

CHAPTER V

THE PREFERENTIAL TREATMENT OF WORKERS' WAGE CLAIMS IN CASE OF EMPLOYER'S BANKRUPTCY

1. Protection of wage claims by means of a privilege

298. Article 11 of the Convention embodies one of the oldest measures of social protection, namely the priority accorded to wage debts in the distribution of the employer's assets in case of bankruptcy. To avoid a situation where wage earners are deprived of their livelihood in the event of the bankruptcy of their employer, provisions have to be made to guarantee the immediate and full settlement of debts owed by employers to their workers. The Convention spells out the widely recognized principle that workers' wage and other service-related claims, regarding a certain period of service or up to a prescribed amount as may be determined by national laws and regulations, should be treated as privileged debts in the event of the bankruptcy or judicial liquidation of an undertaking. It further requires that wages constituting privileged debts must be paid in full before ordinary creditors can be paid even in part. The Convention, however, leaves it to ratifying States to determine the relative priority of wages constituting a privileged debt and the limits within which such claims are to be given preference.¹ Article 11 of the Convention was partially revised by the Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173), which was adopted in 1992, with a view to improving the protection provided for in 1949 in two ways: first, by setting specific standards concerning the scope, limits and rank of the privilege, which are scarcely addressed in Convention No. 95, and secondly by introducing new concepts, such as wage guarantee schemes, designed to offer better protection than the traditional privilege system.

¹ At the first Conference discussion, a proposed amendment to the effect that members of an employer's family employed in the bankrupt undertaking should be excluded from the application of wage privileges in order to avoid abuses failed to be adopted; see ILC, 31st Session, 1948, *Record of Proceedings*, p. 462. At the second Conference discussion, another proposal to give wages a position of absolute priority over other privileged debts was finally withdrawn, as it was realized that it would be difficult to secure acceptance for such a rule in the light of the complexity of bankruptcy law in the various legal systems; see ILC, 32nd Session, 1949, *Record of Proceedings*, p. 508. A similar provision is in Article 11 of the Workmen's Compensation (Accidents) Convention, 1925 (No. 17), but refers only to the payment of compensation for personal injury or death in case of industrial accident.

The Committee will first review national law and practice under the system of protection based on preference, as reflected in Article 11 of the Convention, and will then refer to the new standards set out in Convention No. 173, in particular those relating to wage guarantee institutions, and their practical application.

1.1. Origins and evolution of the principle of privileged protection of workers' claims

299. It is broadly recognized that workers' wage claims deserve special protection, since the insolvency of an enterprise and consequently the suspension of payments directly threatens the means of subsistence of workers and their families. Moreover, as employees do not normally have a share in the profits of the enterprise, they should not share in its losses either. The preferential treatment of wage claims is by far the most widely accepted and most traditional method of protecting service-related claims in the event of the employer's bankruptcy or the judicial liquidation of an enterprise. The privilege system was first codified in the civil codes of the nineteenth century, beginning with the Napoleonic Code, initially to protect the wages of domestic servants. Protection was progressively extended to other categories of wage earners and the preference principle soon gained recognition in both commercial and labour legislation. In *France*, for instance, the privilege granted to domestic servants was extended in 1838 to cover the claims of wage earners and apprentices for up to six months' wages. Wage claims, however, were placed in the fourth rank of privileged claims, after legal expenses, so that the protection of wage debts often remained illusory. By new legislation enacted in 1935, that part of the privileged claims necessary for the worker's maintenance had to be paid immediately and became known as the "super-privilege".

300. The privilege system consists of paying in full out of the available assets of the bankrupt estate certain claims that enjoy priority or a "privilege" over ordinary, non-privileged claims. Wage claims are, of course, not the only claims to be recognized as privileged debts. The legislation in most countries also grants a privilege to various other claims, such as the court expenses occasioned by the bankruptcy proceedings, the sums owed to the State and to social security institutions (unpaid taxes or compulsory insurance contributions), the debtor's personal claims (e.g. funeral or medical expenses) and the maintenance claims of the debtor's family members. Equally important in granting a privilege to certain claims is the relative priority, or rank, which may be given to those claims in relation to other privileged debts. Higher ranking creditors have to be satisfied in full before lower ranking creditors can recover even a fraction of their claim, which in most cases implies that a privilege in itself is not sufficient to guarantee debt recovery and that, unless wage claims are assigned a sufficiently high-ranking preference, they have little chance of being paid.

301. Despite its overwhelming recognition, however, the privilege system varies significantly in its practical application from country to country. National rules and practices governing preferential treatment differ principally with regard to the scope of protection, that is the categories of protected workers and the nature of the claims covered, the relative priority assigned to wage claims as compared to other privileged debts, the reference period covered by the privilege or the other limits set for privileged protection, and the assets of the bankrupt employer against which the preferred claim is enforceable. The Committee will briefly examine below each of these four aspects.

1.2. Scope of privilege

1.2.1. Categories of workers treated as privileged creditors

302. Through the protection afforded to workers' claims, the legislation in all countries primarily seeks to protect the wages of those employed under a formal contract of employment or those who are in an employment relationship with the insolvent employer. Rules and practices differ, however, as regards persons engaged in types of employment such as home work, apprenticeship or subcontracting. In *Uruguay*,² preferential treatment seems to apply only to lawyers, medical doctors, attorneys, dependent workers, manual workers and domestic servants. In *Venezuela*,³ the law seems to protect the claims of domestic workers differently from those of other workers, providing for a lower rank of preference and a more limited service period. In contrast, in *Mauritius*,⁴ for instance, apprentices are treated as privileged creditors in exactly the same manner as ordinary workers. In nearly all countries, civil servants and other workers employed by public enterprises are not covered by the protection afforded by labour legislation to the wage claims of other workers, on the grounds that the bankruptcy or insolvency of the employer of such groups of workers is simply not conceivable.⁵

303. In certain countries, the preferential treatment of wage claims covers all workers without distinction. The legislation in *Algeria*,⁶ for instance, grants a

² (14), s. 11; (15), s. 2369(4); (16), s. 1732(4).

³ (1), ss. 158, 275; (2), s. 101; (3), s. 1870.

⁴ (3), ss. 2148, 2152.

⁵ For instance, the Government of *Spain* has indicated, on the occasion of the ratification of Convention No. 173 which revises Article 11 of the Convention, that public employees are excluded from the scope of legislation dealing with protection of workers' claims by means of a privilege.

⁶ (1), s. 89.

first-rank privilege to wage claims irrespective of the nature, validity or form of the employment relationship.

304. In other countries, the legislation excludes specific employees from privileged protection on account of their possible responsibility for the insolvency of the enterprise. Thus, claims of managerial employees or other influential persons considered as having clearly contributed to the financial straits of the enterprise are granted no privilege. The assumption is that those accountable for business failure should not, by the mere fact of their legal status as employees of the insolvent enterprise, be allowed to benefit from the legal mechanism designed to protect the unintentional victims of the insolvency. In Norway,⁷ for instance, the following persons are barred from privileged creditor status: (i) employees who exercised or were in a position to exercise material influence on the debtor's enterprise by virtue of their position as managers; (ii) employees holding a stake of at least 20 per cent in the enterprise; (iii) employees who have served on the board; (iv) employees closely connected or related (immediate family, relatives, cohabitee, fiancé, etc.) to the manager or to persons holding a stake of at least 20 per cent in the enterprise.

305. In other cases, while no creditors are excluded from privileged protection of their wage claims on account of their managerial position in the insolvent enterprise or their close relationship with the insolvent employer, they are conferred a lower priority in the distribution of assets. For example, in New Zealand,⁸ any unpaid wages due to the bankrupt's wife or husband where the latter was employed in the bankrupt's trade or business rank seventh among priority claims, that is after legal costs, workers' wage claims (i.e. four months' wages or no more than \$6,000), taxes and any amount of salary or wages that is not a preferred claim (e.g. wage claims exceeding the four-month or \$6,000 limit). In Australia,⁹ the legislation on corporate insolvency, while recognizing the same priority status, restricts the benefits of certain "excluded employees", i.e. those who were directors of the insolvent company at any time during the 12 months before the commencement of the winding up, their spouses and their relatives, and limits the payable amounts to \$2,000 in respect of wages and \$1,500 for leave entitlements.

⁷ (2), s. 9-3. Similarly, in *Saint Vincent and the Grenadines* (3), s. 457(1)(b), the law exempts the salary of a company director from the preferential treatment otherwise reserved for all wages or salaries of any employee in the event of winding up of a company. In the United States, some state laws specifically provide that no officer, director, or general manager of a corporation employer or any member of an association employer or partner of a partnership employer is entitled to preferential treatment of any wage debts; see for instance, Utah (52), s. 34.26.1.

⁸ (2), s. 104(1)(g).

⁹ (4), s. 556(1A), (1B).

1.2.2. Type of service-related claims covered by a privilege

306. National law and practice differs widely in this respect, as the legal notion of wages varies greatly in different countries. Even though the original intention was to protect wages in the strict sense of money payment for work done or services rendered pursuant to the terms of a contract of employment, the principle of preferential treatment gradually came to cover claims other than wages in the narrow sense. Thus, the legislation in a considerable number of countries grants a privilege to broader claims, such as holiday pay, allowances in respect of other paid leave (e.g. sick or maternity leave) and severance pay.

307. In a certain number of countries, such as *Brazil*,¹⁰ *Burkina Faso*,¹¹ *Colombia*,¹² *Honduras*,¹³ *Mauritania*,¹⁴ *Panama*,¹⁵ *Senegal*¹⁶ and *Venezuela*,¹⁷ the legislation expressly provides that for the purposes of the privileged treatment of wage debts in case of bankruptcy, the term "wage" is deemed to include the basic wage, irrespective of its denomination, wage supplements, leave allowances, bonuses, compensation and benefits of all kinds. In New Zealand,¹⁸ the privilege covers all wages, whether payable for time or for piece-work and whether earned wholly or in part by way of commission, and all holiday pay, as well as any remuneration in respect of absence from work through sickness or other good cause.

¹⁰ (2), s. 449(1); (6), s. 102. This is also the case in *Bolivia* (1), s. 14; (7), s. 1345(2); *Central African Republic* (1), s. 109; *Chile* (1), s. 61; *Mali* (1), s. L.115; *Nicaragua* (2), s. 89; *Niger* (1), s. 167; *Rwanda* (1), s. 104.

¹¹ (1), s. 116. In *Mauritius* (3), ss. 2148, 2152 and *Seychelles* (1), s. 37, the privilege covers labour remuneration of all kinds, including dismissal allowance and paid leave, while in *Cameroon* (1), s. 70(2), the preference extends to compensation due for breach of contract and to damages for unfair dismissal. In *Azerbaijan* (1), s. 178(2), priority is given to the payment of wages and all social benefits, including payment for unused paid leave.

¹² (1), s. 157.

¹³ (1), s. 128(4); (2), s. 374.

¹⁴ (1), s. 93.

¹⁵ (1), s. 166.

¹⁶ (1), s. L.118.

¹⁷ (1), ss. 158 to 160; (2), s. 101.

¹⁸ (2), s. 104(1)(d), (3); (3), s. 312(1) and Schedule 7, paras. 2, 12. The Government has reported that it intends to include redundancy compensation among the protected wage claims, as well as raising the threshold of the wage sums protected by privilege. See also *United Kingdom: Guernsey* (13), ss. 1(1)(b), 6(a), and *Jersey* (20), s. 32(1)(b).

308. In many countries, including Croatia,¹⁹ the *Czech Republic*,²⁰ *Malaysia*²¹ and *Thailand*,²² protected claims include severance pay and other termination benefits, while in *Ecuador*,²³ *Peru*²⁴ and *Tajikistan*,²⁵ specific reference is made to the payment of retirement plans. Similarly, in Singapore,²⁶ in addition to all wages or salaries, priority wage debts also include ex gratia payments or retrenchment benefits payable to an employee on the ground of redundancy or by reason of any reorganization of the employer, compensation, unpaid contributions to superannuation schemes or provident funds.

309. Among the countries which have accepted Part II of Convention No. 173 regarding protection of workers' claims by means of a privilege, *Zambia*²⁷ has brought its legislation into line with the minimum requirements set forth in Article 6 of that Convention. In the event of a bankruptcy, therefore, the following are paid in priority to all other unsecured debts: (i) all amounts due by way of wages accruing to any employee within a period of three months before the date of the receiving order; (ii) all amounts due in respect of leave for the last two years before the date of the receiving order; (iii) all amounts due in respect of any paid absence within the period of the last three months; (iv) recruitment expenses or other amounts reimbursable under any contract of employment; (v) an amount equal to three months' wages by way of severance pay; and (vi) all amounts due in respect of worker's compensation under any written law accrued before the date of the receiving order. Similarly, the Government of *Madagascar*, whose acceptance of the obligations of Part II of Convention No. 173 has terminated its obligations under Article 11 of Convention No. 95, has reported that privileged status is accorded to: (i) workers' claims for wages relating to a prescribed period which nonetheless has not so far been specified; (ii) claims for holiday pay; (iii) compensation in lieu of notice of termination amounting to up to six months' wages; and (iv) severance pay on the basis of ten days for every full year of service, but not exceeding six months' wages. In *Mexico*,²⁸ which has also accepted the obligations arising out of Part II of

¹⁹ (1), s. 86(1). See also Estonia (3), s. 86(1); Republic of Korea (1), s. 37(1); Morocco (2), s. 1248.

²⁰ (3), s. 31(3).

²¹ (1), s. 31(2); (2), s. 292(1).

²² (1), s. 11.

²³ (1), s. 35(7); (2), s. 88.

²⁴ (8), s. 1.

²⁵ (2), s. 26(2).

²⁶ (2), s. 328(1), (2B).

²⁷ (2), s. 2(1).

²⁸ (1), s. 123A(XXIII); (2), ss. 113, 162(I), 434(V), 436.

Convention No. 173, the privilege covers the wages earned during the preceding year and any other wage supplements, including claims for holiday, claims for amounts due in respect of other types of paid absence and severance pay of three months' salary upon the termination of their employment. In *Spain*,²⁹ the privilege covers wage claims, including holiday pay, without any specific time limit but subject to a monetary cap, as well as indemnity for dismissal.

1.3. Ranking of the privilege

310. The ranking of workers' privilege vis-à-vis the privilege of other creditors is as important as the existence of sufficient assets in the bankrupt estate. Wage claims are often ranked lower than the court expenses incurred on behalf of the creditors and funeral and medical expenses in respect of the deceased debtor, as well as the claims of the State or the social security system. In this latter case, there is a risk that the privilege granted to workers' claims may be of no practical value, since the claims of the tax authorities and those of the social security institutions almost invariably take off the greatest part of the assets.

1.3.1. Absolute priority

311. In many countries workers are given higher priority than all other privileged creditors, including the State and the social security system. For example, in *Algeria*,³⁰ *Brazil*,³¹ *Croatia*,³² *Hungary*,³³ *Paraguay*³⁴ and the *Philippines*,³⁵ wage debts are payable before all others, including those owed to the Treasury and to the social security system. In *Mauritius*,³⁶ wage debts arising from the last 120 days of work are satisfied first and are followed in

²⁹ (1), ss. 26(1), 32(3).

³⁰ (1), s. 89. Wage claims are also granted a first-rank privilege in *Chad* (1), s. 268; *Côte d'Ivoire* (1), s. 33(3); *Democratic Republic of the Congo* (1), s. 91; *El Salvador* (2), s. 121; *Gabon* (1), s. 157; *Guinea* (1), s. 223; *Mali* (1), s. L.115; *Malta* (1), s. 27; *Norway* (2), s. 9-3; *Oman* (1), s. 47; *Panama* (1), s. 166; *Romania* (1), s. 87(2); (2), s. 7(2); *Rwanda* (1), s. 102; *Saudi Arabia* (1), s. 15; *Switzerland* (3), s. 219; *Viet Nam* (1), s. 66; *Yemen* (1), s. 8; *Zambia* (2), s. 2(2). In *Tunisia* (1), s. 151-2 only the unattachable part of the wages takes priority over all other privileged claims while the remaining part of wages claims is granted fourth-rank priority among privileged debts, just before the debts owed to the Treasury.

³¹ (6), s. 102.

³² (1), s. 86(1); (2), s. 71(2).

³³ (2), s. 57(1)(a), (2)(a).

³⁴ (3), s. 445; (1), ss. 247, 248.

³⁵ (1), s. 110.

³⁶ (3), ss. 2148, 2152.

order of priority by the costs of the legal proceedings, the claims of the State and the social security system and funeral expenses. It is interesting to note that wage debts in respect of services rendered in the last six months are also recognized as preferential claims, but enjoy a lower ranking privilege, as they are placed in sixth position among privileges enforceable against movable assets and in fourth place among privileges enforceable against immovables.

312. Mention should be made here of the notion of “super-privilege”, according to which certain wage claims rank ahead of claims which are secured by a right *in rem* and may thus be satisfied outside the insolvency proceedings. The origins of this concept are to be found in the French and Mexican labour legislation, which were the first to provide for the immediate payment of a certain portion of the wages due, notwithstanding the existence of any other preferred claim, or debt secured by a lien or mortgage. In most cases, the super-privilege is limited to the portion of the wage claim necessary for the worker’s maintenance. For example, in *Côte d’Ivoire*,³⁷ *Guinea*³⁸ and *Madagascar*,³⁹ the super-privilege covers the last 60 days of work or apprenticeship up to a maximum monthly amount applicable to all categories of beneficiaries. In *Spain*,⁴⁰ debts in respect of wages for the last 30 days of work are granted priority over all other debts, including those secured by mortgage, to an amount not exceeding twice the minimum interoccupational wage. In *Malaysia*,⁴¹ the law confers priority on employees to whom wages are due from the insolvent employer over and above the rights of secured creditors, provided that the amount does not exceed the wages due for any four consecutive months’ wages. In *Benin*,⁴² *Comoros*,⁴³ and *Senegal*,⁴⁴ wage debts, up to a maximum amount equal to the percentage of the wage which is not liable to attachment, enjoy

³⁷ (1), s. 33(4).

³⁸ (1), s. 227.

³⁹ (1), s. 83.

⁴⁰ (1), s. 32(1), (3). Similarly, in *Jordan* (1), s. 51(b), *Libyan Arab Jamahiriya* (1), s. 60, and *Saudi Arabia* (1), s. 15, the legislation provides for an immediate advance equal to one month’s wages to be paid to the workers prior to any other outlay, including legal fees and bankruptcy or liquidation costs.

⁴¹ (1), s. 31(1). See also *Luxembourg* (2), ss. 42, 43, where the “super-privilege” covers six months’ wages but limited to six times the minimum social wage.

⁴² (1), s. 228. This is also the case in *Burkina Faso* (1), s. 117; *Congo* (2), s. 92; *Cameroon* (1), s. 70(1); *Mauritania* (1), ss. 94, 96. The situation is similar in *Central African Republic* (1), s. 109; *Djibouti* (1), s. 104; *Niger* (1), s. 167; *Togo* (1), s. 100.

⁴³ (1), s. 108. No order has as yet been adopted establishing the portion of wages which may not be attached and the Committee has been commenting for a number of years on the need to adopt appropriate laws or regulations determining the relative priority of privileged wage debts in accordance with Article 11, paragraph 3, of the Convention.

⁴⁴ (1), ss. L.119, L.121.

priority over all other general or special privileged debts irrespective of the length of service. This super-privilege may be claimed on the employer's movable and immovable property and has to be paid within ten days of an adjudication in bankruptcy or winding up order, subject to the sole condition that the liquidator has the necessary funds in hand.

313. In a number of countries, wage claims and claims of the tax authorities or of the social security system are assigned the same rank of preference. This is the case in the *Czech Republic*,⁴⁵ where taxes and social security contributions, together with the costs of the administration of the estate and workers' claims, constitute the first category in the statutory order of priority. The legislation in *Bahamas*,⁴⁶ *Barbados*,⁴⁷ *Dominica*,⁴⁸ *Guyana*⁴⁹ and *Saint Vincent and the Grenadines*⁵⁰ provides that all rates, taxes, assessments or impositions and all wage debts due to a salaried employee for up to four months (up to two months for a wage earner) rank equally between themselves and that, if the property of the bankrupt is insufficient to meet them, they are to be abated in equal proportions.

1.3.2. Relative priority

314. Wage debts are not granted absolute priority everywhere. The legislation in certain countries, such as *Dominican Republic*,⁵¹ *Ecuador*,⁵² *Honduras*⁵³ and *Spain*,⁵⁴ ranks the claims of the State or the social security system higher than those of workers. This is also the case in *Lebanon*,⁵⁵ where

⁴⁵ (3), s. 32(1).

⁴⁶ (2), s. 30. Likewise, in *Sri Lanka* (3), s. 347(1), (2); (1), s. 50A; (2), s. 57, and *Uganda* (3), s. 37(1), (2); (4), s. 314, all taxes and local rates having become due and payable within the last 12 months, as well as all wages up to a prescribed amount, are paid in full first. See also *Cyprus* (4), s. 38(1)(b), (2); (5), ss. 299, 300(1)(b); *Kenya* (3), s. 38(1), (2); (4), s. 311(1), (5); *Nigeria* (2), s. 494(1), (4); (3), s. 36(2); *United Kingdom* (4), ss. 175(2), 386(1), and Schedule 6, s. 6, as well as certain non-metropolitan territories such as *Guernsey* (13), s. 1(4), and *Jersey* (20), s. 32(2).

⁴⁷ (3), s. 34(1), (2).

⁴⁸ (3), s. 37(1).

⁴⁹ (2), s. 39(1)(f); (3), s. 225(1)(b), (c).

⁵⁰ (3), s. 457(1)(b), (3)(a).

⁵¹ (1), s. 207.

⁵² (3), ss. 2398, 2399.

⁵³ (3), s. 2257(2)(d).

⁵⁴ (11), s. 1924. This ranking, however, concerns the workers' claims other than those covered by the guarantee institution.

⁵⁵ (1), s. 48. Similarly, in *Egypt* (1), s. 5, *Libyan Arab Jamahiriya* (1), s. 60, and *Syrian Arab Republic* (1), s. 8, wage debts are settled immediately after judicial costs, amounts due to the

wage claims for the past year rank after the claims of the Treasury and claims in respect of judicial costs and compulsory mortgages, while in the United Arab Emirates,⁵⁶ unpaid wages constitute a first priority on all the employer's movable and immovable property to be settled immediately after any legal expenses, sums due to the public treasury and alimony awarded under Islamic religious doctrine to wives and children. In Guinea-Bissau⁵⁷ and Mozambique,⁵⁸ the law provides that all wages are to be paid in full, before ordinary creditors, except for the State, are entitled to claim their share of the assets. The Government of *Madagascar* reported that the claims of the State and the social security system still rank higher than wage debts, but that the new draft Labour Code which is currently under review will give priority to workers' claims.

315. In other countries, wage claims are not granted a first-rank privilege, but are still listed ahead of tax claims. For example, in *Bolivia*,⁵⁹ *China*⁶⁰ and *Singapore*,⁶¹ wage claims are satisfied immediately after the expenses connected with the administration of the bankrupt estate and ahead of state and local taxes. In *Belarus*⁶² and the *Russian Federation*,⁶³ unpaid wages are second-priority claims, immediately after reparation claims for personal injury and death and judicial costs, and before taxes and social security contributions. In *Canada*,⁶⁴

Treasury and expenses for conservation and repairs. However, the Government of *Egypt* has reported that under s. 6 of the new draft Labour Code, which is now before the legislative authority for approval, wages are given first rank priority among privileged debts.

⁵⁶ (1), s. 4.

⁵⁷ (1), s. 108.

⁵⁸ (1), s. 58(2).

⁵⁹ (7), s. 1345(2). This is also the case in *Estonia* (3), s. 86(1); *Lithuania* (3), s. 35; *Sudan* (1), s. 71; *Tajikistan* (2), s. 26(1), (2); *Ukraine* (3), s. 21(2); (2), s. 28. In *Malaysia* (2), s. 292(1), wage claims are ranked second after costs and expenses in connection with the liquidation procedure. All remuneration payable in respect of vacation leave is given fourth priority, while any amounts due in respect of contributions payable during the 12 months before the commencement of the winding up under a superannuation or retirement benefit scheme are listed fifth in order of priority, followed by all federal taxes, which come sixth.

⁶⁰ (4), s. 37.

⁶¹ (2), s. 328(1), (2B), (3).

⁶² (2), s. 144. This is also the case in *Azerbaijan* (2), s. 53; *Kyrgyzstan* (2), s. 87; *Republic of Moldova* (3), s. 28(1), (2); (2), s. 20(1).

⁶³ (2), s. 106(2); (3), s. 855(2).

⁶⁴ (3), s. 136(1)(d). The federal Government has exclusive jurisdiction over bankruptcy and insolvency matters. While there are numerous provincial statutes that confer special protection to wage claims in general, these provisions are not applicable in the event of bankruptcy as the federal insolvency legislation overrides them; see, for instance, *Alberta* (4) s. 109(3); *British Columbia* (6), s. 87(3); *Manitoba* (7), s. 101; *Newfoundland and Labrador* (9), s. 37(1); *Ontario* (14), s. 14(1).

Central African Republic,⁶⁵ *Colombia*,⁶⁶ the United States⁶⁷ and *Uruguay*,⁶⁸ wage debts are placed in the fourth position and are satisfied immediately after court expenses, funeral expenses and the expenses for the terminal illness of the debtor. In New Zealand,⁶⁹ payment of all arrears of wages or salaries is ranked fourth among prioritized debts, immediately after the payment of costs, charges and expenses related to the adjudication procedure and the administration of the bankrupt estate, while the fifth priority in the distribution of assets is for the payment of income tax and other amounts payable to the Commissioner of Inland Revenue. In Australia,⁷⁰ under the relevant Commonwealth legislation concerning personal insolvency, the costs of insolvency, including expenses of the administration of the bankruptcy, expenses of the trustee, costs of any audit and funeral expenses in the case of a deceased debtor, are the only unsecured debts that come prior to employees' wage claims. More concretely, fifth ranking is given to a fixed amount for each employee (\$1,500 or as set by regulation) to whom remuneration is owed; sixth is the payment of all amounts due in respect of workers' compensation; and seventh is payment of all amounts due in respect of long-service leave, annual leave or sick leave in respect of a period before the date of the bankruptcy. Similarly, under the federal statutes governing corporate insolvency, priority is given to employees' entitlements, such as wages and superannuation contributions, injury compensation, leave entitlements and

⁶⁵ (1), s. 108. See also Chile (2), s. 2472; *Guatemala* (2), s. 101(b); *Mexico* (1), s. 123A(XXIII); (2), ss. 113, 114; (3), s. 262; Morocco (2), s. 1248; *Niger* (1), s. 166; *Togo* (1), s. 99. Similarly, in *Botswana* (3), ss. 82(1), 83(1), 84(1), 85(1), 86(a), and *Zimbabwe* (2), ss. 101 to 104, 105(1), (6), 106(1), wage claims are paid out of the free residue of the estate, i.e. that portion of the estate under sequestration which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention, immediately after the funeral and death-bed expenses of the insolvent, the costs of sequestration, and all taxed costs of any execution upon the estate of the insolvent, but before any taxes on the income of the insolvent, which rank fifth in the order of preferences. In *Bulgaria* (2), s. 722(1), wage claims are granted fourth-rank privilege, whereas unpaid contributions to the state social security system and taxes are placed sixth and seventh respectively. See also *Seychelles* (2), s. 2101 and *Thailand* (1), s. 11.

⁶⁶ (1), s. 157; (2), s. 2495.

⁶⁷ Under the Federal Bankruptcy Code, in the event of an employer's bankruptcy, wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual, are preferred claims and rank in priority next after administrative expenses, funeral expenses, expenses of the last sickness, and the allowances of the surviving spouse and minor children. Similar provisions are found in most state laws; see, for instance, *Arizona* (7), s. 23.354; *Idaho* (17), s. 45-602; *Indiana* (19), s. 22-2-10-1; *Rhode Island* (47), s. 28-14-6.1; *Utah* (52), s. 34-26-1; *Washington* (55), s. 49.56.010.

⁶⁸ (15), s. 2369(4); (16), s. 1732(4).

⁶⁹ (2), s. 104(1)(d), (e); (3), s. 312(1) and Schedule 7.

⁷⁰ (3), s.109(1); (4), s. 556(1).

retrenchment payments, after certain expenses related to preserving or carrying on the company's business and certain winding up costs.

316. In certain countries, such as Bahrain and Kuwait, there do not appear to exist any laws or regulations conferring privileged status to workers in respect of wage claims in the event of the employer's bankruptcy or judicial liquidation of the enterprise. Similarly, the Government of the British Virgin Islands has reported that wages do not constitute privileged debts under the laws of the territory nor are they protected by means of any wage guarantee. In addition, the Government of Germany has stated that by virtue of the new Insolvency Ordinance, which entered into force in 1999, all general preferential rights (including those of the Treasury, social funds and employees) were abolished and that employees are now protected by means of an insolvency allowance which covers unpaid wages of the last three months before the opening of the proceedings. In contrast, the Government of the *United Republic of Tanzania* has reported that workers are treated as privileged creditors as a matter of practice, even in the absence of national laws or regulations on this matter. In other countries, such as the *Islamic Republic of Iran*,⁷¹ *Iraq*⁷² and Namibia,⁷³ while recognizing workers as preferential creditors, the law does not establish the relative priority of wage debts compared to other privileged debts.

1.4. Limitations on the privileged treatment of workers' claims

317. Most countries have found it necessary to set limits on the extent of wage claims to be protected by means of a privilege. Preferential wage debts, therefore, must arise within a prescribed period of service prior to the bankruptcy or judicial liquidation of an enterprise, or may not exceed a prescribed amount. In some cases, the legislation provides for a combination of these two types of limits.

1.4.1. Time limits

1.4.1.1. Wage claims for work or services rendered prior to bankruptcy or liquidation

318. In many countries the privilege covers at the most a specific period of service, also known as the "reference period", preceding the opening of bankruptcy proceedings or the closure of the enterprise. The protected period

⁷¹ (1), s. 13(1). See also Qatar (1), s. 7.

⁷² (1), s. 12.

⁷³ (1), s. 48(2).

may vary from three months, for instance, in *Kyrgyzstan*⁷⁴ and *Zambia*,⁷⁵ to three years as in the case of the *Czech Republic*,⁷⁶ *Slovakia*⁷⁷ and *Tajikistan*.⁷⁸ In *Mauritius*⁷⁹ and *Uganda*,⁸⁰ the reference period is fixed at four months, while in *Argentina*⁸¹ and *Norway*,⁸² the maximum protected period is six months. In other countries, such as *Bulgaria*⁸³ and *Honduras*,⁸⁴ the national legislation limits the preferential treatment of wage claims to 12 months preceding the initiation of proceedings or the liquidation of the indebted enterprise. In *Bolivia*⁸⁵ and *Central African Republic*,⁸⁶ preferred claims are those arising from work performed during the year in which the insolvency occurred and in the preceding year.

319. In some countries, the reference period is defined differently depending on the occupational category of the worker, the nature of the debtor, or the periodicity of wage payment. In *Guinea*,⁸⁷ for instance, the protected period is six months for wages paid at intervals not exceeding a fortnight and

⁷⁴ (2), s. 87.

⁷⁵ (2), s. 2(1)(a).

⁷⁶ (3), s. 31(4).

⁷⁷ (3), s. 32(2)(a). Wage claims for up to three months from the last 18 months of the employment relationship preceding the employer's insolvency are covered by a special guarantee fund.

⁷⁸ (2), s. 26(2).

⁷⁹ (3), ss. 2148, 2152. This is also the case in *Saint Vincent and the Grenadines* (3), s. 457(1)(b) and *Swaziland* (1), s. 54(2).

⁸⁰ (1), s. 36(1).

⁸¹ (1), ss. 268, 273; (4), ss. 241, 246. This is also the case in *Azerbaijan* (2), s. 53; *Denmark* (2), s. 95(1)(i); *Guatemala* (2), s. 101; *Republic of Moldova* (3), s. 28(2)(b); *Morocco* (2), s. 1248; *Paraguay* (1), ss. 247, 248; *Switzerland* (3), s. 219; *Venezuela* (1), s. 158. In addition, the Governments of Japan and Sweden have indicated that priority claims are limited to those which became due during the last six months of the employee's service with the bankrupt debtor. Similarly, in the United States, in *Kansas* (21), s. 44-312, the preference of wages of employees in insolvency extends to six months' wages, while in *Utah* (52), s. 34-26-1, wages owing to workers for work performed within five months next preceding the cessation of business or receivership are to be considered and treated as preferred debts.

⁸² (2), s. 9-3.

⁸³ (2), s. 722(1). This is also the case in *Côte d'Ivoire* (1), s. 33(2); *Lebanon* (1), s. 48; *Mali* (1), s. L.113.

⁸⁴ (1), s. 128(4); (2), s. 374.

⁸⁵ (7), s. 1345(2).

⁸⁶ (1), s. 108.

⁸⁷ (1), s. 221.

12 months for wages paid monthly. In *Turkey*,⁸⁸ the law provides that in the event of bankruptcy of an enterprise the domestic servants employed by the owner of the enterprise shall be treated as privileged creditors as regards unpaid wages for up to 12 months, whereas all salaried employees, clerical staff and workers employed by the hour or on a piece or task rate shall be treated as privileged creditors for wage claims not exceeding six months prior to the bankruptcy. Inversely, in *Uruguay*,⁸⁹ the protected period is six months for claims of manual workers and one year for claims of lawyers, medical doctors, attorneys, dependent workers and domestic servants. More unusual is the situation in *Uganda*,⁹⁰ where the length of the protected period depends on the worker's nationality or origin, since privileged debts include all wages of a labourer not exceeding a prescribed amount for work performed during the last four months before the date of the receiving order, or in the case of an African labourer, during 12 months before that date.

1.4.1.2. Wage claims for work performed after the reference date

320. Under the terms of Article 11, paragraph 1, of the Convention, the privilege is limited to wages due for service rendered during a prescribed period prior to the date of initiation of bankruptcy proceedings, also known as the "reference date". At a time when bankruptcy was tantamount to the immediate closure of the establishment and the termination of employment of the workers, the protection of wages in respect of service performed after the bankruptcy was not at issue. Upon the cessation of operation of the insolvent employer, all workers were automatically dismissed, and it was therefore only natural to confine the preferential treatment of workers' wages to services rendered prior to the bankruptcy or judicial liquidation. Modern practice, however, has shown the need for protection of claims arising after the reference date, as legislation in numerous countries now allows for insolvent enterprises to continue to operate either temporarily with a view to winding up or on a new basis with the aim of redressing their financial situation. As the tendency has shifted from the liquidation to rehabilitation of a firm in difficulties, it is all too common today

⁸⁸ (2), s. 206. In *Guyana* (2), s. 39(1)(d), (f), according to the order of distribution of the assets of an insolvent employer, if the assets were obtained from the sale of any plantation, the salaries of the persons employed in the business are protected by privilege for the three months preceding the receiving order, whereas all wages of any worker employed in a mine, woodcutting, or *balata* bleeding business constitute privileged debts in respect of services rendered during four months prior to the date of the receiving order, and those of salesmen in retail provision shops or domestic servants for the two months before that date.

⁸⁹ (15), s. 2369(4); (16), s. 1732(4).

⁹⁰ (3), s. 37(1)(d); (4), s. 314.

for employees to continue to work after suspension of payment and the institution of proceedings, hence the need to extend privileged protection to claims subsequent to the reference date.

321. The legislation in several countries treats wages in respect of services rendered after the beginning of proceedings as administrative expenses or bankruptcy costs. For example, in *Bulgaria*,⁹¹ bankruptcy costs, including payables to employees where the debtor's enterprise has not wound up its operations, are placed third and thus rank higher than the wage claims relating to work performed prior to the institution of bankruptcy proceedings. In *Austria*,⁹² the legislation treats as privileged debts only those wage claims arising after the initiation of bankruptcy proceedings, since claims prior to that date are covered – as explained below – by the wage guarantee fund and such claims are considered to be debts of the estate, in the same way as the costs of the bankruptcy proceedings, public taxes and social insurance contributions.

1.4.2. Monetary limits

322. There are two main types of monetary limits to the wage debts protected by privilege; a cash ceiling, i.e. a specified amount, or an adjustable limit defined by reference to figures such as the minimum interoccupational wage or the maximum monthly wage used for calculating social security contributions. In this latter case, the limit does not need periodic adjustment, but changes automatically every time the reference amount is itself reviewed. In *Spain*,⁹³ for instance, privileged protection, that is protection other than the “super-privilege”, is limited to three times the minimum daily wage rate multiplied by the total number of unpaid days. In *Malta*,⁹⁴ wage debts up to the amount of 200 liri constitute privileged claims and are paid in preference to all other claims. In *Australia*,⁹⁵ the bankruptcy legislation, i.e. the legislation dealing with the insolvency of individuals and not corporations, provides for a monetary cap to the amounts owed in relation to wage debts (not including amounts in respect of long-service leave, extended leave, annual leave, recreation leave or sick leave) fixed for each employee at \$1,500 or such greater amount as may be prescribed by regulations. In contrast, the legislation on corporate insolvency provides for a maximum limit only with respect to the priority benefits of those who were directors of the corporation and their relatives within 12 months of the commencement of the winding up by limiting

⁹¹ (2), s. 723.

⁹² (3), s. 46(1); (4), s. 23(1).

⁹³ (1), s. 32(3).

⁹⁴ (1), s. 27.

⁹⁵ (3), s. 109(1)(e); (4), s. 556(1A), (1B).

the payable amounts to \$2,000 in respect of wages and \$1,500 for leave entitlements. In Seychelles,⁹⁶ privileged protection of wage claims is limited to a maximum amount of 30,000 rupees in respect of any one claimant.

323. Also, in *Benin*,⁹⁷ *Burkina Faso*⁹⁸ and *Congo*,⁹⁹ the amount of the claim protected by a privilege is limited to the part of the wage which is not subject to attachment. It should be noted, in this respect, that according to Article 7, paragraph 1, of Convention No. 173, which incidentally was ratified by *Burkina Faso* in 1999 in respect of Part II, limitations to the protection by privilege of workers' claims are permissible, but must not fall below a "socially acceptable level", while Paragraph 4 of Recommendation No. 180 offers some guidance as to what might objectively constitute a socially acceptable level by referring to variables such as the minimum wage, the part of the wage which is unattachable, the wage on which social security contributions are based or the average wage in industry. The assumption is that since the unattachable portion of the wage by definition corresponds to the minimum amount necessary for the maintenance of the worker and his family, it can be a reliable criterion for the determination of a socially acceptable level of protection of the worker's income in the case of the employer's bankruptcy or insolvency.

1.4.3. Multiple limits

324. In many countries, the legislation specifies limits in respect of both the maximum protected amount and the maximum protected service period. This is the case, for instance, in *Malaysia*,¹⁰⁰ where the privilege extends to all wages or salaries (including allowances or commissions) not exceeding 1,500 ringgit or such other amount as may be prescribed from time to time on a time or piece-work basis in respect of services rendered within a period of four months before the commencement of the winding up of an insolvent company. In *Botswana*,¹⁰¹

⁹⁶ (1), s. 37.

⁹⁷ (1), s. 228.

⁹⁸ (1), s. 117.

⁹⁹ (2), s. 92.

¹⁰⁰ (2), s. 292(1)(b). Similarly, in *Kenya* (3), s. 38(1)(c), (d); (4), s. 311(1)(c), (2), priority is granted to the wages or salary of an employee, clerk or servant in respect of services rendered during four months next before the relevant date, not exceeding 4,000 shillings, whereas in the United Kingdom (4), Schedule 6, s. 9, preferential debts include claims for wages in respect of a period of four months next before the relevant date, or a sum not exceeding £800. Four months' wages or a maximum amount of £1,500 is also the statutory limit in Guernsey (13), s. 1(1)(b), whereas in Jersey (20), s. 32(1)(b), the priority claim covers unpaid wages due for a period up to six months or an amount of £2,000.

¹⁰¹ (3), s. 85(1). Similarly, in *Zimbabwe* (2), s. 105(1), the preferential treatment of wage debts is limited to a period of three months in the case of an employee engaged by the month, or a period of four weeks in the case of an employee engaged by the week, up to a sum of \$400.

preference is given to claims in respect of wages for one month and the wages for the month current with the sequestration of any worker employed by the month (or the wages for one week and the wages for the week current with the sequestration of any worker employed by the week), but to an amount not exceeding 100 pula. In *Bahamas*¹⁰² and *Barbados*,¹⁰³ in the case of a clerk or servant, four months' wages or a prescribed amount, whichever is the less, may be paid in preference to ordinary debts, whereas in the case of a labourer or workman the privileged debts are limited to two months' wages or half of the amount prescribed for a clerk or servant.

325. In Canada,¹⁰⁴ the federal legislation confers priority to claims in respect of wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during the six months immediately preceding the bankruptcy to the extent of \$2,000 in each case. In *Cyprus*,¹⁰⁵ the preferential treatment of wage debts is limited to the period of 18 weeks preceding the receiving order, or an amount not exceeding 18 times double the amount of basic remuneration subject to insurance contributions. In *Croatia*,¹⁰⁶ only wage claims for the last three months prior to the initiation of the bankruptcy proceedings or prior to the termination of the employment contract are covered up to an amount corresponding, for a particular month, to two-thirds of the national average monthly wage. In *Singapore*,¹⁰⁷ the amount of wage claims settled in priority to all other unsecured debts may not exceed an amount that is equivalent to five months' salary or \$7,500, whichever is lower. In *New Zealand*,¹⁰⁸ employees' wages and holiday pay are protected for a period of four months immediately preceding the adjudication or up to \$6,000. In the *United States*,¹⁰⁹ under the Federal Bankruptcy Code, priority is granted to wages earned within 90 days before the

¹⁰² (2), s. 30; (3), s. 159(1)(b), (c). This is also the case in *Dominica* (3), s. 37(1)(b), (c); *Guyana* (3), s. 225(1)(b), (c); *Nigeria* (3), s. 36(1)(b); (2), s. 494(1)(c), (d); *Sri Lanka* (3), s. 347(1)(f); *Uganda* (3), s. 37(1)(c), (d).

¹⁰³ (3), s. 34(1)(b), (c).

¹⁰⁴ (3), s. 136(1)(d).

¹⁰⁵ (4), s. 38(1)(b); (5), s. 300(1)(b).

¹⁰⁶ (1), s. 86(1), (2).

¹⁰⁷ (1), s. 33(4); (2), s. 328(2).

¹⁰⁸ (2), s. 104(1)(d); (3), s. 312(1) and Schedule 7. According to the Government's report, the \$6,000 threshold in respect of priority payments to employees will soon be raised to \$15,000.

¹⁰⁹ At the state level, limits on preferred wage claims vary from 60 days' wages or an amount of \$100 in *Washington* (55), s. 49.56.010, to three months' wages or \$600 in *Indiana* (19), s. 22-2-10-1. In *Arizona* (7), s. 23-354, the law confers priority to wages not exceeding \$200 for services rendered within 60 days prior to the insolvency proceedings, whereas in *Idaho* (17), s. 45-602, the limit is set at 60 days' wages or \$500. Moreover, in *Rhode Island* (47), s. 28-14-6.1, priority is given to unpaid wages not exceeding \$300 earned within three months.

date of the filing of the petition or the date of the cessation of the debtor's business but only to the extent of \$4,000 for each individual.

326. Lastly, it should be mentioned that in some countries, such as *Belarus, Chile, China, Colombia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Guinea-Bissau, Hungary, Iraq, Libyan Arab Jamahiriya, Nicaragua, Oman, Panama, Peru, Philippines, Russian Federation, Syrian Arab Republic and Ukraine*, the legislation does not establish a maximum length of service or a maximum amount for privileged wage claims, or information is not available on this point.

1.5. Enforceability of privilege against the debtor's assets

327. A distinction is often made between general privileges and special privileges, depending on the type of assets against which such privileges may be exercised. Generally speaking, general privileges are enforceable against all of the debtor's assets, whereas special privileges are only enforceable against a specific asset.

328. In most countries, wage claims are accorded a general privilege enforceable against all of the debtor's assets, both movable and immovable. This is the case, for instance, in *Brazil*,¹¹⁰ *Côte d'Ivoire*,¹¹¹ *Ecuador*,¹¹² *Egypt*,¹¹³ *Gabon*,¹¹⁴ *Mexico*,¹¹⁵ *Niger*,¹¹⁶ *Seychelles*¹¹⁷ and *Venezuela*.¹¹⁸

329. In some countries, the legislation grants wage claims a general privilege which is nevertheless limited to movable assets. For example, in *Guinea*,¹¹⁹ the wage claims of employees and apprentices for the year in which the insolvency occurred and the preceding year have priority in respect of the debtor's movable assets only.

¹¹⁰ (6), s. 102. This is also the case in *Bolivia* (7), s. 1345; *Burkina Faso* (1), s. 117; *Central African Republic* (1), s. 108; *Chad* (1), s. 268; *Congo* (2), s. 92; *Democratic Republic of the Congo* (1), s. 91; *Dominican Republic* (1), s. 207; *Guatemala* (2), s. 101; *Libyan Arab Jamahiriya* (1), s. 60; *Madagascar* (1), s. 77; *Mauritius* (3), ss. 2148, 2152; *Rwanda* (1), s. 102; *Syrian Arab Republic* (1), s. 8; *Togo* (1), s. 99.

¹¹¹ (1), s. 33(2).

¹¹² (3), ss. 2391, 2399.

¹¹³ (1), s. 5.

¹¹⁴ (1), s. 156.

¹¹⁵ (2), s. 113.

¹¹⁶ (1), s. 166.

¹¹⁷ (2), ss. 2101, 2104.

¹¹⁸ (1), ss. 158 to 160; (2), s.101; (3), s. 1870.

¹¹⁹ (1), s. 226.

330. Special privileges are often granted to seafarers in respect of the wages for the last voyage, which are enforceable against their vessels, and to masons, carpenters and other construction workers, whose claims are enforceable against the property which they have helped to build or repair, while in the case of farm workers, the preference is enforceable against the harvest.¹²⁰ In *Madagascar*,¹²¹ apart from the above categories, special privileges are also granted to assistants employed by domestic workers. In *Argentina*¹²² and *Mauritius*,¹²³ architects, building contractors, masons and other workers enjoy a special privilege over the buildings or other construction works executed for the debtor's account up to the amount of their honoraria, fees or salaries, while in *Bolivia*,¹²⁴ transport workers enjoy a privilege over the transported goods.

2. Protection of workers' claims by a guarantee institution

2.1. Weaknesses of the privilege system and the need for the revision of Convention No. 95

331. Over the years, the protection of workers' wage claims in the event of bankruptcy by means of a privilege has not proven to be very satisfactory. Article 11 of Convention No. 95 has been criticized on several grounds: first, it may be without much practical effect where there are not sufficient realizable assets in the bankrupt estate. Secondly, it seeks to provide a relative priority for workers' claims, but fails to guarantee a minimum rank for such claims. Moreover, Article 11 recognizes the possibility of setting a ceiling to the privilege, without establishing a minimum standard of socially acceptable protection. Finally, it does not address the question of wage claims for work performed after the insolvency in situations where the latter does not necessarily involve the closure of the enterprise.¹²⁵ It therefore became obvious that the privilege system, no matter how improved or strengthened, would by and large

¹²⁰ This is the case, for instance, in *Djibouti* (1), s. 103; *Guinea* (1), s. 224; *Mali* (1), s. L.116; *Togo* (1), s. 99.

¹²¹ (1), s. 83.

¹²² (1), s. 271.

¹²³ (3), s. 2151.

¹²⁴ (7), s. 1349(3).

¹²⁵ For a critical analysis of the preference system, see Arturo Bronstein, "The protection of workers' claims in the event of the insolvency of their employer", in *International Labour Review*, Vol. 126, 1987, pp. 715-731. See also the Report of the Meeting of Experts on the Protection of Workers in the Event of the Insolvency of their Employer, MEWPI/1985/D.3/Rev., paras. 29-36.

fall short of ensuring the full and definite settlement of wage debts and that new guarantees for the payment of wage claims were needed.

332. In addition, significant developments in national law and practice since the adoption of Convention No. 95 pointed to the necessity to adopt new standards. First, the labour legislation in many countries extended the scope of wages covered by the privilege to cover various bonuses and allowances. Secondly, noticeable progress was also made in respect of the priority granted to workers' claims, which progressively came to be given preference over most other privileges. Thirdly, since 1967, numerous wage guarantee schemes had been established offering protection of workers' claims through the intervention of an independent institution.

333. Another objection which progressively gained currency, related to the philosophy underlying the preference system: the sole object of bankruptcy proceedings under the preference system is to arrange for the liquidation of the distressed enterprise and for the sale of its assets for the purpose of satisfying the creditors' claims. Nowadays, however, it is widely accepted that such proceedings should instead be aimed at rescuing enterprises in difficulties, the assumption being that in most cases it is economically and socially preferable to keep the enterprise afloat by separating its fate from that of its owner. Under the influence of the so-called "rescue culture", therefore, the privilege system has come to be seen as not only inadequate in its practical application but also outdated in its conception.

2.2. From privileged claims to wage guarantees: ILO Convention No. 173

334. Convention No. 173 is one of the very few ILO instruments consisting of different parts which may be ratified together or separately. It proposes a distinct set of standards dealing with the protection of workers' claims by means of a privilege and another referring to protection through the intervention of an independent guarantee institution. The dual-thrust instrument is based on a flexible approach permitting member States to choose the system of protection which best corresponds to their needs and interests. When ratifying the Convention, a member State may therefore undertake to apply either the provisions of Part II, dealing with protection by privilege, or those of Part III regulating the protection of workers' claims by means of wage guarantee institutions. Nothing prevents a member which has initially accepted only one of the two parts from subsequently extending its acceptance to the other part.¹²⁶

¹²⁶ For the Conference discussions which preceded the adoption of the Convention, see ILC, 78th Session, 1991, *Record of Proceedings*, pp. 20/1-20/27, 26/2-26/6 and ILC, 79th Session,

335. With respect to the privilege system, Convention No. 173 marks a clear improvement over the standards set out in Convention No. 95 in three different respects. First, it defines the minimum coverage of the privilege, namely: (i) workers' claims for wages relating to a prescribed period of not less than three months prior to the insolvency or prior to the termination of the employment; (ii) claims for holiday pay as a result of work performed during the year in which the insolvency or the termination of the employment occurred and in the preceding year; (iii) claims for amounts due in respect of other types of paid absence (e.g. sick leave or maternity leave) relating to a prescribed period which may not be less than three months prior to the insolvency or prior to the termination of the employment; and (iv) severance pay.¹²⁷ Secondly, the Convention requires that national laws or regulations must 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 for arrears in taxes or unpaid contributions.¹²⁸ Thirdly, the Convention specifies that whenever national laws or regulations set a ceiling to the protection by privilege of workers' claims, the prescribed amount may not fall below a socially acceptable level, and that it therefore has to be reviewed periodically so as to maintain its value.¹²⁹

1992, *Record of Proceedings*, pp. 25/1-25/40, 30/2-30/8. Convention No. 173 entered into force on 8 June 1995. To date, it has been ratified by 14 member States, nine of which have only accepted the obligations of Part II, three others have only accepted the obligations of Part III and another two have decided to apply the provisions of both parts. It is interesting to note that Australia and Slovakia, although they have so far only accepted the obligations of Part II of the Convention regarding protection of workers' claims by means of a privilege, are already operating wage guarantee schemes. Full indications of ratifying States are given in Appendix I.

¹²⁷ Under the terms of the Recommendation, the privilege should also cover overtime pay, commissions and other forms of remunerations, as well as end-of-year and other bonuses relating to work performed during a period prior to the insolvency which should not be less than 12 months, payments due in lieu of notice of termination of employment, and compensation payable directly by the employer in respect of occupational accidents and diseases. Moreover, other claims such as contributions due in respect of national social security institutions or other social protection schemes might also be protected.

¹²⁸ The Convention stipulates, however, that where workers' claims are protected by a guarantee institution, the claims so protected may be given a lower rank than those of the State and the social security system.

¹²⁹ In this respect, the Recommendation indicates that to establish what constitutes a socially acceptable level, account should be taken of variables such as the minimum wage, the part of wage which is unattachable, the wage on which social security contributions are based or the average wage in industry. Attention should also be drawn to other provisions of the Recommendation addressing the question of the payment of workers' claims which fall due after the insolvency proceedings have been opened, that is when the enterprise is authorized to continue its activities, and also the problem of a special procedure for accelerated payment in case the insolvency proceedings cannot ensure rapid settlement of workers' privileged claims.

336. As regards wage guarantee schemes, Convention No. 173 provides that they must cover as a minimum: (i) workers' claims for wages relating to a prescribed period of not less than eight weeks prior to the insolvency or prior to the termination of the employment; (ii) claims for holiday pay as a result of work performed during a prescribed period which may not be less than six months prior to the insolvency or the termination of the employment; (iii) claims for amounts due in respect of other types of paid absence relating to a prescribed period which may not be less than eight weeks prior to the insolvency or prior to the termination of the employment; and (iv) severance pay. The minimum coverage under a wage guarantee scheme is more limited than that afforded by the privilege system, since a guarantee institution offers an assurance of payment which is not present in the case of privilege. The Convention allows for the limitation of guaranteed compensation to a certain amount, but requires such amount not to fall below a socially acceptable level, and to be periodically adjusted so as to maintain its value.

337. Recommendation No. 180 highlights the main principles which might govern the operation, management and financing of guarantee institutions; first, they should be administratively, financially and legally independent of the employer. Secondly, they should be financed by compulsory contributions payable by employers, unless they are financed exclusively out of public resources, and the funds so collected should only be used for the purpose of satisfying claims in respect of unpaid wages. Thirdly, payments should be effected irrespective of any outstanding contributions due by the insolvent employer to the guarantee institution.

338. It should be mentioned that the standards set out in Part III of the Convention dealing with wage guarantee institutions bear a certain similarity to the provisions of the European Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. The 1980 Directive requires Member States to put in place an institution guaranteeing to employees whose employer has become insolvent the payment of their outstanding claims to remuneration for a specific period. In order to restrict the duration of the guarantee, Member States are given the choice of three alternative dates marking the beginning of the reference period within which the minimum period of guaranteed remuneration must fall. The Directive also allows Member States to set a ceiling for the liability for employees' outstanding claims, and highlights the operating principles for guarantee

institutions, i.e. financial independence, funding by employers, and liability irrespective of the contributions record.¹³⁰

339. On the whole, the partial revision of Article 11 of Convention No. 95 has resulted in a flexible instrument setting considerably higher standards of protection and offering modern responses to the current challenges of regulating corporate insolvency. In the Committee's opinion, Convention No. 173 constitutes a solid and ambitious response to the problems of social protection in the case of insolvency, which have become increasingly topical in the context of a globalized economy and a period of recession. It gives substantive content to the privilege system, introduces new methods of protection in the form of wage guarantee funds, and leaves a wide margin of discretion to member States in the implementation of the standards. The information available shows that many countries, in particular those which have in the past decade gone through market-based structural changes, are in the process of establishing wage guarantee institutions, or are currently engaged in discussions with the social partners with a view to setting up such institutions in the very near future. The Committee also notes that in some cases the technical assistance of the Office has been requested in drafting appropriate laws and regulations or in disseminating relevant information concerning similar experiences in other countries. The Committee has every reason to believe, as explained in Chapter IX below, that the rate of acceptance of Convention No. 173 will increase significantly in the coming years and requests the Office to increase its efforts to assist member States in devising effective insolvency regimes in line with the standards contained in the Convention.

¹³⁰ In September 2002, the European Parliament and the Council adopted Directive 2002/74/EC amending Council Directive 80/987/EEC with a view to adapting its content to new trends in insolvency law in the Member States, and better reflecting other Community directives adopted in the meantime, as well as the recent case law of the Court of Justice. The new Directive proposes a wider definition of insolvency to cover not only bankruptcy or liquidation proceedings, but also other collective insolvency proceedings. It also extends the scope of protection in respect of the employees covered by stipulating that Member States may not exclude part-time workers, workers with fixed-term contracts or workers with a temporary employment relationship within the meaning of the relevant Directives. Moreover, the new Directive seeks to simplify the provisions on the time limit applicable to guaranteed pay claims by laying down a minimum period (three months) and leaving it to Member States to fix a reference date, it being understood that such period does not necessarily refer only to wages due before the reference date, but may also cover claims arising after that date. Finally, the Directive addresses the question of jurisdiction in cases of cross-border insolvencies. In this connection, see also the European Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, which entered into force in May 2002 and which aims to improve and accelerate insolvency proceedings with cross-border effects. For more, see Pierre Rodière, *Droit social de l'Union européenne*, 2002, pp. 490-494.

5.1. Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer

Article 1

1. This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1). [...]

Article 2

1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings, as provided for under the laws, regulations and administrative provisions of a Member State, based on insolvency of the employer and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has (a) either decided to open the proceedings, or (b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings. [...]

Article 3

Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships. The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.

Article 4

1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.

2. When Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in Article 3. Member States may include this minimum period of three months in a reference period with a duration of not less than six months. [...]

3. Furthermore, Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive. When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.

(continued...)

(concluded...)

Article 8a

1. When an undertaking with establishments in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(1), the institution responsible for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work.

2. The extent of employees' rights shall be determined by the law governing the competent guarantee institution.

3. Member States shall take the measures necessary to ensure that, in the cases referred to in paragraph 1, decisions taken in the context of insolvency proceedings referred to in Article 2(1), which have been requested in another Member State, are taken into account when determining the employer's state of insolvency within the meaning of this Directive. [...]

2.3. Wage guarantee funds

340. Wage guarantee institutions seek to provide a remedy for all employees who would otherwise not recover entitlements by imposing a cost burden on all businesses, including those that are both solvent and responsible. Such schemes were first introduced in Western Europe in the late 1960s and early 1970s, with *Belgium* being the first country to set up a wage guarantee fund in 1967, followed by the *Netherlands* in 1968, Sweden in 1970, Denmark in 1972 and Finland, *France* and *Norway* in 1973. Several other countries, such as Australia, *Austria*, *Czech Republic*, Estonia, *Greece*, *Israel*, *Italy*, Japan, Republic of Korea, Lithuania, Luxembourg, *Poland*, *Slovakia*, *Spain* and Switzerland, also operate wage guarantee institutions.

2.3.1. Scope of the wage guarantee

341. As a general rule, all employees may benefit from a wage guarantee scheme. In certain cases, however, persons such as senior managers or close relatives of the insolvent employer are excluded for fear of abuse. In *Austria*,¹³¹ for instance, managerial staff and executive officers who exert a decisive influence over the company's operations, as well as partners with a controlling

¹³¹ (2), s. 1(6). Similarly, the Government of Finland has reported that the wage guarantee under the Pay Security Act does not apply to the managing director of a company, the general partner of a limited partnership or other persons holding managerial positions. In United Kingdom: Isle of Man (14), s. 70, no payment may be made to a person who, at any time during the 12 months preceding the insolvency, was a director of the company, or the beneficial owner of one-half or more of the issued share capital of the company, or of any other company which at that time had control (directly or indirectly) of that company.

influence on the company, are not entitled to receive payment from the Insolvency Compensation Fund (IAG). Similarly, in Switzerland,¹³² the scheme for insolvency compensation does not apply to senior management or persons with financial participation in the enterprise, or to their spouses when they are employed in the same enterprise. In Australia,¹³³ an “excluded employee”, i.e. an employee who was a shareholding executive director of the former employer, a relative of such a director or a relative of the former employer, is not eligible to receive payments under the existing schemes. The term “relative” in this respect means the spouse, parent or remote linear ancestor, son, daughter or remoter issue, or brother or sister of the person. In addition, the Government of *Spain* has indicated at the time of the ratification of Convention No. 173 that it excludes household servants from the application of Part III dealing with the protection of workers’ claims by means of a guarantee institution.

342. The wage and other service-related claims covered by guarantee funds vary considerably. With respect to wages, most schemes guarantee the payment of all the components of remuneration, including the basic wage, allowances, bonuses, increments, holiday pay and sick leave pay, as well as compensation arising out of termination of employment, such as severance pay. This is the case, for instance, in the *Czech Republic*,¹³⁴ *Israel*¹³⁵ and *Poland*.¹³⁶ In Australia,¹³⁷ payments to eligible claimants cover unpaid wages (including allowances, such as shift allowances and overtime), annual leave, long service leave, payment in lieu of notice and redundancy pay. In addition to these claims,

¹³² (4), s. 51(2). In this respect, it is interesting to note that the new Directive 2002/74/EC of 23 September 2002 amending Council Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer provides for the possibility to refuse or reduce the liability of the guarantee institution “in cases where the employee, on his or her own or together with his or her close relatives, was the owner of an essential part of the employer’s undertaking or business and had a considerable influence on its activities”.

¹³³ See operational arrangements of the Employee Entitlements Support Scheme (EESS) and the General Employee Entitlements and Redundancy Scheme (GEERS), s. 5.1. The GEERS was established in September 2001 to deal with claims lodged in respect of terminations due to insolvency occurring on or after 12 September 2001, while the EESS, which was established in February 2000, continues to apply to claims arising out of terminations due to insolvency from 1 January 2000 up to and including 11 September 2001. The operational arrangements of these schemes may be accessed at <http://www.workplace.gov.au/>. Similarly, in the United States, some state laws specifically provide that no officer or director in the case of a corporation, no partner in the case of a partnership and no owner in the case of a sole proprietorship may be considered an employee for the purposes of a wage guarantee fund; see, for instance, *Maine* (25), s. 632(1).

¹³⁴ (5), s. 3(b). See also *Denmark* (1), s. 2(1); *Republic of Korea* (2), s. 6(2); *Luxembourg* (2), s. 46(2); *United Kingdom: Falkland Islands* (9), s. 100(3), and *Isle of Man* (14), s. 67(3).

¹³⁵ (2), s. 180; (1), s. 1.

¹³⁶ (2), s. 6(2); (3), s. 1.

¹³⁷ See operational arrangements of the EESS and the GEERS, s. 6.1.

the legislation in *Austria*,¹³⁸ *Norway*,¹³⁹ *Slovakia*¹⁴⁰ and *Sweden*¹⁴¹ also guarantees any necessary expenses incurred in prosecuting such claims. In contrast, in *Finland*, *Greece* and *Switzerland*,¹⁴² the legislation does not guarantee the payment of severance benefits, while in *Spain*,¹⁴³ only indemnity for dismissal is guaranteed.

2.3.2. Limits of the wage guarantee

343. In a manner comparable to the privilege system, payments guaranteed by a wage fund are subject to limitations with regard to the length of service or a prescribed amount, or a combination of these two criteria. For instance, the protected period of service is limited to three months in the *Czech Republic*,¹⁴⁴ *Finland*,¹⁴⁵ *Italy*,¹⁴⁶ *Poland*¹⁴⁷ and *Slovakia*¹⁴⁸ and to six months in *Luxembourg*,¹⁴⁹ *Norway*¹⁵⁰ and *Switzerland*.¹⁵¹ In contrast, in *Austria*,¹⁵² the period of protected service appears to be unlimited, with the only limitation being that compensation is payable for wages which became due more than six months before the bankruptcy or insolvency proceedings were instituted. In *Australia*,¹⁵³ under the Employee Entitlements Support Scheme (EESS), protected entitlements include up to four weeks' unpaid wages, four weeks'

¹³⁸ (2), s. 1(2).

¹³⁹ (3), s. 1.

¹⁴⁰ (4), s. 64b(2)(i).

¹⁴¹ (2), ss. 7, 8.

¹⁴² (5), s. 5(2).

¹⁴³ (1), ss. 26(1), 33(1), (2), (8), 50, 51, 52(c).

¹⁴⁴ (5), s. 5(1). An employee may only file a claim for wage arrears against the same employer once in a period of three years. Moreover, in *Greece* (5), s. 5(3), and *Slovenia* (2), s. 19, guaranteed payment is also limited to unpaid wages for a period of three months prior to the date of termination of employment. Similarly, in the Republic of Korea (2), s. 6(2); (3), s. 10(1), wages of the final three months and the retirement allowance of the final three years are guaranteed by the Wage Claim Guarantee Act.

¹⁴⁵ (2), s. 5.

¹⁴⁶ (2), s. 2(1).

¹⁴⁷ (2), s. 6(2).

¹⁴⁸ (6), s. 22(4). Wage claims not settled by the guarantee fund, and which arose in the last three years prior to the declaration of the bankruptcy order, remain privileged debts of the first category and are satisfied before taxes and social security contributions.

¹⁴⁹ (2), s. 46(2).

¹⁵⁰ (2), s. 9-3; (3), s. 1.

¹⁵¹ (3), s. 219.

¹⁵² (2), s. 1(3)(2b).

¹⁵³ See operational arrangements of the EESS and the GEERS, s. 6.1.

annual leave, four weeks' redundancy pay, five weeks' pay in lieu of notice and 12 weeks' long-service leave. In contrast, under the General Employee Entitlements and Redundancy Scheme (GEERS), there is no maximum limit as regards the period in relation to which wage claims have accrued, with the exception of the redundancy pay entitlement, which is limited to eight weeks. In the United Kingdom,¹⁵⁴ guaranteed payment covers pay arrears up to eight weeks and holiday pay not exceeding six weeks. In the United States,¹⁵⁵ at the state level, limits normally vary from two weeks to two months.

344. In some cases, guaranteed compensation may not exceed a prescribed cash amount or a limit defined by reference to the national minimum wage or the amount used for the assessment of social security contributions. For example, in *Norway*,¹⁵⁶ the wage guarantee fund does not cover claims in excess of three times the basic national insurance amount which is adjusted annually. In *Spain*,¹⁵⁷ the guaranteed payment may not exceed twice the minimum daily wage rate multiplied by the total number of unpaid days, up to a maximum of 120 days. In *Austria*,¹⁵⁸ the maximum compensation payable by the fund may not exceed twice the maximum contributory basis for the general social security scheme. This amount is reviewed annually to reflect changes in pension levels. In *Switzerland*,¹⁵⁹ insolvency compensation is paid for wage claims up to a monthly ceiling equivalent to the maximum earnings that are subject to employment injury insurance contributions. In the *Czech Republic*,¹⁶⁰ the total amount of wage arrears paid to an employee in a month may not exceed one-and-a-half times the national average wage in the preceding calendar year, as

¹⁵⁴ (1), s. 184(1). This is also the case in the Falkland Islands (9), s. 100(3)(a), (c), and Isle of Man (14), s. 67(3)(a), (c).

¹⁵⁵ For instance, in *Maine* (25), s. 632, the Wage Assurance Fund covers unpaid wages for a maximum of two weeks, while in *Oregon* (45), s. 652.414, the Wage Security Fund covers the unpaid amount of wages earned within 60 days before the date of the cessation of business to the extent of \$4,000.

¹⁵⁶ (3), s. 1. Similarly, in *Italy* (2), s. 2(2), payments made by the Wage Guarantee Fund (CIG) may not exceed a sum equal to three times the maximum amount of the extraordinary monthly income supplement net of social security and assistance deductions.

¹⁵⁷ (1), s. 33(1).

¹⁵⁸ (2), s. 1(3).

¹⁵⁹ (4), s. 52.

¹⁶⁰ (5), s. 5(2). Similarly, in *Poland* (2), s. 6(2) the total payment financed by the fund for a period of one month may not exceed the level of average monthly remuneration in the previous quarter, while in *Slovakia* (6), s. 22(5) compensation paid out by the guarantee fund must not be higher than three times the average monthly wage in the first semester of the previous calendar year.

determined annually by ministerial decree. Moreover, in Estonia¹⁶¹ and Lithuania,¹⁶² the amount of the worker's outstanding claims for wages covered by the guarantee institution is limited to three minimum monthly wages.

345. In *Israel*,¹⁶³ the guaranteed benefit to be paid in case of the bankruptcy or winding up of companies may not exceed, in respect of each employee, the average wage multiplied by ten. In Finland,¹⁶⁴ the maximum amount is determined by decree having regard to general pay levels and is currently fixed at FIM90,000, while in Sweden¹⁶⁵ the ceiling for claims is fixed by law at SEK100,000. In Australia,¹⁶⁶ there is a \$20,000 cap on the amount any individual may receive under the EESS, whereas the GEERS sets an income cap (currently fixed at \$75,000 but indexed annually), it being understood that employees with higher earnings may receive payments as if they earned a rate equivalent to the scheme's income cap. In the United Kingdom,¹⁶⁷ the total amount payable to an employee under the wage guarantee scheme may not exceed £210 in respect of any one week. In the Republic of Korea,¹⁶⁸ the maximum guaranteed amount for unpaid wages varies in consideration of the worker's age and is currently set at 1 million won for workers less than 30 years of age and at 1.45 million won for workers over 45 years of age.

2.3.3. Organization, management and financing of wage guarantee institutions

346. The operation of wage guarantee schemes is based on the same principles governing other social security schemes, namely obligatory participation, wage-based contributions, administration by autonomous bodies and collective responsibility of the community of entrepreneurs for the business risk. Acting usually as secondary, not principal debtors, wage guarantee institutions pay workers' claims only when there are no assets available in the insolvent's estate. Any sums advanced by a wage guarantee fund may then be

¹⁶¹ (4), s. 20(3). Similarly, in Slovenia (2), s. 19, the wage guarantee covers claims for unpaid wages up to a maximum of three minimum wages, claims in respect of unused annual leave up to one-half of the minimum wage and claims in respect of severance pay up to one minimum wage. In Luxembourg (2), s. 46(2), the payment guaranteed by the Employment Fund is limited to six times the minimum social wage.

¹⁶² (4), s. 5(1).

¹⁶³ (2), s. 183.

¹⁶⁴ (2), s. 9. See also Denmark (1), s. 3.

¹⁶⁵ (2), s. 9.

¹⁶⁶ See operational arrangements of the EESS and the GEERS, s. 6.4.

¹⁶⁷ (1), s. 186(1).

¹⁶⁸ (2), s. 6(2); (3), s. 6, and table 2.

recovered through an ordinary insolvency procedure. This right of subrogation is protected by the same privilege as the original wage debt.

347. In most countries, wage guarantee funds are operated by independent bodies set up within existing administrative institutions. In *Austria*,¹⁶⁹ for instance, the Insolvency Compensation Fund (IAG) operates under the authority of the Federal Ministry for Labour and Social Affairs, while in *Norway*,¹⁷⁰ the State Guarantee Fund is managed by the Directorate of Labour Inspection. Similarly, in *Spain*,¹⁷¹ the Wage Guarantee Fund (FOGASA) is an autonomous institution affiliated with the Ministry of Labour and Social Security. In *Australia*,¹⁷² safety net schemes protecting unpaid employee entitlements are administered by the Department of Employment and Workplace Relations. In *Greece*,¹⁷³ the management of the assets of the wage guarantee fund is entrusted to the board of directors of the Workforce Employment Organization (OAED) of which half of the members are employers' and workers' representatives. In *Poland*,¹⁷⁴ the Guaranteed Workers' Benefits Fund is a public institution endowed with legal personality and managed by a board of six members composed of representatives of employers' (two-thirds) and workers' (one-third) organizations. In *Switzerland*¹⁷⁵ the insolvency compensation scheme is integrated into the system of unemployment insurance. In *Israel*,¹⁷⁶ wage guarantee benefits are paid out by the National Insurance Institute which is placed under the general supervision of the Minister of Labour and Social Welfare. In the *Czech Republic*,¹⁷⁷ claims for wage arrears are processed by the local labour office competent for the district in which the headquarters of the

¹⁶⁹ (2), s. 13(1). This is also the case in the Republic of Korea (2), s. 17(1).

¹⁷⁰ (4), ss. 4-1, 4-2. In Finland (2), ss. 3, 10, 11, the pay security scheme is administered by the Ministry of Labour through the offices of manpower districts, while in Sweden (2), ss. 22, 24, 25, the wage guarantee is paid by the county administrative board in the county in which the district court dealing with the bankruptcy matter is located. Moreover, in Denmark (1), s. 11, the administration of the Employees' Guarantee Fund is entrusted to the Labour Market Supplementary Pension Service.

¹⁷¹ (1), s. 33(1); (13), s. 1(1).

¹⁷² See operational arrangements of the EESS and the GEERS, s. 10.1.

¹⁷³ (5), s. 3(1), 4(1).

¹⁷⁴ (2), ss. 12, 15; (4), ss. 6, 10, 11.

¹⁷⁵ (4), s. 57. Similarly, in Estonia (4), ss. 21(1), 33(1), the wage guarantee fund is part of the Unemployment Insurance Fund.

¹⁷⁶ (2), s. 8(c). Similarly, in the United Kingdom (1), s. 182; (7), s. 161(1), protected employee entitlements are paid from the National Insurance Fund (NIF), while in *Italy* (5), s. 2, the fund is established in the National Social Security Institution (INPS).

¹⁷⁷ (5), ss. 4(2), 6, 8, 10.

insolvent enterprise, the place of the business activity or the private address of the insolvent employer is located.

5.2. The feasibility of setting up wage guarantee institutions

The wage guarantee institutions shift the individual employer's business risk to what might be called the "community of employers" and hence make it possible for the service-related claim to be paid in all cases through a third party which is by definition solvent and acts as an insurer of the "risk of insolvency". [...] In the final analysis, the principle of insurance by the community of employers against the risk of individual insolvency is not very different from the principle of occupational accident insurance financed exclusively by the employer's contributions. Nor is it very different from the collective and compulsory professional liability insurance organized by some professions, such as that of the notaries, or from the collective guarantee established by banks in some countries to indemnify third parties for any prejudice suffered through the dishonesty or malpractice of any one member of the profession. [...] It remains to be seen whether the establishment of wage guarantee institutions, which have so far been set up in industrialized countries with mature social security systems, is feasible in other countries as well. The fundamental problem to be taken into account concerns the great inter-country differences as regards the functioning of social security institutions and, in particular, the capacity for administering these institutions. A further point to be borne in mind is that social security is usually an institution that proceeds by progressive steps, and it is not without reason that some argue that, before a wage guarantee institution is set up, it would be desirable to strengthen the others, such as old-age pension or health insurance schemes, which cover more universal social risks. [...] While there are countries which are now capable of organizing a wage guarantee institution, this is probably not the case everywhere. Besides, there are economic considerations, political factors and questions of social sensitivity that do not carry the same weight in all countries. It may be, on the one hand, that in some countries the economic situation is so flourishing that the risk of bankruptcies is quite limited, and if bankruptcies do occur they affect so few workers that the problem of the non-payment of workers' claims – even if it affects a few individuals – will not cause any social repercussions. On the other hand, it may also happen in other countries that the number of bankruptcies is so high that the financing of a wage guarantee might involve an intolerably high cost. In such a case the problem will be fraught with social consequences and will be very difficult to deal with. Finally, in certain societies it may be that the level of social sensitivity to the problem of unpaid wage claims is very low, in which case the State will probably consider it unnecessary to organise a wage guarantee institution, even if it is technically and financially capable of doing so.

Source: Arturo Bronstein, "Comparative study" in Edward Yemin and Arturo Bronstein (eds.): *The protection of workers' claims in the event of the employer's insolvency*, ILO, 1991, pp. 52-54.

348. As regards financing, wage funds are, in principle, financed exclusively by compulsory contributions payable by employers. This is the situation in *Austria*,¹⁷⁸ *Denmark*,¹⁷⁹ *Finland*,¹⁸⁰ *Norway*¹⁸¹ and *Poland*.¹⁸² In other countries, financing is also provided through public funds. In *Slovakia*,¹⁸³ for instance, the fund is supported by employers' contributions and a state subsidy of an equal amount. Similarly in *Greece*,¹⁸⁴ the Ministry of Labour subsidizes the wage guarantee fund with an annual amount of €1.5 million. Yet in other countries, such as *Slovenia*,¹⁸⁵ the wage guarantee institution is financed solely by the state budget. In *Australia*,¹⁸⁶ both safety net schemes are funded from general taxation with the only difference being that whereas the EESS was established on the basis that state governments would contribute 50 per cent of the funds, the GEERS is fully funded by the Commonwealth Government. More generally, guarantee funds also draw on revenues other than compulsory contributions and state subsidies, such as the sums recovered from employers for settled claims, interest on the financial assets deposited in banks, or penalties and fines received for the late payment of contributions or the violation of the fund's regulations.

349. Contributions depend on wage income, but may not exceed a certain limit, which is often determined on the basis of social security contributions. Contributions may be adjusted according to the financial situation of the fund; they may rise at times of economic crisis and a high number of bankruptcies, or fall when the general economic climate improves. In *Austria*,¹⁸⁷ for instance,

¹⁷⁸ (2), s. 12(1).

¹⁷⁹ (1), s. 9. The amount of annual contributions may be adjusted by ministerial decision, while unpaid contributions with accrued interest at the rate of 1 per cent for every month may be recovered through distraint.

¹⁸⁰ (2), s. 31.

¹⁸¹ (3), s. 2.

¹⁸² (2), s. 17.

¹⁸³ (5), s. 77a(2), (4), (5). The situation is similar in *Lithuania* (4), s. 4(1).

¹⁸⁴ (6), s. 16(2).

¹⁸⁵ (2), ss. 13, 14. According to the Government's report, under the Guarantee Fund Act, part of the funding should also be provided by employer contributions, but this has not yet been implemented in practice.

¹⁸⁶ See operational arrangements of the EESS, s. 6.8, and operational arrangements of the GEERS, s. 9.

¹⁸⁷ (2), s. 12(1), (2). The rate is currently set at 0.7 per cent of the general basis for the overall social security contribution, while in *Slovakia* (5), s. 128a(1) the monthly contribution is fixed at 0.25 per cent of the assessment base. Similarly, in *Italy* (2), s. 4(1); (5), s. 2, the employers' contribution is set at 0.05 per cent of the remuneration used for the calculation of compulsory unemployment insurance, and may be increased or decreased by decree of the

contributions take the form of a supplement to employers' unemployment insurance contributions. The rate of this supplement, which is fixed each year by ministerial ordinance having regard to the balance of accounts of the fund, may be increased if, according to preliminary estimates, the available assets are not sufficient to cover the foreseeable expenditure of the current year, or are lowered if estimates show a surplus in excess of 20 per cent of average expenditure in the previous and current year. In *Greece*,¹⁸⁸ the employer's contribution, which is currently set at 0.15 per cent of the worker's overall earnings, may be modified by common decision of the Ministers of Labour and National Economy upon the recommendation of the institution administering the fund.

350. Wage guarantee schemes may, however, take different forms. In *Belarus*,¹⁸⁹ for instance, the national legislation requires every employer to set up a reserve wage fund in order to ensure the payment of wages and other compensation payments in the case of insolvency or bankruptcy, liquidation or the termination of activities. The creation of such a fund is based on profits remaining at the disposal of an enterprise after the payment of taxes up to an amount equal to 25 per cent of the annual wage bill. Similar legislation is in force in *Kyrgyzstan*,¹⁹⁰ providing for the establishment of wage reserve funds on the basis, to the level and in accordance with the procedure which may be provided for by a legislative act or a collective agreement. In the *Dominican Republic*¹⁹¹ and *Mozambique*,¹⁹² in the absence of a unified wage guarantee institution, the Labour Code stipulates that all enterprises must possess an insurance policy with wage claims coverage. Finally, in the case of *Argentina*,¹⁹³ mention may be made of the 1986 Act providing for the establishment of a wage

Minister of Employment and Social Security according to the financial situation of the fund. See also *Poland* (2), ss. 13, 17, 18, and *Spain* (1), s. 33(5); (13), s. 12(1).

¹⁸⁸ (6), s. 16(2).

¹⁸⁹ (1), s. 76; (3), ss. 1, 3, 5.

¹⁹⁰ (1), s. 236(1), (2).

¹⁹¹ (1), ss. 465, 466. According to s. 738, the guarantee must be regulated by a tripartite agreement, but such an agreement has not yet been concluded.

¹⁹² (1), s. 58(3).

¹⁹³ See Act No. 23.473 of 22 December 1986 concerning the establishment of a wage guarantee fund.

guarantee fund, which has nevertheless not yet entered into force, since implementing legislation has not been enacted.

* * *

351. In the light of the above, the Committee concludes that the privileged protection accorded to workers' wage claims in the case of the bankruptcy of the employer appears to be, on the whole, a standard feature of the general labour legislation of nearly all member States. Numerous countries have gone even further than the largely permissive language of Article 11 in conferring preferential treatment to employment-related claims other than wages, granting to wage claims absolute priority over all other privileged debts, including those of the State and the social security system, and, in some cases, guaranteeing the settlement of workers' wage claims through a wage guarantee scheme.

352. In law and practice the large majority of countries therefore seem to have progressively departed from the generally worded provisions of Article 11 of Convention No. 95 and moved towards the adoption of more specific standards, which often reflect the principles and rules contained in Convention No. 173. Indeed, the Committee considers that Convention No. 173 contains the most relevant standards in relation to the protection of workers' claims in the event of the employer's bankruptcy or insolvency and firmly encourages member States to consider the ratification of this instrument in the very near future. Designed as a dual thrust instrument which allows for a considerable measure of flexibility, Convention No. 173 strengthens the privilege system while exploring new means of protection in the form of wage guarantee institutions.

353. It should be recalled, however, that, whether there may be considerable advantages in setting up wage guarantee institutions, these are no panacea to the problems of corporate insolvency. They, of course, offer an assurance of payment which is absent under the privilege system, but they are subject to limitations, in terms of maximum length of service and the maximum amount protected; they do not totally replace the traditional bankruptcy procedures of liquidating assets and settling priority debts according to the established order of distribution; and they presuppose healthy labour institutions and sound management, and as such may not be readily applicable in many contexts. Having said that, the Committee believes that, at a time of growing uncertainty and gloomy economic forecasts for the global economy, as recently been confirmed and amplified by some of the most serious corporate bankruptcies of all times, the need for enhanced protection of worker's earnings for work already performed is more pressing than ever and, in this respect, the significance of Convention No. 173 and Recommendation No. 180 can hardly be overemphasized.

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