The Myth of Debtor-Friendly or Creditor-Friendly Insolvency Systems: Evidence from a New Global Insolvency Index

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Abstract

This article seeks to test the validity of the traditional classification of insolvency systems as debtor-friendly or creditor-friendly jurisdictions. For that purpose, the article develops a novel Global Insolvency Index (“GII”) that seeks to measure the attractiveness of reorganization procedures from the perspective of debtors, secured creditors and general unsecured creditors. After assessing the attractiveness and evolution of reorganization procedures in 53 jurisdictions around the world, it will be shown that insolvency jurisdictions can be pro-debtor and pro-creditor, anti-debtor and anti-creditor, or somewhere in the middle. Hence, the GII developed in this article shows that the traditional classification of insolvency systems as debtor-friendly or creditor-friendly jurisdictions is misleading and therefore should be abandoned. Moreover, it will show that many jurisdictions around the world have various reorganization procedures that exhibit different levels of attractiveness for debtors and creditors. Therefore, when assessing the attractiveness of a restructuring framework from the perspective of debtors and creditors, labelling jurisdictions instead of procedures can also be misleading. Finally, it will be shown that many jurisdictions only provide attractive reorganization procedures for certain debtors and creditors. For instance, the GII shows that many insolvency systems traditionally classified as creditor-friendly jurisdictions provide strong protections to secured creditors but do not provide an attractive framework for unsecured creditors. Similarly, other insolvency jurisdictions provide strong protections to employees and tax authorities but are not attractive to secured creditors and the general body of unsecured creditors. A similar argument can be made with respect to debtors. Indeed, while the attractiveness of reorganization procedures for different types of debtors is not measured in the GII, it will be argued that most businesses around the world are micro and small enterprises that need simplified insolvency procedures. Unfortunately, only a few jurisdictions around the world, such as the United States, South Korea, Myanmar, Colombia, Chile, Australia, Spain and Singapore, provide this type of procedures. Therefore, labelling an insolvency system as a debtor-friendly jurisdiction would also be misleading if, despite the existence of an attractive reorganization procedure for medium and large enterprises, most businesses in the country do not have access to an attractive reorganization procedure. After debunking the traditional classification of debtor-friendly or creditor-friendly insolvency systems, the article concludes by providing various lessons for jurisdictions interested in improving the overall attractiveness of their restructuring framework.
1. Introduction

Insolvency systems have often been classified as debtor-friendly or creditor-friendly jurisdictions. Generally, an insolvency system is classified as a debtor-friendly jurisdiction if the insolvency legislation provides certain features that make a reorganization procedure attractive to debtors, such as the ability of the managers to keep running the firm during the procedure as well as the possibility of obtaining a moratorium or “stay” that prevents creditors from initiating enforcement actions against the debtor. Similarly, an insolvency system is generally classified as a creditor-friendly jurisdiction if the management is replaced by an external administrator and the insolvency legislation does not provide a full moratorium to protect the debtor from enforcement actions initiated by the creditors. In addition to those aspects, an insolvency legislation may include many other provisions potentially attractive to debtors and creditors. For instance, debtor-friendly provisions may include the existence of certain rules to facilitate debtor-in-possession (“DIP”) financing and the ability of the debtor to impose a reorganization plan on dissenting classes of creditors (“cross-class cramdown”). Examples of creditor-friendly provisions may include those seeking to empower creditors in the procedure by allowing them to appoint or remove an examiner or trustee (“insolvency practitioners”) or decide key aspects of the procedure such as the authorization of DIP financing or the approval of a reorganization plan or a sale of assets.

This article seeks to test the validity of the classification of insolvency systems as debtor-friendly or creditor-friendly jurisdictions. For that purpose, the article develops a novel insolvency index that seeks to measure the attractiveness of reorganization procedures from the perspective of debtors, secured creditors and general unsecured creditors. Unlike previous indexes published by international organizations such as the World Bank and the European Bank for Reconstruction and Development, the Global Insolvency Index (“GII”) suggested in this article does not seek to measure the strength, efficiency or effectiveness of an insolvency system. As it will be argued, those aspects can only be measured after a comprehensive assessment of a variety of country-specific factors that will affect the optimal design of insolvency law. Therefore, any global index seeking to measure and compare the “desirability” of

1 This classification has been heavily influenced by the index on creditors’ rights suggested in the law and finance literature. See Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer and Robert Vishny, ‘Law and Finance’ (1998) 106 Journal of Political Economy 1113.
3 For an index that seeks to measure the strength of insolvency systems, see The World Bank, ‘Resolving Insolvency’ (Doing Business, 2019) <https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/what-measured> accessed 18 August 2023. Since the Doing Business was suspended, the World Bank has recently launched another index that also seeks to measure the strength of insolvency systems. The details of this index, called “Business Ready” or B-READY, can be found at https://www.worldbank.org/en/businessready accessed 18 August 2023. For an index seeking to measure the efficiency and attractiveness of different insolvency systems, see EBRD Insolvency assessment on reorganisation procedures (April, 2021) https://www.ebrd-restructuring.com/storage/uploads/documents/94228029cc1b26dd8b7522226a9d0d0.pdf accessed 1 July 2021.
different insolvency systems will inevitably face various flaws and methodological limitations that might affect the accuracy of the index. For that reason, the GII does not seek to provide any type of “international best practices”. In fact, the GII is built on the assumption that one size does not fit all and the fact that what qualifies as a “good practice” depends on how it is designed in a particular market and institutional environment.  

The GII is more aligned with those indexes that have sought to identify different variables making an insolvency procedure more or less attractive to debtors and creditors. Nonetheless, the GII significantly differs from previous indexes in four major aspects. First, unlike the indexes generally suggested in the law and finance literature, the GII measures the attractiveness of a reorganization procedure from the perspective of three different stakeholders: debtors, secured creditors and general unsecured creditors. Second, the GII provides a new comprehensive set of variables that can help assess the attractiveness of a reorganization procedure from the perspective of debtors, secured creditors and general unsecured creditors. Third, previous indexes have often associated debtor-friendly regimes with manager-friendly regimes. However, this classification is very simplistic, and does not often capture all the aspects which make a reorganization procedure attractive to both the debtor itself and the individuals who, in many jurisdictions and types of firms (particularly, companies with controlling shareholders), ultimately decide, directly or indirectly, whether a reorganization procedure should be initiated: the shareholders. The GII seeks to fill this gap by analyzing the attractiveness of reorganization procedures from the perspective of debtors broadly understood, and therefore comprising directors, shareholders and the debtor itself. Fourth, most existing indexes have focused on assessing the attractiveness of an insolvency system even if, when conducting this task, they have only assessed certain aspects of a single procedure. However, as shown in the GII, many jurisdictions have different reorganization procedures that exhibit different levels of attractiveness for debtors and creditors. Therefore, classifying jurisdictions rather than procedures can be misleading.

Therefore, despite the limitations inevitably associated with any global index, the GII seeks to contribute to the literature by providing new measures for the understanding, comparison, and classification of insolvency regimes, especially from the perspective of their reorganization procedures. For the purpose of this article, it also seeks to serve as a useful tool to test the validity of the traditional classification of insolvency systems as debtor-friendly or creditor-friendly jurisdictions.

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5 Arguing that the adoption of “international best practices” has contributed to the failure of insolvency law in emerging economies, see Aurelio Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (Cambridge University Press, Forthcoming 2024).


7 Emphasizing this aspect among other weaknesses of the traditional classification of insolvency systems as debtor-friendly or creditor-friendly jurisdictions, see Gerard McCormack, CORPORATE RESCUE LAW: AN ANGLO-AMERICAN PERSPECTIVE (Edward Elgar 2008) 292-296.
2. The Global Insolvency Index

2.1. Measuring the attractiveness of reorganization procedures

2.1.1. Methodology

The GII developed in this article seeks to measure the attractiveness of reorganization procedures from the perspective of debtors, secured creditors and unsecured creditors. This is done by identifying and then assigning a score to a comprehensive set of variables with different weight depending on their importance for debtors, secured creditors and unsecured creditors. The methodology of the GII is included as Annex 1. This methodology explains how the scores have been assigned, providing examples from different jurisdictions. The information obtained to assess and finally assign the score is based on the insolvency legislation of the jurisdictions covered in the index. When the insolvency legislation of a particular jurisdiction is silent or unclear, the score has been assigned after consulting secondary sources or following certain assumptions specified in the methodology.

The variables of the GII that seek to measure the attractiveness of a reorganization procedure from the perspective of debtors include: (1) Financial conditions needed for the commencement of the reorganization procedure [0-2]; (2) Flexibility of directors' duties in the zone of insolvency [0-1]; (3) Scope and duration of the moratorium [0-3]; (4) Debtor in possession [0-3]; (5) Cross-class cramdown [0-2]; (6) Post-petition financing and expenses [0-2]; (7) Directors' special liability regime during the reorganization procedure [0-3]; (8) Restriction of ipso facto clauses [0-2]; (9) Prohibition of set-offs in reorganization [0-1]; (10) Fast-track reorganization procedure [0-1]; (11) Subordination of shareholder loans [0-1]; (12) Debtor's exclusive right to propose a reorganization plan [0-2]; (13) Rejection of executory contracts [0-1]; (14) Preservation of executory contracts [0-1]; (15) Reorganization plan approved by shareholders' meeting [0-1]; (16) Debtor's ability to sell essential assets between the commencement of the procedure and the approval of a reorganization plan [0-1]; (17) Majority rule [0-3]; (18) Accrual of interests during the procedure [0-1]; (19) Types of creditors potentially bound by the plan [0-3]; (20) Shareholders' risk to be wiped out without their consent [0-3]. The maximum score potentially obtained in the index measuring the attractiveness of a reorganization procedure for debtors is 38.

The variables of the GII that seek to measure the attractiveness of a reorganization procedure from the perspective of secured creditors include: (1) Ability to enforce security interests during procedure [0-6]; (2) Priority of fixed charge holders in a hypothetical liquidation [0-3]; (3) Existence of an insolvency practitioner (“IP”) in the procedure [0-1]; (4) Ability to initiate the procedure [0-1]; (5) Ability to reject an application for reorganization [0-1]; (6) Ability to appoint or remove an IP [0-1]; (7) Risk of being negatively affected by a cross-class cramdown [0-2]; (8) Risk of being negatively affected by post-petition financing and expenses [0-2]; (9) Approval of assets subject to a security interest when they are sold during the procedure [0-2]; (10) Restriction of ipso facto clauses [0-1]; (11) Ability to terminate the procedure prior to the approval of the reorganization plan [0-1]; (12) Ability to obtain information during the procedure [0-1]; (13) Ability to be part of a committee of creditors with monitoring functions [0-1]; (14) Accrual of interests during the procedure [0-1]; (15) Treatment of...
rejected executory contracts [0-1]; (16) Treatment of assumed executory contracts [0-1]; (17) Risk of being bound by a reorganization plan if it is approved by the relevant majorities [0-4]. The maximum score potentially obtained in the index measuring the attractiveness of a reorganization procedure for secured creditors is 30.

Finally, the variables of the GII that seek to measure the attractiveness of a reorganization procedure from the perspective of general unsecured creditors include: (1) Best interest of creditor test [0-2]; (2) Existence of IP [0-1]; (3) Set-off rights [0-1]; (4) Ability to appoint or remove IP [0-1]; (5) Ability to initiate the procedure [0-1]; (6) Risk of being negatively affected by cross-class cramdown [0-2]; (7) Risk of being negatively affected by post-petition financing and expenses [0-2]; (8) Approval of asset sales during procedure [0-1]; (9) Restriction of ipso facto clauses [0-1]; (10) Ability to be part of a committee of creditors with monitoring functions; [0-1]; (11) Risk of being negatively affected by statutory priorities in a hypothetical liquidation [0-2]; (12) Ability to terminate the reorganization procedure [0-1]; (13) Ability to obtain information during the procedure [0-1]; (14) Availability of avoidance actions [0-2]; (15) Moratorium [0-3]; (16) Accrual of interests during procedure [0-1]; (17) Risk of having to bear the costs of a committee of secured creditors or equityholders [0-1]; (18) Treatment of rejected executory contract [0-1]; (19) Treatment of assumed executory contract [0-1]; (20) Ability to reject an application for reorganization [0-1]; (21) Risk of being bound by a reorganization plan if it is approved by the relevant majorities [0-4]; (22) Creditor's ability to recover their claims through the liability of shareholders or directors [0-2]; (23) Subordination of shareholder loans [0-1]. The maximum score potentially obtained in the index measuring the attractiveness of a reorganization procedure for general unsecured creditors is 34.

2.1.2. Limitations and scope of the index

The GII is subject to several limitations. First, even though the index measures several aspects of liquidation procedures potentially relevant in reorganization, the GII focuses on reorganization procedures. Nonetheless, the concept of “reorganization procedure” is used very broadly. Namely, it comprises formal reorganization procedures such as the US Chapter 11 as well as hybrid procedures like the scheme of arrangement or the preventive procedures and out-of-court procedures subject to court approval existing in many jurisdictions around the world. It also comprises insolvency proceedings potentially leading to reorganization even if the rehabilitation of the distressed company is not the only outcome of the procedures. These latter procedures will include: (i) the administration procedure existing in many commonwealth jurisdictions such as Australia, Ghana, New Zealand, Nigeria and the United Kingdom; (ii) the judicial management procedure available in countries like

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8 For example, these variables include the treatment of secured creditors and shareholder loans in the event of liquidation, given the importance of the ranking of claims for the purpose of determining the bargaining power of different parties in a reorganization procedure.

9 For the concept, definition and features of hybrid procedures, see Jose Maria Garrido, ‘Out-of-Court Debt Restructuring’ (World Bank Studies, 2012) 47-51.

10 Even though administration procedures can be used for corporate rescue, they are not “reorganization procedures” technically speaking, or at least not in the traditional sense of the term. Instead, it has been argued that they are a temporary measure that provides a gateway to a variety of exit routes such as a scheme of arrangement and a CVA. See Kristin van Zwieten, GOODE ON
Singapore, Malaysia and Brunei;\(^\text{11}\) (iii) the single-entry insolvency process potentially leading to reorganization that exists in countries like India, Mexico, Spain and Uruguay; and (iv) the provisional liquidation procedure that, in jurisdictions like Hong Kong and the Cayman Islands, is often used for restructuring.\(^\text{12}\)

Since the GII seeks to measure the attractiveness of reorganization procedures leading to corporate rather than business rescue, procedures that facilitate the rehabilitation of a financially distressed and the preservation of the company’s legal entity, administration-style procedures, and provisional liquidation procedures need to be assessed in conjunction with other procedures eventually used to achieve a debt restructuring. Namely, administration and judicial management procedures will be assessed assuming that they will conclude with a scheme of arrangement, a company voluntary arrangement (“CVA”) or any other mechanism potentially leading to an agreement between debtors and creditors.\(^\text{13}\) Similarly, it will be assumed that the provisional liquidation procedure often used for a corporate restructuring in jurisdictions such as Hong Kong and the Cayman Island is combined with a scheme of arrangement as it is actually observed in practice.\(^\text{14}\) Due to the focus on reorganization procedures, the GII will not cover purely liquidation procedures as well as procedures eventually leading to a business rather than a corporate rescue.\(^\text{15}\)

Special insolvency proceedings such as those potentially existing for financial

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\(^\text{11}\) For the purpose of this article, insolvency proceedings consisting of the appointment of an external administrator for the management of the debtor’s property and business affairs will generally be referred to as “administration-style procedures”.


\(^\text{13}\) For instance, as mentioned in note 10, an administration procedure in the United Kingdom can lead to a corporate rescue if the procedure is used in conjunction with a scheme of arrangement or a CVA. In Singapore, judicial management needs to be used in conjunction with the scheme of arrangement. In other jurisdictions with administration procedures, such as Australia and Ghana, the procedure needs to be used in conjunction with a deed of company arrangement (“DOCA”) and a restructuring plan, respectively.

\(^\text{14}\) See note 12.

\(^\text{15}\) In fact, purely liquidation procedures can also lead to a business rescue if the assets are kept and sold together. As highlighted by Jackson, the key distinction between reorganization and liquidation is not whether the assets are kept together but the ultimate owner of the assets: third parties (in liquidation) or the company’s former claimants (in reorganization). See Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986) 211.
institutions,\(^\text{16}\) individuals,\(^\text{17}\) and micro and small enterprises ("MSEs"),\(^\text{18}\) will also be excluded. Therefore, the GII will focus on ordinary reorganization procedures generally available for medium and large enterprises.

Second, as mentioned in Section 1, the GII does not measure the efficiency of a reorganization procedure or the desirability of a particular insolvency provision. Instead, it just focuses on the attractiveness of a procedure based on a variety of provisions that can make a procedure more or less attractive from the perspective of debtors, secured creditors and general unsecured creditors. For example, if a reorganization procedure makes the shareholders liable for the company’s debts, this solution can be attractive to the creditors of the insolvent firm. However, the adoption of this solution would probably be socially undesirable due to the harmful economic effects associated with abolishing the principle of limited liability in a corporation. Therefore, a higher or lower score in the index does not necessarily reflect a more desirable or undesirable solution.

Third, the GII exclusively focuses on the law on the books and, when appropriate, established case law. Therefore, it does not measure the attractiveness or desirability of a particular provision within the legal, economic and institutional features of a given jurisdiction. For example, in jurisdictions with sophisticated and independent insolvency practitioners, the appointment of an insolvency practitioner as examiner or trustee can be a useful tool to protect creditors as the GII actually assumes. However, not all jurisdictions have a sophisticated body of insolvency practitioners. In the absence of independent and highly qualified insolvency practitioners, the mandatory appointment of an examiner or trustee can reduce the pie available for the creditors without adding any value to the process. Therefore, it can end up doing more harm than good for the creditors. Other local factors potentially affecting the desirability of certain insolvency provisions include the sophistication and efficiency of the judiciary, the level of financial development in the country, the types of businesses prevailing in a jurisdiction, and the debt and ownership structures of those businesses.\(^\text{19}\) The GII does not capture any of these aspects.

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\(^\text{16}\) For an analysis of the special treatment of banks in insolvency, see John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer, and Jennifer Payne, PRINCIPLES OF FINANCIAL REGULATION (OUP 2016) Chapter 16.


Fourth, some jurisdictions, such as India, do not distinguish between “secured creditors” and “unsecured creditors” for many aspects of the insolvency proceeding. Instead, they distinguish between financial creditors and operational creditors. Since the GII does not distinguish between financial and operational creditors, this aspect serves as another limitation of the GII. To address this issue, India has been coded assuming that financial creditors are secured creditors. Similarly, for the purpose of the GII, it has been assumed that operational creditors are general unsecured creditors. Nonetheless, it should be noted that many financial creditors can be unsecured creditors and some operational creditors may also be secured creditors. Therefore, this aspect acts as a limitation that should be carefully examined when interpreting the GII in countries like India.20

Fifth, various issues potentially affecting the attractiveness of an insolvency jurisdiction are not covered in the GII. For instance, some jurisdictions have adopted pre-insolvency or preventive restructuring frameworks. In the absence of a proper coordination between pre-insolvency and insolvency proceedings, non-viable businesses can postpone an inevitable liquidation by opportunistically using various reorganization procedures.21 During that period, value can be destroyed, reducing the pie available for distribution and therefore making the insolvency framework less appealing for creditors. Additionally, even if this GII focuses on reorganization procedures, the treatment of directors in liquidation can also be relevant when choosing an insolvency forum, especially if a liquidation procedure is automatically opened if the reorganization procedure fails and the directors can be exposed to a tough liability regime.22 Another factor that can make an insolvency forum more or less appealing from the perspective of the debtor is the ability of a reorganization procedure to be recognized overseas. Since the international recognition of a procedure depends on various external factors, such as the reputation of the jurisdiction and a country’s approach to cross-border insolvency, this aspect is also excluded from the GII.

Sixth, the GII measures the attractiveness of reorganization procedures in a limited period of time. Namely, it has been built measuring the attractiveness of reorganization procedures between 2000 and 2022 and based on the legislation that was effective the 31st of December of each of the years covered in the GII. Due to the lack of reliable information in certain years, however, the GII does not cover the whole 22-year period in all countries. When the information was not reliable or a procedure does not exist in a particular year, the GII does not assign any score. Instead, it uses a N/A.

Finally, the GII does not measure the overall efficiency of an insolvency system. As mentioned, that would require a comprehensive assessment of the legal, market and institutional environment of a country. Instead, the GII just seeks to measure the attractiveness of individual reorganization procedures, and to do so from the

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20 For example, the committee of creditors is in charge of making many decisions during the corporate insolvency resolution process in India. However, the committee of creditors is mainly formed by financial creditors. Therefore, for the purpose of the GII, most of these decision rights will be held by “secured creditors”, even if that is not necessarily the case.


22 This event may occur, for example, in Spain. Jurisdictions where corporate directors can be subject to a tougher liability regime in liquidation also include France and the United Kingdom.
perspective of debtors, secured creditors and general unsecured creditors, and exclusively based on the law on the books. Therefore, a higher or lower position in the GII does not mean that a procedure, and needless to say an entire insolvency system, is more or less desirable.

Despite the existence of these limitations, this GII is expected to serve several purposes. First, it seeks to provide regulators, practitioners and policymakers with a comprehensive list of variables that make a reorganization procedure more or less attractive to debtors, secured creditors and general unsecured creditors. Therefore, it can ultimately be useful for the design of insolvency laws as well as the comparison of insolvency jurisdictions. Second, the GII can be helpful to identify trends, similarities and divergences in the design and evolution of insolvency laws around the world. Third, as mentioned below, the GII can serve as a helpful tool to test the validity of the traditional classification of insolvency systems as debtor-friendly or creditor-friendly jurisdictions. Finally, the GII can be useful for future empirical studies seeking to assess the economic impact of certain trends and reforms that may have affected the attractiveness of reorganization procedures from the perspective of debtors, secured creditors and general unsecured creditors.

2.2. Findings and analysis

2.2.1. Attractiveness of reorganization procedures for debtors

As shown in the table included in Annex 2, the US Chapter 11 has traditionally been the most attractive reorganization procedures for debtors. This is due to several factors, including the existence of a DIP model as the default rule for the governance of reorganization procedures as well as the lack of a special liability regime for the directors of insolvent firms, the restriction on the enforcement of *ipso facto* clauses, the existence of DIP financing provisions, and the possibility of imposing a plan on dissenting classes of creditors.

The attractiveness of the US Chapter 11 reorganization procedure has not significantly changed over time. For the purpose of the index, the only relevant change took place in 2005 after a reform that limited the debtor's exclusivity period to propose a reorganization plan.\(^\text{23}\) In the past years, however, various regulatory developments around the world have changed the traditional dominance of the US Chapter 11 as the most attractive reorganization procedure for debtors. In 2017, Singapore implemented a major insolvency reform that significantly enhanced the attractiveness of its restructuring framework.\(^\text{24}\) This reform was complemented by the enactment of the Insolvency, Restructuring and Dissolution Act 2018 that came into force in 2020.\(^\text{25}\) After these reforms, the GII shows that, from the perspective of debtors, a variety of


\(^{24}\) This reform led to the introduction of a more powerful moratorium in the scheme of arrangement, as well as the adoption of a cross-class cramdown, a pre-packaged scheme of arrangement and rescue financing provisions in the scheme of arrangement and judicial management.

\(^{25}\) For the purpose of the GII, these reforms primarily affected the treatment of *ipso facto* clauses and directors’ duties and liability in insolvency.
factors have made the Singapore scheme of arrangement more attractive than the US Chapter 11.

First, the Singapore scheme of arrangement has adopted most of the restructuring tools existing in the US Chapter 11, including a powerful moratorium, restrictions on the enforcement of *ipso facto* clauses, the availability of rescue financing, and a cross-class cramdown. Second, unlike what happens in the US Chapter 11, where an examiner or trustee can be appointed in certain scenarios, the Singapore scheme of arrangement is always managed by the debtor without the appointment of any supervisor or insolvency practitioner. Third, in a US Chapter 11 reorganization procedure, the creditors are entitled to submit reorganization plans once the debtor’s exclusivity period has expired. Moreover, creditors play an important role in certain aspects of the procedure, such as a potential sale of assets. Under the Singapore scheme of arrangement, as in most schemes of arrangement around the world, creditors enjoy very limited powers. Since a scheme of arrangement has not traditionally been considered a formal insolvency proceeding, the role of creditors in a scheme of arrangement is mainly limited to voting on the reorganization plan. Fourth, another importance difference between the US Chapter 11 and the Singapore scheme of arrangement is the role of the shareholders. As it happens in most schemes of arrangement, the shareholders cannot be forced to be wiped out in the Singapore scheme of arrangement. Therefore, while the shareholders can lose the company in a US Chapter 11 reorganization procedure, this scenario – or even the dilution of the shareholders’ ownership – may not occur without the shareholders’ consent in the context of a scheme of arrangement in Singapore.

Even though the table included in Annex 2 shows that the Singapore scheme of arrangement has become the most attractive reorganization procedure for debtors in 2022, it is important to emphasize that the GII only measures the law on the books. Therefore, the fact that, from the perspective of debtors, the Singapore scheme of arrangement has become the most attractive reorganization procedure for debtors in 2022, it is important to emphasize that the GII only measures the law on the books. Therefore, the fact that, from the perspective of debtors, the Singapore scheme of

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26 In 2022, however, the Singapore High Court made an unprecedented order for the compulsory appointment of a Chief Restructuring Officer (“CRO”) that was given broad powers to monitor the debtor and make certain decisions in the procedure. See Rob Child, Jean Woo, Karan Puri and Matt Becker, ‘Unprecedented order for the compulsory appointment of a CRO in Singapore restructuring proceedings’ Singapore Global Restructuring Blog (15 February 2023) <https://ccla.smu.edu.sg/sgri/blog/2023/02/15/unprecedented-order-compulsory-appointment-cro-singapore-restructuring> accessed 18 August 2023. Therefore, given the court’s discretion when deciding about the extension of a moratorium in a scheme of arrangement in Singapore as well as the potential conditions attached to the extension granted by the court, it is expected to observe similar orders if the court believes that the imposition of a CRO can be valuable or necessary to protect the interests of the creditors.

27 11 U.S. Code § 1121(c).

28 11 U.S. Code § 363. See also *In re Lionel Corp.*, 722 F.2d 1063 (2nd Cir. 1983).

29 For that reason, the English scheme of arrangement was not listed in the annex to the European Insolvency Regulation as one of the insolvency proceedings available in the United Kingdom. For an analysis of the concept and nature of insolvency proceedings, see Horst Eidenmüller, ‘What is an Insolvency Proceeding’ (2016) *European Corporate Governance Institute (ECGI) – Law Working Paper* No. 335/2016; Riz Mokal, ‘What is an insolvency proceeding? Gategroup lands in a gated community’ (2022) 31(3) *International Insolvency Review* 418.

arrangement ranks above any other reorganization procedure does not mean that, in practice, Singapore provides the most attractive restructuring venue for companies. This latter aspect should be determined after examining many other legal, market and institutional factors, as well as the particular features of the company seeking to conduct a debt restructuring.\footnote{For example, unlike the US Chapter 11, the cross-class cramdown adopted in Singapore requires, among other conditions, that the plan must be approved by a majority in number and at least 75\% in the value of all the company’s creditors present and voting at the meeting. Therefore, creditors representing more than 25\% of the company’s debts have a \textit{de facto} veto right in a scheme of arrangement in Singapore. As a result, if a debtor has a group of creditors representing more 25\% of the company’s debts and the debtor knows that the creditors will vote against the plan, all else equal, the United States will provide a more attractive restructuring forum. This is a type of firm-specific factor that may affect the attractiveness of a reorganization procedure in a given situation. Examples of country-specific factors that can affect the choice of insolvency forum may include the sophistication and predictability of the judiciary, the level of expertise of insolvency professionals or the existence of a developed market for DIP financing.}

After the Singapore scheme of arrangement and the US Chapter 11, other attractive reorganization procedures observed in the GII include the French safeguard procedure and the new restructuring plan adopted in the United Kingdom. Other relatively attractive procedures for debtors observed in the GII include the new restructuring procedure adopted in the Netherlands ("WHOA") and various forms of hybrid procedures such as the scheme of arrangement existing in many commonwealth jurisdictions and the workout subject to court approval found in many civil law countries such as Argentina, Chile, Brazil and Uruguay. The attractiveness of many hybrid procedures is primarily due to the fact that the shareholders cannot generally be wiped out, the procedure is run by the managers, many of these procedures (particularly the scheme of arrangement) do not require any financial condition for the initiation of the procedure, and corporate directors are not generally exposed to a special liability regime in these procedures. Moreover, as happens in formal insolvency proceedings, these procedures generally allow debtors to enjoy a majority (or super-majority) rule for the approval of a reorganization plan and, in some cases, even a moratorium.

The most unattractive procedures for debtors generally observed in the GII are the administration-style procedures found in most commonwealth jurisdictions. This is due to several factors. First, administration-style procedures typically imply the appointment of an external administrator that replaces the directors in the management of the company’s property and business affairs. Second, many administration-style procedures subject corporate directors to a liability regime that may often be very tough. Finally, most administration-style procedures existing around the world do not provide debtors with a comprehensive system of DIP financing or the possibility of imposing a plan on dissenting classes of creditors.

\textbf{2.3.2. Attractiveness of reorganization procedures for secured creditors} 

As shown in the table included in Annex 3, the most attractive procedures for secured creditors are generally those in which secured creditors are not even affected by the procedure. These procedures include the suspension of payments procedure existing in the Netherlands and the UK company voluntary arrangement, where secured
Creditors can enforce their security interests during the procedure and they are not bound by any reorganization plan unless they consent. Some of these features are also found in some administration-style procedures. For example, in Australia, secured creditors are not bound by a reorganization plan unless they consent, and secured creditors with a security interest over the whole or substantially the whole of the property of the company are entitled to enforce their security interests within a short period of time after the appointment of an administrator. In New Zealand, secured creditors cannot be bound by a reorganization plan either but they are subject to certain restrictions for the enforcement of their security interest. Still, secured creditors have significant powers during the procedure.

Other procedures generally attractive for secured creditors include various hybrid procedures where secured creditors can be bound by the plan but they are allowed to enforce their security interest during the procedure. This latter scenario can be found, for example, in the traditional version of the scheme of arrangement existing in most commonwealth jurisdictions, including Australia, Cayman Islands, India and Hong Kong. Interestingly, the GII shows that a reorganization procedure that is also relatively attractive to secured creditors is one of the most debtor-friendly procedures in the world: the US Chapter 11. This is due to several factors. First, secured creditors can lift the automatic stay if they are not adequately protected or the assets subject to their security interests are not essential for an effective reorganization and the debtor does not have an equity interest in those assets. Therefore, secured creditors are protected by the existence of a kind of “no worse off rule”. Second, when considering the approval of new financing, courts cannot prime an existing lien unless the affected secured creditor obtains adequate protection. Again, this rule seeks to make sure that any alteration of pre-bankruptcy entitlements does not make the secured creditors worse off. Third, the rights of secured creditors in the approval of a reorganization plan are also protected by the existence of certain mechanisms such as the absolute priority rule and the best interest of creditor test. Some of these protections for secured creditors existing in the US Chapter 11 are also found in the Singapore scheme of arrangement and the restructuring plan in the United Kingdom. For that reason, these latter procedures also obtained a high position when assessing their attractiveness for secured creditors in the GII.

The most unattractive reorganization procedures for secured creditors are found in countries like France (safeguard procedure) and Ecuador (preventive reorganization). The weak position of secured creditors in these procedures is explained by a variety of reasons, including the fact that secured creditors do not have the ability to enforce their security interest in any situation, they can be bound by a reorganization plan, they do not have any significant powers during the procedure, and they are paid after administrative expenses and a variety of preferential creditors. Moreover, these countries allow debtors to obtain new financing to be paid as administrative expenses. Therefore, given that administrative expenses are paid ahead of secured creditors,

32 11 U.S. Code § 362(2).
33 11 U.S. Code § 364(d).
any new financing that does not end up creating or preserving value will worsen the position of secured creditors.\textsuperscript{34}

\textbf{2.3.3. Attractiveness of reorganization procedures for unsecured creditors}

The table included in Annex 4 shows that the most attractive procedure for unsecured creditors is the new rehabilitation procedure adopted in Myanmar. This is due to a variety of factors, including the mandatory appointment of an insolvency practitioner to replace the debtor’s management team, the possibility of initiating avoidance actions for the recovery of assets, the liability of the rehabilitation manager for debts incurred by the company during the procedure, the involvement of unsecured creditors in various aspects of the procedure, and the best interest of creditor test that makes sure that unsecured creditors receive in reorganization at least what they would get in liquidation.

Many of the provisions existing in the rehabilitation procedure adopted in Myanmar are also found in the Singapore judicial management and various administration-style procedures, which are ranked as the next most protective procedures for unsecured creditors. Then, the GII also shows that the US Chapter 11 also provides strong protections to unsecured creditors. Factors contributing to this level of protection for unsecured creditors include the existence of the best interest of creditor test and the appointment of a committee of unsecured creditors whose fees and expenses are paid by the estate. Another feature of the US Chapter 11 that does not exist in many reorganization procedures – particularly in many hybrid procedures such as schemes of arrangement or the restructuring procedures adopted in the United Kingdom and various EU countries – is the existence of avoidance actions that may facilitate the recovery of assets.\textsuperscript{35}

The most unattractive procedures for unsecured creditors are generally hybrid procedures such as the Argentinian extrajudicial reorganization procedure and the traditional version of the scheme of arrangement existing in jurisdictions such as Australia, Cayman Islands, India, the United Kingdom and Hong Kong. Other unattractive procedures for unsecured creditors include the reorganization procedures existing in Bolivia and Ecuador. In most of these procedures, creditors do not generally enjoy many of the powers and protections existing in formal insolvency proceedings, such as those mentioned in the context of the rehabilitation procedure found in Myanmar. Despite their limited powers, they can be bound by a reorganization plan, and they can also be affected by other modification of creditors’ rights generally allowed in those procedures.

\textbf{3. Trends and evolution of insolvency laws around the world}

\textsuperscript{34} Given the existence of such an unattractive regime for secured creditors, it is not surprising that, at least in France, it has been shown that lenders generally respond by requiring more collateral when deciding to extend credit. See Sergei A Davydenko and Julian R Franks, ‘Do Bankruptcy Codes Matter? A Study of Default in France, Germany and the UK’ (2008) 53 \textit{The Journal of Finance} 565.

\textsuperscript{35} It should be noted, however, that not all types of avoidance actions increase the value of the estate. Moreover, the effectiveness of avoidance actions for the recovery of assets will depend on various factors, such as the availability of funds to investigate transactions and the requirements eventually imposed for the initiation of avoidance actions.
The GII shows certain trends in the design and evolution of reorganization procedures around the world. First, it shows that many countries seem to be improving the attractiveness of their reorganization procedures from the perspective of debtors. Some jurisdictions have done so by adopting new procedures (e.g., new restructuring plan in the UK, Spain and the Netherlands) or by improving the attractiveness of their existing reorganization procedures (e.g., scheme of arrangement in Singapore). Still, the GII shows that there is significant room for the improvement of reorganization procedures around the world. For example, many countries still have very unattractive reorganization procedures for debtors as a result of the lack of DIP financing provisions and a cross-class cramdown, the imposition of stringent conditions for the initiation of insolvency proceedings, and the mandatory appointment of an insolvency practitioner that often replaces the debtor’s management team.

While the adoption of debtor-friendly insolvency reforms seems to be the most common trend observed around the world, there are countries that have moved in the opposite direction. An example of these jurisdictions is India. Indeed, the Indian corporate insolvency resolution process grants significant powers to the creditors. Those powers can be observed in several aspects of the procedure, such as the appointment of the resolution professional in charge of managing the proceeding, the approval of reorganization plans, or even the approval of new financing. Other countries that have implemented creditor-friendly reforms in recent years include Malaysia and Myanmar.

Second, the GII shows various similarities in certain regions as well as in countries with similar legal origins. Given the level of integration existing in the European Union, it is not surprising that many insolvency reforms adopted by EU countries are moving in a similar direction (usually becoming more attractive to debtors), and a greater level of convergence on insolvency laws is expected to be observed in the coming years. Yet, there are significant divergences. For example, countries like Germany remain relatively protective of the interest of the creditors while France has a very unattractive insolvency regime for creditors.

In terms of legal origins, the GII also shows certain similarities. For example, the insolvency framework existing in the United Kingdom seems to have influenced the direction of various insolvency reforms adopted in common law countries such as Ghana and Nigeria. Similarly, various insolvency reforms in Latin America seem to have been influenced by the insolvency laws of other civil law countries such as France, Germany, Italy and Spain. Nonetheless, despite these similarities, there are also significant divergences among countries with similar legal origins. For example, while India has adopted a creditor-friendly reform, Singapore remains an attractive jurisdiction for creditors but has significantly improved the attractiveness of its restructuring framework for debtors.

36 So far, there has been a convergence on preventive restructuring frameworks or “pre-insolvency” proceedings as a result of various factors, including more recently the adoption of the EU Directive on Preventive Restructuring Frameworks. Nonetheless, the European Union is currently discussing a Proposed Directive that seeks to harmonize additional aspects of insolvency law (the text can be found here https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0702). If this EU Directive is approved, it is supposed to provide a greater level of convergence on insolvency laws across the EU.
Third, when analyzing similarities and divergences between advanced economies and emerging markets and developing economies (“EMDEs”), the GII shows that many advanced economies such as Singapore, the United Kingdom and EU countries have recently embarked on major insolvency reforms. Yet, this trend can also be observed in many EMDEs, such as Brazil, Chile, China, Colombia, Ghana, India, Laos, Nigeria, Myanmar and Uruguay, that have implemented major insolvency reforms in the past two decades. More interestingly, the GII does not seem to show any significant association between the type of economies and the attractiveness of reorganization procedures. For example, even though advanced economies such as New Zealand, Singapore and the United Kingdom have some of the most attractive reorganization procedures for creditors, the rehabilitation procedure in Myanmar is also one of the most attractive procedures for creditors, as shown in Annex 5. Meanwhile, advanced economies such as France do not provide an attractive reorganization procedure for creditors.

Similar conclusions can also be reached when comparing the attractiveness of reorganization procedures from the perspective of debtors. Indeed, even though some of the most attractive reorganization procedures for debtors are found in advanced economies such as the United States (Chapter 11) and Singapore (scheme of arrangement), other advanced economies, including Australia and New Zealand, have some of the most unattractive reorganization procedures for debtors. These mixed findings are also observed in the context of EMDEs. Indeed, while countries like the Philippines have adopted very attractive reorganization procedures for debtors, other EMDEs, such as Ghana and Nigeria, have administration-style procedures that are not very attractive for debtors. Therefore, the type of economy does not seem to play a major role when explaining the attractiveness of reorganization procedures from the perspective of debtors and creditors.

4. Deconstructing the myth of debtor-friendly or creditor-friendly insolvency systems

The findings of the GII seem to confirm that the traditional classification of insolvency systems as debtor-friendly and creditor-friendly jurisdictions is misleading and should be abandoned. First, the GII shows that an attractive procedure for debtors does not necessarily mean that the procedure will be unattractive for creditors. Indeed, the experience of the US Chapter 11, as well as some of the new restructuring procedures adopted around the world, such as the Singapore scheme of arrangement and the UK restructuring plan, show that a procedure can be attractive to debtors while remaining relatively attractive to creditors. Similarly, the GII shows that some reorganization procedures, such as those existing in Ghana (administration) and Ecuador (preventive reorganization), can be unattractive for both debtors and creditors. Yet, most countries around the world have reorganization procedures that are somehow in the middle: more biased towards the debtor at the expense of the creditors (e.g., French safeguard procedure), more biased towards the creditors at the expense of debtors (e.g., Australian administration), or relatively neutral (e.g., Spanish restructuring plan or Colombian reorganization procedure). Therefore, the GII shows that some procedures can be pro-debtor and pro-creditor, anti-debtor and anti-creditor, or somewhere in the
middle. The graph included in Annex 6 provides a general overview of the attractiveness of reorganization procedures in a variety of jurisdictions.

Second, the GII also shows that many jurisdictions have various reorganization procedures that exhibit different levels of attractiveness for debtors and creditors. For example, Singapore simultaneously has one of the most attractive procedures for creditors (judicial management) and actually the most attractive reorganization procedure for debtors (scheme of arrangement). Therefore, these findings show that classifying jurisdictions rather than procedures can be misleading, at least in the context of jurisdictions with different procedures. Yet, there are some exceptions. For example, the GII shows that all the reorganization procedures existing in France are very friendly to debtors and very unattractive to creditors. Therefore, France can indeed be classified as a pro-debtor and anti-creditor insolvency jurisdiction. Nonetheless, the experiences of the United States, and more recently Singapore and the United Kingdom, show that the implementation of an attractive reorganization procedure for debtors can be achieved while remaining an attractive jurisdiction for creditors.

Third, the GII also shows that many jurisdictions only provide attractive reorganization procedures for certain creditors. For instance, many insolvency systems traditionally classified as creditor-friendly jurisdictions, such as Hong Kong, Bermuda, Cayman Islands, provide strong protections to secured creditors but they do not provide an attractive framework for unsecured creditors. Similarly, other insolvency jurisdictions, such as Ecuador and Mexico, provide strong protections to employees and tax authorities but their reorganization procedures are not very attractive to secured creditors and general unsecured creditors. A similar argument can be made with respect to debtors. Indeed, even though the attractiveness of reorganization procedures for different types of debtors has not been measured in the GII, most businesses around the world are MSEs that need simplified insolvency procedures. Unfortunately, only a few jurisdictions around the world, such as the United States, South Korea, Myanmar, Colombia, Chile, Australia, Spain and Singapore, provide these types of procedures. Therefore, labelling an insolvency system as a debtor-friendly jurisdiction would also be misleading if, despite the existence of an attractive reorganization procedure for medium and large enterprises, most businesses in the country do not have access to an attractive reorganization procedure.

5. Lessons for regulators and policymakers

Designing an efficient insolvency framework is not an easy task. Some jurisdictions often favor debtors at the expense of creditors while others have traditionally put more emphasis on the protection of creditors even if that jeopardizes the survival of viable businesses. Both types of systems can create inefficiencies.\(^{37}\) If an insolvency regime is not attractive to debtors, it can harm entrepreneurship, innovation and the effective reorganization of viable but financially distressed firms that create jobs and wealth.\(^{38}\)


If an insolvency regime is not attractive to creditors, it can hamper a firm’s access to finance. In both scenarios, the system will not be maximizing the potential of insolvency law to promote economic growth. Therefore, an insolvency framework should ideally be pro-debtor and pro-creditor, which is something generally achieved by facilitating the most efficient allocation of the debtor’s assets – that is, the reorganization of viable companies and the liquidation of non-viable firms – while minimizing different forms of behavior that can destroy or opportunistically divert value. Even though the implementation of an insolvency reform in that direction can often be challenging, the GII shows that several countries around the world, including the United States and more recently, Singapore and the United Kingdom, have shown that it is feasible.

Unfortunately, the GII shows that many countries around the world still have significant room for improvement in their insolvency frameworks. For example, countries like Nigeria and Ghana can significantly improve the attractiveness of their restructuring framework for debtors and creditors. Similarly, countries like Ecuador and France can significantly improve the attractiveness of their restructuring framework for creditors and countries like Myanmar, Australia and New Zealand can adopt a more attractive reorganization procedure for debtors. Of course, the design of the specific provisions leading to those debtor-friendly and creditor-friendly insolvency reforms should depend on a variety of country-specific factors.

The primary role of insolvency law is minimizing most of these problems. See Thomas H Jackson, The Logic and Limits of Bankruptcy Law (Cambridge, MA: Harvard University Press, 1986); Anthony J Casey, ‘Chapter 11’s Renegotiation Framework and the Purpose of Corporate Bankruptcy’ (2020) 120 (7) Columbia Law Review 1709. It should also solve some related problems that can lead to the loss (or not creation) of value, as happens when a financially distressed debtor is unable to obtain new financing to pursue value-creating investment projects. To address this problem, some insolvency laws provide DIP financing provisions. Thus, as pointed out by Ayotte and Skeel, insolvency law can serve as a “liquidity provider” for insolvent firms. See Kenneth Ayotte and David Skeel A. Jr., ‘Bankruptcy Law as a Liquidity Provider’ (2013) 80 University of Chicago Law Review 1557.

For example, the adoption of DIP financing provisions can improve the attractiveness of reorganization procedures for debtors. However, if a jurisdiction does not have a sophisticated judicial system, the decision to authorize new financing can be made by the creditors. A reform in that direction would improve the attractiveness of the restructuring framework for debtors while remaining protective of (and even improving) the position of creditors. See Aurelio Gurrea-Martínez, ‘Debtor-in-Possession Financing in Reorganisation Procedures: Regulatory Models and Proposals for Reform’ (2023) European Business Organization Law Review 1.


the attractiveness of reorganization procedures from the perspective of debtors, secured creditors and general unsecured creditors.

Finally, it is important to emphasize that the insolvency legislation only represents a small part of the insolvency ecosystem. A well-functioning insolvency system requires an attractive market and institutional environment comprising sophisticated courts and a combination of highly qualified lawyers, investment bankers, activist investors and other relevant actors. Therefore, while embarking on legal reforms to improve the attractiveness of reorganization procedures, countries should simultaneously work on the improvement of their restructuring ecosystem. In the absence of a developed market and institutional environment to deal with financial distress, insolvency law should be designed differently, putting more emphasis on contractual and market-based solutions as well as the empowerment of creditors at the expense of courts and court-appointed administrators.

6. Conclusion

This article has sought to test the validity of the traditional classification of insolvency systems as debtor-friendly or creditor-friendly jurisdictions. To achieve this goal, the article has used a novel index that measures the attractiveness of reorganization procedures from the perspective of debtors, secured creditors and general unsecured creditors. After assessing the attractiveness and evolution of reorganization procedures in 53 jurisdictions around the world, this article has shown that the traditional classification of insolvency systems as debtor-friendly or creditor-friendly jurisdictions is misleading and should be abandoned. By developing a new insolvency index, this article has also sought to provide a comprehensive set of variables for the assessment of reorganization procedures that can contribute to the improvement and understanding of insolvency laws around the world.

Annex 1. Methodology of the Global Insolvency Index (GII)

A) Attractiveness of reorganization procedures from the perspective of debtors

1. Financial conditions needed for the commencement of a reorganization procedure (0-2)

- 0: Strict requirements. The debtor needs to show that it is insolvent. For that purpose, the concept of insolvency should be broadly understood. Therefore, it includes cessation of payments, default on certain debts, cash-flow insolvency, balance-sheet insolvency, or any other definition of insolvency existing in a jurisdiction (e.g., India).

- 1: Relatively soft requirements. Initiating a formal reorganization procedure is possible even if the company is not factually insolvent yet. However, the company needs to show that it is facing, or it will face shortly, financial trouble. Therefore, it needs to show certain conditions such as financial difficulties (e.g., France), imminent insolvency (e.g., Germany, Spain), the fact that the company will become insolvent (e.g., Singapore JM before 2017) or risk of being unable to pay its debt (e.g., Japan’s civil rehabilitation procedure). This score is also given to procedures that allow solvent companies to initiate reorganization procedures but might prevent insolvent firms from initiating the procedures (e.g., French conciliation procedure/mandat ad hoc).

- 1.5: Soft requirements. Initiating a formal reorganization procedure is possible even if the company is not factually insolvent yet. However, the company needs to show certain financial conditions showing a likelihood of insolvency (e.g., EU Directive, UK administration, Singapore JM after 2017) or likelihood of financial difficulties (e.g., UK Restructuring Plan).

- 2: No proof of insolvency. Moreover, even if a reorganization procedure can be terminated if it is shown that the debtor filed for bankruptcy opportunistically, a situation of insolvency is not formally required for the initiation of the procedure (e.g., US Chapter 11, UK/HK/Singapore Scheme).

2. Directors’ duties in the zone of insolvency (0-1)

- 0: Very rigid. Duty to stop trading (e.g., Australia before 2018) or duty to initiate insolvency proceedings within a short period of time (less than 2 months after the company becomes insolvent), imposing sanctions for a failure to file the insolvency petition in a timely manner (e.g., liability of directors, criminal sanctions, disqualifications, etc.) (e.g., Germany: 3 weeks; Spain: 2 months).

- 0.25: Rigid. Duty to stop trading (or prohibition to incur debts) unless subject to certain exceptions (e.g., Australia after 2018), or duty to file for bankruptcy subject to some exceptions (e.g., Spain after 2009), or duty to recapitalise or liquidate with a tough liability regime associated with a failure to comply with this duty (e.g., liability for the company’s debts) (e.g., Spain).

- 0.5: Relatively rigid. Prohibition to incur debts if they cannot be paid in full (e.g., New Zealand), or duty to recapitalise or liquidate with a soft liability regime if the directors fail to comply with this duty (e.g., liability for damages) (e.g., Colombia, Ecuador, Uruguay, Argentina).

- 0.6: Greater flexibility but still restrictions. For example, prohibition to incur debts that cannot be paid in full subject to certain exceptions (e.g., Singapore JM after 2020).

- 0.75: Flexible. However, directors’ duties generally change in the zone of insolvency and directors should pay more attention to the creditors (e.g., UK, HK).

- 1: Very flexible. In fact, directors are not subject to special duties in the zone of insolvency (e.g., US).

3. Moratorium in reorganization (0-3)

- 0: No moratorium available.

- 0.5: No statutory moratorium available. However, the court has the discretion to order a stay on terms it thinks fit in certain cases (e.g., India’s scheme of arrangement process before 2013).
1: Limited moratorium available. This limited moratorium is not automatic and it does not affect secured creditors (e.g., Singapore Scheme before 2017) or other types of creditors such as public creditors or employees (e.g., Mexico, Ecuador).

1.5: Full moratorium. However, the moratorium requires court review/approval (e.g., analysing whether a debtor is eligible for the moratorium/reorganization procedure) and it is subject to a short period of time (e.g., no more than 3 months).

1.75: Full moratorium. However, the moratorium requires court review/approval (e.g., analysing whether a debtor is eligible for the moratorium/reorganization procedure). Then, it can be relatively broad in terms of length (e.g., up to 6 months, including any extension) and scope (e.g., affecting secured creditors). Alternatively, this score would also be assigned to a moratorium that, although it is automatically granted, is not generally extended for more than 3 months (e.g., UK restructuring plan).

2: Full moratorium. However, the moratorium requires court review/approval (e.g., analysing whether a debtor is eligible for the moratorium/reorganization procedure). Then, it can be very broad in terms of length (e.g., up to 12 months, including any extension) and scope (e.g., Spain). Alternatively, this score would also be assigned to a moratorium that, although it is automatically granted, is not generally extended for more than 6 months or the extension of the moratorium initially granted requires some conditions that the debtor needs to prove, such as the viability of the company or the likelihood of approving a reorganization plan (e.g., Singapore scheme after 2017).

2.25: Full moratorium granted automatically with application. Therefore, no court review/approval needed. Powerful moratorium. However, it is limited in time (e.g., up to 12 months, including any extension) (e.g., Singapore JM before 2017; e.g., UK administration).

2.5: Full moratorium granted automatically with application. Therefore, no court review/approval needed. It could be very broad in terms of length and scope, and it can even affect subsidiaries.

2.75: Full moratorium granted automatically with application. Therefore, no court review/approval needed. The moratorium is always very broad in terms of length and scope. Secured creditors (or other creditors) can only lift the stay in limited scenarios, such as when the company is not viable, no adequate protection is available, and/or assets are not essential for effective reorganization (e.g., US).

3: Full moratorium granted automatically with application. Therefore, no court review/approval needed. The moratorium is always very broad in length and scope. Creditors can never lift the stay.

4. Debtor in possession in reorganization (0-3)

0: An Insolvency Practitioner (IP) is always appointed. Moreover, the IP always manages the company’s property and business affairs, replacing the directors (e.g., Singapore JM; UK administration).

0.75: An IP is always appointed. However, IP generally acts as a monitor/supervisor instead of an administrator/JM replacing the directors. In certain cases (e.g., involuntary petitions, mismanagement, etc.), the IP may act as an administrator replacing the directors (e.g., Spain, Japan’s civil rehabilitation procedure).

1.25: An IP is always appointed. However, IP generally acts as a monitor/supervisor instead of an administrator/JM replacing the directors. The monitor/supervisor is generally appointed by the creditors or court. Directors remain in office. However, the courts or creditors can replace the directors even if the company is still run by the company’s board of directors and not by an external IP (e.g., Ecuador).

1.5: An IP is always appointed. However, IP acts as a monitor/supervisor instead of an administrator/JM replacing the directors. The monitor is generally appointed by the creditors/court.

1.75: An IP is always appointed in reorganization. However, the IP acts as a monitor/supervisor instead of an administrator/JM replacing the directors. The monitor is generally appointed by the debtor (e.g., UK restructuring plan).

2: An IP is appointed. However, the debtor is also allowed to appoint its executives as the IP (e.g., Thailand, Korea, Colombia).
2.5: A debtor-in-possession (DIP) is always the general rule in reorganization. An examiner/IP is only appointed in exceptional cases (e.g., US).

2.75: A debtor-in-possession (DIP) is always the general rule in reorganization. An examiner or Chief Restructuring Officer performing the functions of an examiner is only appointed in very exceptional cases (e.g., Singapore scheme).

3: A DIP without an IP is always the rule. No examiners/supervisors can be appointed (e.g., UK/HK Scheme).

5. Cross-class cramdown in reorganization (0-2)

0: No cross-class cramdown. Only majority rule or “intra-class” cramdown (i.e., imposition of a plan on dissenting creditors within a class) (Singapore before 2017; UK/HK Scheme).

0.5: Cross-class cramdown is allowed. However it is subject to very strict conditions (i.e., secured creditors being paid fully, no discrimination, best interest test) (e.g., China’s reorganisation procedure).

1.5: Yes, cross-class cramdown available. However, it is subject to certain limitations (e.g., fair and equitable plan, no discrimination, best interest test) (e.g., Singapore Scheme after 2017).

1.75: Yes, cross-class cramdown available. However, it is subject to certain limitations (e.g., fair and equitable plan, no discrimination, best interest test) (e.g., US; UK restructuring plan).

1.85: Yes, cross-class cramdown available. It is subject to some minor limitations (e.g., minimum percentage of creditors in favour of the plan) (e.g., Brazil after 2005).

2: Yes, cramdown available. It is not subject to any limitations.

6. Post-petition financing in reorganization (0-2)

0: Post-petition financing/debts do not enjoy priority (e.g., Singapore Scheme before 2017; UK/HK Scheme).

0.25: Post-petition financing/debts can be paid as administrative expenses, and therefore ahead of the general body of unsecured creditors. However, directors/IPs are personally liable for the new debts/expenses (e.g., Australia; Singapore JM before 2017).

0.5: Post-petition financing/debts can be paid as administrative expenses, and therefore ahead of the general body of unsecured creditors. However, IP/creditor committee/court approval is always needed. In the absence of negligence/breach of duties, IP is not liable for the new debts/expenses (e.g., UK administration).

0.75: Post-petition financing/debts can be paid as administrative expenses, and therefore ahead of general unsecured creditors. No liability of IPs/directors. Approval by the courts/IP/committee of creditors is generally needed, even though there are certain exceptions (e.g., debts in the ordinary course of business) (e.g., Spain).

1: Post-petition financing/debts can be paid as administrative expenses, and therefore ahead of general unsecured creditors. No direct liability of IPs/directors. No approval by courts/IP/committee of creditors is needed (e.g., Ecuador).

1.25: Post-petition financing/debts can be paid ahead of both unsecured creditors and other administrative expenses. Some conditions needed (e.g., court/IP/creditor approval).

1.5: Post-petition financing/debts can be paid ahead of both unsecured creditors and other administrative expenses. DIP lenders can get other forms of priority, including new liens, junior liens and even senior liens over a secured asset. DIP financing is subject to certain conditions and court/IP/creditor approval is always required for all forms of priority (e.g., Singapore after 2017).

1.75: Post-petition financing/debts can be paid ahead of both unsecured creditors and other administrative expenses. DIP lenders can get other forms of priority, including new liens, junior liens and even senior liens over a secured asset. Court/IP/creditor approval is generally
required, but there are certain exceptions (e.g., debts in the ordinary course of business) (e.g., US).

- 2: Post-petition financing/debts can be paid ahead of both unsecured creditors and other administrative expenses. DIP lenders can get other forms of priority, including new liens, junior liens and even senior liens over a secured asset. No court/IP/creditor approval is needed.

7. Special liability regime for corporate directors (0-3)

- 0: Yes, special liability regime in reorganization. Moreover, it is a tough liability regime (e.g., personal liability for company’s debts and disqualifications, or criminal liability for failure to file for reorganization in a timely manner) (e.g., Germany, Singapore JM).
- 1.5: Yes, special liability regime. However, soft liability regime (e.g., disqualifications, liability for damages, etc.).
- 3: No special liability regime in reorganization procedures (e.g., US, Singapore Scheme, UK/Australian Scheme).

8. Restriction of ipso facto clauses in reorganization (0-2)

- 0: The enforcement of ipso facto clauses is totally allowed. Therefore, the debtor’s counterparty can terminate a contract once a debtor initiates a reorganization procedure (Singapore before 2020).
- 0.5: The enforcement of ipso facto clauses is generally allowed. However, certain contracts such as contracts for supply of essential goods or services or provision of utility services to the debtor cannot generally be terminated (e.g., India and Cambodia).
- 1: The enforcement of ipso facto clauses is not generally allowed. However, there are many exceptions. Therefore, the debtor’s counterparty can terminate the contract in many situations (e.g., financial contracts, financial hardship by counterparties, default, etc.) (Singapore in 2020, UK restructuring plan).
- 1.5: The enforcement of ipso facto clauses is very restricted. Therefore, the initiation of reorganization procedures can only lead to the termination of contracts in very limited circumstances (e.g., financial contracts) (e.g., US, Spain).
- 2: The enforcement of ipso facto clauses is always prohibited. Therefore, the debtor’s counterparty can never terminate a contract once a debtor initiates a reorganization procedure.

9. Set-offs in reorganization (0-1)

- 0: Set-offs are allowed in a reorganization procedure if they are allowed under non-bankruptcy law. Therefore, the initiation of a reorganization procedure does not affect set-off rights (e.g., US, Singapore).
- 0.25: Set-offs are allowed in a reorganization procedure if they are allowed under non-bankruptcy law. However, the initiation of a reorganization procedure does not affect set-off rights. However, the creditor would not have a right to set-off if it became a debtor only after the opening of the insolvency proceedings, or acquired its claim from another creditor after the commencement of insolvency proceedings or if the underlying transaction is subject to avoidance (e.g., Cambodia).
- 0.5: Set-offs are generally prohibited in a reorganization procedure. However, there are exceptions (e.g., special contracts, pre-petition debts, etc.) (e.g., Spain).
- 1: Set-offs are always prohibited in reorganization procedures.

10. Fast-track version of the reorganization procedure (0-1)

- 0: No fast-track version of the reorganization procedure. If a fast-track procedure is available, it is a different reorganization procedure (e.g., workout subject to court approval existing in various Latin American countries), or it is only available for the sale of assets (e.g., UK pre-packaged administration), or the procedure is only available to certain companies not covered in this index (e.g., Indian pre-pack for small companies).
• 0.25: Certain formalities in reorganization procedures can be exempted. However, the procedure still needs to follow most of the rules and timelines generally existing in a typical reorganization procedure.

• 0.5: The procedure can be shortened, but it can never be approved within weeks (or even days) as it happens with the pre-packs in certain jurisdictions such as the United States (e.g., Spain before 2020).

• 1: Yes, a formal pre-pack is available (e.g., US, Singapore Scheme).

11. Subordination of shareholders’ or directors’ loans (0-1)

• 0: Yes, automatic subordination of shareholders’ or directors’ loans (e.g., Italy, Spain).

• 0.25: Yes, automatic subordination if some minimum criteria are met (e.g., directors with a minimum percentage of shares, or controlling shareholders).

• 0.5: Yes, automatic subordination if some stringent requirements are met (e.g., bad faith) (e.g., Germany, Austria).

• 0.75: Subordination is not generally available unless it is contractual. In exceptional cases, however, the court may subordinate certain claims (e.g., equitable subordination doctrine) (e.g., US).

• 1: Subordination is not possible unless it is contractual (e.g., UK, Singapore).

12. Debtor’s exclusive right to propose a reorganization plan (0-2)

• 0: No, debtors never have the exclusive right to submit a plan/solution. Therefore, the plan can be submitted by debtors (if so) and/or third parties such as IPs and creditors (e.g., Singapore JM).

• 0.5: Yes, debtors have the exclusive right to submit a reorganization plan but this exclusivity right is subject to stringent limitations (e.g., no more than 2 months, including any extension).

• 0.75: Yes, debtors have the exclusive right to submit a reorganization plan but this exclusivity right is subject to some reasonable limitations (e.g., no more than 6 months, including any extension).

• 1: Yes, debtors have the exclusive right to submit a reorganization plan but this exclusivity right is subject to some limitations (e.g., no more than 12 months, including any extension).

• 1.5: Yes, debtors have the exclusive right to submit a reorganization plan but this exclusivity right is subject to some minor limitations (e.g., no more than 18 months, including any extension) (e.g., US after 2005).

• 2: Yes, debtors have the exclusive right to submit a plan without being subject to any formal deadline, provided that they get extensions from the court (e.g., US before 2005, Singapore Scheme).

13. Rejection of executory contracts in reorganization (0-1)

• 0: Executory contracts cannot be rejected even if the contracts are value-destroying.

• 0.5: Executory contracts can be rejected. If so, the debtor is required to pay damages as administrative expenses (e.g., Spain until 2022).

• 0.75: Executory contracts can be rejected. If so, the debtor is required to pay damages as general unsecured creditors. However, certain contracts cannot be rejected (e.g., Canada).

• 1: Contracts can be rejected. If so, damages will be paid as general unsecured creditors (e.g., US). This score will also be assigned to procedures with no special provisions for executory contracts (e.g., Singapore/UK/HK Scheme).

14. Preservation of executory contracts in reorganization (0-1)

• 0: Executory contracts are automatically terminated upon the initiation of a reorganization procedure even if the contracts are value-enhancing.
0.5: Executory contracts can be preserved. If so, the debtor is required to cure default and/or provide adequate protection or a guarantee to the counterparty (e.g., US and China).

1: Executory contracts can be preserved. Moreover, pre-petition debts eventually owed to the counterparty are paid as general unsecured creditors even if the new debts are paid as administrative expenses. This score will also be assigned to procedures with no special provisions for executory contracts (e.g., Singapore/UK/HK Scheme).

15. The reorganization plan should be approved by the shareholders’ meeting (0-1)

0: Shareholder approval is never required to approve a reorganization plan (e.g., US).

0.5: Shareholder approval is only required if the reorganization plan includes the issuance of new shares (e.g., Singapore/UK/HK Scheme) or only required in limited circumstances (e.g., Japan’s corporate reorganisation procedure).

0.75: Shareholder approval is always required, but the plan can still become effective if it is only approved by creditors (e.g., UK CVA).

1: Shareholder approval is always required.

16. Debtors can sell essential assets between the commencement of the reorganization procedure and the approval of a reorganization plan (0-1)

0: No. The sale of essential assets (including the business as a going concern) can only take place if it is included in the reorganization plan.

0.5: Yes, debtors can sell essential assets (including the business as a going concern) before the approval of a reorganization plan. However, the sale of essential assets can only take place if it is approved by the creditors/IP/courts (e.g., US, UK administration).

1: Yes, debtors can sell essential assets (including the business as a going concern) before the approval of a reorganization plan. No court/creditor/IP approval is required (e.g., Singapore/UK/HK Scheme).

17. Possibility of imposing a plan on dissenting creditors within a class of creditors (majority rule) (0-3)

0: No majority rule available. Unanimity of creditors is required.

1.5: Yes, majority rule is available. However, very stringent majorities required such as at least 75% in value and 50% in number (e.g., Singapore/UK/UK Scheme).

1.75: Yes, majority rule is possible. However, it requires stringent requirements such as at least 75% in value even if the headcount can be exempted in certain cases or it requires a qualified majority in value (e.g., at least 2/3 and majority in number (e.g., US).

2: Yes, majority rule is possible. However, it requires relatively stringent requirements such as at least 75% in value. Headcount test is never required (e.g., UK CVA, Ecuador).

2.25: Yes, majority rule is possible. However, it requires a qualified majority in value (e.g., at least 2/3) and no headcount test, or a majority in value and majority in number is required (e.g., Singapore JM, Australian DOCA).

2.5: Yes, majority rule is possible. However, it requires a majority in value and headcount test is not required (e.g., Spain).

2.75: Yes. In fact, a minority of creditors (e.g., at least 25% in value) can approve the plan.

3: Yes. In fact, debtors/courts can approve a plan even in the absence of a minority level of support within a class.

18. Accrual of interests between the commencement of the reorganization procedure and the approval of a reorganization plan (0-2)

0: The commencement of reorganization procedures does not stop the accrual of interests (e.g., Singapore).

1: The commencement of reorganization procedures stops the accrual of interests. However, there are certain exceptions (e.g., solvent debtors, interests charged by over-secured creditors, or interest on the secured portion of a claim) (e.g., US, Spain, Cambodia).
1.75: The commencement of reorganization procedures always stops the accrual of interests. However, in case of any surplus after the payment of all debts, the surplus may be applied towards payment of interest calculated from the date of initiation of the reorganization procedure (e.g., reorganization procedure in Bangladesh).

2: The commencement of reorganization procedures always stops the accrual of interests.

19. Creditors potentially bound by a reorganization plan (0-3)

- 0: None of the company’s creditors can be bound by a reorganization plan unless they consent to be bound.
- 1.5: Only certain types of creditors can be bound by a reorganization plan. Therefore, certain debts (such as secured creditors, or operational creditors) cannot be restructured unless the affected creditors consent (e.g., UK CVA).
- 2.5: All types of creditors can generally be bound by a reorganization plan. However, secured creditors should generally be allowed to realise their security, unless they have consented to a reorganization plan that provides otherwise or if the court restricts them from realising their security provided their interests are adequately protected (e.g., Myanmar rehabilitation procedure).
- 3: All types of creditors can be bound by a reorganization plan. Therefore, all types of debts can be restructured (e.g., US, Singapore/HK/UK Scheme).

20. Shareholders can be wiped out in reorganization (0-3)

- 0: Yes. The shareholders are always wiped out.
- 1.5: The shareholders will be wiped out and they will lose the firm unless the reorganization plan establishes otherwise (e.g., US).
- 2: The rights of shareholders may get altered under the reorganization plan (e.g., China’s reorganization procedure).
- 2.5: The reorganization plan may not compromise or transfer shares of a shareholder if doing so is unfairly prejudicial to the interests of the shareholders (e.g., Myanmar rehabilitation procedure).
- 3: No. Shareholders cannot be wiped out. They always keep their shares in the reorganized firm (e.g., Singapore/UK/HK Scheme, Spain).

B) Attractiveness of reorganization procedures from the perspective of creditors

a) Secured creditors

1. Secured creditors are allowed to enforce their security interests during the reorganization procedure (0-6)

- 0: No, never. Secured creditors are always subject to a moratorium during the reorganization procedure. No time limits.
- 1: Yes, secured creditors can lift the moratorium but only in limited scenarios and/or after a long period of time. For example, they can lift the moratorium after 12 months from the initiation of the reorganization procedure or when the assets subject to security interests are not essential for the insolvent firm. No adequate protection is provided to secured creditors while they are subject to the moratorium (e.g., Spain).
- 3: Yes, secured creditors can lift the moratorium in certain cases. For example, the moratorium can be lifted if: (i) the company is not viable, (ii) the assets subject to the security interests are not essential, or (iii) the moratorium is not needed for a successful restructuring. No adequate protection is provided to secured creditors while they are subject to the moratorium (e.g., UK administration).
- 3.5: Yes, secured creditors can lift the moratorium in many cases (e.g., creditors do not approve extensions of the moratorium, opportunistic use of the moratorium, etc.) (e.g., UK Restructuring Plan). They can also lift the stay after a short period of time (e.g., less than 3
months since the commencement of the reorganization procedure) or the extension of the
moratorium would require the debtor to show certain conditions (e.g., Singapore scheme).

4.5: Yes, secured creditors can lift the moratorium if their interests are not adequately
protected. They can also lift the stay if the secured assets are not essential for an effective
reorganization (e.g., US).

6: Yes, secured creditors can always enforce their security interests (e.g., UK/HK Scheme,
Singapore Scheme before 2017).

2. Priority given to holders of fixed charge over encumbered assets (0-3)

▪ 0: Low priority. The fixed charge holder is paid after various preferential creditors (e.g.,
employees, tax authorities) and administrative expenses. Therefore, the proceeds obtained
by the sale of encumbered assets can be used to pay other creditors, even if the affected
secured creditor is not paid in full (e.g., France, Ecuador, Mexico).

▪ 1.5: Medium priority. The fixed charge holder is paid after administrative expenses or some
preferential creditors (e.g., employees), even if the proceeds obtained by the sale of
encumbered assets are insufficient to pay the affected secured creditor in full.

▪ 3: Strong priority. Fixed charge holders are always paid first over the proceeds of the sale of
encumbered assets (e.g., US, Singapore, Hong Kong, UK).

3. Existence of an IP in reorganization (0-1)

▪ 0: No, an IP is never appointed (HK/UK Scheme).

▪ 0.5: An examiner/IP can be appointed in exceptional cases (e.g., US, Singapore scheme).

▪ 1: Yes, an IP is always appointed (UK Administration/Restructuring Plan, Singapore JM).

4. Secured creditors have the ability to initiate a reorganization procedure (0-1)

▪ 0: No.

▪ 0.5: Yes, but only creditors who hold a certain amount of debt (e.g., Japan’s corporate
reorganization procedure or Mongolia’s recapitalization procedure).

▪ 1: Yes.

5. Secured creditors have the ability to reject an application for reorganization filed by the debtor (0-1)

▪ 0: No. Secured creditors do not have the ability to reject an application for reorganization filed
by the debtor.

▪ 0.25: Yes. Secured creditors have the ability to reject an application for reorganization.
However, the court will ultimately decide whether the application is accepted.

▪ 0.75: Only certain secured creditors have veto rights (e.g., holders of a floating charge)
(Singapore JM before 2017)

▪ 1: Yes, secured creditors always have veto rights.

6. Ability to appoint or remove IPs in reorganization (0-1)

▪ 0: No ability to appoint or remove IP, or no IP is appointed.

▪ 0.1: Court appoints but may consider the desire of creditors who hold a significant amount of
debt (e.g., Bangladesh).

▪ 0.25: In exceptional circumstances, secured creditors can appoint or remove an IP, or they
can ask the court to do so.

▪ 0.5: Yes, secured creditors always have the ability to appoint or remove the IP.

▪ 1: Yes, secured creditors always have the ability to appoint and remove an IP.

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7. Secured creditors can be subject to a cross-class cramdown in reorganization (0-2)

- 0: Yes, and no protection available against an opportunistic cross-class cramdown.
- 0.5: Yes, but some minor protections are available (e.g., relative priority rule – RPR\(^{44}\) – and no best interest of creditor test\(^{45}\)).
- 1: Yes, but various conditions are required (e.g., RPR and best interest of creditor test) (e.g., possibility under the EU Directive).
- 1.25: Yes, but various conditions are required (e.g., a modified absolute priority rule and best interest of creditor test) (e.g., UK restructuring plan).
- 1.5: Yes, but stringent conditions need to be met (e.g., absolute priority rule – APR\(^{46}\) – and best interest of creditor test) (e.g., US).
- 1.75: Yes, but very stringent conditions need to be met (e.g., APR, best interest test, overall majority of creditors) (e.g., Singapore or strong protections are in place (e.g., secured creditors being paid fully, or allowing payment of secured claim through sale of collateral after deduction of sale expenses) (e.g., China and Japan’s corporate reorganisation procedure).
- 2: No. A cross-class cramdown is not available or secured creditors are not subject to cramdown provisions (e.g., UK/HK Scheme, Singapore Scheme before 2017).

8. Secured creditors can be affected by the preferential treatment potentially given to post-petition debts/financing in reorganization (0-2)

- 0: Yes. Moreover, no protections available to creditors.
- 1: Yes. However, creditors enjoy some minor protections (e.g., court approval verifying that the new financing will create or preserve value).
- 1.75: Yes. However, it is very unlikely because secured creditors enjoy strong protections (e.g., court approval verifying that the new financing will create or preserve value and the affected secured creditor is adequately protected or it requires an approval of the secured creditors) (e.g., US, Singapore after 2017, India).
- 2: No. They are not affected (e.g., Australia, Spain, UK/HK Scheme).

9. Approval by secured creditors is required in a sale of encumbered assets in reorganization (0-2)

- 0: No.
- 1: No approval by secured creditor is needed. No approval by IP/court either. However, secured creditor gets a priority over the proceeds.
- 1.5: No approval by secured creditor is needed. However, IP/court approval is needed, and secured creditor gets a priority over the proceeds.
- 1.75: Encumbered asset can be sold either with the consent of the secured creditor OR with the leave of court, which can only be granted if the interest of the secured creditor is adequately protected (e.g., Myanmar rehabilitation procedure).
- 2: Yes. Approval by the affected secured creditor is always needed or there are no provisions for sale of encumbered assets (e.g., India).

10. Enforcement of ipso facto clauses upon the commencement of the reorganization procedure (0-1)

\(^{44}\) Under the relative priority rule (RPR) adopted in some jurisdictions (e.g., UK) senior creditors get paid ahead of junior creditors. However, junior creditors can get paid even if senior creditors have not been paid in full. Therefore, under the RPR, senior creditors should just receive a more beneficial treatment compared to junior creditors.

\(^{45}\) For the purpose of this variable, a best interest of creditor test should be broadly understood. Therefore, it refers to a test making sure that creditors receive in reorganization at least what they would receive in an alternative scenario whether this scenario is a piecemeal liquidation (e.g. US) or another insolvency proceeding (e.g. UK, Singapore, Myanmar).

\(^{46}\) Under the absolute priority rule (APR), senior creditors would get paid ahead of junior creditors. Moreover, junior creditors cannot get anything unless senior creditors have been paid in full.
• 0: Ipso facto clauses are not enforceable. Thus, secured creditors are not allowed to terminate their contracts upon the initiation of the reorganization procedure.

• 0.25: Ipso facto clauses cannot generally be enforced. However, there are many exceptions. Thus, secured creditors can terminate their contracts in many circumstances (e.g., default, financial contracts, special contracts, financial hardship, etc.) (e.g., Singapore after 2020, UK after 2020).

• 0.5: Ipso facto clauses can only be enforced by secured creditors in very limited scenarios (e.g., financial contracts) (e.g., US).

• 0.75: The enforcement of ipso facto clauses is generally allowed. However, certain contracts such as contracts for supply of essential goods or services or provision of utility services to the debtor cannot be terminated (e.g., India and Cambodia).

• 1: Ipso facto clauses can always be enforced. Therefore, secured creditors are always allowed to terminate their contracts upon the initiation of a reorganization procedure.

11. Secured creditors have the ability to terminate the reorganization procedure prior to the approval of a reorganization plan (0-1)
   • 0: No. A reorganization procedure can only be terminated if the reorganization plan is not approved or the debtor voluntarily decides to terminate the procedure.
   • 0.5: Secured creditors can ask the court to dismiss the case based on a justified reason (e.g., opportunistic filing for reorganization, lack of viability). However, the court will ultimately decide.
   • 1: Yes. Secured creditors can terminate the reorganization procedure anytime.

12. Secured creditors can request information from debtor/IP during the reorganization procedure (0-1)
   • 0: No information available.
   • 0.5: They only obtain information required by the law.
   • 0.75: They can require the IP to furnish ‘financial information’ in relation to the debtor at any time during the reorganisation procedure (e.g., India) or request information in relation to the administration of the estate (e.g., Cambodia).
   • 1: Yes, they can request any type of information anytime.

13. Secured creditors can be represented in a committee of creditors with monitoring functions during the reorganization procedure (0-1)
   • 0: No, secured creditors cannot be represented in any committee of creditors with monitoring functions.
   • 0.5: Yes, secured creditors can be represented in a committee of creditors with monitoring functions. The costs and legal fees generated by this committee are not paid by the estate though.
   • 1: Yes, secured creditors can be represented in a committee of creditors with monitoring functions. The costs and legal fees generated by this committee can be paid by the estate (e.g., US).

14. Accrual of interests between the commencement of the reorganization procedure and the approval of a reorganization plan (0-1)
   • 0: The commencement of the reorganization procedure stops the accrual of interests potentially charged by secured creditors (e.g., Spain).
   • 0.5: The commencement of the reorganization procedure stops the accrual of interests potentially charged by secured creditors. However, there are certain exceptions (e.g., interests charged by over-secured creditors or distribution towards interest in case any surplus is remaining after payment of all debts) (e.g., US, Bangladesh).
0.8: The commencement of the reorganization procedure does not affect the accrual of interests potentially charged by secured creditors but only on the secured portion of the claim (e.g., Cambodia).

1: The commencement of the reorganization procedure does not affect the accrual of interests potentially charged by secured creditors (e.g., Singapore Scheme).

### 15. Treatment of secured creditors in rejected executory contracts (0-1)

- **0**: Creditor’s claim (including pre-petition claims and, if so, damages) is paid as general unsecured creditors (e.g., US). This score will also be assigned to procedures without a regulatory framework for executory contracts where the counterparties’ claim will be treated as a general unsecured creditor (e.g., UK/HK/Singapore Scheme).

- **0.5**: Creditor’s claim can be partially paid as administrative expenses (e.g., damages). The remaining part of the claim (e.g., pre-petition debt) is paid as general unsecured creditors.

- **1**: Creditor’s claim (including damages and pre-petition claim) is paid as administrative expenses.

### 16. Treatment of secured creditors in preserved executory contracts (0-1)

- **0**: Creditor’s claim (including pre-petition claims and future debts) is paid as general unsecured creditors. This score will also be assigned to procedures without a regulatory framework for executory contracts where the counterparties’ claim will be treated as a general unsecured creditor (e.g., UK/HK/Singapore Scheme).

- **0.5**: Creditor’s claim is partially paid as administrative expenses (e.g., new debts). The remaining part of the claim (e.g., pre-petition debt) is paid as a general unsecured creditor.

- **1**: Creditors’ claims (including pre-petition and post-petition claims) are paid as administrative expenses. (e.g., US).

### 17. Ability to be bound by a reorganization plan (0-4)

- **0**: Yes. Secured creditors can always be bound by a reorganization plan (e.g., US, Singapore/UK/UK Scheme).

- **2**: Certain types of secured creditors cannot be bound by a reorganization plan (e.g., non-secured operational creditors).

- **3.5**: Secured creditors will not be prevented from realising their security interest unless they have agreed otherwise or if the court directs them not to realise their security but such an order can only be passed if the interests of the secured creditor are adequately protected (e.g., Myanmar’s rehabilitation procedure).

- **4**: No. Secured creditors can never be bound by a reorganization plan unless they consent (e.g., UK CVA).

#### b) Unsecured creditors

1. **Unsecured creditors are entitled to receive in reorganization at least what they would receive in liquidation (“best interest of creditor test”) (0-2)

   - **0**: No (e.g., Spain before 2022).

   - **0.5**: No, but the court considers the interest of creditors when approving the reorganization plan (e.g., Bangladesh).

   - **1**: Yes, but it is an informal best interest of creditors test applied as a form of ‘fairness test’ (e.g., UK/HK Scheme) or if it is only available in certain instances.

   - **1.5**: Yes, but only if the cross-class cramdown provisions have been used. If a plan has not been crammed down, the fairness test/informal best interest test will apply (Singapore Scheme after 2017).

   - **2**: Yes, always. This is a right enjoyed by individual creditors (e.g., US).

2. **Existence of IP in reorganization (0-1)**
3. Set-offs in reorganization (0-1)

- 0: Set-offs are prohibited in reorganization procedures.
- 0.75: Set-offs are allowed in a reorganization procedure if they are allowed under non-bankruptcy law. Therefore, the initiation of a reorganization procedure does not affect set-off rights. However, the creditor would not have a right to set-off if it became a debtor only after the opening of the insolvency proceedings, or acquired its claim from another creditor after the commencement of insolvency proceedings or if the underlying transaction is subject to avoidance (e.g., Cambodia).
- 1: Set-offs are allowed in reorganization procedures provided that they are allowed under non-bankruptcy law. Therefore, reorganization procedures do not affect set-off rights.

4. Ability to appoint or remove an IP (0-1)

- 0: No ability to appoint or remove IP, or no IP appointed (e.g., Singapore/HK/UK Scheme).
- 0.1: Court appoints but may consider the desire of creditors who hold a significant amount of debt (e.g., Bangladesh).
- 0.25: In exceptional circumstances, unsecured creditors can appoint or remove an IP, or they can ask the court to do so (e.g., US).
- 0.5: Yes, unsecured creditors always have the ability to appoint or remove the IP.
- 1: Yes, unsecured creditors always have the ability to appoint and remove the IP.

5. Unsecured creditors have the ability to initiate the reorganization procedure (0-1)

- 0: No.
- 0.5: Yes, but only creditors who hold a certain amount of debt have the ability to initiate the reorganization procedure. For example, only creditors whose claim accounts for at least 10% of the amount of the paid-up capital of the company are allowed to file (e.g., Japan’s corporate reorganization procedure).
- 1: Yes

6. Unsecured creditors can be subject to a cross-class cramdown in reorganization (0-2)

- 0: Yes, and no protection available.
- 0.5: Yes, but some minor protections available (e.g., RPR and no best interest of creditor test).
- 1: Yes, but some conditions need to be met (e.g., RPR and best interest of creditor test).
- 1.25: Yes, but various conditions need to be met (e.g., a modified absolute priority rule and best interest of creditor test) (e.g., UK restructuring plan).
- 1.5: Yes, but stringent conditions need to be met (e.g., absolute priority rule or APR and best interest of creditor test) (e.g., US).
- 1.75: Yes, but very stringent conditions need to be met (e.g., APR, best interest test, overall majority of creditors) (e.g., Singapore).
- 2: No (e.g., UK/HK Scheme, Singapore Scheme before 2017).
7. Unsecured creditors can be affected by the preferential treatment potentially given to new post-petition debts/financing (0-2)

- 0: Yes. Besides, approval by courts/IP/committee of creditors is never required.
- 1: Yes. However, approval by courts/IP/committee of creditors is required in certain cases (e.g., debts outside the ordinary course of business) (e.g., US, Spain).
- 2: No. Unsecured creditors cannot be affected either because debtors cannot incur new debts or because strong protections are available. Types of strong protections include personal liability of IPs (e.g., Australia), court approval (e.g., Singapore Scheme/JM), IP approval (e.g., UK), or approval by committee of creditors (e.g., India).

8. Involvement of unsecured creditors in the sale of unencumbered assets after the commencement of the reorganization procedure and before the approval of a reorganization plan (0-1)

- 0: No.
- 0.5: Not directly. However, IP/court approval is required.
- 1: Yes.

9. Enforcement of ipso facto clauses upon the commencement of reorganization procedures (0-1)

- 0: Ipso facto clauses are not enforceable. Thus, unsecured creditors are not allowed to terminate their contracts upon the initiation of the reorganization procedure.
- 0.25: Ipso facto clauses cannot generally be enforced. However, there are many exceptions. Thus, unsecured creditors can terminate their contracts in many circumstances (e.g., default, financial contracts, special contracts, financial hardship, etc.) (e.g., Singapore after 2020, UK after 2020).
- 0.5: Ipso facto clauses can only be enforced by unsecured creditors in very limited scenarios (e.g., financial contracts) (e.g., US).
- 0.75: The enforcement of ipso facto clauses is generally allowed. However, certain contracts such as contracts for supply of essential goods or services or provision of utility services to the debtor cannot be terminated (e.g., India and Cambodia).
- 1: Ipso facto clauses can always be enforced. Therefore, unsecured creditors are always allowed to terminate their contracts upon the initiation of the reorganization procedure.

10. Unsecured creditors can be represented in a committee of creditors with monitoring functions during the reorganization procedure (0-1)\textsuperscript{47}

- 0: No, unsecured creditors cannot be represented in any committee of creditors.
- 0.25: No. However, unsecured creditors can be represented in the committee of creditors if the debtor does not have any secured creditors (e.g., operational creditors in India).
- 0.5: Yes, unsecured creditors can be represented in a committee of creditors with monitoring functions. The costs and legal fees generated by this committee are not paid by the estate.
- 1: Yes, unsecured creditors can be represented in a committee of creditors with monitoring functions. The costs and legal fees generated by this committee can be paid by the estate (e.g., US).

11. General unsecured creditors can be affected by the existence of preferential creditors in a hypothetical event of liquidation (0-2)

- 0: Yes. General unsecured creditors only get paid after several preferential creditors have been paid in full. Those preferential creditors typically include at least employees and tax authorities (e.g., Singapore, US, Spain).

\textsuperscript{47} By ‘committee of creditors’, this index refers to a committee of creditors generally created with the purpose of monitoring the debtor and, if so, making certain decisions during the procedure. Therefore, it will include the type of committees of creditors existing in the United States, as well as the committee of inspection existing in many commonwealth jurisdictions.

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1: Yes. However, there are very limited preferential creditors. The statutory priorities are mainly limited to employees, and not to tax authorities (e.g., Australia, UK between 2003-2019).

2: No. Most, if not all, statutory priorities have been abolished. After liquidation/administrative expenses, general unsecured creditors will get paid first over any unencumbered assets (e.g., Germany).

12. Unsecured creditors have the ability to terminate the reorganization procedure prior to the approval of a reorganization plan (0-1)

0: No. The reorganization procedure can only be terminated if the reorganization plan is not approved or the debtor voluntarily decides to terminate the reorganization procedure (e.g., Spain).

0.5: Unsecured creditors can ask the court to dismiss the case based on a justified reason (e.g., opportunistic filing for reorganization). However, the court will ultimately decide (e.g., US).

1: Yes. Unsecured creditors can terminate the reorganization procedure anytime.

13. Unsecured creditors can request information from debtor/IP during the reorganization procedure (0-1)

0: No information available.

0.25: No information is available generally. However, if the unsecured creditor holds a significant portion of the debt, then it may have access to certain information (e.g., operational creditors holding at least 10% of the total debt are allowed to attend meetings of the committee of creditors and receive notice and related documents for such meetings in India).

0.5: They can only obtain the information required by the law.

1: Yes, they can request any type of information anytime.

14. Avoidance actions in reorganization (0-2)

0: No. Avoidance actions are not available in reorganization (e.g., Singapore/HK/UK Scheme, UK restructuring plan).

2: Yes. Avoidance actions are available in reorganization (e.g., US, Singapore JM, UK administration).

15. Moratorium protecting the debtor’s assets from individual enforcement actions that may destroy value at the expense of the creditors as a whole (0-3)

0: No moratorium available (e.g., UK/HK Scheme).

1: Limited moratorium. The moratorium does not usually affect secured creditors. However, a specific injunction order may be requested from the court which will need to satisfy the requirements of showing that the stay conforms to the common interest of creditors and is not likely to cause damage to the secured creditors (e.g., Japan’s civil rehabilitation procedure).

1.5: Limited moratorium. The moratorium does not affect secured creditors or other creditors such as public claimants or employees (e.g., Mexico, Ecuador, Singapore Scheme before 2017).

2: Full moratorium protecting the debtor’s assets. However, the moratorium can be lifted by certain creditors if the debtor is unable to provide adequate protection (e.g., US).

2.5: Yes, full moratorium protecting the debtor’s assets. Moreover, the moratorium cannot be lifted if the company is viable and the assets are essential for a successful reorganization. However, the debtor needs to ask for extensions (e.g., Singapore Scheme after 2017).

3: Yes, full moratorium protecting the debtor’s assets. Moreover, the moratorium cannot be lifted if the company is viable and the assets are essential for a successful reorganization. The debtor does not need to ask for extensions.
16. Accrual of interests between the commencement of the reorganization procedure and the approval of a reorganization plan (0-1)

- 0: The commencement of the reorganization procedure stops the accrual of interests potentially charged by unsecured creditors (e.g., Spain).
- 0.5: The commencement of the reorganization procedure stops the accrual of interests potentially charged by unsecured creditors. However, there are certain exceptions (e.g., US).
- 1: The commencement of the reorganization procedure does not affect the accrual of interests potentially charged by unsecured creditors (e.g., Singapore).

17. Possibility of bearing the costs and legal fees of a committee formed by secured creditors or shareholders (0-1)

- 0: Yes. The estate, and therefore the body of unsecured creditors, may be required to bear the costs and legal fees of certain committees, including a committee of secured creditors or a committee of equity holders (e.g., US).
- 0.5: Yes. The estate may be required to bear certain costs of a committee formed by secured creditors or equity holders (e.g., Japan’s corporate reorganisation procedure).
- 1: No. A committee of secured creditors or equity holders is not formed or the estate does not cover the costs and legal fees associated with the creation of this committee (e.g., Singapore).

18. Treatment of creditors in rejected executory contracts (0-1)

- 0: Creditor’s claim (including pre-petition claim and, if so, damages) is paid as a general unsecured creditor (e.g., US).
- 0.5: Creditor’s claim is partially paid as administrative expenses (e.g., damages) and the remaining part of the claim (e.g., pre-petition debt) is paid as a general unsecured creditor.
- 1: Creditor’s claim (including pre-petition claims and, if so, damages) is paid as administrative expenses.

19. Treatment of creditors in preserved executory contracts (0-1)

- 0: Creditor’s claim (including pre-petition claims and future debts) is paid as a general unsecured creditor.
- 0.25: Creditor’s claim can be partially paid as administrative expenses if some conditions are met (e.g., court/IP/creditor approval). The remaining part of the claim (e.g., pre-petition debt) is paid as a general unsecured creditor.
- 0.5: Creditor’s claim is partially paid as administrative expenses (e.g., new debts) and the remaining part of the claim (e.g., pre-petition debt) is paid as a general unsecured creditor.
- 1: Creditor’s claim (including pre-petition and, if so, post-petition claims) are paid as administrative expenses (e.g., US, Spain).

20. Ability to reject an application for reorganization (0-1)

- 0: No.
- 1: Yes. They have a veto right.

21. Ability to be bound by a reorganization plan (0-4)

- 0: Yes. Unsecured creditors can always be bound by a reorganization plan (e.g., US, Singapore, UK).
- 2: Certain types of unsecured creditors cannot bound by a reorganization plan (e.g., employees, tax authorities, operational creditors (e.g., Ecuador, Mexico).
- 4: No. Unsecured creditors can never be bound by a reorganization plan unless they consent.

22. Ability to get paid through the liability of shareholders or directors in reorganization (0-2)
• 0: No. Unsecured creditors can only be paid through the liability of shareholders or directors in liquidation (if so) even if they can be entitled to damages if there is a violation of directors’ duties under general company law (e.g., Singapore/HK/UK Scheme).

• 0.75: In rare cases and only for losses associated with a failure to comply with special directors’ duties in the zone of insolvency (e.g., UK administration).

• 1.5: Yes. Unsecured creditors can get paid through the liability of shareholders or directors. Not very rare due to tough liability regime for directors in the zone of insolvency (e.g., Singapore JM).

• 2: Yes. Unsecured creditors can always recover their claims from shareholders/directors. Therefore, tough liability regime for shareholders or directors in reorganization.

23. Subordination of shareholders’ or directors’ loans (0-1)

• 0: Shareholders’ or directors’ loans are never subordinated unless it is a contractual subordination.

• 0.25: Subordination is not available unless it is contractual. In exceptional cases, however, the court may subordinate certain claims (e.g., equitable subordination doctrine) (e.g., US).

• 0.5: Automatic subordination only if some stringent requirements are met (e.g., bad faith) (e.g., Germany, Austria).

• 0.75: Yes, automatic subordination if some criteria are met (e.g., directors with a minimum percentage of shares, or controlling shareholders).

• 1: Shareholders’ or directors’ loans are automatically subordinated (e.g., Italy, Spain).
## Annex 2. Attractiveness of reorganization procedures for debtors

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### Annex 3: Attractiveness of reorganization procedures for secured creditors

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**Notes:**
- Attractiveness for secured creditors (0-30)
- Annex 3: Attractiveness
- 15.5 is the attractiveness score for secured creditors.
### Annex 4. Attractiveness of reorganization procedures for unsecured creditors

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Note: The attractiveness scores range from 0 to 34, with higher scores indicating a more attractive reorganization procedure for unsecured creditors.
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Annex 5. Total attractiveness of reorganization procedures for creditors
Annex 6. Overview of the attractiveness of reorganization procedures for debtors and creditors in various jurisdictions

![Graph showing attractiveness of reorganization procedures for debtors and creditors in various jurisdictions.](https://ssrn.com/abstract=4557414)