INSOL International™

EMPLOYEE ENTITLEMENTS II

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International Association of Restructuring, Insolvency & Bankruptcy Professionals

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President's Introduction

On behalf of INSOL International, I am very proud to introduce the 2nd edition of "Employee Entitlements" in e-book format. As stated by Robert S. Hertzberg, who was President of INSOL International when the first edition of the Employee Entitlements book was published in 2005, for employees of a financially distressed company there is seldom a more emotionally wrenching issue than the treatment of their salary, wage and benefit claims in an insolvency process. This is as true today as it was in 2005, perhaps even more so than before.

Employee entitlements are dealt with in a number of diverse ways in various jurisdictions. This book provides this information in a consolidated format covering 35 jurisdictions – 11 more than was the case in the 1st edition of the book in 2005. The new jurisdictions that have been added are Chile, Indonesia, Kenya, Malawi, Mauritius, Mexico, Nigeria, Poland, Portugal, Romania, Singapore, South Korea, Spain and Zimbabwe.

The 2nd edition of this book not only updates and refreshes the existing country contributions, but features slightly adjusted questions as well as new information relating to future reforms; however, the information requested remains largely the same. Retaining the essence and format of the questions set in the previous edition has enabled the contributors to more readily update the existing chapters for this edition.

While this book will be enormously useful to practitioners working in this area, it can also be used as a very useful reference source by governments looking to implement or amend legislation dealing with employee entitlements. Employee entitlements and the various ways in which these are dealt with, make for fascinating reading. We hope that you will find this book useful as a reference source and that it will assist you in addressing these issues in practice.

We would like to thank the many INSOL members who have generously given their time and expertise in providing us with the information regarding their jurisdictions. The project was led by David Cowling and Natalie Tatasciore (King & Wood Mallesons, Australia) and we would like to sincerely thank David and Natalie for the time and effort they have invested in bringing this project to fruition.

Adam Harris
President, INSOL International, Bowmans

Foreword

INSOL first published "Employee Entitlements" more than 10 years ago. It is purely coincidental that publication was followed by the Global Financial Crisis. Nevertheless, the GFC was a timely reminder that, in economics as in life, there are no perpetually good times. There may be peaks and troughs in the rate of insolvencies, but there is never (and will never be) a time when the expertise of insolvency practitioners is not needed to mitigate and manage the effect of insolvency on a variety of stakeholders.

It has long been recognised that one particularly vulnerable group of stakeholders is the employees of insolvent businesses. Unlike many other creditors, they can do little to protect their position while insolvency is looming, and they often have no other sources of income once insolvency strikes.

Governments around the world have responded to this issue by legislating special protections for employees. This usually involves a judgement call about the respective positions of unsecured creditors, secured creditors and employees: how far can you protect employees without jeopardising or downgrading a business's ability to source materials or services, or to raise funds on security?

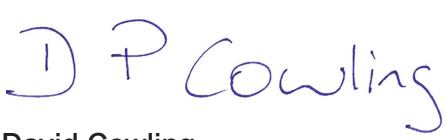
As the various chapters in this book show, there is no universally-accepted answer to this question. For that reason alone, the book is a valuable read. If nothing else, seeing how other jurisdictions handle employee entitlements in insolvency allows us to look at our own country's laws with a slightly more critical eye. Since an important part of INSOL's work is the constant improvement of insolvency laws, this publication can be seen as a significant contribution to that mission.

Another, equally important, function of the book is to allow us to familiarise ourselves with insolvency regimes that we may encounter in the course of our work. If nothing else, the GFC clearly demonstrated that the flipside of the ever-increasing globalisation of trade is the concomitant globalisation of insolvency practice. Nothing can substitute for detailed local knowledge, of course, but a high-level grasp of key topics such as employee entitlements in other jurisdictions is a great facilitator of mutual understanding and, consequently, of more effective transnational insolvency and reconstruction management.

It was with those aims in mind that this book was designed. Practitioners from 40 jurisdictions were asked to respond to a set of standardised questions. The questions have been pitched at a level that allows the reader to grasp the essentials of the relevant law without becoming bogged down in detail. Armed with that knowledge, readers will both understand the "big picture" and know what further questions to ask in the light of the particular insolvency with which they are dealing.

As always, no project like this will ever be the last word. The constant changes in national insolvency laws mean that this is only a snapshot. In addition, the experience of practitioners in using the book may reveal areas for improvement or a change of emphasis. I would therefore encourage you to provide us with feedback on how you've used the book, so that future editions can be even more useful.

Having said that, I must acknowledge the hard work of those who have got us this far. That includes the many INSOL members around the world who have contributed chapters and David Burdette from INSOL.



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ARGENTINA

1. How is an employee defined for the purposes of formal insolvency proceedings?

The Argentine Insolvency Law[1] refers to an employee as a trabajador (worker). The Work Contract Law[2] *Régimen de Contrato de Trabajo* defines the employment relation as "work" (trabajo) and states that "[f]or the purposes of this law, work is any legal activity that is performed for the benefit of him / her who has the power to direct it, for a remuneration". [3]

2. What are the employee entitlements and to what extent (if any) are they given priority treatment during the formal insolvency proceedings?

2.1. Privileges in insolvency proceedings established by Argentine Insolvency Law

The Argentine Insolvency Law establishes a system of privileges / preferences in insolvency proceedings. These preferences can only arise from a legal rule, cannot be created by the will of the contracting parties and are subject to restrictive interpretation. A preference cannot be declared by analogy.

The Insolvency Law deals with priority of employee claims in three ways:

- **Special priority employee claims:** some employee claims have a special priority over the proceeds of the liquidation, in particular the proceeds of the liquidation of all merchandise, raw materials and machinery belonging to the debtor and which are stored in the establishment where the employee has rendered services or which may be used to conduct the business.[4] Payment of arrears of interest for 2 years after the employer defaults in payment of recognized items is also allowed.[5]
- **General priority employee claims:** certain other employee claims have a general priority over the proceeds of liquidation of the general assets of the debtor.[6]
- **All other employee claims:** all employee claims not awarded a special priority or a general priority are considered unsecured claims in the liquidation.[7]

Special priority employee claims

Special priority employee claims are as follows:

(a) Arrears of wages: Six months' salary due to an employee before the filing of a voluntary reorganization proceeding or a declaration of bankruptcy.

(b) Redundancy Pay: If a work contract is terminated by an unjustified decision of the employer, the worker is entitled to a severance compensation payment equivalent to one month's salary for each year of service or period of service exceeding 3 months. This amount is based on the highest salary earned in the last year or period of service exceeding 3 months. There are both upper and lower limits on the amount to which the worker is entitled:

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1 24.522 Argentine Insolvency Law (AIL).
2 Law 20.744 (WCL).
3 WCL, art 4.
4 AIL, art 241, s 2).
5 *Idem*, art 242, s 1.
6 *Idem*, art 246, s 1).
7 *Idem*, art 248.

- statutorily, it cannot be more than three times the monthly median of all salaries contained in the trade-union agreements applicable to each worker (excluding seniority). It should be noted that this limit has been declared unconstitutional by the Supreme Court of Argentina.[8] As a result, the limit is now three times the best monthly regular remuneration of each individual worker;
- it cannot be **less** than one month's salary;
- however, if the work contract has been terminated because of a diminution in the activity of the enterprise that is not attributable to the employer, the amount of severance pay is halved.[9] What constitutes "a diminution not attributable to the employer" has been interpreted quite restrictively.

(c) Compensation for the death of an employee: Compensation for the death of an employee is payable to the next-of-kin.[10]

(d) Additional (bonus) yearly salary pay: Each year, a worker is entitled to be paid an additional 1/12 of his or her annual salary. This is payable in two instalments (one on 30 June and the other on 18 December).[11] Whenever a work contract is terminated, the worker is entitled to compensation equivalent to 1/12 of the total salary paid in the last semester.[12] This claim is assimilated to wages.

(e) Last month's salary: A terminated worker is entitled to one month's salary if the termination[13] is notified to the worker without the prescribed due notice, and on a date that is not the last day of the month.

(f) Holiday pay: Workers are entitled to paid vacations. If the work contract is terminated,[14] the worker is entitled to a proportional holiday payment. This claim is assimilated to wages.

(g) Termination without proper notice: Employers are required to give employees notice of termination. The amount and timing of the notice are prescribed. If these requirements are not complied with, the worker is entitled to compensatory payments. This claim is assimilated to wages.

(h) Unfair discriminatory dismissal claim: The general provisions prohibiting all discriminatory acts[15] are applicable to dismissals.

(i) Compensation for work-related accidents: The Labor Risk Law[16] prescribes mandatory insurance for most employers through specific insurance corporations (*Aseguradoras de Riesgos del Trabajo,* or *ARTs*).

(j) Unemployment insurance (redundancy compensation funds): Workers made redundant are covered under a National Employment Fund[17] (*Fondo Nacional de Empleo*), to which employers contribute a percentage of the payroll. The program covers most aspects of redundancy in addition to insolvency.

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8 CSJN, Sept. 14, 2004, *Vizzotti c/ AMSA, El Derecho*, Oct. 13, 2004, nr. 52.998.
9 WCT, art 247.
10 *Idem*, art 248.
11 *Idem*, arts 121 and 122.
12 *Idem*, art 123.
13 WCL, art 233.
14 *Idem*, art 156.
15 Law nr. 23.592 (1988).
16 Law nr. 24.557 *Ley de Riesgos del Trabajo* (LRL).
17 Law 24.013, art 114, s e.

General priority employee claims

General priority employee claims have a lien over the general assets of the debtor. These claims include:

- all special priority claims which are unpaid due to the fact that the assets under the special priority lien were insufficient to cover them; and
- any other claims derived from the work contract, as well as interest for two years after default in payment of salaries and the costs of any judicial proceedings brought against the debtor by the worker.

2.2 Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173):

The Convention on the protection of labor claims in case of an employer's insolvency (*Convenio sobre la protección de los créditos laborales en caso de insolvencia del empleador*), 1992 (No. 173) of the International Labor Organization (ILO) has been included in Argentine Law as a consequence of the decision of the Supreme Court of Justice of Argentina in *Pinturas y Revestimientos Aplicados S.A. s/ Quiebra* dated March 26th, 2014.

The Convention establishes a preference for claims relating to:

- Salaries for a specified time period, which must not be less than three months and which must precede the insolvency or the termination of the employment;
- Sums owed on account of paid holidays accrued during both the year in which insolvency or the termination of employment occurred, and the preceding year.;
- Sums owed to workers for paid absences corresponding to a specific time period, which must not be less than three months and which must precede insolvency or the termination of employment, and;
- Severance pay due to workers upon termination of employment.

As regards the relative ranking of these claims, the Convention states that:

"National laws or regulations shall give workers' claims a higher rank of privilege than most other privileged claims, and in particular those of the State and the social security system."

Because the Convention is an international treaty signed by Argentina, it takes precedence over Argentine domestic law. As a result, the Convention has impacted the AIL by modifying its privilege regime, as explained in the following section.

2.3 Payment of claims

Prompt payment of labor claims in voluntary reorganization proceedings

Where a voluntary reorganization has been proposed, the law establishes the following procedure for the payment of labor claims during the reorganization:

(a) When petitioning for a reorganization, the debtor must present the creditors' ledger (including labor claims), indicating the domiciles of the creditors and the amounts, causes, expiration dates and preferences of their claims;

(b) After 10 days of the opening of the reorganization procedure, the Trustee designated for the proceeding must present a report on the labor claims reported by the debtor and the existence of other relevant labor claims.
(c) Within 10 court days after the presentation of the report, the Court must authorize the payment of labor claims, provided that:

- The labor claims are remuneration owed to workers, compensation for occupational accidents or diseases or any other concept established by the Law (for instance, fines for the withholding of contributions not given to the relevant institutions, compensation for decreased work capacity caused by a disease or an accident, compensation in lieu of prior notice, payment for the full month of dismissal, compensation due to seniority or dismissal, dismissal due to pregnancy or marriage, and so on);
- The labor claims have general or special preference;[18] and
- The labor claims are included in the report presented by the Trustee.

The claims are fully paid to the workers if there are sufficient available liquid funds.

Otherwise and until the Trustee detects the existence of available liquid funds, the debtor must, each month, assign 3% of its gross income to prompt payment, for which the Trustee will establish a payment plan proportional to labor claims; the monthly assignment in respect of each individual must not exceed the equivalent of 4 minimum wage payments (*salarios mínimos vitales y móviles*).

The Court may also authorize the payment of individual claims to cover contingencies related to health, provision of food and other matters which cannot be postponed.

The Court can reject in full or in part a request for prompt payment if there are doubts as to the origin or legitimacy of the claim, the claim is disputed or there is suspicion of willful connivance between the worker and the debtor.

The AIL also allows prompt payment of some labor claims which were not included in the Trustee's report.

Prompt payment is not allowed if the debtor's employment records do not allow the existence of the claim to be determined with certainty, there are doubts as to its origin or legitimacy, the claim is disputed, or there is suspicion of willful connivance between the worker and the debtor.

Prompt payment of labor claims during bankruptcy

In a bankruptcy, labor debts with special or general preference will be immediately paid out of the first funds collected or the proceeds from the sale of the goods subject to special preference. Therefore, in addition to the preference in the order of payment, the holders of these labor claims enjoy a temporal preference not available to other creditors.

[18] AIL, art 241, s 2 and art 246, s 1.

3. How does the priority given to employee entitlements in formal insolvency proceedings, compare to the priority given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

The insolvency system stipulates the following ranking order of preferences:

(a) First, claims with special priority on certain assets and whose priority of payment is exercised over the proceeds of the asset (after discounting the cost of conservation, administration and realization of such assets during the liquidation proceeding). These preferences include:

- Construction, improvement or conservation expenses of an asset, as long as it is in the possession of the debtor on whose behalf the expenses have been incurred;
- Claims for six months' salary due to an employee and claims arising from workers' compensation, redundancy payments due to seniority or dismissal, dismissal without notice, and unemployment fund claims have preference over goods, raw materials and machinery which belong to the debtor and which are stored in the establishment where the employee has rendered services or which might be used to conduct the business, (plus two years interest from the date on which the debtor got into arrears);
- Taxes and duties applicable to certain assets;
- Secured and similar claims;
- Any amount due to the retainer for the retained asset as at the date of the adjudication of bankruptcy;
- Claims with special preference under the Argentine Maritime Law No. 20094, the Argentine Aviation Code (Law No. 17285), the Argentine Financial Institutions Law No. 21526, and the Argentine Insurance Law No. 17418.

(b) Second, conservation and litigation expenses arising from the preservation, administration and liquidation of the debtor's assets during the liquidation proceedings. They are paid from the surplus of the liquidated assets, once claims with special priority and their corresponding expenses have been accounted for.

(c) Third, general labor claims, which are paid from the surplus left from paying claims with special priority and conservation and litigation expenses. This category or super priority for general labor claims arises as consequence of the adoption of the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) ILO:

- Remuneration and family allowance claims (plus interest and court costs) due to a worker for six months and arising from worker's compensation, a redundancy payment due to seniority or dismissal, dismissal without notice, vacations, supplementary annual salary, the unemployment fund and any other sum derived from the employment relationship;[19]
- Labor claims with special priority where the goods under the lien were insufficient to cover such claims.

(d) Next are the rest of the general non-labor claims. These are paid *pro rata* from half of the amount obtained from the liquidation of assets, once preferred claims have been paid. These are:

[19] In this case, no distinction should be made between wages, salaries and remuneration due for six months and other general labor claims, as established in the AIL, art 247.

- Sums relating to benefits due to national, provincial or municipal social security, family allowance and unemployment fund agencies;
- If the debtor is a natural person, any funeral and medical expenses during the last six months of his life, as well as the housing, food and clothing costs of himself and of his family during a specified period before the petition for the reorganization or the adjudication of bankruptcy;
- Taxes and charges due to the national, provincial or municipal tax authorities;
- Capital for accepted credit invoices up to ARS $20,000 for each seller or lessor.

(e) Other unsecured claims are paid from the other half of the surplus obtained from the liquidation of assets.

(f) Finally, subordinated claims (claims which creditors have voluntarily postponed).

In the case of general and unsecured claims and conservation and litigation expenses, when the amount resulting from the liquidation of assets is insufficient to pay all the debts belonging to the same class, the distribution is done on a *pro rata* basis within the corresponding category. Regarding the various special privileges, the AIL and other relevant laws establish the priority of payment. Where two or more claims with the same special privilege arise with the same preference, they are paid on a *pro rata* basis.

4. What, if any, personal liability do directors and / or others involved in management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Administrators of companies are not responsible for wages or other entitlements owed to employees. Some court decisions have made directors liable for wages where the employees have not been duly registered with the labor authorities. Argentine company law also allows the corporate veil to be lifted if the company has been "used as a recourse to violate the law or frustrate third party rights".[20]

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There is no form of statutory, industry or government funded "safety net" in Argentina.

[20] Argentine General Companies Law No. 19.550, art 54.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The liability of the acquirer of a business depends upon whether or not the business is sold in the context of a formal liquidation insolvency proceeding.

In a formal liquidation, where the debtor's business is sold as an ongoing business, the buyer is not a successor of the insolvent company; as a result, any claim for an amount owed to employees for services performed before the declaration of bankruptcy is dealt with in the liquidation proceedings.

Outside liquidation insolvency proceedings, the situation is drastically different. The WCT[21] makes the acquirer of a business liable for all obligations arising under the labor contracts that bound the seller. The labor contracts are deemed to continue with the acquirer and the worker retains his / her entitlements, including seniority. This rule[22] applies even in cases of leases or other temporary assignments of the establishment. The seller and buyer are jointly liable,[23] except where the State acquires the business. [24]

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

A Commission in the Ministry of Justice, Security and Human Rights is responsible for analyzing possible modifications to the AIL. The Commission has indicated that there are no current proposals to protect even more labor rights in case of employer's insolvency.

20 Argentine General Companies Law No. 19.550, art 54.
21 WCT, art 225.
22 *Idem*, art. 227.
23 *Idem*, art 228.
24 *Idem*, art 230.

AUSTRALIA

1. How is an employee defined for the purposes of formal insolvency proceedings?

In Australia, corporate insolvency is governed by the Corporations Act 2001 (Cth) (the Corporations Act).

There is only a very broad definition of "employee" in the Corporations Act.[1] It is defined to be a person who "is, or has been, an employee of a company". "Employee" is not otherwise defined in Australian legislation for the purpose of corporate insolvency. For this reason, for the purpose of determining whether or not a person is an "employee" for the purpose of corporate insolvency, it is necessary to consider the definition of "employee" accepted under Australian common law.

Traditionally, the test for whether or not a person is an employee relied solely on the nature and degree of control exercised over the person – a contract of service being one of employment and a contract for services not creating an employment relationship.[2] The Australian High Court uses a "multiple *indicia* test".[3] Factors for examination include:

- nature of the task undertaken;
- freedom of action given;
- provision of services apart from labour;
- magnitude of the contract amount;
- manner in which payment to be made;
- powers of dismissal;
- circumstances under which payment of the reward may be withheld;
- deduction of taxes from money paid;
- granting of annual holidays; and
- need to report one's comings and goings.

The High Court has emphasised that it is the totality of the relationship between the parties that needs to be considered in determining whether or not a person is properly an employee.[4]

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

The Corporations Act recognises a number of categories of employee entitlements and affords them statutory priority over other unsecured creditors in the liquidation of a company.[5]

Currently, the following order of priority applies:

- First, the wages of employees who are retained by a liquidator during the liquidation to preserve, realise or "get in" the property of the company or to carry on the business of the company.[6] In addition to employees' wages, priority is also given to

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1 Corporations Act, s 596AA(4).
2 "Organisation test" formulated by Denning LJ in *Stevenson, Jordan and Harrison Ltd v McDonald and Evans* [1952[1 TLR 101 (it is important to note that Australian courts have never accepted this as the only test, rather as one in a sequence of separate, related tests).
3 "Multiple *indicia* test" leading case: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.
4 Kirby J, *Ermogenous v Greek Orthodox Community of South Australia* [2002] HCA 8 para 81.
5 Corporations Act, s 556.
6 *Idem*, s 556(1)(a) .

any service-based entitlements that these employees accrue during the period of the liquidation.[7]

- Second, the wages and entitlements of employees whose employment was terminated during a prescribed period leading up to the commencement of the administration or liquidation of the company. These entitlements are paid in the following order:

a) wages and superannuation entitlements;[8]

b) injury compensation;[9]

c) amounts due under an industrial instrument in respect of a leave of absence (for example, annual leave and long service leave);[10]

d) retrenchment payments.[11]

For employees of an insolvent company who are also directors of that company (or a spouse of a director of that company), there is a limit on the amount for which that employee can rank as a priority creditor. Currently, these employees may obtain priority for:

- wages and superannuation up to a maximum amount of AUD 2,000;[12] and
- for leaves of absence due under an industrial instrument up to a maximum amount of AUD 1,500.[13]

These employees are not entitled to any priority for retrenchment payments.[14]

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

3.1 Secured creditors

In certain circumstances, the Corporations Act prioritises employee entitlements over secured debts.

If the unsecured property of the company in liquidation is insufficient to pay employee entitlements in full, certain employee entitlements (wages, leave entitlements and retrenchment payments) are also given priority over debts that are secured by a circulating security interest (previously known in Australia as a "floating charge"). In these circumstances, these priority employment entitlements are paid out of the assets secured by the circulating security interest in preference to any debt owed to the secured creditor.[15]

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7 *Idem*, s 558.
8 *Idem*, s 556(1)(e).
9 *Idem*, s 556(1)(f).
10 *Idem*, s 556(1)(g).
11 *Idem*, s 556(1)(h).
12 *Idem*, s 556(1A).
13 *Idem*, s 556(1B).
14 *Idem*, s 556(1C).
15 *Idem*, s 561.

The same priority is afforded to employee entitlements when a secured creditor enforces its rights under a security agreement and appoints a receiver or controller to circulating assets captured by their security interest. In these circumstances, employee entitlements will be paid from the circulating assets of a company coming into the hands of the receiver or controller on the date of their appointment (or the proceeds of those assets) in priority to the debt owed to the secured creditor.[16]

3.2 Insolvency administrators, professionals retained by the estate and unsecured creditors

Under the Corporations Act,[17] fees and expenses incurred by insolvency practitioners during a formal insolvency process which are considered to be expenses incurred in realising and / or preserving the property of the insolvent company (including their remuneration), rank in priority to other unsecured claims, including claims by employees for employment entitlements.

3.3 Shareholders

In Australia, all creditor claims, including those of employees, are prioritised over shareholders.

Any debt payable to shareholders will not be paid until all other debts payable by, and claims against, the insolvent company are satisfied.[18]

4. What, if any, personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Although directors in exercising their duties to the company should consider the interests of employees, there is no case law or legislation in Australia imposing an explicit obligation on directors to do so. However, if a director places the company in breach of any law by not giving consideration to the interests of employees, the director may be seen to not have acted with the required care and diligence from which both criminal and civil consequences flow.[19]

There are few circumstances where directors can be found personally liable for unpaid employee entitlements or taxes. However, those limited circumstances include where:

- A company fails to pay superannuation to employees by the due date. In these circumstances, a director is personally liable to pay the superannuation and can be liable to pay penalties;[20]
- A director fails to remit tax amounts withheld from employee wages to the Commissioner of Taxation. In these circumstances, a director is personally liable to pay the superannuation and can be liable to pay penalties;[21]
- A director incurs a debt or debts on behalf of a company whilst the company was insolvent or, as a result of the debt or debts that the director incurred, became

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16 *Idem*, s 433.
17 *Idem*, s 556(1)(a).
18 *Idem*, s 563A.
19 H A J Ford, R P Austin, I M Ramsay, *Ford's Principles of Corporations Law* 10th Edition, Butterworths, 2001 at [8.120].
20 Taxation Administration Act (Cth), Sch 1, s 269.
21 *Ibid.*

insolvent - this is known as insolvent trading.[22] A director found guilty of insolvent trading is liable to compensate the company and can be required to pay a penalty. Additionally, criminal prosecution can be commenced against a director where the incurring of the debt was dishonest.

In respect of persons other than directors, a person must not enter into an agreement or transaction with the intention of preventing the recovery of employee entitlements or significantly reducing the recovery of employee entitlements.[23] If a person contravenes this Part they will be liable to compensate for the loss.[24] The company's liquidator may recover the amount of the loss from the person as a debt due to the company. Alternatively, an employee of the company may bring proceedings to recover their entitlements directly, either with consent of the liquidator,[25] or by providing the liquidator with notice of their intention to bring proceedings.[26]

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

The Commonwealth Government has established the Fair Entitlements Guarantee Scheme[27] (FEG Scheme) to provide for unpaid entitlements of employees who have been terminated as a result of their employer entering liquidation. The Commonwealth Department of Jobs administers the FEG Scheme which applies to all terminations of employment since 5 December 2012.

Employees are eligible for an advance under the FEG Scheme if:

- the person's employment has ended; and
- the end of the employment:
  - was due to the insolvency of the employer;
  - occurred less than six months before the appoint of a liquidator to the employer or bankruptcy of the employer; or
  - occurred on or after the appointment of a liquidator to the employer or bankruptcy of the employer;
- the person is owed one or more debts wholly or partly attributable to one or more employment entitlements;
- the person has taken reasonable steps to prove for these entitlements in the winding up or bankruptcy of the employer;

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22 Corporations Act, s 588G.
23 *Idem*, s 596AB.
24 *Idem*, s 596AC.
25 *Idem*, s 596AF.
26 *Idem*, s 596AG.
27 See the Fair Entitlements Guarantee Act 2012 (Cth) (FEG Act).

- the person took reasonable steps to be paid any entitlements owing to them prior to their employer becoming insolvent;
- the person is an Australian citizen, permanent visa holder, or a New Zealand citizen who is the holder of a special category visa; and
- a claim under the FEG Scheme has been made.

Employees may claim up to 13 weeks of unpaid wages (up to the maximum weekly wage cap, which is presently AUD 2,451), unpaid annual leave and long service leave, up to five weeks pay in lieu of notice and redundancy pay of up to four weeks' pay per year of service.

Employees are not eligible for an advance under the FEG Scheme if:

- the employer is a corporation and the employee is a director, spouse or relative of a director of the employer; or
- the employer is a natural person and the person is a relative, spouse or *de facto* partner of the employer;
- the employee was a contractor, who was then employed in the six months prior to a liquidator being appointed to the employer or the employer's bankruptcy, or the employment being terminated, and it was reasonable to expect that when employed, the employer would not be able to meet the employer's obligations under the terms and conditions of employment.

If the Commonwealth Department of Employment makes an advance to an employee under the FEG Scheme, the Commonwealth is granted the same priority in the winding up of the employer for these advances as the employee would have enjoyed in relation to payment of their entitlements.[28]

The Commonwealth Government has also established the Fair Entitlements Guarantee Recovery Program which operates where advances have been made under the FEG Scheme. The program allows liquidators of companies and trustees in bankruptcy to apply for funding for the purpose of pursuing recovery proceedings to increase the assets available to creditors in the winding up or bankruptcy process, including priority employee creditors.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

A purchaser of the assets of an insolvent company is only be liable for employee entitlements if:

1) it agrees to accept liability for those entitlements as part of the contract of sale (which is common and factored into the purchase price); or

2) in accordance with the Fair Work Act 2009 (Cth) (the Fair Work Act), a transfer of business has occurred. In order for a transfer of business to have occurred:

   a) one or more employees must have had their employment with the insolvent company terminated and must become employed by the purchaser within three months of that termination, doing substantially similar work; and

[28] FEG Act, ss 29-31; Corporations Act, s 560.

b) one of the following must apply:

- the insolvent company and the purchaser are "associated entities" as defined under section 50AAA of the Corporations Act;
- the purchaser owns or has the beneficial use of assets of the insolvent company which relate to the transferring employees' work;
- the insolvent company outsourced work to the purchaser; or
- the insolvent company undertook outsourced work for the purchaser and the purchaser then ceased the outsourcing arrangement so that the purchaser could insource the work using the transferred employees.[29]

In addition to this, various State long-service leave Acts contain transfer of business provisions which are in similar form and seek to transfer an employees' accrued long service leave entitlements upon transfer of business. These provisions generally provide that, notwithstanding the termination of employment resulting from the transfer of business, the employee's service with the outgoing employer is relevant and counted as ongoing service with the incoming employer.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

Yes. The Corporations Amendment (Strengthening Protections for Employment Entitlements) Bill 2018 is currently before Parliament. The Bill seeks to strengthen enforcement and recovery options to deter behaviours that prevent, avoid or significantly reduce the recovery of employment entitlements in insolvency. The Bill also seeks to deter the behaviours that shift the cost of employee entitlement from employers onto Australian taxpayers through utilisation of the FEG Scheme.

The Bill introduces new provisions that will facilitate the disqualification of company directors and other officers where they have a track record of corporate contraventions, and who inappropriately use the FEG Scheme to pay outstanding employee entitlements.

[29] Fair Work Act, s 311.

AUSTRIA

1. How is an employee defined for the purpose of formal insolvency proceedings?

There is no special definition of employee for the purpose of formal insolvency proceedings. The relevant definition is the general definition in the Austrian General Civil Act (ABGB), under which an employee is a person who undertakes to render services to another person for a certain time. The employee has to perform his or her services under the direction of another person. The employer-employee relationship is determined by reference to the following factors:

- Place of work, labour time and actions performed (an employee has no freedom of decision concerning these matters);
- The degree of control exercised over the employee;
- Integration into the company's organisation;
- Obligation to comply with the directives of the employer;
- Financial and economic dependence;
- Obligation on the employee to render all services personally.

These factors need to be considered in their entirety to be able to distinguish the employer-employee relationship from contracts for services.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

The opening of a formal insolvency proceeding itself does not change the employer-employee relationship, modify the employment contract or terminate the employment relationship. The insolvency practitioner takes up all the duties of the employer. During the formal insolvency proceeding both the insolvency administrator and the employee have the option of continuing the relationship or terminating it prematurely if:

- the employer is not a company or
- the company is shut down or
- a decision on whether or not to shut down has not been made during the first court session.[1]

If both decide to continue the employer-employee relationship after the opening of the formal insolvency proceeding, all employee claims (included the stipulated wages) accrued during the administration have to be paid by the insolvency practitioner. The insolvency practitioner must have enough money to pay all the claims arising during the insolvency proceeding.

Employee entitlements that arose before the opening of the insolvency proceeding are only paid *pro rata* at the end of the insolvency proceeding. They have no priority over the claims of other creditors all creditors have to be treated equally during the insolvency proceeding.

If the employee or insolvency administrator terminates the employment relationship, the employee is entitled to claim the following:[2]

- Arrears of the stipulated wages;
- Accrued annual leave entitlements;

1 Austrian Bankruptcy Act (IO), § 25.
2 *Ibid*.

- Compensation payable because the employee is given notice before the expiration of the legal period of notice;
- Redundancy pay.

In the event of termination, all these entitlements will only be satisfied proportionally at the end of the formal proceeding. They are not given any priority treatment. The unpaid entitlements will then be satisfied by the IEF-Service GmbH (see below).

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

In general, the Austrian bankruptcy Act does not give employee entitlements priority over other claims, because all claims accrued at the date of the formal insolvency proceeding have to be paid by the insolvency administrator.[3] However, if the assets are insufficient to meet all the above-mentioned claims, the law specifies the following priorities of payment:[4]

- costs of the formal insolvency proceeding (including the insolvency practitioner's remuneration, court fees, etc.);
- advances paid by a third person for covering the costs of the insolvency proceeding;
- employee entitlements;
- other claims accrued during the administration.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The directors of a company may be liable for employment taxes if they have deliberately or negligently neglected their tax responsibilities.[5]

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to pay out employee creditors and other unsecured creditors?

[3] *Idem*, § 46.
[4] *Idem*, § 47.
[5] Austrian Tax Act, § 9.

5.1 How the scheme operates

The IEF-Service GmbH has been set up to guarantee the payment of employee entitlements in an insolvency context. The IEF will only pay these entitlements if the following requirements are met:

- a formal insolvency proceeding has been opened;
- the employee has registered his claims at the Bankruptcy court;
- the employee has sent a completed application form to the IAF-Service GmbH within 6 months from the opening of the formal insolvency proceedings;
- the insolvency practitioner has admitted the registered employee entitlements;
- the employee is not a managing director of a GmbH-Company, a member of the management board of a Stock Company or an executive.

The IEF-Service GmbH will then pay arrears of wages, annual leave, overtime pay, holiday pay, payment in lieu of notice and redundancy pay. There are statutory and time limits in relation to the above mentioned claims. The employees may only claim arrears for the last 6 months of the continuing or terminated relationship. Entitlements dating further back are only secured if the employees have already asserted them in legal proceedings court and those legal proceeding are continuing.

5.2 Priority in formal insolvency proceedings in terms of payments it may make

If the IEF-Service GmbH pays the claims of an employee, these claims will devolve automatically upon the IAF-Service GmbH. The IEF-Service GmbH will then participate in the formal insolvency proceeding in place of the employee and will attempt to recover payments to that employee out of the insolvency process. There is no priority over other creditors.

5.3 What action the scheme takes to enhance recoveries that may be made in an insolvency to pay out employee creditors and other unsecured creditors

The fund is financed mainly by employers' IESG contributions. These are part of the social security contributions.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

6.1 Sale outside a formal insolvency proceeding

If a business is sold as a going concern outside a formal insolvency proceeding, all employer-employee relationships devolve upon the acquirer, who has to enter into all employment contracts without any modifications and take on all actual and contingent obligations.[6] The purchaser is obliged to continue paying wages and other employee entitlements as stipulated. The acquirer is also liable jointly and severally with the vendor for all claims which had accrued before the event of sale and which were known at the time of the transfer of the business.[7] The purchaser is also liable for any unpaid employment taxes accrued during the last year before the transfer.

6 Austrian Employment Contract Act (AVRAG), § 3.
7 AVRAG, § 6 and ABGB, § 1409.

6.2 Sale in a formal insolvency proceeding

As a basic principle, the sale of an ongoing business in a formal insolvency proceeding relieves the purchaser from liability for employee entitlements accrued in the past.[9] Furthermore, the purchaser is not obliged to enter into any employment agreement and is free to choose whether to continue any employer-employee relationships.[10]

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

As the current rules provide good protection for employees in the case of formal insolvency proceedings, there are currently no new proposals for reform.

8 BAO, § 14.
9 ABGB, § 1409a.
10 AVRAG, § 3/2.

BELGIUM

1. How is an employee defined for the purpose of formal insolvency proceedings?

A distinction must be made between:

- bankruptcy,[1] which is a liquidation procedure for companies which have ceased paying their debts and cannot obtain credit. It involves the Commercial Court appointing a bankruptcy trustee to take control of the company, to collect and realise its assets and to distribute the proceeds among creditors in accordance with their legal ranking. Bankruptcy will essentially lead to the company's business being dismantled; and
- judicial reorganisation,[2] where a company has temporary difficulties paying its creditors. Judicial reorganisation gives the company an opportunity to restructure and temporarily suspend the rights of its creditors. The purpose is to safeguard the business, allowing it to continue its activities, including the employment of its workers, while it reorganises its debts. There are three types of judicial reorganisations:

  (i) amicable settlement;
  (ii) collective agreement; and
  (iii) transfer under judicial supervision.

Upon the request of the debtor or interested third party, the Commercial Court can appoint a judicial commissioner to assist the company in managing its business and in drafting its restructuring plan. The aim is to allow the company to survive as a legal entity and, if this is not possible, to allow the transfer of all or part of the company's business as a going concern.

In addition, the Belgian Companies Code allows a company to be wound up by its shareholders or the Commercial Court. The Commercial Court can wind up a company which has, for three consecutive years, failed to file its annual accounts with the National Bank of Belgium.

For the statutory definition of an "employee" for the purpose of insolvency proceedings, see article 2 of the Law of April 12, 1965 on salary protection for employees.

Belgian employment case law defines an employee as a person who is paid for work done under the supervision of another person. The factor that determines the parties' professional relationship is therefore whether one party is subordinate to the other. In determining the professional relationship between the parties, the court will take into account:

- the type of contract the parties have entered into and its provisions; and
- how the parties have actually performed the contract, i.e. whether performance is compatible with the terms of the contract.

In practice, labour courts decide whether one party is subordinate to the other by examining whether there is a "link of subordination". The following are examples of such indicators (more than one must exist to establish a "link of subordination"):

- an employer gives detailed instructions to a worker, which the worker is obliged to follow;

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1 As from May 1, 2018 the new Law of September 11, 2017 was scheduled to be included in Book XX of the Economic Law Code, replacing the old Insolvency law dated August 8. 1997 and amending certain provisions of the Law on the Continuity of Enterprises.

2 The Law on the Continuity of Enterprises dated January 31, 2009, as amended.

- an employer requires a worker to regularly draft reports, attend meetings where instructions are given, comply with a schedule and justify the use of time, justify absences (especially in the event of illness) or obtain permission before taking annual leave;
- an employer offers to fully reimburse expenses, to pay a fixed or guaranteed remuneration, to provide a company car, to give holiday pay or to put an insurance policy in place.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

Preferential debts for employees include unpaid wages and employee compensation and social security contributions. They rank as follows (compared with the main other preferential debts):

a) judicial costs;

b) unpaid remuneration, up to a maximum of EUR 7,500[3] and payment in lieu of notice (without limitation of the amount);[4]

c) various social security contributions such as:

- holiday pay (past and current year);[5]
- workers' injury compensation;
- contributions in favour of the social security administration;
- claims of the Fund to indemnify workers dismissed on the occasion of the closing down of a company (see also under question 5);

(d) tax claims.

Employees are unsecured creditors of the bankrupt company in respect of all other amounts owed to them by the company.

In case of judicial reorganisation proceedings, the company must continue to pay all its creditors, including its employees. If an employment contract was terminated before the start of the proceedings, the claims arising out of it will be considered as privileged for the purpose of the proceedings.

If a company is declared bankrupt after judicial reorganisation proceedings are commenced, the company's employees could claim that any remuneration or payment in lieu of notice due to them is a cost that ranks ahead of the claims of all other creditors in the bankrupt estate. Such a claim would be based on the argument that these sums constitute a cost of a contract which was continued after the start of the judicial reorganisation proceedings (see question 3). It should be noted that this is a contested issue under Belgian law.

Under the new Law of September 11, 2017 which was intended to come into force on May 1, 2018,[6] in a subsequent bankruptcy or liquidation, tax and social security debts incurred during the suspension period acquire the status of a debt of the bankrupt estate.

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3 This amount is adapted on a two yearly basis by Royal Decree upon the advice of the National Works Council.
4 Article 19,3° *ter* Civil Code, Book III, Title XVIII, Priority rights and Mortgages (hereafter referred to as the "Civil Code").
5 Article 19, 4° Civil Code.

Where a company is being wound up, the liquidator must pay all the company's creditors, including the employees. If the assets are insufficient to pay all creditors in full, their claims will be paid according to their rank.

The Belgian Supreme Court *(Cour de cassation)* has ruled that, if a liquidator terminates an employment contract during the winding-up proceedings, the payment in lieu of notice will be considered as a cost and expense of the winding-up and will therefore rank ahead of all other claims.

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare with the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

The preferential debts set out in the Civil Code, Book III, Title XVIII, Priority rights and Mortgages, rank after the costs and expenses of the bankruptcy. The relevant creditors are referred to as having a general privilege, which does not attach to specific assets.

The costs and expenses of the bankruptcy rank ahead of the claims of all creditors and include:

- the bankruptcy trustee's remuneration and professional expenses, and
- the costs of continuing any contracts (including employment contracts) for the benefit of the liquidation, after the start of the bankruptcy.

The costs of contracts which were continued after the start of judicial reorganisation proceedings also have a priority ranking, but it is unclear whether they rank ahead of certain secured creditors.

In principle, all assets owned by the bankrupt company form part of the bankrupt estate. However, certain creditors may have specific rights over some of the company's assets. These include creditors who hold a security over an asset or who have retained title over assets.

Unsecured creditors and shareholders rank last and will only be paid if the company is solvent after paying all other creditors.

Any payment in lieu of notice to which an employee is entitled following termination of his employment contract by the liquidator during winding-up proceedings, will be considered as a cost and expense of the winding-up and will therefore rank ahead of the claims of all other creditors.

4. What (if any) personal liability do directors and others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Section VII of Book XX of the Economic Law Code under the new law provides new rules on directors' liability. Company directors may be held liable for damages to the bankrupt estate (and thus indirectly to the employees) under five types of civil liability:

[6] Book XX Economic Law Code.

(a) breach of management duties: the bankruptcy trustee may bring a claim against the directors on the company's behalf if they failed to properly manage the company. Their performance will be assessed according to the standard of a normal, prudent and diligent director;

(b) in tort: at the request of the bankruptcy trustee, the court may hold directors liable in tort if the directors:

- breached a legal obligation (for example not paying employees' salaries or paying them late), or
- have not acted as normal, prudent and diligent directors should;

(c) objective liability: the directors failed to pay social security contributions and taxes;

(d) breach of the Company Code or the company's articles of association: at the request of the bankruptcy trustee, the court may hold a director liable for breaches such as not presenting the company's annual accounts;

(e) a serious fault which contributes to the company's bankruptcy: under the Company Code, where a company's liabilities in bankruptcy exceed its assets, the directors or former directors may be personally liable for the amount of the shortfall if they are found to have committed a manifestly serious mistake (for example, serious fraud or continuing a significant loss-making activity or investments that significantly exceed the company's financial means) that has contributed to the bankruptcy.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

The Law of June 28, 1966 created a Fund (with legal personality) to compensate workers dismissed when a company closes down ("the Fund"). This Law has been replaced by the Law dated June 26, 2002 on the closure of enterprises. The maximum amounts payable are fixed by Royal Decree.

The objective of the "Fund" is to pay employee entitlements (unpaid remuneration, holiday pay and payment in lieu of notice [7]) that are unpaid when the company closes down or there is a change of employer. To be entitled to these payments, employees must fulfil certain conditions, such as having an employment contract of indefinite duration, having at least one year's service with the company and not having been dismissed for serious cause.

[7] Article 19,4°*quinquies*.

If the Fund pays employee entitlements, it will then attempt to recover them from the employer or the employer's bankrupt estate. As the Fund is subrogated to the employees' rights, it may rely on the same general privilege (and thus the same priority) as the employees under the Civil Code, Book III, Title XVIII, Priority rights and Mortgages.[8] The Fund has a general privilege for payments in lieu of notice; this ranks after the employees' claims.

The remuneration taken into account for the purposes of the Fund is currently limited to a maximum of EUR 25,000.

The Fund might also intervene in the event of a transfer of undertaking in the framework of judicial reorganisation proceedings or winding-up of the company.

The Fund pursues its rights among the other creditors in a bankruptcy or judicial reorganisation proceeding, but does not really take an active leading role.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The rights of employees on a transfer of an undertaking are set out in Collective Bargain Agreement n°32*bis* of June 7, 1985, as approved by the Royal Decree of July 15,1985 and amended by the Collective Bargain Agreements n°32*ter*, *quater and quinquies* of December 2, 1986, December 19, 1989 and March 13, 2002 respectively ("the Collective Bargain Agreement").

A distinction must be made between Chapter II and Chapter III of the Collective Bargain Agreement:

(a) Chapter II of the Collective Bargain Agreement relates to the conventional transfer of an undertaking, with a consequent change of employer.

Such a transfer might occur as a result of formal insolvency proceedings (for example, winding-up of the company). In that case, the new employer must take over all the rights and obligations under existing employment contracts, except supplementary social security entitlements such as extra-legal pensions, etc. The former employer and the new employer are also jointly and severally liable for all claims existing at the time of the transfer and resulting from employment contracts existing at that time.

However, such a transfer might also occur in the framework of judicial reorganisation proceedings. In that event, the new employer will not be liable for claims existing at the time of the transfer and resulting from the employment contracts existing at that time. However, a new employer will be liable if the Fund does not compensate the employees. Further, the former employer, the new employer and the worker's representatives may negotiate modified working conditions in a bid to save jobs and ensure the company's survival.

(b) Chapter III of the Collective Bargain Agreement relates to a transfer of an undertaking in the case of bankruptcy.

[8] Articles 19, 3°*ter*.

The following rules apply to workers who are employees at the date of the bankruptcy or renunciation to the company's assets (or who were dismissed within a one-month period before that date) and who were taken over at the moment of the transfer of the undertaking or within six months after the transfer:

- the new employer is not liable for the transferred employees' claims against the bankrupt employer; and
- the new employer may freely decide on the employees it wants to employ.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

The only proposal currently under consideration mainly relates to information and consultation of employees in case of collective dismissal and the negotiation of social plans.

BRAZIL

1. How is an employee defined for the purpose of formal insolvency proceedings?

Under the Labor Legislation, an employee is any natural person who provides services of a non-contingent nature to an employer, under the employer's direction and for a salary.[1]

For payment purposes in the bankruptcy law, a claim by an employee is referred to as a labor claim (credit).

It is important to note that the Bankruptcy Law equates food claims with labor claims. Food claims include those arising from pensions, social security benefits and indemnities for death or disability, based on civil liability determined by a judgement (including legal costs).

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

Under Brazilian labor law, an employee is entitled to certain rights, in addition to any items which may have been agreed to in a written employment contract. Examples of employee entitlements in Brazil are:

- annual mandatory salary increases – as provided for in a collective bargaining agreement between the employer and employee unions (whether or not the employee is affiliated to the union), or in a collective labor claim filed by an employee union against the employer union;
- Christmas Bonus - an additional payment equal to one month's compensation;
- annual vacation - 30 days, plus a bonus of one-third of the employee's monthly compensation;
- accrued severance fund (or FGTS) - an amount funded by the employer. equaling 8% of the employee's monthly compensation, deposited in a special bank account of the employee at the Federal Savings Bank (*Caixa Econômica Federal*);
- transportation voucher - employers are liable for the cost of transportation vouchers which exceed 6% of the employee's monthly compensation;
- sick leave - employers are liable for 15 days sick leave; thereafter sick leave is determined by the Social Security administration, which is responsible for the payment of the employee;
- 120-day maternity leave - employees are entitled to 120 days of maternity leave;
- 5-day paternity leave - employees are entitled to 5 days of paternity leave;
- 30% increase in pay for dangerous working conditions;
- 10%, 20% or 40% increase in the minimum wage for unhealthy working conditions;
- 25% increase in pay for a temporary transfer of the workplace;
- in the event of a dismissal without cause, payment of an accrued severance fund indemnity equaling 40% of the deposits made during the employment relationship;
- overtime pay allowance of a minimum of at least 50% of the normal hourly rate;
- night shift hour reduction (every 52 minutes and 30 seconds of work done between 22:00 and 05:00 is considered equal to a full 60 minutes of work);
- 20% additional pay for night shift workers;
- 6 hour shifts for some employee categories;
- minimum salaries when provided by law; and
- weekly paid rest period, usually on Sundays.

[1] Decree-Law 5,452 of 1943 (Consolidation of Labor Laws - CLT), Art 3.

Benefits not provided by law, or those benefits contained in a collective bargaining agreement extended by the employer on a discretionary basis, such as discretionary bonuses, become a vested right in the employee when paid repeatedly and are therefore treated as an entitlement. A true discretionary bonus (that is, the payment of which is not required and is only paid occasionally) does not give the employee any rights.

During formal insolvency proceedings, which are regulated by Law 11,101/05, labor lawsuits are processed by specialized labor courts. The amount assessed by the labor court (credit) is not paid in that court. Instead, it must be registered in the general creditors' registry in the judicial recovery and paid as provided in the plan approved by all creditors or, in the case of bankruptcy, according to the order of priority established in article 83 of the same law.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

Creditors in bankruptcy are ranked as follows:

- labor claims, claims for compensation arising from work-related accidents[2] and other social security claims, up to a maximum payment of 140 minimum wages;
- tax liabilities;[3]
- costs of administering the bankrupt estate, including professional fees;[4]
- secured claims (claims *in rem*);[5]
- personal claims enjoying special privilege;[6]
- personal claims enjoying general privilege;[7]
- unsecured claims.

Opinion (*súmula*) no. 219 issued by the Federal Court of Appeals (STJ) has determined that claims resulting from services rendered to the bankrupt estate, including the trustee's fees, must enjoy the same privilege as labor claims. In practice, fees for the administration of the insolvency proceedings commonly take absolute priority over all claims since they are paid out of the bankrupt estate throughout the proceedings and before the payment of any other obligations, even if such obligations are privileged.[9]

The Brazilian Bankruptcy Law places secured claims above tax claims in the order of preference. However, labor claims will continue to enjoy preference over both secured and tax claims, up to the limit mentioned above.

In the judicial recovery process provided for by the Brazilian Bankruptcy Law, labor claims have must be paid within one year of the decision approving the judicial recovery plan approved by the creditors.

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2 Decree-Law 7,661/45 (Bankruptcy Law), s 1, art 102, as restated by Law 3,726/60 and Law 8,213/91 and Decree 2 ,172/97.
3 Law 6,830/80, art 5; National Tax Code (Law 5, 172/66), arts 186, 187 and 188.
4 Bankruptcy Law, s III, para 1, art 124.
5 *Idem*, s I, art 102.
6 *Idem*, s II and para 2 of art 102.
7 *Idem*, s III and para 3 of art 102 .
8 *Idem*, s IV and para 4 of art 102.
9 Brazilian courts frequently grant advanced payments, or prompt reimbursement, to the trustee for expenses incurred in connection with the administration of the estate. In some cases, courts may provide the trustee with a salary as an advance of fees which he would be entitled to at the end of the proceedings.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

In an insolvency proceeding, directors and others involved in the management of the company will only be liable for the payment of a labor claim if there is an order to disregard the corporate entity (that is, to lift the corporate veil), at which time they will personally respond with their assets.

Under Brazilian law, officers and directors are not personally liable for obligations incurred in the corporation's name by virtue of administrative acts performed in the normal course of business. However, corporate officers and directors are personally liable when:

(a) within the scope of their powers, they act recklessly, negligently, incompetently or fraudulently; or

(b) they violate the law or act in an *ultra vires* manner, whether or not they do so in a negligent or fraudulent manner.[10]

Under a) above, if officers or directors are acting within the scope of their powers, they can only be held liable if it is proven that they have acted recklessly, negligently, incompetently or fraudulently. Under b) above, however, officers and directors will be held strictly liable for *ultra vires* acts. In principle, a company is not liable for the *ultra vires* acts of its officers and directors unless the injured party was acting in good faith. On a finding of liability, the company, any of its shareholders, or an injured third party may bring an action against the responsible director in an attempt to recoup its losses.[11]

Although there is no special liability system for bankruptcies in Brazil, the general rules outlined above will apply. The sole provision relating to officer and director liability in the Bankruptcy Law deals exclusively with procedural issues, requiring the personal liability of an officer or director of a bankrupt company to be adjudicated by way of a separate action brought before the bankruptcy court which is administering the company's bankruptcy.

4.1 Breach of fiduciary duty to creditors or wrongful trading

There are additional rules providing for the joint and individual liability of corporate directors.[12] Liability deriving from illegal acts is distinguished from liability arising from a failure to carry out duties and obligations in connection with the regular functioning of the company, as follows:

- **Liability for illegal acts** - A director is not responsible for the illegal acts of other directors unless he conspires with them or is deemed negligent in regard to the discovery of their illegal acts or, having knowledge of their wrongdoing, fails to attempt to impede it. Members of corporate bodies, such as the board of directors and those participating in joint decisions in accordance with the company's by-laws, have joint and several liability, unless they voted against the relevant action;
- **Liability for damage resulting from a failure to carry out corporate duties and obligations** - Directors are jointly and severally liable for damages resulting from a failure to carry out their duties and obligations in connection with the

[10] Law 10,406/2002 (Civil Code), arts 1,015, 1,016 and 1,017 and Law 6,404/76 (Corporation Law), art 158.
[11] Corporation Law, art 159.
[12] Corporation Law, paras 1 through 5 of art 158.

regular functioning of the company, even if each director is not responsible for the performance of all duties. Thus, for example, the failure to produce and publish annual balance sheets, which may impair the normal functioning of the company, may result in the joint and several liability of the directors. However, in the case of public companies, directors will only be liable for damages resulting from a failure to perform their individual duties in accordance with the company by-laws.

In any event, a director who learns of a failure on the part of a current or former director to perform his corporate duties must communicate this fact to the shareholders at a general meeting in order to exonerate himself of liability for damages.

The Brazilian Securities and Exchange Commission can impose administrative penalties, such as warnings, fines and the suspension or disqualification of directors of public companies. The Central Bank possesses similar authority over financial institutions.

4.2 Liability in bankruptcy

There is no special liability system in the event of bankruptcy. The Bankruptcy Law states that when a company is declared bankrupt, the managers are not liable for obligations incurred in the corporation's name by virtue of administrative acts performed in the normal course of business, subject to certain exceptions.[13] There is a trend in Brazilian courts, in relation to outstanding labor and tax debts, to aggressively pursue any potentially liable party who may have "deep pockets", regardless of the general principle that liability is limited to companies and corporations. Therefore, in addition to parent and affiliate company liability, principal / shareholder assets are frequently attached in Brazil for the enforcement of such outstanding obligations.

4.3 Criminal liability system

Certain acts performed by corporate administrators are defined as crimes in the Criminal Code and are punishable by imprisonment and / or fines.

Under Brazilian law, a legal entity usually cannot be held criminally liable, although the Bankruptcy Law provides for the criminal liability of such an entity's legal representatives (directors, officers, administrators, managers or liquidators).[14]

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There is no statutory, industry or government funded "safety net" that guarantees the payment of employee entitlements in an insolvency context in Brazil.

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13 Bankruptcy Law, art 6.
14 *Idem*, arts 186 to 190.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Under the present Bankruptcy Law, all labor debts are assumed by the buyer of the whole or part of a distressed company. Therefore, the buyer will be liable for labor debts that the seller is unable to satisfy. This poses a very real obstacle to the transfer of an insolvent company, or any division of it, as a going concern. To address this issue (and encourage the sale of companies as going concerns), the proposed New Bankruptcy Law permits the exclusion of labor liabilities (as well as other commercial and tax liabilities) so that the buyer of a bankrupt company, or any portion thereof, in a judicial sale of assets, would no longer assume such liabilities.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

Currently, there are no Bills that aim to guarantee greater protection of workers' rights in the event of insolvency.

CANADA

1. How is an employee defined for the purposes of formal insolvency proceedings?

An "employee" is not expressly defined in Canadian insolvency legislation, though employees have certain express rights under such legislation. Where an insolvency matter turns on whether an individual is or is not an employee of a debtor, the courts typically draw upon both insolvency and employment-related legislation and case law.

The determination of the meaning of an "employee" (as with substantially all employment-related matters) is principally a matter of provincial, not federal, constitutional jurisdiction. However, the meaning of "employee" has also evolved in Canada under federal insolvency legislation and under federal (and provincial) tax legislation. For example, employees are afforded different tax treatment than independent contractors, thereby evoking a long line of tax-driven case law concerning the attributes of an employment relationship and the factors that characterize an employee. Canadian courts have accepted that there is no single test or conclusive factor or list of factors that universally determines whether an individual is an employee; rather, all the circumstances must be considered and each case decided on its merits.

Factors which are considered (but not determinative) include: whether employment is exclusive to one employer; the degree of control the employer exerts over the employee; whether the employee works regular fixed hours or intermittently; and whether the employee receives a fixed salary, defined remuneration or is compensated based on other variable factors such as profits.

Under the Employment Standards Act (Ontario) (the "ESA"), an "employee" is not defined exhaustively, but is defined to include:

- a person, including an officer of a corporation, who performs work for an employer for wages;
- a person who supplies services to an employer for wages;
- a person who receives training from a person who is an employer, as set out in subsection (2); or
- a person who is a homeworker,

and includes a person who was an employee. This definition of "employee", in turn, incorporates terms such as "wages", "employer" and "homeworker", each of which is broadly defined in the ESA.

There are also numerous aspects of insolvency law relevant to pensioners and former employees who are retired as of the date of the bankruptcy or insolvency proceedings (or who otherwise retire while such proceedings are ongoing). Current employees are typically distinguished from pensioners due to their having different interests and legal rights.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

2.1 Bankruptcy (Bankruptcy and Insolvency Act (Canada)) (the "BIA")

Employees enjoy both a priority claim and a further preferred claim in bankruptcy and receivership.

Priority Claim. In a bankruptcy or receivership, and subject to certain claims of other creditors,[1] an employee (expressed to be a clerk, servant, travelling salesperson, labourer or worker) is entitled to a priority claim in respect of:

- unpaid wages, salaries, commissions, compensation or disbursements for services rendered during the period beginning six months before the date of the initial bankruptcy event or receivership, as the case may be, and ending on the date of the bankruptcy or date of commencement of the receivership, as applicable, to the extent of CAD 2,000 (less any amounts paid to such person for their services by the trustee or receiver, as applicable), together with
- in the case of a travelling salesperson, disbursements properly incurred by that salesperson in and about the bankrupt's business to the extent of an additional CAD 1,000 in each case over the same period. For the purposes hereof, commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six month period, shall be deemed to have been earned therein.[2]

This priority claim is extended to all current assets of the bankrupt / company in receivership, including cash, inventory and accounts receivable. As discussed below, the priority claim is typically asserted by the government by reason of having paid an employee claim under the Wage Earner Protection Program Act (WEPPA) and having become subrogated to the employee's claim under the BIA. No priority claims are permitted by persons whose claims arise while and in respect of their not dealing at arm's length with the bankrupt or insolvent company, unless the trustee or receiver (as applicable) is satisfied that it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing at arm's length.

Preferred Claim. The BIA establishes various unsecured claims that are given a preferred status in priority to other "ordinary" unsecured claims, but which are otherwise subordinate to all priority claims / secured claims. With respect to employees, there may be instances where the current assets on which the priority is given are not sufficient to pay the claim in full, but there are other assets of the insolvent person available for distribution. In such cases, the remaining unsecured employee claims are given a preferred claim status ranking in priority to general unsecured claims but subsequent to trust claims, secured claims, other priority claims and three other preferred claims, namely:

(a) reasonable funeral and testamentary expenses of a deceased bankrupt;

(b) administrative costs of the bankruptcy; and

(c) a 5% levy (that is, tax) on all distributions by the trustee to secured, preferred and unsecured creditors, payable to the government official – called the Superintendent of Bankruptcy – responsible for supervising and administering all bankruptcy matters.

Any remaining employee claims not paid pursuant to the priority and preferred claims above rank as ordinary unsecured claims.

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1 Claims in priority to the priority claim extended to employees consist of the following, as applicable: (i) trust claims; (ii) claims pursuant to ss 81.1 and 8.2 of the BIA, dealing with priority claims of unpaid suppliers, farmers, fishermen, and aquaculturalists; (iii) priority Crown claims for source deductions (i.e. amounts deducted from employee paychecks but not remitted to the government for income tax, Canada Pension Plan deductions, and employment insurance); and (iv) limited environmental priority claims.

2 BIA, ss 136(1)(d) and 81.3.

To the extent that a secured creditor is prejudiced by the priority employee claim above, such secured creditor is given a preferred claim for such amount, ranking subordinate to the preferred claim of employees.

There has been considerable deliberation in Canadian case law as to the meaning of the words "wages, salaries, commissions or compensation" in the BIA. It has been established – and is now codified in the BIA – that "compensation" includes vacation pay but not termination or severance pay.

Where a director or officer has a claim against a bankrupt for wages, salary, commission or compensation for work done or services rendered to the corporation in any capacity, such director or officer is precluded from benefiting from the preference granted under section 136(1)(d) and such claim will be treated solely as an unsecured claim.[3]

If a wage-earner is not entitled to a preference, or has money still owing after receiving his or her preferential claim, he is entitled to rank as an ordinary unsecured creditor for the amount owing.

In addition, subject to the claims of trust claims, secured creditors and other priority claims, the BIA provides a ninth ranking preferred claim status to unsecured claims of employees resulting from injuries to employees of the bankrupt that are not covered by applicable workers' compensation legislation.[4] The priority exists only to the extent of monies received from persons or corporations (that is, insurers) guaranteeing the bankrupt against damages resulting from the injuries. Prior-ranking preferred claims include:

(a) funeral and testamentary expenses;

(b) administrative costs;

(c) the levy payable to the Superintendent of Bankruptcy;

(d) employee preferential claims, subrogated secured claims to the extent prejudiced by priority wage or pension claims and certain family support claims;

(e) certain municipal tax claims;

(f) certain landlord claims for arrears and accelerated rent; and

(g) the enforcement costs of a first execution creditor.

2.2 Restructuring

In a restructuring under the Companies' Creditors Arrangement Act (the "CCAA"), the claims of employees do not have an express statutory preference or priority. The status and treatment of these claims would be as set out in the company's restructuring plan, where applicable, subject to the minimums established in the CCAA. Pursuant to section 6(5) of the CCAA, the court may only sanction a plan of arrangement or compromise if it provides for payment to employees and former employees of the company, immediately after the court's sanction, of:

[3] *Idem*, s 140.
[4] *Idem,* s 136(1)(i).

a) all preferred claim amounts to which such employees would have been entitled under section 136(1)(d) of the BIA if the company had been bankrupt; and

b) all wages, salaries, commissions or compensation for services rendered after CCAA proceedings commence and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period. The court must be satisfied that the company can and will make these required payments.

Similarly, in a restructuring proposal under the BIA, no proposal in respect of an employer shall be approved by the Court unless such proposal provides for payment to the employees and former employees, immediately after Court approval of the proposal, of amounts equal to the amounts that they would be qualified to receive under section 136(1)(d) if the employer had became bankrupt instead of restructuring, as well as wages, salaries, commissions or compensation for services rendered after that date and before the Court approval of the proposal, together with, in the case of travelling salesmen, disbursements properly incurred by those salesmen in and about the bankrupt's business during the same period.[5] Further, the Court cannot approve the restructuring proposal unless it is satisfied that the employer can and will make the aforementioned payments due to employees as and when required.

2.3 Wage Earner Protection Program Act

The Wage Earner Protection Program Act (WEPPA) is a government program that applies to receiverships and bankruptcies of an employer that takes place after July 7, 2008. WEPPA provides for the timely reimbursement of eligible employees for wages owed to them by an insolvent employer in bankruptcy or receivership. Wages is defined in that Act to include salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation.

An employee is entitled under WEPPA in cases of bankruptcy and receivership for eligible claims of such employees up to a capped amount. Employees may claim four times the maximum weekly insurable earnings amount, less amounts prescribed by regulation, in the six months prior to the employer's bankruptcy or receivership.

An individual is not eligible to receive a payment in respect of any wages earned during, or that otherwise relate to, a period in which the individual:

(a) was an officer or director of the former employer;

(b) had a controlling interest within the meaning of the regulations in the business of the former employer;

(c) occupied a managerial position within the meaning of the regulations with the former employer; or

(d) was not dealing at arm's length with:

- an officer or director of the former employer;

[5] BIA, s 6(5).

- a person who had a controlling interest within the meaning of the regulations in the business of the former employer; or
- an individual who occupied a managerial position within the meaning of the regulations with the former employer.

Essentially, the underlying objective of WEPPA is to provide timely payments to employees and former employees of wage claims, up to enumerated maximums, instead of having to wait for such claims to be compensated through the bankruptcy or insolvency process (which often results in employees having to wait for a prolonged period of time before obtaining any distribution on account of their claims). Where the government makes a payment to an employee under the WEPPA, the government is effectively subrogated in the prescribed manner to the employee's claim against the bankrupt or insolvent company.

Pursuant to WEPPA, trustees in bankruptcy and receivers are obligated to:

(a) identify employees who are owed eligible wages;

(b) determine the amounts owed to such employees;

(c) inform those employees of the existence of the program under WEPPA; and

(d) provide the government and employees with information necessary to establish eligibility for payment.

Employees submit proofs of claim to the trustee or receiver, and also submit an application to the government for payment under the WEPPA program (which applications must be submitted within 56 days of the earlier of the commencement of the bankruptcy or receivership and the date employment terminated).

2.4 Pensioners

There are also protections in favour of pensioners in bankruptcy and insolvency proceedings. These are distinct from rights and protections for active employees. For example, under the BIA there is a special priority over all property and assets of a bankrupt or company in receivership. If the bankrupt / company in receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the company's employees, the following amounts that are unpaid on the date of bankruptcy or receivership, as applicable, to the fund established for the purpose of the pension plan are secured by security on all the assets of the company:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

- an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund; and
- an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985;

- an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act; and

(c) in the case of any other prescribed pension plan,

- an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament;
- an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament; and
- an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act.

This priority charge is subsequent in priority only to a few other claims.[6] If the trustee or receiver, as applicable, disposes of assets covered by the security, it is liable for the amounts referred to above to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

In addition, no proposal or restructuring plan under the BIA or CCAA may be sanctioned by the court unless the proposal provides for payment of the aforementioned amounts and, in each case, the court must be satisfied that the employer can and will make the payments as required. However, notwithstanding this, the court may approve a proposal that does not allow for the payment of the amounts referred to above if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

3.1 Secured creditors

As noted above, an employee's priority claim has priority ahead of most competing claims. In contrast, an employee's preferred claim is subject to the claims of trust claims, secured claims, other priority claims and certain higher-ranking preferred claims. Lastly, any residual employee claims to which the priority claim and preferred claim do not extend are general unsecured claims ranking *pari passu* with other ordinary unsecured claims.[7]

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[6] Claims in priority to the priority claim extended to pensioners consist of the following, as applicable: (i) trust claims; (ii) claims pursuant to ss 81.1 and 8.2 of the BIA, dealing with priority claims of unpaid suppliers, farmers, fishermen, and aquaculturalists; (iii) priority Crown claims for source deductions (i.e. amounts deducted from employee paychecks but not remitted to the government for income tax, Canada Pension Plan deductions, and employment insurance); (iv) limited environmental priority claims; and (iv) priority claims of employees, as set out above.

[7] Bank Act, s 427(7).

A further priority for employees may be found in banking legislation. Banks in Canada may have secured claims pursuant to a special security interest under the Bank Act (Canada), which provides that certain employees will have a claim for wages, salaries or other remuneration for the three months' immediately preceding the bankruptcy that is in priority to the bank's claim.

3.2 Insolvency administrators

Subject to the claims of trust claims, secured creditors and other priority claims, the BIA grants a second ranking preferred claim to the costs of the administration of the bankruptcy proceeding (i.e. the fees and disbursements of the trustee in bankruptcy, including its legal costs), which claims have priority ahead of the claims of employees (whether preferential or unsecured).[8] The preferred claim for administrative claims ranks subsequent only to the reasonable funeral and testamentary costs of a deceased bankrupt. Accordingly, employee priority claims have priority to administrative claims, but employ preferred claims and ordinary unsecured claims rank subsequent to the administrative claims.

In restructurings under either the BIA or the CCAA, the administrative costs of the insolvency proceeding would be paid in full in advance of any payments to employees in respect of their claims.

3.3 Unsecured creditors

Preferred claims of employees have a fourth ranking priority under the BIA, which preferential claims have priority over the claims of general unsecured creditors.[9]

If a wage-earner is not entitled to a preference, or has money still remaining owing after receiving his or her preferential claim, the employee is entitled to rank as an ordinary unsecured creditor for the amount owing, and such claim would be paid *pari passu* with other unsecured creditors.

As noted above, the CCAA and BIA provide that employee wage-related claims must be paid in full as part of a restructuring under that statute, the effect of which is to afford such claims better treatment than unsecured claims (which typically would be significantly compromised).[10]

3.4 Directors

Any claim for wages, salary, commission or compensation for work done or services rendered by an officer or director of the bankrupt company, however, will not rank as a preferred claim under section 136(1)(d) of the BIA and will be treated solely as an unsecured claim.

In a restructuring under the CCAA, however, directors are often granted by court order a "super-priority" charge in respect of any claims against them (excluding claims relating to fraud or gross negligence), which court-ordered charge has priority over unsecured claims against the debtor (which would include employee claims). In restructurings under the BIA, charges in favour of directors are quite rare, and all claims of directors are typically treated according to their nature – either secured or unsecured as the case may be, and typically the latter.

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8 BIA, s 136(1)(b).
9 *Idem*, s 36(1)(d).
10 *Idem*, s 60(1.3).

3.5 Professionals retained by the estate

Professionals retained by a trustee or receiver have their fees and disbursements paid as part of the trustee or receiver's administrative expenses (that is, the same priority as is given to the trustee or receiver's own fees and expenses). Professionals retained by a debtor-in-possession (that is, proposal or restructuring proceedings under the BIA or CCAA) may obtain a court-ordered charge that typically has a first priority ahead of employee claims. However, as noted above, payment of the employee claims up to prescribed minimums is mandated in order to obtain approval of a proposal or plan by the court. In some cases, such professionals may obtain a cash retainer, which provides a *de facto* priority ahead of employee claims.

3.6 Shareholders

Shareholders have no priority status in bankruptcy and insolvency with respect to competing employee claims.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

While claims for outstanding wages are typically asserted first against the bankrupt company, a director of the bankrupt company may be held personally liable for outstanding "wages" under the Employment Standards Act (Ontario) (the ESA). The definition of "wages" in the ESA is very broad and includes "any payment required to be made by an employer to an employee (under the ESA)" and "any payment owed under an employment agreement". Under the ESA, "employment agreement" is defined as including a collective agreement, thus any monies owed to an employee under the terms of the collective agreement would also be covered.

The ESA places some limits on a director's potential liability. The ESA expressly excludes director liability for termination and severance pay (that is, as these amounts are not "wages") and it provides that the maximum amount of director liability for each employee is six months' wages, plus outstanding vacation pay accrued within the last 12 months. It also provides that a director's liability is limited to claims arising in the period for which he or she was a director.

Directors are also liable to ensure that certain statutory trust deductions from employee wages are remitted to the governmental taxing authorities. These trusts include income tax, pension plan contributions and employment insurance. Again, directors may be personally liable for failing to meet these remittance obligations (or failing to ensure that the debtor corporation makes these remittances).

Directors may also be held liable for up to six months' unpaid wages under the Canada Business Corporations Act[11] (CBCA) and provincial equivalent legislation, such as the Ontario Business Corporations Act[12] (OBCA), if certain conditions are met, as well as under the oppression remedy provisions of such legislation.[13]

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11 CBCA, s 119.
12 OBCA, s 131
13 *Idem*, s 248.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

WEPPA, described above, is a form of statutory safety net in Canada to guarantee certain minimal employee entitlements.

In addition, in Ontario, the Pension Benefits Guarantee Fund (PBGF) was established in 1980 to protect basic pension benefits for pension plan members when a defined-benefit pension plan is wound up with insufficient assets. The PBGF is funded by annual levies charged to employers with defined benefit pension plans (excluding multi-employer plans). In general, the PBGF guarantees the first CAD 1,000 per month of pension benefits. The PBGF does not guarantee non-pension benefits such as health or dental, or future indexation of pension benefits. The PBGF is administered by the Financial Services Commission of Ontario (FSCO).

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

In Canada, jurisdiction with respect to employment matters in insolvency proceedings is quite complex. The federal government has sole jurisdiction with respect to insolvency matters, whereas jurisdiction in respect of employment matters is divided between the federal and provincial governments. The provinces are empowered to legislate with respect to most employment matters through their power over "property and civil rights".

Canadian courts have held that provincial labour legislation governs these matters. A purchaser of assets on a going concern basis is consistently held to be a "successor employer" under provincial legislation with respect to any employees whose employment is assumed as part of the sale transaction. Purchasers generally understand and accept that they will be successor employers in these circumstances as a matter of law and, accordingly, conduct significant due diligence with respect to employment-related claims of the vendor and, further, inevitably factor these obligations into the purchase price paid by them.

An employee's employment contract cannot simply be assigned from an insolvent vendor to a solvent purchaser (that is, you cannot compel an employee to work for a new employer). In practice, a purchaser determines which employees it wishes to acquire as part of a sale transaction and will make offers of employment to such employees, typically consistent with the terms of their present employment. The purchaser would typically be found to be a successor employer as a matter of law with respect to any employee who accepts the offer of employment.

In businesses where employees are members of a union, the acquirer becomes bound by the existing bargaining rights of the union by operation of law, including any collective agreement, regardless of whether it actually hires the former union employees. It cannot avoid the union or collective agreement merely by refusing to hire the former union employees.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There were extensive amendments to the bankruptcy and insolvency legislation in Canada over the course of the last decade. There are currently no proposals for legislative reform to further protect employee entitlements in an insolvency.

CHILE

1. How is an employee defined for the purpose of formal insolvency proceedings?

There is no definition of the term "employee" in the Insolvency Law. However, the Chilean Labour Code defines "worker" as "any natural person who provides intellectual or material personal services, under dependency or subordination, and under a contract of employment."[1] This definition applies, in general, to all Chilean legislation.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

The new Chilean Insolvency Law[2] improved the treatment of employees in formal insolvency procedures.

Under the previous bankruptcy legislation, the treatment of employees was uncertain. The commencement of the bankruptcy procedure did not necessarily mean the immediate termination of the contract of employment; when the trustee dismissed a worker, it was usually on technical grounds other than the insolvency itself (such as *force majeure* or company needs). As a result, many of these terminations did not require the trustee to give the worker a labour termination certificate (*finiquito laboral*). Without such certificates, workers could not prove their situation before the Association of Unemployment Funds (AFC – see below) and collect their unemployment insurance. This forced workers to take legal proceedings in the Labour Courts in order to establish their rights (and the exact amount of their claims), before they could lodge a claim in the bankruptcy procedure. This was both expensive and time-consuming for the workers.

The new Chilean Insolvency Law sought to correct this situation by incorporating a series of pro-worker benefits into the law. The Labour Code was also amended and an employer's declaration of liquidation was established as an immediate cause of termination of a contract of employment. The declaration of the employer's liquidation also allows the immediate payment to the worker of an indemnity equal to the average of the last three-monthly wages earned, as well as an indemnity for years of service. In addition, a labour termination certificate (*finiquito laboral*) signed by the worker before a labour inspector or public notary and presented to the insolvency court by the liquidator, is taken to be sufficient verification of the claims detailed therein and allows the employee to collect his claim before any other creditors. This measure allows the worker to save the costs associated with lawyers and labour lawsuits. Other relevant changes include the standardisation of monetary and temporal limits for the payment of worker compensation, compensation for workers who are entitled to maternity leave and allowing workers to access unemployment insurance.

The Chilean Civil Code sets the general rule for priority of claims. Labour entitlements are considered as first class or category claims, which implies that, as a general rule, they are paid before all other creditors (even secured creditors).

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1 *Código del Trabajo de Chile* (Chilean Labour Code), art 3.b). This is available online, in Spanish: https://www.leychile.cl/Navegar?idNorma=207436.

2 Law No. 20,720.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

If the information available to a liquidator proves that a worker is owed unpaid wages, an indemnity for years of service,[3] or maternity leave compensation, that claim is paid as an administrative expense of the bankruptcy, before any other claims (strictly speaking they are not treated as claims, as they don't have to be verified in court).[4] The Insolvency administrator`s fee is also considered an administrative expense. Secured creditors are paid next, and unsecured creditors last.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

There is no specific regulation regarding this subject. However, the Chilean Criminal Code does impose penalties on company directors and officers who are involved in acts or omissions such as increasing corporate liabilities or reducing corporate assets in order to defraud creditors.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There is no "safety net" that serves this purpose. However, there is a general unemployment insurance fund managed by the Association of Unemployment Funds. This is privately operated, and funded from employee wages.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

A total or partial change in the ownership, possession or mere tenancy of a company does not alter the rights and obligations emanating from individual or collective labour contracts. Those contracts remain in force and continue with the new employer.[5] This is due to the fact that the employment relationship is seen as being between the worker and the company, not between the worker and the natural or legal person who owns the company.[6]

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3 Of an amount equal to three-monthly minimum income for each year of service and a fraction of more than six months, with a limit of 11 years. However, the excess of the prior claim (if any) will be paid as an unsecured claim.

4 Superintendency of Insolvency and Entrepreneurship, *Instructivo No. 3*.

5 Chilean Labour Code, cl 2 of art 4.

6 As established by the administrative case law of the Labour Directorate (*Dirección del Trabajo*).

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are currently no proposals for reform.

CHINA (PRC)

1. How is an employee defined for the purpose of formal insolvency proceedings?

In the People's Republic of China at present, corporate insolvency is subject to the China Enterprise Bankruptcy Law 2006, which replaced the China Enterprise Bankruptcy Law 1986 (For Trial Implementation) and applies to state-owned, private and foreign-invested companies.[1]

Generally speaking, the concept "employee" is not specifically defined for the purpose of corporate insolvency law. Under the China Labour Law 1994, Article 2, to qualify as an employee the individual must have established an employment relationship with the employer, a business entity.

Proving the existence of employment relationship will depend on the extent to which the China Labour Contract Law 2007[2] has been implemented. Under Articles 7 and 10 of this Law, the employment relationship comes into existence at the point when the employee begins his work for the employer, even though a written employment contract may not have been signed; Article 10 further clarifies that a labour contract should in principle be signed before the employee begins work, but must be signed within one month following the commencement of the employment relationship. Therefore, a signed employment contract is sufficient to prove that a person is an employee.

However, a recent study found that the China Labour Contract Law 2007 is, at best, not well implemented. This is especially the case in regard to migrant workers, which make up the majority of the labour force in China. According to the study, only 36.2 per cent of migrant workers had written employment contracts in 2015.[3]

But the fact that an employee does not have a written contract does not mean that his legal rights are not protected in corporate insolvency. Whether there is a written contract or not, an individual working for the enterprise prior to bankruptcy will be treated as an employee fully protected under the China Enterprise Bankruptcy Law 2006, since China's judicial system recognises *de facto* employment relationships by looking at whether this relationship exists as a matter of fact.[4]

In practice, for an employee unable to present a written employment contract, a monthly wage payroll, a company entrance permit and even a factory notice mentioning the name of the person could be used as evidence to prove that an employment relationship exists. The trouble with this kind of proof is that while it can be useful, it does not go far enough in demonstrating the starting point of an employment relationship. This causes difficulties in judicial practice, especially when calculating employment termination compensation.

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1 See an insightful examination of this law at Charles D Booth, "The 2006 PRC Enterprise Bankruptcy Law: The Wait is Finally Over" (2008) 20 *Singapore Academy of Law Journal* 275-315.

2 It was amended in 2012 to curb the abuse of so-called dispatch workers. See Ronald Brown, "Chinese Workers without Benefits" (2016) 15 *Richmond Journal of Global Law and Business* 21-54, and Virginia Harper Ho and Qiaoyan Huang, "The Recursivity of Reform: China's Amended Labour Contract Law" (2014) 37 *Fordham International Law Journal* 973-1034.

3 Mingwei Liu and Sarosh Kuruvilla, "The State, the Union and Collective Bargaining in China, the Good, the Bad and the Ugly" (2017) 38 *Comparative Labour Law & Policy Journal* 187, 204.

4 See Haina Lu, "New Developments in China's Labour Dispute Resolution System: Better Protection for Workers' Rights" (2008) 29 *Comparative Labour Law & Policy Journal* 247, 256 (noting that an employee without having a written labour contract in China will be treated the same as peers who do have one).

Compared with the position of migrant workers,[5] employees in state-owned enterprises are, generally speaking, better protected and labour law is well policed to safeguard the interests of these employees in China.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

Under the China Enterprise Bankruptcy Law 2006, Article 113, employee entitlements include:

- unpaid wages;
- occupational compensations, such as work-related medical costs and permanent injury and bereavement payments;
- pension and medical insurance contribution; and
- benefits entitled under other legislations.

These pre-insolvency claims are given priority in the final insolvency asset distribution.

For unpaid pre-insolvency wages, this is relatively common in some private companies since many delay wage payment for months before finally sliding into insolvency.[6]

Regarding occupational compensation, this applies to a very small number of employees who suffered injuries (and even death) at work and apart from the medical costs, accrued and projected, there are standard payments for permanent injuries and death which are regularly updated by regional authorities.[7]

As regards pension and medical insurance contribution, under the China Labour Law 1994, Article 71, it is compulsory for employers to join the official pension and medical insurance schemes and to pay monthly contributions. Generally speaking, for state-owned companies this provision is complied with quite well in practice. However, in the case of private companies, the majority of whose employees are migrant workers, a recent study revealed that less than 20 per cent of these workers are included in the schemes.[8]

For bankruptcy employment entitlements on pension and medical insurance, it is a little more complex. The employer needs to pay monthly pension and medical insurance contribution into two different accounts, the employee's personal account and the general account. The accumulated amount in the employee's personal account will affect how much pension the employee can receive after reaching pensionable age; by contrast, the contribution to the general account is a kind of tax, which will benefit all scheme participants collectively. The China Enterprise

5 See Elaine Sio-ieng Hui, "The Labour Law System, Capitalist Hegemony and Class Politics in China" (2016) 226 *The China Quarterly* 431-455.

6 See Sarah Biddulph, Sean Cooney and Ying Zhu, "Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking" (2012) 34 *Law & Policy* 373, 391. See also International Trade Union Confederation, "2018 ITUC Global Rights Index, the World's Worst Countries for Workers" (Brussels Belgium 2018) (ranking China very low in providing employee protection).

7 For example, Shanghai has its own standards of occupational compensation, including permanent injuries and death. See the Shanghai Municipal People's Government, "Implementation Procedures of Shanghai Municipality on Industrial Injury Insurance" (Shanghai China, 21 November 2012) <http://www.shanghai.gov.cn/shanghai/node27118/node27386/node27408/n31241/n31288/u26ai35933.html> accessed 17 February 2019. Mingwei Liu and Sarosh Kuruvilla, "The State, the Union and Collective Bargaining in China, the Good, the Bad and the Ugly" (2017) 38 *Comparative Labour Law & Policy Journal* 187, 204.

Bankruptcy Law 2006, Article 113, stipulates that delayed / defaulted pension and medical insurance payments into the employee's personal account, is treated as an employee entitlement and is given priority. By contrast, defaulted payment into the general account by the employer is ranked as a tax claim that ranks behind employee entitlements in the list of priorities.

As for benefits provided under other statutes or regulations, these are mostly cases of employment termination compensation under the China Labour Contract Law 2007, Articles 44 and 46, which state that employees are entitled to such compensation when employment ends due to the employer's insolvency. Article 47 of this Law sets the standard, which equals one monthly wage for each year of employment. To this end, one whole year of employment can be counted as such if it lasts more than six months but less than a full year. For a period of less than six months, it is counted as half a year. It is clear that the calculation of the length of employment has been simplified in favour of employees.

For senior company managers, including directors and supervision directors (China has a two-tier board system), given that they are assumed to be responsible, not to say culpable, for the bankruptcy of the company, in deciding the amount of employment termination compensation under the China Enterprise Bankruptcy Law 2006, Article 113, their average monthly wages are reduced to the average monthly wages of employees as a whole. The same principle applies on the defaulted wages, if any, of senior managers. Unfortunately, in reality there are few cases in which senior managers have claims on defaulted wages – this seems to be limited to ordinary employees in most cases.

One controversial issue regarding employee entitlements in China, is where the company borrows from its own employees. This practice is supposed to have declined following a government crackdown in recent years. However, it is still used occasionally, especially by some large state-owned companies.[9] Technically, an employee lending to the company is a loan, the nature of which is an unsecured debt. However, given that employees usually have no say in whether these loans are made or not, for employee protection and the maintenance of social stability such a loan is treated as part of employee entitlements in the event of bankruptcy, and is given priority according to a Supreme Court 2002 judicial notice.[10]

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

For a secured creditor, under the China Enterprise Bankruptcy Law 2006, Article 109, the secured claim is given priority directly over the proceeds realised from the charged assets. Article 110 provides that if the secured creditor is under-secured, the balance of the claim is an unsecured debt and is treated *pari passu* along with other unsecured debts. Therefore, generally speaking, an encumbered asset is used to pay the secured creditor first and is not part of the assets over which the bankruptcy administrator / trustee can exercise his powers.

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9 See Alexandra Stevenson and Cao Li, "Cash-Strapped Chinese Giant Taps a New Money Source: Its Workers" *The New York Times* (New York USA, 1 February 2018) B1 (reporting that Hainan Airlines Group, a SOE in China, still borrowed heavily from its employees in 2018).

10 The China Supreme People's Court, "Several Issues of Handling Enterprise Bankruptcies (关于审理企业破产案件若干问题的规定)" (Beijing China, 30 July 2002) Article 58.

After meeting secured claims, pursuant to the China Enterprise Bankruptcy Law 2006, Article 113, bankruptcy costs, including the administrator / trustee fees and post-bankruptcy debts, should be paid, followed by a top-down payment order as follows:

1) employee entitlements;
2) tax claims and pension and medical insurance contributions to the general account;
3) unsecured debts.

Each claim within the various classes are treated *pari passu* in the event of insufficient proceeds being available to meet any one of the above classes of claims in full.

The general principle is therefore that employee entitlements are paid before tax claims, but after insolvency practitioner fees and post-bankruptcy debts. As is the case under most insolvency systems, unsecured creditors are placed at the bottom of the payment ladder.

The general principles set out above are subject to one important transitional exception.[11] Under the China Enterprise Bankruptcy Law, Article 132, in the event that employee entitlements have accrued prior to the date on which the Law took effect (being 1 June 2007), and cannot be fully paid under the payment order enshrined in Article 113, the secured assets must then be used to meet the shortfall. It should be clarified that:

- the unpaid employee entitlements must have accumulated before 1 June 2007 (which means that entitlements arising after that date will not be paid out of secured assets); and
- this exception applies to state-owned, private and foreign-invested company bankruptcies.

It should be emphasised that this exception has become almost irrelevant, given the fact that 2007 passed some time ago.

As regards the rights of shareholders, the China Enterprise Bankruptcy Law 2006, Article 113, does not explicitly mention whether shareholders should be paid or not if there is anything left following the full payment of all creditors. Presumably, when making this Law, the draftsmen did not anticipate the existence of such a scenario. However, in practice, this does happen. In this situation, the China Companies Law 2013,[12] Article 186, should be invoked to fill the vacuum, since it addresses the absolute priority principle according to which debt should be paid before equity, suggesting that if anything is left, it should go to the shareholders who can share the residual assets under the *pari passu* principle or according to the company articles.[13]

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11 See Terence C Halliday, *The Making of China's Corporate Bankruptcy Law* (The Foundation for Law, Justice and Society, Policy Briefing, 2007) 1-7.

12 The first China Companies Law was made in 1993, and was amended several times, in 1999, 2004, 2005 and 2013 respectively.

13 See Zinian Zhang, "Corporate Reorganisation of China's Listed Companies: Winners and Losers" (2016) 16 *Journal of Corporate Law Studies* 101, 124-6 (discussing the use of absolute priority in China's listed company reorganisations).

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Generally there are no specific provisions under the Chinese law that impose personal liabilities on directors who breach duties to the detriment of employee entitlements.

Under the China Enterprise Bankruptcy Law 2006, Article 125, directors, supervisors and other senior managers are liable for the company's losses if the company's bankruptcy was caused by their violations of the duties of loyalty and diligence. However, the problem is that this Article is too general to be used in practice. Given that the rigorous enforcement of this Article may implicate the directors of some state-owned enterprises, it has no real practical value.

It is also worth noting that even where delinquent directors are forced to pay compensation, which is very unlikely in practice, these amounts usually form part of the assets of the company in bankruptcy and are not specifically applied in meeting the payment of outstanding employee entitlements.

As for unpaid taxes, there is also no personal liability of directors in favour of the tax authorities.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

The short answer to this question is no.

Under the China Enterprise Bankruptcy Law 2006, Article 113, if there are insufficient funds to pay employee entitlements, this is a risk employees have to accept. Thankfully, in most existing corporate bankruptcy cases in China employee entitlements are often fully honoured.[14] The real concern is that in China only a small proportion of bankrupt companies can access the formal bankruptcy procedure. Without using the formal insolvency procedure, employees are likely to lose out on their outstanding employee entitlements.

Although there is no legal mechanism to guarantee employee entitlements, in practice employees in China have their own way of seeking justice, for example by making use of protest action. In cases where this kind of social stability incident arises, the local government is quite likely to intervene by meeting outstanding employee claims

[14] See Zinian Zhang, *Corporate Reorganisation in China: An Empirical Analysis* (Cambridge University Press 2018) 104-107.

through the use of the government's social stability fund. For example, in 2009 a local government in Guangdong Province paid RMB 7,000,000.00 (approximately USD 1,034,000.00) to the employees of a local bankrupt company – this happens quite often, although there is no law regulating such an intervention.[15] After having done this, the local government will usually take the employees' position in the formal bankruptcy procedure and will be reimbursed, to the extent possible, out of the company's assets.

While from an employee perspective the tactic of using protest action works, it also comes with substantial risk – for example, employees may be arrested if the protest action goes too far. Obtaining payment from local government is largely at the discretion of local senior politicians and they are usually cautious, as they may face a situation where the payment made is not fully reimbursed in the subsequent bankruptcy procedure. In reality, local government will only satisfy employee claims in this way if it convinced that a full reimbursement is likely in the subsequent bankruptcy procedure.

In 2009, the China Supreme People's Court issued a judicial notice instructing that the court should actively seek support from the local government's social stability fund to pay employees prior to the final asset distribution in order to maintain social stability; the court went further and stated that such payments can be treated as employment entitlements, given the priority.[16]

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The answer to this question is also no.

In China, the general principle is that employee claims are contractual in nature and are only against the company, an employer as an independent legal entity. In the sale of the company's business or assets, whether in or outside a formal insolvency procedure, employee claims cannot reach the purchaser, a third party, who is not a signatory to the original labour contract.

Occasionally it has been evident that some companies, in anticipation of imminent bankruptcy, wilfully transfer substantial assets to related companies under the guise of a sale in order to frustrate the claims of creditors (including the employees). The judicial system does little to prevent or rectify this situation.

Also, in corporate bankruptcy reorganisations under the China Enterprise Bankruptcy Law 2006, given that many reorganisations resort to a company sale (as opposed to a business sale), employees are supposed to automatically retain their jobs in the reorganised company. However, it is common to see the labour contracts of all employees being automatically terminated in order to create a "clean slate" for the purchaser who then chooses who to re-employ.[17]

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15 Roman Tomasic and Zinian Zhang, "The Political Determination of Corporate Reorganisations in China" in Christoph Antons (ed), *Routledge Handbook of Asian Law* (Routledge 2017) 133.

16 The China Supreme People's Court, "Judicial Notice on Corporate Bankruptcies to Enhance China's Market Economy Reforms" (关于正确审理企业破产案件为维护市场经济秩序提供司法保障若干问题的意见) (Beijing China, 12 June 2009) para 5, http://rmfyb.chinacourt.org/public/detail.php?id=129395.

17 Wei Zhongyu (韦忠语), "Employee Protection in Corporate Reorganisations"（论破产重整中职工劳动权益的保护）(2017) 5 *China Labour*（中国劳动）19-24.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

In September 2018, the China People's Congress, the Chinese parliament, released a legislating plan, stating the China Enterprise Bankruptcy Law 2006 will be amended,[18] but little is known as to whether any new employee protection mechanisms will be introduced.

[18] The China People's Congress Standing Committee, "The Legislating Plan of the 13th People's Congress Standing Committee" （十三届全国人大常委会立法规划）' (Beijing China, 7 September 2018), http://www.xinhuanet.com/politics/2018-09/08/c_1123397570.htm

CZECH REPUBLIC

1. How is an employee defined for the purpose of formal insolvency proceedings?

Section 6 of the Czech Labour Code[1] defines an employee as "a natural person who is contracted to perform dependent work". This means that an employee is a person who performs the employer's tasks personally, in accordance with the employer's instructions, in the name of the employer and as a subordinate to the employer. According to this regulation, an employee is a person in an employment relationship.

The Czech Act on the Protection of Employees against the Employer's Insolvency[2] (the Employees Protection Act) states[3] slightly differently that, for the purposes of this Act, an employee is an individual with whom the employer has concluded a labour relationship, an agreement on labour activity or an agreement to perform a job (these are different types of employment relationships) and who has unsettled wage-related claims that arose within the "decisive period". The decisive period is defined as the month in which a moratorium before insolvency proceeding has been declared or in which a petition for insolvency of the employer was filed, as well as three months before and three months after that month.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

According to the Employees Protection Act,[4] where an employer has become insolvent, an employee is, within the scope of and upon conditions stipulated by the Act, entitled to payment of due wage claims not paid by his employer.[5] In the case of international employers with employees working in the territory of the Czech Republic, such payment is to be performed by the regional labour office (or, in the case of international employers with employees working in the territory of the Czech Republic, the Prague labour office).

The Employees Protection Act also stipulates that a maximum of three months wages may be claimed. Claims for additional wages may be asserted only after certain conditions have been satisfied and there has been at least partial satisfaction of the previous claims.

The total wage claims paid to one employee may not exceed one-and-a-half times the "decisive sum" for one month's wages. The "decisive sum" is determined by a decree of the Ministry of Labour and Social Affairs, and is based on the national average wage in the preceding calendar year. In 2017, this amount was about CZK 45,000 (EUR 1,700) per month (this amount is expected to increase to CZK 52,000 in 2019).[6]

Within seven working days of receiving an application from an employee, the labour office[7] requests the employer to present the file of all employee wages, including wages for which mandatory social insurance contributions have not been paid. The employee is to be paid no later than ten days after the application.

1 Labour Code, Act. No. 262/2006 Coll.
2 Act of the Czech Republic No. 118/2000 Coll. on Protection of Employees against the Employer's Insolvency as amended.
3 *Idem*, § 3.
4 *Idem*, § 1.
5 Labour Code, § 5, para 1 and § 8.
6 Employees Protection Act, § 5 para. 2.
7 *Idem*, § 9, para 6.

The Czech Bankruptcy Act[8] sets out the priority of claims.

The employees' claims[9] arising from the employment relationship have the same right to priority payment as claims arising from the administration of the debtor's estate, which means they can be fully paid at any time during the insolvency proceeding. The relevant claims are:

- wage (salary) claims of employees, including remuneration for work performed outside an employment relationship and remuneration for on-call duty;
- claims for leave and public holidays;
- severance payments for termination of employment;
- claims for compensation for damage incurred by the employee in the performance of working tasks or in direct connection therewith;
- claims for compensation for damage incurred by the employee while averting danger;
- claims for compensation for damage to things brought to work by employee;
- claims for compensation for invalid termination of the employment by the employer;
- compensation for travel, moving or other expenses;
- compensation of employees for their tools, equipment and items necessary for work;
- compensation for damage and non-material damage due to accidents at work and occupational diseases;
- compensation for loss of earnings arising from full or partial disability (unless compensated otherwise) and claims for compensation and the maintenance of survivors in connection with a work injury, incapacity or death.

The above mentioned claims are considered work claims regardless of when they arose.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

The claims of insolvency administrators and professionals retained by the estate[10] and claims the rank equally with claims against the estate (such as work claims), may be satisfied at any time during the bankruptcy proceedings.[11] They therefore have a much higher probability of settlement than other unsecured creditors' claims. These claims may be satisfied only after the adjudication of bankruptcy. They are to be submitted to the person with the power of disposition, while other claims must be submitted to the insolvency court.[12]

8 Act of the Czech Republic No. 182/2006 Coll. on Bankruptcy and Means of Resolving It (hereafter referred to as the Bankruptcy Act).
9 *Idem*, § 169, para 1.
10 *Idem,* § 168, para 3.
11 *Idem*, § 169, para 2.
12 *Idem*, § 203, para 1.

4. What if any personal liabilities do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owned in relation to employee entitlements?

The directors and managers of a company are liable if they fail to act with due professional diligence and, as a result, cause damage to the company.[13] Failure to pay employee entitlements is an administrative infraction which can result in fines for the company in an amount of up to CZK 2,000,000.[14] This fine could be classified as damage caused to the company by a failure to act with due professional diligence, such that the directors and managers would be liable to compensate the company for that damage. Employees and other creditors could also have civil damage claims in the case of a delay in filing for insolvency.

Failing to pay social security contributions, taxes, health insurance contributions and similar payments is a criminal act.[15] Compared to other jurisdictions, prosecution of such criminal acts is very slow. In many cases, the outcome is an agreement with the authorities for the payment of outstanding payments without additional sanctions.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There is no additional special "safety net" scheme that guarantees employee entitlements in the event of insolvency. However, employees[16] may ask a labour office to satisfy unpaid wage claims within 35 months and 15 days after the labour office has published information about the possibility of satisfaction of such claims.[17]

The Labour Office will pay all mandatory social insurance contributions and deductions from employees' salaries that should have been made by the employer. The Labour Office can then attempt to recover such pay-outs by lodging a claim with the trustee. Labour Offices are quite often represented on the creditor committee and other bodies.

13 Act No 90/2012 Coll. on Commercial Companies and Cooperatives (Business Corporations Act), § 53.
14 Act No 251/2005 Coll. on Labour Inspection, § 26 para 1, para 2.
15 Act No 40/2009 Coll., Criminal Code, §§ 240 and 241.
16 Employees Protection Act, § 4, para 1.
17 *Ibid*.
18 Bankruptcy Act, § 291, para 1.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability otherwise?

As general rule in civil law, where a debtor's enterprise is transferred by a single agreement, all rights and obligations of the enterprise pass to the acquirer. This includes rights and obligations owed to employees of the debtor company.[18] However, in the case of bankruptcy, claims arising against the debtor before the agreement has come into effect are not transferred and must be satisfied out of the distribution of proceeds of the sale of the estate.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

No proposals from the current or the next government are expected. The number of insolvencies has decreased considerably during the present boom in the Czech economy and, until the next crisis comes, employee entitlements in case of bankruptcy of the employer are not a central topic of Czech politics.

DENMARK

1. How is an employee defined for the purpose of formal insolvency proceedings?

There is no statutory definition of an employee. The concept has developed through case law and theory.

Of essence are the following criteria:

- is the employee subject to orders from the employer?
- does the employer withhold tax when paying remuneration to the employee?
- does the employee have only one employer?
- is the employee paid on a regular basis (for example, monthly or weekly)?
- is the employee granted annual leave?

If a positive reply can be given to these questions, a person will be considered an employee in regard to the Danish Bankruptcy Act.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

Employee entitlements depend upon whether the employer is in bankruptcy or in a restructuring process. Both of these are dealt with below.

2.1 Bankruptcy

"The estate should as soon as possible decide whether to adopt employment contracts made with persons, employed with the debtor's business enterprise…"[1]

The estate has two weeks from the date of the adjudication order to decide and inform the employees if the estate will adopt the employment contracts. If the estate chooses to adopt some or all the employment contracts, the remuneration (from the date of the adjudication order) will be a pre-preferential claim in the estate.

If the estate decides not to adopt employment contracts and informs the employees within two weeks, the remuneration will be a preferential claim in the estate.

If the estate fails to decide and inform the employees within two weeks, the remuneration will be a pre-preferential claim in the estate for the period from the adjudication order until the date on which employees are notified.

The following claims are preferential and will be covered according to the order of distribution of assets mentioned below:

- salary and allowances;
- compensation (notice period);
- unpaid pension contributions;
- holiday (leave) allowances;
- redundancy payments;
- unfair dismissal claims;
- reasonable legal costs incurred before the bankruptcy.

[1] Bankruptcy Act, s 63.

The following claims are not preferential and will be treated as unsecured claims:

- mileage allowances;
- subsistence allowances;
- entertainment costs;
- claims from more than six months before the bankruptcy.

2.2 Restructuring

As in bankruptcy, a debtor in a restructuring process has two weeks after the commencement of the process to decide and inform the employees as to whether their employment contracts will continue.

If the debtor declares that he is unwilling to continue the employment contracts, the employees' claim for remuneration for the period after the commencement of the restructuring proceedings will be ranked alongside remuneration for the preceding period.

Should the debtor make the declaration more than two weeks after the commencement of the restructuring proceedings, a claim for the period between the date of commencement and the date of the declaration will fall within the scope of section 94, meaning that it will be ranked above preferential claims but below the pre-preferential claims for employment during bankruptcy. Claims for remuneration for work which the employee has performed in the course of the restructuring process, will fall into the same category.[2]

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

The assets of the estate are distributed in the following order:[3]

a) secured claims;[4]

b) the costs and expenses of commencing the bankruptcy, the administration of the estate (that is costs incurred in the course of bankruptcy proceedings, including salaries on the employment contracts that have been adopted) and debts incurred by the estate during its administration, are paid in equal proportions (pre-preferential claims);[5]

c) the reasonable costs and expenses incurred in an attempt to provide a rearrangement of the debtor's financial affairs by a restructuring, reorganization, dissolution process, composition or similar scheme, other debts (including salaries) incurred by the debtor (with the consent of a restructuring administrator appointed by the bankruptcy court) after the date of notice, reasonable costs and expenses incurred in a commencement of liquidation of a public limited liability company or private company, and the court fees, are paid in equal proportions;[6]

2 *Idem*, s 12 u.
3 *Idem*, ss 82, 93 to 98.
4 *Idem*, s 82.
5 *Idem*, s 93.
6 *Idem*, s 94.

d) claims for wages / salaries and other consideration for work performed in the debtor's service which have fallen due within the period from six months prior to the date of notice and until the making of the winding up order, are paid in equal proportions (preferential claims);[7]

e) any suppliers' claims for duties on dutiable goods which have been supplied to the debtor in duty paid condition for resale within 12 months before the date of the notice;[8]

f) the remaining unsecured creditors are then paid in equal proportions (with the exception of claims referred to below).[9]

After all other categories of claims, the following claims are paid in the following order:

(i) claims for interest, accrued after adjudication (not being interest accrued on the claims referred to under b) and c) above);

(ii) claims under a lease agreement that could be considered financial leasing;

(iii) claims on regular payments relating to the period after adjudication, to the extent that the creditor is unable to prove that the payments are comparable to instalments;

(iv) claims for fines, penalties and appraisal value on seizure;

(v) claims for payment of additional tax in consequence of a wrongful tax return or non submission of such a return;

(vi) claims for agreed penalties to the extent that such penalties exceed the actual loss suffered; and

(vii) claims under gratuitous promises (deferred claims).[10]

Any excess will be distributed to the shareholders according to rules governing the solvent liquidation of companies.

4. What if any personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The management of the company can be held liable for unpaid claims if the management has committed the company to obligations knowing that the company will not be able to pay claims relating to those obligations. This issue arises in relation to unpaid, withheld tax on salaries where the management knew that the company would not be able to pay those taxes.

7 *Idem*, s 95.
8 *Idem*, s 96.
9 *Idem*, s 97.
10 *Idem*, s 98.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

The Employees' Guarantee Fund is an independent institution established by law in 1972. The Employees' Guarantee Fund revenue comes from employers' contributions.

In the case of bankruptcy, it covers claims up to DKK 160,000 plus holiday allowances. The employee must file an application within four months of the bankruptcy.

The Employees' Guarantee Fund does not cover claims from the managers of the debtor or persons related to the managers of the debtor.

The Employees' Guarantee Fund is subrogated as a potential claimant against the estate.

The Employees' Guarantee Fund does not take any actions to enhance recoveries that may be made in an insolvency to pay out employee creditors and other unsecured creditors.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The acquirer takes on all the transferor's rights and obligations in respect of the employees taken over, including salary, holiday and public holiday pay, expenses payable to the ATP (the Danish Labour Market Supplementary Pension Scheme), bonuses, profit shares, gratuities and the value of overtime where time has not been taken in lieu.[11]

According to current practice developed in theory and by the Employees' Guarantee Fund, special rules apply if the transfer of a business is made from a bankrupt estate and the transfer was not planned before the bankruptcy. In this case, the acquirer might avoid claims relating to the period before the bankruptcy.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are no proposals for legislative reform to further protect employee entitlements in an insolvency.

[11] Act on the Legal Position of Employees on the Transfer of Undertakings (*Lov om lønmodtageres retsstilling ved virksomhedsoverdragelse*), s 2.

ENGLAND AND WALES

1. How is an employee defined for the purposes of formal insolvency proceedings?

The Insolvency Act 1986 does not contain a definition of "employee", but section 230(1) of the Employment Rights Act 1996 defines an "employee" as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

Section 230(2) of the Employment Rights Act defines a "contract of employment" as a "contract of service or apprenticeship, whether expressed or implied, and (if it is express) whether oral or in writing."

The significance of establishing whether an individual is an employee for the purposes of insolvency proceedings is that:

- only employees are afforded certain statutory rights and protections which can be claimed during the insolvency process (such as statutory redundancy pay); and
- only employees can claim debts from the National Insurance Fund (see question 5 below).

The relevant date for insolvency proceedings is:

(a) the date of passing a resolution to wind up the company in a liquidation;

(b) the date an administration order is made in an administration;

(c) the date of appointment for a receiver in an administrative receivership;

(d) the date that a company voluntary arrangement is approved; and

(e) in the case of a compulsory winding up of a company, the date that the order is made.

2. What are the employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

Employees may have a range of claims in connection with insolvency proceedings. The majority of debts owed to employees will be unsecured and will rank second to last in the order of priority on a realisation of assets. However, some employee debts will be preferential debts or qualifying liabilities which rank higher in the order of priority (see question 3 below). In addition, where they are unable to recover them from the employer, employees can seek compensation of certain debts from the National Insurance Fund (see question 5 below).

2.1 Qualifying liabilities

Qualifying liabilities are wages and salaries owed to employees whose contracts are adopted by an administrator (that is, who are not dismissed within 14 days of the administrator's appointment). Qualifying liabilities rank second in the order of priority, behind fixed charges[1] (see question 3 below).

Qualifying liabilities are limited to "wages or salary" and include holiday pay, sick pay, payments in lieu of holiday and certain contributions to occupational pension schemes.[2]

1 Insolvency Act 1986, Sch B1, para 99(4).
2 *Idem*, paras 99(5) and 99(6).

Case law has established that statutory redundancy payments, payments for unfair dismissal, payments in lieu of notice, protective awards for failure to consult in relation to redundancies, and damages for wrongful dismissal are not qualifying liabilities (and will therefore not be paid in priority to an administrator's expenses).

2.2 Employee preferential debts

Preferential debts are debts that have statutory priority over other unsecured debts and debts owed to floating charge holders (see question 3 below).

Employee preferential debts consist of:

(a) remuneration owed to employees for the four-month period before the start of insolvency proceedings, subject to a statutory cap of GBP 800 per employee; and

(b) uncapped accrued holiday pay (both statutory and contractual) in respect of any period prior to the start of proceedings.[3]

Remuneration includes:

- wages or salary;
- sick pay, contractual or statutory maternity pay;
- remuneration for suspension on medical or maternity grounds and payments for time off for trade union duties, antenatal care, and looking for work;
- contractual commission or bonus; and
- overtime payments.

An employee will rank as an unsecured creditor in respect of any remuneration debt in excess of the GBP 800 cap / four month period (see "unsecured debts" below).

In addition, certain pension contributions owing by employers to occupational pension schemes are preferential debts.[4]

2.3 National Insurance Fund

Where an employer is insolvent, the National Insurance Fund guarantees payment of certain debts owed to employees, subject to a statutory cap. If an insolvent employer fails to pay all or part of these specific debts that are owed to an employee, the employee may apply to the Secretary of State for the payment (or outstanding balance) to be paid out of the NIF through the Redundancy Payments Service (see question 5 below). The NIF then stands in the employee's shoes in seeking redress from the insolvent employer.

2.4 Unsecured debts

To the extent that employee debts do not fall into any of the categories above, or exceed the statutory caps on preferential employee remuneration or on the amount that can be claimed from the National Insurance Fund, these debts will rank second to last in the order of priority as unsecured debts.

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3 Insolvency Act 1986, s 386 and category 5, Sch 6,.
4 *Idem*, category 4, Sch 6.

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings, compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

On a company's insolvency creditors will rank in the following order of priority:

First: Fixed charge holders

Second: Qualifying liabilities under adopted contracts

Third: Expenses incurred by the insolvency practitioner to allow them to carry on their duties

Fourth: Insolvency practitioner's own fees

Fifth: Preferential creditors, including preferential employee debts

Sixth: Floating charge holders (save for the ring fenced fund for the benefit of unsecured creditors)

Seventh: Unsecured creditors (on a *pari passu* basis)

Eighth: Shareholders

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Directors generally have no personal liability to employees, unless the employee's contract of employment states that the employee was employed by the director and not the insolvent company.

However, directors could be personally liable if an employee claims that their dismissal or treatment in the context of the insolvency has been discriminatory at the hands of a director, as discrimination claims can be brought against both individuals and companies.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate;

(b) what if any priority does it enjoy in formal insolvency proceedings in terms of payments it may make; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

If there are insufficient funds to pay an employee from the insolvent business, the employee can apply to the National Insurance Fund for outstanding payments. In order

to qualify for National Insurance Fund payments, the employer must be insolvent and the employee's employment must have been terminated.

The National Insurance Fund, operating through the Redundancy Payments Service, guarantees a basic minimum payment of specific debts owed to employees by their employers. The guaranteed debts are set out below.[5]

5.1 Arrears of pay

Employees can claim up to a maximum limit of eight weeks' arrears of pay from the National Insurance Fund. This is capped at the statutory limit on a week's pay and is subject to tax and National Insurance Contributions. Arrears of pay include:

- statutory guarantee payments;
- payment for time off work for carrying out trade union duties;
- remuneration on suspension on medical or maternity grounds; and
- remuneration under a protective award.

5.2 Statutory redundancy payment

Employees with two years' continuous employment have a right to redundancy pay. The total payment is dependent on length of service, the employee's age and the employee's weekly wage (subject to a statutory cap).

5.3 Holiday pay

Employees can claim up to six weeks' holiday pay (capped at the weekly limit) which accrued in the 12 month period ending on the date of the insolvency, less basic rate tax and National Insurance Contributions. Holiday pay may include holiday carried over from the previous year if the contract of employment allows this.

5.4 Statutory notice pay

Employees can claim in relation to their employer's failure to give statutory notice (irrespective of the length of the employee's contractual notice) based on their length of service. This is subject to a maximum of 12 weeks' capped weekly pay. If an employee receives any other income during the notice period, this will be deducted from the notice pay.

5.5 Unfair dismissal basic award

If an employment tribunal finds that an employee has been unfairly dismissed the employee can claim compensation of the basic award from the National Insurance Fund. The basic award is calculated in the same way as the statutory redundancy payment (subject to the statutory limit). If the employer is in administration or compulsory liquidation, the employee would need the stay on legal proceedings to be lifted in order to claim the basic award. The second element of the compensation payable for unfair dismissal (the compensatory award) cannot be claimed from the National Insurance Fund and is an unsecured debt.

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[5] Employment Rights Act 1996, s 184, Ch VI, Pt XI and Pt XII.

5.6 Unpaid pension contributions

The trustees of an occupational pension scheme or personal pension scheme may apply to the Secretary of State claiming unpaid pension contributions (either on the employer's own account or on behalf of the employee if deducted from the employee's pay) into the scheme during the 12 months preceding the date on which the employer became insolvent. The National Insurance Fund is obliged to meet these liabilities subject to the maximum amounts set out in sections 124 and 125 of the Pension Schemes Act 1993.

A statutory cap on weekly pay applies to all of the above payments. The statutory cap is revised annually by the Secretary of State.

Once an employee has been paid out of the National Insurance Fund, their claim to that debt from the employer is extinguished and the state has a subrogated claim against the insolvent employer.[6] The state's priority in recovery of the debt will therefore depend on the priority of the employee whose rights it assumes.

In addition, certain payments are covered by Her Majesty's Revenue and Customs (HMRC). If an employee cannot obtain payment from his / her employer due to insolvency, HMRC is liable to pay statutory maternity pay,[7] statutory paternity pay,[8] statutory adoption pay[9] and / or statutory sick pay.[10]

The National Insurance Fund does not take any action to enhance recoveries that may be made in an insolvency to pay out employee creditors and other unsecured creditors.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The rights of employees in the context of a business sale by their employer are governed by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Ordinarily, the contracts of employment – and, therefore, the rights – of employees employed by the seller and "assigned to the organised grouping of resources or employees that is subject to the relevant transfer", automatically transfer to the buyer on their existing terms.

However, TUPE contains specific derogations where the seller is insolvent:

(a) Where the seller is subject to insolvency proceedings which are under the supervision of an insolvency practitioner but have not been opened with a view to the liquidation of the seller's assets,[11] the buyer will not inherit all of the insolvent seller's debts owed to transferring employees. The pre-existing debts that do not transfer are those guaranteed to be paid by the National Insurance Fund (see question 5 above).[12] However, the buyer remains liable for those debts owed to

6 *Idem*, s 189.
7 Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960), regs 7(3), 7(4) and 30.
8 Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002/2822).
9 *Ibid*.
10 Statutory Sick Pay (General) Regulations 1982 (SI 1982/894), reg 9B.
11 TUPE, Regs 8(1) and 8(6).
12 *Idem*, Reg 8(4)(b).

employees which are not covered by the National Insurance Fund or which exceed the relevant statutory limits. In addition, there is greater scope for the buyer to vary the terms of employment of transferring employees than is otherwise permitted in relation to TUPE transfers.[13]

(b) Where the seller is subject to "bankruptcy proceedings or any analogous proceedings" (that is, the insolvency proceedings are under the supervision of an insolvency practitioner and have been opened with a view to the liquidation of the seller's assets), employees – and therefore, any of their claims against the seller – will not automatically transfer to the buyer as regulation 4 (automatic transfer principle) does not apply. Additionally, any dismissals because of the transfer, or for a reason connected with it, are not automatically unfair as regulation 7 (special protection against dismissal) does not apply.[14]

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are currently no proposals for legislative reform aimed specifically at further protecting employee entitlements in an insolvency.

[13] *Idem*, Reg 9.
[14] *Idem*, Reg 8(7).

HONG KONG

1. How is an employee defined for the purposes of formal insolvency proceedings?

The term "employee" is defined in the Employment Ordinance[1] as a person engaged under a contract of employment. To determine those workers to whom the Ordinance applies, reference must be made to the common law.

The Employment Ordinance covers all employees, whether temporary or part-time, with the following exceptions:

(a) a family member who lives in the same dwelling as the employer;

(b) an employee as defined in the Contracts for Employment Outside Hong Kong Ordinance;[2]

(c) a person who is serving under a crew agreement within the meaning of the Merchant Shipping (Seafarers) Ordinance,[3] or on board a ship which is not registered in Hong Kong; and

(d) an apprentice whose contract of apprenticeship has been registered under the Apprenticeship Ordinance,[4] other than certain provisions of the Employment Ordinance.

Employees employed under a continuous contract, whether temporary or part-time, are entitled to all the statutory benefits under the Employment Ordinance subject to satisfaction of the conditions stipulated therein. An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week, is regarded as being employed under a continuous contract.[5] In any dispute as to whether a contract of employment is a continuous contract, the onus of proving that it is not a continuous contract shall be on the employer.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

Employers have a basic legal obligation to pay the wages or salaries agreed with an employee subject to provision that the employee carries out the work and services agreed with the employer. In Hong Kong, salaries and wages are not fixed by law and are negotiated between the employer and the employee, except for certain minor classes of employees and subject to the statutory minimum wage which came into effect on 1 May 2011.[6]

A summary of employee claims on termination of a contract of employment in case of receivership or liquidation of their employer under the provisions of the Employment Ordinance and the Companies (Winding Up and Miscellaneous Provisions) Ordinance,[7] is as follows:

1 Cap 57.
2 Cap 78.
3 Cap 478.
4 Cap 47.
5 Employment Ordinance, Sch 1.
6 Minimum Wage Ordinance, Cap 608.
7 Cap 32.

2.1 Wages

All remuneration, earnings, allowances (including travelling allowances, attendance allowance, commissions and overtime), tips and service charges however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment.

2.2 Payment in lieu of notice

Where there is a proper employment contract and the contract has:

- no specific provision, payment in lieu of notice should not be less than one month;
- specific provision, payment in lieu of notice should cover the agreed period but not less than seven days.[8]

Where there is no proper employment contract, payment in lieu of notice should be the equivalent of one month's salary.

Either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party a sum equal to the amount of wages which would have accrued to the employee in the period of notice (as per the above).

2.3 Severance payment

Only employees who have been employed under a continuous contract for not less than 24 months are entitled to severance payment . Generally, the maximum payment is equal to (last month's wages x 2/3) or a maximum of (HKD 15,000 x reckonable years of service) or a maximum of HKD 390,000, whichever amount is less.

2.4 Accrued holiday pay

Employees employed under a continuous contract for a period of three months immediately preceding a statutory holiday as defined in the Employment Ordinance, are entitled to holiday payment equivalent to the wages which the employees would have earned if he had worked on the holiday.[11]

2.5 Annual leave pay

In many cases, annual leave is provided for in the employment contract. For cases where this is not provided for in the employment contract and:

(a) the employee has been employed for 12 months;[12] or

(b) the employee has been employed for less than 12 months but more than three months, the annual leave pay is proportional to the entitlement.[13]

Employees have preferential claims in respect of a portion of the total amount outstanding to them when an employer becomes insolvent. The Companies

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8 Employment Ordinance, ss 6 and 7.
9 *Idem*, s 31B(1).
10 *Idem*, s 39(1).
11 *Idem*, ss 40 and 41D.
12 *Idem*, s 41AA.
13 *Idem*, s 41D.

(Winding Up and Miscellaneous Provisions) Ordinance specifies which debts are preferential (including employee claims) and the priority of payment in the event of formal insolvency proceedings against a corporate employer. The following schedule summarises some of the employee claims that rank for priority.[14] All of these debts rank equally among themselves and must be paid in full unless the assets are insufficient to meet them, in which case they abate in equal proportion amongst themselves.

Categories of claims	**Limits of preferential claims with first priority (HKD)***
Arrears of wages	8,000
Severance pay	8,000
Long Service Leave	8,000
Compensation due under the Employees' Compensation Ordinance	No limit
Wages in lieu of notice	2,000
Accrued holiday remuneration	No limit
Unpaid contributions due by the employer to the employees' pension fund	50,000 plus 50% of the amount that exceeds 50,000
Salaries deducted by the company for making contributions to MPF not paid into the scheme	No limit

* All amounts in excess of the above limits share the same priority as ordinary unsecured creditors.

Where any payment is made on account of wages, severance payment, long service payment, wages in lieu of notice, or accrued holiday remuneration out of money advanced by some person for that purpose, that person has a right of priority in a winding-up equivalent to the priority which the employees would have had if they had not been paid by such advance. Included in this group is the Protection of Wages on Insolvency Fund (see below).

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

In insolvency proceedings generally, the available assets are distributed amongst the various types of claims in the following order:

- creditors secured by a fixed charge;
- costs and expenses of the insolvency proceedings, including the remuneration of the insolvency practitioner;
- preferential creditors – including certain debts due to employees as outlined above;
- creditors secured by a floating charge;
- unsecured creditors in general; and
- shareholders.

Where there are insufficient funds to pay any class of claims in full, payments are made on a *pro rata* basis.

[14] Companies (Winding Up and Miscellaneous Provisions) Ordinance, s 265.

4. What if any personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The directors and / or others involved in the management of the company have no personal liability with respect to unpaid employee entitlements or taxes or other duties owed, unless their employment contracts state that they are employed by the directors and not the company.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payment it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

Since 1985, pursuant to the Protection of Wages on Insolvency Ordinance[15] (PWIO), employees owed wages, severance pay or wages in lieu of notice by an insolvent employer may apply to the Protection of Wages on Insolvency Fund Board (PWIFB) for payment. The PWIFB is funded by a special levy on business registration fees. The payments are made on an *ex gratia* basis and are subject to certain limits. The PWIFB has no statutory obligation to make payments in the case of a voluntary liquidation or a receivership. However, it will often make such payments on an *ex gratia* basis.

The circumstances under which payment will be made by the PWIFB include the following:

(a) in the case of an employer who is not a company,[16] a bankruptcy petition has been presented against him; or he has committed an act of bankruptcy within the meaning of the Bankruptcy Ordinance[17] but a petition cannot be presented against him;[18]

(b) in the case of any employer which is a company, a winding-up petition has been presented against that employer;[19] or

(c) the Commissioner may make an *ex gratia* payment if in his opinion:-[20]
   (i) the employer employs less than 20 employees; and
   (ii) sufficient evidence exists to support the presentation of a petition on the ground, if the employer is a company, that it is unable to pay its debts; or if the employer is a person other than a company; that he has committed an act of bankruptcy; and
   (iii) it is unrecoverable or uneconomic to present a petition.

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15 Cap 380.
16 Protection of Wages on Insolvency Ordinance, s 16(1)(a).
17 Cap 6, s 3.
18 Protection of Wages on Insolvency Ordinance, s 16(1)(a).
19 *Idem*, s 16(1)(b).
20 *Idem*, s 18.

The following table summarizes the limits of *ex gratia* payments made by the PWIFB:

Categories of claims	Wages protection fund limits (HKD)
Arrears of salary	36,000
Payment in lieu of notice	22,500 or one month's pay, whichever is less
Untaken annual leave and statutory holidays	10,500[21]
Severance pay	50,000 + 50% of amount exceeding 50,000

Any employee whose employer has become insolvent and who is owed wages, wages in lieu of notice or severance payments, is eligible to submit an application to the PWIFB. Directors of insolvent companies will generally not be entitled to claim from the PWIFB.

In seeking payment from the PWIFB, the applicants must sign a statutory declaration to confirm the accuracy of their claims. The PWIFB will verify the claims against personnel and wages records before the *ex gratia* payments are approved.

The PWIO provides that the rights and remedies of the employee, to the extent of the amount of payment made by the PWIF, will be subrogated to the PWIF. The claims of the PWIF are afforded preferential status in a winding up ahead of other employee claims.[22]

The operation of the PWIO has no effect on the enhancing of any recoveries.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The contract of service of an employee is deemed to terminate upon the making of the winding up order (in the case of a court-initiated liquidation) or the appointment of a liquidator (in the case of a voluntary liquidation). The appointment of a receiver or provisional liquidator does not serve to terminate a contract of employment. However, the general rule that the assignment of the benefit of a contract is possible without the consent of the other party does not apply to employment contracts, which are personal contracts and are not assignable.

When a business is sold with the intention that the employees will transfer with the business, there is legally a termination of the employment with the seller, and a new hiring by the purchaser. The Employment Ordinance makes special provision to protect entitlements to severance and long service payments, which are both subject to minimum length of service requirements.

If the intention of the parties is to transfer obligations from the seller to the purchaser, certain conditions have to be met. These include:-

- giving notice or payment in lieu of notice;
- making an offer of employment to the employee with terms which are either "not different" from the previous terms and conditions, including provisions as to the capacity and place in which the new employee would be employed, and "no less favourable" to the employee;

[21] In terms of the Protection of Wages on Insolvency (Amendment) Ordinance, 2012.
[22] Companies (Winding Up and Miscellaneous Provisions) Ordinance, s 265.

- an offer of re-employment to take effect on or before the termination of the previous employment; in practice, both are usually timed to occur on the date of transfer;
- an acceptance of the offer by the employee.

If the purchaser subsequently dismisses an employee transferred in this way, he will be liable to pay severance payment or long service payment based on the entire length of service with both employers.

If an employee unreasonably refuses an offer of new employment made in accordance with the above conditions, neither the seller nor the purchaser will have any liability for severance payments.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

For a number of years, the Hong Kong government has indicated that it would revise the "offsetting" mechanism to employees' Mandatory Provident Fund entitlements, which allows employers to utilise employees' pension funds for severance and long-service payments.

This has been a controversial topic over the years given the competing interests of employers *vis-à-vis* employees. The consideration of this issue was delayed given the change of Hong Kong's chief executive on 1 July 2017. This topic is still being discussed by the government, business and community groups at large, with no proposals envisaged in the near term.

INDIA

1. How is an employee defined for the purpose of formal insolvency proceedings?

"Employee" is not defined in the Insolvency and Bankruptcy Code, 2016 (Bankruptcy Code).

The term "workman" is defined in section 3(36) of the Bankruptcy Code and has the same meaning as in the Industrial Disputes Act, 1947[1] (relevantly, any person, including an apprentice, employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied).

Many of a company's employees may not fall within this definition of "workman". Nevertheless, it would be safe to say that, for the purpose of formal insolvency proceedings, all persons in the employment of a debtor company are generally considered to be employees. Despite this, the Bankruptcy Code's treatment of an employee may vary depending upon whether he or she is also a "workman".

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

The Bankruptcy Code gives priority to the entitlements of workmen and employees in corporate insolvency resolution processes and liquidation proceedings.

In liquidation proceedings, workmen's entitlements have priority over those of employees.

In insolvency resolution processes, employees and workmen are treated as "operational creditors". An operational creditor is a person to whom an operational debt is owed and any person to whom such debt has been legally assigned or transferred.[2] Operational creditors can submit a claim to the insolvency professional appointed as interim resolution professional by the National Company Law Tribunal (Adjudicating Authority) and later appointed as resolution professional by the committee of creditors of the debtor.

A workman can submit a claim for permissible workmen's dues, which is the aggregate of the following sums due from the company to its workmen:

(a) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) in respect of services rendered to the company and any compensation payable to the workman under any of the provisions of the Industrial Disputes Act, 1947;

(b) all accrued holiday remuneration that is payable to the workman (or, in the case of his death, to any other person in his right) on the termination of his or her employment before or resulting from the winding up order or resolution;

(c) workers compensation entitlements (unless the company is being wound up voluntarily for the purposes of reconstruction or amalgamation, or the company has, at the commencement of the winding up, rights capable of being transferred to and vested in the workmen under section 14 of the Workmen's Compensation Act, 1923 (Act 19 of 1923));

1 Insolvency and Bankruptcy Code 2016, s 3(36).
2 *Idem,* s 5(20).

(d) all sums due to the workman from any provident fund, pension fund, gratuity fund or other fund that the company maintains for the welfare of its workmen.[3]

Employees can submit a claim on the basis of their contractual terms of employment.

The claim must verified by the interim resolution professional or resolution professional, as the case may be.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compared to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

In an insolvency resolution process, the cost of the process itself (including the costs of administration, the insolvency professional and costs relating to the process) ranks higher in priority than the claims of operational creditors. The claims of operational creditors must be paid (on liquidation value) in priority to any financial creditor (secured or unsecured) and must be paid before the expiry of 30 days after the approval of the resolution plan by the Adjudicating Authority.

In the liquidation process, the unpaid costs of an insolvency resolution process and the cost of the liquidation itself, rank ahead of workmen's dues and employee claims.

Workmen's dues for the period of 24 months preceding the liquidation commencement date, rank equally with debts owed to secured creditors which relinquish their security interest in favour of the liquidation estate. Wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date, rank below secured creditors and workmen's dues as stated above.

Workmen's dues arising more than 24 months before the liquidation and employee claims arising more than 12 months before the liquidation, are treated as unsecured debts and rank with other unsecured creditors.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The Bankruptcy Code itself does not impose any liability on directors and others involved in the management of the company with respect to unpaid employee entitlements, taxes or other duties owed in relation to employee entitlements.

In an insolvency resolution process, section 30(2)(b) of the Bankruptcy Code requires the resolution professional to examine the proposed resolution plan to confirm that operational creditors will be paid not less than the amount they would receive if the company were being liquidated under Section 53 of the Bankruptcy Code. Further, a resolution plan can be approved only if it provides for:

- the payment (at liquidation value) of operational creditors' claims in priority to any financial creditor (secured and unsecured); and

[3] Companies Act 2013, s 326.

- payment of those claims within 30 days after the approval of the resolution plan by the Adjudicating Authority.[4]

A successful bidder may be liable for failure to implement the resolution plan.

In a liquidation, the liquidator is obliged to distribute the proceeds of sale of the liquidation estate in accordance with the priorities set out in section 53 of the Bankruptcy Code. The liquidator can be penalised for making payments in violation of those priorities.

However, other statutes hold directors or management responsible for non-payment of the dues of workmen and employees or depriving them of their lawful entitlements:

- Industrial Disputes Act, 1947;
- Industries (Development and Regulation) Act, 1951;
- The Employees Provident Funds and Miscellaneous Provisions Act, 1952;
- Employees State Insurance Act, 1948;
- Employers Liability Act, 1938;
- The Minimum Wages Act, 1948;
- The Payment of Bonus Act, 1965;
- The Payment of Gratuity Act, 1972;
- The Payment of Wages Act, 1936;
- Workmen's Compensation Act, 1923;
- Employees' State Insurance (General) Regulations, 1950.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to pay out employee creditors and other unsecured creditors?

There is no government scheme guaranteeing payment of employee entitlements in insolvency resolution or liquidation proceedings.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Although the terms of an insolvency resolution plan are proposed by the resolution applicant (bidder), there is a statutory requirement that the plan must balance the interests of all stakeholders. If the bidder is acquiring the business on "as is where is" basis, it is expected that it will take over all assets and liabilities, including employee and workmen's claims. The insolvency professional may only present the committee of creditors with plans which conform to the laws presently in force in India. Thus, a

[4] Insolvency and Bankruptcy Code 2016, s 5(1).

bidder is required to ensure not only that the dues of employees and workmen are paid at liquidation value, but that any other entitlement that they have under any other law in force in India is also complied with (unless waived by the Adjudicating Authority when approving the plan).

7. Are there any proposals for legislative reform to further protect employee entitlements in insolvency?

Although there are no specific employee-related amendments under consideration, the Bankruptcy Code is living document and the policy makers are constantly endeavouring to address issues that keep arising in implementation of the law.

INDONESIA

1. How is an employee defined for the purpose of formal insolvency proceedings?

There is no specific definition of an employee for the purpose of insolvency proceedings in Indonesia as set out under Law No 37 of 2004 on Bankruptcy and Suspension of Payment (the Bankruptcy Law). The definition of an employee is set out under Law No 13 of 2003 on Labor Law (the Labor Law). The Labor Law defines an "employee" as "every person who works for a wage or other forms of remuneration" and an employment relationship as a relationship between an employer and an employee based on an employment agreement which consists of, at least, a work description, a wage and a reporting scheme.

An employee is an individual who has entered into an employment agreement with the employer whether for a definite period or for an indefinite period.

2. What are the employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

In the context of insolvency, there are two types of entitlement for an employee: wages and other rights.

The Labor Law does not specifically define "other rights". However, in the context of insolvency, such rights are the obligations of the employer to the employee which arise from a termination of employment; these are stipulated in the Labor Law as severance payments, long service pay and compensation pay for rights or entitlements that the terminated employee has not utilized (for example, annual leave).

Both wages and other rights have privilege in a formal insolvency proceeding under article 95, paragraph (4) of the Labor Law, which states that, in the event of an insolvency or liquidation, employees' rights need to be prioritized.

This privilege is consistently applied by the courts. In the Constitutional Court Decision No. 67/PUU-XI/2013, employees' rights have been prioritized over other rights, excluding tax and excise (if any).

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings, compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

There are three types of creditors in Indonesian bankruptcy law, ranked as follows:

(a) Separate creditors, who hold collateral rights over property of the debtor; separate creditors are allowed to execute such rights without being affected by an informal insolvency / suspension of payment proceeding. This type of creditor is positioned above other creditors.

(b) Preferential creditors, who have special rights / privilege over concurrent creditors (see below) for repayment of their debts. This type of creditor is positioned below the separate creditors, but above concurrent creditors. An example of a preferential creditor would be the state (for example, tax and excise would be prioritized over all rights including employees' rights).

(c) Concurrent creditors, who are creditors who do not hold any kind of collateral rights and are not given any special rights / privilege by law.

Unpaid wages have priority over any other creditor claims and must be paid before all other creditors (including separate creditors).

On the other hand, the payment of other rights (severance payment, long service pay, compensation for unutilized employee rights) only has priority over the claims of creditors other than separate creditors. As a result, these rights are only paid after unpaid wages and separate creditors' debts have been paid.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

A failure by a company to, among other things, pay a termination payment for pension, pay the minimum wage to its employees or pay salary to employees who are currently taking their employment entitlements, may be subject to criminal penalty.

As the board of directors of a company is regarded as the body governing the actions of the company, any criminal penalty imposed on a company will be the responsibility of the board.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There is no special government scheme to guarantee the payment of employee entitlements. However, in an insolvency, where all employees are deemed to be terminated, the employees will be able to cash out their old age security, which is administered by the social security body for manpower (*Badan Penyelenggara Jaminan Sosial – Ketenagakerjaan*).

6. In the event of a sale by an Insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

If the buyer acquires the insolvent company itself, the buyer may be subject to employment claims (that is, as a shareholder).

If the buyer acquires only the company's assets, the buyer would not be liable for employee claims on the basis of successor liability. In Indonesia, employees are not considered to be assets of the company, so employees would either need to be transferred to the acquirer of the assets or to be terminated and rehired.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

The authors are not aware of any proposal for legislative reform to further protect employee entitlements in Indonesia.

IRELAND

1. How is an employee defined for the purposes of formal insolvency proceedings?

In this chapter, the employee entitlements referred to arise on liquidation and receivership of companies, and on bankruptcy of individuals. The following has no application to the rescue procedure known as examinership.

The definition of "employee" is not uniform across all relevant legislation. The entitlements referred to below will however be available to employees who:

- are in employment which is insurable for all benefits under the Social Welfare Acts (in general this means employees who pay full social insurance contributions);
- are between 16 and 66 years of age or, if over 66 years, in employment which, but for their age, would be insurable for all benefits under the Social Welfare Acts.

An "employee" is also defined as[1] "a person who has entered into or works under (or, in the case of a contract which has been terminated, worked under) a contract with an employer, whether the contract is for manual labour, clerical work or otherwise, is express or implied, oral or in writing, and whether it is a contract of service or apprenticeship or otherwise".[2]

2. What are the employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

In procedures affecting company debtors[3] and individual debtors,[4] certain debts are granted preferential status. They must be paid out of the realised assets after the costs, charges, and expenses of the procedure have been paid, but prior to the claims of any creditors secured by a floating charge (in the case of companies) and unsecured creditors. Creditors secured by fixed charges do not fall within the system of priorities as they have a right to realise their security outside the procedures. The following employee entitlements rank as preferential claims in a liquidation, receivership or bankruptcy of the employer.

2.1 Arrears of wages

An employee is entitled to claim for full wages or salary due in respect of the four months prior to the commencement of the procedure, subject to a maximum claim of EUR 10,000 in the case of a company employer[5] and EUR 3,174 in the case of an individual employer.[6] Wages due in excess of these limits rank as an unsecured claim.

2.2 Holiday pay

Employees have statutory rights to rest, working hours and holidays.[7] Any payment due in respect of accrued holidays ranks as a preferential claim.[8] There is a minimum entitlement to 20 days annual leave, plus nine public holidays and there is no cap on the weekly rate of pay that may be claimed. Contractual holiday entitlements in excess of the statutory minimum also rank as a preferential claim.

1 Protection of Employees (Employers' Insolvency) Act 1984, s 1.
2 Separate provisions govern workers whose services are provided by an employment agency.
3 Companies Act 2014, s 621.
4 Bankruptcy Act 1988, s 81 (as amended).
5 Companies Act 2014, s 621(2)(b) and (4).
6 Bankruptcy Act 1988, s 81(1)(b) and (c).
7 Organisation of Working Time Act, 1997.
8 Companies Act 2014, s 621(2)(c); Bankruptcy Act 1988, s 81(1)(d).

2.3 Minimum notice

The following periods of notice of termination of employment apply:[9]

Length of Service	Period of Notice
13 weeks to 2 years	1 week
2 to 5 years	2 weeks
5 to 10 years	4 weeks
10 to 15 years	6 weeks
More than 15 years	8 weeks

If an employee is not required to work during the relevant notice period, the employee is entitled to payment in lieu of notice. There is no cap on the weekly rate of pay that may be claimed. An award made in favour of an employee in respect of a minimum notice entitlement ranks as a preferential debt in a liquidation, receivership or bankruptcy.

If a contract of employment provides for a notice period in excess of the statutory entitlements, such terms are binding but any excess over the statutory entitlement will rank as an unsecured claim.

2.4 Redundancy

Employees have a statutory right to a redundancy payment[11] calculated by reference to continuous and qualifying service and normal weekly remuneration. A lump sum redundancy payment for a qualifying employee is calculated, subject to a statutory weekly ceiling of EUR 600, as follows:

- two weeks' pay for every qualifying year of service;
- in addition, one week's pay;

The employee's right to claim statutory redundancy from the employer ranks as a preferential claim in a liquidation, receivership or bankruptcy.[12] An employee is also entitled to two weeks' notice in writing of the proposed redundancy.[13] The statutory notice under the minimum notice legislation and the two-week statutory notice under the redundancy legislation, may run concurrently.

If an individual's contract of employment includes an entitlement to redundancy in excess of the statutory redundancy payment, then the additional payment will rank as an unsecured claim in the liquidation, receivership or bankruptcy.

2.5 Unfair dismissal

Compensation payable as a result of an unfair dismissal ranks as a preferential claim in a liquidation, receivership or bankruptcy.[14]

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9 Minimum Notice and Terms of Employment Acts, 1973 to 2001.
10 Minimum Notice and Terms of Employment Act 1973, s 13; Workplace Relations Act 2015, s 49.
11 Redundancy Payments Act 1967, s 7 (as amended).
12 *Idem*, s 42 (as amended).
13 *Idem*, s 17 (as amended).
14 Unfair Dismissals Act 1977, s 12.

2.6 Equality award

An award of compensation for breach of employment equality rights ranks as a preferential claim in a liquidation, receivership or bankruptcy.[15]

2.7 Minimum pay arrears

Arrears of pay due pursuant to minimum wage legislation rank as a preferential claim in a liquidation, receivership or bankruptcy.[16]

2.8 Maternity leave

Compensation payable for breach of rights under the Maternity Protection Act 1994, ranks as a preferential claim in a liquidation, receivership or bankruptcy.[17]

2.9 Parental leave

Compensation payable for breach of rights under the Parental Leave Act 1998, ranks as a preferential claim in a liquidation, receivership or bankruptcy.[18]

2.10 Adoptive leave

Compensation payable for breach of rights under the Adoptive Leave Act 1995, ranks as a preferential claim in a liquidation, receivership or bankruptcy.[19]

2.11 Carer's leave

Compensation payable for breach of rights under the Carer's Leave Act 2001, ranks as a preferential claim in a liquidation, receivership or bankruptcy.[20]

2.12 Sickness benefits

All sums due to an employee under any sickness benefit scheme rank as a preferential claim in a liquidation, receivership or bankruptcy.[21]

2.13 Pensions

Any payment due by an employer to a pension scheme, either in respect of its own contributions or in respect of contributions deducted from an employee, ranks as a preferential claim in a liquidation, receivership or bankruptcy.[22]

2.14 Damages in respect of an accident

All amounts due in respect of damages and costs to an employee in connection with an accident in the course of employment, which occurred prior to the commencement

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15 Employment Equality Act 1998, s 103.
16 National Minimum Wage Act 2000, s 49.
17 *Ibid.*
18 *Ibid*.
19 *Ibid*.
20 *Ibid*.
21 Companies Act 2014, s 621(2)(f); Bankruptcy Act 1988, s 81(1)(e).
22 Companies Act 2014, s 621(2)(g). Bankruptcy Act 1988, s 81(1)(f).

of the procedure, save to the extent that the employer is not effectively covered by insurance, rank as a preferential debt in a liquidation or receivership, but not in a bankruptcy.[23]

2.15 Other entitlements

Employees have rights under numerous other legislative provisions,[24] but awards for breaches of those rights are not granted preferential status. See, however, paragraph 5 below.

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings, compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

A creditor secured by a fixed charge does not come within the system of priorities set out below, as such a creditor has the right to realise the security outside the relevant insolvency procedure.

In a liquidation, the priority in which claims are paid is as follows:

- remuneration, costs and expenses of an examiner;
- costs and expenses of a liquidation;
- remuneration of a liquidator;
- the "super-preferential claim", that is, social insurance contributions deducted from employee wages but not paid to the Social Insurance Fund;
- preferential debts ranking *pari passu* with each other;
- floating charges;
- unsecured debts ranking *pari passu* with each other;
- deferred debts ranking according to the agreement for deferral;
- shareholder rights under the constitution of the company.

In a receivership, the priority in which claims are paid is as follows:

- remuneration, costs and expenses of an examiner;
- remuneration, costs and expenses of the receiver;
- the "super-preferential claim", that is, social insurance contributions deducted from employee wages but not paid to the Social Insurance Fund;
- preferential debts ranking *pari passu* with each other;
- floating charges.

In a bankruptcy, the priority in which claims are paid is as follows:

- remuneration, costs and expenses of the trustee;
- the "super-preferential claim", that is, social insurance contributions deducted from employee wages but not paid to the Social Insurance Fund;
- preferential debts ranking *pari passu* with each other;
- unsecured creditors ranking *pari passu* with each other.

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[23] Companies Act 2014, s 621(2)(e).
[24] For example, Terms of Employment (Information) Act 1994 and Protection of Young Persons (Employment) Act 1996.

4. What, if any, personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The directors / managers of a company do not have any specific liability to employees or to any other party with respect to unpaid employee entitlements, taxes or other employee related liabilities.

Various provisions exist, however, which may render directors and others liable for all the debts of a company, including employee related liabilities (for example, the Companies Act 2014, provides for the personal liability of directors for failure to keep proper books of account[25] and for fraudulent and reckless trading.[26]

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

5.1 How does such a scheme operate

The Department of Enterprise Trade and Employment administers the Social Insurance Fund (the Fund) under the Protection of Employees (Employers' Insolvency) Acts 1984 to 2004 (the Acts).

Each employee who qualifies under the Acts can claim against the Fund. Claims are computed by the liquidator, receiver or trustee, who prepares the necessary forms for signature by the employees. Forms are submitted *en bloc* to the Fund, which, having assessed the claims, pays the total amount to the liquidator, receiver or trustee for onward distribution to the employees.

Most categories of preferential entitlement can be claimed from the Fund, but the amount payable in respect of any of the debts calculated by reference to remuneration, is capped at EUR 600 per week. It is to be noted that damages and costs in respect of an uninsured accident are not payable out of the Fund.

In addition, the Fund will pay arrears of contributions due to a pension scheme which were deducted by an employer from employee wages, or which were due as the employer's contributions, within 12 months of the commencement of the liquidation, receivership or bankruptcy. Alternatively, the Fund will pay an actuarially calculated shortfall, if the amount is less than the arrears of contributions.

[25] Companies Act 2014, s 609.
[26] *Idem*, s 610.

The Fund will also pay the amount of any award made under specified employment related legislation (see paragraph 2 above) within 18 months prior to the commencement of the insolvency, where the award itself does not carry preferential status.

Not all sums payable out of the Fund are calculated on the same basis as the employees' preferential claims (see for example the Fund's weekly limit on wages and the overall limit of EUR 10,000 on preferential wages). Where the Fund pays less than the full amount of the employee's preferential claim, the employee may claim the balance as a preferential claim in the liquidation, receivership or bankruptcy.

5.2 What (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

The Department for Enterprise Trade and Employment is subrogated to the rights of the employee as a preferential creditor (or as the case may be, an unsecured creditor) in relation to any payments made from the Fund. The right of the employee to recover any preferential or unsecured amount not paid by the Fund is subordinated until the Fund is fully repaid.[27]

5.3 What (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to pay out employee creditors and other unsecured creditors?

The Fund has established a firm reputation for processing and making prompt payment in respect of employee claims which qualify for payment under the scheme.

The Fund is not typically active as a creditor, but tends to benefit from the very active role in insolvency cases taken by the Revenue Commissioners.

6. In the event of a sale by an insolvent debtor, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The Transfer of Undertakings Directive (77/187/EEC) (the Directive) became part of Irish domestic legislation in 1980. The amended Directive 2001/23/EC of 12 March 2001 was implemented in Ireland by the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (SI 131/2003) (the Regulations).

The purpose of the Regulations is to safeguard employees' rights in the event of a transfer of an undertaking, business or part of a business, by providing that on a relevant transfer of a business all the rights and obligations under employment contracts are automatically transferred. However, the Regulations do not apply if the transfer occurs after the employer company has been put into liquidation by order of the court, or after the employer has been declared bankrupt.[28] There is no such exception in the case of voluntary liquidation or receivership.

[27] Protection of Employees (Employers' Insolvency) Act 1984, s 10.
[28] European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003, Reg 6.

7. Are there any proposals for legislative reform to further protect employee entitlements in insolvency?

There are no reform proposals at present.

ITALY

1. How is an employee defined for the purposes of formal insolvency proceedings?

There is no specific definition for the term "employee" in the Italian insolvency legislation. There is, however, a provision which states that "[a]n employee is a person who binds himself, for a remuneration, to cooperate in the enterprise by contributing his intellectual or manual work, in the employment and under the management of the enterpriser".[1]

Bankruptcy[2] is not a cause of automatic termination of the employment relationship and the Receiver has to notify his intention to dismiss the employee by notice, as provided by law.

2. What are the employee entitlements, and what extent (if any) are they given priority treatment during the formal insolvency proceeding?

Italian legislation protects employee's entitlements as follows:

- remuneration as determined in the national labour contracts;
- severance pay;
- old age indemnity;
- sickness compensation;
- allowance for notice requirements;
- pay for unused holiday leave;
- redundancy payments.

In case of insolvency proceedings,[3] employees' claims are given a high priority compared to other categories of creditors.

There is a general priority over the debtor's movables for claims for employees' accrued wages,[4] retirement indemnity credits and damages for ineffectual, invalid or annullable dismissal.[5]

The Italian judicial system has set up a series of guarantees for employees in order to mitigate the negative consequences that may arise as a result of the initiation of an insolvency proceeding.

When an employer becomes insolvent, often his employees become creditors for one or more unpaid wages as well as for severance pay in the case of the termination of the employment relationship.

The first step that the creditor employee must take to safeguard his rights, is to file a claim before the insolvency court for the admission to the list of creditors' claims under article 93 of the Bankruptcy Law.

By filing his claim, the employee lays claims to all the credits against the insolvent employer and the bankruptcy judge rules on the validity and the amount of such credits.

1 Civil Code, art 2094.
2 *Idem*, art 2119.
3 *Idem*, art 2751 *bis*.
4 *Idem*, art 2751-*bis* n.1.
5 Law 300/70, art 18 and Law of 108/90, art 2.

The employee will therefore see his claims settled. However, the employee may only be partially refunded and, in this case, he may file a petition to the *Fondo di garanzia Inps*, the procedure of which will be explained in more detail below.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings, compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

A general privilege (priority) over movable property is granted to claims relating to the following:[6]

- remuneration due in any form to employees and all allowances due by reason of employment termination, as well as damages consequent to an employer's failure to pay compulsory social security and insurance contributions and compensation for an ineffective, void or voidable discharge;
- remuneration of professionals or any other person performing intellectual work due for the last two years of services;
- commissions deriving from an agency relationship due for the last year of services and the allowances due for the termination of such relationship;
- claims of an artisan enterprise or co-operative companies for production and work, for the compensation of services rendered and the sale of manufactured products;
- claims for taxes due to the State, for value added tax and for taxes due to local public bodies;[7]
- claims for contributions of compulsory insurance for disability, old-age and survivors.[8]

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Italian law does not impose a personal liability on directors in relation to unpaid employee entitlements or taxes.

The Civil Code[9] provides for the general liability of directors who do not comply with obligations fixed by the law or by the company by-laws, using the ordinary diligence required by the nature of the matter and by their specific skills. This liability is only *vis-à-vis* the company but could, in case of insolvency, be enforced by the Receiver.[10]

6 Civil Code, art 2751 *bis*.
7 *Idem*, art 2752.
8 *Idem*, arts 2753-2754.
9 *Idem*, art 2392.
10 *Idem*, art 2394 *bis*.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

Fondo di garanzia Inps[11] has been established to substitute the employer in case of insolvency for the purpose of paying the retirement indemnity. The Inps fund extends the competence[12] also to the last three wages during the last 12 months of employment before the declaration of insolvency.

There is a specific kind of extraordinary temporary unemployment compensation (*Cassa Integrazione Guadagni Straordinaria* or CIGS).[13]

To qualify for compensation from the CIGS, the following criteria must be met:

- there must be more than 15 employees if the undertaking is an industrial company, and more than 200 if it is a commercial company;
- the company has been declared insolvent and an insolvency proceeding has commenced;
- the employee has worked with the insolvent employer for at least 12 months.

The maximum duration of the CIGS is 12 months (or 36 months in five years), but the term may be extended for a further six months.

These dates can be modified if the productivity of the undertaking started at least 24 months before the admission to the CIGS and the activity continued for 12 months before the start of the insolvency proceeding.

The CIGS provides for 80 percent of the hourly remuneration of the employee.

In order to protect the employees, the severance indemnity and credits resulting from the employment relationship fund was established. Such Fund represents a means of protection for those employees who have an insolvent employer.

The employee's credit must be related only to the wages accrued in the last quarter, including the Christmas bonus and other possible contingent monthly payments, as well as the sums due by the employer for sickness and maternity leave.

On the other hand, the pay in lieu of notice, the amounts relating to unused holiday leave and the *Istituto Nazionale Previdenza Sociale* or INPS's sickness benefits, which the employer would have had to anticipate, are excluded.

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11 Law no. 297/82, art 2.
12 d.lgs. 80/1992, arts 1 and 2.
13 Law 223/91, art 3.

All employees whose employers are obliged to pay INPS are covered by the Fund's protection.

The requirements for accessing the Fund are:

- termination of the employment relationship;
- ascertainment of the insolvency status and the start of a bankruptcy proceeding, composition with creditors, compulsory winding-up and extraordinary administration;
- ascertainment of the existence of credit as severance pay and / or the last three wages which are matured and due.

The application to the Fund must be submitted by the employee or his heirs to the competent INPS office. The INPS must, within 60 days from the date of submission of the application, pay the severance indemnity and all other claims that differ from severance pay, from the Fund.

In regard to the timeframe for submitting an application, it must be filed in the case of:

- an insolvency, compulsory winding-up and judicial administration, from the 15th day after the submission of the list of creditors' claims enforced under Bankruptcy Law;
- a composition with creditors, from the day after the publication of the decree of approval or the ruling on any opposition or appeal;
- individual foreclosure proceedings, from the day after the ascertainment of a negative foreclosure.

It is important to note that the right to use the Fund is subject to a statute of limitations which is set at:

- five years from the date of termination of the employment relationship for severance pay;
- one year for all other work credits.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The Civil Code[14] governs the transfer procedures of business concern in insolvency proceedings.

The second paragraph[15] of article 2112 states that "the transferor and the transferee are liable *in solido* for all claims that the employee had at the time of the transfer. By the procedures set forth,[16] the employee may consent to the release of the transferor from the obligations deriving from the labor relationship."

The law grants the lessee of the business the right of pre-emption in order to purchase the business.

[14] Law 428/90, art 47 and Civil Code, art 2112.
[15] Civil Code, art 2112.
[16] Code of Civil Procedure, arts 410 and 411.

The legislation also states that in the case of a continuation of business activity, only by an agreement between trade unions and the purchaser (or lessee) can the same acquirer employ only some of the employees of the insolvent company (or ongoing business). Pursuant to this agreement, the new employer should not be liable for claims on the basis of the successor's liability. Should this agreement fail, the purchaser (or lessee) will be liable jointly with the Receiver for employee's credits and claims.[17]

In the same cases mentioned above, the declaration of insolvency is followed by the temporary exercise of the company's business or the lease of the company. These cases are not part of the procedure aimed at liquidating the business, but are instrumental in the most profitable sale of the company in view of the fact that this is the best way to satisfy the creditors (the preservation of production being more profitable than its disintegration).

In addition, the company may be subject to two so-called "dynamic events", namely the relocation of the leased company or its sale.

Following the declaration of insolvency and its effect on the company, different events may occur:

a) Temporary exercise of the company's business:

   All agreements, including employment agreements, will automatically continue unless the Receiver decides to terminate the agreement or freeze it.[18] If the Receiver decides not to make use of all the employees, he should provide for a dismissal for just cause. Once the temporary exercise of the company's business is concluded, the employment relationships will not be automatically terminated, but the Receiver will provide for dismissals for just cause.

b) Lease of company or business unit

   In choosing a lessee, the Receiver must take into consideration the guarantees offered for the preservation of employment levels.

   If an agreement with the Trade Unions about the partial preservation of employment levels is reached, the above-mentioned article 2112 of the Italian Civil Code (rule on the protection of employees' rights in the case of a business transfer) cannot be applied to the employment relationships that continue with the lessee, as article 47 of Law 29 December 1990, no. 428, provides for the total disapplication of the rule.

   It follows that the employees will be directly employed by the lessee through a new hiring procedure or a different contractual framework. They would lose their right to the solidarity fund and the application of the national labour contract enforced by the transferor. They will not be entitled to pre-existing seniority or the preservation of their previous qualification, and will lose any supplementary retirement benefits.

[17] Civil Code, art 2112, 2nd par.
[18] Bankruptcy Law, art 104.

c) Transfer of the leased company

Subsequent to a transfer, the Receiver may decide to take over the employment relationships in accordance with article 72 of the Bankruptcy Law. In such a case, the transferred employees will be subject to article 2112 of the Italian Civil Code, with the exception of the solidarity regime between the transferor and the transferee as the insolvency procedure is not liable for debts (that is, employment debts) accrued until the transfer, as expressly provided for in the last paragraph of article 104*bis* of the Bankruptcy Law.

d) Company sale

As in the case of a company lease, if there is a Trade Union agreement as referred to in article 47 of Law 428/1990, regarding the preservation (even partial preservation) of the employment levels, article 2112 of the Italian Civil Code does not apply.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are no law reform proposals at present concerning further protection of employees in an insolvency.

JAPAN

1. How is an employee defined for the purpose of formal insolvency proceedings?

The term "employee" is not defined in the Japanese insolvency laws. An "employee" is defined in the Labour Standard Law as "an individual who both works for a business or a place of business and is paid wages," regardless of the type of work.[1] "Wages" are defined as all payments from employer to employee for compensation for his or her work, including, but not limited to, salary, benefits, bonuses, etc.[2]

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

There are four major types of formal insolvency laws in Japan:

- the appointment of a trustee under the Bankruptcy Law;
- the voluntary appointment of a liquidator (usually one of the directors of the company) under the Special Liquidation Law;
- a reorganisation under the Corporate Reorganization Law;
- a reorganisation under the Civil Rehabilitation Law.[3]

The treatment of employee entitlements varies slightly under each.

In Bankruptcy Law proceedings, two types of employee claims are given priority over other unsecured claims:

- claims for wages for three months prior to the commencement of the insolvency proceedings;[4] and
- severance payments (up to three months' wages) for employees who retire before the insolvency proceedings are closed.[5]

The court can allow the bankruptcy trustee to pay all or part of these claims before it approves the distribution plan, if:

- the employee or retired employee would suffer hardship without the timely distribution of the claim, and
- the payment does not impair the interest of other creditors with the same or higher priority.[6]

As noted above, a special liquidation differs from a Bankruptcy Law liquidation in that a special liquidation involves the appointment by the company itself of a liquidator (usually one of the directors of the company). The liquidator's role is to formulate a distribution plan for the company's assets. That plan excludes wages, which are paid in full outside the plan.

As also noted above, there are two major types of reorganization law in Japan:

- a reorganisation under the Corporate Reorganization Law, which binds all the company's creditors, and requires the appointment of a trustee;[7]

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1 Labour Standard Law, s 9.
2 *Idem,* s 11.
3 There is a fifth rehabilitation procedure under the Commercial Code: the Corporate Arrangement Law. Because this law requires unanimous approval of the plan, there have been only a few proceedings under this Law.
4 Bankruptcy Law, s 149.
5 *Ibid*.
6 *Idem*, s 101.
7 Corporate Reorganization Law, s 42.

- a reorganisation under the Civil Rehabilitation Law, which binds only unsecured creditors, and is a debtor-in-possession type procedure.

The Corporate Reorganization Law treats wage claims for the six-month period prior to the commencement of the insolvency proceedings as claims of common benefit, a type of administrative claim, which can be paid at any time before the distribution of unsecured claims and outside the reorganization plan.[8] If an employee quits the debtor before the confirmation of the plan, the employee has a common benefit claim for the equivalent of six months' wages before retirement, or one-third of the amount of the total retirement allowance (whichever amount is larger).[9] Other wages are treated as priority claims. If the debtor fires the employee, the employee has a common benefit claim for the full amount of the retirement allowance.[10]

Under the Civil Rehabilitation Law, wage claims before the commencement of insolvency proceedings are considered general priority claims and wage claims after commencement of insolvency proceedings are considered common benefit claims. Both can be paid at any time outside the procedure.[11]

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

Under the Bankruptcy Law, estate claims, including employee entitlements, are given priority over unsecured creditor claims and shareholder claims. Estate claims also include fees for trustees and professionals. If the estate is insufficient to pay the estate claims in full, they are paid out of the existing estate in proportion to the amount of each claim without regard for priorities prescribed by other laws. The status of secured claims is unaffected.

Other employee entitlements enjoy priority over general unsecured claims. That means that their priority is lower than that of secured claims (since secured claimants are not bound by the Bankruptcy Law) and administrative claims (including the fees for trustees and other professionals), but higher than for general unsecured claims and shareholder claims.

Under the Special Liquidation Law, secured creditors can execute their rights at their own discretion. Claims which are equivalent to administrative claims and priority claims under the Bankruptcy Law (including employee entitlements) are paid first outside the plan and then unsecured claims are paid under the liquidation plan.

Under the Corporate Reorganization Law, employee entitlements are considered to be claims for common benefits (which also include the claims of trustees and professionals). These claims should be paid before secured and unsecured claims are paid. If the estate is insufficient to pay all the common benefit claims in full, they are paid *pro rata*. Shareholders' claims are the lowest priority.

Under the Civil Rehabilitation Law, employee entitlements are considered general priority claims and are paid at any time outside the rehabilitation plan. Claims by the

8 *Idem*, s 130.
9 *Idem*, s 130.
10 *Idem*, s 127.
11 Sections 122 and 119 of the Civil Rehabilitation Law, respectively.

DIP (debtor in possession) and retained professionals are claims for common benefit. The order of priority between general priority claims and claims for common benefit is determined according to the Civil Code and / or the Civil Execution Code, not by the Civil Rehabilitation Law itself. Employee entitlements have priority over unsecured claims, but not secured claims, because the Civil Rehabilitation Law binds only the unsecured claims.

4. What if any personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Directors and officers are generally not subject to personal liability with respect to unpaid employee entitlements or taxes. In practice, directors are often obliged to personally guarantee bank loans to the company.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

The Japan Organization of Occupational Health and Safety (JOOH) has established a procedure for payment of unpaid wages on behalf of debtor companies. If a debtor company files an insolvency proceeding, or the chief of the Labor Standard Inspection Office finds that the company is inside the zone of insolvency, a retired employee who leaves the debtor between six months before the filing or approval from the chief of the Office (Day X) and two years after Day X can obtain part of their unpaid wages from the JOOH. The unpaid wages include up to six months' salary and a retirement allowance. The amount paid is 80 percent of the total amount of the unpaid wages, varied by reference to the age of the employee. If the JOOH pays an employee in lieu of the company, it takes over the employee's claim against the employer, with the same priority.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The seller can transfer an employee claim to the buyer, which may result in the deduction of this amount from the price of the business. Employment contracts can only be transferred from the seller to the buyer with the consent of all three parties - the seller, the buyer, and the individual employee. A collective bargaining agreement can be transferred to the buyer as long as the seller, buyer, and the labour union agree to it. These principles apply in the ordinary course of business, and continue to apply even if the seller files under the insolvency laws.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

The author is not aware of any pending reforms in this area at present.

KENYA

1. How is an employee defined for the purpose of formal insolvency proceedings?

The Insolvency Act, 2015[1] (the Insolvency Act) defines an "employee" as "a person employed by an employer for wages or a salary under a contract of service; and includes a home worker specified in section 2 of the Employment Act, 2007, but does not include in the case of a bankruptcy, a nominee or relative of, a trustee for, the bankrupt or in the case of the liquidation of a company a nominee or relative of, a trustee for, a director of the company".

This can be contrasted with the definition in the principal statute governing employment law in Kenya, the Employment Act,[2] which defines an "employee" to mean "a person employed for wages or a salary and includes an apprentice and indentured learner".

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

An employer under the Employment Act becomes insolvent under the following circumstances:

- the employer has been adjudged bankrupt or has made a composition or arrangement with his creditors, or has died and his estate is to be administered in accordance with the Law of Succession Act;[3]
- if the employer is a company, a winding-up order or an administration order has been made, or a resolution for voluntary winding-up has been passed, with respect to the company, or a receiver or a manager of the company's undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.[4]

The Employment Act and Insolvency Act provide a number of avenues through which an employee might seek payment of debts owed to him or her by an insolvent employer. These fall into two broad categories:

- the Minister for the time being responsible for labour matters (the Minister) pays certain debts to employees;
- employees may seek payment from the company's assets through insolvency proceedings or through administrators.

Where an employee or his representative makes a written application to the Minister and the Minister is satisfied that

- the employer of the employee has become insolvent;
- the employment of the employee has been terminated; and
- on the appropriate date the employee was entitled to be paid the whole or part of any debt,

the Minister shall pay the employee earlier out of the National Social Security Fund, the amount to which, in the opinion of the Minister, the employee is entitled in respect of the debt.[5]

1 Act 18 of 2015.
2 Act 11 of 2007.
3 Employment Act 2007, s 67.
4 *Ibid.*
5 *Idem,* s 66.

The debts that are covered by these provisions are:[6]

- arrears of wages between one and six months;
- amounts payable during notice periods ;
- any pay in lieu of leave for annual leave days earned but not taken;[7]
- any basic award of compensation for unfair dismissal; and
- any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice.

The total amount payable to an employee in respect of any debt, where the amount of the debt is referable to a period of time, shall not exceed:[8]

(a) ten thousand shillings (KES 10,000) or one half of the monthly remuneration, whichever is greater in respect of any one month payable; or

(b) in respect of a shorter period, an amount proportionate to the shorter period based on the amount payable under paragraph (a).

The Minister may, by order in the Gazette, vary the limit specified in (a) above.[9] Claims in respect of the following debts have second priority to the extent that they remain unpaid:[10]

(a) all wages or salaries payable to employees in respect of services provided to the bankrupt or company during the four months before the commencement of the bankruptcy or liquidation;

(b) any holiday pay payable to employees on the termination of their employment before, or because of, the commencement of the bankruptcy or liquidation;

(c) any compensation for redundancy owed to employees that accrues before, or because of, the commencement of the bankruptcy or liquidation;

(d) amounts deducted by the bankrupt or company from the wages or salaries of employees in order to satisfy their obligations to other persons (including amounts payable to the Kenya Revenue Authority in accordance with Income Tax Act);

(e) any reimbursement or payment provided for, or ordered by the Industrial Court under the Labour Institutions Act, 2007 to the extent that the reimbursement or payment does not relate to any matter specified in the Labour Relations Act, 2007 in respect of wages or other money or remuneration lost during the four months before the commencement of the bankruptcy or liquidation;

The Insolvency Act further provides that the total amount to which priority is to be given under any or all of subparagraphs (a) to (e) above may not, in the case of

6 *Idem,* s 68.
7 The Employment Act 2007, s 28, provides that an employee shall be entitled after every 12 consecutive months of service with his employer to not less than 21 working days of leave with full pay and, where employment is terminated after the completion of two or more consecutive months of service during any 12 months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.
8 Employment Act 2007, s 69.
9 *Idem,* s 69.
10 Insolvency Act 2015, Sch 2, para 3.

any one employee, exceed two hundred thousand shillings (KES 200,000) as at the commencement of the bankruptcy or liquidation.[11]

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

The debts of a person who is adjudged bankrupt, or of a company that is in liquidation, are payable in the order of priority described below. This does not apply to the claims of secured creditors who hold fixed charges. They have the right to recoup their claims from the fixed assets charged to them. On the other hand, holders of floating charges and unsecured creditors' claims would be subject to the priority claims described below.[12]

3.1 First Priority

The expenses of the bankruptcy or liquidation have first priority and are payable in the following order:

(a) the remuneration of the bankruptcy trustee or liquidator, and the fees and expenses properly incurred by that trustee or liquidator in performing the duties imposed, and exercising the powers conferred, by or under the Insolvency Act;

(b) the reasonable costs of the person who applied to the court for the order adjudging the person bankrupt or placing the company in liquidation; and

(c) in the case of a creditor who protects or preserves assets of the bankrupt or company for the benefit of the creditors of the bankrupt or company by the payment of money or the giving of an indemnity, the amount received by the bankruptcy trustee or liquidator from the realisation of those assets, up to the value of that creditor's unsecured debt and the amount of the costs incurred by that creditor in protecting, preserving the value of, or recovering those assets.

3.2 Second priority

After the claims referred to above have been paid, claims in respect of employees' debts have second priority to the extent that they remain unpaid.

3.3 Third priority

After the claims in respect of the expenses of the bankruptcy or liquidation and the employees' debts have been paid, claims in respect of the following debts have third priority to the extent that they remain unpaid:

- tax deductions under the "pay as you earn" rules of the Income Tax Act;
- non-resident withholding tax under the Income Tax Act;
- resident withholding tax under the Income Tax Act; and
- duty payable within the meaning of section 2(1) of the Customs and Excise Act.

11 *Idem*, Sch 2, subpara 2.
12 *Idem*, Sch 2, subpara 1.

Claims having the same priority rank equally among themselves and, subject to any maximum payment level prescribed by law, are payable in full. If the property of the bankrupt or company is insufficient to pay all claims within a priority ranking in full, they are paid *pro rata*.[13]

3.4 Others

A deficiency in contributions to an insolvent company's occupational pension scheme immediately before the insolvency is effectively a preferential debt ranking ahead of the holders of floating charges of the company.[14] The priority of employee claims under plans and schemes during liquidation and restructuring, however, depends on the type of scheme in question.

Actuarial variations of pension schemes are provided for under the Retirement Benefits Act.[15] The Retirement Benefits Authority[16] requires that defined contribution schemes be valued by an actuary from time to time unless all benefits are secured by an insurer or all benefits equal an accumulated contribution. Therefore, claims arising from defined contribution schemes can be brought against the insurance company or the employer and will rank as a secured debt during insolvency.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Under the Insolvency Act, a director of a company that has gone into insolvent liquidation or administration can be personally liable for its debts if the director is guilty of wrongful trading. Wrongful trading occurs when a company carries on trading during a period when the director knew, or ought to have concluded, that there was no reasonable prospect of its avoiding insolvent liquidation or administration.[17]

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

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13 *Idem*, Sch 2, subpara 5.
14 *Idem*, s 615(6)(e).
15 Act 3 of 1997.
16 The Retirement Benefits Authority ensures regulation of pension schemes to reduce pension liabilities and promote accountability and good faith by employers.
17 Insolvency Act 2015, s 506.

As mentioned in paragraph 1 above, the National Social Security Fund Act, 2013 (the NSSF Act), which establishes the National Social Security Fund (NSSF), requires all employers who employ one or more employees to register with the NSSF as a contributing employer and to register employees as members of the NSSF.[18]

5.1 How does such a scheme operate?

The NSSF Act makes it mandatory for an employer to make a direct contribution of six percent (6%) of the employee's monthly pensionable earnings and deduct from the employee's remuneration and contribute on the employee's behalf six percent (6%) of the employee's pensionable earnings.[19]

The Employment Act then provides that, where the Minister is satisfied that the employer is insolvent, the Minister shall pay an employee, out of the NSSF, the amount to which, in the opinion of the Minister, the employee is entitled in respect of the debt.[20] Therefore the NSSF contributions serve as an indirect "safety net" for employee entitlements during insolvency proceedings.

5.2 What (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

The NSSF Act provides that where, on application on behalf of the Fund, any attachment is issued against the property of an employer in execution of a decree against him and any such property is seized or sold or otherwise realised in pursuance of such execution or on the application of a secured creditor, the proceeds of the sale or other realisation of the property shall not be distributed to any person entitled thereto until the court ordering the sale or other realisation has made provision for the payment of any amount due by the employer to the NSSF before the date of such order.[21]

It should be noted that the Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulation 2000 also provides that members of a scheme (employees) in liquidation and insolvency shall be treated as deferred creditors in their claims as members and that those claims shall not be settled until after the debts of the ordinary creditors have been settled during restructuring and liquidation. Those member-employees have the same remedies as unsecured creditors in customary insolvency procedures. However, these Regulations appear to have been superseded by the priority provisions in the Insolvency Act referred to in paragraph 3 above in relation to deficiencies in pension schemes.

5.3 What (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

The NSSF Act provides that an action for the recovery of the NSSF contributions under the NSSF Act may be instituted and conducted by an authorized officer of NSSF.[22]

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18 National Social Security Fund Act 2013, s 19.
19 *Idem*, s 20.
20 Employment Act 2007, s 69.
21 National Social Security Fund Act 2013, s 59.
22 *Idem*, s 58.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The acquirer of the assets of an insolvent company is not liable for its employees' claims unless the liabilities have been negotiated as part of the sale of the assets.

It should be noted that, in addition to liquidation, the Insolvency Act also provides an option for the administration of an insolvent company.[23] The objective of administration is to maintain the company as a going concern in order to achieve a better outcome for the company's creditors. Therefore, where the assets of the insolvent company are sold, the administrator may make a distribution to the employees out of the realised assets.

7. Are there any proposals for legislative reform to further protect employee entitlements in insolvency?

Currently there are no proposals for legislative reform to further protect employee entitlements in insolvency.

[23] Insolvency Act 2015, s 522.

REPUBLIC OF KOREA

1. How is an employee defined for the purposes of formal insolvency proceedings?

In Korea, formal insolvency proceedings for both personal insolvency and corporate insolvency are governed by the Debtor Rehabilitation and Bankruptcy Act (the Bankruptcy Act).

The Labor Standards Act (the LSA) defines an employee as a person, regardless of occupation, who offers work to a business or workplace for the purpose of earning wages. In contrast, the Bankruptcy Act has no separate definition of employee for the purposes of formal insolvency proceedings. In this regard, it is necessary to look at the Korean Supreme Court's ruling on the meaning of an employee under the LSA.

The Korean Supreme Court has ruled as follows:

"Whether a person is an employee as defined in the Labor Standards Act shall be determined in substance by the existence of a dependent relationship with an employer in which the person provides labor to a business or workplace in exchange for wages, regardless of a form of the agreement, either employment agreement or subcontractor agreement prescribed under the Civil Act, and the existence of a dependent relationship shall be determined by considering the totality of the circumstances as follows: whether details of work are decided by an employer and governed by the rules of employment, internal office regulations, personnel policies, etc., and the performance of work is specifically and directly directed and supervised by the employer; whether work hours and place of work are fixed and controlled by the employer; whether work is substitutable, for instance, the person subcontracts the work to a third party; ownership of facilities, raw materials and working tools, etc.; matters of wages such as whether the wages are in consideration for work, whether there exists an arrangement for base pay or fixed pay, and withholding tax; continuance of employer-worker relationship, and the person's exclusivity to the employer; whether the person is acknowledged as a worker under other laws such as the Framework Act on Social Security; and the economic and social conditions of the employer and the person."[1]

In the same case, the Supreme Court noted that, because an employer is in a superior position, the employer has a high degree of discretion as to whether there is an arrangement of base pay or fixed pay and withholding tax, and whether the person is acknowledged as an employee in relation to the social security system. Because of this, the mere fact that these particular conditions don not apply in a particular case doesn't mean that the person is not an employee.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

Under the LSA,[2] wages, accident compensation and other claims arising from labor relations are paid in preference to taxes, public charges and other claims. Wages for the last three months, as well as accident compensation and retirement benefits, etc. for the final three years of service have priority over:

- claims secured by pledges, mortgages or security rights under the Act on Security Over Movable Property, Claims, Etc. on the whole of the employer's property; and

1 Supreme Court, 2015Da252891. Decided April 15, 2016.
2 Labour Standards Act, art 38(1).

- taxes and public charges which take precedence over those pledges, mortgages, or security rights under the Act on Security Over Movable Property, Claims, Etc.[3]

Employee entitlements include any monies which are paid by an employer to an employee in compensation for the work done by the employee. During formal insolvency, all of the abovementioned employee entitlements are treated as estate claims.

Under the Bankruptcy Act,[4] estate claims are to be satisfied at any time without going through bankruptcy procedures. Therefore, an employee who has the abovementioned employee entitlements may ask for the payment of such amount directly from the insolvency administrator or, if denied, may commence civil litigation against the insolvency administrator.

Under the Bankruptcy Act, where it becomes clear that the value of the bankruptcy estate is insufficient to repay in full the estate claims, the estate claims are paid as follows:

- any lien, pledge, mortgage, security right under the Act on Security Over Movable Property, Claims, Etc and right to lease on a deposit basis, as established over the estate claims, prevails over employee entitlements;[5]
- such employee entitlements[6] as are stipulated in Article 473(10) of the Bankruptcy Act have priority over other estate claims;
- the repayment of estate claims of the same ranking is made in proportion to the outstanding amounts of the claims, notwithstanding any preferential rights provided for in other statutes.[7]

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

3.1 Secured creditors

Under the Bankruptcy Act,[8] secured creditors have the right to foreclose, outside bankruptcy procedure, against the properties which are secured. As long as the secured properties can satisfy the secured creditors' rights, the Bankruptcy Act does not give employee entitlements priority over secured creditors.

3 LSA, art 38 (2); Act of the Guarantee of Employee's Retirement Benefits (AGERB), art 12(2).
4 Bankruptcy Act, art 475.
5 *Idem*, art 477(1).
6 Wages, severance allowances and disaster compensation for the debtor's employees.
7 Bankruptcy Act, art 477 (1).
8 *Idem,* arts 411 and 412. Article 411 (Holders of Right to Foreclose Outside Bankruptcy) reads as follows: "A person who has any lien, pledge, mortgage, security right prescribed in the Act on Security Over Movable Property, Claims, Etc., or right to lease on a deposit basis, over any property that belongs to the bankruptcy estate, shall, regardless of the bankruptcy procedure, have the right to foreclose outside bankruptcy, with respect to the property which is the object of the lien, etc." Article 412 (Exercise of Right to Foreclose Outside Bankruptcy) reads as follows: "The right to foreclose outside bankruptcy shall be exercised without resorting to bankruptcy procedures."

3.2 Insolvency administrators, professionals retained by the estate and unsecured creditors

Under the Bankruptcy Act,[9] priority over unsecured claims is given to fees and expenses incurred by insolvency practitioners during a liquidation, administration or receivership process in realising and / or preserving the property of the insolvent company. This priority includes the entitlements of employees retained during the relevant process, as well as other employee entitlements.

3.3 Shareholders

Under the Bankruptcy Act,[10] any property claim that accrues before the debtor is declared bankrupt constitutes a bankruptcy claim. This includes a debt owed by an insolvent company to its members as dividend, profit or otherwise. Under the Bankruptcy Act,[11] bankruptcy claims are divided into:

- priority bankruptcy claims;
- ordinary bankruptcy claims; and
- subordinate bankruptcy claims.

Any shareholder's right to a dividend or profit is an ordinary bankruptcy claim over which employment entitlements have priority.

4. What, if any, personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

There are no specific provisions under which directors can be found personally liable for unpaid employee entitlements or taxes in the Bankruptcy Act. Under the provisions of the Bankruptcy Act,[12] if the trustee in bankruptcy becomes aware of a right to seek damages relating to directors' duties, he must file an application for judgment with the court.

Under the LSA,[13] directors or others involved in the management of the insolvent company have criminal liability for unpaid employee entitlements. Such prosecutions may not be initiated against the clearly expressed will of the employee who has suffered the loss concerned.[14]

9 Bankruptcy Act, art 477(2).
10 *Idem*, art 423.
11 *Idem*, arts 441, 446.
12 *Idem*, art 352.
13 Labor Standards Act, art 109(1).
14 *Idem*, art 109(2).

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so;

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

Under the Wage Claim Guarantee Act (WCGA),[15] where a ruling declaring bankruptcy is issued against an employer under the Bankruptcy Act and any of the employer's retired employees claims overdue wages, the Minister of Employment and Labor shall pay such wages to the employees on behalf of the employer.

Under the WCGA,[16] the overdue wages are limited to:

- wages under Article 38(2) 1 of the LSA and retirement benefits for the final three years of service under Article 12(2) of the Guarantee of Workers' Retirement Benefits Act; and
- business suspension allowances under Article 46 of the LSA (limited to those for the final three months).

Under the WCGA,[17] an employee has two years from a bankruptcy declaration to file an application to the Minister of Employment and Labor.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

In principle, the transferee under an asset transfer does not assume any liability for employee claims.

However, according to a decision of the Supreme Court of Korea[18] in the case of a business transfer, rights and obligations arising from the employment relationship are wholly transferred to the transferee unless an employee who works for the transferor expressly manifests his or her intention to retire.

Therefore, if an insolvent company's sale of its assets as an ongoing business is regarded as business transfer, the acquirer may possibly be liable for employee claims.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are no proposals for legislative reform at this time.

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15 Wage Claim Guarantee Act, art 7(1).
16 *Idem*, art 7(2).
17 Enforcement Decree, art 9.
18 Supreme Court, 2011Da45217. Decided May 10, 2012.

MALAWI

1. How is an employee defined for the purpose of formal insolvency proceedings?

An employee is not defined in Malawi's unified insolvency law, the Insolvency Act, 2016.[1] The main legislation covering employment matters is the Employment Act.[2] Section 3 of the Employment Act defines an employee as a person who offers his services under an oral or written contract of employment, whether express or implied.[3]

The definition in this section reflects the agrarian nature of the economy by defining employees to include those persons, including tenant share croppers, who perform paid work or services for another person on terms and conditions that more closely resemble the relationship of employee than that of an independent contractor. In appropriate cases an employee also includes a former employee.

Although the Employment Act does not define a contract of employment, the courts[4] have taken the following to be indicative of the existence of a contract of employment:

- the person is under a legal obligation to perform work;
- the person receiving the services is under an obligation to remunerate the person rendering the services; and
- the person who offers his work is economically dependent on the person providing the work.

The courts[5] have gone on to note that the key is really the common law tests of:

- control - the right to control the method of doing the work and the right to suspend and dismiss;
- integration - whether the employee was regarded as part and parcel of the employer's undertaking; and
- the economic reality test, which constitutes the foregoing two tests.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

During a formal insolvency, the entitlements of the employee must "be paid in priority to all other unsecured debts", according to section 297 of the Insolvency Act. The amounts to be paid relate to:

(a) wages, overtime pay, commissions and other forms of remuneration relating to work performed during the twelve weeks preceding the date of the declaration of insolvency or winding-up;[6]

(b) holiday pay due as a result of work performed during the two years preceding the date of the declaration of insolvency or winding-up;[7]

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1 Act 9 of 2016.
2 Act 20 of 2000.
3 The courts have readily found the existence of an employment contract even in the absence of any contract in writing. This reflects the social dynamics of a country where literacy rates (though increasing) are still comparatively low.
4 *Chisowa v Ibrahim Cash 'n Carry* [2008] Malawi Labour Law Reports 385, Industrial Relations Court.
5 *Chiwembu and others v Dairiboard (Malawi) Ltd* [2008] Malawi Labour Law Reports 145, High Court.
6 Insolvency Act 2016, s 297(1)(b)(i).
7 *Idem*, s 297(1)(b)(ii).

(c) amounts due in respect of other types of paid absence accrued during the three months preceding the date of the declaration of insolvency or winding-up;[8] and

(d) severance pay, compensation for unfair dismissal and other payments due to employees upon termination of their employment.[9]

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

The general priority ranking under the Insolvency Act, 2016 is as follows:

(a) creditors with a valid security interest;[10]

(b) costs and expenses (including professionals' fees) incurred by the insolvency practitioner to allow him to carry out his duties;[11]

(c) employee claims outlined above under paragraph 2. and any claims for compensation under the Workers Compensation Act;[12]

(d) any Government taxes (regardless of when payment has become due) and Government rents no more than five years in arrears;[13]

(e) unpaid local government levies for the three years preceding insolvency;[14]

(f) unsecured creditors;[15]

(g) post-insolvency interest on creditors' claims and shareholders (which are only paid if all the company's creditors have been paid in full).[16]

However, in the event that the assets which are available cannot meet full payment of all preferential payments, section 297(5) of the Insolvency Act requires that preferential payments be met first before the secured claims.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Section 222 of the Companies Act, 2013 states that a director of a company who believes that the company is unable to pay its debts as they fall due must immediately call a meeting of the Board to consider whether the Board should appoint a liquidator or an administrator of a company reorganisation. Where there is a failure to comply with this duty and the company becomes insolvent, the Court may order that the

8 *Idem,* s 297(1)(b)(iii).
9 *Idem*, s 297(1)(b)(iv).
10 *Idem*, ss 158(2), 213(4) and 298(6) and (7).
11 *Idem*, s 297(1)(a).
12 *Idem*, s 297(1)(b) and (c).
13 *Idem*, s 297(1)(d) and (e).
14 *Idem,* s 297(1)(f).
15 *Idem*, s 298(2).
16 *Idem,* s 281(2) and (3).

directors, other than directors who attended the meeting and voted in favour of appointing a liquidator or an administrator, are liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade. There would be little doubt that employees are creditors in respect of their entitlements. There is also no doubt that tax authorities would be creditors. Therefore, section 222 may impose personal liability on directors (which is very widely defined in the Companies Act, 2013) with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements for insolvent trading.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There is no such form of statutory, industry or government funded "safety net" in Malawi.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Section 32(1) of the Employment Act states that a contract of employment may only be transferred from one employer to another with the consent of the employee. This provision has no restriction and must apply in any transfer whether the company is solvent or not.

Section 32(2) of the Employment Act states that where an undertaking or a part of it is sold, transferred or otherwise disposed of, the contract of employment of an employee at the date of the disposition is automatically transferred to the transferee and all the rights and obligations between the employee and the transferor at the date of the disposition continue to apply as if they had been rights and obligations between the employee and the transferee. In addition, anything done before the disposition by or in relation to the transferor in respect of the employee is deemed to have been done by or in relation to the transferee. Section 32(2) of the Employment Act does not limit forms of disposition of an undertaking and is drafted to be as wide as possible. It therefore must apply in an insolvency. It makes the acquirer liable on the basis of successor liability.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are no proposals at this time for legislative reforms to further protect employee entitlements in an insolvency.

MALAYSIA

1. How is an employee defined for the purpose of formal insolvency proceedings?

There is no specific definition of an "employee" for the purpose of insolvency proceedings in Malaysia. In general, an employee is one who has entered into a contract of service as opposed to a contract for services with the employer. The Employment Act 1955 defines contract of service[1] as any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee. This includes apprenticeship contracts.

One can consider the following factors, amongst others, to determine whether an employer-employee relationship exists:

(a) contractual provisions (for example, duration of employment, working arrangements, termination, salary and allowances and other employment entitlements or benefits);

(b) the degree of control exercised by the employer, whether by way of contractual obligations or by code of conduct; or

(c) the obligation of the employer to provide work, tools and payment of statutory contributions.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

The Companies Act 2016 provides that an employee's claim shall rank in priority to all other unsecured debts in a winding-up or in the appointment of a receiver or receiver and manager, and payments shall be made in the following order:[2]

(a) Firstly, wages or salary, whether or not earned wholly or in part by way of commission, including any amount payable by way of allowance or reimbursement under any contract of employment, or award or agreement regulating conditions of employment, of any employee not exceeding MYR 15,000 or such other amount as may be prescribed, whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding-up or the appointment of the receiver or receiver and manager.

The definition of "wages" must be read together with the Employment Act, which means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service, but does not include:[3]

i) the value of any house accommodation or the supply of any food, fuel, lights or water or medical attendance, or of any approved amenity or approved service;
ii) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;
iii) any travelling allowance, or the value of any travelling concession;

1 Employment Act, s 2(1).
2 Companies Act, ss 527(1) and 392(1).
3 Employment Act, s 2(1).

iv) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;
v) any gratuity payable on discharge or retirement; or
vi) any annual bonus, or any part of any annual bonus.

However, in the case of *Indo Malaysia Engineering Co Bhd (In Receivership) v Muniandy Rengasamy & Ors* (1990)[4] the Supreme Court held that to qualify for the priority accorded under the Companies Act 1965 (which was repealed on 31 January 2017), the payments must necessarily be categorised either as wages, salary, vacation leave superannuation or provident fund payment. The court held that *pro rata* bonus, termination benefits and indemnity in lieu of notice, do not come within the definition of wages. This is because the *pro rata* bonus is paid under a collective agreement and does not amount to wages or salary in respect of services, and the bonus is usually paid at the end of the year and was not yet due. As for termination benefits, they become due only after the termination of the employment of the employee and are therefore not wages for the purpose of the Companies Act 1965. An indemnity in lieu of notice is not for work done or payment for services rendered and hence is not within the purview of the Companies Act.

(b) Secondly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding-up. (Note: This provision is not applicable where a receiver or receiver and manager is appointed.)

(c) Thirdly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding-up or the appointment of the receiver or receiver and manager.

(d) Fourthly, all amounts due in respect of contributions payable during the 12 months before the commencement of the winding-up or the appointment of the receiver or receiver and manager, by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax.

In addition to the above, an employee's claim in respect of wages or salary, vacation leave and contributions payable, rank in priority to secured creditors subject to floating charges created by the company and the claims must be paid out of any property comprised in or subject to that charge.[5]

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

[4] [1990] 2 ILR 518.
[5] Companies Act, ss 392(1) and 527(4).

3.1. Secured creditors

In the case of a winding-up

An employee's entitlements, in particular wages or salary, vacation leave and contributions payable, are preferential claims and rank in priority to secured creditors subject to the following:[6]

i) assets in the company available for payment to general creditors are insufficient to settle the preferential claims; and
ii) payment shall be out of any property comprised in the floating charges created by the company in favour of the secured creditors and not from fixed charges.

In the case of the appointment of a receiver or receiver and manager

In general, wages or salaries, vacation leave and contributions payable rank in priority to secured creditors out of any property comprised in or subject to the floating charges created by the company in favour of the secured creditors.[7] However, the Employment Act further provides that for employees falling within the definition of the Employment Act, wages must rank in priority to secured creditors not exceeding salaries for four consecutive months' work, provided that the proceeds of the sale arise out of the sale of a place of employment of the employee.[8] It is further provided that wages in this case includes termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance.[9]

3.2. Insolvency administrators and professionals retained by the estate

In the case of a winding-up

Costs and expenses of the winding-up, including the taxed costs of a petitioner, the remuneration of the liquidator and the costs of any audit carried out on the accounts of any liquidation, rank in priority to an employee's claim.[10]

In the case of the appointment of a receiver or receiver and manager

Costs, expenses and remuneration of the receiver or receiver and manager and any indemnity to which the receiver or receiver and manager is entitled to from or out of the property of the company, rank in priority to an employee's claim.[11]

3.3. Unsecured creditors

An employee's claim ranks in priority to all other unsecured creditors in a winding-up or the appointment of the receiver or receiver and manager.[12]

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6 *Idem*, s 527(4).
7 Employment Act, s 392(1).
8 *Idem*, s 31(1).
9 *Idem*, s 31(2).
10 Companies Act, s 527(1).
11 *Idem*, s 392(1).
12 *Idem*, ss 392(5) and 527(1).

3.4. Shareholders

The Companies Act provides that shareholders are entitled to any residue after all the secured debts and unsecured debts have been paid. Generally, residual assets are to be divided among the shareholders in proportion to the nominal value of the shares held by them.[13]

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

4.1. Taxes

Based on the Income Tax (Deduction From Remuneration) Rules 1994, employers must remit to the Director General of the Inland Revenue Board the monthly tax deductions deducted from the remuneration of employees in the preceding calendar month, not later than the 15th day of every calendar month.[14] The Income Tax Act 1967, further provides that directors will be responsible for any unpaid monthly tax deductions.[15] Failure to comply with the above will render an employer liable to prosecution and, upon conviction, can be fined not less than MYR 200 and not more than MYR 20,000, or to imprisonment for a term not exceeding six months (or both).[16]

4.2. Employees Provident Fund

Where Employees Provident Fund contributions (including dividends due) remain unpaid by a company, the directors of such company, including any persons who were directors of such company during such period in which contributions were liable to be paid, shall together with the company, be jointly and severally liable for the contributions due and payable to the Employees Provident Fund.[17]

Offences include:

i) an employer who fails to remit contributions to the Employees Provident Fund Board on behalf of each of his employees on or before the 15th day of each month is, on conviction, liable to imprisonment for a term not exceeding three years or to a fine not exceeding MYR 10,000 (or both);[18] and

ii) employers who deduct the employee's contributions from the wages and fail to remit the same is, on conviction, liable to imprisonment for a term not exceeding six years or to a fine not exceeding MYR 20,000 (or both).[19]

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13 *Idem*, s 452.
14 Income Tax (Deduction From Remuneration) Rules 1994, r 10(1).
15 Income Tax Act, s 75A.
16 Income Tax (Deduction From Remuneration) Rules 1994, r 17.
17 Employees Provident Fund Act 1991, s 46.
18 *Idem*, s 43(2).
19 *Idem,* s 48(3).

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) How does such a scheme operate?;

(b) What (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) What (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to pay out employee creditors and other unsecured creditors?

There is currently no special scheme by the government in place to guarantee the payment of employee entitlements.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The Employment Act is applicable to any person whose wages do not exceed MYR 2,000 per month and to those employees (irrespective of their salary) engaged in manual labour, operation and maintenance of vehicles, those supervising employees engaged in manual labour, in any capacity in any vessel and as domestic servants.[20]

Based on the Employment Act,[21] where there is a change of ownership of the business for the purpose for which the employee is employed, the employee is entitled to, and the employer must give to the employee, written notice of termination based on the length of service of the respective employee, as the change of ownership of a business amounts to a termination.[22] Failure to give notice of termination will cause the employer to be liable under the Employment Act[23] to pay an indemnity in lieu of notice.

Upon termination, the amount of the termination benefits that an employer is required to pay an employee, cannot be less than:

(a) 10 days' wages for every year of employment under a continuous contract of service with the employer, if he has been employed by that employer for a period of less than two years; or

(b) 15 days' wages for every year of the employment under a continuous contract of service with the employer, if he has been employed by that employer for two years or more but less than five years; or

(c) 20 days' wages for every year of employment under a continuous contract of service with the employer, if he has been employed by that employer for five years or more, and *pro rata* with respect to an incomplete year, calculated to the nearest month of employment.[24]

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20 Employment Act, s 2(1) and First Sch.
21 *Idem*, s 12(3).
22 *Radtha d/o Raju & 358 Ors v Dunlop Estates Bhd* [1996] 1 CLJ 755.
23 Employment Act, s 13.
24 Employment (Termination & Lay Off Benefits) Regulations 1980, r 6.

Pursuant to the Employment (Termination and Layoff Benefits) Regulations 1980, where a change occurs in the ownership of a business for the purposes of which an employee is employed, or of a part of the business, the employee is not entitled to termination benefits:

(a) if, within seven days of the change of ownership, the new owner offers to continue to employ him on terms and conditions not less favourable than before, and the employee unreasonably refuses the offer; but

(b) if the new owner does not do so, the employee's contract is deemed to have been terminated, and the new owner and his previous employer are jointly and severally liable to pay him termination benefits;[25]

(c) where a new owner makes such an offer and the offer is accepted by the employee, the change of owners would not be construed as a break in the continuity of the period of the employee's entitlement.

Despite there being an offer for continuous employment by the new owner, a termination notice must nevertheless still be given.

In the case of non-Employment Act employees, the Employment Act and the Regulations are not applicable but reference must be made to the Industrial Relations Act, 1967. The Industrial Relations Act does not have specific provisions for termination benefits nor changes in ownership of business. Termination of an employee's contract of service is generally only allowed where there is "just cause or excuse".

Any transfer of employees to the new employer would require the consent of the employees to be transferred, as a change in the employer would amount to a variation of the employment contract. It is advisable for the employees to be offered continuous employment wherein the new employment contract should take into account the employee's years of service with its previous employer (that is, the new terms of employment cannot be less favourable than the previous terms).

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

The Employment Insurance System Act 2017 was passed and came into force on 1 January 2018. The implementation of the EIS is administered by the Social Security Organisation, which generally provides for temporary financial assistance in the form of job search allowance for up to six months and other assistance such as career counselling, job matching and placements, and training programmes to, amongst others, retrenched or terminated private sector employees due to bankruptcy or business restructuring. Employers not in compliance with the Employment Insurance System could, on conviction, be subjected to legal action, including a maximum fine of MYR 10,000 or two years imprisonment (or both).

[25] *Idem*, r 8.

MAURITIUS

1. How is an employee is defined for the purpose of formal insolvency proceedings?

Although it is used in the Insolvency Act, 2009 (Insolvency Act), the term "employee" is not defined in the Act itself. During formal insolvency, the term "employee" has the same meaning as in the Companies Act 2001 (Companies Act).

In terms of the Companies Act, "employee" means a person who has entered into, or works in Mauritius under, an agreement or a contract of service or apprenticeship with a company, whether by way of manual labour, clerical or managerial work, or otherwise and however remunerated.[1]

Although it does not specifically relate to insolvency, the Employment Rights Act 2008 (the Employment Rights Act) can affect the rights of workers whose employment has been affected by insolvency, as noted below. Under the Employment Rights Act, a "worker" is defined as follows:

"'Worker':

(a) means a person who has entered into, or works under an agreement or a contract of apprenticeship, other than a contract of apprenticeship regulated under the Mauritius Institute of Training and Development Act, whether by way of casual work, manual labour, clerical work or otherwise and however remunerated;

(b) includes:
  (i) a part-time worker;
  (ii) a former worker where appropriate;
  (iii) a share worker;

(c) does not include:
  (i) a job contractor;
  (ii) a person whose basic wage or salary is at a rate in excess of MUR 360,000 per annum."[2]

2. What are the employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

By virtue of the Insolvency Act, an employee is entitled to all wages or salary whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services provided to the company in liquidation during the period of one month before the commencement of winding up proceedings.[3]

The maximum amount that may be paid to any one employee under this provision, is MUR 30,000.

In addition, any compensation for unjustified dismissal that accrues or crystallises before the completion of the winding up, and payment for termination of employment in accordance with the Employment Rights Act 2008, ranks *pari passu* with first ranking fixed and floating charges and mortgages inscribed for more than three years.[4]

1 Companies Act, s 2.
2 Employment Rights Act, s 2.
3 Insolvency Act, Second Sch.
4 *Ibid*.

3. How does the priority (if any) given employment entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

The order of priority followed in formal insolvency proceedings is as follows:

(a) Costs of liquidator – which may include fees and expenses incurred by the liquidator and the reasonable costs of applying to the Court for winding up etc;[5]

(b) Amounts due to Government and its agencies – which is the sum due and unpaid for a period not exceeding four years prior to the date of the commencement of the winding up, but limited in each case to the greatest amount due in respect of any one tax year or revenue year over that period of four years;[6]

(c) Wages or salary due to employees – which is the sum due to employees during the period of one month before the commencement of winding up, but limited to MUR 30,000;[7]

(d) Cost of compromise with creditors – which is the cost incurred by any person other than the liquidator in organising and conducting a meeting of creditors for the purpose of voting on a proposed compromise;[8]

(e) First ranking fixed and floating charges and mortgages inscribed for more than three years rank *pari passu* with any compensation for unjustified dismissal that accrues or crystallises before completion of the winding up and payment for termination of employment in accordance with the Employment Rights Act;[9]

(f) Rent: landlord's special privilege – which is the rent unpaid to any landlord for the period of six months preceding the commencement of winding up;[10]

(g) First ranking, fixed and floating charges and mortgages inscribed for less than three years;[11]

(h) Claims of victims of an accident – which is the amount due to the victim of an accident or to his heirs or relatives, including any medical and funeral expenses and damages for temporary incapacity;[12]

(i) Other privileges, securities and creditors – which may include the cost incurred by a creditor for the preservation of any movable property of the insolvent company (including the costs of storage and insurance);[13]

(j) Amounts due to Government and its agencies in relation to amounts due and unpaid for over three months – which are all other arrears in relation to taxes, charges and dues which are due and unpaid for the period not exceeding four

5 Insolvency Act, Fourth Sch, para 1. (1).
6 *Idem*, para 1. (2).
7 *Idem*, para 1. (3).
8 *Idem*, para 1. (4).
9 *Idem,* para 1. (5).
10 *Idem*, para 1. (6).
11 *Idem*, para 1. (7).
12 *Idem*, para 1. (8).
13 *Idem*, para 1. (9).

years prior to commencement of the winding up and which have not been paid under the second priority above;[14] and

(k) All other unsecured creditors who have proved their claims in the winding-up.[15]

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements.

Due to the fact that a company is a separate legal entity from its shareholders and its directors, the directors are not normally personally liable for any debt of the company.

However, under the Companies Act, a director may be liable for losses suffered by the company's creditors if:

- the director believes that the company is unable to pay its debts[16] as they fall due; and
- the director fails to call a meeting of the board of directors to consider whether to appoint a liquidator; and
- the company is subsequently placed in liquidation. [17]

In this situation, the Court may, on the application of the liquidator or a creditor, order that the director is liable for the whole or any part of any loss suffered by creditors of the insolvent company as a result of the company continuing to trade.

Under these provisions, a director could therefore be personally liable for unpaid employee entitlements or taxes and other duties owed in relation to employee entitlements.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) How does such a scheme operate?;

(b) What (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) What (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

In Mauritius there is no statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements specifically in an insolvency context.

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[14] *Idem*, para 1. (10).
[15] *Idem*, para 1. (11).
[16] According to the Insolvency Act, s 178, a company is deemed to be unable to pay its debts where:
(a) the company has failed to comply with a statutory demand;
(b) execution issued against the company in respect of a judgment debt has been returned unsatisfied;
(c) a person entitled to a charge over all or substantially all of the property of the company has appointed a receiver under the instrument creating the charge; or
(d) a compromise between a company and its creditors has been put to a vote in accordance with Part XVII and Part XVIII of the Companies Act but has not been approved.
[17] Insolvency Act, s 162.

However, under the Employment Rights Act, the Workfare Programme compensates employees for termination of employment due to a reduction of the workforce or the closing down of their enterprise.

The Workfare Programme applies to employees who have lost employment following six months continuous employment with an employer.[18] It provides a Transition Unemployment Benefit (TUB) to every worker whose agreement has been terminated and who has opted to join the Workfare Programme. The TUB is paid for a minimum period of one month and a maximum period of 12 months.

In addition, the employee also receives assistance in finding a job placement, training and re-skilling, or starting up a small business.[19]

The Workfare Programme does not cover:

(a) a public officer;

(b) a person employed by a statutory body or by a local authority, other than a worker who is an insured person under section 13(1) of the National Pensions Act;

(c) a part-time worker;

(d) a migrant worker or a non-citizen;

(e) a person who has less than 180 days continuous employment with an employer as at the date of the termination of his employment.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Under the Employment Rights Act, where a worker's employment by a body corporate ceases on the dissolution of that body and he is employed or offered employment by some other corporate body in accordance with an enactment or a scheme of reconstruction immediately after the dissolution,[20] the employment is deemed not to have been terminated.

Where the worker to whom such an offer is made in writing accepts the offer, he is deemed to enter the employment of the person by whom the offer is made immediately upon the cessation of his employment with the first employer. As a result, the employment of the worker by the first and the second employers is deemed to be continuous.[21]

Therefore under the Employment Rights Act, in the event of a sale by an insolvent company, whether in or out of a proceeding, where the acquirer makes an offer for the employment of the workers of the insolvent company, he will be liable for those employees.

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18 Employment Rights Act, s 41.
19 *Idem*, s 41.
20 *Idem*, s 47(2)(d).
21 *Idem*, s 47(3).

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There is no proposal for legislative reform to further protect employee entitlements in insolvency proceedings in Mauritius.

MEXICO

1. How is an employee defined for the purpose of formal insolvency proceedings?

There is no definition of the term "employee" in the Mexican Insolvency Law (LCM).[1] However, the Mexican Labour Law (LFT)[2] in article 8 defines "worker" as "any natural person who provides intellectual or material services, under dependency or subordination". This definition generally applies to all Mexican legislation.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

According to the Mexican Labour Law, employers have to guarantee these basic entitlements:

(a) annual bonus - it must be paid in December and must correspond to at least 15 days of salary;

(b) vacation and holiday bonus - all workers with more than one year employment in the company are entitled to six days' leave, paid at the rate of 125% of the worker's base salary. Each additional year of service adds two additional bonus days, up to a maximum of 12 days;

(c) Sunday bonus - if the worker has to work on Sundays, the employer is required to pay 25% more than the base salary;

(d) weekly rest day - all workers are entitled to one day of rest for every six days worked. In addition, a number of public holidays are obligatory breaks. If the worker's services are required on those days, they must be paid double pay;

(e) maternity leave - working women have the right to six weeks leave before and six weeks leave after delivery;

(f) license by adoption - if they adopt an infant, women are entitled to six weeks of paid leave;

(g) paternity leave – working fathers are entitled to five working days leave when their child is born, or if they adopt a child;

(h) seniority premium - If a worker has worked for 15 years or more, he or she is entitled to a bonus of 12 days of salary for each year of service on termination of their employment contract;

(i) profit-share - each year, workers are entitled to receive a portion of the profits earned by their employer in the previous year;

(j) a worker who is dismissed without just cause is entitled to receive compensation (three months' salary, bonus, vacation, holiday bonus, utilities, seniority bonus).

The Mexican Insolvency Law sets the general rule for the priority of claims. Labour entitlements are considered to be first class or category claims, which implies that, as a general rule, they are paid before all other creditors, even secured creditors.

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1 *Ley de Concursos Mercantiles* (LCM).
2 *Ley Federal del Trabajo (LFT).*

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

Labour claims do not have to be verified by the Insolvency Court. The labour courts are empowered to order a specific attachment on the debtor's assets even if the debtor is declared insolvent. Such an order would only include labour claims arising from indemnity for years of work service, unpaid wages, etcetera, for the two years preceding the insolvency petition.

All labour claims are considered a priority and they have to be paid before any other creditor. There have been a couple of cases in which the labour courts have ordered the sale of assets of the debtor to pay for labour claims, even where the assets were pledged in favour of a non-labour creditor.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

There is no specific law or decree in regard to this subject. Administrators of business companies are not personally responsible for wages or other entitlements owed to employees. There is a general rule that any person who acts unlawfully is liable for any damages or losses that they cause.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There is no funded "safety net" that guarantees payment of employee entitlements in an insolvency proceeding.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Mexican labour law establishes different regulations that govern the acquisition of a company, in or out of an insolvency proceeding. The new owner of the company is called a substitute employer and is generally liable for any past employee claims (such as vacation bonuses and seniority premiums). Legally, this is referred to as the subrogation of personnel.

[3] Article 290 of the Social Security Law specifies the basic characteristics that occur when there is a substitute employer. Substitution of pattern occurs when assets or titles are transferred to another person or company.

Article 41 of the Federal Labour Law states that the substitute employer cannot change, in any way, the labour relations established by the company before the arrival of the new owner. In addition, the former employer and the new one are jointly responsible for labour obligations for six months after the date on which written notice of the substitution is given to the workers or their union.[3]

These principles apply even in bankruptcy. A person who buys an insolvent company or the majority of its assets as a going concern is regarded as the successor and substitute employer in respect of the labour rights of the workers who have remained employed by the company.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are no proposals for legislative reform at this time.

NETHERLANDS

1. How is an employee defined for the purpose of formal insolvency proceedings?

With respect to the definition of "employee", the Bankruptcy Act,[1] refers to "employment agreement" as defined in the Civil Code. To meet this definition, a master / servant relationship is essential. An employment contract need not be in writing. In the Bankruptcy Act commercial agency contracts are dealt with in the same way as employment contracts.

For purposes of social security legislation, including the scope of the "safety net" (see question 5 below) which is part of the Unemployment Act, the definition of an "employee" is somewhat wider than in the Civil Code; it comprises, under certain circumstances, some "socially comparable" categories, like home workers, artists and musicians, sportsmen and, indeed, commercial agents - as long as the individuals involved are not independent contractors.

It is important to consider the position of a statutory managing director of a company who is a shareholder. According to the Civil Code he may also be considered as an employee, but here the social security laws are more restrictive: the director is excluded from the definition if he and his family hold such an amount of shares that a potential dismissal of the director is at their joint discretion.

There is a remaining grey zone in the area of subcontracting, for example consultancy and interim-management. Whether the individuals involved are deemed to be employees or independent contractors depends on many factual circumstances. In the past, the social security authorities (UWV, a public body – a Dutch abbreviation) would issue a "Statement Labour Relationship" (VAR) as to certify the independence status of the contractor. In 2016, a new system of assessment was introduced, based on the use of certain standard agreements (approved by the tax authorities) between the contractor and the commissioning company. However, the enforcement of this system was put on hold for the year 2017, awaiting the outcome of new political discussions regarding the criteria of "independence". This is because the independence of many individuals who act as independent contractors (*ZZP-ers*) is really a façade. At this point in time, the status of "*quasi*-independent" contractors is most unclear.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

The bankruptcy trustee (*curator*) or the administrator appointed under the suspension of payments regime (*surséance*) may dismiss personnel (to be more precise, in a *surséance* it is the management which dismisses, but only with the approval of the administrator). Generally speaking, dismissed employees are given a maximum notice period of six weeks, irrespective of any (potentially longer lasting) contractual notice period or the statutory minimum period according to the Civil Code (in this section we deal only with employees within the definition of the Civil Code). It must be noted that, apart from the notice period, the degree of employee protection against dismissals is much higher in a *surséance* than in bankruptcy. During a *surséance*, like outside formal insolvency proceedings but different from the bankruptcy scenario, a so-called dismissal permit is required before giving notice of termination to an individual; and in the case of redundancies a certain order of layoffs must be complied with.

[1] Articles 40 and 239.

Employee entitlements may be defined as the aggregate of:

- financial consideration for labour performed, inclusive but not limited to: basic pay, holiday allowance, bonuses of all kinds, commission, overtime payments and pension contributions (collectively referred to as "wages" under the Civil Code); plus
- the amounts owed by the employer to the employee in respect of the termination of the employment agreement (generally speaking, different kinds of severance pay).

Post-insolvency employee claims usually qualify as "debts of the estate" (*boedelschuld*) and are dealt as "general costs of the estate".[2] As such, these claims have a higher ranking than all pre-insolvency claims, whether or not these are preferential (with the exception of claims secured by pledge or mortgage).

The Dutch Supreme Court has ruled that, where employees are dismissed by the *curator*, payments for unused holidays qualify as *boedelschuld* (even where the holidays were accrued before the insolvency).

In 1990, the Supreme Court ruled that, where such a dismissal triggered a contractual (golden) parachute clause that existed before the insolvency, the claim arising therefrom was neither a pre-insolvency claim nor a *boedelschuld*. In practice, therefore, such clauses are non-enforceable once the company has gone bankrupt. The author of this chapter has good reason to believe that, after 1 July 2015, when new labour legislation came into force, such a claim should qualify as a pre-insolvency claim.

Employment entitlements consisting of pre-insolvency claims are considered preferential[3] provided, however, that they do not date back further than 1 January in the year preceding the year in which the insolvency formally began. This priority does not apply to the employer's part of the pension contribution, which is a non-preferential pari passu claim of the pension body against the estate.

As mentioned above, employee entitlements include severance payments. Therefore, such pre-insolvency claims are preferential claims in the same way as pre-insolvency salaries. However, 2014 statutes governing employee dismissals (the *WWZ*) have introduced a new type of standard severance pay, the so called "transition compensation" (based on the duration of the employment agreements to be terminated).[4] This compensation is no longer due in the case of bankruptcy or suspension of payments by the employer.[5] As a result, there is now no issue whether such a claim is preferential or unsecured - it simply no longer exists. This claim extinction does not apply to other kinds of severance pay arising from the specific (personal) circumstances of the dismissal.

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

Secured creditors who have secured their rights by mortgage or pledge may execute their security rights and be paid from the proceeds as if there were no insolvency, without being obliged to share in the general costs of the estate. Thus, these creditors rank in priority to anybody else (apart from some specific preferential rights of the

2 As defined in article 182 of the Bankruptcy Act.
3 Civil Code, art 3:288 sub e.
4 *Idem*, art 7:673.
5 *Idem,* art 7:673c.

tax authorities), but their priority is limited to recoupment from the specific assets over which they have security.

In respect of tax claims (such as payroll tax and VAT) and claims for arrears of social security premiums, the tax authorities have priority over employees' entitlements; this is usually referred to as a "super preference".

Generally, the order of payment could be set out as follows:

(a) general costs of the estate, including but not limited to:

- expenses incurred by the *curator* / administrator in the due course of his work, as well as his remuneration; and
- *boedelschuld* (employee entitlements incurred after the insolvency and rent of premises incurred after insolvency for a maximum of three months, including any taxes and social premiums related thereto).[6]

(b) taxes and social security premiums (super preferential);

(c) employee entitlements (preferential);

(d) unsecured creditors;

(e) subordinated creditors; and

(f) finally, shareholders.

4. What if any personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Directors of a bankrupt company have no liability to the employees. However, directors may have a form of liability where a court finds that the insolvency process was invoked for an improper purpose, such as getting rid of the company's employees.

Directors will also be liable if the company fails to give the relevant authorities due notice of its inability to pay its payroll taxes or social security premiums.

5. Is there any form of statutory, industry or government funded "safety net" that services to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payment it may make?; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

[6] If the assets of the estate are not sufficient to cover all these costs and the amount of *boedelschuld*, the estate becomes "negative", and a further sub-order has to be made (this is not covered in this chapter).

Such a scheme does exist in the Netherlands. It is laid down in chapter IV of the Unemployment Act, and is informally called *loongarantieregeling* (wages guarantee scheme). It must be interpreted in accordance with the minimum standards set out in EC Directive 2008/94 (the successor of Directive 90/987). For employees of a bankrupt company, the wage guarantee is most often "the only law that counts", as the scheme has a generous coverage. It applies fully in in the case of bankruptcy of the employer and partly in a suspension of payments scenario.

It is important to note that claims for severance payments awarded by an employer fall outside the scope of the *loongarantieregeling*, because such claims cover potential loss of earnings in the future.

The *loongarantieregeling* is operated by *UWV*. Certain forms have to be completed by both the employee and the curator / administrator. The first payments are usually made within four to six weeks.

The scheme provides for the following payments:

(a) arrears of wages to a maximum of 13 weeks; arrears are calculated back from one of the following dates -

  (i) the day the employee's employment is rescinded by the labour court, if that day is within six weeks after the bankruptcy date; or
  (ii) the day the employment agreement is terminated by mutual consent, if that day is within six weeks after the bankruptcy date; or
  (iii) the day the employment contract ends by operation of law (for example, contracts for a fixed period), if that day is within six weeks after the bankruptcy date; or
  (iv) the day on which the bankruptcy trustee (*curator*) terminates the employment contract (this is the usual practice in relation to employment contracts with an indefinite period and in all other cases where the foreseeable expiration date is more than six weeks after the bankruptcy date);

(b) where the employment contract was terminated by the bankruptcy trustee (*curator*) as mentioned in para (a)(iv) above, wages for the notice period, up to a maximum of 6 weeks;

(c) outstanding holidays, holiday allowance and pension premiums, to a maximum of one year, calculated back from the last day of the employment agreement (in the case of termination by the bankruptcy trustee (*curator*, para (a)(iv) above), this is the last day of the notice period).

For these purposes, case law has given "wages" has a wider meaning than the definition in the Civil Code. In addition to basic pay, it includes:

- bonuses, commissions and overtime (all related to the arrears period of 13 weeks and the notice period of six weeks);
- expenses validly incurred by the employee in the due course of business;
- many kinds of contractual fringe benefits (such as student grants, the value of free private use of a company car, traffic fines if these usually were reimbursed by the employer, costs of relocation that took place during the relevant period and court fees that the employer was ordered to pay to the employee in a law suit).

Where a bankruptcy began before 1 January 2016, there was no monetary cap on the guarantee amounts to which an employee was entitled. In bankruptcies beginning since then, the guarantee amount has been capped by reference to the maximum allowances (outside of insolvency proceedings) under Dutch social security laws. That cap was EUR 6,773 per month as of 1 July 2017.

Although *loongarantieregeling* is a guarantee scheme, payment may be refused where the scheme is being abused (for example, management has deliberately chosen not to pay their own salaries during the last three months before the insolvency – anticipating that they will benefit from the scheme - but to pay creditors or the bank instead).

The *UWV* is entitled to claim in the bankrupt estate in place of the employees it has paid. In this respect the *UWV* claim usually qualifies partly as *boedelschuld* (repayment of post insolvency employee entitlements), partly as a preferential claim (regarding pre-insolvency salaries) and partly as a *pari passu* claim (regarding pension premiums).

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The Netherlands is bound by EC Directive (2001/23) on the safeguarding of employees' rights in the event of transfer of undertakings and has implemented that Directive in its labour law.[7]

If a company sells all its assets as an ongoing business and that business keeps its identity, the sale may constitute a "transfer of an undertaking" as defined in the EC Directive. This would have two consequences:

- the employees of the business are transferred to the acquirer on the same terms and conditions as before, and the acquirer becomes liable for all outstanding employee claims; and
- for a limited period of time, the transferor remains jointly and severally liable for employee claims, together with the acquirer. (In accordance with the Civil Code, pension commitments entered into by the transferor are to some extent included in the transfer.)

This concept is fully applicable in a *surséance* scenario. However, it is not necessarily applicable to all bankruptcies as article 5 of the Directive allows Member States to make an exemption in case of transfer of an undertaking during bankruptcy. Hence, for an acquirer who wants to "pick and choose" personnel from the insolvent business, it is much more attractive to buy the assets out of a bankruptcy instead of reorganizing the business via a *surséance*.[8]

However, the EU Court of Justice at Luxembourg has ruled that the exemption set in article 5 of the Directive is not applicable if a bankruptcy, including a post-insolvency transfer of undertaking, was preceded by a "pre-pack" operation.[9] In this context, a pre-pack is to be understood as a joint effort between the management of the company and the *curator in spe*, under high level supervision of a court, to have the business continued by way of a transfer to a purchaser directly after the commencement of the

7 Civil Code, ss 7:662 - 7:666.
8 This, together with the high degree of dismissal protection in a *surséance* (see above), helps to explain why more than 90 percent of the *surséances* in the Netherlands end up in a bankruptcy.
9 Case C-126/16, *FNV c.s vs Smallsteps*, 22 June 2017.

bankruptcy. The EU Court held that, in such a situation, there was no good reason to withhold from the employees the full protection offered by Directive 2001/23.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

Currently, no, but in Autumn 2017 a new Dutch government took over, and is now studying potential consequences of the EU Court ruling of 22 June 2017 and the question whether or not legislative reform is required.

NEW ZEALAND

1. How is an employee defined for the purpose of formal insolvency proceedings?

Schedule 7 of the Companies Act 1993 (Companies Act) contains the definition of an employee for the purposes of priority of payments to creditors.[1] "Employee" is defined as "any person of any age employed by an employer to do any work for hire or reward under a contract of service (including a homeworker as defined in section 5 of the Employment Relations Act 2000); but does not include a person who is, or was at any time during the 12 months before the commencement of the liquidation, a director of the company in liquidation, or a nominee or relative of, or a trustee for, a director of the company."[2]

"Employee" was not defined in Schedule 7 of the Act until an amendment was introduced in 2004. The legislative intent is clear that directors, their relatives, nominees and trustees, are specifically excluded from the employee definition and therefore from the preferential ranking conferred on employees generally. This is in stark contrast to the pre-existing common law which had not imposed any restriction on claims made by directors who were also employees of the company.

There are no other definitions of employee contained in New Zealand insolvency legislation. While there is a definition contained in the Employment Relations Act 2000 (essentially a person employed by an employer to do any work or hire for reward under a contract of service), this is not expressly incorporated into insolvency legislation.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

In a liquidation, the Act compels a liquidator to first pay out of the assets of the company (generally excluding those subject to a charge) certain expenses and fees (including those of the liquidator), followed by claims in the order of a specified "waterfall".[3] Each claim type in each class ranks equally. However, if there are insufficient realisations to meet all claims in full, they abate in equal proportions.[4]

Employee entitlements are to be paid out in the order prescribed in the waterfall in Schedule 7 of the Act.

Where the company assets (or accounts receivable and inventory for the purposes of receivership) are insufficient to satisfy the preferential claims listed in the waterfall in Schedule 7, preferential claims have priority over the claims of a secured creditor who has a security interest over all or any part of the company's accounts receivable and inventory, other than:

(a) creditors who have a purchase money security interest (PMSI) that has been perfected under the Personal Property Securities Act 1999 (PPSA); and

(b) creditors who have a perfected security interest arising from the transfer of an account receivable for which new value is provided by the transferee for the acquisition of that account receivable.

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1 The 7th Schedule of the Act dictates the priorities in a liquidation by virtue of s 312 of the Act, a receivership by virtue of s 30(2)(c) of the Receiverships Act 1993 and a statutory management pursuant to s 55 of the Corporations (Investigation and Management) Act 1989.

2 Companies Act, Sch 7, cl 3(4)(b).

3 *Idem*, s 312. Where a charge has been surrendered or redeemed under s 305 of the Companies Act, assets subject to that charge are subject to the waterfall.

4 *Idem*, Sch 7, cl 2(1)(a).

A receiver is required to apply accounts receivable and inventory of the company first to the receiver's expenses and remuneration, secondly to secured creditors falling into categories (a) and (b) above, and thirdly according to the same "waterfall" of preferential claims.[5]

The various categories of preferential entitlements in the waterfall include wages or salary (including commission), holiday pay, redundancy compensation and certain orders made under the Employment Relations Act 2000. With effect from 30 September 2015, the maximum gross preferential entitlement is NZD 22,160. This maximum sum is adjusted every three years.

2.1 Wages or salary

All outstanding wages or salary of an employee, whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services provided to the company during the four months before the commencement of the liquidation or receivership are preferential.[6] In a receivership context, section 30(3)(d) of the Receiverships Act means that the relevant period for claiming wages or salary is read as commencing four months before the date of appointment and ending 14 days after the appointment or on termination of employment if notice is lawfully given within the first 14 days or such extended period approved by the Court.

New Zealand courts have adopted a fairly broad interpretation of what constitutes "wages or salary". This has been held to include living or other expenses of an employee where the expenses are incurred by the employee while on the company's business.[7] Payments owed in respect of prior holiday or absence from work through sickness or other good cause fall within the definition of wages or salary.[8] Payment in lieu of notice has been held not to fit within the definition of wages or salary as it did not arise in respect of services provided to the company.

2.2 Holiday pay

Holiday pay accrued but not paid to the employee on the termination of employment before, or because of the commencement of the liquidation or receivership, is preferential. Holiday pay is defined as all sums payable to an employee by the company under subpart 1 of Part 2 of the Holidays Act 2003, including all sums that by or under any other enactment or agreement are payable as holiday pay.[9] There is no limit prescribed in regard to the time over which holiday pay entitlements accrue.

2.3 Redundancy payments

Compensation for redundancy owed to an employee that accrues before, or because of, the commencement of the liquidation or receivership, is preferential. There is no entitlement to statutory redundancy compensation in New Zealand – it is entirely contractual. Employees can claim preferential entitlement for redundancy where there was a pre-existing agreement between an employer and employee which provided for redundancy compensation to be paid on termination of employment.

5 Receiverships Act 1993, s 30(2).
6 Companies Act, Sch 7, cl 1(2)(a).
7 *Re R McGaffin Ltd* [1938] NZLR 764.
8 Companies Act, Sch 7, cl 3(4)(a).
9 *Idem*, Sch 7, cl 3(4)(c).

2.4 Award for lost wages or salary

Any award for reimbursement or payment under the Employment Relations Act 2000 in respect of wages, remuneration or other money lost during the four months before commencement of the liquidation or receivership, is preferential. This does not extend to any order for compensation made under section 123(1)(c) of that Act.[10]

2.5 Payroll donations

All untransferred amounts of an employee's payroll donations by an employer or PAYE intermediary under section 24Q of the Tax Administration Act 1994 during the four months before the commencement of the liquidation, are preferential claims.[11] Payroll donations refer to amounts that are directly deducted from an employee's pay to donate to a donee organisation.

2.6 Amounts deducted to satisfy obligations of the employee:

Any amounts that have been deducted by the company from the wages or salary of an employee in order to satisfy the obligations of the employee, are preferential claims.[12] The Act does not place any restriction on the period to which these deducted amounts must relate. Such amounts include obligations owing by the employee for child support and student loan repayments.[13]

2.7 KiwiSaver contributions:

Employee KiwiSaver contributions are preferential claims.[14] It is likely that employer KiwiSaver contributions will also be considered preferential claims.[15] There is no restriction prescribed in the Act as to the period for which these amounts must relate.

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

The preferential employee entitlements recognised in the "waterfall" described above rank:

- after certain fees and expenses of liquidators and receivers (and professionals retained by them);
- after creditors who have a perfected PMSI;
- after creditors who have a perfected security interest arising from the transfer of an account receivable for which new value is provided by the transferee for the acquisition of that account receivable; but
- before all other creditors and shareholders.

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10 *Idem*, Sch 7, cl 1(2)(e).
11 *Idem*, Sch 7, cl 1(2)(b).
12 *Idem*, Sch 7, cl 1(2)(d).
13 Child Support Act 1991, s 163(1) and Tax Administration Act 1994, s 167(2) as applied by the Student Loan Scheme Act 2011, s 70.
14 Companies Act, Sch 7, cl 1(2)(g).
15 *Idem*, Sch 7, cl 1(5)(b).

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The New Zealand legislation has no specific provision imposing personal liability on a director / manager of a company with respect to unpaid employee entitlements, taxes or other duties owed in relation to employee entitlements in the normal course of business. However, in certain circumstances where a director / manager of a company has been involved in a breach of employment standards, they may be liable for an employee's wages or other money owed to the employee.[16]

However, the High Court has the power to require directors or other managers to repay money or return property where those directors or managers have misapplied, retained or become liable or accountable for money or property of the company or been guilty of negligence, default or breach of duty or trust. In such circumstances, a liquidator, shareholder or creditor may make an application to the Court seeking an order that the person be made personally liable to repay or restore money or property, or to contribute such sum to the assets of the company by way of compensation as the Court determines.[17]

This provision provides a means of seeking redress from directors and those involved with the management of the company for the outstanding debts of the company, including employee entitlements, taxes or other duties owed in relation to employee entitlements.[18]

A director / manager of a company could also face personal liability, including criminal liability, for any misleading representation concerning entitlements.[19]

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

New Zealand has no statutory, industry or government funded "safety net" that guarantees payment of employee entitlements in an insolvency context.

Section 316 of the Act established the Liquidation Surplus Account and it is from this account that the Official Assignee may authorise the payments of costs incurred by a creditor of a company in respect of proceedings initiated after the commencement of a liquidation. Whilst the Liquidation Surplus Account does not constitute a "safety net"

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16 Employment Relations Act 2000, Pt 9A.
17 Companies Act, s 301.
18 *Idem*, s 301.
19 Fair Trading Act 1986, s 13(i).

in respect of outstanding employee entitlements, it has been used successfully to fund actions as a result of which employee priority entitlements have been settled. In *Re New Zealand Stevedoring Company Ltd (in receivership and liquidation)*,[20] the liquidator used the Liquidation Surplus Account funding to successfully recover from the receivers the sum of NZD 1,831,731 as priority debts due to employees.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

The default position under New Zealand law is that following a sale of a company's business and assets, there is no transfer of liability unless the parties otherwise agree. Employment of all employees will terminate due to redundancy and it is up to the purchaser as to whether they want to employ any of the employees following the sale. Even if employees are offered and accept new employment with the purchaser, employee liabilities will not transfer unless the parties agree otherwise. It is a new and distinct employment relationship.

The Employment Relations Act 2000 provides limited protection to employees if their employer proposes to restructure its business. In particular, all agreements must include an employee protection provision outlining the employer's obligations in a restructuring and certain employees involved in cleaning and food catering have the right to elect to transfer to a purchaser. However, restructuring is specifically defined in the Employment Relations Act 2000 to exclude "any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation."[21]

An administrator or a receiver may become personally liable for the payment of wages or salary that, during the administration or receivership, accrue under a contract of employment with the company that was entered into before the appointment, unless the administrator or receiver has lawfully given notice of termination within 14 days of appointment, or within such extended period determined by a court.[22]

In the vast majority of cases an employee's employment will be terminated either on, or shortly after, the appointment of an insolvency administrator, be they a receiver, liquidator, statutory manager or the Official Assignee. Termination of employees' employment may occur even in those circumstances where trading of the insolvent entity is continuing, in order to avoid personal liability on administrators or receivers after 14 days, to crystallise all outstanding entitlements and to effectively provide a "clean state" to any prospective purchaser. In some circumstances, employees may be re-employed on receivers' terms which exclude personal liability. If a sale of the company is subsequently achieved, it is then up to the purchaser as to whether it wants to offer employment to any employees.

[20] HC Auckland CP601-IM01, 20 June 2002.
[21] Employment Relations Act 2000, ss 69B and 69OI.
[22] Companies Act 1993, s 239Y and Receiverships Act 1993, s 32.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There is currently a proposal to clarify whether long service leave is included within the scope of clause 1(2)(b) of Schedule 7, which gives a preferential entitlement to employees in respect of holiday pay. Holiday pay is defined at clause 3(4)(c) of Schedule 7 as "all sums that by or under any agreement, or contract of service are payable to that person by the company as holiday." At this early stage, the proposal is limited to clarification and there is no indication as to whether long service leave will be expressly included or excluded from the scope of the preferential entitlement.[23]

[23] Ministry of Business, Innovation and Employment, on behalf of the Insolvency Working Group, *Review of Corporate Insolvency Law, Report No. 2 of the Insolvency Working Group, on voidable transactions and other corporate insolvency matters* (15 May 2017), at p 51.

NIGERIA

1. How is an employee defined for the purpose of formal insolvency proceedings?

The relevant insolvency legislation, the Companies and Allied Matters Act (CAMA) and the Bankruptcy Act (BA), do not define "employee". However, in the Labour Act 2004, which is the principal legislation governing employment relations in Nigeria, the terms "employer" and "worker" refer to the parties to a contract of employment.

"Worker" in the Labour Act means any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour. It does not include-

(a) any person employed otherwise than for the purposes of the employer's business;

(b) persons exercising administrative, executive, technical or professional functions as public officers or otherwise;

(c) members of the employer's family;

(d) representatives, agents and commercial travellers in so far as their work is carried on outside the permanent workplace of the employer's establishment;

(e) any person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the articles or the material; or

(f) any person employed in a vessel or aircraft to which the laws regulating merchant shipping or civil aviation apply.

The Employee Compensation Act 2010 (ECA) provides for compensation for any death, injury, disease or disability arising out of or in the course of employment. In that Act, an employee means "a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer including any person employed in the Federal, State and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy."

In the context of a formal liquidation insolvency procedure, CAMA describes various categories of employees' preferential claims and describes employees under some of the various terminologies used with reference to employees in the ECA, that is worker, clerk, labourer, servant, workman.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

Under Nigerian employment law,[1] for the purpose of establishing an employee claim or entitlement, the contract of employment executed by parties is binding on all parties and is the foundation upon which all claims succeed or fail. The Court is not

[1] Section 9(1) of the Labour Act, CAP L1, LFN, 2004 defines a contract of employment as "any agreement, whether oral or written, express or implied whereby one person agrees to employ another as a worker and that other agrees to serve the employer as a worker."

expected to look outside the terms agreed by the parties in determining their rights and obligations.[2] It is only in the absence of any written contract or where the contract is silent that the provisions of the Labour Act, as well as relevant trade custom and practice, are referred to.

Generally, employee benefits are all forms of consideration given by an entity in exchange for services rendered by employees, This may include: salaries, allowances (transport, housing, clothing, utilities), commissions, bonuses, long-service monetary award, and post-employment benefits such as a gratuity.

An employee is entitled to make the same claims under insolvency proceedings as he could make upon termination (with or without notice) of his relationship with the employer.[3] Under the Companies and Allied Matters Act, the following are employee entitlements which are given priority as preferential claims during any formal solvency proceeding:[4]

- Accrued salaries / wages – salaries / wages here refers to entitlements under the employee's full salary package which the company owes the employee as at the relevant date; these include: basic salary, housing, clothing, allowance, transport, utilities, and lunch allowance.[5]
- Leave allowance - where provided for by the employment contract, an employee can claim for unpaid leave allowance for all accrued holiday remuneration which was payable on the termination of his employment before or by the effect of the winding up order or resolution.[6]
- Salary in lieu of notice - where provided for by the employment contract, an employee can claim for salary in lieu of notice of termination of the employment contract. For junior employees this is usually a month's pay, whilst for those at executive or managerial level it is usually three months' pay.[7]
- Unremitted tax - Each state of the Nigerian Federation has its own tax laws, which require employers to remit personal income tax of their employees. An employee can claim against the liquidator for unremitted personal income tax, but the tax period for the purpose of priority is one year of assessment.[8] Tax claims by the State are limited to tax due for only one year of assessment, and rank *pari passu* with employees' claims.
- Unremitted deductions under the National Provident Fund Act, 1961.[9]
- Unremitted deductions under the Pension Reform Act.[10]
- Redundancy claims.[11]

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2 *Nwaubani v Golden Guinea Breweries Plc* (1995) 6 NWLR, Pt. 400 at p 184.

3 An employee is only entitled to the salary and benefits he would have earned within the period of notice provided for by the contract of employment: *Ibama v Shell Petroleum Development Co Ltd* (2005) 10 SC at p 62.

4 Please note that as provided for under s 494(4)(a) of the Companies and Allied Matters Act, 2004, the foregoing entitlements as debts rank equally among themselves and are paid in full, unless the assets are insufficient to meet them, in which case they are paid *pari passu*.

5 Companies and Allied Matters Act, CAP C20, LFN 2004, s 494(1)(c)(d).

6 *Idem*, s 494(1)(e).

7 *Idem*, s 494(1)(c) and (d).

8 *Idem*, s 494(1)(a).

9 This Fund is *in pari materia* with the provisions of Nigeria Social Insurance Trust Fund Act under the Employee Compensation Act, 2010.

10 See Pension Reform Act 2014, s 11.

11 There is no specific provision for redundancy pay by an acquirer under the Labour Act in Nigeria. However, ss 20(1), (2) and (3) of the Labour Act 2004 is to the effect that redundancy benefits are payable based on any of the following; statutory regulation, contract of employment, collective agreement or negotiated sum. In the Nigerian case of *Peugeot Automobile Nig. Ltd v Saliu Oje & Ors* (1997) 6331 (CA), the Court held that an employee would only be entitled to those benefits enumerated by the terms of contract as payable to an employee declared redundant.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

Outside the context of a collective proceeding, secured creditors generally have overall priority. But where a formal collective procedure has been commenced (unless the judge directs otherwise), every creditor is expected to prove his debt.[12]

The order of priority during formal insolvency proceedings is:[13]

- costs of liquidation- which may include the costs of advertising, professionals retained by the liquidator, realization, etc. This super-priority is a matter of practice, though the law technically provides that it requires a court order or a resolution of the Committee of Inspection;[14]
- secured creditors[15] - holding either a legal mortgage or a debenture over a specific asset;
- liquidator's remuneration - unless otherwise ordered by the court or agreed by the Committee of Inspection, the remuneration of the liquidator comes second in priority to secured creditors' claims, though deductible from the amount realized from the security surrendered;[16]
- preferential debt claims - these are employee claims relating to unpaid salaries and wages, other termination benefits (for example, bonuses, compensation, leave allowances), unremitted tax deductions and pensions;[17]
- trade creditors, holders of floating debentures and unsecured creditors;
- other shareholders and contributories.

In a nutshell, except for secured claims and liquidation costs / expenses, employee claims have priority amongst unsecured claims, together with a one year tax claim.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Under the Nigerian legal system, a company is seen as being distinct and separate from its promoters / directors (doctrine of separate corporate personality).[18] Therefore, directors as a general rule cannot be held personally liable for unpaid employee entitlements. However, this does not apply in cases of fraud, breaches of specific statutory provisions and breaches of contracts to which the directors are privy in a personal capacity.

Sections 502 to 508 of the CAMA create many offences for which a director could be held liable in the course of winding-up. In addition, section 506(1) of the CAMA provides for personal liability of directors where, in the course of winding up, it is found

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12 See CAMA, s 445 and the Companies Winding-Up Rules, 2001, rr 74-89.
13 CAMA, ss 412, 413, 414, 417, 418, 448, 494 and 495, read with provisions such as the Companies Winding-Up Rules 2001, rr 61, 115, 127 and 142, guide redistribution of the proceeds realized from the assets of the failed company.
14 See CAMA, s 448 and Companies Winding-Up Rules, r 115 and 142.
15 Holding either a legal mortgage or debenture over the company's assets; only the principal sum owed would be paid.
16 See Companies Winding Up Rules 2011, r 142.
17 CAMA, s 494(1)(b) to (e).
18 *Salomon v Salomon* [1897] AC 22.

that they acted fraudulently in relation to the company. Directors will be liable if they conducted the business of the company in a reckless manner or with intent to defraud. Where such a determination is made, the court can order directors to pay debts of the company, including employee claims.

With respect to unremitted or undeducted taxes, the Personal Income Tax Act 2011 provides that directors may be held administratively or criminally liable for contraventions under the Act to the extent of the violation of the Act (by failing to deduct or to remit tax).[19] As such, directors and persons in management may be held personally liable under the Act if they are found to be persons in charge who have failed to comply with the provisions of the Act.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

In Nigeria, there is currently no form of statutory / government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

As already explained, employee claims are preferential claims amongst unsecured claims in formal insolvency proceedings. This means that the proceeds of a sale of the assets as an ongoing business can be used by the liquidator to pay those claims which have been established. Further, in a liquidation setting, the commencement of the insolvency procedure and appointment of a liquidator terminate all employment contracts (including those of directors), leaving the employee to register his claim in the insolvency procedure. So, an acquirer's liability under Nigerian law may only arise if the sale of the business as a going concern was through acquisition of shares or under some form of scheme of arrangement. In that case, unless the liquidator has negotiated an arrangement of onboarding of some or all the employees at a discount, liability may not arise for the acquirer.

An acquirer may definitely be liable in an out of court arrangement, as part of the terms negotiated in the sale of assets as an ongoing business, but the liability may also be excluded, leaving the insolvent company with that risk.

[19] Personal Income Tax Act 2011, ss 74, 94, 95 and 100, provide penalties for offences. See also PAYE Regulations, para 2.

With respect to redundancy claims within an insolvency context and an asset sale as an ongoing business, the liability of an acquirer would also depend on the terms of the asset sale, due to the fact that Nigerian labour law does not provide a clear-cut guide.

Section 20(3) of the Labour Act defines "redundancy" to mean an involuntary and permanent loss of employment caused by an excess of manpower. Although the definition of "excess of manpower" is not stated in the Labour Act, Nigerian Courts have taken judicial notice of different actions which may impliedly lead to redundancy. Such actions include: mergers and acquisitions, asset sales, takeovers, business re-engineering, restructuring, technology advancement, business re-positioning and outsourcing. All these actions have been recognised as valid grounds for declaring redundancy.

Where a redundancy arises, the company to be sold (in its capacity as employer) is required to do the following: -

- inform the trade union or workers' representative union of the reason for and the extent of the anticipated redundancy;
- adopt the principle of "last in, first out" for each cadre of employees affected by a declared redundancy (subject to factors such as relative merit, employees' skills, abilities and reliability);
- use its best efforts to negotiate redundancy payments where the Redundancy Regulations made by the Minister for Employment, Labour and Productivity do not apply to such employees, or no guideline is provided in the employees' contract of employment or the group of employees' collective agreement.[20]

No Redundancy Regulations have so far been published by the Minister for Employment, Labour and Productivity.[21] As a result, an employee's redundancy entitlements would be based on the benefits that the employee is entitled to under the contract of employment,[22] any collective agreement[23] (if the company is unionised) or any such agreement based on negotiated sums.[24]

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20 Labour Act, s 20(1)(a), (b) and (c) of the Labour Act. Note that the term "employer" is not defined to include an insolvency practitioner and, as stated earlier, employment contracts are ordinarily automatically terminated in the event of an involuntary winding-up.

21 No such regulations have been promulgated so far by the Minister.

22 See the Nigerian Case of *Peugeot Automobile Nig. Ltd v Saliu Oje & Ors* (1997) 6331 (CA), where the Court held that an employee would only be entitled to those benefits enumerated by the terms of contract, as payable to an employee declared redundant.

23 Related to Redundancy Regulations are collective agreements, which are usually written memoranda of understanding between an employer or a group of employers and their employees, usually represented by an employees' Trade Union. A Collective Agreement provides guidelines regarding the employees' wages, benefits, hours of work, working conditions, discipline, termination, dismissal, redundancies, etc. Based on a plethora of decided court cases, however, the law remains that the terms and conditions of a collective agreement, which are not expressly incorporated into each employee's contract of employment, are not legally binding in an employment dispute between the employer and the employee.

24 Section 20(1)(c) of the Labour Act provides that the employer shall use his best endeavours to negotiate redundancy payments to any discharged workers who are not protected by regulations made under subsection (2) of this section. Redundancy / severance pay is usually computed using the employee's length of service and the last remuneration of the employee, among other things, as a guide.

Unlike European law, in an asset sale as a going concern, the general insolvency law does not make it compulsory for the acquirer to carry over the employees or pay redundancy claims.[25] Therefore, unless this is part of the deal negotiated within an informal or formal scheme, the Court would not impose a burden on the acquirer but would respect the agreement of parties relating to the asset sale. However, the seller must take steps to ensure that, in anticipation of the sale, its employees are taken care of as required by section 20 of the Labour Law. For the purpose of a formal insolvency procedure, this means that the liquidator would have to ensure payment of employee claims (including, where necessary, contractually established redundancy claims) as required by law.

Apart from the provisions of the law on redundancy highlighted above, section 10 of the Labour Act also requires the consent of the employee for a transfer of employment from one employer to another.[26]

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are currently no proposals for legislative reform to further protect employee entitlements in insolvency.

[25] Although Clause 9.2 of the Central Bank of Nigeria Guidelines & Incentives on Consolidation in Nigeria Banking Industry dated 5 August 2006 provided that "[t]o ameliorate the effect of possible job losses or redundancies, any staff exiting as a result of the consolidation should be compensated by the consolidated entity in line with industry standards, but not below the terms of their sustaining employment. 9.3 In addition, the CBN will work with the Bankers' Committee to assist the staff that will be disengaged to access the SMIEIS Fund to set up their own SMEs and consequently create jobs and wealth." This provision has had little or no effect to date, as there are still ongoing several litigation cases at the Nigerian National Industrial Court on redundancy claims, presumably based on the fact that the use of the word "should" did not connote any legal obligation (following which most financial institutions executed asset purchase agreements, wherein the acquirer took without liability for redundancy claims, pension and accrued salaries). See the Nigerian case of *The Incorporated Trustees of the Association of Ex-Staff of Non- Consolidated Banks v Nigeria Deposit Insurance Corporation & 5 Ors* (NICN/LA/603/2016) which suit is currently pending at the National Industrial Court, Lagos. The action concerns benefit claims of former employees of some financial institutions following the 2006 Consolidation Exercise in the Nigerian Banking Industry.

[26] The transfer of any contract from one employer to another shall be subject to the consent of the worker and the endorsement of the transfer upon the contract by an authorized labour officer.

POLAND

1. How is an employee defined for the purpose of formal insolvency proceedings?

The Polish Insolvency Law[1] uses the term "employment relationship" when establishing the order in which creditors are satisfied from the proceeds of an insolvency estate. The Polish Labour Code says that an employment relationship exists where "the employee assumes the obligation to perform specific work for the employer and under the employer's direction at a place and time specified by the employer, and the employer assumes an obligation to employ the employee in exchange for payment of remuneration".[2] An employment relationship is determined by the content of the relationship rather than the name used by the parties to describe it.[3] This aims to protect people who provide services as employees regardless of the title under which they work.

(It should also be noted that the statutory "safety net" for employees – the Guaranteed Employee Benefits Fund – uses a different definition of employee: see the answer to Question 5 below.)

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

Employee entitlements under the Insolvency Law are called "claims under employment relationships".[4]

The meaning of this phrase is determined by Polish labour law. It covers claims against the employer based on its obligations under the employment relationship. It includes basic salary, statutory bonuses, overtime allowances, statutory severance payments, additional pay for work on Sundays and holidays, cash in lieu of unused vacation leave, compensation arising from the employment relationship, etc.

"Claims under employment relationships" does not include workers' claims that are not for the performance of work or claims arising from legal relationships that are separate from the employment relationship. For instance, remuneration for copyrights and inventions made by employees, benefits for the use of a private car for business purposes, or the right of employees to acquire shares of privatised state-owned enterprises are not included in the term "claims under employment relationships".[5]

Employee claims in insolvency proceedings enjoy two types of privilege:

- a simpler method of proving claims; and
- a superior ranking of those claims.

2.1 Claims procedure

Personal creditors of an insolvent who want to participate in insolvency proceedings are required to file their claims within a mandatory time limit. However, this does not apply to employees. Their employment claims are automatically placed on the list of claims.[6]

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1 Act of 28 February 2003 - Insolvency Law (Journal of Laws 2003 No. 60, item 535 with subsequent amendments).
2 Polish Labour Code, art 22(§1).
3 *Idem*, art 22(§2).
4 Insolvency Law, art 342(1)(1).
5 A. Tomanek, *Ustalenie wierzytelności pracowniczych w postępowaniu upadłościowym, „Praca i Zabezpieczenie społeczne",* 2004, 8, pp 18-25.
6 Insolvency Law, art 237.

2.2 Ranking of claims

After the satisfaction of secured claims and payment of the costs of the insolvency proceedings, unsecured creditors' claims are divided into four ranked categories.

If the sum allocated for distribution is not sufficient to satisfy all claims in full, claims are paid in the order of the categories. Each category can only be paid if there are funds available after paying the claims in the category ranked above it. If the sum allocated for distribution is not sufficient to satisfy in full all the claims within a category, these are paid *pro rata*.

Claims under the employment relationship are included in the first-ranking category. This only applies to employees' claims attributable to the period before the declaration of insolvency. Employment remuneration for work done in the course of insolvency proceedings forms part of the costs of those proceedings and, as such, is paid on an ongoing basis as the funds flow into the estate, or *pro rata* upon the implementation of a distribution plan.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

3.1 Main principles

After secured creditors and the costs of the insolvency proceedings, unsecured claims are ranked as follows:

(a) the first category – as well as claims under employment relationships attributable to the period before the declaration of insolvency, this includes:

- claims for remuneration of the insolvent's representative or remuneration of a person performing acts connected with administration or supervision of the insolvent's enterprise;
- claims by farmers under agreements for providing products from their own farms;
- dues under maintenance and alimony;
- pensions by way of indemnity for causing an illness, incapacity to work, disability or death;
- pension by way of conversion an annuity into a pension for life;
- social insurance premiums for the last three years before the declaration of insolvency;
- claims that arose in the course of restructuring proceedings due to actions of the receiver, or certain claims that arose due to actions of the debtor taken after the opening of restructuring proceedings;
- claims for credit provided under a restructuring arrangement if insolvency was declared no later than three months after the arrangement was validly set aside.

(b) the second category – claims such as tax and other public contributions, and the remaining claims for social insurance premiums;

(c) the third category - interest on claims included in the higher categories, judicial and administrative fines, and claims in respect of donations and legacies;

(d) the fourth category - claims of shareholders under a loan or similar legal claim, particularly for the supply of goods to an insolvent company with a deferred due date in the period of five years before the declaration of insolvency (along with interest).[7]

3.2 Rules concerning secured creditors' claims

Proceeds from the disposal of collateralised assets are generally paid to the creditors whose claims were secured by those assets. Amounts remaining after satisfaction of those claims are included in the funds of the insolvency estate.[8]

The relevant assets and security interests are:

- assets encumbered with a mortgage, pledge, registered pledge, Treasury pledge or maritime mortgage;
- assets that are subject to rights, personal rights and claims evidenced by an entry in the land and mortgage register;
- assets that are subject to rights, personal rights and claims which are not evidenced by an entry in the land and mortgage register but which have been reported to the judge-commissioner.

Notwithstanding this general rule, the payment of some unsecured claims takes priority over the payment of some categories of secured creditor.

The relevant unsecured claims are:

- pensions for illness, incapacity to work, disability or death, and pensions resulting from the conversion of an annuity into a pension for life (but only for pension payments that are due for the period after the declaration of insolvency);
- remuneration of employees who perform work on the property, on board a ship or in accommodation (this remuneration covers the last three months before the sale, up to the amount of three times the minimum remuneration for work).[9]

The secured property over which they have priority is:

- immovable property;
- the right of perpetual usufruct;
- a cooperative member's ownership right to accommodation;
- a sea-going vessel entered in the shipping register.

3.3 Rules concerning insolvency administrators' claims

The costs of insolvency proceedings are in the first instance paid from the insolvency estate.[10] These costs include expenses directly incurred in securing, managing and liquidating the insolvency estate, including:

- the remuneration of the trustee and deputy trustee;
- the remuneration of persons employed by the trustee (and social insurance contributions due on the remuneration of these persons);

7 *Idem,* art 342(1).
8 *Idem*, art 336(1).
9 *Idem*, art 346(1).
10 *Idem,* art 343(1).

- the remuneration and expenses of the members of the committee of creditors;
- expenses incurred in connection with a meeting of creditors;
- the costs of archiving the insolvent's documents, correspondence and announcements;
- taxes; and
- other public contributions connected with the liquidation of the insolvency estate.

In summary, under the Polish legal system, claims under employment relationships are satisfied only after full satisfaction of dues arising from secured creditors' claims and, subject to certain exceptions, the costs of the insolvency proceedings.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The scope of personal liability depends on the type of company and type of liability. Under Polish law there are two main types of business entity: partnerships and capital corporations.

4.1 Partnerships

In general, every partner is and jointly and severally liable for the obligations of the partnership, without limitation. Such obligations include unpaid employee entitlements. However, it is worth mentioning that the liability of each partner is subsidiary.[11] In other words, a creditor of a partnership may carry out enforcement against a partner's assets where enforcement against the partnership's assets proves ineffective.[12] Special principles of liability depend on the type of partnership.

The tax liability of partners is set out in the Tax Ordinance.[13] A partner in a civil, registered or professional partnership and a general partner in a limited partnership or in a limited joint-stock partnership, is liable with all its assets jointly and severally with the partnership or the remaining partners for the tax arrears of the partnership.[14] A former partner is also liable for tax arrears in respect of obligations whose payment term elapsed while he was a partner.[15]

4.2 Corporations

Generally, under the Code of Commercial Companies, members of a corporation's management board are jointly and severally liable for the its liabilities if enforcement against the company proves ineffective.[16] A management board member may be discharged from such liability if he proves that:

- a petition for insolvency was filed with the court within the statutory time limit or restructuring proceedings were commenced, or an arrangement with creditors was approved;

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11 Act of 15 September 2000 - Code of Commercial Companies (Journal of Laws 2000 No. 94, item 1037 with subsequent amendments), art 22(§2).
12 *Idem*, art 31(§1).
13 Act of 29 August 1997 – Tax Ordinance (Journal of Laws 1997 No. 137, item 926 with subsequent amendments).
14 *Idem*, art 115(§1).
15 *Idem*, art 115(§2).
16 Code of Commercial Companies, art 299(1).

- the failure to file a petition for insolvency occurred through no fault on his part;
- despite the failure to file the petition for insolvency or the lack of approval of an arrangement with creditors, a creditor suffered no damage.[17]

Moreover, a member of a management board who fails to file a petition for insolvency despite the insolvency of the corporation or partnership, is liable to a fine or a penalty of restriction of freedom or imprisonment for up to one year.[18]

In addition to this general liability under the Code of Commercial Companies, members of a corporation's management board can be liable for its tax arrears. Under the Tax Ordinance, members of a company's board can be jointly and severally liable for its tax arrears if enforcement against the company's property is entirely or partly ineffective. A member will be liable if he or she:

(a) does not demonstrate that:

- a petition for insolvency was filed with the court within the statutory time limits, or restructuring proceedings were commenced, or an arrangement with creditors was approved,
- failure to file a petition for insolvency was not attributable to them, or

(b) does not reveal the property of the company's property that could satisfy the majority of the company's tax arrears through enforcement.[19]

However, the liability of the members of a management board covers only tax arrears on account of the liabilities whose due date expired while they acted as members of the management board.[20]

4.3 Liability under the Labour Code

A person, acting on behalf of an employer, who does not, within the legal time limit, pay remuneration for work or a benefit due to an employee (or to a member of his family who is entitled to such benefit), or who improperly reduces the amount of such remuneration or benefit commits a misdemeanour and is liable to a fine of between PLN 1,000 and PLN 30,000.[21]

4.4 Liability under the Criminal Code

Individuals acting on behalf of employers can also be liable under the Polish Criminal Code for unpaid employee entitlements, taxes or other duties owed in relation to employee entitlements.[22]

The following actions or omissions at the pre-insolvency stage are penalized by the Criminal Code:

- malicious or persistent infringement of the rights of an employee (for example, lack of payment of due remuneration);[23]

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17 *Idem*, art 299(2).
18 *Idem*, art 586.
19 Tax Ordinance, art 116(1).
20 *Idem*, art 116(2).
21 Labour Code, art 282.
22 Act of 6 June 1997 – The Criminal Code (Journal of Laws 1997 No. 88, item 553 with subsequent amendments)
23 *Idem,* art 218.

- frustrating or reducing the satisfaction of creditors' claims by removing, concealing, selling, donating, destroying, or actually or pretendedly encumbering or damaging assets, or by establishing a new business entity and transferring assets of the debtor assets into it;[24]
- bringing about bankruptcy or insolvency in a reckless manner, especially by squandering assets or by contracting obligations or concluding transactions that are manifestly discrepant from the principles of proper management;[25]
- where the company is under the threat of insolvency or bankruptcy and unable to satisfy all the creditors, paying or satisfying only some of its creditors, thereby acting to the detriment of others.[26]

Another legal basis for personal liability is found in the Act establishing the Guaranteed Employee Benefits Fund (which protects workers' claims in the event of the insolvency of their employer). The answer to the next question provides further details on this topic.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

The Guaranteed Employee Benefits Fund has been operating in Poland since 1993. The main objective of the Fund is to pay employee claims that cannot be fulfilled by the employer due to its insolvency.

The Fund is a State special fund. The main sources of finance for the Fund are employers' contributions (0.1% of monthly salary for each employee) and funds recovered from the reimbursement of benefits that were paid out to employees.

5.1 Insolvency of an employer

For the purposes of the Fund, an employer becomes insolvent:

(a) on the date on which an insolvency or restructuring court issues a decision on:

- the insolvency of the employer;
- the commencement of secondary insolvency proceedings;
- the commencement of debt restructuring proceedings;
- the dismissal of a petition for insolvency on the grounds that the assets of the employer are not sufficient to cover the costs of the proceedings or are sufficient to cover only those costs;

[24] *Idem*, art 300.
[25] *Idem*, art 301.
[26] *Idem*, art 302.

(b) on the date on which an insolvency court issues a decision on termination of insolvency proceedings on the basis that:

- the employer's assets are not sufficient to satisfy the costs of the proceedings; or
- creditors who were obliged to make an advance payment towards the costs of the proceedings have failed to make such payment in due time and there are no other liquid funds to cover those costs;

(c) on the date on which a judicial decision on dissolving a corporation becomes legally binding;

(d) on the date on which a proper authority or court of a member state of the European Union issues a decision on commencement of insolvency proceedings, or on refusal to initiate such proceedings on the grounds that the company has ceased to operate or that there is a lack of resources that would be sufficient to cover the costs of the proceedings;

(e) if the employer has not satisfied any employee claims due to the lack of funds, on the date on which the employer was removed from the Central Registration and Information on Business;

(f) two months after the date on which the employer ceased conducting business.

5.2 Types of employee claims and the period of time guaranteed by Fund

The following persons are entitled to obtain benefits:

- employees of the insolvent employer;
- former employees of the insolvent employer;
- family members of a deceased employee or deceased former employee who are entitled to a survivor's pension;
- persons performing gainful work on a basis other than an employment relationship, if such a basis is required to be covered by social insurance.

A worker employed by a natural person in a household is not entitled to obtain benefits from the Funds (he is not considered to be employee within the meaning of the Act).

The Fund covers a number of claims. These fall into 2 categories.

a) The first category is:

- remuneration for work;
- remuneration for a stoppage not caused by an employee, remuneration for a period in which the employee is not working (off work period), remuneration for another justified absence;
- remuneration for an employee's incapacity to work due to illness;
- remuneration for holiday leave;
- compensatory allowance.

In each case, the employee will be paid a maximum of three months' entitlements, calculated as follows:

- entitlements arising during the three months before the day on which the employer became insolvent; or
- entitlements arising during the three months before the date of termination of the employment relationship if that termination occurred no more than 12 months before the day on which the employer became insolvent.

b) The second category of entitlements payable from the Fund is:

- severance payments (in accordance with the provisions on terminating employment relationships with employees for reasons unrelated to the employees);
- compensation for reducing the period of notice of termination;
- the cash equivalent of unused holiday leave for the year in which the employment relationship was terminated and the preceding year.

These claims are payable if the employment relationship is terminated:

- no more than 12 months before the day on which the employer became insolvent; or
- no more than four months after that day.

The total monthly payment from the Fund (including, for example, severance pay or sickness pay) cannot exceed the amount of the average salary from the previous quarter.

The Fund does not pay any other claims. It is worth noting that eligibility to receive financial support from the Fund does not depend on the duration of the employment relationship with the employer.

5.3 The procedure

The payment of benefits from the Fund is initiated through the submission of a petition to the provincial marshal by the employer, court supervisor, administrator or liquidator (within a month from the day on which the employer becomes insolvent). The payment may also be initiated by an employee, former employee, family members of a deceased employee or deceased former employee who are entitled to a survivor's pension.

Where the Fund pays benefits to an employee, the provincial marshal may lodge a recovery claim against the employer, liquidator or other person managing the employer's estate.

5.4 The Fund in the context of the formal insolvency proceedings

The Insolvency Law requires the administrator of an insolvency estate to promptly discharge any duties set out in the Fund legislation.[27] For example, the administrator is required to submit the petition to the provincial marshal.

Funds transferred from the Guaranteed Employee Benefits Fund are not included in the insolvency estate and cannot be used to satisfy the claims of other creditors.[28] In addition, the Law's provisions on employee claims apply to claims of the Fund for recovery from the insolvency estate of benefits paid to employees. This means that the Fund's claims are placed on the list of claims *ex officio* and enjoy the same priority as the corresponding employee claims. [29]

[27] Insolvency Law, art 177(1).
[28] *Idem*, art 177(2).
[29] *Idem*, art 342(3).

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

In principle, under the Polish Labour Code, if the establishment or a part thereof is transferred to another employer, the new employer becomes a party to the existing employment relationships by operation of law. The transferor and the transferee are jointly and severally liable in respect of the obligations under the employment relationship that arose before the transfer of a part of a work establishment.[30]

However, these rules only apply to a sale by an insolvent company outside of formal insolvency proceedings.

In the event of a sale by an insolvent company in formal insolvency proceedings, the acquirer is not generally considered to be liable for employee claims which occurred before the date of the transfer. Under the Insolvency Law, the acquirer of the insolvent's enterprise acquires it free and clear of any encumbrances, and is not liable for the insolvent's liabilities.[31]

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

On 20 July, 2017 the Act amending the Act of 13 July 2006 on the protection of workers' claims in the event of the insolvency of the employer, was approved by the Polish Parliament. The amendment was signed by the President and entered into force on 5 September, 2017.

The biggest change made by the amending Act was the extension of the definition of an employee for the purposes of the Act on the protection of workers' claims in the event of the insolvency of the employer. Under the amendment, the spouse of an employer, as well as his blood relatives and relatives through marriage, are also considered employees.[32] However, a worker rendering employment in a household is still not considered to be an employee.

An employee will be entitled to obtain benefits from the Fund even if termination of employment relationship occurs during a period not longer than 12 months before the day on which the employer became insolvent. Until the amendment, benefits were paid only if the termination occurred no more than nine months before the day on which the employer became insolvent. This amendment will greatly increase the number of employees entitled to obtain benefits from the Fund.

Moreover, the amendment specifies the definition of the actual cessation of conducting business by the employer. This definition is used to determine employee entitlements to benefits from the Fund. The introduction of the definition of "cessation of conducting business activity" aims at imposing clear conditions on the use of the Fund's resources and thereby protect them from abuse.

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30 Labour Code, art 231.
31 Insolvency Law, art 317(2).
32 In this regard, they will be entitled to obtain benefits from the Guaranteed Employee Benefits Fund; they were not considered to be employees before.

PORTUGAL

1. How is an employee defined for the purposes of formal insolvency proceedings?

Portuguese law does not contain a definition of "employee" for the purposes of formal insolvency proceedings. As such, the definition of the Portuguese Labour Code applies.[1]

Accordingly, an individual person who provides his activity to and under the authority of another person or persons being integrated in his / their organisation and being remunerated for such activity, is considered to be an employee.[2]

Should the insolvent company employ service providers or interns who qualify as employees, such persons can also be considered employees for the purposes of formal insolvency proceedings once this relationship has been duly recognised as such in a court ruling.

For this purpose, Portuguese labour law provides that the following features[3] may evidence the existence of an employment relationship when one person provides its activity to another person or persons and:

- activity is carried out on premises belonging to the beneficiary, or determined by the beneficiary;
- equipment and work tools used belong to the beneficiary;
- service provider works under a schedule determined by the beneficiary;
- beneficiary pays a certain remuneration periodically for the service providers' activity;
- person carries out duties of direction or management within the company's organic structure.

These features are indicative of an employment relationship and, when not present, it does not prevent the court from recognising the service provider as an employee if it is proven he has in fact been in an employment relationship (with reference to the general definition of an employment contract). On the other hand, the recognition may be determined in a judicial context, even if all the features set out above are not observed in the relationship between the company and the service provider.

2. What are the employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

Employees are entitled to claim all overdue credits resulting from the execution and termination of their employment contract in formal insolvency proceedings, in particular remuneration, holiday and Christmas bonuses, other bonuses, meal allowances, training hours credits, compensation for termination, amongst others. The employees are entitled to claim overdue credits resulting from the execution and / or termination of the contract up to one year following termination of the contract.[4]

The contract remains in force during the insolvency proceedings. The insolvency ruling does not determine the automatic termination of the employment contracts, nor their suspension.

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[1] The Portuguese Labour Code (Labour Code) was approved by Law 7/2009, of February 12.
[2] *Idem*, art 11.
[3] *Idem*, art 12.
[4] *Idem*, art 337.

During insolvency proceedings and for as long as the employment contract is in force, the insolvency administrator must assume the position of employer and should continue to comply with all employment obligations, including the payment of the employees' salaries.

The employment contracts may, however, be terminated by the insolvency administrator should this be necessary to ensure the company's viability.

In this scenario, if the insolvency administrator decides that a collective dismissal (applicable when the termination of more than one employment contract is envisaged during the course of three months), or a termination of position (applicable when only the termination of one employment contract is envisaged), is required for ensuring the company's continued viability, the employee(s) whose contract(s) is (are) terminated, will be entitled to receive compensation calculated with reference to his (their) seniority within the company.[5]

The employee's compensation for termination in the case of an objective dismissal (collective dismissal or termination of position), must be calculated based on the following formula:[6]

a) Permanent contracts executed prior to 1 November 2011

For permanent contracts executed prior to 1 November 2011, compensation is calculated in the following terms:

- for the period of execution of the contract until 31 October 2012, compensation is equivalent to one month of base salary per year of seniority;
- for the period from 1 November 2012 to 30 September 2013, the compensation is equivalent to 20 days of base salary per year of seniority;
- for the period from 1 October 2013 until the date of termination, the compensation is equivalent to:
  – 18 days of base salary for each complete year of seniority (in the first three years, when the contract has not reached three years on 1 October 2013); and to
  – 12 days of base salary for each complete year of seniority (in the subsequent years until the date of termination).

b) Permanent contracts executed between 1 November 2011 and 30 September 2013

For permanent contracts executed between 1 November 2011 and 30 September 2013, compensation is calculated in the following terms:

- until 30 September 2013, the compensation is equivalent to 20 days of base salary per year of seniority;
- for the period from 1 October 2013 until the date of termination, the compensation is equivalent to:
  – 18 days of base salary for each complete year of seniority (in the first three years, when the contract has not reached three years on 1 October 2013); and to
  – 12 days of base salary for each complete year of seniority (in the subsequent years until the date of termination).

[5] *Idem*, arts 359 *et seq*.
[6] *Idem*, art 366; Law 69/2013, of August 30, art 5.

c) Term contracts entered into from 1 November 2013

For term contracts entered into from 1 November 2013 onwards, compensation is calculated in the following terms:

- 18 days of base salary for each complete year of seniority (in the first three years); and to
- 12 days of base salary for each complete year of seniority (in the subsequent years until the date of termination).

The amount due as compensation for termination of the employment contract pursuant to objective causes is, however, limited in the following cases:

a) for calculation purposes, the salary cannot exceed 20 times the minimum national salary;[7]

b) to the compensation calculated until 31 October 2012, if it exceeds 12 times the salary of the employee, or 240 times the minimum national salary;

c) to the compensation calculated until 30 September 2013, if it exceeds 12 times the salary of the employee, or 240 times the minimum national salary.

Credits arising from the execution or termination of the employment contract are given priority treatment in insolvency procedures. Employees are privileged creditors, having a prior ranking over all creditors of the estate of the employer.

In addition, employees enjoy a special prior ranking in respect of the company's real estate (immovable property) where their work place is situated, which grants them priority as creditors over the earnings of a sale of this property in an insolvency context.[8]

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

As creditors with a general priority ranking, the employees are entitled to be paid from the liquidated assets of the company right after the costs of the proceeding, including the remuneration of the insolvency administrators, have been paid.

Employees are entitled to have their credits paid before the other secured creditors, the State, Tax Authorities and Social Security Authorities have been paid.[9] Their credits also rank in priority to those of unsecured creditors and shareholders.

Also, in regard to the special privilege over the company's property, the priority of employees' credits ranks above the privileges granted to other creditors with prior ranking or warranties over the insolvent company's property in which the employee works or worked, including the State, the Tax Authority, the Social Security Institute and mortgage creditors.

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[7] Decree-Law 156/2017, of 28 December determines that for 2018, the minimum national salary corresponds to EUR 580,00 per month. The minimum national salary is reviewed from time to time and usually on an annual basis.
[8] Labour Code, art 333; Civil Code, art 747.
[9] Labour Code, art 333; Civil Code, art 748.
[10] Portuguese Insolvency and Company Revitalisation Code, art 6.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

For the purposes of the Portuguese Insolvency and Company Revitalisation Code, the following are considered to be directors:[10]

a) when the debtor is a legal person, all persons who carry out the management or liquidation of the company, in particular the directors appointed for that purpose;

b) when the debtor is an individual, his legal representatives and proxies with general powers of administration.

In insolvency proceedings, the Labour Code provisions concerning the liability of managers and directors continue to apply.

Managers and directors, as registered by the insolvent company in the Commercial Office, are liable before the company's creditors if they have not complied with the legal or contractual provisions that protect creditors, and if by this action the estate of the company is insufficient to settle all credits.

Regarding employment duties, the responsibility of managers and administrators is set out as follows:

a) subsidiary liability of managers or administrators of the temporary employment agencies and of the user companies of temporary employment, in respect of labour credits, social charges and fines;[11]

b) joint responsibility of the employer and the companies with which said company shares a reciprocal ownership, or has a dominant or group relationship;[12]

c) joint responsibility of managers, administrators or directors of contractor companies and construction owners, farming companies or operations, in respect of compliance with the legal provisions, and for non-compliance undertaken by the subcontractor who executes the contract in total or in part on his premises or under his responsibility, as well as for the payment of the respective fines;[13] and

d) joint responsibility of managers, administrators or directors of the contractor company and construction owner, company or farming operation and of the company which uses or is contracting the construction or service, have joint liability for the non-compliance of legal provisions and payment of the fines in respect of the health and safety at work of temporary employees, assigned employees and employees of service providing companies, which take place on the premises, as well as for the payment of the respective fines.[14]

To enforce these provisions, the Social Security Authority may start a procedure for the reversion of the debts of social charges, and fines for the breach of social security obligations, directly against the managers or directors of the company.[15]

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[11] Labour Code, art 174.
[12] *Idem*, art 334.
[13] *Idem*, art 551.
[14] Health and Safety at Work regime, approved by Law 102/2009, of September 10.
[15] General Tax Law, approved by Decree Law 398/98, of 17 December, art 24.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

5.1 How does such a scheme operate?

Portuguese legislation sets out the existence of three specific funds that aim to guarantee, with limitation, the payment of employees' entitlements when the employer has financial difficulties or is insolvent.

The employees who have claimed the payment of their credits in the insolvency proceedings may also request the payment of such credits to the Salary Guarantee Fund,[16] after such credits have been recognised in the formal insolvency proceedings.

The Salary Guarantee Fund was specifically created by the Government to ensure the payment of employee's entitlements in the context of formal insolvency procedures. This scheme is funded by the Government and by a percentage of the employer's monthly contributions to the Social Security authorities.[17]

The Salary Guarantee Fund may reimburse the employee for the credits arising from the execution and termination of the employment contract if they are duly recognised as such in the insolvency proceedings, and if they are claimed directly from the Salary Guarantee Fund.

Employees are entitled to claim from the Salary Guarantee Fund overdue credits resulting from the execution and / or termination of the contract up to one year following termination of the contract.[18]

The Salary Guarantee Fund's responsibility regarding employee entitlements is, however, limited to the payments that should have been made by the employer in the six months prior to the start of the insolvency proceedings. Additionally, the following pecuniary limits apply:

- monthly limit equivalent to three times the minimum national salary;[19]
- total limit equivalent to six months of salary calculated with reference to the minimum national salary;

[16] Decree-Law 59/2015, of 21 April.
[17] *Idem*, art 14.
[18] Labour Code, art 337.
[19] Decree-Law 156/2017 of 28 December determines that for 2018, the minimum national salary corresponds to EUR 580,00 per month. The minimum national salary is reviewed from time to time and usually on a yearly basis.

As regards the employment relationship, the credits of the employees will be paid by the Salary Guarantee Fund discounting the social charge applicable to the employee (11 percent of his remuneration) and of the amounts that are withheld in application of the Personal Income Tax provisions.

When applicable, credits due by way of compensation for the termination of the employment contract are the responsibility of the Employment Compensation Fund and Warranty Employment Compensation Fund.[20]

Employees' whose contracts were executed from 1 October 2013 onwards must be registered with the Employment Compensation Fund and Warranty Employment Compensation Fund.[21] The Employment Compensation Fund and the Warranty Employment Compensation Fund are responsible for the payment of up to half of the compensation due in case of dismissal due to objective causes (collective dismissal and termination of position, amongst others).

For this purpose, employers must make monthly contributions of one percent of the base remuneration of the employee. In cases where the employer does not pay the whole or part of the legal compensation they are entitled to upon termination of the employment contract, employees can request the Funds to pay the outstanding amounts of up to half of the legal compensation.

Where the employer is not able to pay the compensation due for termination, the employees registered with the Employment Compensation Fund and Warranty Employment Compensation Fund may request this payment directly from both the Funds before and during formal insolvency procedures.

5.2 What (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

Should any of the funds (Salary Compensation Fund, Employment Compensation Fund and the Warranty Employment Compensation Fund) pay any amounts to an employee of the insolvent company, these Funds are entitled to be reimbursed in the insolvency proceedings. The Funds are also privileged creditors, being entitled to be paid right after all employee credits have been paid, if the assets of the insolvent company are insufficient to pay all creditors.[22]

5.3 What (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

Funds are entitled, the same as any other creditor, to be paid the amounts they have paid in substitution of the employer to the employee, for which purpose they must claim their credits in the insolvency procedure. No other prerogative is granted to the funds to enhance recoveries.

[20] Law 70/2013, of 30 August.
[21] *Ibid*.
[22] Decree-Law 59/2015, art 4; Law 69/2013, art 52; Civil Code, art 747.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceedings, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

If an ongoing business, constituting an undertaking, business or part of the undertaking or business, is sold as a result of a formal insolvency proceeding, European Union Directive of TUPE[23] (Transfer of Undertakings) and national provisions[24] in the matter will apply.

Thus, all employer-employee relationships remain unaltered and if the employee(s) do not oppose to the transfer (notably by invoking serious harm as a consequence of the transfer), the purchaser will receive all employment contracts without any modifications and shall be compelled to observe all conditions and obligations set in said contracts on all actual and contingent obligations.

The purchaser will be liable for all credits, social security contributions, fines and contingencies of the company purchased. The seller will be jointly and severally liable with the purchaser for all claims accrued before the event of sale and claimed by the employees up to two years after the purchase has been completed.

However, these provisions do not apply where the sale is carried out during an insolvency procedure[25] In such a scenario, the protection of the employees' entitlements is superseded by the principle that the sale of a business in formal insolvency proceedings relieves the purchaser from the liability for credits accrued in the past.

In such a case, employees will only be entitled to claim the credits accrued up to the date of the sale to the insolvent company (prior employer) in the formal insolvency procedure, and not from the new employer.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

We are not aware of any pending legislation for the amendment of the insolvency code or legislation on insolvency. Notwithstanding this fact, the insolvency regime was quite extensively amended in 2017 and at the beginning of 2018. Furthermore, the provisions relating to the liability of managers, administrators and directors were revised in 2016.

As such, further proposals for legislative reform to further protect employee entitlements in insolvency are not expected.

[23] Council Directive 2001/23/EC of 12 March 2001.
[24] Labour Code, arts 285 *et seq*, amended by Law 14/2018 of 19 March.
[25] Council Directive 2001/23/EC of 12 March 2001 and Labour Code, arts 285 *et seq (a contrario)*.

ROMANIA

1. How is an employee defined for the purpose of formal insolvency proceedings?

The Romanian Insolvency Law[1] does not define "employee". However, based on the definition of "contract of employment" in article 10 of the Labour Code, an employee is a person who performs work under the authority of an employer, for emoluments.

The insolvency law defines salary liabilities as liabilities originating in employment relationships and similar relationships between the debtor and its employees.[2]

Insolvencies in Romania are dealt with under two separate laws, namely:

- Law 85/2006 Regarding the Insolvency Procedure; and
- Law 85/2014 Regarding the Procedures to Prevent Insolvency and the Insolvency Procedure.

When Law 85/2014 came into force on 28 June 2014, Law 85/2006 was repealed; however, insolvency cases that were commenced under the 2006 Law continued to be determined under Law 85/2006. Many cases conducted under the old 2006 law are in still in progress.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

The treatment of employees in insolvency is privileged, in as much as they enjoy some exceptions from the general provisions of the Labour Code and the Insolvency Law:

(a) Employees may initiate insolvency proceedings against their employer if the outstanding and unpaid salary liabilities owed to the employee exceeds the equivalent value of six gross national average salaries per employee.[3] Other creditors can only initiate insolvency proceedings if their certain, liquid and eligible debts total at least RON 40,000;

(b) Unlike other creditors, employees do not have to lodge a proof of debt for salary claims which arose before insolvency. Those salary claims are registered by the official receiver or the trustee in accordance with the employer's accounting records;

(c) Salary claims which arise during the insolvency procedure are paid as a priority, without needing to be registered as a claim in the insolvency;

(d) Where a reorganisation plan is proposed, creditors vote in five different classes of debt: preference debts, salary liabilities, tax debts, debts of indispensable creditors and unsecured debts;

(e) Employee protection was further enhanced by the entry into force of Law No. 85/2014, which imposed the collective layoff provisions of the Labour Code.

1 Law No. 85/2014.
2 *Idem*, art 5, point 18.
3 In 2017 the average gross salary was approximately RON 3,131.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

3.1 Secured creditors

Article 69 of the Insolvency Law establishes the method of distribution of the funds obtained by selling secured assets. Priority is given to the payment of the expenses incurred in realising the asset. After the payment of these amounts, debts owed to secured creditors which arose during the insolvency procedure and then debts owed to secured creditors which arose before the opening of the insolvency procedure, are paid.

Salary liabilities are not paid from the distribution of the amounts resulting from the selling of secured assets.

3.2 Unsecured creditors

Article 161 of the Insolvency Law sets out the various priorities of payment in an insolvency case. The payment of the insolvency practitioner's fees and the payment of professionals retained by the insolvency practitioner rank first under the Law.[4]

Funding provided to the debtor during the observation period ranks second,[5] while debts arising from employment relationships are ranked third in the debt payment order.[6]

Unsecured debts that arise during the insolvency procedure as a result of the continuation of the debtor's business operations rank fourth in the payment order,[7] while budgetary claims rank fifth.[8]

Other unsecured secured creditors rank sixth to ninth, based on the origin of the debt as follows:

- sixth ranking: debts representing amounts due by the debtor to third parties, based on obligations of maintenance, allowances for underage children or payment of amounts destined to provide means of existence;[9]
- seventh ranking: debts established by the syndic judge for maintenance of the debtor and his family, if the debtor is a natural person;[10]
- eighth ranking: debts representing bank loans (with associated expenses and interest), debts resulting from the supply of products or services, rental debts and debts owed to lessors of finance lease agreements who do not have a secured debt (including bonds);[11]
- ninth ranking: other unsecured debts.[12]

4 Insolvency Law, art 161.1.
5 *Idem*, art 161.2.
6 *Idem*, art 161.3.
7 *Idem*, art 161.4.
8 *Idem*, art 161.5.
9 *Idem*, art 161.6.
10 *Idem*, art 161.7.
11 *Idem*, art 161.8.
12 *Idem*, art 161.9.

3.3 Shareholders

Debts owed to shareholders (including loans given to the debtor by a shareholder or stockholder who owns at least 10 percent of the debtor's share capital) rank tenth.[13]

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

In accordance with Law No. 85/2006 on the Insolvency Procedure, persons who directly caused the insolvency state of the debtor are liable with their own assets if:[14]

- they used the debtor's assets for their own benefit or the benefit of a third party;
- they used the debtor as legal cover for activities for their own benefit;
- they carried out activities for their own benefit that clearly led the debtor into a situation in which it could not pay its debts;
- they engaged in fictitious bookkeeping, removed accounting documents from the debtor or failed to keep accounting records in accordance with the law;
- they embezzled or concealed a part of the debtor's assets or falsely appearing to increase its liabilities;
- they used ruinous methods to obtain funds for the legal entity;
- in the month before the cessation of payments, they preferentially paid a creditor to the detriment of other creditors or failed to pay salaries, taxes or other duties owed in relation to employee entitlements.

These grounds for liability did not initially include liability for failure to pay employee entitlements or taxes. Law No. 85/2014 introduced a new ground for liability under the heading "any other voluntarily-performed action, which contributed to the debtor's insolvency state."[15] On that basis, it could be argued that not paying employee entitlements or taxes could give rise to personal liability if it contributed to the debtor becoming insolvent. However, on a practical level, Romania has not identified any instances where failure to pay employee entitlements or taxes has led to personal liability of the persons responsible for the debtor's insolvent state.[16]

We believe that the failure to use these provisions of the insolvency law may be accounted for by article 27 of the Tax Procedure Code. This explicitly imposes personal liability on directors (jointly with the debtor) for unpaid taxes.

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13 *Idem*, art 161.10.
14 Law 200/2006, art 138.
15 Law 85/2014, art 169.
16 The Insolvency Law, Law No. 85/2014, entered into force on June 28, 2014. Article 343 provides that trials already underway on the date of commencement of the Law would continue to be decided by the law that was in force prior to that date. As a result, there are still many trials in progress under the earlier law.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

Law No. 200/2006 regarding The Creation and Use of the Guarantee Fund for Payment of Wage Claims, establishes a guarantee fund to pay salary liabilities in the case of an employer's insolvency. In practical terms, this is not an actual safety net, but rather scheme of a minimum assistance provided to employees.

The Law 200/2006 entered into force on January 1, 2007 and it may be used by employees whose employers entered insolvency proceedings after that date.

Employers are required to pay a monthly contribution to the guarantee fund of 0.25% of the total monthly gross salaries due to their employees.[17]

The guarantee fund ensures payment of salary liabilities resulting from employment contracts and collective labour agreements where an employer has been declared insolvent. In terms of article 13 of Law 200/2006, the Fund may pay:

- outstanding salaries (subject to the monetary caps noted below);[18]
- money in lieu of annual leave (to a maximum of one year's accrual);[19]
- outstanding payments of compensation provided for by the employment contract;[20]
- payment obligations arising out of occupational accidents or occupational diseases;[21]
- outstanding payments required by law for the temporary interruption of the employer's business activity.[22]

The guarantee fund does not cover social security contributions due by insolvent employers.

According to article 14 Law 200/2006, payment of outstanding salaries is limited to the amount of three national average gross salaries for each employee. The salary taken into account is the national average gross salary communicated by the National Statistics Institute in the month in which the insolvency procedure was opened. If the employees' entitlements arose before the month in which the insolvency procedure was opened, the three-month period precedes the insolvency procedure opening date. If the entitlements arose subsequent to the insolvency procedure date, the period to be paid shall be subsequent to the insolvency procedure date.

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17 Law 200/2006, art 7 al (2).
18 *Idem*, art 13 let (a).
19 *Idem*, art 13 let (b).
20 *Idem*, art 13 let (c).
21 *Idem*, art 13 let (d).
22 *Idem*, art 13 let (e).

Requests for payment from the fund may be made by the insolvency practitioner, by the employees or by the employees' legally established organizations. They are submitted to the County Employment Agency. Requests must be accompanied by a series of supporting documents.[23] Based on these documents, the Agency determines the amount to be received by each employee. Requests are resolved within 45 days from the date of registration of the request with the Agency.[24]

If the employer did not fulfil its obligation to contribute to the guarantee fund, the payment request will be rejected.[25]

Where the request is approved, benefits paid by the fund are allocated exclusively to salary payments, and the insolvency practitioner removes those salary claims from the register of claims.[26]

Where an employer recovers from insolvency and is declared to be no longer subject to insolvency proceedings, the employer is required to return the amounts paid by the guarantee fund within 6 months from the date of that declaration.[27]

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Where an ongoing business is sold in an insolvency proceeding, the acquirer is not liable for the salary claims registered against the insolvent seller. Those salary liabilities are paid out of the money obtained from selling assets within the terms that were set, accepted and approved in the debtor's reorganisation plan.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

As at the date of writing, there are no projects targeting the protection of employee entitlements during insolvency.

[23] The supporting documents are: the insolvency procedure opening decision, the salary liabilities statement drafted by the insolvency practitioner, the time sheets attesting the employees' work performance, payment slips, employment agreements, medical certificates for occupational accidents or occupational diseases, occupational accident investigation reports, occupational diseases final declaration forms and the employee departure clearance form - art 10 of the Methodological Rules for the Application of Law 200/2006.
[24] Methodological Rules for the Application of Law 200/2006, art 12.
[25] *Idem,* art 13.
[26] Law 200/2006, art 16.
[27] *Idem*, art 17.

RUSSIA

1. How is an employee defined for the purpose of formal insolvency proceedings?

For the purposes of insolvency proceedings, the relevant definition of an employee is contained in the Labour Code.

Article 20 of the Labour Code defines an employee as an individual who has entered into labour relations with an employer. Labour relations are based on an agreement between the employee and the employer regarding the performance by the employee of his labour functions (performing a certain job, having certain qualifications or holding a certain position), on condition that the employee complies with the employer's work rules and provided that the employer ensures acceptable working conditions and complies with labour legislation and any collective bargaining or other agreements.[1]

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

Generally, an employee's claim against an insolvent debtor may comprise amounts for unpaid salary, severance pay (if the employee is dismissed), compensation for unused vacation, and similar allowances provided for by law.

In any bankruptcy procedure, employee claims for salary and other kinds of employee compensation which arose after the court accepted the application for the debtor's bankruptcy are deemed to be current claims. This means that they have priority over registered creditors.

If the claim for employee compensation arose before the application for bankruptcy was filed in court, the claim is deemed to be a registered claim of second rank as provided by the Bankruptcy Law.[2]

Rights to recover employee entitlements vary, depending on the type of insolvency regime applied by the court to the debtor.

Almost all bankruptcy cases begin with a supervision, after which one of four insolvency procedures may be applied to the debtor: financial rehabilitation, external management, bankruptcy liquidation or amicable settlement.

As a general rule, once a supervisory procedure has been initiated, a stay is imposed on satisfaction of all monetary claims accrued prior to that date (including those arising out of employment relations). Employees are entitled to be included in the register of debtor's creditors.

However, if an employee has obtained a court decision for the repayment of salary and that decision entered into legal force before the commencement of supervision and is being enforced, those enforcement proceedings (unlike others) are not suspended.[3]

There are no restrictions regarding the payment of wages during the supervision procedure. These payments should be made as normal.

The financial rehabilitation procedure uses external resources, usually in the form of financing from the founder or third parties, to restructure and repay debts under the

1 Labour code of the Russian Federation, art 15.
2 Bankruptcy Law, art 134.
3 Federal Law on Enforcement Proceedings N 229-FZ, art 96(1).

supervision of an administrative manager and creditors' committee. This financial rehabilitation procedure may not take more than two years.

The rules for bringing employee claims during financial rehabilitation proceedings are largely the same as those for the supervisory procedure. However, under the financial rehabilitation procedure, employee claims must be satisfied in an expedited manner. While regular monetary claims must be satisfied one month before the end of the financial rehabilitation procedure (which, as noted above, may take up to two years), employee claims included in the financial recovery plan must be satisfied within six months after its approval, in accordance with the plan.

The external management procedure provides a variety of methods for restoring a debtor's solvency, including, *inter alia*, altering the company's business profile, terminating unprofitable product lines, liquidating accounts receivable, selling some of the debtor's property, assigning the debtor's claims to third parties, settling the debtor's obligations or selling the debtor's business. External management may not take more than two years.

As a general rule, a stay on satisfaction of creditors' claims is imposed as of the date of that external management commences. However, this stay is not applicable to employee claims which are due and payable by the debtor at the start of the external management procedure. Work conducted by employees during the external management process should be compensated in the usual manner.

Bankruptcy liquidation is initiated for the purpose of organizing a sale of the debtor's property and repayment of outstanding creditors' claims. All claims brought against the debtor are deemed due and must be satisfied in the priority and order set out in the Bankruptcy Law. According to this order, employee claims are claims of the second rank of the bankruptcy register.[4]

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

Article 134 of the Bankruptcy Law provides that employee claims may be included in the second rank of the register of creditors' claims, or may be considered as current and therefore be subject to priority satisfaction over ordinary unsecured creditors (including shareholders).

Expenses incurred for the purposes of the bankruptcy proceedings, including remuneration of the bankruptcy administrator, are repaid with a higher priority than employee claims.

Claims secured by pledge are subject to priority satisfaction during bankruptcy liquidation in the manner provided for by article 138 of the Bankruptcy Law. 70-80 percent of the money received from the sale of collateral is paid to secured creditors; the remainder is distributed among current creditors of the first and second ranks, with part of the proceeds being used to pay court and administrative fees.

[4] The Federal Law on Insolvency (bankruptcy) N 127-FZ, art 134.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The management / directors / other controlling persons of a company may bear:

(a) administrative and criminal liability for non-payment of salaries;

(b) criminal liability for intentional failure to pay taxes or breaches of other duties related to employees' entitlements; and

(c) secondary liability where they are responsible for the company's failure to pay creditors' claims or for failing to file a bankruptcy petition in a timely manner.

A violation[5] of the labour laws incurs an administrative penalty for companies of between RUB 30,000 (approximately EUR 400) and RUB 50,000 (approximately EUR 720).

Intentional non-payment of salaries, pensions, allowances and other payments provided for by law, is punishable under the Criminal Code.[7] If committed by the head of an enterprise, institution or organization (irrespective of its form of ownership) for a mercenary or personal interest, such non-payment is punishable by:

- a penalty of up to RUB 120,000 (approximately EUR 1,400); or
- a penalty in the amount of the convicted person's salary or other income over a period of up to one year; or
- a ban on occupying certain positions or engaging in certain types of activities for up to one year; or
- imprisonment for up to one year.

In practice it is rather difficult to establish the motives of the person who could be liable for the offense. Therefore, actual convictions in such criminal cases are extremely rare.

An organization paying salaries is responsible:

- as a tax agent, for withholding taxes and certain other duties for non-budget funds; and
- as a taxpayer, for payment of taxes imposed on salaries as a whole.

For intentional failure to perform either of these obligations, the head of the company (or chief accountant, as the case may be) may be criminally liable under article 199 of the Criminal Code of the Russian Federation.

Amendments to the Bankruptcy Law in July 2017 made significant changes to the rules on the secondary liability of controlling persons of bankrupt companies. Among other things, the new rules entitle employees or representatives of employees[8] to apply to have controlling persons (such as the Chief Operating Officer, top managers - including

5 Code of Administrative Offenses of the Russian Federation, art 5.27.
6 Under article 22 of the Labour Code of the Russian Federation, all employers are obliged to pay employees' salaries in full.
7 Criminal Code of the Russian Federation, art 145.1.
8 Under the Bankruptcy Law, a representative of employees means a person who has been empowered by current and / or former employees of the insolvent entity to represent their interests during the course of insolvency proceedings.

the Chief Financial Officer and Chief Operating Officer - or shareholders) held liable where they are responsible for the debtor's inability to satisfy employee claims.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There is no statutory, industry or governmental fund to guarantee payment of employee entitlements in an insolvency context. However, an employment fund exists which, *inter alia*, is responsible for payments to people who have become unemployed (which is a common side-effect of insolvency procedures).

In 2014, the Russian Ministry of Labour introduced a federal law to establish a new mechanism for compensating employees in cases of employer insolvency. This law is yet to be approved by Russian parliament (the State Duma).

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Sale of the debtor's "enterprise"[9] as an ongoing business as part of an external management procedure or a bankruptcy liquidation, is subject to the rules as set out below.

A debtor's monetary obligations and mandatory payments are not attributed to the debtor's enterprise upon its sale, with the exception of obligations arising after acceptance of the debtor's application for bankruptcy; those obligations may be assigned to the buyer of the enterprise under the procedure and on the terms and conditions provided for in the Bankruptcy Law.

All labour contracts effective as at the date of sale continue to be in force and effect, and the rights and duties of the employer pass to the buyer. Consequently, the buyer will become the employer of the debtor's employees and will be liable for all of the employer's current obligations (including payment of current salaries). The buyer will also be entitled, *inter alia*, to terminate labour contracts with the debtor's former employees on the general terms and conditions set forth in the Russian Labour Code (including the obligation to provide severance pay).

Employees' registered claims are satisfied out of the money received from the sale of the enterprise.

[9] Under the Bankruptcy Law, an "enterprise" is defined as a proprietary complex whose purpose is to conduct commercial activity.

Specific mention should also be made of the sale of "city-forming enterprises". For purposes of the Bankruptcy Law, a city-forming enterprise is a legal entity employing at least 25 percent of the corresponding locality's inhabitants, or any enterprise employing over 5,000 people.

If a city-forming enterprise is being sold, governmental authorities may impose upon the buyer an additional obligation with respect to employees. The local authority or the relevant federal executive authority involved in the bankruptcy of a city-forming enterprise may request the court dealing with the bankruptcy to include in the sale agreement a requirement that the buyer retain no less than 50 percent of the employees of the enterprise as at the date of its sale, for a fixed period of up to three years.

If the buyer fails to fulfil this condition, the purchase and sale agreement may be terminated by the court upon an application by the governmental authority which requested the imposition of the condition.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

Amendments to the Bankruptcy law in 2015 entitle employees to initiate insolvency proceedings against their employer after their debt is confirmed by an effective court judgment. This allows employees to unite their claims and file a joint petition to declare their employer bankrupt.

The Russian parliament (the State Duma) is now considering a new debt restructuring regime that would allow businesses to avoid bankruptcy liquidation (which currently accounts for 90 percent of bankruptcy cases). This measure includes the obligatory satisfaction of employee claims no later than three months after court approval of a restructuring plan.

Along with the abovementioned amendments entitling employees to seek the imposition of secondary liability on controlling persons for outstanding debts, it may be concluded that the Bankruptcy Law tends to increase the efficiency of protection of employee rights.

SINGAPORE

1. How is an employee defined for the purposes of formal insolvency proceedings?

For the purposes of formal insolvency proceedings, the issue of whether a person is an "employee" is relevant in the context of determining whether payments owed to the said person can be classified as a preferential debt.

In this regard, section 328 of the Companies Act[1] (the Companies Act) (which is the section that deals with priority of claims in a company's winding-up) defines an "employee" as "a person who has entered into or works under a contract of service with an employer and includes a subcontractor of labour".

The test for what a "contract of service" entails has developed from one which focuses on the degree of control the purported employer has on the purported employee's manner of doing the work,[2] to one which focuses on how integral the work done by the purported employee is to the purported employer's business.[3]

The Singapore courts have taken the view that there is no single test to establish whether someone is an "employee". Instead, in the overarching assessment of whether someone is an "employee" the Singapore courts take a fact-centric approach,[4] and have set out various factors that point toward a person being an "employee"[5] This approach is likely to also be adopted in an assessment of whether a person is an "employee" under a "contract of service" for the purposes of section 328 of the Companies Act.

The (non-exhaustive) factors to assess whether a person is an "employee" under a contract of service are whether:[6]

(a) the work of the alleged employee is done as an integral part of the business of the alleged employer;

(b) the alleged employee is paid a regular salary or commission;

(c) there were stipulations as to working hours;

(d) the alleged employee is entitled to overtime pay;

(e) the alleged employer contributed to the Central Provident Fund account of the alleged employee;

(f) the alleged employee is entitled to leave and holidays;

(g) the alleged employee is entitled to medical leave; and

(h) an alleged employer has the power to dismiss an alleged employee from service – if an employer is contractually entitled to terminate the services of a person with notice or salary in lieu of notice, it is more likely that an employment relationship exists.

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1 Cap 50.
2 *Asia Beni Steel Industries Pre Ltd v Chua Chuan Leong Contractors* (1997) 2 SLR 161.
3 *Mat Jusoh Bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71.
4 *Kureoka Enterprise Pte Ltd v Central Provident Fund Board* [1992] SGHC 113.
5 *National University Hospital (Singapore) Pte Ltd v Cicada Cube Pte Ltd* [2017] SGHC 53 at [84].
6 *Ibid*.

If the relationship between the company and the person has characteristics which satisfy one or more of such factors, it is likely that the Singapore courts will find that the person is an "employee" of the company.

Apart from the above factors which would bring a person within the meaning of "employee" on the basis of a "contract of service", section 328 of the Companies Act also extends the definition of "employee" to a "subcontractor for labour". A "subcontractor for labour" is not defined in the Companies Act, and the Singapore courts have not developed a test for the same.[7] Academically, it has been suggested that a "subcontractor for labour" for the purpose of section 328 of the Companies Act likely refers to a person working under a contract for services.[8] Such services would be limited to "labour" and is likely to be limited to subcontractors who supply such labour for the execution of the whole or part of the work undertaken by a contractor for his principal.[9]

The widening of the meaning of "employee" to allow subcontractors for labour to take advantage of the priorities accorded to "employees" under section 328 of the Companies Act, has been indicated as being aimed at protecting the entitlements of persons who contributed to the wealth or earnings of the company in a liquidation scenario.[10]

For completeness, another statutory definition of "employee" is provided in the Employment Act,[11] but its relevance in formal insolvency proceedings is largely limited to situations where there is a sale of a business as a going concern in insolvency proceedings (outlined in the response to question 6 below).

2. What are employee entitlements and to what extent (if any) are they given priority treatment during formal insolvency?

Employee entitlements in Singapore are primarily:[12]

(a) wages and salaries;

(b) retrenchment benefits and ex gratia payments;

(c) compensation for injuries suffered in the course of employment;

(d) contributions to the employee's Central Provident Fund account, which is akin to a compulsory savings / retirement fund, or other forms of private pension schemes approved by the government;

(e) remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before, on or after the commencement of the winding up.

Besides having priority over unsecured liabilities in formal insolvency proceedings, all the above employee entitlements (except compensation under the Work Injury

7 Academics have noted that it is not clear what "subcontractor for labour" means under the Companies Act: Ravi Chandran, *Employment Law in Singapore* (LexisNexis, 5th Ed, 2017) (at [9.3], fn 8).
8 *Woon's Corporations Law* at O[5463] at pp O 754-O 755.
9 Drawing from the definition of "subcontractor for labour" provided in s 2 of the Employment Act.
10 *Report of the Select Committee On The Companies (Amendment) Bill*. [Bill No. 16/83] Parl. 3 at cols. 21-22.
11 Cap 91.
12 Ravi Chandran, *Butterworth's Handbook of Singapore Employment Law* (Butterworths Asia, 3rd Ed, 1997) at pp 34-62.

Compensation Act)[13] will also be paid in priority over any floating charge created by the company, where the company's assets are otherwise insufficient to meet these preferred debts.[14]

The order of priority for preferential claims is set out below (in descending order of priority with emphasis added for employee entitlements):

(a) the costs and expenses of the winding up;[15]

(b) wages and salaries of employees (whether or not earned wholly or in part by way of commission), including any amount payable by way of allowance or reimbursement under any contract of employment or award / agreement regulating conditions of employment of any employee (including salary in lieu of notice of termination)[16] up to a maximum of five months' salary or SGD12,500 (whichever is less),[17] with the remainder being an unsecured debt;[18]

(c) retrenchment benefits and ex gratia payments under the Companies Act up to a maximum of SGD 12,500 (whichever is less) with the remainder being provable as an unsecured debt;[19]

(d) amounts due in respect of contributions payable during the 12 months before, on or after the commencement of winding up by the employer or any person relating to employees' superannuation or provident funds;

(e) remuneration in respect of holiday leave taxes;

(f) floating charges under s 328(5) of the Companies Act; and

(g) compensation to an employee for injuries suffered in the course of employment under the Work Injury Compensation Act.[21]

The priority accorded to the employee entitlements granted preferential status in accordance with section 328 of the Companies Act as set out above, can be subrogated to a lender who advances money to the liquidating company for the payment of such employee entitlements.[22]

It may also be possible for certain employment contracts that a liquidator chooses to continue for the benefit of winding-up to be treated as if it were an expense of

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13 Cap 354. Companies Act, s 328(1)(d).
14 *Idem*, s 328(5).
15 *Idem*, s 328(1)(a); Please note that Costs incurred under the "estate costs" rule (adverse costs orders made against the company will rank in priority over the other costs and expenses of the winding-up: *Ho Wing On Christopher and others v ECRC Land Pte Ltd* [2006] 4 SLR(R) 817 at [9]).
16 Companies Act, s 328(2B)(a)(iii) and Yip Hock Chye v Santan Engineering Pte Ltd (in receivership) [1987] SLR(R) 234 [12]-[13].
17 This limit is imposed by s 328(2) of the Companies Act alongside the Companies (Maximum Amount Payable in Priority in Winding Up) Order 2015.
18 Companies Act, s 328(1)(b).
19 *Idem*, s 328(1)(c).
20 *Idem*, s 328(1)(d).
21 Work Injury Compensation Act.
22 Companies Act, s 328(4). Eg, *In The Matter Of Tan Kah Kee & Co, Limited In Liquidation And In The Matter Of Section 235 Of Ordinance No 155 (Companies) And I* [1935] MLJ 243.1.

the winding-up,[23] and accorded priority[24] over all the other mentioned employee entitlements above. However, this remains untested before a Singapore court.

3. How does the priority (if any) given to employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

3.1 Secured creditors with fixed security

There is no priority over secured creditors with fixed security.

3.2 Secured creditors holding floating charge

The employee entitlements listed in section 328(1) of the Companies Act, save for compensation under the Work Injury Compensation Act, will have priority over creditors with a floating charge in a liquidation where the company's assets are otherwise insufficient to meet there preferred debts, as mentioned above in the response to question 2.

3.3 Insolvency administrators, professionals retained by the estate and unsecured creditors

The costs and expenses of the winding up include the taxed costs of the applicant for the winding-up order,[25] the remuneration of the liquidator and the costs of any audit carried out[26] and rank in priority to employee entitlements.[27]

3.4 Shareholders

Shareholders only stand to be paid out of the residual capital that remains after all creditors have been paid off in a liquidation. As between shareholders, preference shareholders may be paid in priority only if this is specifically stated in the constitution.[28] This means that unsecured creditors rank in priority over a company's shareholders and employee entitlements are a class of unsecured creditors which are given statutory priority as set out in the response to question 2 above.

3.5 Super-priority financing

Under the enhanced regime for restructuring which was introduced in the amendments to the Companies Act in 2017, there is a possibility for the assets available for distribution to employees in a liquidation to change, since the Singapore court has been empowered to make orders which grant various levels of priority to rescue financing.[29] The implications of such an order on employee entitlements include:

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23 *Chee Kheong Mah Chaly and others v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571, citing *re Toshoku Finance UK plc* [2002] 1 WLR 671 and *Lundy Granite Co* LR 6 Ch App 462.
24 Companies Act, s 328(1)(a).
25 *Idem*, s 256.
26 *Idem*, s 317.
27 *Idem*, s 328(a).
28 *Idem*, s 75(1).
29 *Idem*, s 211E.

(a) the possibility that the rescue financing obtained will be treated as if it were part of the costs and expenses of winding up[30] which would rank in priority over employee entitlements;[31]

(b) the possibility that the rescue financing obtained would have priority over all the preferential debts stated in section 328 of the Companies Act (including employee entitlements);[32]

(c) the possibility that the rescue financing obtained would have priority over an existing security interest which is already ranked above employee entitlements,[33] thereby reducing the available pool of assets for employee entitlements.

4. What (if any) personal liabilities do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

4.1 Personal liability of directors

At present, directors are not directly personally liable for employee entitlements. The personal liability of parties can, however, in some circumstances have an indirect impact on employee entitlements in insolvency proceedings by swelling the assets of the liquidation estate.

4.2 Personal liability of receivers / debenture holders of a floating charge

Where a company is put under receivership by holders of a floating charge in circumstances where the company is not yet in the course of being wound up, the Companies Act imposes a duty[34] on a receiver to discharge certain preferential debts in priority to the debts of the debenture holder. These preferential debts include wages, salary, retrenchment benefits and *ex gratia* payments. This is a personal obligation on the receiver that cannot be extinguished by the receiver's removal or resignation.[35]

Payment to a debenture holder ahead of such preferential debts will breach this statutory duty and personal liability to employees, as preferential creditors can be imposed on the receiver in tort.[36] The debenture holders can also be liable to employees as preferential creditors on the basis of being constructive trustees for the amounts they receive in breach of this duty.[37]

4.3 Personal liability of judicial managers

Judicial managers are personally liable for any contract (including contracts of employment) they enter into or adopt in the performance of their functions within 28 days of the making of the judicial management order.[38] They can, however, by giving notice to the other party, disclaim any personal liability under such contracts.[39]

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30 *Idem*, s 211E(1)(a).
31 *Idem*, s 328(1)(a).
32 *Idem*, s 328(1)(a) - (g).
33 *Idem*, s 211E(d).
34 *Idem*, s 226 read with s 328.
35 *Inland Revenue Commissioners v Goldblatt* [1972] Ch 498.
36 *Ibid.*
37 *Ibid.*
38 Companies Act, ss 227I(b) and 227I(3).
39 *Idem*, s 227I(2).

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

There appears to be no such "safety net" in Singapore.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Where the business of a company is sold as a going concern, section 18A of the Employment Act applies to automatically transfer by law certain employment contracts from the old company to the new company. It is important to note that the automatic novation of these employment contracts applies only to employees that can be classified within the definition of an "employee" in the Employment Act. This definition is different from the one set out in Section 328 of the Companies Act mentioned above.

The definition of an "employee" in the Employment Act is:

"any person who employs another person under a contract of service and includes:

(a) the Government in respect of such categories, classes or descriptions of officers or employees of the Government as from time to time are declared by the President to be employees for the purposes of [the Employment Act];

(b) any statutory authority;

(c) the duly authorised agent or manager of the employer; and

(d) the person who owns or is carrying on or for the time being responsible for the management of the profession, business, trade or work in which the employee is engaged"[40]

Employees who do not fall within the definition set out in the Employment Act include:

(a) seafarers;

(b) domestic workers; and

(c) statutory board employees or civil servants.

[40] Employment Act, s 2(1).

Employees who do not fall within the definition under the Employment Act will not have their employment contracts automatically novated and assigned to the purchasing company. Consequently, the purchasing company is not liable for their claims.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are currently no proposals for legislative reform aimed specifically at further protecting employee entitlements in an insolvency.

SOUTH AFRICA

1. How is an employee defined for the purposes of formal insolvency proceedings?

The Insolvency Act[1] (hereafter the Insolvency Act) does not contain a general definition of "employee" although the terms "contract of service" and "employee" are used within the Insolvency Act.[2] This term is quite comprehensively described in both labour and tax law and it is submitted that during formal insolvency proceedings the labour law terms of reference should apply. Both the Labour Relations Act (hereafter the Labour Relations Act)[3] and the Basic Conditions of Employment Act (hereafter the BCEA)[4] contain the following definition:

"'employee' means-

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any other manner assists in carrying on or conducting the business of an employer."

This is a rather nondescript definition and both pieces of labour legislation contain further presumptions regarding who will be deemed to be employees.[5]

"(1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person forms part of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

(e) the person is economically dependant on the other person for whom he or she works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person."

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1 Act 24 of 1936. This Act does not deal with all insolvency procedures in South African law and the liquidation of (insolvent) companies is, apart from the Insolvency Act, also regulated by company legislation, ie the Companies Act 71 of 2008 read with chapter 14 of the former Companies Act 61 of 1973. Chapter 6 of the Companies Act 71 of 2008 deals with formal business rescue procedures. This section is written form the point of view of sequestration and liquidation procedures but contains references to the position of employees in a formal rescue procedure.

2 However, for purposes of s 98A of the Insolvency Act dealing with preferential claims (priorities) of employees, the term "employee" is defined in s 98A(5). See the discussion in paragraph 2 below.

3 Act 66 of 1995 – s 213.

4 Act 75 of 1997 – s 1.

5 Labour Relations Act, s 200A and BCEA, s 83A.

However, this presumption only applies to persons earning less than ZAR 205,433 per annum. For those persons earning in excess of the said amount, and those who wish to rebut the mentioned presumption, the following indicia formulated by the courts will be utilised to determine if a person is an employee: the existence of a relationship of authority; does the person in question form part of the employer's organisation; is the person being taxed as an employee; is the person being paid for the rendering of services (productive capacity) or the end result (such as the completion of a building project).[6]

2. What are the employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

At present, the South African insolvency law provides for a limited preference (priority) for certain claims of employees against the estate of the insolvent employer by providing them with a priority against the free residue of the estate following sequestration or liquidation of the insolvent estate of an employer-debtor.[7]

An employee who was employed by the insolvent is entitled to a preference for:[8]

(a) any salary or wages,[9] for a period not exceeding three months, to a maximum of ZAR 12,000;

(b) holiday pay accrued in the year of insolvency or the previous year, whether or not payment thereof is due at the date of sequestration or winding-up, to a maximum of ZAR 4,000

(c) any payment due in respect of any other form of paid absence for a period not exceeding three months prior to the date of sequestration or winding-up of the estate, to a maximum of ZAR 4,000;

(d) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, wage-regulating measure, or as result of termination under section 38 of the Insolvency Act, to a maximum of ZAR 12,000.

The claim in paragraph (i) enjoys preference above the claims in paragraphs (ii) to (iv), which rank equally and abate in equal proportions if necessary.[10] An employee is entitled to these payments even though he or she has not proved his or her claim,[11] but the trustee may require an affidavit in support of the claim.[12]

An employee for the purposes of this section[13] means any person, excluding an independent contractor, who works for another person and who:

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6 See the Labour Appeal Court cases *Liberty Life Association of Africa Ltd v Niselow* 1996 ILJ 673 (LAC) and *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC). See also A van Niekerk and N Smit Law@work (2015) 60-66.

7 See the discussion in para 3 below regarding the free residue. The amounts of the preferential portions may be altered from time to time.

8 Insolvency Act, s 98A(1)(a).

9 The definition of salary or wages includes all cash earnings received by the employee from the employer – see Insolvency Act, s 98A(5)(B). It seems that benefits other than in cash, are not regarded as salary or wages.

10 Insolvency Act, s 98A(4).

11 *Idem*, s 44.

12 *Idem*, s 98A(3).. This concession regarding the proof of claims applies to the preferential portion of the claims only and an employee must still formally prove a claim to qualify for a dividend on a concurrent claim in so far as his or her claim is not preferential.

13 *Idem*, s 98A(s)(a).

(a) receives, or is entitled to receive, any salary or wages; or

(b) in any manner assists in carrying on or in conducting the business of an employer.[14]

The Minister of Justice[15] may, after prescribed consultation, exclude employees from the preference by reason of the particular nature of the employment relationship between the employer and the employees, or because a guarantee affords employees protection equivalent to the protection in this section. Thus far only company directors employed by the insolvent company and members of insolvent close corporations have been excluded for this purpose.[16]

The Insolvency Act[17] further provides for a preference for any contributions which are payable by the insolvent employer. This includes contributions which are payable in respect of any of his or her employees and which were, immediately prior to the sequestration of the estate or the winding-up, due by the insolvent employer, to any pension, provident, medical aid, sick pay, holiday, unemployment[18] or training scheme or fund, or to any similar scheme or fund. The preferential portion of claims in this regard is limited ZAR 12,000.[19]

Especially in a formal business rescue situation, the continuance of the business is important and for that purpose post-commencement financing will be indispensable. It is to be noted that section 135 of the 2008 Companies Act provides a preference regarding the payment of the rescue practitioner's remuneration and wage and related claims by employees arising during the formal business rescue procedure. Although post-commencement finance will usually first have to be paid before other claims, these claims by the rescue practitioner and employees will thus enjoy a preference.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings, compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

The general principle is that secured creditors must first be paid out of the proceeds of their respective securities after certain prescribed costs have been paid out of the proceeds.[20]

The free residue, being the surplus income derived from the proceeds of an asset serving as real security and the proceeds from unsecured assets, are used to pay the creditors with (statutory) preferential claims (priorities), and then to pay the concurrent (unsecured and unpreferred) creditors. Preferential claims are those which are preferred by operation of law and which are paid first within the prescribed order of preference pro-vided for in the Insolvency Act. This order is usually as follows:

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14 *Idem*, s 98A(5)(a). It is to be noted that this is the same definition as contained in the Labour Relations Act and BCEA, but that it only applies to s 98A of the Insolvency Act as discussed in para 1.

15 *Idem*, s 98A(6).

16 *Government Gazette* No 21519 dated 1 September 2000: GN R865.

17 Insolvency Act, s 98A(1)(b).

18 Section 98A(5)(c) of the Insolvency Act excludes from this definition unemployment insurance. See para 5 below for a discussion of unemployment insurance.

19 Insolvency Act, s 98A(2).

20 The Insolvency Act acknowledges the following types of real security: a special mortgage over immovable property, as well as certain special notarial bonds over movable property; the lessor's tacit hypothec over the *invecta et illata* of the lessee, and the tacit hypothec of a credit grantor in terms of an instalment sale transaction in terms of section 84(1) of the Insolvency Act; a pledge; and a lien.

(a) sequestration or winding-up costs and general costs of administration; (This would, for instance, include the remuneration of the insolvency administrator as well as the fees of certain professionals retained by the estate.)[21]

(b) certain sheriff charges incurred for execution of property before sequestration or winding up;[22]

(c) preferential claims[23] in favour of employees regarding salaries and other claims and thereafter preferences regarding contributions which were payable by the insolvent employer;

(d) a number of other statutory claims that rank *pari passu* and abate in equal proportion;[25]

(e) income tax due by the insolvent in terms of section 101 of the Insolvency Act;

(f) claims secured by a general bond[26] and certain special notarial bonds registered before 1993 outside the province of Kwa-Zulu Natal;[27]

(g) if any balance remains, it is used to pay the concurrent creditors in proportion to their claims. Thereafter interest on such claims, if such claims are settled in full, from the date of sequestration to the date of payment in proportion to the amount of each such claim.[28] It must be noted that employees may claim the balance of their claims, that is, the non-preferential portion, as concurrent claims under this heading;

(h) any surplus assets available after the payment of the costs incurred in the winding up and the various claims of the creditors must be distributed amongst the shareholders according to their rights and interests in the company.[29]

In the case of formal business rescue, section 135(1) of the 2008 Companies Act provides that to the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, such money is regarded to be post-commencement financing and must be paid in the prescribed order of preference. Such order of preference amounts to a preference in terms of section 135(3), in that employees must be paid equally and directly after payment of the business rescue practitioner's remuneration and expenses referred to in section 143 of this Act, but before claims of post-commencement finance lenders (both secured and unsecured) and the claims of other unsecured creditors. Where the business rescue procedure is superseded by liquidation, the section 135(3) preference will prevail except that it will be subordinated to the costs of the liquidation proceedings as such in terms of section 135(4).

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21 Insolvency Act, s 97(2) and (3).
22 *Idem*, s 98(1) and (2).
23 *Idem*, s 98A(1)(a).
24 *Idem*, s 98A(1)(b).
25 *Idem*, s 99.
26 *Idem*, s 102.
27 See Security by Means of Movable Property Act 57 of 1993, ss 1(2) and 1(4).
28 Insolvency Act, s 103.
29 Companies Act 61 of 1973, s 342(1).

4. What if any personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

The directors have no pertinent statutory personal liability to the employees in this regard. Their contracts of employment may create such liability. However, directors may be held personally liable for reckless or fraudulent trading.[30] It is therefore theoretically possible for an employee to rely on the Companies Act[31] when the prescribed requirements are met in this regard.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

Apart from the preferences discussed above, South Africa has no national or provincial government fund to assist employees after insolvency with payment of arrears of salary, leave pay, severance pay or unfair dismissal claims. However, once an employee's contract of employment is suspended or terminated,[32] he is entitled to benefits in terms of the Unemployment Insurance Act.[33]

The Unemployment Insurance Act provides for unemployment benefits ranging between 30 percent and 58.64 percent of previous earnings.[34] The higher a contributor's remuneration while still employed, the closer to 30 percent of previous earnings will be paid out.

A contributor's entitlement to benefits accrues at a rate of one day's benefits for every six days of employment as a contributor, to a maximum of 238 days (or 34 weeks or eight-and-half months) in the preceding four years.[35] In order to calculate the benefits payable to an employee, the rate of remuneration of an employee has to be determined. Included in the term "remuneration" is any amount of income which is payable to an employee by way of salary, leave pay, wage, overtime pay, bonus, commission or pension, whether paid in cash or otherwise, in respect of services rendered. It does, however, not include any pension or retiring allowances.[36]

30 *Idem*, s 424.
31 *Idem*, s 424.
32 Insolvency Act, s 38. Regarding the suspension and termination of the contract of employment following sequestration or liquidation, s 136(1) and (2) of the Companies Act of 2008 precludes cancellation or suspension of such contracts by the business rescue practitioner.
33 Unemployment Insurance Act 63 of 2001.
34 *Idem*, s 12 and Sch 3.
35 *Idem*, s 13(3) and Sch 2.
36 *Idem*, s 1.

An unemployed contributor is entitled to unemployment benefits only if:[37]

- the contributor's contract of employment has been terminated by the employer, or a fixed term contract has come to an end or the contract has been suspended in terms of the provisions of the Insolvency Act;
- application is made in accordance with the provisions of the Unemployment Insurance Act;
- the contributor is registered as a work-seeker in terms of the provisions of the Skills Development Act;[38] and
- the contributor is capable and available for work.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Where the business is transferred in an insolvency dispensation, section 197A of the Labour Relations Act is to be applied to the contracts of employment. The general rule is that where a business (or part thereof) is transferred as a going concern and where the employer is insolvent or in the circumstances of a scheme of arrangement or compromise to avoid winding-up or sequestration for reasons of insolvency, the new employer will automatically be substituted in the place of the old employer in all contracts of employment which were in existence immediately prior to the old employer's provisional winding-up or sequestration.[39]

The Labour Relations Act[40] makes it clear that the transfer of employment would not interrupt the employee's continuity of employment. The contract of employment continues with the new employer as if with the old employer - except that all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee and anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer.[41] In principle, this means that the claims discussed in paragraph 2 above will be against the estate of the old insolvent employer.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are currently no proposals for legislative reform aimed specifically at further protecting employee entitlements in an insolvency.

37 *Idem*, s 16(1).
38 Act 97 of 1998.
39 Labour Relations Act, s 197A(1) and (2)(a). This general rule will not apply if the parties agreed otherwise in terms of s 197(6).
40 *Idem*, s 197A.
41 *Idem*, s 197A(2)(c).

SWEDEN

1. How is an employee defined for the purpose of formal insolvency proceedings?

"Employee" is not defined in either Swedish insolvency legislation or Swedish employment legislation.

Case law and jurisprudence have established that the question of whether a person is an employee involves an overall assessment of all the relevant circumstances in each case. This assessment is made on objective grounds, so it is not possible for an employer to circumvent his responsibility as an employer through different agreements.

Some basic requirements for a relationship to be characterized as an employment relationship are:

- work is carried out under a contractual obligation;
- the purpose of the contract is that work shall be carried out for another person; and
- the employed person personally carries out the work.

Other relevant factors include:

- the worker has been available for work during the time when the working tasks have been performed;
- the relationship between the worker and the employer has been of a continuous and regular character;
- the worker is barred from doing similar work of any significance for anyone else at the same time;
- the worker has received tools to exercise the tasks;
- the tasks, and the place and time for exercising them, have been under the control of the employer;
- some of the remuneration for the worker has consisted of a guaranteed salary;
- the worker generally is economically and socially equal to an "employee".

There are a number of exceptions to this general rule. The most important exception is when the worker has a managerial position within the company. This is generally the case if the worker is also a managing director of the company (in smaller companies the managing director is often considered as the only manager) or a substantive shareholder.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

The most important employment entitlements that can be claimed in an insolvency proceeding are salary, holiday pay and pension. There is no limitation on the type of employee entitlements that can be formally claimed in the proceedings. However, according to the Rights of Priority Act *(Förmånsrättslagen)* only some entitlements are given priority treatment.

That right of priority extends to employees' claims for wages (or other compensation arising from their employment) which relate to the period before the granting of the application for insolvent liquidation and one month thereafter. Further, the claims must not have accrued or have become due for payment more than three months before the date on which the application for insolvent liquidation was filed with the court.

It is not unusual for an employee to have a claim for a notice payment that is longer than one month. Even though claims accruing more than one month after the granting of the application for insolvent liquidation are not prioritised, the employee may have a right to compensation from the Government Wage Guarantee Fund for a notice period longer than one month (see more under question 5 below).

Severance pay with respect to periods during which the employee does not perform work on behalf of the insolvency administrator or any other person, or operates his own business, is subject to priority only if the employee can show that he has registered himself with the public employment office as an applicant for employment. The insolvency administrator must also be notified of any new employment, since other income will be deducted from the claim.

Claims for holiday pay and holiday remuneration are given priority if the claims have accrued prior to the filing of the petition for bankruptcy or insolvent liquidation. This is limited to holiday pay and holiday remuneration that accrued during the current year of earnings and the preceding year.

Priority is also given to claims for pension benefits for the period starting six months before the date of filing for bankruptcy and ending six months after the filing.

Priority employee entitlements are limited to ten times the price base amounts *(prisbasbelopp)*, currently approximately SEK 448,000.

If an employee is compensated from the Government Wage Guarantee Fund, the County administrative board *(Länsstyrelsen)* takes over the employee's claims. However, the board's claim against the debtor in bankruptcy will always be unprivileged even if the employee's entitlement claim was privileged for the employee.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

First priority in the distribution of the estate's assets is given to the payment of professionals retained by the estate to allow the insolvency administrator to carry out his duties. Second in rank is the administrator, who will receive his remuneration before any payment to creditors (including employees). After these payments are made, the balance of the estate's assets are distributed to the creditors in accordance with the Rights of Priority Act.

First in rank under the Rights of Priority Act are secured creditors who have a specific priority in relation to a certain asset (for example, maritime liens, aircraft liens and pledges). If secured creditors' claims are not fully covered by the dividend relating to the asset in question, the excess amount is considered unprivileged.

There are some other claims that have priority before the employees' entitlements. These include:

- the costs incurred by a creditor in having the debtor placed into bankruptcy or insolvent liquidation; and

- payment for the performance of auditing and bookkeeping to the extent that it relates to work undertaken in the six months preceding the date on which the application for bankruptcy was filed with the court.

In addition, creditors with security consisting of a floating charge have priority before the employees' entitlements, but only in relation to the assets that are covered by the security.

Shareholders receive payment last of all, when all creditors, secured and unsecured, have been paid in full.

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

There is no specific liability for directors or other persons in the company's management for payment of the employee entitlements.

Although directors of a limited company are not responsible for the company's debts in general, personal liability for directors or others may occur under specific circumstances, for example after failing to act in accordance with the capital deficiency rules in the Companies Act, or failing to pay taxes that have fallen due before the filing for bankruptcy. These rules may also be applied to claims for employment entitlements or taxes relating to employment entitlements.

It is only in rare cases that personal liability has been imposed in other circumstances.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?;

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

5.1 How does such a scheme operate?;

In Sweden there is a government funded "safety net" called the Government Wage Guarantee Fund *(Lönegarantin)* that guarantees employment entitlements under certain circumstances and up to a certain amount. The County administrative board administers the Government Wage Guarantee Fund.

The insolvency administrator assesses employee entitlements promptly and decides whether an employee is entitled to a payment from the Wage Guarantee Fund. The administrator then makes a formal decision and notifies the County administrative board and the employee of his decision. The County administrative board handles all payments to the employee. If an employee is dissatisfied with the insolvency administrator's decision, he can file a complaint to the district court.

Only preferential employment entitlements can be paid under the guarantee. However, an employee can be entitled to notice payment under the guarantee for a period up to six months (even though entitlements arising more than one month from the date of the bankruptcy decision are not given priority in the insolvency itself).

The maximum payment that an employee can receive from the Government Wage Guarantee Fund is four basic amounts, which currently amounts to approximately SEK 179,200.

The Government Wage Guarantee Fund requires the employee to be available for work during the period of notice. If the employee obtains new employment, he is required to notify this to the insolvency administrator or the County administrative board, because this new income is deductible from the payment by the Fund.

5.2 What (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

Payments from the Government Wage Guarantee Fund are made by the County administrative board and are not related to the distribution of the estate's assets. The County administrative board does, however, take over the employee's claim and has a right to receive dividends in the bankruptcy for payments made under the guarantee. But the County administrative board's claim is always unprivileged even if the corresponding employee claim was privileged for the employee.

5.3 What (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

The state does not take any particular action to enhance recoveries. etcetera. However, the state may support the administrator in the pursuit of claims (for example, by financing legal action) if the state could benefit from the results of such action.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

Swedish labour law regulates the sale of companies or businesses (in whole or part) in order to ensure that employees' rights and entitlements are not prejudiced during the sale process. The law applies to sales of business by an insolvent company except when the insolvent company has been declared bankrupt. If the administrator under a bankruptcy proceeding sells the debtor's ongoing business, an employee has no right to continue to work with the acquirer. Thus, the employment contracts are not automatically transferred to the acquirer in such cases (unlike when the business is sold by a solvent company or out of a formal proceeding). It is up to the acquirer to decide who he wants to hire. Despite this, the employee will have a preferential right to re-employment if the acquirer needs to hire workers within nine months from the acquisition. This gives the employees some protection.

This is a very complex area of law which may have an impact on employee dismissals even before the transfer, and legal advice should always be sought.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

There are currently no ongoing major reforms.

UNITED STATES OF AMERICA

1. How is an employee defined for the purposes of formal insolvency proceedings?

Title 11 of the United States Code (the Bankruptcy Code) does not define "employee" for purposes of a formal insolvency proceeding. The bankruptcy courts will look to the relevant state law or regulation to determine whether an individual qualifies as an employee of the debtor.

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during the formal insolvency proceeding?

2.1. Pre-petition wages

Unsecured claims for wages, salaries, or commissions, and vacation, severance, and sick leave pay, earned by an employee are eligible for priority treatment.[1] Sales commissions earned by an individual (or corporation with only one employee) acting as an independent contractor in the sale of goods or services for the debtor are also eligible for priority treatment, subject to certain requirements pertaining to the level of business with the debtor.

The priority for these claims is limited to USD 12,850 per employee and covers all wages, including salaries (whether hourly, weekly, or monthly), bonuses in the nature of compensation for work performed, and commissions (any excess is a general unsecured claim) and is only available for wages, salaries, commissions, vacation pay, sick leave pay or severance earned within 180 days before the earlier of the date the debtor filed its bankruptcy petition or the date the debtor ceased operating its business. The alternative measuring dates protect against a debtor shutting down its business but delaying the filing of the bankruptcy case to avoid paying pre-petition accrued wage claims.

Debtors frequently file a motion at the beginning of the case requesting that the court use its discretionary power to permit the debtor to pay pre-petition wage claims in the ordinary course of business to maintain the stability necessary for the transition to operating as a debtor in possession.[2]

2.2. Post-petition wages

Wages owed by the debtor for services provided after the company has filed for bankruptcy protection are entitled to the highest possible priority for an unsecured claim, known as an administrative expense priority.[3] The debtor is obligated to pay post-petition wages in full as they are incurred before payments can be made on account of any pre-petition unsecured claims.

2.3. Vacation pay

The priority treatment of vacation pay and sick leave pay depends on the nature of the employment contract or collective bargaining agreement between the debtor and its employees. If the contractual relationship between the debtor and its employees provides that an employee accrues paid time off based on the number of days worked during the year, the employee's priority claim for paid time off is limited to the amount accrued during the 180 days before the earlier of the date the debtor filed its

1 11 U.S.C. § 507(a)(4).
2 11 U.S.C. § 105.
3 11 U.S.C. § 503(b)(1).

bankruptcy petition, or the date the debtor ceased operating its business. Paid time off accrued prior to the 180 day period constitutes a general unsecured claim.

However, if the employment contract provides that a right to vacation pay vests on a certain day and the employee is dismissed prior to that vesting date, the employee likely does not have a claim for vacation pay at all. Or if the vesting date falls outside of the 180 day measuring period, all of the employee's vacation pay claim may be considered simply a general unsecured claim. Conversely, if the vesting date falls within the 180 day measuring period, the employee may have a priority claim for an entire year's worth of vacation pay simply by virtue of the timing of the vesting date. Most bankruptcy courts have generally held that vacation pay will be deemed to have been earned throughout the year and that, so long as the employee has a valid contractual claim for vacation pay, 180 days' worth of vacation pay will be considered to have been accrued during the 180 day measuring period, regardless of the vesting schedule in the contract.

2.4. Pre-petition severance pay

Pre-petition severance benefits are entitled to priority to the extent they are earned within the 180 day measurement period and only up to the USD 12,850 total priority cap provided by the statute.[4] If the employee is terminated prior to the 180 day period, the employee's severance claim is not entitled to any priority. If the employee is terminated within the 180 day measurement period, then some of the severance benefits may be entitled to priority. The most common form of severance package is given as compensation for the loss of employment payable at the time of termination and the amount of severance pay is usually based on length of service. In this case, the severance benefits accrued in the 180 day period are entitled to priority. A few courts have held, however, that severance benefits are earned upon termination because no right to severance exists until an employee is involuntarily terminated. This is the minority view, and most courts will look at the severance benefits earned within the 180 day period and assign priority status on a pro rata basis, with the remaining amount constituting a general unsecured claim.

Another type of severance package provides benefits in lieu of notice of termination. This is payable if the company fails to give the employee the prescribed notice prior to termination. If termination occurs within the 180 day period, the courts have held that the full amount of the severance, up to the USD 12,850 limitation, is entitled to priority treatment.

2.5. Post-petition severance pay

An employee terminated post-petition is entitled to administrative expense priority only to the extent that it is earned post-petition. Severance packages that are considered compensation in lieu of notice are deemed to have been earned at the time of the termination without requisite notice and the entire amount is treated as an administrative expense if the termination occurs post-petition.

However, for severance benefits that are based on length of employment, there is a split of authority as to when and how those benefits are in fact "earned". Most courts grant administrative expense priority to severance claims only to the extent that the severance obligations are incurred based on services provided to the estate post-petition.

[4] 11 U.S.C. § 507(a)(4).

For example, if an employee continues to work for the debtor for three months after the bankruptcy filing, then the pro rata portion of the severance claim that can be attributed to the post-petition period would be afforded administrative expense priority. The remainder of the claim would be a priority claim to the extent it was attributable to the 180 day period before the bankruptcy filing, with the remainder considered a general unsecured claim. The priority granted by section 507 is higher than other general unsecured claims, but is lower in priority than administrative expense claims.

The courts in the Second Circuit hold that regardless of the type of severance at issue, the obligation is incurred upon the termination date and is an administrative expense claim entitled to the highest priority. This is a minority view, however, and the majority of courts of other circuits apply the *pro rata* analysis described above.

2.6. Contributions to employee benefit plans

Contributions to an employee benefit plan are eligible for priority providing the contributions arise from services rendered within 180 days before the earlier of the date of filing for bankruptcy or the date the company ceased to do business, limited to USD 12,850 per employee.[5] This is reduced by the aggregate priority claims of employees and any amount paid on behalf of such employees to any other employee benefit plan. There is no statutory definition of "employee benefit plan", but it includes pension plans, health insurance plans and life insurance plans. The two types of employee benefit plans eligible for priority are self-insured plans where employees are directly reimbursed for expenses covered by the employee benefit program and company-maintained insurance programs for the employees. The priority of employer contributions to both plans is subject to the timing and dollar amount limitations.

2.7. Contributions to pension obligations

Pensions plans operate either as "defined benefit plans" or "defined contribution plans". The priority status for contributions owed to defined contribution plans is relatively straightforward as these plans usually tie the employer contribution to the services rendered by the employee. Therefore, it is generally possible to allocate the contribution claim simply based on the services rendered by the employee during the 180 day measuring period. Defined benefit plans, on the other hand, require regular contributions from the employer in order to ensure that the plans are sufficiently funded to pay out the benefits guaranteed by the terms of the plans. A mandatory governmental insurance program created pursuant to Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) protects workers participating in defined benefit pension plans sponsored by private employers. This insurance program is described in greater detail below.

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors, and shareholders?

The order of payment is as follows:

(a) creditors holding valid and enforceable security interests against property of the estate are entitled to a recovery of their security or the reasonable equivalent value of their security;

[5] 11 U.S.C. § 507(a)(5).

(b) post-petition costs and expenses incurred by the estate that inure to the direct benefit of the estate are considered administrative expense claims and must be paid in full before any payment can be made on account of other unsecured claims. Administrative expense claims include professional fees, trustee fees, post-petition trade or vendor claims and employee claims categorised as administrative claims as above;

(c) priority unsecured claims including certain tax claims, wages, commissions, severance benefits, vacation pay, sick day pay, and employee benefits pursuant to sections 507(a)(4) and 507(a)(5) are paid next, and these claims must be paid in full before any distribution can be made to the general unsecured creditors or equity holders;

(d) general unsecured claims including claims for wages, commissions, severance benefits, vacation pay, sick day and employee benefits above the USD 12,850 limitation or outside of the 180-day measuring period are then paid;

(e) equity holders after all other classes of creditors are paid in full.

4. What if any personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements?

4.1. Wages and employee benefits

As a general rule, officers and directors have no personal liability to the employees unless the employment contract states that the employee was employed directly by the officer or director and not by the company. However, there are some individual state statutes which look to whether the officer or director fits into the state's statutory definition of an "employer" when determining liability. For example, in Illinois, "any officers of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of this Act shall be deemed to be the employers of the employees of the corporation."[6] In New York, the statute provides that if an employer is a corporation, under certain circumstances, the corporation's president, secretary, treasurer or officers exercising corresponding functions may each be held responsible for certain employee liabilities.[7] In Pennsylvania, the statute defines "employer" as including "every person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of any of the above-mentioned classes employing any person in this Commonwealth."[8] As a general rule, these and similar statutes in other states have been interpreted to only apply to officers or directors that have either exercised significant control over the corporation or its finances, or "knowingly" permitted the corporation to purposely withhold benefits.

4.2. Withholding taxes

The Internal Revenue Service (IRS) requires employers to withhold from employees' pay checks money representing the employees' personal income tax and social security tax obligations. The employer holds these funds (referred to as "trust fund taxes") in trust for the United States and must deposit these funds in an approved

6 820 ILCS 115/13.
7 N.Y. LABOR LAW § 198-c(1).
8 43 P.S. § 260.2a.

bank at specified intervals, depending on the amount withheld. If an employer does not timely deposit these funds, the IRS may collect an equivalent sum from the officers or directors responsible for collecting the tax.[9] For an officer or director to be found "responsible", he must have significant control over the employer's finances or discretion over which bills or creditors get paid. However, being "responsible" will not by itself subject the officer or director to personal liability unless the officer or director wilfully failed to collect, account for, or pay over the withholding taxes to the IRS. This wilfulness standard is not particularly difficult to demonstrate. Courts have held directors and officers liable for trust fund taxes when the responsible officer or director knew that the withheld funds were being used for other corporate purposes, but expected that sufficient funds would be on hand on the due date for the payment to be made to the government.

Similar liability for withholding taxes is imposed on officers and directors under various state statutes and case law. For example, in New York, the statute imposes liability on "any person required to collect, truthfully account for and pay over the tax ... who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof."[10]

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate;

(b) what if any priority does it enjoy in formal insolvency proceedings in terms of payments it may make; and

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

Three distinct schemes may provide employees and retirees with enhanced recovery in a bankruptcy case:

(a) the WARN Act,[11] which provides abruptly terminated employees with claims for the wages and benefits they would have earned in the short term following their termination;

(b) ERISA, which protects retirees' interests in certain benefit plans; and

(c) the Coal Act,[12] which provides for continued health benefits to certain retirees previously employed by coal industry employers.

9 26 U.S.C. § 6672(a).
10 N.Y. TAX LAW § 685(g).
11 Worker Adjustment and Retraining Notification Act of 1988.
12 The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq*.

5.1. How does such a scheme operate?

5.1.1. Wages and benefits / the WARN Act

The WARN Act requires that employers with 100 or more employees provide employees 60 days' notice of:

(a) a plant closing which results, during any 30-day period, in an employment loss for 50 or more employees; or

(b) a mass layoff that results in an employment loss at a single site of 50 or more employees who comprise at least 33 percent of active employees at that site, or at least 500 employees regardless of the percentage of employees laid off.

If a company in distress terminates employees in a manner that triggers WARN Act protection and the employees do not have the required notice, the employees are entitled to damages for the company's violation of the statutory scheme. In the bankruptcy context, this equates to a claim in the bankruptcy equal to 60 days of wages and benefits (or the amount by which the notice actually provided falls short of 60 days). There are some exceptions to the notice requirements of the WARN Act, one of which is a "liquidating fiduciary" exception that has developed in the case law. Under this exception, a company in liquidation and no longer operating as a business enterprise does not qualify as an employer under the WARN Act and is not therefore required to provide WARN Act notice to its employees. Other exceptions include:

(a) a "faltering business", where the seller is actively seeking capital to continue the business and it is the seller's reasonable belief that obtaining such capital will continue the business; and

(b) "unforeseeable business circumstances".

5.1.2. Pension plans and the Pension Benefit Guaranty Corporation

Employees' expectations of funding for defined benefit pension plans are protected by the statutory scheme embodied in ERISA. ERISA ensures that employees and their beneficiaries are not completely deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans and shifts responsibility for unfunded defined benefit pension plan liabilities to the Pension Benefit Guaranty Corporation (PBGC). When a company files for bankruptcy, it will likely be unable to simply terminate its existing pension and retiree health plans and negotiate new plans more consistent with its current operations as it restructures. An employer may only terminate a pension plan covered by ERISA:

(i) through a "standard termination" if the employer has sufficient assets to pay all benefit obligations; or

(ii) if the assets are insufficient to pay all benefits (which will most likely be the case for a company in bankruptcy), the employer may terminate the plan by meeting the statutory standard for "financial distress".

However, no employer-initiated termination, whether standard or through a showing of financial distress, is allowed if it would violate the terms of an existing collective bargaining agreement. Most such agreements with major unions do not allow such a termination.

In such a scenario, the PBGC can force an involuntary termination of the plan regardless of the terms of the collective bargaining agreement if it determines that either:

(i) the plan has not met certain minimum funding requirements;

(ii) the plan will be unable to pay benefits when due and other events have occurred;

(iii) certain distributions were made under the plan to a participant who is also a substantial owner of the company (greater than 10 percent holder); or

(iv) the possible long term loss to the PBGC with respect to the plan may "reasonably" be expected to increase "unreasonably" if the plan is not terminated.

The PBGC, in its capacity as custodian of the retirement plans, possesses statutory claims against the employer's estate with which to fund the plans, or to distribute to retirees on account of their interest in the plans. When a plan covered under ERISA is terminated, the PBGC becomes trustee of the plan and takes control of the plan's assets and liabilities. The PBGC then uses the remaining assets to cover the benefit obligations under the plan and the PBGC adds its own funds to cover any remaining benefit obligations. The employer then becomes liable to the PBGC for any benefits it covers on behalf of the terminated plan, which generally gives rise to a substantial claim in the bankruptcy for the difference between the value of the plan assets at the time of termination and the value of the plan's vested obligations to its participants.

5.1.3. Coal Act

The Coal Act ensures the uninterrupted continuation of lifetime health benefits to covered coal industry retirees by extending liability to a broad base of contributors including the coal companies party to collective bargaining agreements with the United Mine Workers of America, and all of those companies' related entities in the corporate structure and its successors in interest. Two of the financing mechanisms included in the Coal Act are the Combined Fund and the 1992 Plan. The former provides benefits to coal industry retirees and their dependents who were receiving benefits from the old collectively bargained 1950 or 1975 Benefit Trusts (Trusts) as of July 20, 1992. The 1992 Plan provides benefits to persons who are not eligible for benefits from the Combined Fund but who, based on their satisfaction of age and service requirements as of February 1, 1993, could have retired and received benefits from those Trusts had those plans remained in existence. The 1992 Plan also provides benefits to those retirees who should be covered by individual employer plans (IEPs) but whose employers fail to provide such benefits. This is funded through annual premiums which provide sufficient assets to fund benefits for beneficiaries whose last employer company no longer exists, and a monthly premium calculated based on the number of the entity's retirees who are receiving benefits from the 1992 Plan (rather than the entity's IEP). While the Coal Act requires a company to maintain its IEP and pay Combined Fund premiums so long as it remains "in business", the obligation to pay premiums to the 1992 Plan extends from as long as there is a liable entity remaining to pay them.[13]

[13] 26 U.S.C. § 9711.

Filing for bankruptcy does not deem an entity no longer "in business" and a debtor will be required to maintain its IEP in bankruptcy.

5.2. What (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

5.2.1. WARN Act

Claims based on the WARN Act are treated in bankruptcy very similarly to claims for severance based on compensation for lack of notice – if a termination occurs without the requisite notice, and it is within the 180 day measuring period, the entire WARN Act claim amount is eligible for priority treatment, subject to the USD 12,850 limitation.[14] If the termination occurs prior to the 180 day period, the WARN Act claim is treated as a general unsecured claim. If the termination occurs post-petition, the obligation is a post-petition obligation of the debtor and the entire claim is given administrative expense status. One bankruptcy court has also held that a WARN Act claim based on pre-petition termination may still qualify in part for administrative expense priority to the extent the 60 days' pay and benefits awarded are attributable to days occurring post-petition. However, to date that court decision has not been widely followed.

5.2.2. Pension plans and the PBGC

As mentioned above, the PBGC possesses claims against the employer for any amount of its own funds it uses to pay obligations of a terminated plan. The priority of such a claim is unclear – the PBGC argues that its claims are "actual and necessary costs" of preserving the estate and should be granted administrative priority. The courts have not been sympathetic to that position, but they usually grant priority to the extent that that the costs were incurred within the 180-day time period. The remainder of the PBGC's claims are usually considered general unsecured claims.

5.2.3. Coal Act

When an employer with Coal Act obligations enters bankruptcy, its Combined Fund and 1992 Plan premiums are treated as taxes in bankruptcy and are entitled to administrative expense priority if the debtor fails to pay these obligations as they fall due after filing for bankruptcy.

5.3. What (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to pay out employee creditors and other unsecured creditors?

5.3.1. WARN Act

While the WARN Act does not provide a mechanism for collective action on behalf of terminated employees, courts have sometimes appointed representative employee creditors to statutory creditors' committees to represent the interests of WARN Act claimants in the bankruptcy. In this capacity, an employee whose interests are presumed to align with those of others is allowed a significant voice to help steer the proceedings toward a scenario resulting in the best possible recoveries for all creditors. In addition, all WARN Act claimants are parties in interest with standing to object to or support any action for which the debtor requires court approval.

[14] 11 U.S.C. 507(a)(3).

5.3.2. PBGC

As discussed above, the PBGC has both the standing and the duty to protect its right to recover from the estate for amounts due to employees under defined benefit plans. In cases with potential termination liability, the PBGC will frequently be appointed as a member to a statutory creditors' committee even before the relevant plans have been terminated. Whether on a committee or in its own capacity, the PBGC is frequently an active participant in discussions and litigation over how best to maximize recoveries.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

A purchaser of only assets of a company generally acquires such assets free and clear of the seller's debts and liabilities, unless such liabilities are specified in the asset purchase agreement or an exception to the principle of non-liability is applicable. When a corporate entity purchases assets and continues to operate the acquired business, the doctrine of successor liability may impute the liabilities of the acquired company onto the buyer. Courts have found successor liability to be appropriate under:

- mere continuation, which applies in cases where there is a common identity of officers, director, and shareholders between the selling and buying entities;
- substantial continuation, which focuses on an entity's ownership and management structure, considering the continuity of the business itself, in determining whether successor liability is appropriate; and
- *de facto* merger under which a buyer is liable for the acquired company's liabilities when the asset sale results in essentially the same outcome as would have occurred had there been a merger, on the basis that in a true merger, the successor company would take on the liabilities of the merged entity.

In bankruptcy, buyers can protect themselves from successor liability as the bankruptcy courts can authorize the sale of property "free and clear of any interest in such property of an entity other than the estate."[15] The Bankruptcy Code does not define the kinds of interests in property that the statute was intended to encompass, but the Third and Fourth Circuits have held that employment-related successor liability claims fit within this expanded definition of "interests in property" and have held that a buyer may purchase a debtor's assets free and clear of such claims.

The rules regarding successor liability for unpaid pension obligations in asset sales are complex. In general, such successor liability for unpaid pension obligations may be imposed if the buyer:

- expressly assumes part or all of the liabilities of a pension;
- purchases assets from an entity which sponsors or maintains a defined benefit pension plan subject to ERISA; or
- purchases assets from an entity which was a member of a controlled group which maintained a defined benefit pension plan subject to Title IV of ERISA.

The Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (COBRA) requires certain employers to provide continued health insurance coverage to former employees and their covered beneficiaries for a period of up to 18 months following

[15] 11 U.S.C. § 363(f).

termination of employment, although employers may charge the employee for such coverage. On an asset sale, unless the buyer and seller agree otherwise, the seller retains the obligation to provide such continued health insurance to employees who terminate employment before or as a result of the asset sale. However, if the seller ceases to exist or to maintain a group health plan after the asset sale and if the buyer continues the business operations of the seller without substantial change, then the buyer is considered a "successor employer" for purposes of COBRA and may be obligated to extend COBRA coverage to the seller's former employees. For purposes of COBRA, a buyer may become a successor employer even if the assets are purchased from a bankrupt company.

In certain cases, WARN Act liability for seller's employees may also be imposed on the buyer in an asset sale if the seller's employees are laid off close to, or in conjunction with, the asset sale.

Courts have held that the buyer may be treated as a successor employer and may be held liable for prior employer discriminatory practices in cases where there is continuity of the business and where the seller has provided notice to the buyer of the potential discriminatory practice liability. (As set forth hereinabove, successor liability of the seller's employment discrimination practices may be avoided pursuant to a section 363 sale of assets in bankruptcy.) A buyer may also be liable under the Fair Labor Standards Act of 1938 for wages and overtime pay of a predecessor organization when it hires those employees if the buyer is considered to be the successor of the seller, adequate notice of the potential liability is provided to the purchaser and an insufficient remedy is available from the seller.

Under federal labor law, the buyer may inherit unfair labor practice liabilities of the seller in an asset deal and may be responsible to complete unfair labor remedies and comply with any National Labor Relations Board orders. Such liability is imposed upon the buyer if:

(a) there is "substantial continuity" between the buyer and the seller in terms of operations and employees so that the buyer is considered a "successor employer" of the seller; and

(b) the buyer has actual or constructive knowledge of unfair labor practices or of any NLRB proceeding against the seller.

Substantial continuity is based on many factors, including whether the employees are essentially performing their same jobs for the buyer and whether a majority of the employees were hired by the buyer. A buyer is free to set initial employment terms, but if a majority of the seller's employees were unionized, then the buyer must negotiate with the union. Though labor law does provide some exceptions for purchase of assets in bankruptcy, a buyer may inherit labor law liabilities in the purchase of an insolvent company's assets.

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

At the time of writing, there are no proposals for legislative reform to provide additional protections for employee entitlements in a bankruptcy case.

ZIMBABWE

1. How is an employee defined for the purpose of formal insolvency proceedings?

The Insolvency Act 2018[1] uses the definition of "employee" that appears in Section 2 of the Labour Act:[2]

"any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person –

(a) in circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or

(b) in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services".

2. What are employee entitlements, and to what extent (if any) are they given priority treatment during formal insolvency?

2.1. Liquidation proceedings

Section 89 of the Insolvency Act provides:

"(1) The free residue of an insolvent estate must be applied in the first place to defray the costs of liquidation contemplated in section 88, but excluding the costs referred to in section 84(4).

(2) In the second place the balance of the free residue must be applied to pay –

(a) to an employee who was employed by the debtor –
(i) any salary or wages, for a period not exceeding three months, due to an employee;
(ii) any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the debtor in the year in which liquidation occurred and the previous year, whether or not payment thereof is due at the date of liquidation;
(iii) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, wage-regulating measure or as a result of termination in terms of section 40; and

(b) any contributions that were payable by the debtor, including contributions which were payable in respect of any of his or her employees, and which were, immediately prior to the liquidation of the estate, owing by the debtor, in his or her capacity as employer, to any pension, provident, medical aid, sick pay, holiday, unemployment or training scheme or fund, or any similar scheme or fund under any law or to such a fund administered by a bargaining or statutory council recognised in terms of the Labour Act, [*Chapter 28:01*], and which does not exceed $750 in respect of any individual employee.

[1] [Chapter 6:07].
[2] [Chapter 28:01].

(3) The claims contemplated in subsection (2)(a) may not exceed the amount of –

(a) $750 per employee in respect of subparagraph (i) and $750 in respect of subparagraph (iii); and

(b) $250 per employee in respect of subparagraph (ii).

(4) The Minister may amend an amount mentioned in paragraph (a) or subsection 2(b) by notice in the Gazette.

(5) The claims referred to –

(a) in subsection (2)(a)(i) must be preferred to the claims referred to in subsections (2)(a)(ii) and (iii) and (2)(b) and must rank equally and abate in equal proportions, if necessary.

(b) in subsection (2)(a)(iii) must be preferred to the claims referred to in subsections (2)(a)(ii) and (2)(b) and must rank equally and abate in equal proportions, if necessary.

(c) in subsection (2)(a)(ii) must be preferred to the claims referred to in subsection (2)(b) and rank equally and abate in equal proportions, if necessary.

(d) in subsection (2)(b) rank equally and abate in equal proportions, if necessary."

The amounts referred to in the section refer to United States Dollars (USD).

Directors of a liquidated company, or members of a private business corporation, do not qualify for the preferential claims status afforded to employees under section 89.[3]

2.2. Corporate rescue proceedings

In the case of corporate rescue proceedings, employees receive greater protection than in the case of a liquidation. There are various sections that protect employees during corporate rescue proceedings.

Section 128, which deals with post-commencement financing, provides as follows:

"(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes payable by a company to an employee during the company's corporate rescue proceedings, but is not paid to the employee –

(a) the money is regarded to be post-commencement financing; and

(b) will be paid in the order of preference set out in subsection 3(a).

(2) During its corporate rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing –

(a) may be secured to the lender by utilizing any asset of the company to the extent that it is not otherwise encumbered; and

[3] Insolvency Act 2017, s 89(8).

(b) will be paid in the order of preference set out in subsection (3)(b).

(3) After payment of the practitioner's remuneration and expenses referred to in section 135, and other claims arising out of the costs of the corporate rescue proceedings, all claims contemplated –

(a) in subsection (1) will be treated equally, but will have preference over –
  (i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and
  (ii) all unsecured claims against the company; or

(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

(4) If corporate rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation."

The relevant part of section 129 (dealing with employee contracts), which deals with the effect of corporate rescue proceedings on employees and contracts, reads as follows:

"(1) Despite any provision of an agreement to the contrary –

(a) during a company's corporate rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that –

  (i) changes occur in the ordinary course of attrition' or
  (ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions;

and

(b) any retrenchment of such employees contemplated in the company's corporate rescue plan is subject to the Labour Act . . ., and any other applicable employment related legislation."

Section 137(2), which deals with the rights of employees during corporate rescue proceedings, provides as follows:

"(1) . . .

(2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's corporate rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferent creditor of the company.

(3) . . .

(4) A medical scheme, or a pension scheme including a provident scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Part to the extent of –

(a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's corporate rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and
(b) in the case of a defined benefit pension scheme, the present value at the commencement of the corporate rescue proceedings of any unfunded liability under that scheme.

(5) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or Court order."

3. How does the priority (if any) given employee entitlements in formal insolvency proceedings compare to the priority (if any) given to secured creditors, insolvency administrators, professionals retained by the estate, unsecured creditors and shareholders?

Priority given to employee entitlements usually comes into effect after amounts owing to secured creditors have been paid from the liquidation proceeds. The general principle is that secured creditors must first be paid out of the net liquidation proceeds from sale of assets over which they hold security. The proceeds from that portion of the estate which is not subject to any right of preference by reason of any security held by a secured creditor (special mortgage, landlord's legal hypothec, pledge or right of retention) is referred to as "free residue". The costs of liquidation, preferential claims and unsecured (non-preferential) claims are paid out of the free residue of the estate.

The free residue is firstly used to pay the costs of liquidation as set out in section 88 of the Insolvency Act.

Thereafter section 89 is applied to pay creditors who have (statutory) preferential claims. Preferential claims are those which are preferred by operation of law and they are paid first within the prescribed order of preference provided for in the Insolvency Act. The employee entitlements discussed under question 2 are the first claims to be paid out of the free residue once the costs of liquidation have been settled. The difference between the total claim by the employee and the preferential part of the claim is treated as a normal unsecured (concurrent) claim. Employee claims rank second to be paid out of the free residue, immediately after the costs of liquidation have been defrayed.

Thereafter, the following preferential claims are also provided for, in their order of preference:

- maintenance due by a natural person debtor in terms of a court order and which is in arrear at the date of liquidation for a period of not more three months, with a maximum amount of USD 750;[4]

[4] *Idem*, s 89(9).

- interest on the preferential claims set out above, from date of liquidation to date of payment of the claims;[5]
- various tax claims by the State;[6]
- various claims relating to agriculture and farming;[7]
- claims by the holders of general notarial bonds;[8]
- claims by concurrent (unsecured) creditors;[9]
- interest on concurrent claims from date of liquidation to date of payment (if there are sufficient funds).[10]

4. What (if any) personal liability do directors and / or others involved in the management of the company have with respect to unpaid employee entitlements or taxes or other duties owed in relation to employee entitlements?

Directors have no statutory personal liability to settle unpaid employee entitlements, but their contracts of employment may create such liability. In addition, directors may be held personally liable for reckless or fraudulent trading. It is thus theoretically possible for an employee to rely on the Companies Act to recover unpaid entitlements.

5. Is there any form of statutory, industry or government funded "safety net" that serves to guarantee the payment of employee entitlements in an insolvency context? If so:

(a) how does such a scheme operate?

(b) what (if any) priority does it enjoy in formal insolvency proceedings in terms of payments it may make?

(c) what (if any) action does the scheme take to enhance recoveries that may be made in an insolvency to payout employee creditors and other unsecured creditors?

Apart from the preferences discussed above, Zimbabwe has no national or provincial government fund to assist employees after insolvency with payment of arrears of salary, leave pay, severance pay or unfair dismissal claims.

6. In the event of a sale by an insolvent company, whether in or out of a formal proceeding, of all of its assets as an ongoing business, would the acquirer be liable for employee claims on the basis of successor liability or otherwise?

In most cases, an acquirer comes in as an equity investor who negotiates for the full and final settlement of all pre-liquidation obligations with all creditors (including employees). Any other arrangements are presented to all creditors who then have to vote on the acquirer's settlement proposals.

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5 *Idem*, s 89(11).
6 *Idem*, s 89(12).
7 *Idem*, s 89(14).
8 *Idem*, s 89(15).
9 *Idem*, s 89(16).
10 *Idem*, s 89(17).

7. Are there any proposals for legislative reform to further protect employee entitlements in an insolvency?

During the Parliamentary debates on the 2017 Insolvency Act, there was a proposal to make employee entitlements fully preferential claims as opposed to having only a portion of the employee entitlements being preferential, although this did not happen in the end.

Currently there are no pending reforms dealing with employee entitlements in an insolvency.

Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociacion Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law and Restructuring Research Centre,
China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Business Recovery Professionals (Mauritius) Ltd
Canadian Association of Insolvency and Restructuring Professionals
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
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Insolvency Practitioners Association of Malaysia
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Instituto Brasileiro de Estudos de Recuperação de Empresas
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Instituto Iberoamericano de Derecho Concursal - Capitulo Colombiano
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Accountants
Malaysian Institute of Certified Public Accountants
National Association of Federal Equity Receivers
NIVD – Neue Insolvenzverwaltervereinigung Deutschlands e.V.
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
REFOR-CGE, Register of Insolvency Practitioners within "Consejo General de Economistas, CGE
Restructuring and Insolvency Specialists Association (Bahamas)
Restructuring and Insolvency Specialists Association of Bermuda
Restructuring Insolvency & Turnaround Association of New Zealand
South African Restructuring and Insolvency Practitioners Association
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