

## Post-Commencement Financing – A Comparative Guide

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# Albania

## I. Name of Law—Is It Still Current?

Law No. 8017, “Bankruptcy Procedure,” dated October 25, 1995, *available at* [http://www.uniadriun.unibo.it/judge/Archives/Albania/Albanian\\_Bankruptcy\\_Procedure.pdf](http://www.uniadriun.unibo.it/judge/Archives/Albania/Albanian_Bankruptcy_Procedure.pdf).

## II. Summary of the Corporate Reorganization Scheme

The law provides for corporate reorganization plans. A bankruptcy petition must first be filed, either by the debtor or by a creditor that has “a well-grounded claim against the debtor’s property” and can provide “convincing arguments proving the debtor’s payment inability and debt-overload.” Art. 5. If the court approves the bankruptcy petition, the debtor must submit a list of total debts and assets. Art. 6. The debtor also is removed from control; it “shall no longer enjoy the right to possession and management of [its] property.” Art. 11. Such property is then under the control of the bankruptcy manager, *see id.*, who is appointed by the court, Art. 14. e bankruptcy manager is “obliged to manage in a proper and most efficient manner” the debtor’s estate, and is empowered to conduct the debtor’s activities and to use the property of the estate “in any other manner.” *Id.*

A reorganization plan may be proposed by the debtor, the bankruptcy manager, creditors holding 1/3 of secured claims, or creditors holding 1/3 of unsecured claims. Art. 27. The plan must specify “measures to be taken to reestablish the viability of the debtor’s enterprise (be it organizational, managing, legal, financial, technical and labor measures) on which the plan of the possible financial project is based. Art. 28. The court must accept a valid plan, Art. 29, and submit it to the creditors for approval. At least two “categories” of creditors (such as unsecured, preferred, secured, etc.) must approve the plan by majority (in value) vote, and the plan must provide for “fair and equal treatment” to those creditors who voted against the plan. Art. 31.

## III. Authorization to Borrow Post-Filing?

There is no explicit authorization, but the broad powers granted to the bankruptcy manager and the requirement that the reorganization plan identify the “financial measures” to be taken to restore solvency to the company suggest that post-bankruptcy financing is contemplated.

## IV. Special Requirements?

Two separate classes of creditors must approve the reorganization plan, by majority in value vote.

## V. Security Interest Required?

The statute is silent.

## VI. Priority Interest Granted?

No.

# Argentina

## I. Name of Law—Is It Still Current?

Law No. 24,522 (*Ley de Concursos y Quiebras*) became effective on Aug. 17, 1995. The law was recently amended to “make it easier for creditors to take control of companies that default on their debts.” Mark Drajem, *Argentina’s Bankruptcy Law Revision “A Step Forward,” IMF Says*, Bloomberg Latin America, May 16, 2003. This revision was passed in order to meet IMF requirements and qualify for aid. *See id.*

## II. Summary of the Corporate Reorganization Scheme

A “*concurso*” is a reorganization proceeding, somewhat similar to a Chapter 11 process. *See* Malcolm Rowat & Jose Astigarraga, *Latin American Insolvency Systems: A Comparative Assessment*, World Bank Technical Paper No. 433 (Apr. 1999), at 48. Only the debtor may file a petition for *concurso* proceedings. *See* 2-13 Collier International Business Insolvency Guide ¶ 13.05[b]. The petition must include a summary of the debtor’s financial condition, its assets and liabilities, a list of creditors and amounts owed, and copies of the debtor’s books. *See id.* ¶ 13.05[b][2][a]. The court then decides whether to accept or reject the petition. *See id.* ¶ 13.05[b][2][b]. If approved, an automatic stay goes into effect against all creditors and the debtor ceases payment. *See id.* ¶ 13.04[a].

A trustee, or *sindico*, is appointed, who must be a certified public accountant. *See id.* ¶ 13.05[4][c]. The *sindico* oversees the operations of the debtor, who otherwise remains in control of the business. *See* Adlofo Rouillon & Juan Dobson, *Insolvency Overview—Argentina* §§ 4.4(b), 4.5 (June 2001). A creditor’s committee is also formed, consisting of “the three unsecured creditors owed the highest amount.” *See* 2-13 Collier International Business Insolvency Guide ¶ 13.05[2][b].

The debtor is to present a composition plan to the creditors’ committee. The plan must pay at least 40% of the pre-filing unsecured claims. *See* Rowat & Astigarraga, *supra*, at 50. To become effective, the plan must be approved by every class of creditor, by a majority in number representing 2/3 of the total value of that class of claims. *See* Rouillon & Dobson, *supra*, at § 4.9.

## III. Authorization to Borrow Post-Filing?

The statute is silent as to new financing. *See* The National Law Center for Inter-American Free Trade, *The New Bankruptcy Law in Argentina: An Overview* § VI(E)(8) (1997), at <http://www.natlaw.com/pubs/sparbr1.htm>. Judicial approval is needed for any transaction outside of the normal course of business. *See* Rouillon & Dobson, *supra*, at § 4.6.

## IV. Special Requirements?

n/a

V. Security Interest Required?

n/a

VI. Priority Interest Granted?

Forbidden—neither the *sindico* nor the debtor may “benefit one of its creditors with a preference which does not arise from the law.” 2-13 Collier International Business Insolvency Guide ¶ 13.05[4][e].

# Armenia

## I. Name of Law—Is It Still Current?

“Law on the Bankruptcy and Financial Reorganization of Legal Entities, Enterprises Lacking Legal Entity Status, and Entrepreneurs,” effective Mar. 1, 1997. Downloaded 2/22/03 at <http://www.aeplac.am/pdf/Company%20Law/BancruptcyLaw.PDF>.

## II. Summary of the Corporate Reorganization Scheme

A company may file a bankruptcy petition, Art. 5, in which it declares its intention to reorganize, Art. 7. Within two days of this filing, the court must appoint an Administrator to oversee the process, Art. 12, and call the first creditors’ meeting within 28 days. Art. 10.

A Financial Reorganization Program may be prepared by 1) the debtor, 2) the Administrator, 3) creditors owing 1/3 of the total debt, or 4) “a person ow[n]ing 1/3 of the debtor’s statutory capital.” Art. 49. The program must detail the measures to be taken “to restore solvency and profitability of the debtor,” Art. 50, and copies must be distributed to the court, the Administrator, and all known creditors. Art. 51. The court will then convene another creditors’ meeting. Art. 52. At that meeting, the creditors are divided into groups, according to type of claim. *Id.* Each group then votes, by majority, whether to accept or reject the proposed Financial Reorganization Program. *Id.* If at least two groups of creditors approve the Program, the court shall accept it, Art. 53, and the Administrator shall carry it out, Art. 54.

## III. Authorization to Borrow Post-Filing?

Yes. The Administrator is authorized to “take loans, as approved” by the court. David L. Shahzadeyan & Van Z. Krikorian, *The Armenian Bankruptcy Law*, CIS LawNotes, Sept. 1997, at <http://www.pbwt.com/resources/articles/cis97c006.html>; see also Art. 13(l); Art. 50(c); Art. 61. Creditors also may “submit proposals” for new loans. *Id.*

## IV. Special Requirements

Court approval required for new loans. *Id.*

## V. Security Interest Required?

Art. 61 lists unsecured post-petition claims, but not secured post-petition claims. However, the Administrator may “pledge[] ... assets owned by the debtor.” Shahzadeyan & Krikorian, *supra*.

## VI. Priority Interest Granted?

Post-petition unsecured claims are ranked behind 1) secured claims, 2) court expenses and Administrator’s salary, and 3) administrative expenses. Art. 61. They rank ahead of pre-filing unsecured claims.

# Australia

## I. Name of Law—Is It Still Current?

The Corporations Act 2001, *available at* <http://scaleplus.law.gov.au/html/pasteact/3/3448/top.htm>.

## II. Summary of the Corporate Reorganization Scheme

Australian law provides for “voluntary administration.” *See generally* Corporations Act Part 5.3A. An administrator may be appointed by the debtor itself, by a liquidator, or by a secured creditor; leave of the court is not required. *See* Corporations Act §§ 436A-436C. When an administrator is appointed, an automatic stay goes into effect. *See id.* §§ 440A-440F. The administrator exercises total control over the debtor; the management stays in place but cannot exercise its powers without the administrator’s approval. *See* Jon Yard Arnason & Ian M. Fletcher, *Practitioner’s Guide to Cross-Border Insolvencies: Australia*, at AUS-24 (Oceana Pubs. 2000). The administrator is authorized to “perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.” Corporations Act § 437A(1).

The administrator’s first must audit the debtor’s affairs. *See id.* § 438A-438C. The administrator next calls a creditors’ meeting. Notice of the creditors’ meeting is to include a report on the state of the debtor, and whether a “deed of company arrangement” (i.e., a settlement between the debtor and the creditors) should be adopted, or the company should be liquidated, or no action should be taken. *See id.* § 439A. The creditors, at the meeting, vote on which course of action to take. *See id.* § 439C. If a deed of company arrangement is approved, it must be signed by the debtor and the administrator. *See id.* § 444B. It then becomes binding on all creditors. *See* Arnason & Fletcher, at AUS-27.

## III. Authorization to Borrow Post-Filing?

No specific authorization, but the statute gives extremely broad powers to the administrator—basically authorizing him or her to do anything the debtor would have been able to do pre-filing. *See* Corporations Act § 437A(1). Presumably this includes borrowing.

## IV. Special Requirements?

Statute is silent.

## V. Security Interest Required?

Statute is silent.

## VI. Priority Interest Granted?

No.

# Austria

## I. Name of Law—Is It Still Current?

Two statutes contain two separate reorganization provisions: the Bankruptcy Act of 1914 (“compulsory reorganization”), and the Settlement and Recomposition of Debts Act of 1914 (“ordinary reorganization”). See Alexander Klauser, *Bankruptcy and a Fresh Start: Stigma on Failure and Legal Consequences of Bankruptcy: Austria* 8 (2002), available at [http://europa.eu.int/comm/enterprise/entrepreneurship/support\\_measures/failure\\_bankruptcy/stigma\\_study/stigma\\_cover.pdf](http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/stigma_study/stigma_cover.pdf). A third law, the Business Reorganization Act of 1997 contains certain restructuring provisions, but applies only to companies that are not insolvent. See *id.* It “has no practical use” and has been invoked only twice. See *id.* at 18.

## II. Summary of the Corporate Reorganization Scheme

The compulsory reorganization and the ordinary reorganization are similar, with a few exceptions: (1) ordinary reorganization requires the debtor to repay at least 40 percent of its (unsecured) debts, while a compulsory reorganization requires repayment of only 20 percent; and (2) a compulsory reorganization must begin as a bankruptcy (liquidation) proceeding, whereas an ordinary reorganization begins by itself, (3) ordinary reorganization allows the debtor to remain mostly in control, while compulsory reorganization transfers all power to the bankruptcy administrator. See *id.* at 9, 20. In both proceedings, only the debtor may file a petition; creditors may not institute a reorganization. See *id.* at 23. The court must then approve the petition. See *id.* at 22.

Both reorganization procedures simply provide for court approval of a privately-negotiated compromise agreement in which the debtor promises to pay back a certain amount of its debts “within a specified time period.” *Id.* at 19-20. Secured creditors must still be paid in full. See *id.* at 24. Only unsecured creditors have their claims diminished; the minimum amount that must be repaid is either 20 percent for a compulsory reorganization or 40 percent for an ordinary reorganization. See *id.* at 9, 24. These “quotas” must be repaid within two years, although in practice creditors will demand to be paid more quickly, and by installment. *Id.* at 20, 25.

The reorganization plan is to be drafted by the debtor, and must include an inventory of the company, a lists of assets and liabilities, a list of all creditors, and a timetable for repayment of outstanding unsecured debts. See *id.* at 21-22. The plan must then be approved by the unsecured creditors: a majority in number and 3/4 in value must vote for the plan. See *id.* at 26-27. The court must then confirm the plan, making it binding on all unsecured creditors. See *id.* at 27-28.

As mentioned above, in an ordinary reorganization, the debtor retains virtually all control. A reorganization manager is appointed by the court, but his or her duties are mainly supervisory. See *id.* at 30. In a compulsory reorganization, however, the debtor’s management will have already been ousted from control because a compulsory reorganization comes out of an existing bankruptcy procedure. See *id.* In such a case, a bankruptcy manager will have been appointed, and retains control throughout the reorganization. See *id.*

III. Authorization to Borrow Post-Filing?

Post-petition financing is “extremely difficult to obtain.” *Id.* at 69. The laws do not appear to provide authorization. *See id.*

IV. Special Requirements?

n/a

V. Security Interest Required?

n/a

VI. Priority Interest Granted?

No—any action which compromises the position of pre-filing secured creditors is strictly prohibited. *See id.* at 10.



# Azerbaijan

## I. Name of Law—Is It Still Current?

Law On Insolvency and Bankruptcy, dated June 13, 1997, *available at* <http://www.lexinfosys.de/document.asp?id=93>.

## II. Summary of the Corporate Reorganization Scheme

Bankruptcy proceedings may be instituted by the debtor (Arts. 4-5) or by creditors (Arts. 6-7). If the court accepts the bankruptcy petition, the debtor loses control over the business. Art. 17. An automatic stay is also implemented. Art. 18. An administrator is appointed to control the business by either the court or the creditors. Art. 19.

The debtor may at this point apply to the court for sanation—a plan under which “all liabilities of the debtor are fulfilled.” Art. 40. The petition for sanation must contain ‘proof’ that the “solvency of the debtor may be restored based on sanation.” Art. 41(1)(b). The court may hire experts to determine the feasibility of the sanation plan. Art. 41(3). If the court approves the plan of sanation, it then “may announce open tender for participation of interested legal entities. Art. 41(4). If no one (creditors, one presumes) elects to take part in the sanation, then the plan is discarded and the debtor sent to liquidation. *See id.* If the sanation plan is approved, however, the plan is then implemented; the sanation period may not exceed two years and at least 1/3 of the total amount of claims must be repaid within the first year. Art. 41(6). During this time, the automatic stay remains in effect, but does not apply to secured creditors. Art. 41(9)-(10).

## III. Authorization to Borrow Post-Filing?

No specific authorization.

## IV. Special Requirements?

n/a

## V. Security Interest Required?

n/a

## VI. Priority Interest Granted?

No.

# Belarus

## I. Name of Law—Is It Still Current?

Law on Economic Insolvency and Bankruptcy, definitely still current as of February 1999. Downloaded 2/22/03 from [http://www.belarus.net/softinfo/catal\\_la/100011.htm](http://www.belarus.net/softinfo/catal_la/100011.htm).

## II. Summary of the Corporate Reorganization Scheme

A procedure called Economic Insolvency is available when a company is no longer able to meet its obligations, Art. 6, or when its liabilities outweigh its assets, Art. 8. Economic Insolvency is a proceeding intended to “settle relations between the economic subject and its creditors and give the economic subject the right to continue its activities.” Art. 7. Either the company itself or its creditors may institute an Economic Insolvency. Art. 9.

Once the process is begun, the company has “the right to carry on its economic activities.” Art. 11. After filing, the court appoints experts to audit the company and to prepare a report and recommend a reorganization plan. Art. 12. The company may apply to the court to “obtain a loan” **if** the filing was initiated by the company and not its creditors. Art. 14.

Presumably the reorganization plan would then take effect, but nothing in the statute indicates what will give it binding effect: whether court approval or creditor vote is required.

## III. Authorization to Borrow Post-Filing?

Yes.

## IV. Special Requirements

The company must have initiated the Economic Insolvency. Art. 14.

## V. Security Interest Required?

The statute is silent.

## VI. Priority Interest Granted?

No.

# Belgium

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Brazil

## I. Name of Law—Is It Still Current?

Brazilian bankruptcy law is covered by Decree-Law No. 7,661 of June 21, 1945. It is “generally regarded as outdated, unnecessarily rigid and not responsive to the needs of modern businesses.” Malcolm Rowat & Jose Astigarraga, *Latin American Insolvency Systems: A Comparative Assessment*, World Bank Technical Paper No. 433 (Apr. 1999), at 53; *see also* Gordon W. Johnson & Adolfo Rouillon, *Coping With the Latest Crisis: Trends and Experience: Brazil*, part of the Global Forum on Insolvency Risk Management: Standards and Strategies for the Next Decade (World Bank 2003), at 5 (describing the law as “obsolete and too rigid to provide meaningful rehabilitation options for modern business.”). Reform of the law is being considered. *See id.*

## II. Summary of the Corporate Reorganization Scheme

The law provides for a *concordata*, or a rehabilitation and composition scheme between the debtor and creditors. *See* 2-16 Collier International Business Insolvency Guide ¶ 16.04[1]. Only the debtor can petition the court for *concordata* relief. *See id.* To qualify, the debtor must have been in business for at least two years, must have assets in excess of 50% of the value of its debts, and cannot be in certain excluded categories, such as financial institutions, airlines, or insurance companies. *See id.* ¶ 16.04[3][c]. If the court does not approve the *concordata* petition, it is required to immediately begin bankruptcy proceedings against the debtor. *See id.*

During a *concordata* proceeding, the debtor remains in possession and control of the business, with the supervision of a commissioner. *See id.* ¶ 16.04[4][b]. The judge selects the commissioner from among the ranks of the major creditors; in practice, this honor is almost always refused and an outside lawyer is appointed instead. *See* Johnson & Rouillon, *supra*, at 6.

The purpose of a *concordata* is to allow the debtor to repay its unsecured debts on a preset schedule, with the benefit of an automatic stay. *See* Rowat & Astigarraga, *supra*, at 55 (“[C]oncordata is essentially a payment plan, which, among other things, will protect a debtor from creditors seeking [liquidation] relief against the debtor.”) The stay applies only to unsecured creditors. *See id.* at 61. The repayment plan is proposed by the debtor and approved by the court; the creditors have no vote in its composition or approval. *See* Johnson & Rouillon, *supra*, at 5. Their interests are protected by the law, however; the debtor must meet certain minimum repayment levels, which vary according to whether the *concordata* was instituted before or after a liquidation proceeding. *See* 2-16 Collier International Business Insolvency Guide ¶ 16.04[7][g].

While *concordata* proceedings do not apply to secured creditors, the “white concordata” has developed, wherein the debtor threatens to file for liquidation, which does freeze secured claims, if a creditors moves to enforce their claims. *See* Rowat & Astigarraga, *supra*, at 61.

## III. Authorization to Borrow Post-Filing?

The debtor's ability to borrow is not affected by the *concordata*. See 2-16 Collier International Business Insolvency Guide ¶ 16.04[6][c]; see also Johnson & Rouillon, *supra*, at 7 (“There are no special regulations regarding borrowing and obtaining of credit under the Brazilian law for *concordata*.”).

#### IV. Special Requirements?

“In practice, companies in *concordata* have difficulty in obtaining credit.” 2-16 Collier International Business Insolvency Guide ¶ 16.04[6][c].

#### V. Security Interest Required?

Not required, but permitted with the approval of the court. See Johnson & Rouillon, *supra*, at 7; 2-16 Collier International Business Insolvency Guide ¶ 16.04[5]

#### VI. Priority Interest Granted?

No.

# Bulgaria

## I. Name of Law—Is It Still Current?

Law Concerning the Amendment and Amplification of the Commercial Law, passed in 1994, available at [http://www.fifoost.de/bulgarien/recht/en/commerce\\_law/node124.php](http://www.fifoost.de/bulgarien/recht/en/commerce_law/node124.php).

## II. Summary of the Corporate Reorganization Scheme

The law focuses on reorganizing rather than liquidation. *See* Harry Rajak, *Rescue Versus Liquidation in Central and Eastern Europe*, 33 Texas Int'l L.J. 157, 170 (1998). After a bankruptcy filing is approved by the court, an automatic stay goes into effect. Art. 638. The stay does not apply to secured creditors, however. *See id.* A receiver (trustee) will be appointed by bankruptcy court, with the approval of the creditors' committee. Art. 656. The receiver takes control of the debtor's business. Art. 658

A reorganization plan may be submitted by the debtor, the trustee, the creditors, or the employees of the debtor. *See id.* Art. 696 permits a reorganization plan to provide for "the deferment of payments . . . the partial or complete waiver of debts, the reorganisation of the enterprise . . ." *Id.* Art. 700 provides for "the conversion of debt into equity, and the novation of any debt." *Id.* The plan must be approved by the creditors, divided into class. *Id.* at 171. Each class must approve the plan by a simple majority (in value). Art. 703. New loans are allowed, and are granted priority over unsecured claims. *See id.* at 171 n.81 (citing Art. 639); Richard D. Coates & Arlene Elgart Mirsky, *Restructuring and Bankruptcy in Central and Eastern Europe* 6, 16 (Deloitte Touche Tohmatsu Int'l 1995). The bankruptcy law has been described as "excellent." Coates & Mirsky, *supra* at 11.

## III. Authorization to Borrow Post-Filing?

Yes.

## IV. Special Requirements?

Statute is silent.

## V. Security Interest Required?

Permitted by Art. 639(2).

## VI. Priority Interest Granted?

Yes, over unsecured creditors.

# Canada

## I. Name of Law—Is It Still Current?

Canada has two corporate reorganization bankruptcy schemes, one under the Bankruptcy and Insolvency Act (“BIA”) and one under the Companies’ Creditors Arrangement Act (“CCAA”). *See* Barbara K. Morgan, *Should the Sovereign Be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy*, 74 Am. Bankr. L.J. 461, 484-85 (2000). The BIA was enacted in 1992 and amended in 1997; the CCAA was enacted in 1985 and also amended in 1997. *See id.* 484, 485 n.145.

## II. Summary of the Corporate Reorganization Scheme

Reorganization may proceed under either law. *See* 2-17 Collier International Insolvency Business Guide ¶ 17.06[1].

### A. *The BIA*

Under the BIA, a reorganization may begin when the debtor either files a reorganization plan or notice of intention to file a plan. *See id.* ¶ 17.06[2][a]. Upon filing, an automatic stay goes into effect for 30 days; all creditors are affected. *See id.* ¶ 17.06[2][b][i]. The debtor management retains control of the business, but a trustee is appointed by the court to supervise and report on the debtor’s activity. *See id.* ¶ 17.06[2][c][i].

The reorganization plan must be approved by the creditors—by a majority in number and 2/3 in value. *See id.* ¶ 17.06[2][d][i]. Creditors may be divided into classes; if the secured creditors reject the plan, they are not bound by it or the automatic stay. *See id.* ¶ 17.06[2][d][iii]. Unsecured creditors, if they approve the plan, are bound by it and the automatic stay regardless of the secured creditors’ vote. *See id.* ¶ 17.06[2][d][iv]. The court must then approve the plan. *See id.* ¶ 17.06[2][e][i]. The plan is then binding on all the creditors of that class. *See id.* ¶ 17.06[2][e][ii].

### B. *The CCAA*

The CCAA has fewer detailed provisions than the BIA; it provides “only a general framework” in which the court has much greater leeway. It has been called “the most unusual piece of reorganization legislation in the world.” *See id.* ¶ 17.06[3][a]. It is also the “reorganization vehicle of choice” for corporate reorganizations. *See id.*

Either the debtor or its creditors may petition the court for a CCAA reorganization. *See id.* ¶ 17.06[3][c]. The court has discretion whether or not to accept the petition; “[g]enerally” the court will do so “if a reorganization is favorable to the creditors, the debtor is viable as a going concern and can develop an acceptable plan.” *See id.* ¶ 17.06[3][d]. If the plan is accepted, there is no statutory provision for an automatic stay; however, the court again may and will impose a broad stay on its own. *See id.* ¶ 17.06[3][e].

During reorganization, the debtor management retains control of the business, but the court appoints a “monitor,” often an accounting firm, to supervise the debtor’s business and financial situation. *See id.* ¶ 17.06[3][g][i]-[ii]. Creditors must also approve the plan; they are

divided into classes and again vote by a majority in number and 2/3 in value. *See id.* ¶ 17.06[3][h][i]. Only if a creditor class approves the plan is it binding on all the creditors in that class. *See id.* As a practical matter, however, a court may require that all classes of creditors approve the plan for it to give its assent. *See id.* Finally, the court must approve the plan. *See id.* ¶ 17.06[3][h][ii].

### III. Authorization to Borrow Post-Filing?

The BIA provides trustees with the power to borrow money and grant security on the property of the debtor. *See* BIA § 30(1)(g). No special priority is granted to such financing, however. Under the wide discretion granted to courts by the CCAA, they have authorized super-priority lending. *See* The World Bank Insolvency Database Project, *Canada*, at § 1(v), available at [http://www4.worldbank.org/legal/legps\\_bank/insolvency/canada/canadasum.html](http://www4.worldbank.org/legal/legps_bank/insolvency/canada/canadasum.html); Janis Sarra, *Debtor in Possession Financing: The Jurisdiction of Canadian Courts to Grant Super-Priority Financing in CCAA Applications*, 23 Dalhousie L.J. 337, 341-45 (2000).

### IV. Special Requirements?

Under the CCAA regime, courts frequently approve super-priority new financing “where continuing with business operations is necessary to preserve the value of the business and assets of the corporation, preserve customer and supplier goodwill, and retain employees with the experience and expertise to assist in a turnaround.” Sarra, *supra*, at 341. Moreover, “courts have recognized that DIP financing can erode the security of creditors and thus the court should make such orders where there is a reasonable prospect of successfully restructuring.” *Id.* at 358.

### V. Security Interest Required?

The BIA authorizes a security interest to be granted to obtain new funding. *See* BIA § 30(1)(g).

### VI. Priority Interest Granted?

Courts, under common law, have allowed super-priority status under the CCAA only. *See* Sarra, *supra*, at 341-45.



# China

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Czech Republic

## I. Name of Law—Is It Still Current?

The current bankruptcy law has been both heavily amended and heavily criticized. It is due to be completely overhauled in 2003. See 2-19 Collier International Business Insolvency Guide ¶ 19.04[2]; Martin Zika, *Legislation: Bankruptcy Continues to Haunt Courts*, The Prague Tribune, Nov. 2002, available at <http://www.prague-tribune.cz/2002/11/2.htm>.

## II. Summary of the Corporate Reorganization Scheme

The current bankruptcy law has been described as “ineffective,” European Union, *Enlargement: Czech Republic* (Nov. 2001), available at <http://europa.eu.int/scadplus/leg/en/lvb/e40107a.htm>, and “dysfunctional,” with “severe deficiencies.” Gordon W. Johnson, *Report on Observance of Standards & Codes, Insolvency and Creditor Rights Systems: Czech Republic 5* (April 2001), available at [http://www.worldbank.org/ifa/icr\\_cze.pdf](http://www.worldbank.org/ifa/icr_cze.pdf). Use of the reorganization procedure is “virtually non-existent.” See 2-19 Collier International Business Insolvency Guide ¶ 19.06[1]; see also Johnson, *supra*, at 7 (stating that reorganization provision “remains virtually unused”). Moreover, “there is no corporate rescue culture, nor established familiarity with the process of financial restructuring . . . . This leaves liquidation as the only practical option, which is both ineffective and unattractive.” *Id.* ¶19.04; see also International Monetary Fund, *Czech Republic: Article IV Consultation Discussions, Preliminary Conclusions of the Mission* ¶ 17 (May 7, 2002), available at <http://www.imf.org/external/np/ms/2002/050702.htm>.

The reorganization procedure provides for an automatic stay, even as to secured creditors. See Johnson, *supra*, at 5. Secured creditors must automatically give up at least 30% of the value of their claims for the benefit of unsecured creditors. See *id.*

## III. Authorization to Borrow Post-Filing?

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## IV. Special Requirements?

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## V. Security Interest Required?

?

## VI. Priority Interest Granted?

?

# Denmark

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# England and Wales

## I. Name of Law—Is It Still Current?

The Insolvency Act of 1986, as modified by the Enterprise Act 2002, passed Nov. 7, 2002, with the aim of streamlining and encouraging administration proceedings.

## II. Summary of the Corporate Reorganization Scheme

English law provides for administration, discussed here, as well as “company voluntary arrangement” and schemes of arrangement under the Companies Act. These last two essential deal with privately-negotiated agreements between the debtor and its creditors concerning debt rescheduled, reduction, suspension of payments, etc.

The debtor or any of its creditors may file a petition for administration. *See* 2-21 Collier International Business Insolvency Guide ¶ 21.05[3][b][i]. The purpose of the administration must be to “rescu[e] the company as a going concern,” if possible; otherwise to continue the company’s business long enough to maximize assets and ensure better returns for its creditors; or, simply for the administrator to “realise property to make a distribution to one or more secured or preferential creditors.” Desmond Flynn, *Enterprise Act: Administration*, at 3 (Nov. 8, 2002), at <http://www.insolvency.gov.uk/eactadmin.pdf>. The court then rules on the petition for administration: to approve, the court must find that the debtor is insolvent and that administration would either keep the debtor afloat or benefit the creditors. *See* 2-21 Collier International Business Insolvency Guide ¶ 21.05[3][b][ii].

If the petition is approved, the debtor management is ousted from control and the debtor is instead run by “one or more court-appointed ‘administrators.’” *Id.* ¶ 21.05[3][a]. An automatic stay also goes into effect; secured creditors are covered by the moratorium but may become exempt from it with the court’s approval. *See id.* ¶ 21.05[3][c][i]. The administrator is vested with very broad powers to run the debtor’s business. *See id.* ¶ 21.05[3][d][iii] (“An administrator . . . has all of the powers that the debtor’s board of directors had prior to the administration.”); Hamish Anderson, *Practitioner’s Guide to Cross-Border Insolvencies: England*, at ENG-25 (Oceana Publications 2001). The period of administration lasts at a minimum three months and may continue for much longer. *See* 2-21 Collier International Business Insolvency Guide ¶ 21.05[3][b][vi] (noting that administrations last “at least three months” and “may take years”). The administrator is obliged to prepare and present to the creditors his or her proposal for the reorganization and rescue of the company. *See id.* ¶ 21.05[3][d][vi]. The creditors must approve the proposal by a simple majority in value of the unsecured claims. *See id.* ¶ 21.05[3][e].

The Enterprise Act of 2002 tinkered with the administration proceedings and sought to make it “the primary vehicle for corporate rescue.” *Id.* ¶ 21.05[3][h]. The Act does not modify or increase the powers of the administrator, who retains the same powers as under the Insolvency Act of 1986. *See* Flynn, *supra*, at 3.

## III. Authorization to Borrow Post-Filing?

Schedule 1 of the Insolvency Act of 1986 authorizes the administrator “to raise or borrow money and grant security therefore over the property of the company.”

IV. Special Requirements?

No—court or creditor approval is not required. However, an administrator may not grant security over already encumbered property. *See* 2-21 Collier International Business Insolvency Guide ¶ 21.05[3][d][vii].

V. Security Interest Required?

Allowed.

VI. Priority Interest Granted?

No.

# Estonia

## I. Name of Law—Is It Still Current?

Bankruptcy Act, passed June 10, 1992, *available at* <http://www.legaltext.ee/text/en/X1033K6.htm>. Current as modified as of May 2002; a new bankruptcy law was apparently passed on January 22, 2003 which reforms the reorganization provisions. *See* Templeton Thorp, *Parliament Passes New Bankruptcy Law*, <http://www.templetonthorp.com/en/news228>; CEEBICnet, *Estonia: Parliament Passes New Bankruptcy Act*, at <http://www.mac.doc.gov/ceebic/cent/020703.htm>. I am unable to find an English translation of the new law.

## II. Summary of the Corporate Reorganization Scheme

Chapter XIII of the (old) law provides for private compromise arrangements between the debtor and unsecured creditors only. The debtor propose the compromise agreement, the creditors approve it, and the court then rules on it. § 102 (1)-(3). A compromise agreement must either (a) pay at least 1/2 of the unsecured claims, and be approved by 2/3 of unsecured creditors (in both value and number), or (b) pay less than 1/2 of the unsecured claims, and be approved by 3/4 of the unsecured creditors (in both value and number). § 104 (1) – (2). If approved, the agreement is binding on all unsecured creditors. § 104(3).

## III. Authorization to Borrow Post-Filing?

No.

## IV. Special Requirements?

n/a

## V. Security Interest Required?

n/a

## VI. Priority Interest Granted?

n/a

# France

## I. Name of Law—Is It Still Current?

Law 85-98 (the “Bankruptcy Law”), effective Jan. 25, 1985, as amended. *See* Laurent Gaillot, *Practitioner’s Guide to Cross-Border Insolvencies: France*, at FRA-16 (Oceana Publications 2000).

## II. Summary of the Corporate Reorganization Scheme

The proceedings begin with the filing of a bankruptcy petition along with a listing of asset and liabilities, the names and addresses of all creditors, and other financial data. *See* 2-22 Collier International Business Insolvency Guide ¶ 22.05[2][a]. The debtor, a creditor, or the bankruptcy court itself may file a petition. *See id.* Once filed, the “observation period” begins, in which a receiver is appointed to manage the company and undertake a review of the debtor’s financial situation. *See id.* ¶ 22.05[3][a]-[d]. An automatic stay comes into effect for both secured and unsecured creditors. *See* Gaillot, *supra*, at FRA-25. At the end of the observation period, the receiver files a report; if the receiver thinks the debtor can be a viable business, a reorganization plan will be included in this report. *See* 2-22 Collier International Business Insolvency Guide ¶ 22.05[4][a]. The court must then accept or reject the plan. *See id.*

The court may implement a reorganization plan “even if the debtor, the creditors’ representative or the workers’ council objects.” *Id.* ¶ 22.05[4][b]. The length of the reorganization plan may be up to ten years. *See id.* Pursuant to Art. 67, the court appoints an administrator to supervise the debtor and implement the plan. *See id.* ¶ 22.05[4][b][i].

## III. Authorization to Borrow Post-Filing?

Yes. Art. 40.

## IV. Special Requirements?

Post-petition claims “must have arisen under regular conditions and in accordance with the powers of the judicial representatives.” *Id.* ¶ 22.06[7].

## V. Security Interest Required?

Sources are silent.

## VI. Priority Interest Granted?

Yes, if so authorized by the bankruptcy court as “necessary to the continuation of the debtor’s activities.” Gaillot, *supra* at FRA-32.

# Georgia

## I. Name of Law—Is It Still Current?

The Law of Georgia On Bankruptcy Proceedings, effective Jan. 1, 1997, *available at* <http://www.lexinfosys.de/document.asp?id=163>.

## II. Summary of the Corporate Reorganization Scheme

A bankruptcy application may be filed by the debtor or by its creditors. Art. 6(1). The application must be approved by the court. Art. 6(3). After the application is filed, the debtor must provide the court with a listing of all assets and liabilities, including the names of existing creditors and debtors. Art. 7.

If the court approves the petition, an automatic stay comes into place. Art. 13. The court will then appoint a “Bankruptcy Intendant [Attendant?].” Art. 15. The bankruptcy intendant must “accept the bankruptcy mass immediately [sic]” and “manage or dispose it honestly.” Art. 15(2). The bankruptcy intendant must also perform an audit of the debtor’s estate. Art. 15(4).

The debtor or any creditor may propose a plan of sanation, or voluntary arrangement. Art. 23. This reorganization plan must not reduce the claims of secured and privileged creditors below 2/3 of their existing claims. Art. 23(3). A majority of both secured and unsecured creditors must approve the plan; this majority must also represent 2/3 of the value of outstanding claims (for secured creditors) and 3/4 off the value of outstanding claims (for unsecured creditors). Art. 24(2). Approval of the court is also required. Art. 24(3).

## III. Authorization to Borrow Post-Filing?

The translation is execrable, but there does not appear to be any explicit authorization to take on new debts.

## IV. Special Requirements?

n/a

## V. Security Interest Required?

n/a

## VI. Priority Interest Granted?

No.



# Germany

## I. Name of Law—Is It Still Current?

The Insolvency Code (*Insolvenzordnung*, abbreviated InsO) was passed in 1994 and came into force Jan. 1, 1999. Previously there had been “no effective procedure for reorganization under German law.” Barbara K. Morgan, *Should the Sovereign Be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy*, 74 Am. Bankr. L.J. 461, 491 (2000).

## II. Summary of the Corporate Reorganization Scheme

The default proceeding for business insolvency is liquidation, but may be converted to a reorganization upon petition of the debtor or the insolvency trustee. *See* Volker Kammel, *Practitioner’s Guide to Cross-Border Insolvencies: Germany*, GER-21 (Oceana Pubs. 2000). The court first appoints an interim insolvency administrator, who takes control of the business and determines whether or not there are sufficient assets to cover the costs of reorganization. *See id.* If the court determines that there is a basis for reorganization and sufficient assets, it will then appoint a (permanent) insolvency administrator. *See* Morgan, *supra* at 491. The debtor may ask the court to remain as debtor in possession. *See id.* An automatic stay comes also comes into effect for three months, applicable to both secured and unsecured creditors. *See id.*

The insolvency administrator then has three months in which to prepare a plan to reorganize the debtor. *See id.* The debtor may also propose its own plan. *See* Kammel, *supra* at GER-45. The plan must then be approved by the insolvency court, by the creditors’ meeting (creditors are grouped by category, and each group must approve the plan by a majority both in number and in value), and not objected to by the debtor. *See id.* at GER 46-47.

## III. Authorization to Borrow Post-Filing?

The InsO provides for “Creditors of the Estate,” i.e., creditors whose claims arose after the beginning of insolvency proceedings and are therefore held against the bankruptcy estate. *See id.* at GER-35. Section 55(1) refers to loans incurred by the insolvency administrator in carrying out the insolvency plan.

## IV. Special Requirements?

Section 264 places a ceiling on any new financing; it may not exceed the value of the debtor’s unencumbered assets at the time of filing.

## V. Security Interest Required?

Permitted, with the approval of the creditors’ committee. Section 160(2)(2); *see also* 2-23 Collier International Business Insolvency Guide ¶ 23.06[2]. Banks will rarely lend to insolvent businesses without such security guarantees, *see* Kammel, *supra* at GER-42.

## VI. Priority Interest Granted?

Priority is granted over general unsecured creditors, but new financing ranks below secured claims. *See id.* at GER-35.

# Hong Kong

## I. Name of Law—Is It Still Current?

The Companies Ordinance § 166 provides for court sanction of privately-negotiated schemes of arrangement. *See* 2-23A Collier International Business Insolvency Guide ¶ 23A.04[2][b]. There is otherwise no statutory provision for corporate reorganization. *See id.*; Charles D. Booth, *Hong Kong Corporate Rescue Proposals: Making Secured Creditors More Secure*, 28 Hong Kong L.J. 44, 44 (1998).

## II. Summary of the Corporate Reorganization Scheme

No statutory reorganization; however, § 166 of the Companies Ordinance permits a court to make a scheme of arrangement that has been approved by some creditors (75% in value and 50% in number, *see* Insolvency Guide ¶ 23A.10[2]) binding on all. Section 166 is ineffective and rarely used; one source says it has been successfully invoked only once. *See* Booth, at 47-48.

Out-of-court workouts are therefore the norm. *See generally* Mary Cheah et al., *Corporate Restructuring in Hong Kong*, in *The AsiaLaw Guide to Corporate Restructuring*, at 23 (AsiaLaw 1998). It is common for companies to request new loans from their creditors in such a workout. *See id.* at 24. Banks who agree to lend will demand “super priority” over existing creditors, including secured creditors. *Id.*

## III. Authorization to Borrow Post-Filing?

N/A; see above for ordinary private practice.

## IV. Special Requirements?

N/A; see above for ordinary private practice.

## V. Security Interest Required?

N/A; see above for ordinary private practice.

## VI. Priority Interest Granted?

N/A; see above for ordinary private practice.

## Note: Proposed New Insolvency Law

New legislation enabling final corporate restructuring proceedings has long been proposed. *See* Booth, at 48. The Companies (Corporate Rescue) Bill was introduced in 2001. *See* Allens

Arthur Robinson, *Hong Kong: Controversial New Law for Troubled Companies—July 2001*, at <http://www.aar.com.au/pubs/asia/hk2jul01.htm>. The bill would provide for an automatic stay period, supervision by a trustee, acceptance of a formal reorganization plan, and administrative priority for post-petition finance. *See id.* The new bill is “controversial,” *id.*, and as of this writing has not been enacted.

# Hungary

## I. Name of Law—Is It Still Current?

Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings, and Members' Voluntary Dissolution, effective Jan. 1, 1992, *available at* <http://www.abiworld.org/international/hubankact.pdf>. The law is current, as amended, as of Jan. 1, 2003. A new bankruptcy law is planned, however, following accession to the European Union. *See* 2-24 Collier International Business Insolvency Guide ¶ 24.01[3].

## II. Summary of the Corporate Reorganization Scheme

Only the debtor may file for reorganizations. *See id.* ¶ 24.05[1]. The petition for reorganization must be accompanied by a listing of the debtor's total liabilities and assets, and a list of its creditors, and affirming that it has not filed for bankruptcy within the past two years. *See id.* The debtor must obtain the approval of its creditors (half of the creditors holding overdue claims and 1/4 of the creditors with up-to-date claims, for a total of 2/3 of all creditors) to petition the court for an automatic stay. *See id.* ¶ 24.05[2]. The court will then grant or deny (only if the petition was inadequate or not approved) the stay, which will last 90 days. *See id.* ¶ 24.05[3]. The court may, on motion, extend the automatic stay period by not more than 60 days. *See id.*

After the moratorium begins, the court will appoint a trustee in bankruptcy. *See id.* ¶ 24.05[4]. The trustee does not wrest control from management, but "has a coordinating and controlling role beside the management in order to protect creditors' interests." *See id.* During this time, the debtor must draft a reorganization plan to restore solvency. *See id.* ¶ 24.05[5]. The plan must then be approved by the creditors (same formulation as above) and the trustee. *See id.*

## III. Authorization to Borrow Post-Filing?

The only provision in the law relating to post-petition financing is Section 14(3)(c), which authorizes the trustee to "approve . . . any financial commitment of the debtor after the starting date of the bankruptcy proceedings if it is for an amount in excess of the limit fixed by the creditors in the moratorium agreement."

## IV. Special Requirements?

Statute is silent.

## V. Security Interest Required?

Statute is silent.

## VI. Priority Interest Granted?

No.

# India

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Indonesia

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Ireland

## I. Name of Law—Is It Still Current?

The Companies (Amendment) Act 1990. Portions of it are controversial, *see infra*, and “fundamental changes” have been proposed. *See* William Day & Arthur Cox, *Practitioner’s Guide to Cross-Border Insolvencies: Ireland*, at IRL-39 (Oceana Publications 2000); Eugene F. Collins, Solicitors, *An Introduction to Insolvency Law in Ireland*, at [http://www.legal500.com/devs/ireland/in/irin\\_001.htm](http://www.legal500.com/devs/ireland/in/irin_001.htm). Reform, however, has been promised, and expected, ever since the law became effective. *See* Thomas B. Courtney, *The Law of Private Companies* 659-60 (Butterworths 1994). As of 2001, the law remained unmolested.

## II. Summary of the Corporate Reorganization Scheme

Insolvent companies may file for protection from their creditors under the 1990 Act “to provide a freezing of Creditor’s rights.” *Practitioner’s Guide*, at IRL-35. An “examiner” may be appointed by the court, to audit the company and prepare a report on its viability. *Id.* If the examiner believes the company has a future, he is then required to formulate a reorganization plan, to be approved by the company, its creditors, and the court. *See id.*; *An Introduction to Insolvency Law, supra*. Creditor approval requires a majority both in number and in value. *See* Michael Forde, *The Law of Company Insolvency* 110 (Round Hall Press 1993).

The Irish law “follows the ‘debtor in possession’ concept found in the US chapter 11 procedure.” *Practitioner’s Guide*, at IRL-37. The directors of the insolvent company therefore remain in charge and the examiner serves only a reporting role. *See id.* If, however, the directors are running the company “in a manner prejudicial to the interests of the creditors” or harmful to the company’s long-term prospects, the examiner may petition the court to be placed in control of the company. *Id.* The examiner then commands a “wide range” of power, including the power to borrow. Courtney, at 679; *see also Practitioner’s Guide*, at IRL-37; Forde, at 99-100; Henry Ellis, *Modern Irish Company Law* 559 (Jordans Press 2001).

## III. Authorization to Borrow Post-Filing?

Yes.

## IV. Special Requirements?

Approval by the court is required. *See* Courtney, at 679.

## V. Security Interest Required?

A security interest may be granted for post-petition financing. *See id.*

## VI. Priority Interest Granted?



Yes. *See id.*; *Practitioner's Guide*, at IRL-37; Ellis, at 564. This provision is controversial and has been the target of proposed reform. *See Practitioner's Guide*, at IRL-39.

# Israel

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Italy

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Jordan

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Kazakhstan

## I. Name of Law—Is It Still Current?

The Law of the Republic of Kazakhstan on Bankruptcy, effective Jan. 21, 1997, *available at* <http://www.lexinfosys.de/document.asp?id=2331>.

## II. Summary of the Corporate Reorganization Scheme

Corporate reorganization is a two-step process in Kazakh law. After a petition is filed by the debtor (Art. 17-19), or by a creditor (Art. 22-24), the court may approve or reject it (Art. 28). If approved, bankruptcy proceedings begin, and an automatic stay goes into effect. Art. 29. “External management” then begins; the debtor is ousted from control and an administrator is appointed by the court to manage the debtor’s affairs. Art. 32. Two-thirds (in value) of the creditors must approve the administrator. Art. 32(5). The administrator then audits the company and prepares a report assessing its future prospects and determining whether a reorganization plan is called for. Art. 33. To begin the next phase (implementation of the reorganization plan), the debtor or a creditor must petition the court to accept the administrator’s recommendation. Arts. 35, 43.

The rehabilitation plan must be approved by the debtor, a majority in value of the secured creditors, and a majority in value of unsecured creditors. Art. 43. The plan must contain a description of the rehabilitation measures to be taken to rescue the company. Art. 44. The court will then replace the administrator with a rehabilitation manager, who runs the business according to the plan and has wide-ranging powers. Art. 46. The statute contemplates the use of “sanation,” which appears to be the obtaining of new financing from creditors to implement the rehabilitation scheme. *See* Art. 2 (defining sanation as “a rehabilitation measure under which . . . creditors or other persons render financial assistance to the debtor”); Art. 55. Sanation must be included in an approved rehabilitation plan. Art. 55(1).

The period of rehabilitation may not exceed two years, but may be extended by another six months with the court’s approval. Art. 50.

## III. Authorization to Borrow Post-Filing?

Sanation is provided for by Art. 55.

## IV. Special Requirements?

Sanation must have been included in the rehabilitation plan approved by the creditors.

## V. Security Interest Required?

The statute is silent.

## VI. Priority Interest Granted?

No.

# Korea

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Kyrgyzstan

## I. Name of Law—Is It Still Current?

Law On Bankruptcy of the Kyrgyz Republic, adopted Sept. 22, 1997. Current as far as I can tell.

## II. Summary of the Corporate Reorganization Scheme

“Rehabilitation” is a process whereby a plan of corporate restructuring is agreed upon by the debtor and a committee of creditors. Art. 98. After the plan is approved, the creditors appoint an “external manager” to oversee the affairs of the company. Art. 98(c). Creditors holding 60 percent of the company’s debt must approve the plan. Art. 102.

The external manager shall run the company to ensure that the rehabilitation plan is properly carried out. Art. 103. The external manager has the right “to carry out any lawful acts with the assets of the debtor” in order to carry out the plan. Art. 66. The rehabilitation plan may change the priority of creditors’ claims, but must not “infringe the rights of secured creditors . . . unless otherwise established by agreement of the parties.” Art. 104.

## III. Authorization to Borrow Post-Filing?

No specific provision, but it clearly doesn’t forbid it.

## IV. Special Requirements

No provisions, but any rehabilitation plan must be approved by creditors holding 60 percent of outstanding debts. Art. 102.

## V. Security Interest Required?

Statute is silent.

## VI. Priority Interest Granted?

Statute is silent, and is unclear whether this may be done by private agreement.

# Latvia

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?



# Lithuania

## I. Name of Law—Is It Still Current?

The Law on Restructuring of Enterprises, No. IX-218, effective July 1, 2001.

## II. Summary of the Corporate Reorganization Scheme

Either the debtor or its creditors may file a petition to begin the reorganization process. *See Zygyntas Macenas & Giedrius Stasevicius, The European Restructuring and Insolvency Guide 2002-2003: Lithuania* 437 (PricewaterhouseCoopers 2002). If the court determines that the debtor is insolvent, or if the debtor “announces to its creditors that it is not able to meet its obligations,” then it will approve restructuring proceedings. *Id.* at 438. The court will then appoint an administrator to oversee the debtor while the restructuring plan is being drafted. Art. 17(2). The administrator takes over the functions of management; the directors retain their positions. *See Macenas & Stasevicius, supra*, at 442.

The CEO has the responsibility of preparing the restructuring plan. *See id.* at 443. The restructuring plan must contain detailed provisions for the company’s return to solvency. Art. 13. The restructuring period may not last more than four years. *See id.* The creditors must approve the plan by at least three-fourths in value of all claims. Art. 15(4). The administrator may also stay in office during this time, if the creditor’s committee so resolves. Art. 17(2).

## III. Authorization to Borrow Post-Filing?

There are “no legal obstacles.” Macenas & Stasevicius, *supra*, at 444. Art. 13, which lays out the requirements for the restructuring plan, contemplates “sources of financing.”

## IV. Special Requirements?

Statute is silent.

## V. Security Interest Required?

Permitted; the administrator “can borrow and create security for new money.” Macenas & Stasevicius, *supra*, at 444.

## VI. Priority Interest Granted?

No.

# Macedonia

## I. Name of Law—Is It Still Current?

The Bankruptcy Law is available in English translation at [http://www.mpa.org.mk/laws\\_pdf/bankrupt.pdf](http://www.mpa.org.mk/laws_pdf/bankrupt.pdf). The law is current, but the date it was passed is unclear—around 1998-2000.

## II. Summary of the Corporate Reorganization Scheme

The law is remarkably detailed and advanced. Bankruptcy proceedings may be initiated either by the debtor or one of its creditors. Art. 4. The process is overseen by a Bankruptcy Judge, who in turn is supervised by a Bankruptcy Council, a group of three judges. Arts. 16-18. Once the bankruptcy petition is filed, the Bankruptcy Council will open a “preliminary proceeding,” during which it decides, on the basis of the fiscal state of the debtor, whether or not a full-blown “bankruptcy proceeding” should occur. Art. 49. As part of the preliminary proceeding, the Bankruptcy Council may appoint a temporary Bankruptcy Trustee to run the debtor’s business and institute an automatic stay. Art. 51. Either the bankruptcy judge or the temporary trustee must prepare a report on the financial state of the company and submit it to the Bankruptcy Council. Arts. 50, 52.

The Council must then consider the report from the preliminary proceeding, as well as appoint an expert to conduct an independent investigation of the debtor. Art. 60. If the Council decides that a full bankruptcy proceeding is warranted, then it will appoint a permanent Bankruptcy Trustee, to run the debtor’s business in place of the debtor. Art. 61. The creditors then form both a Board of Creditors (to supervise and assist the trustee, Art. 35) and an Assembly of Creditors (which has all the powers of the Board of Creditors and votes on matters requiring the debtors’ approval, Art. 40-45). The Bankruptcy Estate also comes into being; it consists of “the complete property of the debtor at the day of the opening of the bankruptcy Proceeding, as well as the property that he shall gain in the course of the Bankruptcy Proceeding.” Art. 68. An automatic stay goes into effect against unsecured creditors; secured creditors with a claim over some property of the bankruptcy estate may still execute their claims against the debtor. Arts. 91, 98-99.

The Bankruptcy Trustee, after being installed, must prepare a report on the “debtor’s economic and financial situation and the reasons for such situation.” Art. 167. He or she also must assess the debtor’s prospects and the likelihood of a bankruptcy reorganization plan succeeding. *Id.* The Assembly of Creditors then votes on whether the debtor should be reorganized or liquidated. Art. 168. If reorganization is approved, then either the debtor or the trustee may submit a “bankruptcy plan” to the Bankruptcy Council. Art. 229. Unless specifically provided, secured creditors will not be covered by the plan. Art. 234. The plan must be approved by the Board of Creditors, labor representatives, the Ministers of Economy and Finance, the debtor, the trustee, and finally the Bankruptcy Council itself. Arts. 243, 259. Each group of creditors will vote separately on the plan, which must be approved by each group (by a majority in number and in value).

The bankruptcy plan may include post-petition financing, with some restrictions. The plan may grant a security interest to new lenders over some property of the bankruptcy estate, but approval of the Board of Creditors is required. Art. 171. New lending may also gain “middle priority,” that is, priority over unsecured claims but still under secured claims. Art. 275. The amount of new financing must not exceed “the value of the objects and rights in possession of the debtor stated in the inventory of the debtor’s property that is an integral part of the bankruptcy plan.” *Id.*

### III. Authorization to Borrow Post-Filing?

Yes, but not more than the value of the debtor’s (unencumbered?) property.

### IV. Special Requirements?

If new lending is to be secured, the approval of the Board of Creditors is required.

### V. Security Interest Required?

No, but permitted.

### VI. Priority Interest Granted?

Only over unsecured claims; secured creditors are unaffected by the bankruptcy proceeding in any way.

# Malaysia

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Mauritius

## I. Name of Law—Is It Still Current?

The Companies Act 2001, effective June 6, 2001, amended the Companies Act 1984 to allow for court approval of privately-negotiated compromises between creditors and debtors. The Act is available at <http://ncb.intnet.mu/medrc/compdiv/download/compact.pdf>. A new insolvency act may soon be drafted. *See* Welcoming Remarks by Hon. Sushil K C Khushiram, at the Dissemination Seminar on the Report on the Observance of Standards and Codes on Corporate Governance, Oct. 16, 2002, at [http://http://economicdevelopment.gov.mu/spgov.htm](http://economicdevelopment.gov.mu/spgov.htm).

## II. Summary of the Corporate Reorganization Scheme

A “compromise” may be proposed by the debtor, a receiver, a liquidator, or, “with the leave of the Court, any creditor or shareholder of the company,” if the company has become insolvent. Section 254. The proposed compromise shall list the names of and amounts owed to each creditor, and the terms and likely consequences of the proposed compromise. Section 255. The compromise plan must then be approved at a creditors’ meeting. Section 256. No provision is made for the number of creditors required for approval. If approved, the court shall order the compromise plan binding on all creditors. Section 262. The court also, on application of the company, may institute an automatic stay; the stay does not apply to secured creditors, however. Section 258.

## III. Authorization to Borrow Post-Filing?

No.

## IV. Special Requirements?

n/a

## V. Security Interest Required?

n/a

## VI. Priority Interest Granted?

No.

# Mexico

## I. Name of Law—Is It Still Current?

The LCM (“*Ley de Concursos Mercantiles*”) governs all corporate reorganizations and liquidations. It came into force May 13, 2000.

## II. Summary of the Corporate Reorganization Scheme

The law provides for a reorganization proceeding, known as a *conciliacion*. See 3-32 Collier International Business Insolvency Guide ¶ 32.01[4]. Either the debtor, one of his creditors, or the Public Ministry may file a petition for insolvency, with accompanying documentation. Arts. 20-21. If the petition has been properly filed, the judge must then approve it. Art. 24. The judge then appoints an inspector to audit the debtor’s financial situation and report to the court any “preventive measures he deems necessary to protect the estate.” Arts. 29-37. The judge will then order any precautionary measures—such as suspension of payments, stay of all enforcement proceedings, and prohibiting the sale or encumbrance of assets—he or she deems necessary. Art. 37. The judge then considers the inspector’s report and, if appropriate, formally declares the debtor insolvent. Arts. 42-44. This creates an automatic stay, Art. 43(9), and a “conciliator” is appointed, Art. 43(4).

The debtor normally remains in control of the business, with the conciliator overseeing “the accounting and all operations.” Arts. 74-75. The conciliator may petition the court, however, to have the debtor removed and have the conciliator appointed in its stead. Arts. 81-82. Representatives of the creditors—receivers—also are appointed by the court to oversee the debtor. Arts. 63-64. The conciliator, through consultations with the creditors and the debtor, will formulate a reorganization plan. Arts. 148-53. The plan must then be approved by a majority in value of the unsecured creditors and the secured creditors that agree to be bound by the plan. Art. 157. Finally, the court must approve the plan. Art. 164. If the plan is approved, it binds all unsecured creditors; secured creditors who did not agree to the plan, however, are not bound. See 3-32 Collier International Business Insolvency Guide ¶ 32.05[5][b]; Art. 165.

## III. Authorization to Borrow Post-Filing?

Yes, the conciliator is authorized to approve “new obligations” under Art. 75

## IV. Special Requirements?

The conciliator must “consider[] the opinion of the receivers.” Art. 75.

## V. Security Interest Required?

Statute is silent.

## VI. Priority Interest Granted?

Unclear. Art. 224(2) provides that the first claims to be paid include “[c]redits contracted by the [debtor] for the management of the estate, which credits were approved by the conciliator or the trustee.” This seems more in the nature of financing necessary for the conciliatory to do his job; i.e., simple administrative costs.

# Mongolia

## I. Name of Law—Is It Still Current?

“Bankruptcy Law of the Mongolian People’s Republic,” effective July 1, 1991, *available at* <http://www.lexinfosys.de/document.asp?id=416>.

## II. Summary of the Corporate Reorganization Scheme

The law contains no corporate restructuring provision.

## III. Authorization to Borrow Post-Filing?

n/a

## IV. Special Requirements?

n/a

## V. Security Interest Required?

n/a

## VI. Priority Interest Granted?

n/a



# The Netherlands

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# New Zealand

## I. Name of Law—Is It Still Current?

Corporate reorganizations are controlled by the Companies Act 1993. The law has been amended many times, most recently in 2001. The text of the statute may be found at [http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes).

Another form of bankruptcy is “statutory management,” which applies to banks and investment companies. *See* 3-34 Collier International Business Insolvency Guide ¶ 34.01[2]. Statutory management is a controversial and “draconian remedy” that has been invoked only once since its passage. *See id.* § 34.07[2]-[3].

## II. Summary of the Corporate Reorganization Scheme

The Companies Act 1993 essentially provides only for court approval of private compromise agreements between the debtor and its creditors. No automatic stay is imposed and no trustee or “independent administrator” is appointed by the court. *See id.* ¶ 34.05[2]-[3].

A “compromise” with creditors may cancel “all or part of a debt of the company” or “[v]ary[] the rights of its creditors or the terms of its debt.” Companies Act § 227(a)-(b). A compromise may be proposed by the company, a receiver, a liquidator, or (with court approval) any creditor or company shareholder. *See id.* § 228. Whoever proposes a compromise must also compile the usual list of creditors and debts and liabilities of the debtor, and include a statement containing the terms of the proposed compromise. *See id.* § 229.

The compromise must be approved at a meeting of the creditors. *See id.* § 230. The required approval is a majority in number and 3/4 in value. *See id.* Schedule 5(5)(2). Once approved, the agreement is binding on all creditors; the approval of the court is not necessary, though judicial appeal may be had. *See id.* § 230; Insolvency Guide, *supra*, ¶ 34.05[5].

## III. Authorization to Borrow Post-Filing?

No specific provision.

## IV. Special Requirements?

n/a

## V. Security Interest Required?

n/a

## VI. Priority Interest Granted?

No.

# Nigeria

## I. Name of Law—Is It Still Current?

Part XVI of the Companies and Allied Matters Act of 1990.

## II. Summary of the Corporate Reorganization Scheme

Nigerian law provides only for court sanction of a privately-negotiated compromise or scheme of arrangement between a debtor and its creditors. *See* 3-35 Collier International Business Insolvency Guide ¶ 35.05[1]. Any such reorganization plan must be initially cleared by the court, approved by the creditors and the shareholders, and then given binding effect on all creditors by the court. *See id.* The plan must be approved by 75% of shareholders and 75% in value of the creditors. *See id.* ¶ 35.05[2][a].

## III. Authorization to Borrow Post-Filing?

Statute contains no provisions.

## IV. Special Requirements?

n/a

## V. Security Interest Required?

n/a

## VII. Priority Interest Granted?

No.

# Norway

## I. Name of Law—Is It Still Current?

Bankruptcy is governed by two laws, the Debt Reorganization and Bankruptcy Act and the Act on Creditors' Access to Assets, both passed in 1984. *See* Marius Moursund Gisvold, *Insolvency Regulations in Norway*, The Norwegian Advisory Council on Bankruptcy, at <http://www.konkursradet.no/kr-gisvold.html>.

## II. Summary of the Corporate Reorganization Scheme

Debt reorganization proceedings (“DRP”) may only be initiated by the debtor. *See id.* The DRP consists of three stages: first, the court appoints a Supervisory Committee, composed of a lawyer, creditor representatives, and an employee representative, to assess the feasibility of the debtor’s business and reorganization proposal. Second, the debtor negotiates with his creditors in an attempt to achieve a voluntary settlement of claims. Third, the debtor negotiates with his creditors for a “compulsory composition,” or non-unanimous settlement of claims. The second phase may be skipped if the court finds it unlikely to succeed. *See id.* During the second and/or third stages, the debtor is run by a Composition Committee, usually composed of the same members as the Supervisory Committee. *See id.* An automatic stay also goes into effect, but does not apply to creditors secured by a lien. *See* Thomas Keiserud, *The Position of Monetary Claims in Bankruptcy*, The Norwegian Advisory Council on Bankruptcy, at [http://www.konkursradet.no/eng/intro/monetary\\_claims/index.html](http://www.konkursradet.no/eng/intro/monetary_claims/index.html).

For a compulsory composition to be upheld by the court, at least 25 percent of claims must be paid to all creditors. *See* Gisvold, *supra*. If the composition plan offers creditors more than 50 cents on the dollar, it must be approved by 60 percent of the creditors (in number and by value of unsecured claims); if it offers creditors between 25 and 50 cents on the dollar, 75 percent approval is needed. *See id.*

## III. Authorization to Borrow Post-Filing?

The debtor is permitted to “undertake or renew debt” during the reorganization proceedings, but only with the permission of the Composition Committee. *See id.*

## IV. Special Requirements?

Permission of the Composition Committee is necessary. *See id.*

## V. Security Interest Required?

Sources are silent.

## VI. Priority Interest Granted?

No. See Halvard Leirvik, *Introduction to Bankruptcy*, The Norwegian Advisory Council on Bankruptcy, at <http://www.konkursradet.no/eng/intro/bankruptcy>

# Philippines

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Poland

## I. Name of Law—Is It Still Current?

There are two applicable laws, the Bankruptcy Law of 1934, and the Composition Law of 1934. *See* 3-37 Collier International Business Insolvency Guide ¶ 37.01[1]. Despite their age, the laws constitute a “sophisticated and comprehensive bankruptcy code” that does not, however, “go in for much in the way of rescue provision.” Harry Rajak, *Rescue Versus Liquidation in Central and Eastern Europe*, 33 *Tex. Int’l L.J.* 157, 165 (1998).

## II. Summary of the Corporate Reorganization Scheme

The Polish laws only encompass “compositions,” or a settlement with creditors to reduce or delay payments. There are two separate ways to achieve a composition, one under each law.

### A. The Bankruptcy Law

Under the bankruptcy law, a composition may be sought after liquidation (“bankruptcy”) proceedings have commenced. *See* 3-37 Collier International Business Insolvency Guide ¶ 37.06[1]. Only the debtor may file a petition for composition, and to do so, it must have enough assets to fully cover the secured claims against it. *See id.* A composition plan may not apply to secured creditors, and all unsecured creditors must be treated equally under the plan. *See id.*

As to the composition plan itself, “any arrangement [with creditors] which meets the statutory conditions is theoretically permissible.” *Id.* The plan must be approved by a creditor’s meeting; all creditors vote in one group. *See id.* ¶ 37.06[2]. Approval requires a majority of the creditors in number, holding 2/3 of the claims. *See id.* Court approval is then required; the court will reject the composition if it was obtained illegally or if the terms are “not consistent with good customs or with public order.” *Id.* ¶ 37.06[3]. If approved by the court, the composition then becomes binding on all relevant creditors.

### B. The Composition Law

A composition under this law can only be sought if bankruptcy proceedings have not already begun. *See id.* ¶ 37.07[1][d]. Only the debtor may file a composition petition with the court. *See id.* ¶ 37.07[2][a]. The debtor may also apply to the court for a preliminary injunction against all creditors (except those with an *in rem* security interest) while the composition plan is negotiated. *See id.* ¶ 37.07[2][c]. The court then decides whether to accept the composition petition. *See id.* ¶ 37.07[2][e].

The court will then appoint a “court supervisor” to oversee the debtor. *See id.* ¶ 37.07[3][a]. While the debtor remains in possession of the business and in charge of day-to-day management duties, any act of the debtor outside the scope of those duties must be approved by the court supervisor. *See id.* The court may also order the supervisor to take over the management of the business, in exceptional circumstances. *See id.* ¶ 37.07[3][d]. After the supervisor has been appointed, an automatic stay comes into effect against all creditors except

those with *in rem* security interests such as mortgages, liens, etc. *See id.* ¶ 37.07[4][b]. Nor are these creditors affected by the composition plan. *See id.* ¶ 37.07[6][b].

The composition plan must then be approved by a creditors' meeting; a majority in number and 2/3 in value is necessary. *See id.* ¶ 37.07[7]. If the composition plan reduces the debtor's obligations by more than 40%, a 4/5 in value approval is required. *See id.* The plan must then be approved by the court, which may refuse to do so if the plan was illegally arrived at or is contrary to public policy; the court also has discretion to reject the plan if it feels that the creditors have been treated unfairly. *See id.* ¶ 37.07[8]. If approved, the plan is then binding on all relevant creditors.

### III. Authorization to Borrow Post-Filing?

Under the Composition Law, the debtor may take new loans but these ordinarily require the approval of the court supervisor. *See id.* ¶ 37.07[4][g]. Smaller loans made in the ordinary course of business may not require such approval. *See id.*

### IV. Special Requirements?

Approval of the court supervisor is ordinarily required.

### V. Security Interest Required?

Permitted in proceedings under the Composition Law. *See id.* ¶ 37.07[4][g].

### VI. Priority Interest Granted?

No.



# Portugal

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

## Qatar

No bankruptcy law.

# Romania

## I. Name of Law—Is It Still Current?

Law 64 of 1995, “Reorganization and Judicial Liquidation,” *available at* [http://www4.worldbank.org/legal/legps\\_bank/insolvency/Romania/RomaniaLawE1.html](http://www4.worldbank.org/legal/legps_bank/insolvency/Romania/RomaniaLawE1.html).

## II. Summary of the Corporate Reorganization Scheme

The debtor or a secured creditor with an overdue payment may file for bankruptcy. Art. 20, 24. The debtor must file a list of outstanding assets and liabilities and the names and addresses of its creditors and debtors. Art. 21. The court will then issue its decision on the petition. Art. 27. If accepted, an automatic stay goes into effect. Art. 31.

Within the next 60 days, the debtor, 1/3 of the secured creditors, or 1/3 of the unsecured creditors may propose a reorganization plan. Art. 55. The plan must describe the current financial state of the debtor and assess the probability that the company may again become solvent. Art. 56. The plan is then submitted to the creditors for a vote. Art. 62. The plan must be approved by at least two classes of creditors, by majority in value vote for each. Art. 63-64. Moreover, the plan must treat classes of creditors that rejected it with “fair and equitable treatment.” Art. 64. After approval, the debtor then implements the reorganization plan under court supervision. Art. 66.

## III. Authorization to Borrow Post-Filing?

“The concept of post-filing credit and financing are not addressed in the Romanian law.” *See World Bank Insolvency Database Project, Summary of Major Aspects of the Romania Insolvency System § 4, at* [http://www4.worldbank.org/legal/legps\\_bank/insolvency/Romania/RomaniaSum.html](http://www4.worldbank.org/legal/legps_bank/insolvency/Romania/RomaniaSum.html).

## IV. Special Requirements?

n/a

## V. Security Interest Required?

Security interests after filing may not be granted. Art. 34.

## VI. Priority Interest Granted?

No.

# Russia

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Saudi Arabia

## I. Name of Law—Is It Still Current?

First corporate reorganization law passed in 1996. *See Saudi Arabia Passes New Bankruptcy Law*, Middle East Executive Reports, at <http://members.aol.com/execrep/meersm.html>.

## II. Summary of the Corporate Reorganization Scheme

The law provides for court approval of privately-negotiated reorganization plans. A majority of creditors owning two-thirds of the outstanding claims must approve the plan. A trustee is then appointed to “supervise the bankrupt firm.” The article also says that “certain transactions” need the approval of the court; this may include new borrowing. The law provides for “debts to be paid off in installments, postponement of due dates for payments, and debt write-offs.”

## III. Authorization to Borrow Post-Filing?

Unclear from source.

## IV. Special Requirements?

Perhaps court approval is required; but it’s unclear from the source whether borrowing is even authorized.

## V. Security Interest Required?

n/a

## VI. Priority Interest Granted?

n/a

## Note:

This is the *only* source I was able to find for Saudi Arabian bankruptcy law.

# Scotland

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Serbia

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Singapore

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?



# Slovakia

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Slovenia

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# South Africa

## I. Name of Law—Is It Still Current?

Chapter XV of the Companies Act of 1973 covers Judicial Management. The law is still current, but will undergo far-reaching review in 2003. *See* Dave Marrs, *A Modern Companies Act Is Much Needed*, Business Day (Johannesburg), Jan. 28, 2003, *available at* <http://allafrica.com/stories/200301280125.html>.

## II. Summary of the Corporate Reorganization Scheme

After the initiation of winding-up proceedings, a company may file an application for “judicial management.” *See* Mary Jo Newborn Wiggins, *Rethinking the Structure of Insolvency Law in South Africa*, 17 N.Y.L. Sch. J. Int’l & Comp. L. 509, 512 (1997); Art. 427 of the Companies Act. The court may issue a judicial management order only if 1) the company is unable to pay its debts or is probably unable to meet its obligations,” 2) is not successful as a going concern, and 3) “there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern.” Art. 427.

If the court approves judicial management, the company’s “[c]urrent management is divested of formal control over the restructuring,” Wiggins, *supra*, at 512, and the court appoints a judicial manager, Art. 428; 430(a). The creditors need not approve the application, *see* Alastair Smith & Andre Boraine, *Crossing Borders into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law*, 10 Am. Bankr. Inst. L. Rev. 135, 156 (2002).

After the judicial manager is appointed, he must prepare a report on the company’s finances and future prospects. *See* Smith & Boraine, *supra*, at 156; Art. 430(c). The court then considers the report, along with the creditors’ wishes, Art. 432(2)(a), and decides whether to “grant a final management order,” according to whether the company has a chance of becoming a successful concern and whether judicial management would be “just and equitable.” Art. 432(2)(e). If the order is granted, the judicial manager takes control of the company. *See* Smith & Boraine, *supra*, at 156.

## III. Authorization to Borrow Post-Filing?

The judicial manager is empowered to run the company “in such manner as he may deem most economic and most promotive of the interests of the members and creditors of the company,” Art. 433(b), and “to raise money in any way ... which the court may consider necessary.” Art. 432(3)(c). Art. 435 additionally refers to “liabilities incurred or to be incurred by the judicial manager.”

## IV. Special Requirements?

The borrowing must be authorized by the court's judicial management order. Art. 432(3)(c).

V. Security Interest Required?

Statute is silent.

VI. Priority Interest Granted?

Priority may be granted to "liabilities incurred ... by the judicial manager," if the pre-filing creditors, at a creditors meeting convened by the judicial manager, consent. Art. 435(1)(a). This provision was added in 1980.

# Spain

## I. Name of Law—Is It Still Current?

The Law on Suspension of Payments, July 16, 1922. A new Spanish bankruptcy law was drafted in 2001, which will include Chapter 11-type concepts. See Bulletin—February 2002, Hurndalls, <http://www.hurndalls.com/bulletin.htm>.

## II. Summary of the Corporate Reorganization Scheme

Suspension of payments, as the name suggests, provides for an automatic stay and protection from creditors. The procedure is designed to give the company breathing room and time to negotiate an agreement with its creditors, either to delay payment or reduce the amount of debt owed. See *The Insolvency System in Spain*, at <http://www.insol-europe.org/publications/theinsolvencysysteminspain.pdf>.

Once a suspension of payments proceedings has begun, the court appoints three inspectors or “intervenor” (*interventores*) to control the debtor’s activities. See 2-40 Collier International Business Insolvency Guide ¶ 40.04[3][c][i]. The debtor remains in possession, but has only “limited” ability to control its business. *Id.* Meanwhile, the intervenors prepare a report on the solvency of the company; the court then declares the company either temporarily insolvent (in which case the suspension of payments proceeding applies) or finally insolvent (leading instead to bankruptcy). *Id.* ¶ 40.04[3][c][iii].

Once a temporary insolvency is declared, the court convenes a creditors’ meeting. *Id.* ¶ 40.04[d][i]. The debtor’s reorganization plan is then discussed and voted on. The plan must be approved by a majority of the creditors, provided they represent at least 60% of the debtor’s liabilities. *Id.* ¶ 40.04[d][ii]. If there are more than 200 creditors, approval of creditors holding 60 percent of the total claims is necessary; no majority is required. *Id.* Final approval by the judge then follows as a matter of course. See Richard Alan Silberstein, *Buying Distressed Companies in Spain*, Gomez-Acebo & Pombo, Abogados, at 9 (2002).

## III. Authorization to Borrow Post-Filing?

During the suspension of payments period, the company remains a going concern. Debtors may, with the approval of the intervenors, “contract[] any kind of obligation” and “continu[e] with the ordinary activities of its business.” *Bankruptcy and a Fresh Start: Stigma on Failure and Legal Consequences of Bankruptcy* 19, available at [http://europa.eu.int/comm/enterprise/entrepreneurship/support\\_measures/failure\\_bankruptcy/stigma\\_study/report\\_spain.pdf](http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/stigma_study/report_spain.pdf) (citing Article 6 of the Law of Suspension of Payments).

## IV. Special Requirements?

Approval of the intervenors is required. *Id.*

## V. Security Interest Required?

Unclear.

#### VI. Priority Interest Granted?

“The law favors new financing by giving new lenders priority status over all the previous claims.” Stefan van Hemmen, *Resource Allocation and Contract Resolution in the Spanish Bankruptcy System*, at 3 (Jan. 2001), available at <http://www.iser.essex.ac.uk/pubs/workpaps/pdf/2001-03.pdf>.

# Switzerland

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Tajikistan

## I. Name of Law—Is It Still Current?

“On Bankruptcy of Enterprises,” effective March 10, 1992, *available at* <http://www.lexinfosys.de/document.asp?id=2282>.

## II. Summary of the Corporate Reorganization Scheme

Private schemes of arrangement, or “peaceful compromises,” can be approved by 2/3 of the creditors (by value of outstanding debt) and the court. No peaceful compromise will be approved unless 35% of the debt will be repaid, or 40% (if payments are to be postponed more than a year), or 50% (if payments are to be postponed more than 18 months).

## III. Authorization to Borrow Post-Filing?

No.

## IV. Special Requirements?

No.

## V. Security Interest Required?

No.

## VI. Priority Interest Granted?

No.



# Taiwan

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Thailand

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Turkey

I. Name of Law—Is It Still Current?

II. Summary of the Corporate Reorganization Scheme

III. Authorization to Borrow Post-Filing?

IV. Special Requirements?

V. Security Interest Required?

VI. Priority Interest Granted?

# Ukraine

## I. Name of Law—Is It Still Current?

Law of Ukraine on the Restoration of Solvency of the Debtor or Declaring it Bankrupt, effective Jan. 1, 2000. I was unable to find an English translation of the law.

## II. Summary of the Corporate Reorganization Scheme

For the court to begin rehabilitation proceedings, or “sanation,” the debtor, its employees, and a majority of creditors must agree to the process. *See* Dmytro Symovonyk & Richard Shriver, *Debtor-Led Sanation—Ukraine’s Answer to U.S. Chapter 11 Proceedings*, L’viv Consulting Group, April 2003, at [http://www.lvivconsult.com/articles/?page=sanation\\_en](http://www.lvivconsult.com/articles/?page=sanation_en). The court then appoints a “rehabilitation manager,” who must be approved by a majority vote of the creditors’ committee. Dmitry Martynenko et al., *Ukraine*, in *The European Restructuring and Insolvency Guide 2002-2003*, 519, 523, available at <http://www.europeanrestructuring.com/contributors/pdfs/Ukraine.pdf>. The rehabilitation manager prepares a rehabilitation plan, which must be approved by a majority vote (in value) of the creditors’ committee and by the court. *See id.* at 523, 526.

Once a plan is approved, an automatic stay goes into effect. *See id.* at 525; Symovonyk & Shriver, *supra*. The automatic stay does not cover overdue wages or tort liabilities. *See* Martynenko at 525; Symovonyk & Shriver. The debtor’s existing management is ousted and the rehabilitation manager takes “full control of the company.” Martynenko at 525. The manager is responsible for implementing the rehabilitation plan, *see id.* at 523; the rehabilitation period lasts for one year, with a possible six-month extension, *see* Symovonyk & Shriver.

## III. Authorization to Borrow Post-Filing?

New funding may be sought. *See* Martynenko at 527.

## IV. Special Requirements?

Approval of the rehabilitation manager (and possibly the creditors’ committee—source is unclear) is required. *See id.*

## V. Security Interest Required?

A security interest is not required but may be granted; such secured claims have first priority. *See id.*

## VI. Priority Interest Granted?

No priority interest for new funding; however, if secured, new financing would have first priority along with other secured claims.

# Uzbekistan

## I. Name of Law—Is It Still Current?

Law of the Republic of Uzbekistan on Bankruptcy, as amended Dec. 15, 2000, *available at* <http://www.lexinfosys.de/document.asp?id=4075>.

## II. Summary of the Corporate Reorganization Scheme

Chapter V of the bankruptcy law provides for “external management.” Either the creditors’ committee or the debtor may apply for external management proceedings. Art. 47. Court approval is required; the period of external management lasts from 12 to 24 months. *See id.* As soon as external management is authorized, the debtor is ousted from control and the external manager takes over. Art. 48. An automatic stay also comes into effect. *See id.*

The external manager must draft a plan of reorganization to be submitted to the creditors’ committee that details measures by which the debtor may once again become solvent. Arts. 53, 60. The plan must be approved by a majority in number of creditors. Art. 61. The external manager will then carry out the plan. Art. 58 of the law refers to obligations incurred during the external management period; the external manager may not incur new debts totaling more than 20 percent of the pre-filing debts without the consent of the debtor and the creditors’ committee.

Fifteen days prior to the termination of the period of external management, the manager must present a report to the creditors’ committee. Art. 68. This report must detail the current financial status of the debtor and include the manager’s recommendation for (a) terminating the external management, (b) concluding an “amicable agreement” or scheme of arrangement, (c) prolonging the external management period, or (d) terminating external management and beginning liquidation proceedings. *See id.* The creditors’ committee may then debate this final report, Art. 69, and the report and a transcript of the creditors’ discussion is sent to the court, Art. 70, who decides whether or not the external manager’s recommendation is implemented.

## III. Authorization to Borrow Post-Filing?

There is no specific authorization to borrow, but the statute clearly contemplates post-petition financing as part of a reorganization plan. *See* Art. 58.

## IV. Special Requirements?

Post-petition borrowing in excess of 20 percent of pre-filing debts must be approved by the creditors’ committee and the debtor.

## V. Security Interest Required?

Statute is silent.

## VI. Priority Interest Granted?

No.

# Venezuela

## I. Name of Law—Is It Still Current?

The Venezuelan Commerce Code (“Código de Comercio”) provides for “*atraso*” proceedings. While not a reorganization proceeding as such, an *atraso* allows “a business suffering a liquidity crisis to defer payment of all commercial debts until enough cash is obtained through the orderly liquidation of assets to meet its obligations.” Malcolm Rowat & Jose Astigarraga, *Latin American Insolvency Systems: A Comparative Assessment*, World Bank Technical Paper No. 433 (Apr. 1999), at 75.

## II. Summary of the Corporate Reorganization Scheme

The debtor may apply for *atraso* relief by filing a petition accompanied by its business books, balance sheet, inventory, accounts receivable, a listing of all creditors and the amounts owed to them, and the consent of three creditors, “all at the time of filing.” *Id.* at 76. The court then appoints a trustee and a creditor’s committee, and consider their opinions when deciding whether or not to grant the petition. *See id.*

If granted, an automatic stay comes into effect under Art. 905. *See id.* at 77. The stay does not apply to secured creditors. *See id.* The debtor remains in control of the business, and may liquidate some of its assets. *See id.* The statute additionally provides for court approval of a settlement (a *convenio*, similar to a composition or scheme of arrangement) between the debtor and its creditors. *See id.* If 75% of the creditors agree to the *convenio* and the interests of the dissenting creditors are protected, then the court will approve the plan and make it binding upon all creditors. *See id.*

## III. Authorization to Borrow Post-Filing?

Source is silent, but it is doubtful. The World Bank Paper says that “[e]xisting systems in the region do not facilitate the granting of credit or concessions during a proceeding.” *Id.* at 30. Latin American statutes do not “deal adequately with the issue of post-petition financing.” *Id.*

## IV. Special Requirements?

n/a

## V. Security Interest Required?

n/a

## VII. Priority Interest Granted?

No.

# Vietnam

## I. Name of Law—Is It Still Current?

Law on Business Bankruptcy, passed December 30, 1993 [“Bankruptcy Law”], *available at* [http://www.vietnamese-law-consultancy.com/s\\_bankruptcy/bankruptcy\\_05\\_98.htm](http://www.vietnamese-law-consultancy.com/s_bankruptcy/bankruptcy_05_98.htm), and the Decree Guiding Implementation of the Law on Business Bankruptcy [“Decree”], issued December 23, 1994, *available at* [http://www.vietnamese-law-consultancy.com/s\\_bankruptcy/bankruptcy\\_12\\_94.htm](http://www.vietnamese-law-consultancy.com/s_bankruptcy/bankruptcy_12_94.htm).

## II. Summary of the Corporate Reorganization Scheme

A petition for bankruptcy may be filed by the debtor (*see* Bankruptcy Law Art. 9), its employees (*id.* Art. 8), or a creditor (*id.* Art. 7). A petition must be accompanied by a list of all creditors and the amount owed to each as well as reports summarizing the financial state of the debtor and the reasons for its insolvency. *See id.* Art. 9. The court shall decide whether to accept or reject the petition within 30 days. *See id.* Art. 13.

If the court accepts the petition, it will then ask the debtor to prepare a rehabilitation plan, or “conciliation measures.” *See id.* Art. 20. This plan must specify in detail all “measures aimed at overcoming the insolvency of the business.” Decree Art. 13. The plan must not extend longer than two years. *See* Bankruptcy Law Art. 20. The rehabilitation plan must then be submitted to the creditors committee, with the vote of a majority in number and 2/3 in value of the creditors necessary for approval. If accepted, the court will acknowledge the creditors’ approval and suspend liquidation proceedings against the debtor. *See id.* Art. 33. The debtor management then remains in control and carries out the rehabilitation plan. *See id.* Art. 34; Decree Art. 14.

## III. Authorization to Borrow Post-Filing?

No specific authorization, but Bankruptcy Law Art. 23 refers to “new debts which result from the operation of the business” that arise “[d]uring a bankruptcy proceeding.”

## IV. Special Requirements?

New debts must be approved by the court (“shall be settled under the supervision of the Judge”). *See id.*

## V. Security Interest Required?

Statute is silent.

## VI. Priority Interest Granted?

No.

### Author's Notes

An extremely helpful resource is *The European Restructuring and Insolvency Guide 2002-2003*, a publication prepared jointly by PricewaterhouseCoopers and Baker & McKenzie. It runs into the hundreds of pages and can be ordered online. I've found bits and pieces of it online (i.e., free).