

CBR EXTENDED CREDITOR PROTECTION INDEX

Centre for Business Research, University of Cambridge

by

John Armour, Viviana Mollica, Mathias Siems, Priya Lele,
Tianshu Zhou, Kenji Hirooka, Theis Klauberg, Stephan Heidenhain,
Nina Cankar, John Hamilton, and Pinar Akman

August 2009

For comments and questions please contact

Simon Deakin
Centre for Business Research
University of Cambridge
Judge Business School Building
Cambridge CB2 1AG
email: s.deakin@cbr.cam.ac.uk

Table of Contents

Part 1: Introduction: Coding Creditor Protection (John Armour)	3
1. General information	3
2. Variables on creditor protection	4
Part 2: Countries Coded	8
1. Argentina (Viviana Mollica)	8
2. Brazil (Viviana Mollica)	13
3. Canada (Viviana Mollica)	18
4. Chile (Viviana Mollica).....	25
5. China (Tianshu Zhou)	29
6. Czech Republic (Stephan Haidenhein).....	36
7. France (John Armour)	38
8. Germany (Mathias Siems).....	40
9. India (Priya Lele).....	46
10. Italy (Viviana Mollica).....	49
11. Japan (Kenji Hirooka)	53
12. Latvia (Theis Klauberg)	57
13. Malaysia (Viviana Mollica).....	60
14. Mexico (Viviana Mollica).....	65
15. Netherlands (Viviana Mollica).....	69
16. Pakistan (Viviana Mollica).....	74
17. Russia (John Hamilton)	79
18. Slovenia (Nina Cankar)	85
19. South Africa (Viviana Mollica).....	87
20. Spain (Viviana Mollica)	95
21. Sweden (Viviana Mollica).....	99
22. Switzerland (Viviana Mollica)	102
23. Turkey (Pinar Akman).....	106
24. United Kingdom (John Armour)	108
25. United States (John Armour).....	110

Part 1: Introduction

Coding Creditor Protection (John Armour)

1. General information

As a part of the project on ‘Law, Finance and Development’ at the Centre for Business Research, University of Cambridge, UK,¹ we constructed a new creditor protection index comprising of 10 variables. Please identify the provisions of law and relevant court decisions applicable to or answering the description of each of the core variables in Part 2. Based on your knowledge and experience of the law in your country, considering the applicable law, please assign values to each individual variable between ‘0’ and ‘1’ for each of the last 13 years and express it in a tabular form.² These will be scores for your country for a given area of law expressed as a value between 0 and 1. Here, ‘0’ would stand for no protection or worst protection offered and ‘1’ would stand for the best or maximum protection offered with respect to the particular core variable.

Statutory and case law. A particular legal rule can be based on statutory law or case law, therefore, for the purposes of this exercise both must be considered. Although in civil-law countries court decisions are not regarded as a source of law, please do take them into account while coding because they can bring about an effect which is as important as a statutory provision. Statutory law can be *coded in the year* in which it comes into force and case law can be coded in the year in which it is delivered and reported. Statutes passed but not yet in force or decisions either secret or expected cannot be considered for coding.

Intermediate (non -binary) coding. In some cases, it may be appropriate to use intermediate coding (that is, fractions between 0 and 1) as well as simply “0” and “1”. The descriptions of most of the variables in Part 2 illustrate some instances in which we consider this appropriate. It may be that you consider it necessary to use additional intermediate coding to reflect meaningfully your assessment of a particular provision. If so, please indicate clearly your reasons for the additional intermediate coding.

Explanations or references. Please include short explanations or at least references to the provisions of law or citations of court decisions on the basis of which you assign values to each of the core variables and for each of the changes in these values over the last eleven years in the ‘Explanation/Reference’ column provided in the template in Part 3.

Comments. The core variables included in Part 2 are proxies for creditor protection law, there may be different legal rules that achieve a similar function in your country. Therefore, please comment on any legal rule that may not be specifically covered by the core variables in Part 2 but which in fact in your country achieves a similar function as any of the core variables and therefore operates as its ‘functional equivalent’.

¹ For further information on the project see <http://www.cbr.cam.ac.uk/research/programme2/project2-20.htm>.

² See the template contained in Part 3.

2. Variables on creditor protection

Variable	Description
I. Restrictions on Debtor Activity	
(1) Minimum capital	<p>Cardinal variable: minimum capital (in Euros) for establishment of a private company.</p> <p>Normalised across {0,1}, with €25,000 = 1.</p> <p><i>(There is more variation across countries and over time in private than public companies, because of the Second Directive. "Private company" should be interpreted to mean any business vehicle having separate legal personality and giving all its equity investors limited liability; i.e. it includes the French SARL).</i></p>
(2) Dividend restriction	<p>Dividend restrictions protect creditors from the payment of the company's assets to shareholders. A basic dividend restriction applies to transactions which are explicitly characterised as "dividends". To be meaningful, it must be incapable of being waived or altered by the company without creditor consent. However it is possible to get around such a restriction in a variety of ways. Tougher restrictions also include restrictions on one or more of the following:</p> <ul style="list-style-type: none"> • Share repurchases • "Disguised" dividends, e.g. undervalue transactions with shareholders <p>0 = less than "basic dividend restriction"(criterion for score of 0.33) 0.33 = "basic restriction" on dividend payments (not waivable without creditor consent) 0.66 = "basic restriction" plus one additional restriction from list above 1 = "basic restriction" plus two additional restrictions from list above</p>
(3) Directors' duties to creditors	<p>Imposing a duty on directors to act in creditors' interest may protect creditors' position during a "twilight" period just before creditors realise something is amiss and put the firm into bankruptcy. Imposing the duty too soon may, however be counter-productive and give creditors "too much" protection.</p> <p>0= no duty on directors to take creditors' interests into account 0.5= duty on directors to act in creditors' interests if firm is cash-flow (commercially) insolvent 1= duty on directors to act in creditors' interests if firm is balance-sheet insolvent</p> <p><i>Practically speaking, balance-sheet insolvency is likely to occur before cash-flow insolvency. Creditors may not be aware of balance sheet insolvency, but will start to press for payment if a debtor is cash flow insolvent.</i></p>

II. Creditor Contract Rights (=Facilitation of Secured Credit)

(4) Security: scope	<p>Captures extent to which non-possessory security interests may be taken over debtor's assets. (Possessory security interests are less useful for raising business finance, as they impede the debtor's ability to use the assets in the business). The assets over which a jurisdiction permits non-possessory security interests to be granted by a corporate debtor may encompass:</p> <ul style="list-style-type: none"> • Land • Personalty (tangible moveables) • Receivables (intangibles) • 'All assets' (general, revolving security interest i.e. "floating lien") <p>0 = only mortgage of land³ 0.33 = land + one further from list 0.66 = land + two further from list 1 = land + three further from list</p>
(5) Security: registration	<p>This variable captures extent to which non-possessory security interests must be registered. (List of security interests is identical to (4))</p> <p>0 = only mortgage of land 0.33 = land + one further from list 0.66 = land + two further from list 1 = land + three further from list</p>
(6) Security: Enforcement	<p>Must a secured creditor go to court in order to enforce a security interest against a debtor in default? (<i>cf. the position if the debtor is in bankruptcy—variable (8) below—sometimes it is desirable to stay secured creditors from enforcing</i>)</p> <p>0 = out of court enforcement is not possible 1 =out of court enforcement is possible</p>

³ I am unaware of any jurisdiction that does not permit non-possessory security to be taken over land, and does not require this to be registered in some way.

III. Creditor Rights in Corporate Bankruptcy Proceedings

<p>(7) Entry to corporate bankruptcy proceedings</p>	<p>The control of entry to corporate bankruptcy proceedings has important implications for the ability of creditors (debtors) to threaten debtors (creditors) with its use even before bankruptcy has begun, and to use it strategically to advance their positions.</p> <p>0= debtor may commence bankruptcy unilaterally, without any requirement that they be insolvent 0.5 = single creditor may commence bankruptcy proceedings against a debtor (if they show debtor is insolvent by some criterion) 1 = debtor required to commence bankruptcy proceedings, if they are balance sheet insolvent</p> <p><i>(Where a debtor may commence unilaterally without a requirement that they be insolvent, they may use bankruptcy as a threat against creditors. Where a single creditor may invoke bankruptcy, then they may use this as a threat to compel payment; more protective still is a requirement that debtors commence bankruptcy pre-emptively. As for variable (3), it is assumed that creditors may not be aware that a debtor is balance sheet insolvent, but are likely to be aware of its cash flow insolvency: hence a requirement that a debtor commence insolvency based on a balance sheet tests is more protective of creditors; a requirement based on a cash-flow test would add little to a creditor's right to commence insolvency proceedings against the debtor)</i></p>
<p>(8) Stay of secured creditors</p>	<p>It is desirable, from an efficiency point of view, that secured creditors be stayed if there is a realistic possibility of rehabilitation. There is no justification for such a stay, however, if there is no realistic possibility: this simply impedes creditors' ability to liquidate their collateral for no useful purpose.</p> <p>0.5 is accorded for <i>each</i> of: (a) secured creditors stayed in rehabilitation proceedings (or, in "single gateway" regimes, where rehabilitation is a realistic possibility); (b) secured creditors not stayed in liquidation proceedings (or, in "single gateway" regimes, where rehabilitation is not a realistic possibility).</p> <p>Minimum score: 0, maximum score:1</p>

<p>(9) Outcome of bankruptcy proceedings</p>	<p>The ability of creditors to vote on the outcome of bankruptcy proceedings better protects their position both <i>ex ante</i> and <i>ex post</i>. Court control, or debtor control, of the outcomes, undermine creditors' positions. Even where creditors control, there may be tensions between different priority classes over the appropriate action to take. Mechanisms which seek to allocate control rights to the "residual claimant" (i.e. the class of claimants who will, when the proceedings are completed, be expected to get a payout on their claims that is greater than zero but less than 100%) are better, from the standpoint of maximising the realisation values, than mechanisms which always include all classes, or always allocate control to a particular class, of creditor.</p> <p>0 = <i>either</i> court <i>or</i> debtor are significant decision-makers regarding whether the firm continues or is closed. (Court is not deemed to be a "significant" decision-maker if its role is only to confirm that a vote of other constituencies was conducted according to correct procedures; court must be a <i>substantive</i> decision-maker)</p> <p>0.5 = creditors are the primary decision-makers regarding whether the firm continues or is closed. That is, neither court, nor debtor, are significant decision-makers.</p> <p>1 = as for 0.5, except that decision rights are allocated <i>within</i> creditors to class who, in economic terms, are the "residual claimants": that is, will benefit (lose from) a marginal gain (loss) in realisations.</p>
<p>(10) Subordination of secured claimants</p>	<p>Many systems subordinate secured claimants to certain types of preferred claims, or even (through partial subordination) general unsecured creditors. This reduces the expected value of secured creditors' rights.⁴ The coding for this variable depends on which types of security interest are subordinated. Because creditors may be able to substitute one type of security for another, the greater the range of interests affected, the more pervasive the impact.</p> <p>0 = subordination of all types of security listed at (4). 0.25 = subordination of 3 types of security listed at (4) 0.5 = subordination of 2 types of security listed at (4) 0.75 = subordination of 1 type of security listed at (4). 1 = subordination of no security listed at (4).</p>

⁴ To the extent that the institution of secured credit is socially beneficial, this subordination will cost creditors as a group more than it benefits them, and the coding is designed on the basis that this is the case. If this assumption turns out to be false, the values of the coding for this variable should be reversed.

Part 2: Countries Coded

1. Argentina (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0.1	0.1	0.1	Art. 186 of Law 19.550 (<i>LEY DE SOCIEDADES COMERCIALES</i> , Corporations Law) states that a capital of at least 12,000 Argentine Pesos (approximately 2,435.55 EUR) is required for an SA (<i>Societad Anonima</i>). Notwithstanding the said minimum capital, there's the requirement that the capital should be sufficient and in accordance with the corporate purpose. For the SRL (<i>Sociedad de Responsabilidad Limidada</i>), there is no minimum capital requirement. But recent resolutions (from 2003) issued by the General Inspection of Corporations didn't admit the registration of undercapitalized companies.
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Art. 224 Law 19.550 regulates the basic dividends restrictions (though there's no obligation to return undue dividends received in good faith).</p> <p>The repurchase by the company of its own shares is authorised under exceptional circumstances enumerated in Art. 220 of the Law 19.550: within a prior decision of capital reduction, to avoid serious damages to the company, when the shares are owned by a enterprise or a company that is acquired or absorbed by the company.</p> <p>Corporations that make public offering of their shares are bound by further requirements, contained in Art. 68 of the Public Offering of Securities Law No. 17,811 (as amended by Decree 677/01).</p> <p>Art. 271 regulates the transactions between the directors and the company, prohibiting undervalue ones.</p>
3. Directors' duties to	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Art. 274 states that directors are jointly and severally

creditors												<p>liable against the company, shareholders or third parties for the negligent performance of their duties, or for violations of the law or of the by-laws or regulations of the company. In case of bankruptcy, the action will be carried out by the curator or, in case of inactivity of the latter, by single creditors (Art. 278).</p> <p>In case of Insolvency, directors may be personally liable if they knowingly contribute, promote, allow or worsen the state of insolvency of the company with the intention of defrauding creditors (Art. 173, Bankruptcy Act 24, Law 24.522).</p>
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	<p>Security interests can be formed over a wide variety of property: movable and immovable assets, securities, shares, cash and receivables. Mortgages can also be established over real estate, ships and aircraft. Security interests can be obtained through mortgages (Art. 3108 CC), pledges (Art. 3.204 CC), commercial pledges (Art. 580 Commercial Law), including floating pledges (<i>prenda flotante</i>), security assignments and trusts.</p> <p>Decree-Law No. 15,348/46, 28 May 1946 (<i>PRENDA CON REGISTRO</i> as amended in 1995), envisages a pledge where the pledged asset remains in the possession of the debtor.</p>
5. Security: registration	1	1	1	1	1	1	1	1	1	1	1	<p>Art. 3.134 CC states that mortgages needs to be registered in a public office set up specifically for the registration and situated in the capital city of every provinces or in the towns the Provincial governments chose for that purpose.</p> <p>Decree-Law No. 15,348/46, 28 May 1946 created a registered pledge, which includes a fixed pledge (<i>CAPITULO II</i>, Art. 10-13) and a floating pledge (<i>CAPITULO III</i>, Art. 14-16).</p>
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	<p>The Commercial Code regulates special commercial pledges (Art. 580-589) to be used for commercial obligations. In a commercial pledge (contrary to what is ruled for in civil pledges) creditors are entitled to a</p>

													private sale (Art. 585 Commercial Code). This happens in the case the debtor and creditor have agreed upon a special sale proceeding, otherwise the pledged asset must be sold by public auction, duly announced ten days before such auction takes place.
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Condition for the initiation of a Bankruptcy proceeding is that the debtor, for any reason, stops paying his debts (Art. 1 Bankruptcy Law⁵). Indicators of this condition are listed in Art. 78 and 79 and includes: letters of exchange that have been protested for non-payment; checks returned for insufficient funds; or documents recognizing the existence of the debt.</p> <p>Bankruptcy may be initiated by the debtor (<i>CONCURSO PREVENTIVO</i>, Art. 5-40, <i>Quiebra</i> Art. 77) or any single creditor (Art. 77, Art. 80).</p> <p>If a secured creditor desires petition for bankruptcy, he must prove that the value of the secured assets is insufficient to cover the full amount of his credit (Art. 80).</p>
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Art 21⁶ (<i>concurso preventivo</i>) provides for a general stay of all the proceedings initiated against the debtor, but secured creditors are excepted from this provision (paragraph 2).</p> <p>Art 57 (<i>acuerdo preventivo</i>, Art. 41-48, as modified by Law N° 25.563 B.O. 15/2/2002), stays that the agreement is not binding for secured creditors who did not approve it, and the consequent the stay doesn't apply to them.</p> <p>Art. 73 (<i>acuerdo preventivo extrajudicial</i>, Art. 69-76 as</p>

⁵ Federal Bankruptcy Law 24,522 (*Ley de Concursos y Quiebra*), which was enacted on July 20, 1995 and entered into force in December 1995. Major reforms were introduced in 1997 (Law N° 24.760 B.O. 13/1/97) and 2002 (Law N° 25.563 B.O. 15/2/2002), when a new extra-judicial restructuring procedure (*Acuerdo Preventivo Extrajudicial*) was created.

⁶ Modified in 2006, by Law N° 26.086 B.O. 11/4/2006.

												<p>created by Law N° 25.563 B.O. 15/2/2002, that allows businesses to restructure their debts privately with the consent of creditors is the equivalent of an out-of-court reorganisation agreement) requires the approval by the absolute majority of the unsecured creditors, that represents the third part of the total unsecured debts. The agreement produces its effect against the creditors listed in art. 56 and Sections III, IV and V of Chapter V of Title II. If a court approves a restructuring agreement for an entire class of creditors, the agreement is binding on non-consenting creditors and shareholders.</p> <p>In case of bankruptcy, the debtor is removed from the administration of his property (Art. 107), and all payments be made through the intermediation of the court and the bankruptcy administrator, which also collects all payments that should be made to the debtor (Art. 109). Art. 125 states that after the declaration of bankruptcy all creditors must exercise their rights exclusively through the rules laid down by the Bankruptcy Law. Art. 126 provides for a leave to secured creditors to proceed with the execution of their credits, provided the credits had been proved their title according to Art. 209.</p>
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.8	0.8	0.8	0.8	<p>In the provisions for '<i>acuerdo preventivo</i>', art. 45 provides for the approval of the creditors' committee of the proposal for the termination of the insolvency proceeding, and art. 46 adds that if the debtor fails to obtain the approval, the debtor will be declared bankrupt. Art 52, as modified in 2002, states that the court must approve the proposal if approved by the majority established in art. 45 and 67. In the case the majority has not been obtained, the judge could nevertheless approve it, and enforce it against the unsecured creditors and the secured creditors who renounced to their security, if at least one of the class of the unsecured or $\frac{3}{4}$ of the unsecured capital of them approved it, and there is no discrimination against the non approval creditors.</p>

												<p>During bankruptcy, the court may authorised the bankruptcy administrator to carry on the business under certain conditions (Art. 189 as modified in 2002).</p> <p>The debtor and the creditors can reach an out-of-court settlement (art 225) to terminate the bankruptcy. All verified creditors (including secured creditors) must accept its terms.</p>
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	<p>Article 3875 CC defines a privilege as the right of one creditor to be paid before another creditor.</p> <p>The Bankruptcy Law (Art. 239-250) creates and ranks various privileges: first, special privileges (art. 241); secondly, costs of preservation and justice (Art. 240) and thirdly, general privileges (art. 246). The debts covered by a special privilege are the first to be paid with the proceeds of the sale of the debtor's assets. Art. 241, point 4 lists secured debts (covered by mortgages, pledges, floating liens, etc..) among the special privileges. Art. 243 ranks the special privileges stating they generally follow the order given in art. 241, with a few exceptions. Among those, secured debts, that follow their own normal rules.</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

Comments

2. Brazil (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital ⁷	0	0	0	0	0	0	0	0	0	0	0	<p>There are two basic types of limited liability company in Brazil:</p> <ul style="list-style-type: none"> • <i>Sociedade Limitada (LTDA)</i>: The Limited Liability Partnerships are governed by the Brazilian Civil Code. There is no minimum capital. • <i>Sociedade Anônima (SA)</i>: It is governed by Law 6404 of December 15, 1976 (Corporations Law) as amended by Law 9.457 of May 1997, but wasn't modified as a result of the entrance into force of the new Civil Code (January 2002). Art. 5° states: the statute of the company will fix the level of the company capital, expressed in the national currency.
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Art. 30 Law 6404 of December 15, 1976 regulates companies' shares repurchase. Corporations cannot compulsorily repurchase their shares, except in the specific circumstances laid down in the first paragraph of the article.</p> <p>Art. 201 states the basic restrictions on dividends, art 202 (as modified by Law n° 10.303, de 2001) deals with the definition of the ordinary dividends.</p>
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>As a general rule, directors are not personally liable for obligations incurred in the corporation's name by virtue of administrative acts performed in the normal course of business. Exceptions to this rule can be found in Decree 3.708 of 01.10.1919 (Limited Liability Companies Law), article 10 and Article 158 of Law No. 6404 of 15.12.1976 (Corporations Law).</p> <p>Article 158 of Law 6,404/76 lists two basic hypothesis of</p>

⁷ The primary sources relating to corporate governance are the Brazilian Corporations Act No. 6,404/76 (the CL, as amended by Acts Nos. 9,457/97, 10,303/01 and 10,411/02), the Securities Law (the SL, Act No. 6,385/76, as amended) and the Brazilian Civil Code, Special Part, Book II (the Civil Code).

												<p>civil liability of directors: a. for damages caused to the company by virtue of negligence or wilful misconduct, even within their powers; b. for actions exceeding the powers granted to them, or contrary to the provisions of the law or bylaws.</p> <p>Bankruptcy Law states that, in the event of declaration of bankruptcy, the corporation's directors and administrators will be identified with the debtor and bankrupt party for criminal purposes. Acts that can constitute a crime can be, for instance, the failure to keep required books or their late, defective or unclear completion or recognition of false or simulated credits.</p>
4. Security: scope	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Very little unpossessory securities. Rather, the principal types of security devices that are taken on movable property are all possessory.⁸ The law doesn't allow businesses to grant a non possessory security right in a single category of revolving movable assets, without requiring a specific description of the secured assets and it doesn't allow businesses to grant a non possessory security right in substantially all of its assets, without requiring a specific description of the secured assets, while a security right cannot extend to future or after-acquired assets or automatically to the products, proceeds or replacements of the original assets.</p> <p>However, in case of enterprises and business companies the law (Títulos de Crédito Industrial Decreto-lei nº 413, 9 January 1969) has created three different titles: <i>penhor cedular</i>, <i>alienação fiduciária</i> and <i>hipoteca cedular</i>, which are registered with the <i>Registro de Imóveis</i> (art. 167- 288 Lei nº 6.015, 31 December 1973 on the public registries). Now they are covered in the 2002 Civil Code at art. 1447-1450.</p>

⁸ Pledge (*penhor*) and chattel mortgage (*alienação fiduciária*) are between the most common for movable goods. The *alienação fiduciária* conveys a personal property interest, through a fiduciary sale, generally as security for a debt such as the purchase price of the personal property. In this case, the debtor retains possession of the property as collateral, while the creditor retains title until the satisfaction of the debt (as regulated by Lei nº 4.728, de 14 July de 1965 Art. 66-66B, repelled by the new Civil Code 2002). Other ways of securing transactions may involve forming structuring deals such as conditional sales or finance leases.

												Art. 1451 – 1460 Civil Code (2002) cover pledges over receivables. Before that the subject (<i>Da Caução de títulos de crédito</i>) was regulated in Art. 798-795.
5. Security: registration	0.	0.	0.	0.	0.	0.	0.	0.66	0.66	0.66	0.66	
6. Security: Enforcement	0	0	0	0	0	0	0	1	1	1	1	<p>Before the introduction of the 2002 Civil Code, the secured property must be sold in a public auction and the proceeds of such sale are paid to the creditor. Contractual provisions that allow the mortgagee to take possession of the mortgaged property in case of a mortgagor's default are null and void.</p> <p>The new code, despite the express prohibition of the creditors to retain the pledged item in case of unpayment (see Art. 1.428 Code Civil), envisage an out of court procedure (<i>venda amigável</i>), if the parties had contractually so agreed (Art. 1.433. IV).</p>
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Art. 9 (III item) Bankruptcy Law 1945 states that any creditor of a civil obligation, a commercial, labour or tax debt or of a legal obligation taken from the accounting books has the legal capacity to petition for bankruptcy, under the condition he holds an unpaid instrument which allows him to execute a debtor and which has been protested.</p> <p>Art. 8 deals with voluntary bankruptcy petitioned by the debtor himself. The debtor needs to show insolvency.</p> <p>Those provisions are now contained in art. 97 (item IV for creditors initiated bankruptcy, under the requirements laid down in art. 94) and art. 105-107 (in case of voluntary bankruptcy) of the 2005 Bankruptcy Law.</p>
8. Stay of secured creditors	0	0	0	0	0	0	0	0	0	0	0.5	<p>Under 1945 Bankruptcy Law, according to Art. 147, reorganisation proceedings⁹ apply only to unsecured creditors (<i>quirografários</i>), excluded those which protested the reorganisation.</p> <p>Art. 24 of the 1945 Bankruptcy Law provides for the stay of all creditors once the insolvency has been declared. The second paragraph states that the execution</p>

⁹ The 1945 law provides for two different types of “*concordata*”: the “preventive *concordata*” and “suspensive *concordata*”.

												<p>proceedings that had already been initiated before the insolvency by creditors whose debt is not subjected to be paid by instalments or whose debt comprise specific object, performance won't be affected by the stay order.</p> <p>Art. 6° New Bankruptcy Law 2005 states that the declaration of insolvency suspends all the execution proceedings against the debtor. Again art. 99 states the stay of creditors once the Court has emitted a bankruptcy declaration, while art. 115 prescribes that all creditors will be able to satisfy their debts only through the ways the bankruptcy law prescribes.</p>
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0.5	<p>Under the 1945 Law, the court's involvement has exclusive jurisdiction and is absolute in all the affairs of the bankruptcy or regarding the declaration of a rehabilitation proceeding (<i>concordata</i>), see Art. 144-145.</p> <p>Under the new Bankruptcy Law (2005), it's up to the general assembly of the creditors to decide whether to accept the reorganisation plan (art. 56- 58) or to proceed with the declaration of bankruptcy of the enterprise (art. 73).</p>
10. Subordination of secured claimants	0	0	0	0	0	0	0	0	0	0	0	<p>The order of priority was mainly stated in Art. 102, Art. 124 and 125 of the pre-reform Bankruptcy Law and is the following:</p> <ol style="list-style-type: none"> 1. Labor and social security credits, plus compensation for accidents at work (art. 102 of the Bankruptcy Law as restated by Law No. 3726, 1960, and art. 499, § 1 of the "CLT", as restated by Law No. 6449, 1977; art. 157 of Law No. 3807, 1960, as restated by Decree-law No. 66, 1966 and art. 1 of Law No. 6830, 1980); 2. Tax credit (art. 5 of Law No. 6830 of 22 September, 1980; art. 186, 187 and 188 of the National Tax Code , Law No. 5172 of 25 October 1966); 3. Burdens and debts of the bankrupt estate (art. 124, 1 and 2 of the Bankruptcy Law); 4. Creditors holding security interests (art. 102); 5. Creditors with special privileges (art.102); 6. Creditors with general privileges (art. 102);

												<p>7. Unsecured creditors.</p> <p>Art. 125 rules that, once an item over which a security interest or a special privilege had been created, was sold, the secured creditors would be given the import of their credit from the sum obtain (though the sum would be diminished of the administrative and procedural fees of the selling of the item and management of the bankruptcy).</p> <p>Art. 83 Law 11.101, 2005 revisited the priority list, stating the following order: I. labour law and social security credits, II. Creditors holding a security interests (within the limit of the value of the subjected item), III.. Tax credit, IV. Creditors with special privileges, V. Creditors with general privileges, VI. Unsecured creditors, VII. Administrative, criminal and tax fines; while art. 84 identifies the creditors (<i>créditos extraconcursais</i>) that have priority over all those mentioned in art. 83.</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

Comments

In 1995- 2005 in Brazil, bankruptcy proceedings were governed by Decree-Law No. 7.661 of June 21, 1945, otherwise referred to as the Bankruptcy Law. In 2005, Brazil passed the New Law of Corporate Bankruptcy and Restructuring (*Recuperação Judicial e Extrajudicial e Falência do Empresário e da Sociedade Empresária, Lei nº 11.101, 9 February 2005*).

3. Canada (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	No minimum capital required
2. Dividend restriction	1	1	1	1	1	1	1	1	1	1	1	<p>Public companies and other non-CCPCs can generally pay eligible dividends without restriction.</p> <p>The purchase of shares by corporations is regulated by the Canada Business Corporation Act 1985 (R.S.C. 1985, c. C-44, ss. 34-36)¹⁰ and equivalent provincial and territorial legislation. Section 101 of the Bankruptcy and Insolvency Act regulates the purchase or redemption of its shares by a corporation and the declaration of a dividend on shares and states that generally, this legislation precludes purchase or redemption of shares at a time when the corporation is insolvent. Normally, share repurchases are also regulated by the by-laws of each stock exchange. According to the TSE company manual, the by-laws of the TSE, open market share repurchases in Canada are called 'Normal Course Issuer Bids'.¹¹</p> <p>As for disguised dividends operations (such as undervalue transaction with shareholders): there has been various proposals to change Section 91 on the Canadian Bankruptcy and Insolvency Act and they were put forward through several bills presented to Parliament over the period 1975-1984. Section 156 (in Bill C-17, section 170) addressed declarations of dividends by corporations and empowered the court to give judgment against directors of a company that paid dividends or repurchased shares within one year of bankruptcy.</p>
3. Directors' duties to creditors	0	0	0	0	0	0	0	0	0	0.5	0.5	In Canada, a director's duty is owed to the corporation. The statutory duty of care in section 122 of the CBCA

¹⁰ All corporations that are generally incorporated under federal law use the CBCA. In reality, there is nothing compelling incorporation under the CBCA and that it is not the most popular corporate legislation in Canada – the Ontario Act is. However, for purpose of coding we will be focusing on the CBCA as six provinces have borrowed very heavily from the CBCA, including Ontario.

¹¹ An open market repurchase firm is not allowed to buy back its shares at a price greater than the most recent trade price.

											<p>requires directors to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." This duty is grounded in basic principles of good faith, stewardship and accountability.</p> <p>In a unanimous decision, on October 29, 2004, the Supreme Court of Canada held in <i>Peoples v. Wise</i> that directors of Canadian corporations owe a fiduciary duty to the corporation and, in particular, do not owe fiduciary duties to creditors of the corporation. The Court also stated that the standard of care for the discharge of directors' duty of care is an objective standard and that under the Civil Code of Québec creditors may bring an action against directors for breach of duty of care. The Court's decision focused on the duties of directors of a corporation that was verging on insolvency. However, it will have broad implications on the scope of directors' duties under corporate law generally and on the manner in which directors should fulfill their duties. In this regard, the notion that creditors can sue directors directly for breach of the duty of care is an astonishing proposition for which there was no prior case law support in Canada.¹² In any case, the Supreme Court recognized that creditors' interests get increasingly relevant as a corporation's finances deteriorate.</p> <p>Personal liability of a director of a bankrupt corporation can arise for: transactions entered into by the corporation while it was insolvent, or which made it insolvent, such as the issuance of dividends or the repurchase, redemption or acquisition of the corporation's shares; allegations of misrepresentation and/or wrongful or oppressive conduct by directors, or the corporation's non-payment of certain</p>
--	--	--	--	--	--	--	--	--	--	--	---

¹² It could be that the *Peoples* decision is only binding on this point with respect to Quebec corporate legislation. However, it is certainly conceivable that lower courts from other provinces will feel obliged to apply the *Peoples* precedent.

													debts, like the debts to employees for services rendered.
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	1	<p>The perfection of security interests in trade receivables is subject to provincial or territorial (rather than federal) jurisdiction. If debtors are resident or otherwise situated in any of the ten provinces or three territories of Canada, the registration and perfection rules of those jurisdictions apply.¹³</p> <p>Securities available to creditors:</p> <ul style="list-style-type: none"> - Security on immovable property usually taken in the form of a ‘mortgage’ or ‘charge’ and registered in the Land Registry Office in the province in which the real property is located. - Securities on movables properties regulated on a province-by-province basis under provincial personal property security legislation.¹⁴ This regulates security interests in personal property through the mechanism of ‘security agreements’. Finance leases of moveable are classified as security interests and in many provinces. <p>In Quebec, the categories of collateral susceptible of being pledged are less numerous. Though, when the new Civil Code of Quebec replaced the Civil Code of Lower Canada in 1994, a concept similar to the floating charge was introduced into Quebec's civil law under the name ‘floating hypothec’.</p>
5. Security: registration	1	1	1	1	1	1	1	1	1	1	1	1	The PPSAs and the CCQ both rule that security interests needs to be registered with the appropriate registry in order to be perfected. That also includes non-possessory security interests, which require registration in the general public registration system.

¹³ The 13 Canadian jurisdictions can be grouped into three registration/perfection systems. Eight provinces (Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, New Brunswick, Nova Scotia and Prince Edward Island) and one territory (the Yukon Territory) have a personal property security system similar to Article 9 of the U.S. Uniform Commercial Code. Personal Property Security Acts (PPSAs) in these jurisdictions apply to every transaction that has the practical effect of creating an interest in personal property in order to secure the payment or performance of an obligation, as well as to absolute assignments (sales) of accounts (e.g. trade receivables) or chattel paper (e.g. leases and conditional sale contracts).

¹⁴ Some chattels (e.g. ships and aircrafts) are regulated under federal legislation.

6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	<p>Remedies available to a secured creditor are similar under the PPSAs and the CCQ: the creditor may take possession of the collateral, sell the collateral or take the collateral in satisfaction of the debt.</p> <p>In Quebec, however, the enforcement of secured credits is subject to more constraints than in the PPSAs provinces: the holder of a mortgage needs a Court order to be empowered to take possession of the collateral, in the case where the debtor does not voluntarily surrender possession of same to the secured party; as seen, in the PPSA provinces self-help is possible and no such Court authorization is required.</p>
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0	0	<p>Under s.2 of the BIA “insolvent person” means “a person who is not bankrupt and who resides, carries on business, or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and (a) who is for any reason unable to meet his obligations as they generally become due, (b) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due” (..).</p> <p>In 2004, the case Re Stelco, (March 22, 2004, Court File No. 04-CL-5306) contributed to define the status of insolvency prior to bankruptcy proceedings. A motion was brought by certain locals of the United Steel Workers of America in March, 2004, seeking to set aside the initial order pursuant to which Stelco was granted CCAA protection, on the basis that was not insolvent, and thus did not qualify as a "debtor company. In response, Stelco cited its large "legacy" obligations to retirees as evidence of a "looming liquidity crisis" that would have seen it run out of funds in the coming months. Farley J. held that Stelco was insolvent and entitled to seek protection from its creditors under the CCAA, and expanded the traditional definition of</p>

												<p>"insolvency" employed by the courts. He held that even if a company is not technically insolvent under the strict BIA tests at the time that it applies for CCAA protection, it may nonetheless be considered insolvent for the purposes of the CCAA if it is facing a looming liquidity crisis. In his view, the proper test was whether Stelco would run out of money at some point in the future without the benefit of the stay.</p> <p>Only an insolvent person may make an assignment in bankruptcy under s.49 of the BIA and essentially been petitioned into bankruptcy by creditors under s.49 of the BIA ("assignment into bankruptcy", chapter II(A)).¹⁵</p> <p>A voluntary liquidation under the BIA commences when a debtor files an 'Assignment in Bankruptcy' with the Government Bankruptcy Office accompanied by a sworn statement listing its assets and obligations.</p>
8. Stay of secured creditors	1	1	1	1	1	1	1	1	1	1	1	<p>In Canada, both the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA) allow debtors to reorganize their affairs. Each act stays creditors from enforcing their claims.</p> <p>In a BIA reorganisation, an automatic stay of proceedings is imposed on secured and unsecured creditors, although the stay does not apply to secured creditors who took possession of their collateral before the filing or who gave formal notice of their intention to enforce their security more than 10 days before the filing.</p> <p>In an insolvency proceeding, secured creditors generally unaffected by a bankruptcy and can execute their title by</p>

¹⁵ The two principal insolvency statutes govern Canadian insolvency regime: the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA). The Bankruptcy and Insolvency Act is a federal law and is applicable to businesses and individuals. The office of the Superintendent of Bankruptcy, a federal agency, is responsible for ensuring that bankruptcies are administered in a fair and orderly manner.

												appointing a receiver, or receiver and manager. A secured creditor can also petition the court to appoint a receiver, either under the BIA or under provincial law in most provinces (Section 69).
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Restructurings are normally governed by the Companies' Creditors Arrangement Act or by the proposal provisions of the Bankruptcy & Insolvency Act, and are conducted under court supervision. The restructuring agreement must be approved. Both CCAA and BIA states that such an agreement should be approved by two-thirds in value and a majority in number of each class of creditors to which it is presented. A plan cannot be "imposed " on a dissenting class, but, the two Acts gives a certain flexibility in the composition of the classes of creditors and negotiation of the proposal. A court approval is also needed.</p> <p>Section 50 regulates the proposal in BIA.</p> <p>The first-time bankrupt is automatically discharged after 9 months if no notice of opposition to discharge is filed either by creditors, official receiver or the trustee in bankruptcy. The second-time or more than two-time bankrupt has the trustee in bankruptcy to apply for order of discharge to the bankruptcy court between 3 months and a year from the date of bankruptcy (chapter V); Where there is an opposition to discharge, the debtor defends himself by opposing the opposing creditors, which attempts to persuade the bankruptcy court that one of the facts listed in s.173(1) has occurred ("opposition to discharge", chapter V).</p>
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	<p>Section 2 of the BIA defines a "creditor" as a person having a claim, unsecured, preferred by virtue of priority under s.136 of the BIA or secured, that can be proved as a claims under s.124 of the Act.</p> <p>The creditors can be divided into 4 categories: -secured creditors, whose claims are guaranteed by some security in bankrupt's property. The secured creditors are on the top of the bankruptcy priority of claims scheme.</p>

													-preferred creditors, formed by employee's wages, spousal payments, child support, trustee in bankruptcy's fees, cost of administration of the estate, municipal taxes and landlord's rent claims, and whose claims rank second under priority of distribution in the BIA by virtue of s.136(1) of the BIA. Those; -unsecured creditors; -deferred creditors.
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005		

Comments

The bankruptcy procedure is under reform. Bill C-55 is a comprehensive insolvency reform package in Parliament to modernize the Bankruptcy and Insolvency Act. The current status of Bill C-55 can be found at Office of Superintendent in Bankruptcy website at http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/h_br01368e.html

4. Chile (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	<i>Sociedad Anónima</i> is formed under Law 18046 (1981) ¹⁶ . No minimum capital is required (Art. 10). <i>Sociedad de Responsabilidad Limitada</i> is regulated by Law 3918, 1923. No minimum capital is required
2. Dividend restriction	1	1	1	1	1	1	1	1	1	1	1	Art. 27 regulates the purchase by the company of its own share, and limits the possibility to a numbered conditions: 1. as a result of the right envisaged in art. 69; 2. when the shares are owned by a commercial establishment or a company that is acquired or absorbed by the company; 3. with a prior decision on a capital reduction; 4. when a deliberation of the extraordinary meeting of shareholders has been passed in accordance to art. 27-27D (Art. 27 A to Art. 27 D regulates the procedure for the share repurchase). In the case of corporations that make public offering of their shares, there are additional requirements contained in art. 27A. Art. 78 regulates dividends distribution. Normal restrictions apply. The ‘open’ incorporated companies (“that trade shares in the stock-market, have more than 500 shareholders, or whose shares (with a minimum threshold of 10%) are owned by at least 100 shareholders”) should distribute in cash dividends at least 30% of the net utilities obtained in the year, unless there is an agreement establishing the opposite. If there are accumulated losses, the board can distribute provisional or partial dividends during the year with charges to the utilities of the period. In case the dividends exceed the annual earnings, the directors will be hold liable for the distribution of partial or provisional dividends (Art. 79)

¹⁶ Known as LSA, and modified by laws: a) N° 18.496 1986; b) N° 18.660, 1987; c) N° 19.221, 1993; d) N° 19.499, 1997; e) N° 19.653, 1999; f) N° 19.705, 2000; g) N° 19.769, de 2001; h) N° 19.806, de 2002, and i) Article 7° Law N° 20.190, 2007.

3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Art. 45 states that directors can be found liable against the company (and the liability is assumed), the shareholders or third parties for the damages caused in the following cases:</p> <ol style="list-style-type: none"> 1) if the company did not have accounting books and registry; 2) for the accumulated loss against the directors that contributed to the pertinent agreements. 3) If the company hid its possessions or in case of frauds <p>Art. 46 imposes on the director a duty to inform shareholders and the general public about the legal, economic, financial position of the company.</p>
4. Security: scope	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Non-possessory pledges are regulated by numerous special laws. There are various non-possessory pledges: pledge without conveyance (Law No. 18.112, 1982); industrial pledge (Law No. 5.687); farming pledge (Law No. 4.097); pledge on bearer security made out to banks (Law No. 4.287, 1928); pledge on commercial paper and credit instruments (Law No. 18.092); pledge in bonded warehouses (Law No. 18.690, 1988); pledge on chattels sold on credit (Law No.4.702), chattel mortgage on farm machinery and livestock contracts (Law No. 4,097, 1926), chattel mortgage contracts (Law No. 5,687, 1935)</p> <p>The law recognizes security over most types of movable (both tangible and intangible) assets. A pledge can be constituted for accounts receivables, intellectual property rights, debtor's credits against third parties, future and to-be-purchased assets. It cannot be constituted for a shifting pool of assets on a global basis.</p>
5. Security: registration	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p><i>Hipoteca</i> (mortgage) is regulated in the Civil Code (Book IV, Title XXXVIII), and must be registered with the Registry of Mortgages and Liens of the Real Estate Register of the community where the property of the immovable asset is registered.</p> <p>Not all the non-possessory pledges listed at variable 4 needs to be registered, as not all pledge laws provide for</p>

												registration of the security. Sometimes, even where registration is required, the pledges may be filed at different registries.
6. Security: Enforcement	0	0	0	0	0	0	0	0	0	0	0	It can not be contractually agreed, during the stipulation of a mortgage or a pledge, that a creditor would be granted retention of title, in case of non compliance. Chilean legislation does not provide alternatives to judicial enforcement, and non-judicial enforcement has not yet been legally admitted. Enforcement proceedings are governed by the Civil Procedures Code (Law No. 1552, published in the Official Gazette on August 30, 1902). There are two categories of proceedings, depending on whether the obligations are evidenced in an executive title (<i>título ejecutivo</i>) or not. Mortgages and pledges are generally considered executive titles.
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Insolvency proceedings can be initiated by one or more of his creditors or by the debtor himself (art.39).</p> <p>A debtor that files for his own bankruptcy must submit several documents and pieces of information about his patrimonial status (art.42), while creditors must specify the grounds for their application and attach documents supporting their statements and provide the necessary evidence (art.43).¹⁷</p> <p>The second paragraph of Law N. 20080, published on 24.11.2005, has incorporated the norms of Law No. 18,175 in the IV Book of the Commercial Code, under the Title “De las Quiebras”, not altering its numbering.</p>
8. Stay of secured creditors	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	<p>Even though one of the immediate effects of the bankruptcy declaration is that it stays the creditors’ right to individually execute the debtor’s assets (art.70), exemptions are made for mortgagees and secured creditors, who are nevertheless authorised to enforcement actions separately in order to realise their credits (art.71).</p> <p>When a special mortgage action is created (<i>concurso</i></p>

¹⁷ The primary legal texts governing insolvency in Chile between the period 1995-2005 was the Bankruptcy Law (Law No. 18,175), published in the Official Gazette on October 28, 1982 and modified by Law 20080 published on 24 November 2005, Law 20004 published on 08 March 2005, Law 19806 published on 31 May 2002.

												<p><i>especial de hipotecarios</i>), the individual right of each secured creditors is suspended as well (Art 71 paragraph 3).</p> <p>Art. 126 states that in case creditors opted for the alienation of the business as a whole economic entity, secured creditors are stayed from enforcing their individual rights.</p> <p>In case of a reorganisation plan submission (approved by a majority vote of creditors), Art. 177 bis provides for a stay period of 90 days, binding also on secured creditors, representing.</p>
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Once the bankruptcy is declared art. 112 states that a deliberation taken by the creditors' committee (with a majority vote of the creditors who represent at least two third of the total debt) can allow for the continuation of the business by the creditor.</p> <p>Informal workouts and restructuring (<i>convenio</i> art. 169-172) are briefly regulated in the Chilean Insolvency Law. Debtor and creditors may enter into an extra judicial agreement providing the terms and conditions they deem appropriate as long as the agreement is approved unanimously. In case there's no unanimity, the law provides for a judicial restructuring procedure (173-217).</p>
10. Subordination of secured claimants	0	0	0	0	0	0	0	0	0	0	0	<p>According to Art. 147 of the Insolvency Law, "creditors shall be paid in the form and order of preference established by law". Art. 148 provides for the payment of first class privileged creditors (as classified by art. 2472 <i>Codigo Civil</i>), Art. 149 provides for second class privileged creditors and so on following the classification made by the civil code.</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

5. China (Tianshu Zhou)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	1	1	1	1	1	1	1	1	1	1	1	<p>In <i>Chinese Company Act 1993</i> □ <i>ChinCA 1993</i>□, the minimum capital requirement for private companies which operate manufacturing business is 500,000 Yuan (approximately €50,000), for the companies which operate retailing business is 300,000 Yuan (approximately €30,000), for the companies which supply consulting services or high-tech is 100,000 Yuan (approximately €10,000).</p> <p>By contrast, the requirement reduced to 30,000 Yuan (approximately €3,000) for all forms of private companies in <i>Chinese Company Act 2005</i> □ <i>ChinCA 2005</i>□.</p> <p>See <i>ChinCA 1993</i> art.23 <i>ChinCA 2005</i> art.26</p>
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>According to <i>ChinCA 1993</i> and <i>ChinCA 2005</i>, the dividends must be out of the profits made by the company.</p> <p>Under the creditor protection regime established by <i>ChinCA 1993</i>, dividends only can be distributed to the shareholders where the following conditions have been achieved:</p> <ul style="list-style-type: none"> • The company shall draw 10 percent of its aftertax profits as the company's statutory common reserve. (The company may stop drawing if the accumulative balance of the common reserve has already accounted for over 50 percent of the company's registered capital.) • If the accumulative balance of the company's statutory common reserve is not enough to cover the losses of the company in the previous year, the aftertax profits shall be used for covering the losses before the statutory common reserve is

											<p>drawn therefrom according to the provisions of the preceding paragraph.</p> <ul style="list-style-type: none">• After the company draws the statutory common reserve from the aftertax profits, it may, upon a resolution made by general meeting, draw a discretionary common reserve from the aftertax profits. After the losses have been made up and common reserves have been drawn, the company may distribute the remaining profits to the shareholders pro rata. <p>The Act also says that the profits distributed must be refunded to the company, where the general meeting or board of directors breaches the dividend restriction. However, the legislation does not clarify that the creditors are entitled to make a claim against the illegal dividends distribution.</p> <p>In addition, the repurchases of share is strictly prohibited by the 1993 Act. On the other hand, the “disguised dividends” (e.g. high remuneration for the shareholder who manages the private company or insider trading by the blockholder) is not properly restricted by the legislations.</p> <p>For these points see, Zhu Ci Yun “Gong Si Zi Ben Li Nian Yu Zhai Quan Ren Li Yi Bao Hu” [The Ideology for Capital Maintenance and Shareholder Protection] 2005 (03) <i>Zheng Fa Lun Tan</i> [<i>The Political Science and Law Review</i>] 128-136</p> <p>The <i>ChinCA 2005</i> inherits the regime of dividend restriction provided by the 1993 Act.</p> <p>In addition, art.20 covers the prohibition of the “disguised” dividends. It says the shareholders those damage the creditor’s interests by abusing their limited liability or the company’s independent personality shall be</p>
--	--	--	--	--	--	--	--	--	--	--	--

												<p>subject to compensation. <i>Insolvency Act 2006</i> art.31 says, the administrator may make a petition to the court to revoke the undervalue transaction carried out in the year before the company entering in the bankrupt process.</p> <p>However, art.143 loses the strict prohibition for share repurchases. In some specified conditions, the shares can be repurchased by the company.</p>
3. Directors' duties to creditors	0	0	0	0	0	0	0	0	0	0	0	<p>Both of <i>ChinCA 1993</i> and <i>ChinCA 2005</i> do not include any provision under which directors bear duties to creditors and the case law does not create <i>locus standi</i> whereby the creditor can sue the director rather than the company.</p> <p>However, the Chinese Supreme Court issued a <i>Guidance</i> on implementing the <i>ChinCA 2005</i> in 2008. Art.18 and art.19 confirm that in the condition of cash-flow insolvent, where the director negligently or fraudulently damages corporate assets or accounting documents, the creditors are entitled to sue the director on the basis of breaching the duty of diligence.</p> <p>See Zhao Song, "Lun Dong Shi Dui Gong Si Zhai Quan Ren De Min Shi Ze Ren" [Director's Liabilities to Creditor] 2005(09) <i>Xi Nan Min Zu Da Xue Xue Bao</i> [<i>Journal of Southwest University For Nationalities</i>]106-110</p> <p>In this article, Zhao made a conclusion that the legislations do not confirm that the directors bear duties to creditor.</p>
4. Security: scope	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p><i>Chinese Securities Act 1995</i> permitted the mortgage of land and security over tangible moveables (e.g. vehicles, shipping and jewelry) and receivables (e.g. mining right, fishery right and land-use right).</p> <p>In addition, floating charge is added in the legislative framework by <i>Property Act 2007</i> art.181. However, only the moveables and receivables can be the objects of floating charge. This regime does not cover immovables.</p>

												<p>See <i>Securities Act 1995</i> art.34 and <i>Property Act 2007</i> art.180 and art. 181</p> <p>Liang Huixing and Cheng Huabin <i>Wu Quan Fa</i> [<i>Property Law</i>] 2ed., Fa Lv Chu Ban She 2000 [Law Press2000] 309 341</p> <p>Wang Liming, Presentation in Ren Min University of China (15. 12. 2007) Topic: The Development of Securities Regime under the <i>Property Act 2007</i>, the full text of this presentation is available at: http://www.civillaw.com.cn/article/default.asp?id=36636</p>
5. Security: registration	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>According to the <i>Securities Act 1995</i> the security over imoveables (e.g. building, plant), some special moveables (e.g. vehicle, aircraft and enterprises' manufacturing equipments) and receivables (state-owned land-use right) must be registered in the local authorities. After the registration, the priority of the security will be given to the secured creditor. For the security over other properties, without registration, the secured creditors are not entitled to defend against the claims made by <i>bona fide</i> third party, although the security has become to be effective after the two parties entering into the security contract.</p> <p>According to <i>Property Act 2007</i>, the requirement of mandatory registration only applies to the security over imoveables (e.g. buildings) and certain kinds of receivables (e.g. land-use right for construction purpose). All the security over moveables (including vehicles shipping and aircraft) is not subject to this requirement. However, without registration, the secured creditors are not entitled to defend against the claims made by <i>bona fide</i> third party.</p> <p>See <i>Securities Act 1995</i>art.41 art.42 and art.43</p> <p><i>Property Act 2007</i> art.187 and art.188</p> <p>Liang Huixing and Cheng Huabin <i>Wu Quan Fa</i> [<i>Property</i></p>

													<i>Law</i>] 2ed., Fa Lv Chu Ban She 2000 [Law Press2000] 313
6. Security: Enforcement	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>According to <i>Insolvency Act 1986</i> and <i>Insolvency Act 2006</i>, the out of court enforcement is available to the secured creditors. They can be stayed for the optimum realisation of their security.</p> <p>However, under the regime provided by <i>Insolvency Act 1986</i>, the out of court enforcement is weak and ineffective, as the law does not require the court to appoint a qualified administrator to take charge of the rehabilitation. Consequently, the creditors' interests cannot be properly protected in the whole process. (It is the main reason why I only give 0.5 to the out of court enforcement under <i>Insolvency Act 1986</i>)</p> <p>According to <i>Insolvency Act 2006</i>, the court must appoint a qualified administrator (e.g. law firms or accounting firms) to supervise the company's rehabilitation. The administrator's powers and duties are stipulated by the Act as well.</p> <p>See <i>Insolvency Act 1986</i> chapter 4 and <i>Insolvency Act 2006</i> chapter 8 and chapter 9</p>
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>The legislation says where the debtor is unable to repay matured debts; the creditors may file to declare the debtor bankrupt. In addition, the debtors are not entitled to commence bankruptcy unilaterally, unless they are cash-flow insolvent.</p> <p><i>Insolvency Act 1986</i> art.7 and <i>Insolvency Act 2006</i> art.7</p>
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>According to the <i>Insolvency Act 1986</i>, secured creditors may not stay in the single-gateway regime where rehabilitation is not a realistic possibility. Art.21 says that the creditor's meeting may make a petition to terminate the administration in the case where the financial condition of the insolvent company is being deteriorated.</p> <p>Similar provisions can be found in <i>Insolvency Act 2006</i>. Art.78 says, the creditors may make a petition to terminate</p>

												<p>the administration in the following conditions:</p> <ul style="list-style-type: none"> • the financial condition of the insolvent company is being deteriorated and lacks possibility of rehabilitation. • the debtors fraudulently damage the assets of the insolvent company • the administrator cannot perform its functions due to the debtors' conducts
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>According to <i>Insolvency Act 1986</i>, the creditor is the substantial decision-maker regarding whether the firm continues or is closed. The creditors are entitled to prove the resolution of rehabilitation made by debtors. Art.16 says the resolution must be approved by majority of creditors (both of the secured and unsecured creditors). In addition, the debts held by the creditors who approve the resolution should exceed half of the total amount of the debts held by unsecured creditors.</p> <p>In <i>Insolvency Act 2006</i>, the decision-making power is also granted to the creditors. Unlike the 1986 Act, the creditors are divided into several classes (secured creditors, employees' remuneration, taxation and unsecured creditors). The resolution will be deemed to be approved where it is approved by all classes of creditors. For certain class of creditors, the resolution will be regarded to be approved where majority of creditors cast their votes on it. The debts held by the creditors who approve the resolution should exceed two thirds of the total amount of debts in this class.</p> <p><i>Insolvency Act 1986</i> art.16 and <i>Insolvency Act 2006</i> art.84 art.85 and art.86</p>
10. Subordination of secured claimants	0	0	0	0	0	0	0	0	0	0	0	<p>According to <i>Insolvency Act 1986</i>, the secured creditors subordinate to the employees' claim of remuneration. In other words, the secured properties will be used to pay the employees' remuneration, where the unsecured properties</p>

												<p>are not enough to cover these claims.</p> <p>This provision is reformed by 2006 Act which confirms that the secured creditors' right does not subordinate to the claims made by other class of creditors.</p> <p>See Li Shuguang "Xin Po Chan Fa De Jiu Da Zhi Du Chuang Xin Yu Tu Po" [The <i>Insolvency Act 2006</i>:Development and Creation] <i>Fa Zhi Ri Bao (Law Daily)</i> 05-09-2006</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

6. Czech Republic (Stephan Haidenheim)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0.6	0.6	0.6	0.6	0.6	0.6	0.7	0.7	0.7	0.7	0.7	<p>Listed stock companies: ~ 827,300.- € (Art. 162 § 3 Commercial Act-cz); up tp 12/31/2000: ~ 41,374.- €</p> <p>Other stock companies: ~ 82,730.- € (Art. 162 § 3 Commercial Act-cz); up tp 12/31/2000: ~ 41,374.- €</p> <p>Limited companies: ~ 8,273.- € (Art. 108 Commercial Act-cz); up tp 12/31/2000: ~ 4,137.- €</p>
2. Dividend restriction	0	0	1	1	1	1	1	1	1	1	1	<p>No rules until 1997</p> <p>Since 1997:</p> <ul style="list-style-type: none"> - prohibited repayment of contributions to shareholders according to Art. 123 § 3 Commercial Act-cz; - dividend payments only according to Art. 178 and 179 Commercial Act-cz, evasive transactions (“disguised dividends”) prohibited by Art. 179 § 4 Commercial Act-cz; - share repurchase according to strict rules of Art. 161a-c, 179 § 2 Commercial Act-cz
3. Directors’ duties to creditors	1	1	1	1	1	1	1	1	1	1	1	<p>Directors’ duty to file for insolvency both if company is cash-flow or balance-sheet insolvent to obtain insolvency assets in favour of creditors, Art. 3 Bankruptcy Act (No. 328/1991, Coll. Of Laws, in force until 12/31/08)</p> <p>(as from 01/01/08 : Art. 3, 5, 98 and 99 Insolvency Act-cz)</p>
4. Security: scope	0	0	0	0	0	0	1	1	1	1	1	<p>Since 2001: Assets over which non-possessory security interests may be granted comprise:</p> <ul style="list-style-type: none"> - land (Art. 157 Civil Code-cz) - personalty (Art. 158 Civil Code-cz) - receivables (Art. 159 Civil Code-cz) - aggregate of assets (Art. 153 § 1 i.c.w. Art. 156 et seqq. Civil Code-cz)
5. Security: registration	0	0	0	0	0	0	0	0	0	0	0	No obligation to register any non-possessory security

												interest; Art. 35b Notary Act
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	Out of court enforcement is possible, e.g. via public sale, (cf. Art. 165 § 2 Commercial Act-cz)
7. Entry to corporate bankruptcy proceedings	1	1	1	1	1	1	1	1	1	1	1	The debtor is obliged to commence bankruptcy proceedings if balance-sheet insolvent. Also, a single creditor may commence bankruptcy proceedings against a debtor if he shows that debtor is insolvent in any respect: however, without any indication for bankruptcy, neither of the parties can commence proceedings, Art. 3, 4 Bankruptcy Act (as from 01/01/08: § 97 and § 98 Insolvency Act-cz)
8. Stay of secured creditors	1	1	1	1	1	1	1	1	1	1	1	Creditors are not stayed if rehabilitation proceedings are against all odds, Art. 52 Bankruptcy Act (as from 01/01/08: Art. 249 and 251 Insolvency Act-cz)
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	The court is the single decision maker, Art. 39 and 44 et seqq. Bankruptcy Act; as from 01/01/08: Art. 10, 11 Insolvency Act-cz
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	None of the listed secured claimants' securities is subordinated to preferred claims, Art. 28 Bankruptcy Act; (as from 01/01/08: Art. 157, 298 and 299 Insolvency Act-cz)
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

7. France (John Armour)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0	0	0	SARL form available until end of 2003 with minimum capital of 50,000FF (=€7,500): Loi n°66-537 du 24 juillet 1966 sur les sociétés commerciales, art 35. From 1 January 2004, SARL form available with no minimum capital: Article L223-2, Loi n°2003-721 du 1 août 2003 - art. 1.
2. Dividend restriction	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	Article L225-210 Commercial Code (ex art. art. 217-3 loi n°66-537 du 24 juillet 1966) (dividends); Article L225-209 Commercial Code (Law No 2003-7 of 3 January 2003 Article 50 (II) Official Gazette of 4 January 2003) (repurchases); Article L232-11,12 (disguised distributions).
3. Directors' duties to creditors	1	1	1	1	1	1	1	1	1	1	1	Commercial Code Art L 624-3: Where management errors have contributed to a lack of assets, court may order that all or some of the debts of the company be borne by its directors. See also Art L 624-5.
4. Security: scope	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	Personalty: Charges not possible over inventory—must be a pledge, which requires dispossession of the debtor. Charges however possible over certain assets, including a purchase money security interest over material and equipment. See M. Gdanski, 'Taking Security in France' in M. Bridge and R. Stevens (eds.), <i>Cross-Border Security and Insolvency</i> (Oxford: OUP, 2001), 64-68. Receivables: loi du 2 Janvier 1981 ('Loi Dailly') established a statutory framework specifically for the grant of security over book debts. 'Entire undertaking': 'The notion of a "floating charge" which crystallises on enforcement of the charge does not exist under French law' (Gdanski, supra, 59). However, a pledge may be given over a 'fond de commerce' (i.e., 'going business'), including commercial name, goodwill, IP, etc, but excluding real estate, book debts, inventory and contractual rights (ibid. 65-66).
5. Security: registration	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	Registration required for security over corporeal moveables (Art. 2238 Civil Code) but not for incorporeal

												assets (Art 2361 Civil Code).
6. Security: Enforcement	0	0	0	0	0	0	0	0	0	0	0	Gdanski, <i>supra</i> , 79.
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Commercial Code, Art LL 620-2, 621-1 (single creditor may commence insolvency proceedings, cash flow test).
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Commercial Code, Art L 621-40 (secured creditors stayed); but see also Art L 622-23 (secured creditors may exercise individual enforcement in liquidation if liquidator has not sold assets within 3 months);
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	Commercial Code, Art L 621-62: court makes primary decision regarding outcome of case. See also LL 621-60, 621-61 (judicial administrator, in preparing report, must consult with creditors and employees; report is then influential in court's decision on the case. Introduced by Loi no 94-475 du 10 juin 1994 relative à la prévention et au traitement des difficultés des entreprises, Official Journal 134 du 11 juin 1994 page 8440, in force 21 October 1994.
10. Subordination of secured claimants	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	Commercial Code, Art L 621-31 I : Loi du 25 Janvier, 1985, art 40 (secured and unsecured debts subordinated), cf Commercial Code, Art L 621-32 II (debts secured by specific charges of real or personal property are not subordinated in liquidation) Loi no 94-475 du 10 juin 1994 relative à la prévention et au traitement des difficultés des entreprises, Official Journal 134 du 11 juin 1994 page 8440, in force 21 October 1994.
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

8. Germany (Mathias Siems)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	1	1	1	1	1	1	1	1	1	1	1	§ 5(1) GmbHG (as amended by GmbH-Novelle 1980): 50.000 DM → 25.000 Euro.
2. Dividend restriction	1	1	1	0.80	0.80	0.80	0.80	0.80	0.80	0.80	0.80	<p>Generally, dividend restrictions follow from. § 233 AktG. Share repurchases are restricted by § 71 AktG. In the original version this section only provided for six very narrow exceptions but since Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG), 27. 4. 1998, BGBl. I 786 amended § 71 AktG: now general authorisation possible.</p> <p>§ 57 AktG and & case law (cf. BGH, NJW 1960, 285; NJW 1987, 1194; NJW 1996, 589); cf. also Peter O. Mülbart, A synthetic view of different concepts of creditor protection, Working Paper 2006, available at http://ssrn.com/abstract=883625: “It is not entirely clear what kind of transactions the prohibition applies to. While the Second Directive explicitly speaks only of “distributions,” German commentators generally agree that so-called concealed distributions (<i>verdeckte Ausschüttungen</i> or <i>verdeckte Einlagenrückgewähr</i>) are also prohibited by the directive. This term refers to transactions by which corporate funds are conveyed to shareholders indirectly, typically through contracts entered into on unfair terms, such as loans to shareholders with unusually low (or no) interest rates or purchases from shareholders at excessive prices”.</p>
3. Directors’ duties to creditors	1	1	1	1	1	1	1	1	1	1	1	<p>Directors’ liability possible because:</p> <p>(1) In case of balance sheet insolvency (as defined in § 19(2) InsO) directors must apply for the institution of insolvency proceedings (§ 92(2)(s.2) AktG) and must only make payments if they are compatible with the diligence of an orderly and conscientious manager (§ 92(3) AktG). Violation of (§ 92(2)(s.2) AktG) can lead to directors’ liability with respect to creditors (regarding</p>

												<p>§ 92(2)(s.2) AktG this follows from § 823(2) BGB (BGHZ 29, 100, 103 = NJW 1959, 623; BGHZ 75, 96, 106 = NJW 1979, 1823; BGHZ 100, 19, 21 = NJW 1987, 2433 f; BGHZ 126, 181, 190 = NJW 1994, 2220). Furthermore, there can be a claim based on § 93(2) AktG to pay damages to the company, which can be asserted by the creditors (§ 93(5) AktG); The same is true for a violation of § 92(3) AktG (see §§ 93(3)(no.6),(5) AktG).</p> <p>(2) If the directors have committed a crime (§§ 283-283d StGB), this may also lead to directors' liability based on tort law (§ 823(2) BGB).</p> <p>(3) In case of "crisis" equitable subordination is more strict (see Hüffer, AktG- Kommentar, § 57 para. 16a).</p> <p>§ 92(2)(s.1) AktG: the same rules apply in case of illiquidity, i.e. inability to pay one's debts as they come due (§ 17(2) InsO). The criminal provisions, which may lead to directors' liability (§ 823(2) BGB with §§ 283-283d StGB), are already applicable in case of "imminent insolvency" (see also § 92 InsO and Becker, Insolvenzrecht, 2005, para. 1073).</p> <p>No general obligation to take stakeholder interests into account (see shareholder index), but stakeholder interests can be taken into account (cf. Hüffer, Aktiengesetz, 7th edn, 2006, § 76 para. 12).</p>
4. Security: scope	0.83 33	0.83 33	0.91 66	0.91 66	0.91 66	0.91 66	0.91 66	0.91 66	0.91 66	0.91 66	0.91 66	<p>§ 1113 BGB (hypothec), § 1191 BGB (land charge).</p> <p><i>Sicherungsübereignung</i> (transfer by way of security) possible (case law since 1890; RGZ 26, 180). <i>Sicherungsabtretung</i> (assignment by way of security) possible.</p> <p>As such, there is no floating charge in German law. However, courts have accepted global security if certain requirements are fulfilled (for a comparative overview see Hugh S. Pigott, The Need for Harmonisation of Collateral Law in Europe, (2004) 15 EBLR 871); in particular (1) identification has to be possible (principle</p>

												of specificity) (e.g., RGZ 155, 26; BGHZ 7, 365); (2) no violation of “good morals” (§ 138 BGB): violation can occur, e.g., because (a) “over-security” (Übersicherung); (b) inducement to breach contract which provides retention of title; see, e.g., Mayr-Maly and Armbrüster in MünchKommBGB, § 138 paras 98 et seq.; Eva-Maria Kieninger (ed.), Security rights in property in European private law, 2004, p. 418, 439, 441-2, 481-4. Since 1997 thjs has become slightly easier (BGH, 27.11.97, BGHZ 137, 212 = NJW 1998, 671: courts imply appropriate waiver into security agreement → no “over security”)
5. Security: registration	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Hypothec and land charge must be registered but not <i>Sicherungsübereignung</i> and <i>Sicherungsabtretung</i> .
6. Security: Enforcement	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Depends on type of collateral: (1) possessory pledge: self-enforcement possible §§ 1228, 135 BGB; (2) non-possessory security interest over personalty = transfer by way of security: enforcement depends on contract; default rule: analogy to pledge law (§§ 1228 II, 1234, 1247 S. 2 BGB; see also Kindl in Bamberger/Roth, BGB, Anh. § 930 paras. 25 et seq.) (but: danger that third person acquires personalty in good faith because no registration; coded in variable 5 above); (3) receivables: self-enforcement possible (but usually not transfer to third person; depending on contract) (see Rohde in Bamberger/Roth, BGB, § 381 para. 51); (4) for entire undertaking and financial collateral usually the same rules as in (2) and (3) apply; (5) land: self-enforcement of hypothec or land charge not possible (§ 1147 BGB); but usually notarielly certified deed (§ 794(1)(no.5) ZPO: enforcement arising out of notarielly certified deed possible).
7. Entry to corporate bankruptcy proceedings	1	1	1	1	1	1	1	1	1	1	1	In case of balance sheet insolvency (as defined in § 19(2) InsO) directors must apply for the institution of insolvency proceedings (§ 92(2)(s.2) AktG) and must only make payments if they are compatible with the diligence of an orderly and conscientious manager (§ 92(3) AktG).
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	For unsecured creditors there is a stay of assets. This means: (1) suspension of pending trials (§ 240 ZPO with

												<p>§ 38 InsO) and prohibition of execution (§ 89 InsO); (2) creditors can only enforce their claims under the provisions governing the insolvency proceedings (§§ 87, 89 InsO); also: claims based on company law can only be exercised by the insolvency administrator (§§ 62(2)(s.2), 93(5)(s.4), 117(5)(s.3), 309(4)(s.5) AktG).</p> <p>(1) does not apply to secured creditors: § 240 ZPO with § 38 InsO is superseded by § 11 KO (until 1999) and § 86(1) InsO (since 1999): “actions of secured creditors pending against the debtor as defendant on the date when the insolvency proceedings are opened may be joined by the insolvency administrator or continued by the plaintiff” (§ 86(1) InsO); then, secured creditor can also execute judgment because the prohibition of execution (§ 89 InsO) does not apply for secured creditors (see Uhlenbruck, InsO, 12th edn., 2003, § 89 para 1)</p> <p>(2) does not apply to land-secured creditors: §§ 47, 126 KO (until 1999) and § 49, 165 InsO (since 1999): secured land-creditor can start new proceedings according to § 49 InsO with ZVG.</p> <p>Other secured creditors until 1999: disposition of movables by insolvency administrator (§ 127(1) KO), unless creditor agreed with debtor on own disposition (§ 127(2) KO) → the latter usually happened → secured creditors outside the main insolvency proceedings.</p> <p>Since 1999: Disposition of movables only by insolvency administrator (§ 166(1) InsO; cf. Uhlenbruck, ibid, § 166 para. 1); but § 86(1) InsO for pending trials.</p> <p>These rules are identical for liquidation and rehabilitation proceedings (see also § 217 InsO). It is also irrelevant of whether rehabilitation is a realistic possibility) → 0.5</p>
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.75	0.75	0.75	0.75	0.75	0.75	0.75	<p>No substantive court involvement:</p> <p>- Until 1999: two different procedures: (1) for “compulsory arrangement”: §§ 184 et seq. KO (mentioning specific reason for rejection); (2) for “creditors’ arrangement”: §§ 78 et seq VerglO</p>

											<p>(mentioning specific reason for rejection) (no discretion). - Since 1999: Court has to confirm the accepted plan (§ 248(1) InsO) based on §§ 250, 251 InsO (no discretion, see Lüer in Uhlenbruck, 12th edn., 2003, § 248 para. 12).</p> <p>No substantive debtor involvement: The debtor either has to initiate or to approve the plan (see § 247(1) InsO). Insolvency law does not specify which person/organ of the debtor is responsible. According to company law, the start of the insolvency proceedings leads to the dissolution of the company (§ 262(1)(no.3) AktG). However this does not mean the end of the company as a legal entity but only as a change of the object of the company (Hüffer, AktG, Kommentar § 262 Rn. 2); Moreover, insolvency proceedings do not affect the general structure of the company (management and supervisory board; general meeting) (e.g., OLG München AG 1995, 232). However, the powers of the administrator and creditors under insolvency law replace most powers of the organs of the company (see Hüffer, ibid, § 264 para. 10). Only insolvency-neutral measures remain possible (Hüffer, ibid, § 264 para. 79: e.g. change of articles and change of capital may be permissible). Continuation of the old company is only possible after the insolvency proceedings have been completed (§ 274(2)(no.1) AktG).</p> <p>Creditor involvement: - Until 1999: Two different procedures: (1) for “compulsory arrangement”: § 182 KO; (2) for “creditors’ arrangement”: § 74 VerglO. In both cases majority of votes and majority of persons is necessary (double majority). For secured creditors only to the extent that they waive their right to separate satisfaction, or that such separate satisfaction has failed (§§ 182, 64 KO; §§ 74, 27 VerglO) - Since 1999: Creditors have to approve insolvency plan by groups (§§ 222, 235, 243, 244 InsO). Secured creditors are a separate group if “their rights are</p>
--	--	--	--	--	--	--	--	--	--	--	---

												<p>encroached upon by the plan” (§ 222(1)(no.1) InsO; see also § 238 InsO). To the extent that they waive their right to separate satisfaction, or that such separate satisfaction has failed (§ 237 InsO), they are always part of the group of non-lower ranking creditors (§ 222(1)(no. 2) InsO).</p> <p>In general each group of creditors has to agree on the plan (§ 244 InsO). However, there is a prohibition to obstruct (§ 245 InsO): i.e. “a voting group shall be deemed to have consented if the creditors forming such group presumably suffer no loss by the insolvency plan compared with their situation without such plan” ((1)(no.1)), and the creditors forming such group participate to a reasonable extent in the economic value devolving on the parties under the plan ((1)(no.2): this is the case if “neither a creditor with a lower-ranking claim to satisfaction without a plan, compared with the creditors forming his group, nor the debtor nor a person holding the debtor's shares receives an economic value” (2)(no.2), cf. cramdown provisions of US bankruptcy law). Furthermore, in some cases lower-ranked creditors shall be deemed to have given consent (§ 246 InsO).</p>
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	<p>There are various statutory priorities (§§ 57 et seq. KO; §§ 35 ff. InsO; see also Balz, 23 Brook. J. Int’L. 167 at 174 (1997). However, these do not affect the position as a secured creditor (Uhlenbruck and Berscheid, supra note 23, § 53 para. 3; Becker, supra note 27, paras. 852, 1446).</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

For explanations see the original creditor protection index, available at <http://www.cbr.cam.ac.uk/pdf/CreditorProtectionIndex5Countries.pdf>

9. India (Priya Lele)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0.07	0.07	0.07	0.07	0.07	0.07	Companies Act 1956 S. 3 (iii) as amended by the Companies (Amendment) Act of 2000. €1713.58, (currency conversion http://www.x-rates.com/calculator.html as on 29 May 2006).
2. Dividend restriction	0.33	0.33	0.33	0.17	0.17	0.17	0.17	0.17	0.17	0.17	0.17	Companies Act 1956, S.77 (restriction on repurchase of shares); Companies Act 1956, Ss.77A, 77AA and 77B introduced by the Companies (Amendment) Act of 1999 with effect from 31/10/1998 read with SEBI (Buy-Back of Securities) Regulations, 1998 (relaxation of restriction).
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Liability only for fraudulent conduct of business : S.542 (similar to S.458 and S.630 of English CA 1985)– If in the course of winding up of a company, it appears that any business of the company has been carried on with intent to defraud the creditors of the company or any other person or for any fraudulent purpose, the persons who were knowingly parties to the carrying on of the business (which includes directors), in the manner aforesaid, shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company, as the court may direct. Cases – Heavy withdrawal of money by the directors of a company under interest-free loans with knowledge that the company unable to pay creditors: <i>Official Liquidator v. Ram Swarup</i> , AIR 1997 All 72.
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	See Ss. 125 and 124 of the Companies Act 1956, to be read with the Transfer of Property Act 1882.
5. Security: registration	1	1	1	1	1	1	1	1	1	1	1	All registrable.
6. Security: Enforcement	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1	1	1	1	The Recovery of Debts Due to Banks and Financial Institutions Act 1993 enables faster recovery of debts (whether secured or otherwise) due to banks and financial institutions of the value of Rs.1 M or more through special tribunals [known as Debt Recovery Tribunals] established under the Act in a summary proceeding; From 2002, s.13 of the Securitisation and

												Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 grants special powers of banks/financial institutions/securitisation or reconstruction companies to enforce security without court order
7. Entry to corporate bankruptcy proceedings	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	For industrial companies, mandatory reference to BIFR when balance sheet conditions met: See S.15 and S.23 of the Sick Industrial Companies Act 1985. For non-industrial companies, a single creditor may launch a petition for liquidation when company unable to pay its debts: Companies Act 1956 ss 433 (e), 439 (1) (b) (Code as 0.75= midway between 1 and 0.5)
8. Stay of secured creditors	1	1	1	1	1	1	1	0.5	0.5	0.5	0.5	Secured creditor may enforce security interest in liquidation proceedings: <i>Ranganathan v/s Govt of Madras</i> AIR 1955 SC 604. Secured creditors stayed in SICA proceedings: Sick Industrial Companies Act 1985, s 22. Since 2002, action by bank/financial institution/securitisation or reconstruction company under S.13 (4) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFEASI Act) is protected. SARFEASI Act has overriding effect over any other law to the extent of inconsistency between them (see S.35 of SARFEASI Act).
9. Outcome of bankruptcy proceedings	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	For industrial companies: all parties can propose scheme; BIFR obliged to take into account objections by affected parties (see Regs 29, 30,34,35 of Chapter VI Procedure for preparation of scheme under S.18 of the BIFR Regulations, 1987), ultimate decision lies with the BIFR. For non-industrial companies, scheme of arrangement requires creditor vote: Companies Act 1956 S.391 specifies the requirement for meeting of shareholders or creditors with whom the scheme of compromise or arrangement is proposed. (Code as 0.25 = midway between 0 and 0.5)
10. Subordination of secured claimants	0	0	0	0	0	0	0	0	0	0	0	Liquidation (non-industrial companies): Companies (Amendment) Act of 1985: preferential payment of the 'workmen's dues' ranks pari passu to all secured creditors, amending ss 529, 530 and introducing s 529A

												to Companies Act 1956. Also applicable under SICA: SICA ss 18(11), 20(4).
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

For explanations see the original creditor protection index, available at <http://www.cbr.cam.ac.uk/pdf/CreditorProtectionIndex5Countries.pdf>

10. Italy (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	<p>Art. 2327 c.c. referring to S.p.A. was modified in 2003 by d.lgs. 6/2003, though the new norm became effective only since the 1st of Jan 2004.</p> <p>Before the reform, the minimum capital for a S.p.A. was 200 millions lire (Art. 2327cc), after 2003 it's 120,000 EUR (Art. 2373 cc).</p> <p>The minimum capital requirement for S.r.l. amounts, instead, to 10,000 euro (art 2463, 2° comma 4 cc), and used to be 20,000,000 (art. 2474 comma 1 cc) Italian Lire (almost 10,000 EUR) before the reform. The same minimum capital requirements apply to S.a.p.a.</p>
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Normal dividend restrictions apply when the company balance is below the minimum capital requirement. (Art. Art. 2433 bis cc pre reform).</p> <p>Before and after 2003, art. 2357- 2357quater cc regulated the purchase of the company's own shares, establishing that a company cannot, if not within the limits of the distributed dividends and the available funds as stated in the last approved balance sheet, purchase its own shares, though there are exceptions to this principle (2357bis cc).¹⁸.</p> <p>Art. 2373 regulated the case of conflicts of interests of a shareholder.</p>
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.6	0.6	0.6	Art. 2394 regulates the directors' duties to creditors,

¹⁸ Special cases for own shares' purchase:

- [1] The limitations provided for in Art. 2357 c.c. shall not apply when the purchase of the own shares is performed:

- 1) as a shareholders' resolution of capital reduction, legally approved by the shareholders meeting;
- 2) for free;
- 3) in conjunction with a universal succession, a merger or a split of the company;
- 4) in conjunction with a court order emitted to satisfy a debt of the company.

												<p>stating that directors are liable against the company's creditors for the noncompliance of the obligations concerning the integrity of the company patrimony (as defined at 2407 cc). The action can be proposed by creditors when the company patrimony results insufficient to satisfy their debts.</p> <p>The courts have also worked towards the definition of directors' duties towards the creditors. In 2002, a court has condemned the directors of a company for violation of the provisions of Art. 2357 cc (purchase of own shares).</p>
4. Security: scope	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Art. 2784 cc defines the pledge and states that movable assets, universality, credits and any other rights having movable as an object, can be secured through a pledge, while art. 2785 refers to special laws concerning pledges in special sector. Art. 2810 cc defined the mortgage as specifies that it can be constituted over lands, and certain movable assets like aircrafts, ships, cars...</p> <p>A typical example of a non-possessory security interests is the so called '<i>pegno rotatorio</i>', elaborated by the Italian Courts in the past decades. Yet, it is considered mainly an exception¹⁹. Generally all security interests on movables are possessory. Many commentators (Phillip Wood) attribute to the Italian <i>privilegio speciale</i> the same function of the English 'floating lien', but the field of application of the <i>privilegio</i> is very limited, and the law lists its only possible uses²⁰. <i>Privilegi speciali</i> for Credits in the industry, agricultural and company sectors are regulated in Art. 2751bis cc.</p>
5. Security: registration	0	0	0	0	0	0	0	0	0	0	0	Mortgage of land (and on the <i>diritti reali</i> on land) shall be registered. Same apply to mortgage of certain

¹⁹ There are security rights for IP. Art. 111 Copyright Law allows non-possessory security interests on the profits created by the exploitation of the copyrighted materials and Art. 69 of Patent Law allows security interests on any industrial inventions. Securities interests of shares and obligations have to be recorded in the company book and all the formalities for their passage have to be respected.

²⁰ There is a *privilegio speciale* that guarantees the credits to the industry sector through all the machinery an industry owns.

												categories of movables (such as aircraft, cars, ships, etc...). Normally, registration does not apply to movables, as security interests on those are of possessory nature.
6. Security: Enforcement	0	0	0	0	0	0	0	0	0	0	0	<p>A court order is always necessary. The law places a general ban on private enforcement against the debtor default (Art. 2797 cc for pledges and 2891 cc for mortgages). Enforcement follows the norms contained in art. 474-632 c.p.c.</p> <p>See also art. 2744 cc '<i>divieto di patto commissorio</i>', where the law stated that any transaction (included any contract that has similar effect, such as the <i>vendita in garanzia</i>) that establishes that the property of the secured asset will be transferred to the creditor in case of the debtor noncompliance.</p>
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Art. 5 of <i>Legge Fallimentare</i> (Regio Decreto 16 March 1942, n. 267)²¹ defines when a debtor is insolvent status. This is a key feature, which is a necessary prerequisite for starting an insolvency procedure. The procedure can be started by the creditors (one or more) of the company, the debtor himself – but only on the condition he is insolvent, the court or a public prosecutor (Art. 6 LF).</p>
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Art. 51 LF imposes a stay on all creditors' individual actions. Art. 53 LF deals with secured creditors (pledge or privilege on movable assets as specified in art. 2756 – credits arising from the conservation and amelioration of the assets and 2761 credits for the carriers, depositary and so on..) and states that enforcement proceedings can still be carried on during the insolvency procedure. The secured creditors have to be authorised by the court. During reorganization, secured creditors' claims aren't exempt from an automatic stay on enforcement.</p>
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	<p>See <i>Concordato</i> (Art. 128, 129 and 130 LF) <i>Concordato Preventivo</i> (Art. 181) and <i>Amministrazione coatta controllata</i> (Art. 188, 190 and 191). The creditors have a</p>

²¹ Revised and extensively modified by D.lgs. 9 gennaio 2006, n. 5 and D.Lgs. 12 Settembre 2007, n. 169.

												voting procedure for establishing whether they wish to stay the proceedings. Yet, it is the Court who made the final decision on the feasibility of the stay and it is effectively up to the Court to decide whether the company should go into winding up.
10. Subordination of secured claimants	0	0	0	0	0	0	0	0	0	0	0	All secured claims rank (Art. 111 LF) below a number of preferential creditors: state (Inland Revenue), employees, etc... Art. 2745 c.c. and ss. on the <i>privilegi generali</i> created by the law to cover certain types of credits. Art. 54 specifies that creditors with pledges, mortgages and privileges have a pre-emption right on the sums obtained from the auction of the secured assets.
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

Comments

1. In Italy case law has always pointed out a certain legislative disfavour for security interests in general.

11. Japan (Kenji Hirooka)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	1	1	1	1	1	1	1	1	1	1	1	Prior to the enactment of the Companies Act in May 2006, there have been two major types of vehicles to conduct business with giving their equity investors limited liability benefit – stock corporation (<i>Kabushiki Kaisha</i>) and private limited company (<i>Yugen Kaisha</i>). 10 Million Japanese Yen was required to be contributed for establishment of stock corporation pursuant to Article 168-4 of the old Commercial Code, and 3 Million Japanese Yen was required to be contributed for establishment of limited private company pursuant to Article 9 of the old <i>Yugen Kaisha</i> Law. At the time of the enactment of the current Companies Act, these two types of corporate vehicles were merged and private limited company was absorbed into the category of stock corporation, and the above minimum capital contribution requirements were abolished.
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	For stock corporation, normal dividend restriction applies when a corporation pays dividend to its equity investors and therefore dividend payment can only be allowed to certain extent calculated according to the law (Article 290-1 of old Commercial Code, or Articles 461 of the current Companies Act). Similar rule applied to limited private company (Article 44 and 46 of <i>Yugen Kaisha</i> Law). In addition, stock corporation could not repurchase its shares except for certain cases ²² pursuant to Article 210 of

²² The former Commercial Code of Japan lists following cases as exception to the limitation of repurchase of its own shares (Article 210, 210-2, 210-3 of the former Commercial Code).

- (a) Acquisition for the purpose of liquidation of treasury stock
- (b) Acquisition along with a merger or acquisition of all business of other company or other corporate reorganization
- (c) Acquisition for the purpose of exercising right of the company
- (d) Acquisition as a result of shareholder's exercise of its right to require the company to buy back its shares
- (e) Acquisition of its own shares, for which transfer restriction is imposed, in case a company is designated as buyer
- (f) Acquisition for the purpose of transferring treasury stocks to its directors or employees.

												old Commercial Code. In 2001, old Commercial Code was amended and this repurchase restriction was relaxed so that a stock corporation thereafter can purchase its own shares, while such repurchase still can only be allowed according to certain procedure and up to dividend payable amount calculated under the law pursuant to Article 210, Paragraph 3 of the old Commercial Code, or Article 461, 156 of the current Companies Act. Similar repurchase restriction rule also applied to private limited company (Article 24 of Yugen Kaisha Law).
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	If directors are with knowledge or grossly negligent in performing their duties, such directors shall be liable to a third party (including creditors) for damages arising as a result thereof pursuant to Article 429 of Companies Act. Thus, if cash-flow insolvency or balance-sheet insolvency is caused by such directors' failures to perform their duties with knowledge or gross negligence, such directors are held liable for creditors' damages.
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	Mortgage (<i>Teitouken</i>), which is non-possessory security interest, can be obtained for real estates, including lands (Article 369 of Civil Code). Also, another type of non-possessory interest, mortgage by transfer (<i>Jyouto Tanpo</i>), which is admitted by court precedents, can be obtained for land, tangible movables or receivables, and aggregation of such tangible movables or receivables.
5. Security: registration	0	0	0	0	0	0	0	0	0	0	0	To perfect mortgage of real estates against any third party, registration is required (Article 177 of Civil Code). To perfect mortgage by transfer against any third party, certain procedure is required depending on each type of assets, and, in general, (i) registration is required for real estates, including lands (Article 177 of Civil Code), (ii) notice to debtor or consent of debtor with date proved by notary is required for receivables (Article 467, Paragraph 2 of Civil Code), and (iii) transfer of possession (including agreement on possession) is required for tangible movables pursuant to Article 178 of Civil Code, except for cars, ships, aircrafts or other certain assets for

												which registration is still required. In addition, Special Law on Transfer of Tangible Movables and Receivables (Law 104 of 1998) allows registration as means of perfection for tangible movables and receivables.
6. Security: Enforcement	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	In general. A secured creditor must go to court to enforce security interests to take procedure prescribed in the Civil Enforcement Law. However, out of court enforcement is possible for mortgage by transfer (<i>Jyouto Tanpo</i>) or other certain security interests.
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Insolvent status is required to commence a bankruptcy proceeding (Articles 15, 16 of Bankruptcy Law). The procedure can be started by creditors of the company, or debtor itself (Article 18 of the Bankruptcy Law).
8. Stay of secured creditors	0.75	0.75	0.75	0.75	0.75	0.90	0.90	0.90	0.90	0.90	0.90	In bankruptcy procedure, secured creditors can exercise their rights to enforce their security interests. On the other hand, in corporate rehabilitation procedure, which is one of the rehabilitation procedures, secured creditors must wait exercising their rights to enforce their security interests once corporate rehabilitation procedure commences (i.e. stayed). Under Composition Law (<i>Wagi Hou</i>), which provided rehabilitation procedure, secured creditors can exercise their rights to enforce their security interests (i.e. not stayed). However, this Composition Law (<i>Wagi Hou</i>) was succeeded by Civil Rehabilitation Law in 2001, under which secured creditors can still exercise their rights to enforce their security interests (i.e. not stayed), while the court can order to stop the exercise of security interests for a reasonable period if that action is beneficial to the interest of creditors as a whole (Article 31 of Civil Rehabilitation Law).
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	Debts restructuring agreements according to civil rehabilitation procedure and corporate rehabilitation procedure are to be approved by a certain majority of the creditors and the competent judge.
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	In general, creditors with secured claims are satisfied out of the proceeds from the realization of the respective security interests. Thus, such creditors are satisfied preferentially outside of bankruptcy or rehabilitation

												procedures. However, as per corporate rehabilitation procedure, creditors with secured claims are satisfied in the corporate rehabilitation procedure, while the rank of such claim is basically not subordinated to other claims (Article 168, Paragraphs 1 and 3 of Corporate Rehabilitation Law).
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

12. Latvia (Theis Klauberg)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	1	1	1	1	1	1	1	1	1	1	1	Art. 255 of Commercial Law: 25 000 LVL /app.35 714 EUR . In force since 13 April 2000. The same rule in force before the new law entered into force in 2000
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	Arts.153 (5), 154 of Commercial Law: rules on property contributions to avoid undervalue transactions. Art 161 (4) of Commercial Law: dividends may not be paid out if the own funds are less than the equity. Art 180 (4) of Commercial Law: the shareholders decide on utilisation of the profit. In force since 13 April 2000. Similar rules applied before the new law entered into force in 2000
3. Directors' duties to creditors	0	0	0	0	0	0	0	0	0	0	0	Art. 169 of Commercial Law: directors shall perform their duties as would an honest and careful manager. No explicit duty to act in creditors' interests
4. Security: scope	0.33	0.33	0.33	1	1	1	1	1	1	1	1	Art. 6 of Insolvency Law*: a secured creditor is a creditor whose right to claim is secured by commercial pledge, a mortgage registered in the Land Register or Ship register . In force since 1 January 2008 (the previous law, which was in force from 12 October 1996, referred to the same) Art 3 of Commercial Pledge Law: any tangible moveable, ingtangibles and all assets as well may be pledged In force since 21 October 1998. Only moveables qualified until the new law entered into force in 1998
5. Security: registration	0.33	0.33	0.33	1	1	1	1	1	1	1	1	<i>Ibid.</i>
6. Security: Enforcement	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Arts 1319 and 1321 of Civil Law: A pledgee who has not been satisfied by a debtor

												may take all the necessary steps for its sale. A right to sell a pledge in open market should be granted to pledgee by a debtor. If not, the pledge may only be sold by way of auction through the court**. In force since 1 September 1992
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Arts 50 and 54 (3) of Insolvency Law: a debtor has an obligation to submit an application for insolvency proceedings if it lacks the assets to satisfy all the justified creditors' claims In force since 1 January 2008***
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Art 36(1) of Insolvency Law: secured creditor may not apply for the sale of pledged property or for insolvency during the legal protection (rehabilitation) proceedings. Art 57(1) of Insolvency Law: secured creditor may not submit the application for insolvency proceedings Art 92(4) of Insolvency Law: with regard to termination of debtor's deals the secured creditor may require to have them in force if his interests are influenced Art 99(1) of Insolvency Law: secured creditor may request the sale of a pledged property when a decision is made regarding the solution of the state of insolvency proceedings In force since 1 January 2008. Creditors' stay during a rehabilitation proceedings was not mandatory before the new law entered into force in 2008****
9. Outcome of bankruptcy proceedings		1	1	1	1	1	1	1	1	1	1	Arts 78(2) and 79 of Insolvency Law: creditors meeting, where the votes are assigned to unsecured creditors, is competent to define the outcome of insolvency proceedings. In force since 1 January 2008. Similar rules applied before the new law entered into force in 2008
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	No subordination applicable

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	
--	------	------	------	------	------	------	------	------	------	------	------	--

Comments:

*Full text of Insolvency Law (English version; unofficial translation), which entered into force from 1 January 2008 by providing substantively higher standard of creditors' protection, available at the webpage of the Insolvency Agency of the Republic of Latvia <http://www.mna.gov.lv/mnae/index.jsp>.

**Variable (6) – the auction through the court grants expedited way to get the satisfaction in comparison with the traditional court proceedings. Therefore score “0.5” is applied.

***Variable (7) – the maximum protection (score “1”) is effective since 1 January 2008.

****Variable (8) - the maximum protection (score “1”) is effective since 1 January 2008.

13. Malaysia (Viviana Mollica)²³

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	A minimum paid-up capital of only RM2 is needed to start a private limited company, while public limited companies need a paid-up capital of not less than RM60mil (in order to be listed on the Kuala Lumpur Stock Exchange Main Board) or not less than RM40mil (in order to be listed on the KLSE Second Board).
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	1	1	1	1	1	<p>The 2001 amendments to the LRs²² strengthened the provisions on related party transactions which are now tighter than the rules under the Companies Act 1965. The changes have widened the range of related party transactions. The definition under Paragraph 10.2 of the LRs covers the acquisition and disposal of assets, the provision and receipt of services and the provision of financial assistance.</p> <p>Section 67 regulates the dealing by a company in its own shares, etc., while Section 67A regulates the purchase by a company of its own shares, etc</p> <p>Section 365 states the basic dividends restrictions: dividends are payable from profits only.</p>
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>In Malaysia, the responsibility for managing the affairs the company is placed with the company's board of directors, who have a collective responsibility.²⁴</p> <p>The duties and responsibility of directors are set out in the Companies Act by Section 132 and the Articles of</p>

²³ The key piece of legislation for the securities market is the Companies Act of 1965 (CA). Important corporate governance reforms have been implemented in Malaysia since 1998, when a high-level Finance Committee on Corporate Governance, consisting of both government and industry, was formed to identify and address weaknesses highlighted by the Asian financial crisis. In 2004, disclosure rules and corporate protections were strengthened. In 2005, major reforms commenced to government-linked corporations.

²⁴ However, there was an intense call for reform in this area to incorporate provisions which expressly require directors to consider the interest of stakeholders. The Malaysian High Level Finance Committee on Corporate Governance, in its recommendations, stated that there should be a statutory clarification of the responsibility of the board to supervise management and there should be a statutory clarification of the minimum functions of the board of directors of public companies.

												<p>Association. Section 132 requires that: a director shall at all times act honestly and use reasonable diligence in the discharge of the office; an officer or agent of the company or officer of the Stock Exchange shall not make improper use of any information acquired by virtue of his or her position to gain a direct or indirect advantage for himself or herself or another.</p> <p>The CA imposes a number of general and specific duties on directors. One of their general duties is a fiduciary duty to act in good faith and in what they believe to be the best interests of the company as a whole.</p>
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	<p>The following types of securities are available under Malaysian law to secure borrowings by a corporation: (a) registered charge over land under the National Land Code 1965; (b) debentures containing fixed and floating charges over land and movable or personal property; (c) legal and/or equitable mortgages of property of an intangible or personal nature; (d) pledges of personal property; (e) lien over land; (f) assignment of proceeds of contracts or other chose-in-action.</p>
5. Security: registration	0,66	0,66	0,66	0,66	0,66	0,66	0,66	0,66	0,66	0,66	0,66	<p>The following must be registered with the Registrar of Companies under section 108 of the Companies Act 1965. If not, such charges are void as against the liquidator and any creditor of the company.</p> <ul style="list-style-type: none"> • Charge to secure an issue of debentures; • Charge on uncalled share capital of a company; • Charge on shares of a subsidiary of a company; • Charge on land; • Charge on book debts; • A charge on calls made but not paid; • A floating charge on the undertaking or property of a company; • A charge on ship or aircraft or any share in a ship or aircraft; • Charge on goodwill, patent or licence, on a trademark, or copyright; • Charge on a credit balance of a company in any

												deposit account; <ul style="list-style-type: none"> Charges over land under the National Land Code must be registered under section 243 of the Code. As such charges also come within the ambit of section 108(3)(e) of the Companies Act, such charges must also be registered under the Companies Act
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	If no payments were made, the creditor (depending on the type of security) can initiate legal proceedings by way of enforcement or exercise extra-judicial remedies. A substantial degree of self-enforcement is permitted, save for land that is subject to both a fixed charge in a debenture and a statutory charge created under the Code ²⁵ .
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	²⁶ Creditors can initiate winding up proceedings by filing a winding up petition under sections 217 and 218 of the Companies Act. The ground for such petition would be the inability of the debtor to pay its debts within the meaning of section 218(2) of the Act.
8. Stay of secured creditors	0.5	0.5	0.5	0.5	1	1	1	1	1	1	1	If winding-up proceedings are pending, but no winding order has been made, the secured creditor does not need to obtain leave of court to commence enforcement proceedings. Though, the secured creditor may require a validation order so as to overcome the possibility that if a

²⁵ Enforcement mechanisms differ according to the type of security. Debentures are enforced mainly by the appointment of a receiver and manager over the charged asset. Normally, the receiver and manager would take possession of the assets, including land. However, the Supreme Court in a 1997 decision, namely *Kimlin Housing Development Sdn Bhd* [1997] 2 MLJ 805, ruled that land subject to not only a fixed charge but also a statutory charge, couldn't be sold privately by the receiver using his power of sale under the debenture.

²⁶ Malaysia's bankruptcy law (the Bankruptcy Act 1967) is based on English law. The enactment of the *Pengurusan Danaharta Nasional Berhad Act 1998* (entered into force on 1.9.98) introduced for the first time in Malaysia of the concept of special administration and regulates how to acquire and manage assets and liabilities of financially distressed companies in Malaysia. An amendment to the Companies Act 1965 in the form of the Companies (Amendment) (No.2) Act 1998 (Amending Act No. A1043 of 1998) that came into force on 1.11.98 introduced new provisions to protect creditors during the period the scheme is pending before the courts.

The relevant legislation governing each type of insolvency procedure available for corporate debtors is as follows:

- For liquidation, Part X of the Companies Act 1965.
- For court approved schemes of arrangement, section 176 - 178 of the Companies Act 1965.
- For special administration by Danaharta Corporation, the *Pengurusan Danaharta Nasional Berhad Act 1998*.
- For court appointments of receivers, the First Schedule to the Courts of Judicature Act 1964 read with Order 30 of the Rules of the High Court 1980.

												<p>winding up order is made, the sale resulting from the enforcement proceedings will not be rendered void under section 223 of the Companies Act.</p> <p>Before 1998²⁷, there were not much room for corporate restructuring or judicial management in Malaysia. The only real alternative was a scheme of arrangement that is proposed pursuant to section 176 of the Companies Act, that requires the sanction of the High Court, and the previous approval of three-quarters in value and a simple majority in number of each class of creditors present and voting. By virtue of sub-section (10) of section 176, the subject company that is proposing a scheme can apply to the High Court to grant an order staying all proceedings against the company whilst the scheme is pending before the court.</p>
9. Outcome of bankruptcy proceedings	0	0	0	0	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Liquidation can be brought to an end by dissolution of the company under section 272 of the Companies Act where the affairs of the corporate debtor have been fully wound up.</p> <p>The liquidator or any creditor or contributory can also apply to stay the winding up under section 243.</p> <p>Even where a proposal has been rejected by the secured creditors or abandoned in its implementation, the Corporation may direct the special administrator to submit a new proposal. It also has the power to lift the moratorium under Section 41.</p> <p>There appears to be no express provision for termination of special administration.</p>

²⁷ The following procedures are available under the Malaysian legal system, whether by statute or under common law:

- liquidation of corporate entities;
- court approved schemes of arrangement;
- private and court appointed receivers (and managers).
- special administration by *Pengurusan Danaharta Nasional Berhad* (or Special Asset Management Corporation).

10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	Secured creditors' rights are given priority under section 291(2) of the Companies Act 1965. After those, rank certain creditors deemed preferential under section 292 and then, finally, unsecured creditors. All unsecured debt is subject to the pari passu principle ²⁸ .
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

²⁸ The order of priorities prescribed by law in Malaysia through sections 191, 291 and 292 of the Companies Act 1965 as regards payment of debts in a liquidation are:
I. secured debts;
II. preferential such as costs of the winding up, salary and wages, workers' compensation, remuneration in respect of vacation leave, contributions to superannuation or provident funds and lastly Federal (i.e. Malaysian Federal Government) taxes;
III. unsecured debts
IV. shareholders.

14. Mexico (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	<p><i>Sociedad Anónima</i>: N\$50,000 (Mexican Pesos, approx 2,620.89 EUR), for which 20% must be paid at the time of incorporation²⁹, Art. 89 GCCL.</p> <p>Limited Liability Company: N\$3,000 (Mexican Pesos, approx. 157.253EUR), for which 50 % must be paid at the time of incorporation, Art. 63 GCCL.</p>
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Art. 134 GCCL states that a company is forbidden from acquiring its own shares, except for judicial adjudication in payment of corporate credits.</p> <p>Art. 138 states that the directors responsible for the share repurchase in violation of the provisions laid down in Art. 134 shall be jointly and severally liable to the company and its creditors.</p> <p>Art. 196 GCCL deals with shareholders having a conflict of interests with the company in a specific transaction.</p>
3. Directors' duties to creditors	0	0	0	0	0	0	0	0	0	0	0	Not well specified until the law reform occurred in 2006 ³⁰ .
4. Security: scope	0.33	0.33	0.33	0.33	0.33	1	1	1	1	1	1	Before 2000, the real property mortgage and the possessory pledges (which required the actual delivery of the asset to the creditor) were the main security instruments used in Mexico. There were hardly non-possessory devices outside agricultural and retail sales, and the system was very scattered: there were various secured financing devices like true security mechanisms, title retention mechanisms, conditional sales contracts, "sale with reservation of title" (Art. 2856 et. Seq CC), chattel mortgages for specific movable goods such as naval vessels and aircraft (Naval Mortgage, Navigation Law Art. 90, 1993) and secret liens in use. The system

²⁹ Regulated by '*LEY GENERAL DE SOCIEDADES MERCANTILES*', general law of commercial companies, published in 1934.

³⁰ The new law (*Ley del Mercado de Valores*) came into effect 28 June 2006.

												<p>allowed also security interests in a document of title representing legal ownership of collateral deposited in a warehouse (<i>Certificado de Depósito y Bono de Prenda, General Law of Credit Instruments and Operations, Art. 229, General Law of Credit Organizations and Activities, Art. 11).</i>)</p> <p>Then, in 2000, the sytem changed with the introduction of the <i>Decreto que Reforma, Adiciona y Deroga Diversas Disposiciones de la Ley Gen-eral de Títulos y Operaciones de Crédito, Del Código de Comercio, Del Código Penal para el Distrito Federal y De la Ley de Instituciones de Crédito, a cargo de los CC</i> [Official Gazette of the Federation, May 23, 2000]. This law created two new types of securities: the guarantee trust and the non-possessory pledge. Plus, the new law allows the creation of security interests in all types (including personal property, such as accounts receivable, inventory, equipment and intellectual property, and real property) of present and future collateral (proceeds and after-acquired property) and in relation to both present and future obligations (Arts. 355 (III), 356, and 402, 348, 352 and 359.)</p>
5. Security: registration	0	0	0	0	0	1	1	1	1	1	1	<p>The 2000 law defers registration rules to the applicable registry law and procedures, of which the New Commercial Registry Law is part. This new law and operational system creates a centralized, notice-based, computerized registry system. (New Commercial Registry Law, Article Second, Reforms to the Commercial Code Arts. 18, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32 and 1091; Repealing Arts. 1092 to 1095, 1104 al 1108 y 1110; Adding Arts.: 20-A, 21-A, 21-B, 30-A, 30-B and 32-A, one sub-paragraph XXIV to Art. 75; Adding Title Three bis, Chapter I; Arts. 1414 bis, 1414 bis 1, 1414 bis 2, 1414 bis 3, 1414 bis 4, 1414 bis 5, 1414 bis 6, 1414 bis 7, and Chapter II, Arts. 1414 bis 8, 1414 bis 9, 1414 bis 10, 1414 bis 11, 1414 bis 12, 1414, bis 13, 1414 bis 14, 1414 bis 15, 1414 bis 16, 1414 bis 17, 1414 bis 18, 1414 bis 19, 1414 bis 20 and 1414 bis</p>

												21, of Book Five.)
6. Security: Enforcement	0	0	0	0	0	0	1	1	1	1	1	The 2000 law the trustee (in case of guarantee trust) or secured party (in case of non-possessory pledge) may, in case of default, enforce the security interest in an extra-judicial manner. (Commercial Code, New Title Three, Arts. 1414 bis. et. seq.) Before the reform an extra judicial remedy was not allowed.
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	The petition requesting the judicial declaration of commercial insolvency (<i>declaracion de concurso mercantil</i>) can be initiated voluntarily by a debtor (Art. 20) or involuntarily by a creditor or the Attorney General (Art. 21). ³¹ The condition for both is the insolvency of the debtor.
8. Stay of secured creditors	0	0	0	0	0	0	0	0	0	0	0	Art. 65 provides for a stay of all creditors (secured creditors included), once the bankruptcy is declared. Art. 160 states that in case of an agreement between the debtor and the creditors, the secured creditors will not be stayed, unless the agreement provides for the payment of their credits as envisaged in art. 158 or the payment of the value of their security.
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Art. 157 stays that, in order to be effective, an agreement for reorganisation needs to be subscribed by both the debtor and recognised creditors that represent more than 50% of the total debt and for a sum that is equal to the secured and privileged creditors that would subscribe it. Art. 162 provides for the juridical authorization of such agreement, but the judge will just verify its conformity to the law and the fact it is not contrary to public order (Art. 164). Insolvency procedures are generally decided before

³¹ Sources: *Ley de Concursos Mercantiles* (Insolvency Act), Commerce Code and Federal Civil Procedure Code (supplementing legislation), General Rules of the Insolvency Act (given by IFECOM), State civil codes (which apply to consumer cases). In Mexico a new insolvency law (published in the Daily Gazette of the Federation of May 12, 2000 abrogating the former Law on Suspension of Payments and Bankruptcy, published in 1943) was enacted. Under Mexican legislation, there is a distinction, not between personal and corporate procedures, but between procedures involving merchants and non-merchants (consumers). Consumer insolvency procedures (which might involve associations), are governed by state rules. Insolvency procedures that involve merchants are considered of federal jurisdiction.

												the court, and if there is an agreement between creditors and debtor, the court has to approve it. Yet, the fact that the court has to recognise the agreement between creditors and debtor does not necessarily mean it is impossible for them to settle outside of court.
10. Subordination of secured claimants	0	0	0	0	0	0	0	0	0	0	0	Art. 217 ranks the creditors: I. singular privileged creditors; II. secured creditors (as defined by Art.219); III. special privileged creditors IV. unsecured creditors.
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

Comments

15. Netherlands (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	<p>The minimum capital to be paid up initially for a <i>besloten vennootschap</i> (BV), a company limited by shares, is €18,000. The minimum issued and paid-up capital for a public company, <i>Naamloze Vennootschappen</i> (NV) is €45,000.³²</p> <p>Before the Euro was introduced the minimum share capital of a BV was NLG 40,000, (which is 18,151.21 EUR) while of a NV was NLG 100,000 (which is 45,378.02 EUR).</p>
2. Dividend restriction	1	1	1	1	1	1	1	1	1	1	1	<p>Share repurchases are restricted in BV's and NV's (although less so for BV's than NV's).</p> <p>Furthermore, the system rely on rules protecting creditors, i.e. legal capital, restrictions on using the company own capital to finance takeovers of the same company, etc...</p>
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>In principle, a director's liability will be to the company rather than to individual shareholders or creditors. As a general rule, each director has a duty towards the company to properly perform the duties assigned to him (section 2:9 Civil Code). If the company is in financial difficulties, the directors will have greater responsibility for acting in the interests of creditors, and will be more likely to incur personal liability, yet normally that needs serious culpability in order to succeed.</p> <p>A director may be held liable in tort (section 6:162 Civil Code) by a creditor if he entered into a transaction on behalf of the company, while knowing (or should have reasonably been knowing) that the company would not be able to meet the obligations, and would not have</p>

³² The law governing NVs and BVs can primarily be found in book 2 of the Dutch Civil Code (*Burgerlijk Wetboek*,). Its mandatory nature derives from art. 2:25 BW, which states that the provisions of Book 2 may only be modified to the extent allowed by specific provisions. NVs issuing securities to the public are subject to the Act on the Supervision of the Securities Trade (*Wet Toezicht Effectenverkeer* 1995).

												<p>sufficient assets from which the debt could be recovered. In the Netherlands, the supreme court have decided in the <i>Beklamel</i> case that directors may not deal with a creditor in the knowledge that they would not be able to pay that creditor. This gives an individual creditor the possibility to sue directors personally.</p> <p>If the legal entity does not provide sufficient resources to pay all creditors in the case of bankruptcy of the legal entity, the directors shall be jointly and severally liable for the deficit in the bankruptcy if (a) it is apparent that the management has not discharged its duties properly and (b) it is likely that the bankruptcy was caused by the mismanagement of the board (2:138-248 Civil Code).</p> <p>Bankruptcy holds that the procedure should focus on protecting creditors, but does not specify a duty for directors.</p>
4. Security: scope	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>With the introduction of the new Civil Code the notion of non-possessory pledge entered the Dutch legal system. These rules can be found in Book 3, Articles 237 and 239 of the CC. Article 237(1) states: ‘The right of pledge on a moveable thing, on a right payable to bearer, or on the usufruct of such a thing or right, can also be established by an authentic deed or a registered deed under private writing, without the thing or the document to bearer being brought under the control of the pledgee or of a third person.’ Article 239(1) states: ‘A right of pledge on a right which can be exercised against one or more specifically determined persons and which is not payable to bearer or order, or a right of pledge on the usufruct of such a right, can also be established by an authentic deed or a registered deed under private writing without notification thereof to those persons, provided that the right in question already exists at the time of the establishment of the right of pledge or will be directly acquired pursuant to a juridical relationship already existing at that time.’</p>

													The Netherlands doesn't have a provision that envisages a floating lien, but many assets can be pledged (non-possessory), including rights to brand names, patents etc.
5. Security: registration	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	A mortgage must be established as a notarial deed; a pledge can be established as either a notarial or a private deed. However, a private deed must be registered with the local tax department (<i>Belastingdienst</i>) in order to have effect (merely to certify the date), if it relates to a non-possessory or undisclosed pledge. Other formalities apply in relation to different classes of assets, such as intellectual property rights.
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	1	<p>The execution of pledge outside courts is normally possible. The primary method is public sale in accordance with local customs and customary terms. Court involvement is required if one wants to execute the pledge through a different method, e.g. private sale (unless both pledgor and pledgee agree to a different method after the pledgee has become entitled to enforce).</p> <p>Special rules apply to banks, which may foreclose on a mortgage if the debtor has stopped his payments; a non-possessory pledge may be transformed into a possessory pledge and the pledge holder can foreclose on that if again the debtor can not fulfill the contract terms.³³</p>
7. Entry to corporate bankruptcy proceedings ³⁴	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	In the case of bankruptcy the debtor must be in the situation where he has ceased to make payments (Art. 1 of the Bankruptcy Act). When a debtor stops the payments, with a minimum of one unpaid due payment obligation (Art. 6), a bankruptcy proceeding can be initiated. A debtor that is no longer able to pay its debts can be also declared insolvent by judicial order at the request of one or more of its creditors. A creditor who

³³ Retention of title should be agreed and notified in writing before delivery, preferably at order confirmation. In case of insolvency, the retention of title claim must be arranged via the administrator/liquidator.

³⁴ The Dutch Bankruptcy Act came into force in 1896 and it has not been thoroughly revised in the years 1995-2005. The most significant changes made consisted of a new debt-restructuring regime for natural persons in 1998. At present, the Bankruptcy Act comprises three separate insolvency proceedings: bankruptcy, suspension of payments, and debt reorganization of natural persons. Bankruptcy is intended as a procedure to liquidate the debtor's assets and to divide the proceeds among the creditors. Suspension of payments is meant to be a restructuring procedure, while debt reorganization of natural persons is a liquidation procedure.

												<p>requests the insolvency of a debtor must summarily prove its claim.</p> <p>The Bankruptcy Act does not require any (judicial or extrajudicial) preparatory proceedings. The Court, does however, require a well-founded petition.</p>
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>The suspension of payment (restructuring procedure) does not affect secured and/or privileged creditors.</p> <p>The bankruptcy provides for a general stay on creditors. Art. 26 of the Dutch <i>Faillissementswet</i>, states that after the commencement of bankruptcy proceedings, all claims against the debtor may be asserted only in the verification proceeding. If there are legal proceedings pending against the debtor for execution of debts, such proceedings will be suspended after the commencement of the bankruptcy and the claims will have to be filed for verification.</p> <p>Under Art. 350 BA, a debtor can start an action in front of the Court for an interim termination (in case of new debts incurred during the term of debt restructuring or if there are indications that the debtor is trying to disadvantage his creditors).</p>
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	<p>A bankruptcy ends by means of an agreement, or by means of a simplified completion (removal in the case of a lack of income) or by means of a distribution to the creditors following verification of their claims.</p> <p>During bankruptcies, a trustee takes over control in among to maximize payout to ordinary creditors. As creditor committees are nearly never formed in the Netherlands, creditors do not have control over the process.</p>
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	<p>The first debts that should be paid are the debts secured by mortgage or pledge (<i>separatisten</i>). Only after the satisfactions of those creditors come highly preferential insolvency debts, preferential debts, the unsecured debts, the subordinated debts and the shareholders.</p>

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	
--	------	------	------	------	------	------	------	------	------	------	------	--

16. Pakistan (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	There are no minimum capital requirements for Pakistan companies. ³⁵
2. Dividend restriction	1	1	1	1	1	1	1	1	0.66	0.66	0.66	<p>Normal dividend restrictions apply when the company balance is below the minimum capital requirement (Section 248-250).</p> <p>From 2003, companies were allowed to buy back their own shares (Section 95 and 95A). This option has been made available to companies having excess liquidity and in case their shares were traded below their intrinsic value.</p> <p>Section 225 regulates the contracts by agents of company in which company is undisclosed principal.</p>
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Section 413 states that: “.(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or any other person, or for any fraudulent purpose, the Court, on the application of the official liquidator or the liquidator or any creditor or contributory of the company, may, if it thinks fit, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.”
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	A variety of mechanisms for taking security exist in Pakistan. A corporate borrower may grant a floating charge over all or any class of its present and future assets. Other mechanisms for taking security consist of legal mortgages over land, equitable mortgages, fixed charges, liens, pledges, hypothecations and securing deposit accounts in favour of a lender.

³⁵ Both private and public companies must be registered under the Companies Ordinance 1984.

5. Security: registration	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	A system of registration, for companies, for mortgages and charges exists under the Ordinance 1984. Section 121 lists the charges that must be registered with the Registrar within twenty one days of the date of their creation. ³⁶ There is no law in existence for registration of mortgages and charges by trusts.
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	1	A secured creditor may self-enforce the security in the case of a legal mortgage. The creditor has the power to foreclose on a mortgage under Section 67 of the Transfer of Property Act 188. He can also sell the secured property. However, where an insolvency order has been passed, a leave of the court will be required.
7. Entry to corporate bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	0	Insolvency ³⁷ is initiated where a company is unable to pay its debts (as defined by Section 306). Section 297 states that: “(1) The winding up of a company may be either:- (i) by the Court; or (ii) voluntary; or (iii) subject to the supervision of the Court.” Section 309 states that “an application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), or by any contributory or contributories, or by

³⁶ These are:

(a) a mortgage or charge for the purpose of securing any issue of debentures; or (b) a mortgage or charge on uncalled share capital of the company; or (c) a mortgage or charge on any immovable property wherever situate, or any interest therein; or (d) a mortgage or charge on any book debts of the company; or (e) a mortgage or charge, not being a pledge, on any movable property of the company; or (f) a floating charge on the undertaking or property of the company, including stock-in-trade; or (g) a mortgage or charge on a ship or any share in a ship; or (h) a mortgage or charge goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright; or (i) a mortgage or charge or other interest based on agreement for the issue of any instrument in the nature of redeemable capital; or (j) a mortgage or charge or other interest based on a musharika agreement; or (k) a mortgage or charge or other interest based on a hire-purchase or leasing agreement for acquisition of fixed assets.

³⁷ Insolvency law in Pakistan is regulated primarily in Commercial law (Companies Ordinance 1984), but norms on insolvency can be found also in Civil law and, with the enactment of the Banking Companies Act in 1997, also in the Banking law.

												<p>all or any of the aforesaid parties, together or separately, or by the registrar, or by the Commission or by a person authorised by the Commission in that behalf.</p> <p>Winding up may be commenced by the company through a special resolution under Section 358 (b) ³⁸, yet this is not strictly an insolvency procedure, as Section 362 states the company may be solvent and able to pay all its debts at the time the resolution is taken. This voluntary winding up can be initiated when the company decides, through a special resolution to wind up, but is unable to file a declaration that it is insolvent.</p>
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Section 313 states that; “the Court may, at any time after presentation of the petition for winding up a company under this Ordinance, and before making an order for its winding up, upon the application of the company itself or of any its creditors or contributories, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit.”.</p> <p>Under Section 316, once an insolvency order has been passed or a provisional manager have been appointed, a leave of court is required for enforcement and no suit or other legal proceedings shall be carried on against the company, unless the court itself grants a leave and subject to the terms the court may impose. Enforcement through out of court methods, though, is not affected by Section 316. Secured creditors can still proceed notwithstanding the liquidation proceeding, and can rely upon their securities or a decree by the Court, if the leave to proceed has been obtained from the Court.</p>
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	Decision for terminating administrator is taken by the SECP.
10. Subordination of secured	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	Section 405 ranks creditors in the following order:

³⁸ Section 358 states: “A company may be wound up voluntarily:

(a) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

(b) if the company resolves by special resolution that the company be wound up voluntarily;

and, in the subsequent provisions of this Part, the expression "resolution for voluntary winding up" means a resolution passed under clause (a) or clause (b).”

claimants											<p>“ (1) In a winding up, there shall be paid in priority to all other debts-</p> <p>(a) all revenues, taxes, cesses and rates due from the company to the Federal Government or a Provincial Government or to a local authority at the relevant date and having become due and payable within the twelve months next before that date;</p> <p>(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date and any compensation payable to any workman under any law for the time being in force, subject to the limit specified in sub-section (2);</p> <p>(c) all accrued holiday remuneration becoming payable to any employee or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;</p> <p>(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions towards insurance payable during the twelve months next before the relevant date, by the company as employer of any persons, under any other law for the time being in force;</p> <p>(e) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (VIII of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;</p> <p>(f) all sums due to any employee from a provident fund,</p>
-----------	--	--	--	--	--	--	--	--	--	--	---

												<p>a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and</p> <p>(g) the expenses of any investigation held in pursuance of section 263 or section 265 in so far as they are payable by the company.</p> <p>(...)(5) The foregoing debts shall-</p> <p>(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and</p> <p>(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.”</p> <p>In all formal insolvency proceedings, once secured creditors have been paid all other creditors rank equally.</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

17. Russia (John Hamilton)³⁹

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	<p>The minimum charter capital of a limited liability company/ closed joint-stock company is equal to 100 times the minimum monthly wage. The minimum charter capital of an open joint-stock company is equal to 1000 times the minimum monthly wage.</p> <p>The minimum monthly wage (RUR) was:</p> <p>(i) January 1995 - April 1996 - 57.75</p> <p>(ii) April 1996 - January 1997 - 75.90</p> <p>(iii) January 1997 - July 2000 - 83.49</p> <p>(iv) July 2000-December 2007 - 100.</p>
2. Dividend restriction	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	<p>Under Russian legislation, a joint-stock company is not entitled to announce a decision to pay dividends:</p> <p>(i) until its entire charter capital is paid up;</p> <p>(ii) if it is under an obligation to redeem shareholders' shares, but has not done so;</p> <p>(iii) if it meets the insolvency criteria under the Insolvency Law (as defined below) or payment of dividends may lead to its insolvency;</p> <p>(iv) if the value of its net assets is less than its charter capital, plus the reserve fund, plus the excess over par value of the liquidation value determined by the charter of the issued preferred stock, or if the value of the assets becomes less than the amount thereof as a result of payment of dividends; and</p> <p>(v) in other cases depending on specific types of shares.</p> <p>Limited liability companies do not pay dividends</p>

³⁹ General comment: for the purposes of preparing the table below we have considered only the relevant legislation for the period from 1995 to 2007. Explanations and references are also given on the basis of the legislation for the period in question. It should be noted that in January 2009 the legislation was changed significantly (especially, the insolvency legislation and the legislation dealing with pledges) to make it more favourable to creditors.

													to their participants.
3. Directors' duties to creditors	0	0	0	0	0	0	0	0	0	0	0	0	No explicit duty to act in creditor's interests.
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	1	<p>The only security under Russian law which gives a creditor the status of a secured creditor is a pledge or mortgage. Security taken over land, buildings and other immovable property (e.g. ships and aircraft) is referred to as a mortgage (<i>ipoteka</i>) and a security over movable property (e.g. goods in circulation, shares/participatory interest, rights under contracts) is generally referred to as a pledge (<i>zalog</i>). The term "pledge" is often used generally to denote a mortgage or pledge in some contexts where it is not necessary to distinguish.</p> <p>Russian courts do not recognise security over cash in bank accounts.</p> <p>As Russian law requires that each asset subject to pledge must be sufficiently identified in a pledge agreement (other than in the case of a pledge over goods in circulation where assets subject to pledge should be identified generically due to the nature of the pledge), it is not possible to have an "all assets" pledge (i.e. a pledge over all assets of a company without proper description of each asset)</p>
5. Security: registration	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	There are few security perfection requirements under Russian law, and there is no public register of general encumbrances in Russia. The most relevant perfection requirements relate to a mortgage which requires registration in the state immovables register in order to be effective) and a pledge of shares (which must be noted in the share or depo account of the pledgor with the share registrar or a custodian). Until such registration is made the pledge is not effective.
6. Security: enforcement	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	While it is generally possible for enforcement against pledged property to occur through an out-of-court procedure (usually agreed in advance by

												<p>the parties in the pledge agreement itself), in practice execution is likely to be levied through the court due to absence or lack of participation of a pledgor in the out-of-court enforcement procedure. Moreover, enforcement of a mortgage or a pledge the granting of which required the consent of a third party (for example, a pledge of a claim against a third party where the terms of the claim required the consent of that third party in order for the claim to be pledged), is only possible through the court.</p> <p>Where the granting of a mortgage did not require the consent of a third party, execution need not be levied through the court if, following the occurrence of an enforcement event, the mortgagor and mortgagee sign an agreement on the procedure for out-of-court enforcement, and have this agreement notarised.</p>
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1	1	1	<p>Under Law "On Insolvency (Bankruptcy) of Enterprises" No. 3929-1 dated 19 November 1992 (effective before 1 March 1998) and Federal Law "On Insolvency (Bankruptcy)" No. 6-FZ dated 8 January 1998 (effective before 2 November 2002), a petition for bankruptcy could be filed with a court by, <i>inter alia</i>, either of:</p> <p>(i) the chief executive officer of the debtor; or</p> <p>(ii) a creditor.</p> <p>The above legislation provided only for a right for the debtor to file the petition, but not an obligation.</p> <p>Under Federal Law "On Insolvency (Bankruptcy)" No. 127-FZ dated 26 October 2002 (as amended), a petition to open a case for a debtor's bankruptcy may be filed with a court by, <i>inter alia</i>, either of:</p> <p>(i) the chief executive officer of the debtor; or</p>

													<p>(ii) a creditor.</p> <p>The debtor may petition the court for bankruptcy if bankruptcy is anticipated due to the existence of circumstances clearly evidencing the debtor's inability to perform its payment obligations to creditors or to make mandatory payments (payments in relation to debts owed to the state budget or otherwise to the Russian Federation) ("Mandatory Payments").</p> <p>The chief executive officer of the debtor must petition the court for bankruptcy within one month of the following becoming evident or occurring:</p> <p>(i) the satisfaction of the claims of one or more creditors would result in the debtor's inability to perform in full its payment obligations, including Mandatory Payments, to all other creditors;</p> <p>(ii) the shareholders (participants) of the debtor take a decision to file such a petition;</p> <p>(iii) the enforcement of claims against the debtor's assets would make it significantly difficult or impossible for the debtor to continue operations; or</p> <p>(iv) in the course of a solvent liquidation of the debtor, it emerges that the debtor has insufficient assets to satisfy its creditors' claims in full.</p>
8. Stay of secured creditors	1	1	1	1	1	1	1	1	1	1	1	1	<p>Once insolvency proceedings are commenced, there is a general moratorium on the levying of execution against the property of the insolvent company. Pledged assets are segregated from the other assets, and may not be sold prior to the liquidation stage without the consent of the pledgee. On liquidation, the pledged assets are sold by the liquidator at public auction and the proceeds are applied against the secured debt, on the basis of the priority described below (please</p>

													see 10).
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Creditors file their monetary claims against the debtor with a court and participate in bankruptcy proceedings through creditors' meetings.</p> <p>Any creditors' meeting has exclusive competence to take the decision <i>inter alia</i> to:</p> <p>(i) petition a court to initiate or change the period of financial rehabilitation or external administration;</p> <p>(ii) approve and amend an external administration plan;</p> <p>(iii) approve a financial rehabilitation plan and a debt repayment schedule;</p> <p>(iv) submit a voluntary arrangement to the court for approval; and</p> <p>(v) petition the court to declare the debtor bankrupt and commence liquidation.</p> <p>However, it should be noted that the Russian insolvency legislation provides for a number of cases when the court may disregard the decision of a creditors' meeting and rule otherwise.</p>
10. Subordination of secured claimants	1	1	1	0	0	0	0	0	0	0	0	0	<p>Under Law "On Insolvency (Bankruptcy) of Enterprises" No. 3929-1 dated 19 November 1992 (effective before 1 March 1998), secured claims could be settled prior to any other claims.</p> <p>Under Federal Law "On Insolvency (Bankruptcy)" No. 6-FZ dated 8 January 1998 (effective before 2 November 2002) and Federal Law "On Insolvency (Bankruptcy)" No. 127-FZ dated 26 October 2002 (as amended), upon the commencement of bankruptcy proceedings, the satisfaction of monetary claims against the insolvent company is generally subject to the following statutory order of priorities:</p> <p>(i) first, claims for harm inflicted to health or life and claims for moral damages;</p> <p>(ii) second, employment claims (wages and severance payments) and royalty claims under</p>

												<p>copyright agreements; and</p> <p>(iii) third, all other claims, including the claims of secured creditors.</p> <p>Claims secured by a pledge (or mortgage) of the debtor's assets are settled out of the proceeds of sale of such assets ahead of all other claims, with the exception of claims of the first and second order of priority that arose before such pledge or mortgage was granted.</p> <p>At the liquidation stage, so-called current claims (essentially, payments arising after the commencement of insolvency proceedings, including court and bankruptcy costs, taxes, and utilities and operational costs) are discharged ahead of the above statutory order of priorities.</p>
--	--	--	--	--	--	--	--	--	--	--	--	--

18. Slovenia (Nina Cankar)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital d.o.o.	0.25	0.25	0.25	0.25	0.25	0.25	0.35	0.35	0.35	0.35	0.35	Slovenian Companies Act distinguishes between two types of private companies, both of which have separate legal personality and give its investors limited liability – a limited liability company (d.o.o.) and a corporation (d.d.). D.o.o. is a private company by default, while d.d. can choose whether or not to be listed on the stock exchange. The codings given here are for the d.o.o.
2. Dividend restriction	0	0	0	0	0	0	0	0	0	0	0	It is in the capacity of shareholders to decide on the utilisation of profit and no creditor consent is required. There are, however, certain restrictions on share repurchases in d.d. regarding the purpose of such repurchase as well as the maximum percentage of shares allowed to be repurchased by the company.
3. Directors' duties to creditors	0	0	0	0	0	0	0	0	0	0	0	Directors have a duty to act in the best interest of the company, honestly and in good faith. Directors are jointly liable to the company for damages incurred as a result of violation of their duties. There is no explicit duty to act in the creditors' interest.
4. Security: scope	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.66	0.66	0.66	In 2003 the new Law of Property Code was adopted, allowing for non-possessory security interests to be established over tangible moveables as well.
5. Security: registration	0	0	0	0	0	0	0	0	0.33	0.33	0.33	The new Law of Property Code requires registration of non-possessory security interests over tangible moveables for which a register of security interests is established. Pursuant to a 2004 decree issued by Slovenian government such a register has been established for inventories, equipment and gear, motor vehicles, caravans and trailers, and animals.

6. Security: Enforcement	0	0	0	0	0	0	0	0	0	0	0	0	Generally, out of court enforcement is not possible. Nonetheless, such enforcement is possible for possessory security interest over tangible moveables, provided it has been explicitly agreed upon at the time of establishment of the security interest (Art 167 of the Law of Property Code).
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	According to the Slovenian bankruptcy laws a bankruptcy procedure may be commenced unilaterally by a debtor, a creditor or a personally liable member of the debtor, if they show the debtor is cash-flow or balance sheet insolvent (art. 90 of the Insolvency Law).
8. Stay of secured creditors	1	1	1	1	1	1	1	1	1	1	1	1	In a rehabilitation procedure secured creditors are stayed, with an exception of secured rights that have been established in the enforcement procedure within 2 months prior to the commencement of the rehabilitation procedure. The liquidation procedure, on the other hand, does not affect secured creditors who get paid in a separate enforcement procedure (art. 36, 111 and 131 of the Insolvency Law).
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	0	The court is a significant decision-maker in the bankruptcy procedure – it decides upon the commencement and conclusion of the bankruptcy procedure as well as issues a decision regarding a distribution of the debtor's assets. The role of the creditors is only to make suggestions to the bankruptcy manager as well as control and supervise its activities (art 72 – 89 of the Insolvency Law).
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	1	Secured claimants get paid in full from a separate fund of debtor's assets that is allocated specifically for this purpose.
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005		

19. South Africa (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	No minimum capital required. ⁴⁰
2. Dividend restriction	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	<p>Section 38 prevents companies to give financial assistance to purchase their shares or shares of a holding company. Exception to this rule are stated in paragraph 2.</p> <p>Section 85 regulated the company shares repurchase. A company may by special resolution of the company, subject to the provision of the section, approve the acquisition of shares issued by the company. If the approval is a general approval, it shall be valid only until the following annual general meeting of the company. Paragraph 4 regulates the ground upon which a lawful repurchase can be carried on: “A company shall not make any payment in whatever form to acquire any share issued by the company if there are reasonable grounds for believing that: a) the company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business; or b) the consolidated assets of the company fairly valued would after the payment be less than the consolidated liabilities of the company.” Paragraph 9 adds: “Shares in the capital of a company may not be acquired under this section if, as a result of such acquisition, there would no longer be any shares in issue other than convertible or redeemable shares.”</p>

⁴⁰ All South African companies are governed by the Companies Act No 61 of 1973 as amended (by Abolition of Restrictions on the Jurisdiction of Courts Act 88 of 1996; Companies Amendment Act 35 of 1998; Companies Second Amendment Act 60 of 1998; Companies Third Amendment Act 125 of 1998; Insider Trading Act 135 of 1998; Companies Amendment Act 37 of 1999; Revenue Laws Amendment Act 53 of 1999; Companies Amendment Act 35 of 2001; Corporate Laws Amendment Act 39 of 2002; Judicial Matters Amendment Act 55 of 2002; Insolvency Second Amendment Act 69 of 2002; Prevention and Combating of Corrupt Activities Act 12 of 2004), which was originally based on English company law.

												Art. 90 regulates payments (including any direct or indirect payment or transfer of money or other property to a shareholder of the company by virtue of the shareholder's shareholding in the company) made by the company to shareholders.
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Directors have a fiduciary duty to act honestly, in good faith and in a manner the director believes to be in the best interests and for the benefit of the company. The fiduciary duties of the directors and management only extend to the protection of the interests of the company, and rarely to its shareholders and the interests of creditors or employees. But Section 424 (1) sets out the following:</p> <p>When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.</p>
4. Security: scope	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Debts owed to banks and other lending institutions and debts owed over immovable property are normally secured by mortgage over real estate. Business debts secured over personal property are either commercial loans or/and trade debts documented by notarial general bonds over movables or cessions of receivables.</p> <p>As a general rule, in order to finalize a lien or pledge, the creditor must be in possession of the debtor's property. This does not apply, however, to a lien arising under the Merchant Shipping Act 57 of 1951. Similarly,</p>

												<p>special provisions apply to security for financing the purchase of aircrafts.</p> <p>The concept of a “floating charge” is unknown in South African law.</p>
5. Security: registration	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	<p>Mortgage bonds and notarial bonds over movables are registered in the office of the Registrar of Deeds. All other forms of security, instead, are recorded in written documents that are retained by the parties.</p>
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	<p>Secured claims are enforced in liquidation by the creditor submitting his claim to the insolvency administrator, who thereafter acts to realize the secured property and pay the net proceeds over to the secured creditor.</p> <p>The enforcement and realization of secured claims with respect to movables or personal property is dealt with in substantially the same way as the enforcement and realization of secured claims over immovable or real property.</p>
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Section 343 Companies Act lists the modes of winding-up. (1) A company may be wound up: (a) by the Court; or (b) voluntarily. (2) A voluntary winding-up of a company may be- (a) a creditors' voluntary winding-up; or (b) a members' voluntary winding-up.</p> <p>Section 346 regulates the application for winding-up of company to a Court. An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made a) by the company; b) by one or more of its creditors (including contingent or prospective creditors); c) by one or more of its members, or any person referred to in section 103(3), irrespective of whether his name has been entered in the register of members or not; d) jointly by any or all of the parties mentioned in paragraphs (a), (b) and (c); e) in the case of any company being wound up</p>

											<p>voluntarily, by the Master or any creditor or member of that company; or</p> <p>f) in the case of the discharge of a provisional judicial management order under section 428(3) or 432(2), by the provisional judicial manager of the company.” Insolvency can be one of the ground for the Court to pronounce the company wound up.⁴¹.</p> <p>section 345(1) of the Companies Act 61 of 1973 provides as follows:</p> <p>(1) A company or body corporate shall be deemed to be unable to pay its debts if -</p> <p>(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due -</p> <p>(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or</p> <p>(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or</p>
--	--	--	--	--	--	--	--	--	--	--	--

⁴¹ For corporations, section 345(1) of the Companies Act 61 of 1973 provides as follows:

“(1) A company or body corporate shall be deemed to be unable to pay its debts if -

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due -

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favor of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.”

												<p>(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or</p> <p>(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.</p> <p>When the company enters into a voluntary winding up, this will have effect only after the registration of: “(i) security has been furnished to the satisfaction of the Master for the payment of the debts of the company within a period not exceeding twelve months from the commencement of the winding-up of the company; or (ii) the Master has dispensed with the furnishing of such security on production to him of-</p> <p>(aa) a sworn statement by the directors of the company that it has no debts; and</p> <p>(bb) a certificate by the auditor of the company that to the best of his knowledge and belief and according to the records of the company, it has no debts.” (Section 350)</p> <p>Section 3 of the Insolvency Act regulates the voluntary surrender in bankruptcy : ⁴² the estate of a debtor may be sequestrated at his own request, that is, he applies to the court for the acceptance of the surrender of his estate. The Court has discretion whether or not to grant the application. The debtor has to show insolvency.</p>
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Individual actions (such as sale of assets in execution) are stayed by the commencement of proceedings until the winding up administrator is appointed (Section 358 and 359 Companies Act). After that, actions may be

⁴² The Insolvency Act 24 of 1936 has been amended more than twenty times, but without any drastic changes. The Act, although in the nature of a code, is not a complete statement of the law of insolvency and does not interfere with the common law (Roman, Roman-Dutch law, and the judgments of the courts) of insolvency where the latter is not inconsistent with the provisions of the Act.

												<p>continued subject to time scales and special permissions.</p> <p>Bankruptcy stays civil proceedings and proceedings to execute judgments given against the insolvent (Section 20(1) of the Insolvency Act.). Section 83 regulates the realisation of secured claims. The proceeds of assets subject to secured claims are applied to pay certain costs and the secured claims (Section 95) and assets not subject to secured claims are applied to pay the cost of sequestration, statutory preferences and ordinary creditors who have proved their claims against the estate (Sections 96 - 103).</p> <p>A composition (Section 119 CA) is binding only on unsecured creditors. A compromise (Section 311 CA is binding on all creditors). If a composition in terms of section 311 of the Companies Act is contemplated, a stay is obtained by applying for the winding up of the company.</p>
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Section 437 CA “When any company by reason of mismanagement or for any other cause--</p> <p>a) is unable to pay its debts or is probably unable to meet its obligations; and</p> <p>b) has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management.” Any person indicated in Section 346 can ask for this, but the final decision is taken by the Court.</p> <p>Composition: Provision is made for acceptance of an offer of composition by 75 percent of proven creditors in value and in number (Insolvency Act section 119). Such a composition is binding on all the ordinary creditors. The composition binds secured and preferred creditors if they consent.</p> <p>Rehabilitation (Section 124-130), has the effect of</p>

											<p>ending the bankruptcy and terminating all debts that were due.⁴³ Application to court may be made in the following cases: if the creditors have agreed to a composition and security are given by the insolvent for 50% of the amount of the composition. Or after 12 months after the Master has confirmed the first account, provided that the Master recommends rehabilitation, the estate has not been sequestrated before and he has not been convicted of any fraudulent act in connection with the insolvency.</p> <p>Compromise is regulated by section 311 CA states: “1) Where any compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or any creditor or member of the company or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the Court may direct.</p> <p>2) If the compromise or arrangement is agreed to by- a) a majority in number representing three-fourths in value of the creditors or class of creditors; or b) a majority representing three-fourths of the votes exercisable by the members or class of members, (as the case may be) present and voting either in person or by proxy at the meeting, such compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members (as the case may be) and also on the company or on the liquidator if the company is being wound up or on the judicial manager if the company is</p>
--	--	--	--	--	--	--	--	--	--	--	---

⁴³ South Africa has no formal non-bankruptcy workouts or restructuring guidelines. Such matters are addressed on an ad hoc basis. The out-of-court arrangements are only binding on consenting parties. Where this arrangement is not possible, it becomes necessary to resort to the courts.

												subject to a judicial management order.”
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	<p>Section 342(1) of the Companies Act provides that the assets of a company in liquidation shall be applied towards the payment of costs of the liquidation and claims of creditors.</p> <p>The claims of secured creditors are met first; the remainder is known as the free residue, which is used to meet the remaining claims. The order of preference for secured creditors is as follows: Where the asset is immovable, any of these: enrichment lien, mortgage bond, debtor and creditor lien. When the asset is movable, the holder of any of these: enrichment lien, statutory installment sale hypothec, pledge, landlord’s tacit hypothec, debtors and creditors lien.</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

Comments

20. Spain (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	<p>The minimum capital required by statute for a Limited Liability Company (<i>Sociedad de Responsabilidad Limitada</i> or "SL") is €3,005.06. The minimum capital requirement for a joint stock company is € 60,101.21, which must be fully subscribed at the time of incorporation.</p> <p>Before the Euro introduction Art. 4 <i>Ley 2/1995, de 23 de marzo, de Sociedades de Responsabilidad Limitada</i> stated that for a Limited liability company the minimum capital should have not been inferior to 500,000 pesetas (=3,000 approx. EUR), while for a joint stock company the minimum capital according to <i>Real Decreto Legislativo 1564/1989, de 22 de diciembre, por el que se aprueba el texto refundido de la Ley de Sociedades Anónimas</i> was 10,000,000 pesetas.</p>
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Art. 42 regulates passive dividends.</p> <p>Art. 74-89 rules the purchase by the company of its own shares. The so-called Spanish "financial assistance" rules prohibit a company from providing security or guarantees in support of the acquisition of its shares or those of its holding companies. There are no procedures that allow companies to overcome these prohibitions.</p> <p>Art. 88 renders void the shares repurchase even when fictionally accomplish through a third party.</p>
3. Directors' duties to creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1	1	<p>Directors' corporate liability is defined in broad terms by Spanish law (art. 127-127quater: duty of diligence, duty of loyalty, duty to secrecy). Directors are liable for damages caused by an act contrary to the law or the by-laws or by their failure to carry out their duties with the necessary diligence and care. Directors' liability is incurred against the company itself, its shareholders and third parties, including creditors for damages caused to the Company, to individual shareholders or to third</p>

												parties. With the introduction of the new insolvency law, in the event of non-compliance, the directors may incur serious liability, including disqualification from holding office, if he doesn't file a bankruptcy petition in time.
4. Security: scope	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	Chattel Mortgage and Pledge without Displacement (<i>Prenda sin desplazamiento</i>) are two types of security interests available with respect to movable assets under Spanish law when the collateral cannot be delivered to the pledgee as required under a normal pledge. ⁴⁴ The concept of floating charge is not recognized.
5. Security: registration	1	1	1	1	1	1	1	1	1	1	1	All forms of unpossessory security interest normally need to be recorded in the relevant registry. ⁴⁵
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	Judicial and notarial procedures are available for the enforcement of security interests. Foreclosure is effected by the sale of the mortgaged property through a public auction directed by the court or a notary public. However, there is no legal obligation to enforce collateral by public auction or any other prescribed manner, and the parties can also agree on a specific procedure for the sale of the asset. Enforcement of a security interest does not allow the secured creditor to take over ownership of the collateral in satisfaction of the secured obligation.
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	The insolvency of the debtor is defined as the state in of a debtor unable to fulfill its obligations (Article 2.2 of the 2003 Insolvency Law).

⁴⁴ Regulated by *Ley de 16 de diciembre de 1954, de hipoteca mobiliaria y prenda sin desplazamiento*.

A chattel mortgage may be created upon: (a) commercial businesses (*establecimiento mercantil*), including the premises of the business and its facilities, its commercial signs, the lease and transfer rights of leases (*derecho de traspaso*), stock and machinery provided that they form part of the mortgaged business; (b) vehicles; (c) aircrafts, (d) industrial machinery; and (e) intellectual property rights: trademarks, patents, copyrights, inventions, etc. A pledge without displacement may be created upon: (a) agricultural business property; (b) machines and other movable goods, which may be identified by their particular characteristics, such as trademark, model, manufacture number, and in regard to which a chattel mortgage may not be established; (c) inventories and raw materials that are located in a certain place, building or store; and (d) artistic objects such as paintings, sculptures, books, etc.

⁴⁵ On March 15, 2005 a new regulation on financial collateral entered into force.

												<p>The bankruptcy proceeding can be initiated by the debtor (art. 6 2003 Law) or any creditor (Art. 7 2003 Law).</p> <p>A debtor can request the commencement of the insolvency proceedings (voluntary insolvency, <i>concurso voluntario</i>), but in this event, it is not necessary for the debtor to actually be insolvent when he files the petition; it suffices that the situation of insolvency is imminent (Article 2.3).</p> <p>Before the reform the systematic noncompliance of the debts (Art. 1° LQSP), would authorize the debtor or the creditor(s) or the court or the public prosecutor to petition for bankruptcy (Art. 5° and 6° LQSP).</p>
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Once a debtor has been filed into bankruptcy, a stay on enforcement proceedings over assets devoted to the company's activity applies to all creditors (included secured ones). Article 56 of the 2003 Insolvency Law foresees a stay of such proceedings for a term of up to 12 months from the date of the insolvency declaration or until an agreement has been reached.</p> <p>Secured creditors are given the opportunity – but will not be obliged -- to join the remaining creditors in the negotiation of a composition agreement (<i>convenio</i>) with the debtor. Art 134 states that secured creditors who did not approve the agreement, won't be bound by it.</p> <p>Before the reform, art. 9 <i>Ley de 26 de julio de 1922, de suspensión de pagos</i>, provided for the stay of all the execution proceedings, but for those related to mortgages or pledges.</p>
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0.8	0.8	<p>The insolvency proceedings may end up either with the liquidation of the debtor's estate (<i>liquidación</i>) or an arrangement or composition agreement with the debtor's creditors (<i>convenio</i>).</p> <p>The general rule is that creditors representing at least 50% of the ordinary claims must approve the composition proposal (Art. 124). However, in the event</p>

												<p>the composition proposals foresees the payment in full of ordinary creditors within less than 3 years or the immediate payment of ordinary claims with a discount of less than 20%, it will be sufficient that the composition proposal is approved by relative majority. In any event, the composition proposal must also be approved by the Commercial Court.</p> <p>Before the reform, Art. 8 <i>Ley de 26 de julio de 1922, de suspensión de pagos</i> (in force until September 2004), states that the court will sanction the reorganisation agreement, taking in special consideration and the report of the intervening creditors and the report of the court clerk. The debtor was the only person who could petition for a <i>suspensión de pagos</i>.</p>
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	<p>The preamble of the Insolvency Law states that "the principle of equal treatment of creditors must be the general rule in insolvency situations and its exceptions must be very limited and always justified". Creditors' claims are ranked as privileged, ordinary and subordinated (Article 89, 2003 Insolvency Law). Privileged claims are, in turn, ranked as claims with a special privilege, if they affect specific assets of the debtor's estate, and claims with a general privilege, if they affect all of the debtor's estate (Art. 90, 91, 92 Insolvency Law).</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

Comments

In June 2003, a new comprehensive insolvency law was approved by the Spanish Parliament and became applicable as from September 2004. The changes created a single insolvency procedure to replace the various procedures previously available. The regime now places greater weight on reorganization or administration rather than liquidation. Before 2003, there were 4 insolvency proceedings: (a) *Procedimiento de Quita y Espera*, for the temporary insolvency of a natural person; (b) *Concurso de Acreedores* for the definitive insolvency of a natural person; (c) *Suspensión de Pagos* for the temporary insolvency of a juridical person and (d) *Quiebra* for the definite insolvency of a juridical person.

21. Sweden (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	The minimum share capital of a private Swedish limited company is SEK 100,000 (100,000 SEK = 9,135.00 EUR more or less). Swedish public limited companies need to have a share capital of not less than SEK 500,000 = 45,207.12 EUR.
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.33	0.33	0.33	0.33	0.33	Basic dividend restrictions apply. On March 10 th , 2000 a law was passed that enables Swedish companies to repurchase their own shares. Companies can repurchase up to a 10% of outstanding shares if the repurchase program is authorised by a 2/3 majority during the shareholders' meeting.
3. Directors' duties to creditors ⁴⁶	1	1	1	1	1	1	1	1	1	1	1	In Sweden, directors could incur liability primarily in connection with the liquidator's investigation and the claim that the estate might have against the directors as a consequence of their behavior prior to the commencement of the insolvent proceeding. If the board of directors fail to prepare the balance sheet described as in variable 7 (to convene the initial general meeting) or to petition the court for a liquidation order within set time limits, they can be held jointly and severally liable for the obligations incurred by the company during the period of such failure to act, (unless they can prove absence of negligence). In general, a director is liable for any loss the company incurs as a result of his intentional or negligent acts during the performance of his duties.
4. Security ⁴⁷ : scope	1	1	1	1	1	1	1	1	1	1	1	Swedish law would typically use a pledge to create a security interest over cash or fungible assets.

⁴⁶ The Swedish Companies Act used for this coding it's the 1975 version. A new Companies Act was emanated in 2005 and entered into force in January 2006. As for variable 2, a central feature of the new Act consists of the rules governing the way and extent to which assets can be transferred from the company to shareholders or other parties. In the new Act, the rules on this have been brought together under the concept of "value transfer".

⁴⁷ Now the most central rules for the Swedish securities market are defined by *Lag om värdepappersmarknaden* (LVM), the Financial Markets Act (2007:528), and by *Lag om handel med finansiella instrument* (LHFI), the Financial Trading Act (1991:980).

												<p>The most common form of general preferential claims is a floating charge, which covers all business assets (trade debts, trading stock, equipment, cash, shares, real estate not subject to mortgage), with a few exceptions e.g. liquid funds.</p> <p>A lien can be created by contract or by operation of law. It is also possible to register ownership of movable property and receive protection as owner without actually transferring the property (security transfer).</p>
5. Security: registration	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Mortgage. A mortgage on real property must be registered with the Land Registry.</p> <p>Floating charge. A floating charge must be registered with the Swedish Companies Registration Office and a certificate of charge is issued.</p> <p>Pledge. A pledge is usually created by delivery of the asset to the creditor.</p> <p>A security transfer must be registered at the governmental enforcement service in the district where the property is located.</p>
6. Security: Enforcement	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	0.8	<p>Enforcement of a security interest must usually take place through a public auction or, if the collateral is securities traded on a recognised exchange, by sale on that exchange. However, it is possible for the parties to agree differently in the pledge agreement. Following a default or a court judgment, secured creditors can sell the property and, this way, recover the debt.</p>
7. Entry to corporate bankruptcy proceedings ⁴⁸	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>The prerequisite for a bankruptcy proceeding is that the debtor (whether a natural person or a company) is insolvent, i.e. the debtor is unable to pay his debts in a proper manner and this inability is not temporary. The bankruptcy proceeding can be initiated by the debtor or</p>

⁴⁸ The Swedish legislation regarding insolvency has also been changed through the *Business Reorganization Act 1996 (no. 764)*. The status of the present legislation regarding insolvency in Sweden is scattered. Provisions regarding insolvency are found in a number of laws for example the *Bankruptcy Act (1987:672)*, the *Business Reorganization Act (1996:764)*, the *Sale of Goods Act (1990:931)*, and the *Land Code (1970:994)*

												by a creditor. In the case of a company, this must be liquidated if its equity is less than half of its registered share capital (as for the pre-requisite of 'insufficiency'). This compulsory liquidation proceeding will also apply if the company has not registered its board, managing director or auditor, or if it has not provided the Companies Registration Office with annual audited reports.
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	During the reorganisation, there is a moratorium on all creditors action. During the bankruptcy proceedings, the receiver takes control of the company and the directors' powers cease. The procedure imposes a statutory moratorium on creditors taking action against the company (2 kap. 17 § LFR). While enforcement is still possible on the bankruptcy of the pledgor, rules of an administrative nature would cause delays.
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	The reorganisation process ends when the company is successfully reorganised or when the administrator decides that there is no prospect of success, after which bankruptcy usually follows. The bankruptcy proceeding ends when the dividend declared by the court is distributed among the creditors. There is also the option of a voluntary private (private arrangement, an entirely voluntary and unregulated by law) and public composition (aiming to settle the debt problems of a company in the process of a company reorganisation). In the first case the process ends when every creditor has accepted the composition, in the second case, the process ends when the court is satisfied that the necessary approvals have been obtained.
10. Subordination of secured claimants	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	Creditors who have a security with a special preferential claim are entitled to receive payment from the assets before other creditors. For instance, when a certain asset has been pledged in security. A floating charge would have only a general preferential claim. Creditors who

												have a security with a general preferential claim are entitled to receive payment before other creditors with lesser preferential claims and creditors with no preferential claims at all.
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

22. Switzerland (Viviana Mollica)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Minimum capital of a Swiss limited joint stock company (S.A.) is CHF 100,000 (art. 621 CO -- approx. 65,986.82 EUR), of which CHF 50, 000 must be paid in (art. 632 CO).</p> <p>The minimum capital of the limited liability company (Sagl, SARL, GmbH, (art. 772 CO) is CHF 20,000 (approx. 13,196.25 EUR), of which CHF 10,000 must be paid in.</p>
2. Dividend restriction	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	<p>Dividends cannot be distributed before the sums destined by the law to the legal and statutory stockpile have been assigned. By law, a 5 % of the profits is assigned to the stockpile, until the latter doesn't reach the 20 % of the paid in capital (Art. 674 CO). Shareholders can constitute stockpiles that are not envisaged in the law or the statute of the company, though this must be done taking into the account the interests of all the shareholders (art. 674 cpv. 2 CO). Interests in favour of the social capital cannot be attributed and dividends must be distributed only from the profits of the balance sheet and the stockpiles potentially instituted for this purpose (art. 675 CO). Whoever has received undue dividends has the legal obligation to return them (Art. 678 CO).</p> <p>The Code of Obligations regulates shares repurchases at Art. 659 and 659a (introduced by LF of the 4th of October 1991, and entered into force on the 1st July 1992). It also equates subsidiary purchases to own shares purchases (Art. 659b CO).</p>

												Besides those, special provisions regarding transfer restrictions apply to corporations listed on a Swiss stock exchange.
3. Directors' duties to creditors	1	1	1	1	1	1	1	1	1	1	1	<p>The board members are jointly and severally liable for mismanagement of the corporation. In the past few years, there has been a notable increase of court actions against board members on the basis that they neglected to supervise the management diligently.</p> <p>Irrespective of ongoing insolvency proceedings, a creditor may, at any time, propose a claim against directors, if he can show that the directors have caused him both directly and individually to suffer financial loss, as a consequence of an action violating legal provisions exclusively established to protect the interests of the creditor. As most of the obligations of directors stipulated by Swiss law protect either the interests of the company or both the interests of the company and the creditor, it is generally accepted that cases explained above are very rare.</p> <p>In insolvency proceedings, directors can incur civil liability whenever they fail to promptly notify the courts of the company's over-indebtedness.</p>
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	All of them.
5. Security: registration	1	1	1	1	1	1	1	1	1	1	1	All of them. Swiss registration of security interests copied the uniform commercial code of the United States (See Regulation 22 February 1910 for the land registry (RRF), Federal Law 28 September 1923 on the shipping registry, Ordinance 16 June 1986 on the shipping registry, Federal Law 7 October 1959 on the aeronautic registry).
6. Security: Enforcement	0	0	1	1	1	1	1	1	1	1	1	<p>Art. 895-898 Civil Code regulates the retention of title. Art. 151-158 bankruptcy Law regulates court enforcements of pledges.</p> <p>Enforcement proceedings can be initiated by a creditor filing an enforcement request with the competent debt enforcement authority and asking for issuance of a</p>

												<p>payment summons to the debtor.</p> <p>According to Art. 130B as introduced by the 1994 amending law (and entered into force on the 1st of January 1997), the selling of the guaranteed asset can be done privately, when agreed by the parties.</p>
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Art. 191 Bankruptcy Law states that a debtor can commence bankruptcy proceedings by declaring insolvency with the competent court.</p> <p>Art. 190 Bankruptcy Law states that the creditor can initiate bankruptcy proceedings without a previous enforcement proceeding only in 3 cases: 1. the debtor doesn't have a fixed residence, or has attempted to escape or has attempted to carry on fraudulent acts against his creditors or has hidden part of his patrimony in an enforcement proceeding; 2. against a debtor whose subject to an insolvency proceeding and has suspended his payment, in case of art. 390.</p> <p>Art. 188 regulates the request of initiating a bankruptcy proceedings by creditors, when there is an enforcement proceeding taking place.</p>
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>Creditors with secured claims are satisfied out of the insolvency proceedings from the realization of the respective collaterals (art. 41, art. 151-158, Art. 219 Bankruptcy Law).</p> <p>Art. 297 envisages a creditors' stay in case of restructuring agreement. Paragraph 2, excludes secured creditors (ranking first class according to art. 219) from having to be bound by the stay rule.</p>
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	<p>For all types of debt restructuring agreements (ordinary debt restructuring agreement and debt restructuring agreement with assignment of assets) Swiss law requires the approval by a certain majority of the creditors as well as the competent judge.</p>
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	<p>Art. 219 regulates ranking of creditors. Secured creditors rank first (see variable 8).</p>

												<p>The 4th paragraph deals with unsecured creditors, who are classified (and consequently ranked) in the following class order: 1. claims of employees and claims originating from premature dissolution of employment relationships due to bankruptcy of the employer; 2. claims by social security, health and unemployment insurance institutions for employer contributions; 3. all other claims against the debtor.</p>
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

Comments

Applicable law on Insolvency: Federal Statute on Debt Enforcement and Bankruptcy of 11 April 1889, revised as of 16 December 1994 and several rulings of the Swiss Supreme Court on procedural aspects of insolvency proceedings.

23. Turkey (Pinar Akman)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	1	1	1	1	1	1	1	1	1	1	1	For corporations – 50000000000TL since 2002 (Turkish Commercial Code Article 272) (€25000) 1995-2001 – 5000000000 TL For limited companies 5000000000 TL since 2002 (Article 507) 1995-2001 5000000000 TL
2. Dividend restriction	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33	Turkish Commercial Code Articles 469 and 470.
3. Directors' duties to creditors	0	0	0	0	0	0	0	0	0	0	0	However, balance-sheet insolvency must be notified to the court immediately to require the bankruptcy of the company (Turkish Commercial Code Article 324).
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	The general rule for movables is that - subject to exceptions as stipulated by law- their possession has to be transferred to the creditor for security to be established (Turkish Civil Code Article 939). One exception is for movables for which there is a registry; if there is a registry for the movable, then it can be given as security without transferring possession (Turkish Commercial Code Article 940). For example, there is a registry for trade-marks. Similarly, receivables can be used for security; if the receivable is established by a bill/deed, then the possession of the bill/deed has to be transferred (Turkish Civil Code Article 954 et seq). Other assets, such as future interest income and dividend income can also be used as security (Turkish Civil Code Article 959). Finally, there is a special Act for certain undertakings – Act on Security of Commercial Undertakings (1971, Act No 1447). Under this Act, security can be granted over the moveables of the undertaking without possession being transferred.
5. Security: registration	1	1	1	1	1	1	1	1	1	1	1	Depends on the asset over which security was granted; if there is a registry for the asset, then the security over it should be registered.
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	Enforcement and Bankruptcy Code Articles 45, 145-153.
7. Entry to corporate	1	1	1	1	1	1	1	1	1	1	1	Turkish Commercial Code Article 324

bankruptcy proceedings												
8. Stay of secured creditors	1	1	1	1	1	1	1	1	1	1	1	Turkish Commercial Code Article 324- the court can postpone bankruptcy if there is likelihood of rehabilitation upon the request of the management board or creditors.
9. Outcome of bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	The court decides whether or not the company will be bankrupt; can also decide to postpone bankruptcy (Turkish Commercial Code Article 324). Creditors or the management board can ask for bankruptcy to be postponed (Turkish Commercial Code Article 324).
10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	Enforcement and Bankruptcy Code Article 206.
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

24. United Kingdom (John Armour)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	No minimum capital for private companies.
2. Dividend restriction	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	Restrictions on dividends (Companies Act 1985 s 263), repurchases (<i>Trevor v Whitworth</i> (1889) 12 App Cas 409; Companies Act 1985 ss 143, 159, 162) and disguised distributions (<i>Re Halt Garage</i> (1964) Ltd [1982] 3 All ER 1016; <i>Aveling Barford v Perion</i> (1989) 5 BCC 677). But private companies may repurchase out of capital (Companies Act 1985 ss 178-80) hence 0.83 rather than 1 (half way between 0.66 and 1).
3. Directors' duties to creditors	1	1	1	1	1	1	1	1	1	1	1	<i>West Mercia Safetywear Ltd v Dodd</i> [1988] BCLC 250 (balance sheet); Insolvency Act 1986 s 214 (cash flow).
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	Goode, <i>Legal Problems of Credit and Security</i> (3 rd ed., 2005), pp. 1-30.
5. Security: registration	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	Companies Act 1985 s 396 (some security over personalty need not be registered).
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	<i>Bank of Baroda v Panessar</i> [1987] Ch 335 (England & Wales); Insolvency Act 1986 s 218 (Scotland).
7. Entry to corporate bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Single creditor may commence insolvency proceedings: (i) liquidation: <i>Bowes v Hope Life Insurance Company</i> (1865) 11 HLC 389; Insolvency Act 1986 ss 122(1)(f), 123; (ii) receivership (until 2003): <i>Shamji v Johnson Matthey Bankers</i> [1986] BCLC 278; (iii) administration (from 2003): Insolvency Act 1986 Sch B1, paras 11(a); 14; 27(2)(a).
8. Stay of secured creditors	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	No stay on secured creditors' claims in liquidation: <i>Re David Lloyd</i> (1877) 6 Ch D 339. Only junior secured creditors stayed in receivership (until 2003); secured creditors stayed in administration (from 2003), except for financial collateral (Insolvency Act 1986 Sch B1 para 43; Financial Collateral Arrangements (No.2) Regulations 2003, SI 2003/3226 (implementing Council Directive 2002/47/EC on Financial Collateral Arrangements). Hence score = 0.75
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1	1	1	In receivership, secured creditor makes all the decisions: <i>Downsview Nominees v First City Corp</i> [1993] 2 WLR

												86 (until 2003). From 2003, under streamlined administration procedure, decision is accorded to “residual claimant”: Enterprise Act 2002: Insolvency Act 1986 Sch B1, paras 3, 50-53; Insolvency Rules 1986 r.r 2.38-42 (unsecured vote on proposals unless ‘under water’, in which case secureds may also vote). Court does not decide timing of exit.
10. Subordination of secured claimants	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.5	0.5	0.5	0.5	Floating charge subordinated to preferential creditors: Insolvency Act 1986 ss 40, 178, 178A; Sch B1 para 70. From 2002, all charges over receivables effectively subordinated, as no longer possible to take fixed charge: <i>Agnew v CIR</i> [2001] 2 AC 710. .
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	

25. United States (John Armour)

Variable	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Explanations/ References
1. Minimum capital	0	0	0	0	0	0	0	0	0	0	0	No minimum capital requirement.
2. Dividend restriction	0	0	0	0	0	0	0	0	0	0	0	Dividends may either be paid out of surplus, or out of profits from the previous two accounting years ('nimble dividends'): DGCL § 170(a). The restriction of payment to 'surplus' is effectively meaningless because capital may be converted to surplus by a resolution of the board: DGCL § 244(a). Similarly, whilst stock repurchases must not 'impair capital' (DGCL § 160(a)(1)), restriction effectively meaningless as capital may be converted to surplus by board resolution : DGCL § 244(a).
3. Directors' duties to creditors	1	1	1	1	1	1	1	1	1	1	1	<i>Credit Lyonnais Bank Nederland NV v Pathe Communications Corp</i> , No Civ A 12150, 1991 Del Ch LEXIS 215 (1991).
4. Security: scope	1	1	1	1	1	1	1	1	1	1	1	Personalty generally and receivables specifically: UCC § 9-102(a); UCC Revised § 9-109(a) (from 1999); 'Entire undertaking' (floating lien) UCC §§ 9-204, 9-205 and UCC Revised §§ 9-204, 9-205 (from 1999).
5. Security: registration	1	1	1	1	1	1	1	1	1	1	1	UCC § 9-302(1); UCC Revised § 9-310 (from 1999).
6. Security: Enforcement	1	1	1	1	1	1	1	1	1	1	1	UCC § 9-503; UCC Revised § 9-609 (from 1999) (secured party may take possession of collateral on default without judicial process provided no breach of the peace)..
7. Entry to corporate bankruptcy proceedings	0	0	0	0	0	0	0	0	0	0	0	Commencement of a voluntary case does not require the debtor to demonstrate that they are insolvent in either sense: 11 USC §§ 109, 301.
8. Stay of secured creditors	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	11 USC § 362 (automatic stay: secured creditors stayed in both Ch 7 liquidation and Ch 11 reorganization).
9. Outcome of bankruptcy proceedings	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	Secured creditors do not vote in Ch 7: Trustee, appointed by unsecured creditors, takes decisions about the exit from proceedings. However, must give 'adequate protection' to secured creditors in order to use or sell assets subject to security (11 USC § 363(e)); Secured and unsecured creditors vote in Ch 11: 11 USC § 1122, 1126(a). Court must confirm a Ch 11 plan: 11 USC § 1129.

10. Subordination of secured claimants	1	1	1	1	1	1	1	1	1	1	1	11 USC §§ 507, 726, 1123(a)(1).
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	