

**CBR Creditor Protection Index
for the UK, the US, Germany, France, and India**

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(See John Armour, Simon Deakin, Priya Lele and Mathias Siems, 'How do legal rules evolve? Evidence from a cross-country comparison of shareholder, worker and creditor protection' CBR Working Paper No. 382 (2009), <http://www.cbr.cam.ac.uk/pdf/WP352.pdf>, and ECGI Working Paper No. 109/2009.)

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Creditor Protection Index, 5 countries

General note: most variables are coded on a binary basis, with 0 = “no” and 1 = “yes”. However intermediate values are sometimes used, where justifiable (i.e. 0.5 = “sometimes”). Such instances are explained in footnotes to the coding.

	Variable	Description
I	Debtor control (15 variables)	Legal rules which restrict or deter the debtor from entering into transactions that might harm creditors' interests
1	Minimum capital (2)	This is the amount of minimum capital, if any, required to start a firm (in Euros). It is a cardinal variable (i.e. the actual amount) which is then normalised. (a) Private companies (Normalised for 25,000 =1) (b) Public companies (Normalised for 75,000=1)
2	Dividend restriction (3)	Are public companies subject to a meaningful restriction on the payment of dividends defined by reference to legal capital? (a) dividend restriction (1=yes; 0=no) (b) share repurchase restriction (1=yes; 0=no) (c) undervalue transactions with shareholders? (1=yes; 0=no)
3	Equitable subordination (1)	Are shareholder loans subordinated on insolvency? (0=never; 1=sometimes)
4	Piercing corporate veil (1)	Will courts pierce the corporate veil to protect creditors? (0=never; 1=frequently)
5	Transaction avoidance in insolvency (3)	(a) What is the maximum length of 'twilight period' for fraudulent conveyance action (assuming debtor has been fraudulent)?(Cardinal variable, which is then normalised) (b) What is length of 'twilight period' for non-fraudulent undervalue transaction with unconnected counterparty ?(Cardinal variable, normalised) (c) Is it necessary to establish that the debtor intended to confer a preference in order for a preference action to succeed? (0 = yes, 1= no)
6	Directors' liability with respect to creditors (3)	(When) are directors required to act in creditors' interest? (0= no; 0.5= subjective duty; 1= objective duty of care) (a) When company is balance sheet insolvent? (b) When company is 'cash flow' insolvent? (c) When company is solvent?
7	Public enforcement (2)	Is there public enforcement of liabilities of directors/shrs in insolvency ?(1=yes, 0=no) (a) Criminal sanctions (b) Disqualification from acting as a director

	Variable	Description
II	Credit contracts (10 variables)	
1	Set-off (2)	Insolvency set-off (a) Possible? (1=yes; 0=no) (b) Mandatory? (1=yes; 0=no)
2	Enforcement (2)	How many legal procedures (if any) must be completed in order to enforce outside insolvency proceedings? (Cardinal variable, normalised such that 0 = maximum, 1 = minimum) (a) Unsecured creditors (b) Secured creditors
3	Security interests (4)	Are non-possessory security interests permitted over: (1=yes, 0=no) (a) Land (b) Personalty (c) Receivables (d) 'Entire undertaking' (floating lien/charge)
4	Retention of title (2)	May retention of title clauses be validly asserted in insolvency proceedings? (1=yes, 0=no) (a) Over original goods (b) Over proceeds of sale of original goods?

	Variable	Description
III	Insolvency (19 variables)	This section distinguishes between <i>liquidation</i> procedures (geared to the sale of the insolvent companies' assets, and distribution of proceeds between creditors), and <i>rehabilitation</i> proceedings (geared to the rescue of the company, or of its business, as a going concern). See IMF, <i>Orderly and Effective Insolvency Procedures</i> (1999) http://www.imf.org/external/pubs/ft/orderly/
1	Structure (1)	Does the law provide for both liquidation and rehabilitation outcomes? (1 = yes, 0 = no)
2	Trigger (6)	How are insolvency proceedings triggered? (a) Creditor initiation: May a single creditor initiate liquidation proceedings? (1= yes, 0= no) (b) Creditor initiation: Must cash flow or balance sheet insolvency be established? (1= yes, 0= no) (c) Debtor initiation: May debtor initiate rehabilitation proceedings unilaterally? (0= yes, 1= no or NA) (d) Debtor initiation: Must cash flow or balance sheet insolvency be established? (1= yes or NA, 0= no) (e) Debtor initiation: Must balance sheet insolvency be established? (1= yes, 0 = no) (f) Role of court: Does court participate in choice between liquidation and rehabilitation proceedings? (0= yes, 1= no)
3	Control in rehabilitation proceedings (1)	Do directors remain in control for day-to-day management decisions? (0= yes, 1 = no)
4	Appointment of trustee (if no trustee, managers) (4)	Which constituencies vote on appointment of trustee/ appoint trustee? a. Secured creditors (1= yes, 0 = no) b. Unsecured creditors (1= yes, 0 = no) c. Shareholders (0= yes, 1 = no) d. Court (independently of any votes) (0= yes, 1= no)
5	Which constituencies vote on plan for exit? (4)	Which constituencies decide/vote on plan for exit? a. Secured creditors (1= yes, 0 = no) b. Unsecured creditors(1= yes, 0 = no) c. Shareholders (0=yes, 1= no) d. Court (independently of any votes) (0= yes, 1= no)
6	Priorities (3)	(a) Liquidation proceedings: Secured creditors subordinated to statutory priorities? (1=no, 0=yes) (b) Rehabilitation proceedings: Secured creditors subordinated to statutory priorities? (1=no, 0=yes) (c) Rehabilitation proceedings: Statutory super-priority available for post petition finance/ post-petition contracts are 'estate obligations'? (1=no, 0=yes)

Numbers highlighted in yellow indicate uncertainty over coding. Exchange rates: taken from <http://www.oanda.com/convert/classic> current as of 2 Nov 2006.

Creditor Protection Index: France

Coded by John Armour and Viviana Mollica, November 2006.

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05
I Debtor control																																				
1 a	0.15 ¹	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0 ²	0
1 b	0.2 ³	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.5 ⁴	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
2 a	1 ⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2 b	1 ⁶	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2 c	0.5 ⁸	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
4	0.5 ⁹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ¹⁰	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
5 a	0.02 ¹¹	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	
5 b	0.25 ¹²	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	
5 c	0.5 ¹³	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ¹⁴	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
6 a	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6 b	1 ¹⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1 ¹⁶	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
6 c	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7 a	1 ¹⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1 ¹⁸	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
7 b	1 ¹⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.5 ²⁰	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	

¹ SARL form available with minimum capital of 50,000FF (=€7,500): Loi n°66-537 du 24 juillet 1966 sur les sociétés commerciales, art 35. Normalised to 0.15. (NB SAS form available with minimum capital of 100,000FF (=€15,000): Law N. 66-537 du 24 juillet 1966 art. 71 art. 491 alinéa 3).

² From 1 January 2004, SARL form available with no minimum capital: Article L223-2, Loi n°2003-721 du 1 août 2003 - art. 1. Normalised to 0.

³ 100,000FF (=€15,000). Law N. 66-537 du 24 juillet 1966 art. 71 art. 491 alinéa 3. Normalised to 0.2.

⁴ 250,000FF (=€38,000) Loi ordinaire 81-1162 du 30 décembre 1981. Normalised to 0.5

⁵ Article L223-40 Commercial Code – repayment of dividends not corresponding to profit (ex art. 67 loi n°66-537 du 24 juillet 1966); Article L225-161 – Bonds convertible into shares (ex art. 195 loi n°66-537 du 24 juillet 1966) and Article L225-174 (ex art. art. 206)

⁶ Article L225-210 Commercial Code (ex art. art. 217-3 loi n°66-537 du 24 juillet 1966)

⁷ Article L225-209 Commercial Code (Law No 2003-7 of 3 January 2003 Article 50 (II) Official Gazette of 4 January 2003).

⁸ Article L232-11,12.

⁹ The controllers of a company (*de facto* or *de lege*) may be made bankrupt (and liable to contribute to its debts) if they have (i) hidden corporate assets; (ii) used the corporate person to conceal business transactions for their personal benefit; (iii) used the corporate assets as their own; (iv) otherwise acted in *mauvais foi*: Loi du 13 Juillet 1967, Art 106.

¹⁰ See, similarly, Commercial Code, Art L 624-5.

¹¹ 6 months : Loi du 13 Juillet 1967, Art 29. Normalised to 0.02.

¹² 6 months: Loi du 13 Juillet 1967, Art 29. Normalised to 0.25.

¹³ Not necessary to establish debtor was in bad faith, but must establish counterparty was in bad faith. Loi du 13 Juillet 1967, Art 29.

¹⁴ Commercial Code, Art L 621-108.

¹⁵ Loi du 13 Juillet 1967: Directors may be made personally bankrupt if (i) they have acted in bad faith (Arts 106(5), 107) or (ii) 'ont fait preuve d'une incompetence manifeste' (Art 108(1)).

¹⁶ 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.

¹⁷ Loi du 13 Juillet 1967: directors of a company may be made criminally bankrupt for fraud in the period leading up to the insolvency; [CHECK ARTICLE].

¹⁸ Commercial Code, Arts L 626-1 to 626-6: offence of 'aggravated bankruptcy' available against directors of insolvent firm if they have engaged in fraud: see esp. L 626-2.

¹⁹ Loi du 13 Juillet 1967. Directors may be made personally bankrupt if (i) they have acted in bad faith (Arts 106(5), 107) or (ii) 'ont fait preuve d'une incompetence manifeste' (Art 108(1)). Bankruptcy -> disqualification from running a business: Art 105.

²⁰ Directors may be made either personally bankrupt (which carries with it a sanction of disqualification from running a business: Commercial Code, Art L 625-2) or simply disqualified (Art L 625-8) from running a business if they have (i) abusively continued to operate a business that was bound to fail; (ii) failed to keep proper accounting records; (iii) fraudulently or recklessly incurred credit (Arts L 625-3, 625-5).

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05				
II Credit contracts																																								
1 a	0 ¹	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1 ²	1	1	1	1	1	1	1	1	1	1	1	1	1	
1 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
2 a	0	0	0	0	0	0	0	0	0	0	0	0 ³	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 b	0.25 ⁴	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	
3a	1 ⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
3b	0.5 ⁶	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
3c	0.75 ⁷	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	1 ⁸	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
3d	0.25 ⁹	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25		
4a	¹⁰ 0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75 ¹¹	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	1 ¹²	1	1	1	1	1	1	1	1	1	1	1		
4b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	

1 Compensation: Articles 1289 to 1299 French Code Civil. The *compensation conventionnelle* is void if concluded during the suspect period, that is up to 18 months before the date of issue of a judgment declaring a debtor insolvent. If the parties would attempt one in case of an insolvency proceeding, such compensation conventionnelle would be paralysed on the basis of article L 621-24 of the commercial code -- the suspension of payments. Concerning financial transactions, the French Parliament had to enact laws recognising the enforceability of agreements providing for termination (*résiliation*) and set-off (*compensation*) in case of insolvency. Law No. 93-1444, as amended by Law No. 94-679 (the Repo Law) and Law No. 87-416, as amended by Law No. 96- 597 (the Securities Loan Law), created exemptions to the mandatory provisions of French insolvency law. Also the Investment Services Directive Law No. 96-597 allows *compesation* in case of financial instruments transactions. And note also Article L431-7 of the Monetary and Financial Code.

² If the debts are connected. Law no. 85-99 of 25 January 1985, Art 33; *Cassation commerciale*, 2 March 1993, BRDA 93-10, at 14 (A. Sorensen & P.J. Omar, *Corporate Rescue Procedures in France* (London: Kluwer, 1996), 201).

³ 2 procedures required. Civil Procedure Code art. 1405-1425 (Decree n°81-500 of 12 May 1981, Official Journal of 14 May 1981, amendment JORF of 21 May 1981 in force on 1 January 1982) (Decree n°81-862 of 9 September 1981, Official Journal of 19 September 1981) + Civil procedure Code 500-508 (on execution of judgement). Normalised to 0 (lowest creditor protection).

⁴ Enforcement of most security interests requires (i) court hearing (ii) public auction—the latter is coded as 0.5 judicial procedures, as it imposes a significant restriction on creditors’ freedom (see M. Gdanski, ‘Taking Security in France’ in M/Bridge and R. Stevens (eds.), *Cross-Border Security and Insolvency* (Oxford: OUP, 2001), 79). Normalised to 0.25.

⁵ Civil Code, Arts 2114ff.

⁶ Charges are not possible over inventory—must be a pledge, which requires dispossession of the debtor. Charges are 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.), *Cross-Border Security and Insolvency* (Oxford: OUP, 2001), 64-68.

⁷ Civil Code, Art 2075. But notice must be given to the underlying debtor—renders this form of security problematic where secrecy is desired.

⁸ 1981 loi du 2 Janvier 1981 ('*Loi Dailly*') established a statutory framework specifically for the grant of security over book debts.

⁹ 'The notion of a "floating charge" which crystallises on enforcement of the charge does not exist under French law' (M. Gdanski, 'Taking Security in France' in M/Bridge and R. Stevens (eds.), *Cross-Border Security and Insolvency* (Oxford: OUP, 2001), 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).

10 Art. 2367-2372 Civil Code.

¹¹ Law no. 85-99 of 25 January 1985, Art 121; A. Sorensen & P.J. Omar, *Corporate Rescue Procedures in France* (London: Kluwer, 1996), 195.

¹² Extended from 'merchandise' to all 'goods' in 1994: *Ibid*, 196.

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05			
III Insolvency																																							
1	1 ¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1 ²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2a	1 ³	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1 ⁴	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2b	1 ⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1 ⁶	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2c	0.5 ⁷	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ⁸	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2d	1 ⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1 ¹⁰	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2e	0 ¹¹	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0 ¹²	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2f	0 ¹³	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0 ¹⁴	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3	0.5 ¹⁵	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ¹⁶	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
4a	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0 ¹⁷	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4b	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0 ¹⁸	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4c	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1 ¹⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
4d	0 ²⁰	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0 ²¹	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5a	1 ²²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0 ²³	0	0	0	0	0	0	0	0	0	0	0.25 ²⁴	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
5b	1 ²⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0 ²⁶	0	0	0	0	0	0	0	0	0	0	0.25 ²⁷	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
5c	0.5 ²⁸	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1 ²⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
5d	0.5 ³⁰	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0 ³¹	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
6a	1 ³²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0 ³³	0	0	0	0	0	0	0	0	0	0	0.5 ³⁴	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
6b	1 ³⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0 ³⁶	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6c	0 ³⁷	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	

¹ Loi du 13 Juillet 1967.

² Loi du 25 Janvier 1985 (see now Code Commerciale, L 620-1).

³ Loi du 13 Juillet 1967, Art 2.

⁴ *Supra* note 2.

⁵ *Supra* note 3.

⁶ *Supra* note 2.

⁷ Loi du 13 Juillet 1967, Art 1 (debtor *must* file if cash flow insolvent); I-6 (court chooses whether *règlement judiciaire* or *liquidation des biens*).

⁸ Commercial Code, Art L 621-1.

⁹ Loi du 13 Juillet 1967, Art 1 (cash flow test).

¹⁰ Commercial Code, Art LL 620-2, 621-2 (cash flow test).

¹¹ *Supra* note 9.

¹² *Supra* note 10.

¹³ Loi du 13 Juillet 1967, Arts 6,7 (court pronounces whether *règlement judiciaire* or *liquidation des biens* will follow).

¹⁴ Commercial Code, Art L 621-62.

¹⁵ Loi du 13 Juillet 1967, Art 26 (*juge-commissaire* decides whether debtor shall be permitted to continue with the realisation of the business).

¹⁶ Commercial Code, Art LL 621-22, 621-23: the court determines how much power shall be allocated to the directors and how much to the judicial administrator.

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- ¹⁷ Commercial Code, Art L 621-4: the court appoints the judicial administrator.
- ¹⁸ Commercial Code, Art L 621-4.
- ¹⁹ *Ibid.*
- ²⁰ Loi du 13 Juillet 1967, Arts 8,9 (*syndics* are appointed by *juge-commissaire*, who may, change *syndics* following a petition from the debtor or creditors).
- ²¹ Commercial Code, Art L 621-8.
- ²² Marie-Jeanne Campana (ed.), *Code de Commerce* (Paris: Litec, 5th ed., 1993), at 41-42; Loi du 13 Juillet 1967, Arts 67-70 (???).
- ²³ Commercial Code, Art L 621-62: court decides on plan for reorganization/liquidation. Court will be guided by the judicial administrator's report, which will have been prepared after consultation with the creditors' and employees' committees.
- ²⁴ Commercial Code, Art 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: L 621-62. 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.
- ²⁵ Campana, *supra* note 22, at 41-42. Loi du 13 Juillet 1967, Arts 67-70. Secured creditors could not be bound without their consent.
- ²⁶ Commercial Code, Art L 621-62.
- ²⁷ Commercial Code, Art LL 621-60, 621-6.
- ²⁸ Loi du 13 Juillet 1967, Art 67 (debtor proposes concordat).
- ²⁹ Commercial Code, Art L 621-62.
- ³⁰ Concordat must be homologated by the court: Loi du 13 Juillet 1967, Art 72.
- ³¹ Commercial Code, Art L 621-62.
- ³² Loi du 13 Juillet 1967, Art 83.
- ³³ Loi du 25 Janvier, 1985, art 40 (secured and unsecured debts subordinated).
- ³⁴ 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.
- ³⁵ Not without their consent: Anthony R. Houghton and Neil H. Cooper, *Tolley's European Insolvency Guide* (Croydon: Tolley Publishing, 1984), 60.
- ³⁶ Commercial Code, Art L 621-31 I : Loi du 25 Janvier, 1985, art 40 (secured and unsecured debts subordinated).
- ³⁷ Not without secured creditors' consent: Houghton and Cooper, *supra* note 35, 60.

Creditor Protection Index: Germany

Coded by Mathias Siems (27.07.06), checked by Alexander Schall (Spring 07).

Laws: AktG (Companies Act), GmbHG (Law on Private Limited Companies), InsO (since 1999) (Insolvency Code; English translation available at <http://www.iuscomp.org/gla/statutes/InsO.pdf>), KO (until 1999) (Bankruptcy Code), VerglO (until 1999) (Composition Act), BGB (Civil Code), SchVerschG (Law on Bonds), StGB (Criminal Code), ZPO (Civil Procedure Code), ZVG (Compulsory Auction of Immovable Property Act). The GesO (Full Enforcement of Judgement Act), which was in force in the Eastern German Länder in the 1990s, has not been taken into account.

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05			
I. Debtor control																																							
1a	0.4 ¹	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	1 ²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
1b	0.66 ³	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66	0.66
2a	1 ⁴	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
2b	1 ⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.5 ⁶	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5		
2c	1 ⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
3	0.5 ⁸	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1 ⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
4	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ¹⁰	
5a	1 ¹¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.33 ¹²	
5b	0.25 ¹³	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	
5c	1 ¹⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
6a	1 ¹⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
6b	1 ¹⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
6c	0.5 ²⁰	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
7a	1 ²¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
7b	0	0	0	0	0	0	0	0	0	0	0	0.5 ²²	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5

¹ § 5(1) GmbHG: 20.000 DM → 10.000 Euro. Normalised to 0.4

² § 5(1) GmbHG (as amended by GmbH-Novelle 1980): 50.000 DM → 25.000 Euro. Normalised to 1 (largest figure in sample).

³ § 7 AktG: 100.000 DM → 50.000 Euro. Normalised to 0.66.

⁴ § 233 AktG.

⁵ § 71 AktG (originally only six very narrow exceptions).

⁶ Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG), 27. 4. 1998, BGBl. I 786 amended § 71 AktG: now general authorisation possible.

⁷ § 57 AktG and & case law (cf. BGH, NJW 1960, 285; NJW 1987, 1194; NJW 1996, 589); cf. also Peter O. Mülberr, 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 (*verdeckte Ausschüttungen* or *verdeckte Einlagenrückgewähr*) 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".

⁸ Law not yet clarified for joint-stock companies.

⁹ BGHZ 90, 381 ff. = NJW 1984, 1893: at least if shareholder holds more than 25 % of the share capital; cf. also Mülberr, supra note 7: “The best known example is the German *Kapitalersatzrecht*, which covers not only loans given in times of crisis (i.e. not necessarily insolvency, but under circumstances where only shareholders would have extended a loan), but also loans not withdrawn at the onset of a crisis. Similarly, US courts developed the doctrine of *equitable subordination*, which found statutory recognition in § 510(c) of the Bankruptcy Code of 1978, and the more recent *recharacterization* doctrine. Other than the German doctrine, which prohibits repayments while the corporation remains not “creditworthy”, the American doctrine applies only in bankruptcy (Q: relevant here?). However, the crucial point for issues of regulatory competition is that the doctrine, as part of the bankruptcy code, does not share in regulatory competition for corporate law.”

¹⁰ Piercing the corporate veil possible but exception; see e.g. BGH NJW 1956, 785; NJW 1970, 2015; NJW 1974, 134, 492; NJW 1977, 1449 (insufficient capital as such does not lead to piercing the corporate veil); NJW 1981, 522; NJW 1994, 1801; NJW 2002, 3024 (case where courts previously used an analogy to the law of groups of companies; see also BGH, NJW 2001, 3622); cf. also Hüffer, Aktiengesetz, 7th edn, 2006, § 1 para. 15.

¹¹ §§ 31(no.1), 41(1) KO: 30 years (but more strict with respect to “intent” than new law: now *Vorsatz*, previously *Absicht*). Normalised to 1.

¹² § 133(1)(s.1) InsO: 10 years (*Section 133 (Wilful Disadvantage)*): (1) A transaction made by the debtor during the last ten years prior to the request to open insolvency proceedings, or subsequent to such request, with the intention to disadvantage his creditors may be contested if the other party was aware of the debtor's intention on the date of such transaction. Such awareness shall be presumed if the other party knew of the debtor's imminent illiquidity, and that the transaction constituted a disadvantage for the creditors.). Normalised to 0.33.

¹³ §§ 30(no.2), 33 KO: six month if the debtor was illiquid on the date of the transaction; otherwise 10 days before opening of the insolvency proceedings. Normalised to 0.25.

¹⁴ § 131(1) InsO: three month if the debtor was illiquid on the date of the transaction (no. 2) or if the creditor was aware of the disadvantage to the creditors of the insolvency proceedings arising from such transaction on its date (no. 3); otherwise one month (no. 1). (Coded as 3 months: assume debtor illiquid). Normalised to 0.125.

¹⁵ §§ 30, 31 does not require it.

¹⁶ § 131 InsO does not require it.

¹⁷ Identical to the existing law (see next footnote); despite academic debate this can also be said for the – not yet codified – definition of overindebtedness; see Weil in Rajak et al, European Corporate Insolvency, 1995, p. 224; Uhlenbruck, 12th edn., 2003, § 19 para. 8.

¹⁸ Directors' liability possible because of:

(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 § 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).

(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).

(3) In case of “crisis” equitable subordination is more strict (see Hüffer, supra note, § 57 para. 16a).

¹⁹ § 92(2)(s.1) AktG: the same rules as in variable I 6(a) 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).

²⁰ No general stakeholder principle (see shareholder index), but stakeholder interests can be taken into account (cf. Hüffer, Aktiengesetz, 7th edn, 2006, § 76 para. 12).

²¹ §§ 239, 340 KO; until 1976: §§ 283-283d StGB (note that according to Martin 28 B.C. Int'l & Comp. L. Rev. 1, 45 (2005) the law is stricter than in other countries).

²² (1) GmbH-Novelle 1980 (Gesetz zur Änderung des GmbHG und anderer handelsrechtlicher Vorschriften v 4. 7. 80 (BGBl I 836), ÄndG 1980): (a) § 76 III 3 AktG with §§ 283(4), 283b(2) StGB: disqualification for member of the management board in case of conviction for certain insolvency crimes; in some cases negligence is sufficient; (b) § 76 III 4 AktG with § 35 GewO (Gewerbeordnung): disqualification for member of the management board possible if he/she also carries on its on trade (which is usually not the case), is unreliable and disqualification is necessary to protect the public interest or the employees; (2) for members of the supervisory board there are no provisions on disqualification (cf. § 100 AktG).

983), i.e. not part of insolvency assets (cf. also Eva-Maria Kieninger (ed.), *Security rights in property in European private law*, 2004, 247); (b) if administrator chooses performance, (aa) the creditor may get the purchase price from the administrator, or (bb) if the administrator does not/cannot pay, creditor can terminate contract and have a right to separation (see above) → 1 (but delay coded?; see also Kieninger, *ibid.*, 248: because insolvency administrator has time to decide until the creditors' meeting has decided on the realisation of the insolvency estate generally, § 107(s.2) InO)

¹³ Extended retention of title clauses (*verlängerter Eigentumsvorbehalt*) only leads to right to separate satisfaction (*Absonderung*, § 49 KO; § 51(no.1) InsO; see also Marlow & BGH, WM 1971, 71; Uhlenbruck, 12th edn., 2003, § 51 paras. 1, 17; Weber-Rey, 5 ICCLR 234 at 237 (1994)), i.e. part of the insolvency assets, but status of a secured creditor.

¹² Two different procedures: (1) for “compulsory arrangement” involvement only on application of the administrator or the creditors’ committee (§ 176 KO); (2) for “creditors’ arrangement” approval necessary, but no discretion §§ 16 et seq. VerglO. Coded as 0.75.

¹³ Court can refuse the proposed insolvency plan ex officio based on special reasons (§ 231(1) InsO), but not discretion (Lüer in Uhlenbruck, 12th edn., 2003, § 231 para. 1). Coded as 0.5.

¹⁴ Two different procedures: (1) for “compulsory arrangement” like insolvency proceedings: § 6 KO: board of managers loses authority to administer and dispose of those assets covered by the liquidation; (2) for “creditors’ arrangement”: an administrator is also appointed (§ 3 VerglO). However, he/she has just a supervisory function and is not supposed to manage the company (cf. Baur & Stürner, Zwangsvollstreckungs-, Konkurs- und Vergleichsrecht, 12th edn., 1990, p. 278).

¹⁵ Uniform trigger, i.e. like insolvency proceedings → § 80 InsO: Upon the opening of the insolvency proceedings the debtor’s right to manage and transfer the assets involved in the insolvency proceedings shall be vested in the insolvency administrator (for the interim administrator see §§ 21, 22 InsO) – only debtor-in-possession (§§ 270-285 InsO) possible if court and creditors agree, and in §§ 217 et seq. InsO more flexibility to decide on it → 0 (default rule).

¹⁶ See generally note 20, below. Secured creditors only have voting right in the creditor assembly to the extent that they waive their right to separate satisfaction, or that such separate satisfaction has failed (§ 96 KO). (coding?)

¹⁷ §§ 57, 74, 77 InsO (for all creditors); and: §§ 74(1), 76, 77 InsO: secured creditors have voting rights in the creditor assembly.

¹⁸ InsOÄndG 2001: new § 57(s.2) InsO: double majority necessary for appointment of insolvency administrator (majority of votes and majority of persons) → more difficult for creditors to appoint “own administrator”, i.e. more likely that court-appointed administrator (see note 23, below) keeps his position.

¹⁹ In general, court appoints insolvency administrator (§ 78 KO). The creditor assembly can appoint someone else but the court can reject this according to its best interest (§ 80 InsO as understood by the courts; see Baur & Stürner, supra note 14, para. 10.13: “*plichtgemäßes Ermessen*”).

²⁰ §§ 57, 74, 77 InsO (for all creditors).

²¹ See note 20, above.

²² §§ 21(2)(no.2), 56 InsO: Insolvency court appoints the administrator, but in the first report meeting (which takes place six weeks to three months after the opening of the proceedings) the creditors can (!) appoint new administrator. The court may refuse designation only of a person unqualified to assume such an office (§ 57(s.3) InsO).

²³ Two different procedures: (1) for “compulsory arrangement”: §§ 182, 64 KO; (2) for “creditors’ arrangement”: §§ 74, 27 VerglO. In both cases only to the extent that they waive their right to separate satisfaction, or that such separate satisfaction has failed. (coding?)

²⁴ Creditors have to approve insolvency plan by groups (§§ 222, 235, 243, 244 InsO). Secured creditors are a separate group if “their rights are encroached upon by the plan” (§ 222(1)(no.1) InsO; see also § 238 InsO) (coding?). 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).

²⁵ 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).

²⁶ Creditors have to approve insolvency plan by groups (§§ 222, 235, 243, 244 InsO).

²⁷ The debtor either has to initiate or to approve the plan (for the first see variable III, 2(b), above; for the latter see § 247(1) InsO). However, 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 § 262 Rn. 2); Insolvency proceedings do also 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, supra note 10, § 264 para. 10). Only insolvency-neutral measures remain possible (Hüffer, supra note 10, § 264 para. 79: e.g. change of

articles and change of capital may be permissible). Furthermore, continuation of the old company (i.e. reversal of the dissolution) requires the consent of the shareholders (§ 274(2)(no.1) AktG). **KommZ247

²⁸ Two different procedures: (1) for “compulsory arrangement”: §§ 184 et seq. KO (mentioning specific reason for rejection); (2) for “creditors’ arrangement”: §§ 78 et seq. VerglO (mentioning specific reason for rejection) (no discretion).

²⁹ Court has to confirm the accepted plan (§ 248(1) InsO) based on §§ 250, 251 InsO (no discretion, see Lürer in Uhlenbruck, 12th edn., 2003, § 248 para. 12).

³⁰ 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, 12th edn., 2003, § 53 para. 3; Becker, Insolvenzrecht, 2005, paras. 852, 1446).

³¹ Like variable, III 8a.

³² Two different procedures: (1) “compulsory arrangement”: If contract concluded with administrator: §§ 191 with 59 KO: But: creditors have to approve it (§ 134(no.2) KO); (2) “creditors’ arrangement” does not know estate obligations and priorities (see Baur & Stürner, supra note 14, para. 27.2).

³³ (1) if contract concluded with administrator: §§ 258(2) with 53 InsO: “the assets involved in the insolvency proceedings shall be used to settle in advance the costs of the insolvency proceedings and the other debts incumbent on the assets involved in the insolvency proceedings” (i.e. estate obligations). But: creditors have to approve it (§ 160(2)(no.2) InsO.

(2) If contract concluded with debtor: Apart from that, only the insolvency plan “can provide for lower-ranking status for the creditors of the insolvency proceedings compared with creditors with entitlements deriving from loans or other credits entered into by the debtor or the takeover company during the period of surveillance or held open by a creditor of the assets involved in the insolvency proceedings to extend into the period of surveillance” (§ 264(1) InsO) (i.e. new creditors, see Becker, Insolvenzrecht, 2005, para. 276).

Creditor Protection Index: India

Coded by Priya Lele, June 2006.

Main laws: There is no single comprehensive law on corporate insolvency in India. There are two major enactments and several special provisions, which provide statutory and procedural law on the liquidation and reorganisation process. The Companies Act, 1956 and the Sick Industrial Companies Act, 1985 (which came into force w.e.f. 12-1-1987, vide Notification No. GSR 24(E), dated 12th January, 1987 and sections 15 to 34 came into force w.e.f. 15-5-1987, vide Notification No. SO 444(E), dated 28th April 1987 – now proposed to be repealed by the SICA Repeal Act, 2003) are the main enactments. Moreover there are special laws for recovery of dues due to banks and financial institutions, like the State Financial Corporation Act, 1951, the Industrial Reconstruction Bank of India Act, 1984 (now renamed as Industrial Investment Bank of India), the Recovery of Debts Due to Banks and Financial Institutions Act 1993 and now the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 that are crucial for protection of creditor rights, recovery of debts and enforcement of security in the case of special creditors.

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05			
I	Debtor control																																						
1 a	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
1 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 a	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 b	1 ³	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2 c	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4	0.5 ⁵	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
5 a	0.02 ⁶	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02
5 b	0.5 ⁷	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
5 c	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6 a	0.25 ⁸	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
6 b	0.25 ⁹	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
6 c	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7 a	1 ¹¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
7 b	0.5 ¹²	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	

¹ Companies Act 1956 S. 3 (iii) as amended by the Companies (Amendment) Act of 2000. €1713.58, currency conversion is according to <http://www.x-rates.com/calculator.html> as on 29 May 2006. Normalised to 0.07.

² Companies Act 1956 S. 3 (iv) as amended by the Companies (Amendment) Act of 2000. €8567.9, currency conversions are according to <http://www.x-rates.com/calculator.html> as on 29 May 2006. Normalised to 0.11. However, use of the word ‘corporation’ requires the company to possess a minimum authorised capital of Rs. 5 crores (€171,358).

³ Companies Act 1956, S.77.

⁴ 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.

⁵ The court may sometimes pierce the corporate veil to protect creditors for instance where the creditors can show that there was a fraud. E.g. see: Badrock Ltd. Re, (1998) SCL 385 (Bom); & Madumilan Syntex Ltd. v. AAFIR (1999) 34 CLA 158 (Delhi); Further, the Companies Act 1956 provides for personal liability of individual members/directors for fraudulent conduct of business. See S.542 (similar to S.458 and S.630 of English CA 1985)

⁶ 6 months: Companies Act 1956 S.531. Normalised to 0.02.

⁷ 1 year: Companies Act 1956 S.531A. Normalised to 0.5.

⁸To establish fraudulent preference under S. 531, it is not enough to show that preference was shown to a particular creditor, it must also be shown that it was done ‘with a view’ to give him favoured treatment. See e.g.: Official Liquidator, Kerala High Court v. Victory Hire Purchasing CO (p) Ltd., (1982) 52 Com Cases 88 (Ker); Jayanthi Bai v. Popular Bank Ltd. AIR 1966 Ker 296; Official Liquidator v. Vitor Chit Fund (P) Ltd Re, (1972) 42 Com Cases 396 (Del); Hind Iran Bank Ltd. v. Raizada Jagan Nath Bali, (1959) 29 Com Cases 418 (P&H). The use of the word ‘preference’ implies an act of free will and that would by itself make it necessary to consider whether pressure was or had not been used. A payment made under the impression that unless a particular creditor was paid, the company would go into liquidation is not done out of free will and volition. The object was to save the company. It was not fraudulent preference. Chowdhmani v. Jagneswar Sanyal, (1933) 3 Com Cases 456 (Cal-DB); Maneckchowk & Ahmedabad Mfg. Co Ltd., Re, (1970) 40 Com Cases 819(Guj).

⁹Liability 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. (Please note that a company can be wound up inter alia when the company is cash flow or balance sheet insolvent). Cases – Heavy withdrawal of money by the directors of a company under interest-free pretended loans with knowledge that the company was running into heavy losses and would not be able to pay its creditors, would be sufficient to charge them with liability under this section. Official Liquidator v. Ram Swarup, AIR 1997 All 72. See also the decision of the Supreme Court in Official Liquidator v. P.A. Tendolkar AIR 1973 SC 1104. Coded as 0.25.

¹⁰Liability 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. (Please note that a company can be wound up inter alia when the company is cash flow or balance sheet insolvent). Cases – Heavy withdrawal of money by the directors of a company under interest-free pretended loans with knowledge that the company was running into heavy losses and would not be able to pay its creditors, would be sufficient to charge them with liability under this section. Official Liquidator v. Ram Swarup, AIR 1997 All 72. See also the decision of the Supreme Court in Official Liquidator v. P.A. Tendolkar AIR 1973 SC 1104. Coded as 0.25.

¹¹ Sections S.538, 539, 540, 542, the Companies Act 1956.

¹²Companies Act 1956 S.203 (in case of fraud).

¹³Companies Act 1956, S.274 (1) (g) introduced by the Companies (Amendment) Act of 2000 to be read with Companies {Disqualification of Directors under section 274(1)(g) of the Companies Act, 1956} Rules, 2003 (in case of defaults in filing of annual accounts and annual returns and in repaying deposits/interests thereon on due date or redeeming its debentures on due date or in paying dividend for period specified in that section).

II	Credit contracts																																																				
1 a	1 ¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1													
1 b	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1													
2 a	0 ²	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0									
2 b	0 ⁴	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
3 a	1 ⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1					
3 b	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
3 c	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
3 d	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
4 a	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
4 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

¹Companies Act 1956 S.529 to be read with S. 46 of the Provincial Insolvency Act and S. 47 of the Presidency Towns Insolvency Act.

²2 procedures: 1= judgment; 2= enforcement. Normalised to 0 (2 is highest number of procedures in sample).

³For banks and financial institutions, the Recovery of Debts Due to Banks and Financial Institutions Act 1993 enables faster recovery of debts (whether secured or otherwise) 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: coded as 1 procedure (normalised to 0.5).

⁴ 2 procedures: 1= judgment; 2= enforcement (normalised to 0 = maximum).

⁵ For banks and financial institutions, the Recovery of Debts Due to Banks and Financial Institutions Act 1993 enables faster recovery of debts (whether secured or otherwise) 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: coded as 1.5 procedures (normalised to 0.5).

⁶ Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for special powers of banks/financial institutions/securitisation or reconstruction companies for enforcement of security without court order (=0 procedures, coded as 1 = minimum).

⁷ Ss. 125 and 124 of the Companies Act 1956 to be read with the Transfer of Property Act 1882.

interest under S.16 (4). Moreover, after inquiry (or receiving a report of the inquiry from the ‘Operating Agency’), if BIFR decides that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time then it directs to make a scheme under S. 18 and the scheme may contain provisions including measures for any change in the Board of Directors, or the appointment of a new Board of Directors, of the sick industrial company [see S.18 (2) (c)].

¹¹Under SICA 1985, there is no automatic displacement of the management/board of directors, therefore, the directors may continue to manage the company and the shareholders may continue to appoint and remove directors.

¹²The BIFR may appoint one or more persons to be ‘special directors’ for safeguarding the financial and other interests of the company or in the public interest under S.16 (4). Moreover, after inquiry (or receiving a report of the inquiry from the ‘Operating Agency’), if BIFR decides that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time then it proceeds to make a scheme under S. 18 and the scheme may contain provisions including measures for any change in the Board of Directors, or the appointment of a new Board of Directors, of the sick industrial company [see S.18 (2) (c)].

¹³But note that: Under a scheme for compromise or arrangement u/Ss. S.391-394, a company is capable of being rehabilitated and in such cases the Companies Act 1956 S.391 specifies the requirement for meeting of shareholders or creditors with whom the scheme of compromise or arrangement is proposed. A scheme of compromise or arrangement may be proposed between the company and its members or company and its creditors and it is operational when the court sanctions it. The consent of the members and creditors is a pre-requisite (but exceptionally, may be waived by the Court). Particularly, where the scheme involves a voluntary compromise arrangement between the company and the creditors irrespective of who proposes it (creditors, management, government, official liquidator) the scheme has to be approved by creditors (majority in numbers and three-fourth in value). Ordinarily, convening of meetings of members and creditors is a must. Discretion to waive – must be under exceptional circumstances: *B.V. Gupta v. Bangalore Plastics*, CA No. 1676/1981 decided on 19-8-1981 (unreported (Karnataka) applied in *S.M. Holding Finance P. Ltd. v. Mysore Machinery Manufacturers Ltd.*, (1993) 78 Com Cases 432 (Kar). Also see *Mahiganj Loan Office v. Behari Lal*, (1937) 7 Com Cases 474: AIR 1937 Cal 507. See also *Auto Steering India P. Ltd., In Re*, (1977) 47 Com Cases 257 (Del). Secured creditors and unsecured creditors, ordinarily, constitute separate classes and therefore are usually required to sanction the scheme in separate meetings with requisite majority.

¹⁴ Under SICA (same for 5b-5d).

¹⁵See note 51 above.

¹⁶See note 51 above. The section contemplates a scheme between a company and its creditors or any class of them or between the company and its members or any class of them: therefore exclusion of consent of creditors or members is permissible depending upon the facts and circumstances of each case.

¹⁷See note 51 above. The company court sanctioning a scheme under S.391 does not function as a mere rubber stamp or post office and it is incumbent upon the court to be satisfied prima facie that the scheme is genuine, bona fide and in the interests of the creditors and the company: *Gaya Sugar Mills Ltd. v Nanda Kishore Bajoria*, AIR 1955 SC 441; *Pioneer Dyeing House Ltd. v. Dr. S.V. Marathe*, AIR 1967 Bom 456. The court can not sanction a scheme which has not been approved by the creditors even if the consent of the creditors has been withheld mala fide or arbitrarily or even if the court considers the scheme to be reasonable and beneficial to the creditors. *Sehgal (M.M.) v. Sehgal Paper Mills Ltd.* (1986) 60 Com Cases 510 (P&H) following *Coimbatore Cotton Mills Ltd. and Laxmi Mills Co. Ltd.*, in *Re*, (1980) 50 Com Cases 623 (Mad). See also *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1996) 4 Comp LJ 585 (Guj-DB); *Blue Star Ltd., Re* (2000) 37 CLA 157 (Bom). Affirmed in *All India Blue Star Employees Federation v. Blue Star Ltd.*, (2000) 27 SCL 265 (Bom-DB): It is not the function of the court to examine whether there is scope for a better scheme and 2000 CLC 1356 (AP).

¹⁸Whilst, all of the named parties can propose a scheme for making the company’s net worth exceed the accumulated losses within a reasonable time to the BIFR and even though the BIFR is obliged to publish a draft scheme before sanctioning it and take into account suggestions and objections by the affected parties [see Regulations 29, 30,34 &35 of Chapter VI Procedure for preparation of scheme under S.18 of the BIFR Regulations, 1987 and 19 (2) &(3)]- the ultimate decision lies with the BIFR.

¹⁹The Companies (Amendment) Act of 1985 made certain changes in S.529, 530 and introduced a new S.529A, the effect of which is that an overriding preferential payment of the ‘workmen’s dues’ ranks pari passu to all the secured creditors: as a charge in favour of workmen to the extent of the ‘workmen’s portion’ [defined under S.529 (3) (c)] created on the secured assets by virtue of proviso to S.529 (1) read with 529 A and 530.

²⁰ Where a scheme prepared and sanctioned under [S.18 of the] SICA contemplates the sale of the whole of the undertaking of the sick industrial company, the BIFR may distribute the sale proceeds to the parties entitled thereto in accordance with the provisions of section 529A and other provisions of the Companies Act, 1956 [S.18 (11)]. When the company is wound up upon recommendation of the BIFR [under S.20] the provisions of the Company Act 1956 apply to such winding up by the high court. Similarly, the BIFR may itself cause to

be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of section 529A, and other provisions of the Companies Act, 1956 [S.20 (4)].

²¹ But note that although this is not specifically mentioned in the Act, when post-petition finance is proposed under a scheme for rehabilitating the sick company, the Act does require the positive consent of those that are required to provide such post-petition finance before such scheme can be sanctioned (See S.19 of SICA) and it is therefore possible that such creditors/institutions may be more willing to grant consent if offered super-priority to such post-petition finance.

Creditor Protection Index: UK
Coded by John Armour, May 2006.

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05		
I Debtor control																																						
1 a	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
1 b	0	0	0	0	0	0	0	0	0	0	1 ¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
2 a	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1 ²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
2 b	1 ³	1	1	1	1	1	1	1	1	1	1	0.5 ⁴	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
2 c	0	0	0	0	0	0	0	0	0	0	0	0	0.5 ⁵	0.5	0.5	0.5	0.5	0.5	0.5	1 ⁶	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
4	0.5 ⁷	0.5	0.5	0.5	0.5	0.5	1 ⁸	1	0.5 ⁹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0 ¹⁰	0	0.5 ¹¹	0.5	0.5	0.5	0.5	0.5	0.5	0 ¹²	0	0	0	0	0	0	0	
5 a	1 ¹³	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.4 ¹⁴	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4		
5 b	0 ¹⁵	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2 ¹⁶	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	
5 c	1 ¹⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
6 a	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1 ¹⁸	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.5	
6 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1 ¹⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
6 c	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
7 a	1 ²⁰	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
7 b	0.5 ²¹	0.5	0.5	0.5	0.5	0.5	0.5	1 ²²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

¹ Minimum capital £50,000: Companies Act 1980 s 85; Companies Act 1985 s 118. Normalise to 1.

² Companies Act 1980 ss 39, 45. See also Companies Act 1981 Sch 3.

³ *Trevor v Whitworth* (1889) 12 App Cas 409; Companies Act 1980 s 35; Companies Act 1985 s 143.

⁴ Companies Act 1981 ss 45-6; Companies Act 1985 ss 159, 162.

⁵ *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016.

⁶ *Aveling Barford v Perion* (1989) 5 BCC 677.

⁷ *Salomon v A Salomon & Co Ltd* [1897] AC 22; *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 All ER 442.

⁸ *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852.

⁹ *Woolfson v Strathclyde RC* 1978 SLT 159.

¹⁰ *Adams v Cape Industries plc* [1990] Ch 432.

¹¹ *Creasey v Breachwood Motors* [1992] BCC 638.

¹² *Ord v Belhaven Pubs Ltd* [1998] BCC 607; *Yukong Line Ltd v Rendsburg Investment Corporation* [1998] 1 WLR 294.

¹³ No limitation period for fraudulent conveyances under Law of Property Act 1925 s 172. See *Insolvency Law and Practice*, Report of the Law Review Committee, Cmnd 8558 (London: HMSO, 1982), paras 1278-82. Normalise to 1.

¹⁴ 12 year limitation period. Limitation Act 1980 s 9, applicable to Insolvency Act 1986 s 423 (in force 29 December 1986): see J. Armour, 'Transactions Defrauding Creditors' in J. Armour and H.N. Bennett (eds.), *Vulnerable Transactions in Corporate Insolvency* (Oxford: Hart Publishing, 2003), 95 at 120. Normalise to 0.4.

¹⁵ No such action available.

¹⁶ 2 years: Insolvency Act 1985 s 101 (did not come into force); Insolvency Act 1986 s 238 (in force 29 December 1986). Normalised to 1 (largest value in sample).

¹⁷ Companies Act 1948 s 320; Companies Act 1985 s 615; Insolvency Act 1986 s 239.

¹⁸ *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250.

¹⁹ Insolvency Act 1985 s 45, Insolvency Act 1986 s 214 (both in force from 29 December 1986).

²⁰ Companies Act 1928 s 77; Insolvency Act 1986 s 218.

²¹ Companies Act 1948 s 188 (in cases of fraud).

²² Companies Act 1976 s 33, Insolvency Act 1976 s 9 (fraud or persistent breaches of Companies Act accounting requirements); Company Directors Disqualification Act 1986.

II Credit contracts

1a	1 ¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
1b	0	0	1 ²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
2a	0 ³	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
2b	1 ⁴	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
3a	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
3b	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
3c	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
3d	1 ⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
4a	0	0	0	0	0	0	1 ⁶	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
4b	0	0	0	0	0	0	1 ⁷	1	1	1	1	0.5 ⁸	0.5	0.5	0.5	0 ⁹	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

¹ Bankruptcy Act 1914 s 31; Companies Act 1948 s 317; Insolvency Rules 1986 r 4.90.

² *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785.

³ 2 procedures required: 1= judgment; 2= enforcement (*feri facias*; garnishee order; charging order etc). Normalised to 0 (maximum).

⁴ No legal procedures necessary to enforce security: see e.g., *Bank of Baroda v Panessar* [1987] Ch 335. Normalised to 1 (minimum).

⁵ *Re Panama, New Zealand and Australian Royal Mail Co* (1870) LR 5 Ch App 318.

⁶ *Aluminium Industrie Vaassen BV v Romalpa Ltd* [1976] 1 WLR 676; *Armour v Thyssen* [1991] 2 AC 339.

⁷ *Aluminium Industrie Vaassen BV v Romalpa Ltd* [1976] 1 WLR 676.

⁸ *Re Bond Worth* [1980] 1 Ch 223; *Borden (UK) Ltd v Scottish Timber Ltd* [1981] 1 Ch 25.

⁹ *Clough Mill v Martin* [1985] 1 WLR 111.

III Insolvency																																										
1	0.5 ¹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	1 ²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
2 a	1 ³	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
2 b	1 ⁴	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
2 c	1 ⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0 ⁶	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
2 d	1 ⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.5 ⁹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5			
2 e	0 ⁹	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0 ¹⁰	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		
2 f	1 ¹¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1 ¹²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.5 ¹³	0.5	0.5	
3	1 ¹⁴	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
4 a	1 ¹⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
4 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
4 c	1 ¹⁶	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
4 d	1 ¹⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.5 ¹⁸	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
5 a	1 ²⁰	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.5 ²¹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
5 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5 ²³	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
5 c	1 ²⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
5 d	1 ²⁶	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
6 a	0 ²⁷	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
6 b	0 ²⁸	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6 c	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0.5 ²⁹	0.5	0.5

¹ Receivership is capable of rescuing the company's *business*.

² Insolvency Act 1986, Part II (in force 29 December 1986).

³ *Bowes v Hope Life Insurance Company* (1865) 11 HLC 389.

⁴ Companies Act 1948, ss 222(f); 223; Insolvency Act 1986 ss 122(1)(f), 123.

⁵ Rehabilitation proceedings strictly speaking did not exist until the introduction of administration in 1986. Administrative receivership, to the extent that it was a substitute, could only be commenced by the secured creditor.

⁶ Insolvency Act 1986 s 9(1); Sch B1 paras 12(1), 22.

⁷ Debtor could not initiate rehabilitation proceedings unilaterally so creditors' rights in this regard are at least as strong as if answer was "yes".

⁸ 'Is or is likely to become' unable to pay debts: Insolvency Act 1986 s 8(1)(a); Sch B1, paras 11(a), 27(2)(a).

⁹ See note 77 above.

¹⁰ See note 8 above.

¹¹ Court has no role in initiating administrative receivership. See above note 7.

¹² Court's views regarding initiation of administration could always be overridden by secured creditor: Insolvency Act 1986 ss 9(2), 9(3) (secured creditor with floating charge may veto administration proceedings).

¹³ Secured creditor's veto power abolished; administrator may be appointed by court order: Insolvency Act 1986 Sch B1, para 10.

¹⁴ Receivership: *Re B. Johnson & Co (Builders) Ltd* [1955] Ch 634; Administration: Insolvency Act 1986 s 14; Sch B1 paras 59, 60.

-
- ¹⁵ Secured creditor formerly appointed receiver; holder of qualifying floating charge may, since 2003, appoint administrator out of court: Insolvency Act 1986 Sch B1 para 14.
- ¹⁶ Shareholders have no input to appointment of administrative receiver.
- ¹⁷ Court had no input to appointment of administrative receiver.
- ¹⁸ Administration under Part II of the Insolvency Act 1986 required a court order to appoint administrator: Insolvency Act 1986 ss 9, 11.
- ¹⁹ Court order no longer necessary for appointment of administrator: Insolvency Act 1986 Sch B1 paras 14, 22.
- ²⁰ Receiver must decide in accordance with the interests of the secured creditor: *Re B. Johnson & Co (Builders) Ltd* [1955] Ch 634.
- ²¹ In administration, secured creditors do not vote on administrator's proposals. Insolvency Rules 1986 ????
- ²² Enterprise Act 2002: Insolvency Act 1986 Sch B1, paras 50-53; Insolvency Rules 1986 r. 2.38 (secured creditors do not vote on proposals)
- ²³ In administration, unsecured creditors vote on administrator's proposals. Insolvency Rules 1986 ????
- ²⁴ Enterprise Act 2002: Insolvency Act 1986 Sch B1, paras 50-53; Insolvency Rules 1986 r. 2.38 (unsecured vote on proposals)
- ²⁵ Shareholders have no vote.
- ²⁶ Court does not decide timing of exit.
- ²⁷ Companies Act 1948 s 319; Insolvency Act 1986 s 178; Insolvency Act 1986 s 178A
- ²⁸ Companies Act 1948 s ???; Insolvency Act 1986 s 40; Insolvency Act 1986 ss 178, 178A.
- ²⁹ Insolvency Act 1986 Sch B1 para 70.

Creditor Protection Index: USA

Coded by John Armour, October 2006.

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05			
I Debtor control																																							
1 a	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
1 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 a	0 ¹	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 b	0 ²	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 c	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3	1 ³	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
4	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
5 a	1 ⁴	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
5 b	0.5 ⁵	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ⁶	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
5 c	1	1	1	1	1	1	1	1	1	1 ⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
6 a	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1 ⁸	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
6 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1 ⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
6 c	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7 a	0.5 ¹⁰	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
7 b	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5 ¹¹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5

¹ 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).

² Whilst stock repurchases must not 'impair capital' (DGCL § 160(a)(1)), this restriction is effectively meaningless because capital may be converted to surplus by a resolution of the board: DGCL § 244(a).

³ *Pepper v Litton* 308 US 295 (1939); *Taylor v Standard Gas & Electric Co* 306 US 307 (1939): equitable subordination of shareholder loans in bankruptcy if (i) the claimant had engaged in some sort of inequitable conduct (fraud, illegality, breach of fiduciary duty, undercapitalisation, or use of the debtor corporation as an *alter ego*); (ii) the misconduct resulted in injury to creditors of the bankrupt or conferred an unfair advantage on the claimant; and (iii) subordination is not inconsistent with the provision of the Bankruptcy Code.

⁴ No maximum period if fraud present: normalised to 1.

⁵ 1 year: Bankruptcy Act 1898 § 67d (normalised to 0.5).

⁶ 1 year: Bankruptcy Code 1978 § 548(a) (1978 Bankruptcy Code in force from 1 October 1979). Normalised to 0.5

⁷ Bankruptcy Code 1978 § 547(b).

⁸ *Credit Lyonnais Bank Nederland NV v Pathe Communications Corp*, No Civ A 12150, 1991 Del Ch LEXIS 215 (1991).

⁹ *Credit Lyonnais Bank Nederland NV v Pathe Communications Corp*, No Civ A 12150, 1991 Del Ch LEXIS 215 (1991).

¹⁰ 18 USC §§ 151-157 (bankruptcy crimes). Provisions date from 1948. Cover concealment of assets and fraud associated with bankruptcy.

¹¹ Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Pub.L. 101-429, Oct. 15, 1990, 104 Stat. 931) granted SEC power to disqualify individuals from acting as directors or officers of public companies where they have violated federal securities laws: 15 USC § 78u(d)(2).

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	
II Credit contracts																																					
1 a	¹	1	1	1	1	1	1	1	1	1	0.5 ²	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
1 b	¹³	1	1	1	1	1	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
2 a	0.5 ⁴	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
2 b	¹⁵	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
3 a	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
3 b	⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
3 c	¹⁹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
3 d	¹¹	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
4 a	¹³	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
4 b	0.5 ¹⁵	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5

¹ Bankruptcy Act of 1898, § 68.

² 11 USC §§ 362(a)(7) (asserting right of set-off prevented by automatic stay on commencement of bankruptcy); 506(a) (set-off creditor's claim treated as secured); 542(b) (set-off creditor not required to pay debtor to extent that set-off may be asserted); 553(a) (Bankruptcy Code does not affect rights of set-off other than as provided in § 362). Thus debtor cannot compel payment, but creditor cannot extinguish debt (by asserting set-off). Where the debt is a running account, then it constitutes 'cash collateral' under § 363(a) and the Trustee may apply to use it.

³ Bankruptcy Act of 1898, § 68.

⁴ One procedure required. See J.A. MacLachlan, *Handbook on the Law of Bankruptcy* (St. Paul, MI: West Publishing Co, 1956), 3; Elizabeth Warren and Jay Lawrence Westbook, *The Law of Debtors and Creditors: Text, Cases, and Problems* (Boston, MA: Little, Brown & Co, 1986), Ch.2. (Normalised to 0.5 = neither maximum nor minimum).

⁵ UCC § 9-503 (secured party may take possession of collateral on default without judicial process provided no breach of the peace). (Normalised to 1 = minimum).

⁶ UCC Revised § 9-609 (secured party may take possession of collateral on default without judicial process provided no breach of the peace). (Normalised to 1 = minimum).

⁷ UCC § 9-102(a).

⁸ UCC Revised § 9-109(a).

⁹ UCC § 9-102(a).

¹⁰ UCC Revised § 9-109(a).

¹¹ UCC §§ 9-204, 9-205.

¹² UCC Revised §§ 9-204, 9-205.

¹³ UCC §§ 9-102, 9-107.

¹⁴ UCC Revised §§ 9-102, 9-103.

¹⁵ UCC § 9-306 (some restrictions on extend to which PMSI may be asserted in proceeds).

¹⁶ UCC Revised §§ 9-324, 9-327.

	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05		
III Insolvency																																						
1	¹¹	1	1	1	1	1	1	1	1	1 ²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
2 a	0.5 ³	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0 ⁴	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
2 b	0 ⁵	0	0	0	0	0	0	0	0	0 ⁶	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
2 c	0 ⁷	0	0	0	0	0	0	0	0	0 ⁸	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
2 d	1 ⁹	1	1	1	1	1	1	1	1	0 ¹⁰	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
2 e	0 ¹¹	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
2 f	0 ¹²	0	0	0	0	0	0	0	0	0 ¹³	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3	0.5 ¹⁴	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0 ¹⁵	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4 a	0 ¹⁶	0	0	0	0	0	0	0	0	0 ¹⁷	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4 b	0.5 ¹⁸	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ¹⁹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
4 c	0.5 ²⁰	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ²¹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
4 d	0.5 ²²	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ²³	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
5 a	0.25 ²⁴	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.5 ²⁵	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
5 b	1 ²⁶	1	1	1	1	1	1	1	1	1 ²⁷	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
5 c	1 ²⁸	1	1	1	1	1	1	1	1	0.5 ²⁹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
5 d	0.5 ³⁰	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5 ³¹	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
6 a	1 ³²	1	1	1	1	1	1	1	1	1 ³³	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
6 b	1	1	1	1	1	1	1	1	1	1 ³⁴	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
6 c	1 ³⁵	1	1	1	1	1	1	1	1	0 ³⁶	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

¹ Bankruptcy Act 1898, §§ 2,47;Chs X, XI

² Bankruptcy Code introduced in 1978 (in force from 1 October 1979) provides for liquidation (Chapter 7) and reorganization (Chapter 11).

³ Bankruptcy Act 1898, § 59(b) (involuntary bankruptcy requires three or more creditors to file a petition, unless debtor has < 12 creditors in total, in which a single creditor may file).

⁴ 11 USC § 303(b)(1) (involuntary bankruptcy requires three or more creditors to file a petition).

⁵ Bankruptcy Act 1898, § 1(15) (insolvency defined as insufficiency of assets at fair valuation to pay debts).

⁶ Not required even for involuntary case: 11 USC § 303(h)(1).

⁷ Bankruptcy Act 1898, §§ 126 (Chapter X), 306(3), 321 (Chapter XI).

⁸ 11 USC § 301.

⁹ Bankruptcy Act 1898, §§ 130(1) (Chapter X), 323 (Chapter XI).

¹⁰ Commencement of a voluntary case does not require the debtor to demonstrate that they are insolvent in either sense: 11 USC §§ 109, 301.

¹¹ Bankruptcy Act 1898, §§ 130(1) (Chapter X), 323 (Chapter XI) (cash flow insolvency will suffice).

¹² Bankruptcy Act 1898, §§ 149 (Ch X), 325 (Ch XI).

¹³ Unsecured creditor can commence involuntary case (choosing Ch 7 or Ch 11) but debtor can pre-empt by commencing voluntary case at any time. Once a case commenced, debtor can switch from Ch 7 to Ch 11 or vice versa, but creditors can only do this with court permission. 11 USC §§ 706, 1112.

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- ¹⁴ Bankruptcy Act 1898, §§ 156 (Ch X: DIP if liquidated, unsecured liabilities < \$250,000, unless court orders otherwise); 332 (Ch XI: trustee if converted from bankruptcy, or if court orders; otherwise DIP).
- ¹⁵ 11 USC § 1107 (in Ch 11 proceedings, debtor in possession has powers of Trustee), § 1104 (trustee or examiner may be appointed only in limited circumstances in Ch 11 proceedings).
- ¹⁶ Bankruptcy Act 1898, § 56(b) (secured creditors do not vote in bankruptcy). (??? Court appoints trustee under Ch X, Ch XI: §§ 156, 332).
- ¹⁷ 11 USC § 702(a)(2) (secured creditors do not vote on election of Trustee in Ch 7 proceedings); 11 USC § 1107 (in Ch 11 proceedings, debtor in possession has powers of Trustee).
- ¹⁸ In Bankruptcy proceedings, trustee is appointed by unsecured creditor vote (Bankruptcy Act 1898 § 44). (??? Court appoints trustee under Ch X, Ch XI: §§ 156, 332).
- ¹⁹ 11 USC § 702(a)(2) (unsecured creditors vote on election of Trustee in Ch 7 proceedings); 11 USC § 1107 (in Ch 11 proceedings, debtor in possession has powers of Trustee).
- ²⁰ Bankruptcy Act 1898, §§ 156 (Ch X: DIP if liquidated, unsecured liabilities < \$250,000, unless court orders otherwise); 332 (Ch XI: trustee if converted from bankruptcy, or if court orders; otherwise DIP). Shareholders appoint managers if DIP. No DIP in bankruptcy proceedings.
- ²¹ 11 USC § 702(a)(2) (unsecured creditors vote on election of Trustee in Ch 7 proceedings); 11 USC § 1107 (in Ch 11 proceedings, debtor in possession has powers of Trustee).
- ²² Bankruptcy Act 1898, §§ 156 (Ch X: DIP if liquidated, unsecured liabilities < \$250,000, unless court orders otherwise); 332 (Ch XI: trustee if converted from bankruptcy, or if court orders; otherwise DIP).
- ²³ Court may convert a Ch 7 into a Ch 11 (changing control from unsecured creditors to shareholders) (11 USC § 706) or *vice versa* (11 USC § 1112). In Ch11, court may appoint Trustee or Examiner under limited circumstances (11 USC § 1107).
- ²⁴ Secured creditors don't vote in bankruptcy or Ch XI (Bankruptcy Act 1898, § 56(b)). However, they do vote on a Ch X plan which would impair them: §§ 107, 175 179.
- ²⁵ 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 creditors do vote in Ch 11: 11 USC § 1122, 1126(a).
- ²⁶ Trustee, appointed by unsecured creditors, implements recovery of assets in bankruptcy (Bankruptcy Act 1898 § 47); in Ch Xs and XI, unsecured creditors vote on plan (*ibid*, §§ 175, 179, 56).
- ²⁷ Trustee, appointed by unsecured creditors, takes decisions about the exit from proceedings in Ch 7 (§ 721, 726). Unsecured creditors vote in Ch 11: 11 USC § 1122, 1126(a).
- ²⁸ Shareholders do not vote in bankruptcy or Ch XI (Bankruptcy Act 1898 § 56(a)); only vote in Ch X if co is solvent: § 179.
- ²⁹ Shareholders appoint DIP in Ch 11; however in Ch 7 proceedings, Trustee is appointed by unsecured creditors. Shareholders may convert Ch 7 to Ch 11 at any point (11 USC § 706(a)).
- ³⁰ Court must confirm plan under Ch X and Ch XI (Bankruptcy Act 1898, §§ 221, 362 – unless in the case of Ch XI, creditors affected have unanimously approved it: § 361).
- ³¹ Court must confirm a Ch 11 plan: 11 USC § 1129.
- ³² J.A. MacLachlan, *Handbook on the Law of Bankruptcy* (St. Paul, MI: West Publishing Co, 1956), 145.
- ³³ 11 USC §§ 507, 726.
- ³⁴ 11 USC §§ 507, 1123(a)(1).
- ³⁵ Only with consent of secured creditor: J.E. Mulder and L.S. Forman, *Bankruptcy and Arrangement Proceedings* (Philadelphia, PA: American Law Institute, 1956), 157.

³⁶ 11 USC § 364(d).