications made to reverse or modify an administrator's decision in a liquidation are heard in the High Court of New Zealand. The High Court also has jurisdiction under section 307 to estimate a claim of uncertain amount if referred to it, and to review an administrator's decision on such a claim.

The High Court is also the Court to which application must be made for proceedings to be issued against a company in liquidation to establish the validity or quantum of a claim, if the administrator does not consent to the proceeding. If the application is successful, the matter will be heard either in the District Court (if the sums involved are less than NZ$200,000) or in the High Court.

The High Court has jurisdiction over issues arising under creditors' compromises and under the voluntary administration/Deed of Company Arrangement regimes.

4. Discovery

A creditor's claim must specify the documents that evidence or substantiate their claim. The liquidator may require the production of those documents.

In proceedings sanctioned by the High Court that have been issued to establish validity or quantum of a claim, discovery is permitted.

5. Claim adjudication

Where a creditor makes a claim on the basis of a judgment of a New Zealand Court or overseas Court obtained before liquidation, the administrator in a liquidation is not bound to accept that judgment but is entitled to investigate the underlying claim (*Re Home and Colonial Insurance Co Limited* [1930] 1 Ch 102). However, there would need to be a compelling reason to reject a claim which is the subject of a judgment of a New Zealand Court or of an overseas Court recognized as competent in New Zealand.

6. Costs of litigation

Where a creditor applies to the High Court for an order reversing or modifying the decision of an administrator in a liquidation to reject a creditor's claim, the Court has the discretion to:

a. Allow the costs of the creditor to be added to their claim; or

b. Allow the costs of the creditor to be paid out of the assets of the company (in which case they are treated as expenses of the liquidator); or

c. Order costs to be paid by the creditor (Regulation 16).

The manner in which the Court exercises its discretion will generally turn on whether the creditor's application is successful. There is English law authority (which may be adopted in New Zealand) that where an administrator in a liquidation unreasonably rejects a claim, the administrator may be personally liable for the costs of the resulting action (*Re Smith Ex Parte Brown* (1886) 17 QBD 488).

7. Appeals

As noted, in a liquidation a creditor can apply to the High Court to reverse or modify a decision rejecting the creditor's claim.

The decision of the High Court can be appealed to the New Zealand Court of Appeal. The appeal must be filed within 20 working days of the High Court decision.

If the validity or quantum of a claim is being established (with consent of the administrator or the leave of the High Court) in standard court proceedings (either at the District Court or High Court level), either party can appeal a judgment with which it is dissatisfied.

Singapore

The insolvency and rehabilitation laws in Singapore are broadly divided into two categories:

Individuals – governed by Bankruptcy Act (Cap. 20), which sets out the insolvency regime for individuals and unincorporated bodies such as a partnership firm;

Corporations – governed by Companies Act (Cap. 50), which covers liquidation, receivership, judicial management and scheme of arrangement.

In addition, there is also subsidiary legislation to provide details in relation to the enforcement of insolvency provisions. For example, there are Companies (Winding Up) Rules and Bankruptcy Rules for winding-ups and bankruptcies, respectively, and Part V of the Companies Regulations for procedures relating to judicial management. It may be relevant to note that certain provisions in the Bankruptcy Act also apply to insolvent winding up.

There is separate legislation for finance companies, banks and the clearing houses of the securities and future markets.

The Limited Partnership Act (Cap 163A) introduced in year 2005 also contains similar provisions on receivership and winding-up to those of a company.

The insolvency law in Singapore is also shaped by decisions of Singapore Courts, particularly on issues which are not expressly addressed by the primary or subsidiary legislation.

A. Claims presentment

1. Proofs of claim

A claim may be presented by the creditor himself or by another person authorized by or on behalf of the creditor. In cases where there are numerous claims for wages by workmen and others employed by a company, it shall be sufficient if one proof for all the claims is made either by a foreman or any person on behalf of the creditors. A schedule accompanying the proof setting forth the names, addresses and amounts severally due to them shall suffice.

Depending on the nature of insolvency proceedings, different official forms are used. In the case of winding-up and judicial management, the form (Form 77) specified in the Companies Regulations can be downloaded electronically from the official website of Insolvency & Public Trustee's Office – www.ipto.gov.sg.

Details of the claims are to be inserted on the form supported by documentary evidence, and then be submitted to the liquidator / judicial manager. In cases where the Official Receiver is the Liquidator, the duly completed form may also be submitted electronically to www.ipto.gov.sg, with the documents substantiating the claim to be sent with 14 days.

In the case of bankruptcy, a form (Form 23) may also be obtained online from the website of Insolvency & Public Trustee's Office – www.ipto.gov.sg. Similarly, the duly completed form should be submitted to the Official Assignee or a private trustee, if one is appointed in place of the Official Assignee (hereafter called "the bankruptcy trustee").

For Schemes of Arrangement, forms for claims presentment and adjudication procedures are normally provided in the scheme documents.

2. Types of claims

Pursuant to Section 327(1) of the Companies Act, Cap. 50, in every winding up, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, may be proved against the company. However, in the case of insolvent companies, the rules relating to proof of debts in Bankruptcy Act shall apply.

Section 87(1) of the Bankruptcy Act provides that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust, shall not be provable. Hence, unliquidated tort claims shall not be admissible. However, it is not clear if an unliquidated tort claim could be proved if it has crystallized into a judgment sum by the time of the claimant's lodgment of proof after the commencement of winding up. If a judgment is entered after the proof of claim is filed but before adjudication of the same, it is arguable whether the unliquidated tort sum has become liquidated (by reason of the judgment) and is therefore provable in the bankruptcy or winding up, as the case may be.

To be provable in the winding up (or bankruptcy), the debt must have been incurred or have arisen before the date of the winding up order. Section 87(2) of the Bankruptcy Act, however, provides that a person having notice of the presentation of a petition shall not prove for any debt or liability contracted subsequent to the date of his so having notice.

Creditors holding collateral security are required to disclose their securities and the value they assess for the same. If the liquidator (or the bankruptcy trustee) is dissatisfied with the value at which a security is assessed, he may require the security so valued to be offered for sale and on such terms and conditions as are agreed on between the claimant and the liquidator.

Where a creditor valued his security in a proof of claim, he may at any time amend the valuation and proof, showing that the valuation and proof were made bona fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation, except that such amendment shall be made at the cost of the creditor upon such terms as the Court orders, unless the liquidator (or bankruptcy trustee) allows the amendment without application to the Court.

Fully secured creditors may proceed to realize their security to obtain full satisfaction of their debts without filing a proof of debt in respect of their claim. In the event the security realized is not sufficient to cover the liability, the secured creditor may prove for the balance as an unsecured creditor. Two important points relating to this security realization should be noted. First, in the event of a corporate liquidation, if the security is subject to a floating charge, the proceeds of realization must be used to pay various preferential debts set out in Section 328(1) (a), (b), (c), (e), (f) and 328(4) of the Companies Act in priority to that of the secured creditors. Secondly, Section 76(4) of the Bankruptcy Act stipulates that no secured creditor shall be entitled to any interest in respect of his debt after the making of a bankruptcy order (or a winding up order as it shall apply) if he does not realize his security within six months from the date of the bankruptcy (or winding up) order or such period as the bankruptcy trustee (or liquidator) may determine.

On the other hand, if a secured creditor surrenders his security to the liquidator (or bankruptcy trustee), he may prove for his whole debt.

A creditor may prove for interest at the contractual rate up to the date of bankruptcy (or winding up) order. Any interest accrued after the bankruptcy (or winding up) order will only be met upon settlement of claims as at the date of bankruptcy order in full. If interest is not reserved or agreed upon, and the debt is overdue at the date of the winding up order, the creditor may prove for interest at a rate not exceeding 6% per annum from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand has been made in writing, giving notice that interest will be claimed from the date of the demand until the time of payment.

All trade and other discounts which would have been available to the company (or bankrupt) but for the winding up or bankruptcy, except any discount for immediate, early or cash settlement, shall be deducted from the claim.

A creditor may also prove for a debt payable subsequent to the date of the winding up order by deducting a rebate of interest at the rate of 6% per annum.

For foreign currency debt, the amount of debt shall be converted into Singapore dollars at the rate prevailing on the date of bankruptcy (or winding up) order, based on the average of the buying and selling rates as published in a local newspaper.

When any rent or other payment falls due at stated periods, and the bankruptcy (or winding up) order is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order, as if the rent or payment fell due from day to day.

An amount payable under any order made by a court under any written law relating to the confiscation of the proceeds of crime shall be provable in bankruptcy.

3. Unmatured, contingent and unliquidated claims

Contingent claims, though not payable immediately, if culminating in the payment of money and are capable of being fairly estimated, are admissible as a proof.

Section 327(1) of the Companies Act further provides that a just estimate of the value of contingent debts, unliquidated claims and any other debts or claims that do not bear a certain value, may be made.

However, in a meeting of creditors, a creditor shall not be entitled to vote in respect of any contingent or unliquidated debt, or any debt the value of which is not ascertained.

4. Claims for equitable remedies

It is open to a creditor suing on a contract for sale and purchase of real property to apply to court for specific performance of the same vis-à-vis an individual or corporate debtor who is bankrupt or wound up, respectively. However, an order for specific performance is subject to restrictive conditions and is discretionary. It should also be noted that a liquidator or trustee in bankruptcy could make a cross-application to court to disclaim such a contract as being unprofitable. If such a cross-application is granted, the contract may be avoided on terms. Damages suffered by the creditor will be a provable debt in the liquidation or bankruptcy, as the case may be.

In most instances, unless the liquidator or judicial manager decides to perform the contract or to cure the breach, a winding up / judicial management (or bankruptcy) order will give rise to a termination of contract and entitle the creditor to a right to an equitable remedy for breach of performance.

Since there is a stay of actions against a company in insolvent winding up / judicial management (or bankruptcy), the remedy of the claimant will be a presentation of claim to the liquidator / judicial manager (or bankruptcy trustee).

Any aggrieved parties may apply to court for relief.

B. Defenses

1. Bar dates

Rule 91 of the Companies (Winding Up) Rules provides that a liquidator may from time to time fix a day (which shall not be less that 14 days from the date of the notice) on or before which the creditors of the company are to prove their debts or claims or be excluded from the benefit of any distribution made before such debts are proved.

Rule 81(1) (b) of the Companies (Winding Up) Rules further stipulates that a declaration proving a debt in Form 77 must be filed by the creditor within three months after the winding up order is made.

The above rules are however to a large extent, rendered ineffective by Rule 101(1). This rule requires a liquidator in any winding up, not more than 2 months before declaring a dividend (that is, a distribution to creditors), to give notice of the liquidator's intention to do so to every creditor mentioned in the statement of affairs who has not proved his debt. Such notice shall specify the latest date up to which proofs must be lodged, which shall not be less than 14 days from the date of notice. In this regard, the liquidator is required to publish the notice in the

Gazette (and a newspaper or newspapers as he considers appropriate) and at the same time, send such notice to every creditor mentioned in the statement of affairs who has not proved his debt (and, in general practice, to every person who, to the knowledge of the liquidator, claims to be a creditor of the company, as required by Rule 91).

Where a creditor, after the latest date for lodging proofs mentioned in the notice of intention to declare a dividend, appeals against the decision of the liquidator (or bankruptcy trustee) rejecting a proof –

(a) The appeal shall be commenced and notice thereof given to the liquidator (or bankruptcy trustee) within seven days from the date of the notice of rejection against which appeal is made; and

(b) The liquidator (or the bankruptcy trustee) shall make provision for the dividend payable upon the proof and the probable costs of the appeal in the event the proof is admitted.

If no appeal has been commenced within the prescribed time, the liquidator (or the bankruptcy trustee) shall exclude the proof which has been rejected from participation in the dividend.

A creditor who submits his claim after the notice period may not be entitled to the dividend payment and shall not be entitled to disturb any distribution made before his debt was proved. However, Section 118 of the Bankruptcy Act provides that when a creditor has proved his debt after the notice period, he shall be entitled to be paid from available funds for any dividend or dividends which he has failed to receive, and that any future dividends shall be paid only after the aforesaid dividend(s) payable to the unsatisfied creditors are made good.

2. Defenses

a. *Non-bankruptcy defenses*

Liabilities that could not have been enforced against the Company prior to liquidation (or bankruptcy) cannot be admitted to proof. Hence statute-barred claims and claims which are void due to illegality are not provable.

A creditor may also owe a duty to the debtor to mitigate its own losses.

Section 103 of the Bankruptcy Act stipulates that if a transaction is found to be extortionate by the Court, the obligation created by the transaction may be set aside.

A transaction shall be extortionate if, having regard to the risk accepted by the person providing the credit –

(a) The terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit; or

(b) It is harsh and unconscionable or substantially unfair,

and it shall be presumed, unless the contrary is proved, that the transaction was extortionate.

An order under this section may contain one or more provisions relating to the following:

(a) Setting aside the whole or part of any obligation created by the transaction;

(b) Varying the terms of the transactions or varying the terms on which any security for the purposes of the transaction is held;

(c) Requiring any person who is or was party to the transaction to pay the bankruptcy trustee (or liquidator) any sums paid to that person;

(d) Requiring any person to surrender to the bankruptcy trustee (or liquidator) any property held by him as security for the purposes of the transactions;

(e) Directing accounts to be taken between any persons.

Any sums or property required to be paid or surrendered to the bankruptcy trustee (or liquidator) in accordance with an order under this section shall form part of the assets of the bankruptcy estate.

b. *Bankruptcy defenses*

If the debtor has a claim for an unfair preference or an undervalue transaction against a creditor, such a cause of action may be used as a defense to the proof of claim. However, it will be prudent for a prior court order to be obtained by the debtor declaring the relevant transaction as an unfair preference or an undervalue transaction (as the case may be).

As mentioned above, Section 87(2) of the Bankruptcy Act provides that a person having notice of the presentation of a petition shall not prove for any debt or liability contracted subsequent to the date of his so having notice.

Section 88 of the Bankruptcy Act also provides that a creditor who in mutual dealings with the company is also its debtor shall setoff the debt and prove only the balance, if any.

Section 250(1)(g) of the Companies Act states that a sum due to any member in his capacity as a member by way of dividends, profits or otherwise shall not be a debt of the company payable to that member in a case of competition between himself and another creditor who is not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories (a "contributory" is defined in the Companies Act as "in relation to a company, means a person liable to contribute to the assets of the company in the event of its being wound up…") among themselves.

C. Claims adjudication procedures

1. Standing to object

The liquidator (or the bankruptcy trustee) shall examine every proof of debt lodged and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof, he must set out in writing the grounds of the rejection. Case law demonstrates that this statutory duty to examine proofs must be carried out thoroughly. It is generally inappropriate for a liquidator to seek directions from the court as to the admission of a proof of debt.

The Singapore High Court in *ERPIMA SA v Chee Yoh Chuang & Anor* helpfully observed that the duty to "examine" proofs of debt is an investigative and an adjudicative function. To buttress the same, the judicial manager is conferred powers by the regulations to administer oaths and take affidavits. He has to decide judicially on the evidence before him and if in doubt, is entitled to, and should take, legal advice. As his role is quasi-judicial, he cannot act unjudicially, capriciously or arbitrarily.

It is likely that the observations of the Singapore High Court in the ERPIMA case apply with full force in respect of a liquidator's / scheme manager's / bankruptcy trustee's duty to examine proofs of debt. In this regard, it should be noted that the power to administer oaths and take affidavits is also conferred on a liquidator in a court-winding up pursuant to Regulation 96 of the Companies (Winding Up) Rules.

Rule 98, Companies (Winding Up) Rules, provides that the statutory time limit for a liquidator to examine proofs is 14 days from the latest date for lodgment of proofs stipulated in the notice of intention to declare a dividend.

If a creditor is dissatisfied with the decision of the liquidator in respect of the proof, he should make an application to the Court to reverse or vary the decision,

within 21 days from the date of the service of the notice of rejection. Rule 93 of the Companies (Winding Up) Rules also confers *locus standi* on a contributory to take issue with a liquidator's adjudication of a proof. Presumably, this would be in cases of a perceived wrongful admission of a proof which would practically have the effect of reducing amounts payable (if any) to contributories. No time limit applies to such an application by a contributory.

Where a creditor's proof has been admitted, the notice of dividend is sufficient notification to the creditor of the admission.

A creditor's proof may, however, be withdrawn or varied at any time by agreement between himself and the liquidator (or the bankruptcy trustee).

If a liquidator considers that a proof has been improperly admitted, he may apply to the High Court, after giving notice to the proving creditor concerned, to expunge the proof or reduce its amount. The Court may also expunge or reduce a proof upon the application of a creditor or contributory if the liquidator declines to interfere in a proof which has been improperly admitted.

Rule 179 of the Bankruptcy Rules provides that any creditor (or his authorized representative) who has submitted his proof of debt (unless his proof has been wholly rejected) and the debtor (in the case of bankruptcy) shall, upon payment of a prescribed fee, be allowed to inspect the proofs lodged.

Section 87 of the Bankruptcy Act (where it also applies to an insolvent winding up) further provides that the Official Assignee shall make an estimate of the value of any provable debt or liability which, by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a value.

Any person aggrieved by any such estimate may appeal to the court.

If in the opinion of the Court the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall be deemed to be a debt not provable in bankruptcy.

Conversely, if in the opinion of the Court the value of the debt or liability is capable of being fairly estimated, the Court may assess the same and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

2. Burdens of proof

Typically, it is the liquidator / judicial manager/ scheme manager / bankruptcy trustee who initiates a rejection of proof. In practice, the liquidator / judicial manager / scheme manager / bankruptcy trustee will generally endeavor to resolve the disputes in an amicable manner with the claimant in order to avoid incurring unnecessary legal costs and, where necessary, seek the approval of the creditors' committee before rejecting any claims.

In a court winding up, within three days after receiving notice from a creditor of his intention to appeal a decision rejecting a proof, the liquidator must file such proof with the Registry of the Supreme Court, together with a memorandum stating the reasons for his disallowance of the same.

The burden of proof shall be on the creditor to set out his grounds and provide evidence as to why the proof should not have been rejected. The standard of proof is the civil standard, i.e., on a balance of probabilities. The Court must approach the question afresh. This means that although the burden of proof still remains on the appealing creditor, the parties are at liberty to adduce further evidence to the material before the adjudicator when the proof was rejected. The judge, however, may not disregard the grounds of rejection given by the liquidator and must accord due weight to the same.

3. Jurisdiction

Only the High Court has jurisdiction over proceedings relating to bankruptcy, Court winding up, schemes of arrangement and judicial management.

4. Discovery

Any application to reverse or vary a decision of the bankruptcy trustee / liquidator is to be done by summons. In this regard, as a general rule, discovery is not permitted.

5. Claims adjudication

A date will be fixed for the High Court to hear the application. The Court may, upon hearing the parties' respective cases, reverse or vary the decision of the liquidator / bankruptcy trustee.

After the hearing is over, the proof, unless it has been wholly disallowed, must be returned to the bankruptcy trustee, according to Rule 198(5) of the Bankruptcy Rules.

6. Costs of litigation

A creditor shall bear the cost of proving his debt unless the Court orders otherwise.

Rule 100 of the Companies (Winding Up) Rules further provides that the liquidator shall in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part.

7. Appeals

Should parties be dissatisfied with the decisions of the High Court, they may file appeal to the Court of Appeal, which is the final court of appeal in Singapore.

United States of America

In the United States, bankruptcy law comes primarily from the United States Bankruptcy Code, which is federal legislation authorized by the United States Constitution. The Bankruptcy Code preempts state insolvency regimes so that the commencement of proceedings under the Bankruptcy Code displaces any pending state proceeding. The Bankruptcy Code deals with the bankruptcy of both individuals and business entities, but does not cover banks, insurance companies and certain securities dealers.

A. Claims presentment

1. Proofs of claim

The formal requirements for presenting claims in a bankruptcy case are set forth in Chapter 5, Sub chapter I of the Bankruptcy Code and Part III of the Federal Rules of Bankruptcy Procedure.

A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest. (Bankruptcy Code § 501(a)). If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, (such as a surety, guarantor, endorser or other co-debtor) may file a proof of such claim. Also, if a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim. (Bankruptcy Code §§ 501(b) and (c); Fed. R. Bankr. P. 3004 and 3005). If another party files a timely claim on behalf of a creditor, a creditor may thereafter file a proof of claim which will override the claim filed by the co-debtor, trustee or debtor. (Fed. R. Bankr. P. 3004 and 3005).

Generally, in order to assert a claim, a creditor or an indenture trustee must file a proof of claim. However, there are exceptions to the general rule. In cases under Chapters 9 and 11, the debtor is required to file a schedule of liabilities that constitutes prima facie evidence of the validity and amount of the claims of creditors included in the schedule, unless they are scheduled as disputed, contingent, or unliquidated. If the creditor's claim is included on the schedule, and the claim is not listed by the debtor as disputed, contingent, or unliquidated, and the creditor does not disagree with the amount of the claim, the creditor does not need to file a proof of claim. (Fed. R. Bankr. P. 3003(b)).

Similarly, the debtor is required to file a list of equity security holders. The list constitutes prima facie evidence of the validity and amount of the equity security interests. It is not necessary for the holder of scheduled equity security interests to file a proof of interest. (Fed. R. Bankr. P. 3003(c)). An entity who is not the record holder of a security may file a statement setting forth facts which entitle that entity to be treated as the record holder. (Fed. R. Bankr. P. 3003(d)).

A proof of claim is a written statement setting forth the creditor's claim. The proof of claim must substantially conform to Official Form 10. The proof of claim must be executed by the creditor or the creditor's authorized agent. (Fed. R. Bankr. P. 3001). Exceptions to the rule exist for the filing of claims by a debtor or trustee or by a guarantor, surety, endorser or other codebtor. (Fed. R. Bankr. P. 3004 and 3005). Other than Rule 3001, the Bankruptcy Code and Rules do not provide a guide to the contents of the proof of claim. (Collier ¶ 3001.01). Courts have held that, in setting forth the creditor's claim, the proof must make a demand against the debtor, but generally courts do not even require that a claim be valid prima facie. (Collier ¶ 3001.01 *citing Liaka v. Creditors' Committee*, 780 F.2d 176 (1st Cir. 1986)).

If the claim, or interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate must be filed with the proof of claim. If the writing is lost or has been destroyed, a statement of the circumstances of the loss or destruction must be filed with the claim. If the creditor is asserting a security interest in property of the debtor, the proof of claim must be accompanied by evidence that the security interest has been perfected. (Fed. R. Bankr. P. 3001).

Generally, proofs of claim must be filed with the clerk of the court where the case is pending. (Fed. R. Bankr. P. 5005). However, in some cases, the court may enter an order that requires that proofs of claim be filed with a claims agent appointed by the court. (28 U.S.C. § 156(c)). Rule 5005(a)(2) provides for courts to permit proofs of claim to be filed by electronic means. Implementation of electronic filing of proofs of claim remains sporadic, and therefore such filing will be governed by local rules.

The courts do not agree on whether a claim may be filed for a class, as in a class action. (Collier ¶ 3001.07). An apparent majority of courts of appeal and lower courts permit class representatives to file claims on behalf of their class. (*In re Craft*, 321 B.R. 189, 192 (Bankr. N.D. Tex. 2005)). Federal Rule of Civil Procedure 23, applicable in bankruptcy through Bankruptcy Rule 7023, states the requirements and procedures for a civil class action. (Fed. R. Civ. P. 23; Fed. R. Bankr. P. 7023). Indeed, it has been argued that there would be no use for Rule 7023 if claims could not be filed for a class. (*In re Craft*, 321 B.R. at 193).

2. Types of claims

"Claim" is broadly defined in the Bankruptcy Code § 101(5) to mean:

(A) Right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) Right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." This definition includes tort claims.

Claims that may arise in the future may not be claims for bankruptcy purposes. One example of such a claim is an individual that has been exposed to asbestos but has manifested no injury. Also, the holder of an equity security, without more, does not hold a claim. (Collier ¶ 101.05[1]).

3. Unmatured, contingent and unliquidated claims

Bankruptcy has the effect of accelerating claims. Thus, any obligation that has a maturity date after the filing of a bankruptcy case automatically becomes due and payable as of the date of the commencement of the bankruptcy case unless the debtor or trustee takes action to cure and reinstate the maturity of the obligation.

Creditors can assert claims that are contingent or unliquidated. Bankruptcy Code § 502(c) requires the bankruptcy court to estimate a contingent or unliquidated claim when the fixing or liquidation of such claim would unduly delay the administration of the case. For example, a bankruptcy court may fix the amount of damages in a pending lawsuit against the debtor. (*In re Nova Real Estate Inv. Trust*, 23 B.R. 62 (Bankr. D. Va. 1982)). Or a court may fix the date of a claim where the value of the claim depends on the changing market rate. (*In re Brints Cotton Marketing, Inc.*, 737 F.2d 1338 (5th Cir. Tex. 1984)). Bankruptcy Code § 502(c) also requires the court to estimate any right to payment arising from a right to an equitable remedy for breach of performance, such as a state's right to an equitable remedy for violation of its environmental laws. (*Ohio v. Kovacs*, 469 U.S. 274 (1985)); *see also In re Microfab, Inc.*, 105 B.R. 161 (Bankr. D. Mass. 1989)).

The bankruptcy court also may estimate a claim for purposes of allowing a creditor to vote to accept or reject a plan of reorganization. However, such estimate is only for voting purposes and does not fix the creditor's claim for the purpose of payment. (11 U.S.C. § 157(b)(2)(B); Fed. R. Bankr. P. 3018(a)).

4. Claims for equitable remedies

A claim includes an equitable right to performance which gives rise to a right of payment. (Collier ¶ 101.05[5]). This includes, for example, cases in which a purchaser's down payment created a right to either performance or a remedy for breach of performance. (*In re Cybermech Inc.*, 13 F.3d 818 (4th Cir. 1994)). However, where the rights to an equitable remedy do not give rise to a right to payment, they are not claims. For instance, equitable remedies, such as resulting trust or deed reformation, are not claims under the Bankruptcy Code unless they give rise to an alternative remedy for money damages. (Bankruptcy Code § 101(5); *In re Davis*, 3 F.3d 113 (5th Cir. 1993)).

B. Defenses

1. Bar dates

In a case under Chapters 7, 12 and 13, proofs of claim must be filed no later than 90 days after the first date set for the meeting of creditors under Bankruptcy Code § 341 (Fed. R. Bankr. P. 3002(c)). Fed. R. Bankr. P. 3002(c) lists the following exceptions to the 90 day rule:

(1) A proof of claim filed by a governmental unit … is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the governmental unit. ...

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

(6) If notice of the time for filing a proof of claim has been mailed to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was not sufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.

In a case under Chapters 9 and 11, the court enters an order establishing the deadline for filing proofs of claim and interests. (Fed. Rule Bankr. P. 3003(c)(1) and (c)(3)). The deadline for filing claims may be extended by the court "for cause shown." A request for an extension of the deadline must be made and adjudicated before the expiration of the bar date. Additionally, a proof of claim may be filed after the court-established deadline as set forth in Rule 3002(c)(2), (3), (4), (5) and (6), the provisions of which are set forth above.

An entity that is liable on a debt of the debtor (such as a surety, guarantor, endorser or other codebtor) or has secured a claim against a debtor may file a proof of claim in the name of the creditor if the creditor has not filed a proof of claim. The deadline for doing so is 30 days after expiration of the time for filing claims set forth in Rule 3002(c) or fixed by the bankruptcy court pursuant to Rule 3003(c). (Fed. R. Bankr. P. 3005 (a)).

The bar date for filing claims is strictly enforced and late-filed claims may be disallowed. (Bankruptcy Code § 502(b)(9)). If a creditor in a Chapter 11 case files a proof of claim after the bar date established by the court and does not seek an extension of that deadline prior to its expiration, the creditor's claim may be allowed if it can establish that its failure to file the claim was the result of excusable neglect. (*Pioneer Investment Servs. Co. v. Brunswick Assocs., L.P.*, 507 U.S. 380 (1993). Excusable neglect has been found where, among other factors such as lack of prejudice to the debtor, the creditor's attorney experienced "'a major and significant disruption' in his professional life caused by his withdrawal from his former law firm." Id. at 384.

2. Defenses

a. *Non-bankruptcy defenses*

The trustee or the debtor in possession can assert, on behalf of the estate, any defense to a claim that the debtor could have asserted outside of bankruptcy. (Bankruptcy Code § 558). However, certain defenses based on the expiration of time limits to bring a claim may be altered under Bankruptcy Code § 108 (Collier ¶ 558.01[1] n.1), and the failure to take certain actions as a condition to asserting a claim may be excused under Section 546 due to the existence of the automatic stay. (Collier ¶ 546.02[1][c] *citing, e.g., Sears Petroleum & Transport Corp. v. Burgess Constr. Servs., Inc.*, 417 F. Supp. 2d 212 (D. Mass. 2006)).

b. *Bankruptcy defenses*

The Bankruptcy Code provides for the equitable subordination of claims. Bankruptcy Code § 510(c) states that after notice and a hearing, the court may:

(1) Under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) Order that any lien securing such a subordinated claim be transferred to the estate.

The courts disagree as to whether creditors or only the debtor and trustee have standing to assert equitable subordination. Equitable subordination typically results from the creditor's affirmative misconduct in dealing with the debtor prior to the bankruptcy. Examples of inequitable conduct include undercapitalization (*Benjamin v. Diamond (In re Mobile Steel Corp.)*, 563 F.2d 692 (5th Cir. 1977)) and fraud (*Pepper v. Litton*, 308 U.S. 295 (1939)). (*generally* Collier ¶ 510.05[3][e]).

The debtor or trustee can seek the disallowance of a claim based on the creditor's failure to comply with certain obligations imposed by the Bankruptcy Code such as failing to turn over property of the debtor's estate or failing to restore property to the estate that is the subject of an avoidable setoff, lien or other transfer. (Bankruptcy Code § 502(d)). The Bankruptcy Code has broad avoidance powers and Section 502(d) may provide an effective means of recovering value for creditors where the recipient of an avoidable transfer cannot or will not return the property transferred.

C. Claims adjudication procedures

The claims adjudication process in bankruptcy is formal and resembles civil litigation. The issues are developed through pleading, document and deposition discovery is available, the case can be developed through motion practice and there is a formal trial in which testimonial and documentary evidence is presented in accordance with the rules of evidence applicable in other civil litigation.

1. Standing to object

A party in interest may object to a claim. Parties in interest include trustees, Chapter 11 debtors in possession, Chapter 12 debtors, Chapter 13 debtors and creditors of a general partner in a partnership that is a debtor in a Chapter 7 case. In some instances, creditors, Chapter 7 debtors, Chapter 11 debtors and equity holders may be considered parties in interest that may object to proofs of claim. While it is typically the trustee or debtor in a Chapter 11 case that objects to claims, the plain language of section 502(a), which provides the right of objection to a party in interest, does not preclude other parties from objecting. (Bankruptcy Code § 502(a)). (also Collier ¶ at 3007.01[3]). Other than the trustee or debtor, the most common party to object is a creditors committee in a Chapter 11 case. (Collier ¶ 3007.01[2]).

An objection to a proof of claim must be made in writing, filed with the court and mailed or delivered to the claimant whose claim is the subject of the objection, together with a notice of the time and place for the hearing on the objection. Rule 9004 requires that the objection contain a proper caption and must state that it is an objection to a proof of claim. A form of case caption is set forth in Official Form 16A. A form of notice of objection to claim is set forth in Official Form 20B.

An objection to a proof of claim initiates a “contested matter.” The procedures for contested matters are set forth in Rule 9014 of the Federal Rules of Bankruptcy Procedure. An objecting party can assert a counterclaim on behalf of the estate with the objection, such as an action to avoid a preferential transfer. If this occurs, a different procedure called an “adversary proceeding” is applied. Under those circumstances, the counterclaim must be asserted in the same manner as a lawsuit, by filing and serving a complaint. The procedures for adversary proceedings are set forth in Part VII of the Federal Rules of Bankruptcy Procedure. Generally, adversary proceedings have longer set time periods for responses and more applicable rules.

2. Burdens of proof

A proof of claim that is properly filed in accordance with Bankruptcy Code § 501 constitutes prima facie evidence of the validity and amount of the claim. Unless the objector introduces evidence as to the invalidity of the claim or the excessiveness of its amount, the claimant need offer no further proof of the merits of its claim. The party that objects to a claim carries the burden of going forward with evidence disputing the validity and amount of the claim.

Once the objecting party provides evidence to overcome the prima facie validity of the claim, the ultimate burden of persuasion reverts to the claimant. The claimant must establish its claim by a preponderance of the evidence. The objecting party bears the burden of proving any affirmative defenses, such as the statute of limitations, usury, avoidable transfer, setoff or counterclaim.

3. Jurisdiction

Generally, the bankruptcy court determines whether a claim against the estate will be allowed or disallowed. (28 U.S.C. § 157(b)). The bankruptcy court is a court of limited jurisdiction within the United States Federal Court system. It is referred bankruptcy cases by the district court on an automatic basis, but the reference is subject to withdrawal as discussed below. The bankruptcy court hears matters arising in or related to bankruptcy cases. The bankruptcy court does not have authority to conduct a jury trial.

A party filing a proof of claim does not have the right to a jury trial in connection with that claim even if it would have had such a right outside of bankruptcy. An important exception to this rule is for personal injury and wrongful death claims. Those claims are tried in the district court in which the bankruptcy case is pending or the district court in which the claim arose. (28 U.S.C. § 157(b)(5)).

The district court may withdraw the reference of any case or proceeding in a Title 11 case for cause. (28 U.S.C. § 157(d)). In considering withdrawal for cause, courts are reluctant to withdraw core proceedings because of the risk of inefficient allocation of judicial resources, given the bankruptcy court's familiarity with the issues in a case and its power to render final judgments. (28 U.S.C. § 157(b)(2)(B), *In re Chateaugay Corp.*, 104 B.R. 622 (S.D.N.Y. 1989)). The second sentence of section 157(d) requires withdrawal if the proceeding implicates both Title 11 and U.S. laws that regulate organizations or activities affecting interstate commerce." (28 U.S.C. § 157(d). This power has been used sparingly. (*Contemporary Lithographers, Inc. v. Hibbert (In re Contemporary Lithographers, Inc.)*, 127 B.R. 122, 127-128 (N.D.N.C. 1991)).

If litigation of a claim is pending in another court at the time of the bankruptcy, that litigation is stayed. Unless the litigation is in a far advanced stage and nearly ready for trial, the litigation will remain stayed and the bankruptcy court will determine the claim.

If an agreement between the parties provides that a dispute under the agreement is to be arbitrated, the bankruptcy court will generally order the parties to proceed to arbitration. Many courts will also order the parties to proceed to mediation if the agreement provides for it. Many bankruptcy judges favor mediation as a way of resolving disputes and will often order parties to engage in mediation during the course of proceedings.

4. Discovery

Discovery is permitted in both contested matters and adversary proceedings. In a contested matter, parties generally may take depositions, serve interrogatories, request the production of documents, conduct physical and mental examinations of persons and make requests for admissions. (Fed. R. Bankr. P. 9014(c)). In an adversary proceeding, in addition to the aforementioned methods of discovery, the parties also must make certain mandatory disclosures, including disclosure of expert testimony. (Fed. R. Bankr. P. 7026).

5. Claim adjudication

The bankruptcy court conducts hearings to resolve claims. (As noted above, in the case of personal injury torts and wrongful death claims, the district court conducts the trial). When there is a dispute involving a material fact, the testimony of witnesses is to be taken orally in open court. (Fed. R. Bankr. P. 9014(d), 9015). However, disputed factual matters may be resolved on affidavits by agreement of the parties.

Orders from other courts that have adjudicated the underlying claim generally are recognized. However, whether the claim against the estate will be allowed or disallowed remains within the jurisdiction of the bankruptcy court. Claims that have been reduced to judgment by another court may be disallowed for bankruptcy-based reasons, such as that the creditor received an avoidable transfer and has failed to return the debtor's property. (Bankruptcy Code § 502(d)).

6. Costs of litigation

Under the so-called "American" rule, each party generally bears its own costs. However, the prevailing party may recover attorneys' fees and costs if that is provided for by a pre-bankruptcy contract.

7. Appeals

Judgments, orders, and decrees of the bankruptcy court are appealable to the United States District Court as of right (Fed. R. Bankr. P. 8001(a), 28 U.S.C. § 158(a)). Appeal can also be made to a bankruptcy appellate panel if (1) the parties consent, (2) judicial resources are available, and (3) such appeal to the appellate panel would not result in undue delay (28 U.S.C. § 158(b)). Orders of the District Court and bankruptcy appellate panels are appealable to the United States Court of Appeals as of right. (28 U.S.C. § 158(d)(1)). Judgments or decrees of the Court of Appeals are appealable to the United States Supreme Court, but the Supreme Court has discretion on whether to hear an appeal. (28 U.S.C. § 1254). Unless a matter was resolved without trial on summary judgment (*Gray v. Manklow (In re Optical Techs., Inc.)*, 246 F.3d 1332 (11th Cir. 2001)), the appellate court will only reverse the ruling of the bankruptcy court for an error of law (Collier ¶ 8013.04 *citing Alcom Am. Corp. v. Arab Banking Corp.*, 48 F.3d 539 (D.C. Cir. 1995) and other cases) or a clear error in the determination of the facts. (Fed. R. Bankr. P. 8013).

INSOL INTERNATIONAL

2-3 Philpot Lane, London EC3M 8AQ, UK
Tel: +44 (0)20 7929 6679
Fax: +44 (0)20 7929 6678
www.insol.org