afme/
Finance for Europe

25 March 2015

Mr Mark Hayden
European Commission
M059 07/004
B-1049 Brussels
Belgium

Dear Mr Hayden

The high yield division (the "High Yield Division") of the Association for Financial Markets in Europe ("AFME") and a number of its members are very interested in developments related to European insolvency laws. In this respect we have reviewed the "Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency" (the "Recommendations"). We appreciate the opportunity to share with you a brief response to the matters raised in the Recommendations, as well as our general views on European insolvency reform.

This letter provides:

(1) an overview of the negative effects of disparities amongst European insolvency regimes;

(2) a brief response to the Recommendations;

(3) our views regarding the most important features and deficiencies resulting from disparities between national insolvency and restructuring laws within the European Union;

(4) additional considerations with respect to European insolvency;

(5) a discussion of the role of court and administrative officials, and

(6) certain practical issues related to European insolvency.

With respect to the matters mentioned above, we have also attached as Appendix A a chart which summarises the relevant differences between European national insolvency regimes.

The views expressed in this letter do not relate to smaller businesses or trade creditors.

I. Overview of Important Negative Effects of Disparate European Insolvency and Restructuring Laws

As reflected in the Recommendations, national European insolvency laws vary in many respects, both procedurally and substantively. These differences are summarised in the table attached as Appendix A to this letter.

The following are of particular importance to the European high yield market:

- the opening of insolvency proceedings;
- interpretation and application of insolvency rules and regulations;
- the length of and process for a general stay of creditor rights;
- management of insolvency proceedings;
- ranking of creditors;
- the role and level of participation of creditors in insolvency proceedings;
- filing and verification of claims;
- responsibility for proposing and approving reorganisation plans;
- annulment of transactions entered into before the start of insolvency proceedings;
- liability of directors, shareholders and management and
- availability of post-petition financing.

We believe that the differences between national insolvency and restructuring regimes:

(a) increase uncertainty amongst issuers, investors and other stakeholders with respect to creditor recovery rates;

(b) discourage cross-border investment (particularly with respect to multinational companies or those with complicated financing structures) and reduce the overall efficiency, attractiveness and innovation of European capital markets generally;

(c) discourage the timely restructuring of viable companies in financial difficulties, and often lead to liquidation rather than providing an opportunity to restructure as an ongoing concern; and

(d) result in small and medium sized companies being at a disadvantage as they are generally unable to cope with high restructuring costs or take advantage of more efficient restructuring procedures in other member states.

II. Response to the Recommendations

We are generally in agreement with the Recommendations, and are particularly supportive of the recommendations for preventative restructuring frameworks, a strong and effective stay of individual enforcement actions (where appropriate), court confirmation of restructuring plans and generally providing a second chance for entrepreneurs.

We note that a number of jurisdictions have recently reformed their insolvency and restructuring regimes (see Appendix A). While these reforms have been welcomed by the markets, we do not believe that they go far enough in addressing the shortfalls in national regimes, nor in reducing the need for a more uniform approach to insolvency and restructuring laws.

We cannot expect the disparities in national insolvency and restructuring laws to be resolved or determined by market forces. Stakeholders approach each restructuring with their own agenda and strategy, often looking for positions of control and influence to gain leverage, and not always seeking common ground and consensus. In addition, policymakers in various national jurisdictions often cite political considerations, or historical and cultural practices, as serious impediments to insolvency reform and harmonisation. In spite of this, and as highlighted above, the absence of a consistent, predictable and well supervised European restructuring regime creates a considerable layer of uncertainty, increases costs and can alter the economics of a capital markets transaction. Fashioning ad hoc restructuring frameworks around national or market driven influences results in greater transaction risks and higher costs of capital.

Further harmonisation of European insolvency regimes would help to facilitate more predictable and orderly outcomes for corporate restructurings. Accordingly, we believe that certain key aspects highlighted below, when enacted properly and supported by the relevant jurisdiction's legal, judicial and regulatory frameworks, would greatly increase the effectiveness of European insolvency and restructuring laws and, where appropriate, would positively enhance a company's ability to effectively restructure rather than end up in liquidation.

III. Key Features and Deficiencies in existing European insolvency legislation

We consider the following to be the most important matters to be considered as we attempt to enhance efficiency of European insolvency practices and increase the likelihood that a company with its centre of main interest in Europe that is experiencing financial difficulties will be given a real opportunity to successfully restructure using European restructuring tools rather than ending up in liquidation or opting to use international restructuring tools such as US Chapter 11.

(A) Stay

It is critical to the successful rescue of a failing business that precipitate action by creditors be prevented. In other words, a stay of enforcement action is required, otherwise assets that have been secured would be subject to seizure by creditors, and as the company defaults on its obligations its creditors would seek to obtain and enforce judgments. Although in most cases some form of stay has been introduced as part of certain court-supervised insolvency and restructuring procedures throughout Europe, it is arguable that the precise

forms of stay deployed by certain European jurisdictions do not go far enough. See Appendix A – "Stay on Proceedings" for an overview of stay of enforcement practices in various European jurisdictions.

Under English law, for example, contractual termination provisions triggered by insolvency are permitted and remain exercisable by the counterparty notwithstanding any stay. Furthermore, the English scheme of arrangement, an increasingly popular restructuring tool, does not trigger a stay. Spanish insolvency law includes a time limited moratorium on creditor action, but such time limits are generally much shorter than the time required to adequately restructure an otherwise viable business.

Such arguably inadequate stay provisions often allow customers and suppliers to walk away, or demand punitive amendments, just when their continued commitment is most crucial to the company's rescue. As noted above, this contributes to the value destruction seen as an inevitable consequence of filing in certain European jurisdictions.

By contrast, contractual termination provisions are not enforceable in many other jurisdictions, notably France and the USA. See Appendix A – "Creditor's ability to exercise contractual termination rights following commencement of restructuring/insolvency proceedings". It is our firm belief that a properly defined stay on actions prejudicial to the survival of the business is a crucial element of any useful rescue procedure.

(B) Valuation

The valuation issue arises because Europe does not have a consistent and clearly established method for valuing companies in a restructuring process. At issue is the determination of stakeholders' relative participation in a restructured enterprise. The fact that a restructuring is being proposed at all, rather than a liquidation, suggests that there is some excess value over and above the liquidation value that is worth preserving. However, dramatically different allocations of value arise if a liquidation basis of valuation is used as opposed to various alternative "going concern" bases.[1] There is currently no consistent method or platform for resolving stakeholders' disputes as to the basis of valuation, short of a company entering formal insolvency proceedings. See Appendix A – "Valuation method for purposes of determining creditors' entitlement to vote on a court-sanctioned reorganisation plan" for an overview of valuation proceedings in the most relevant European jurisdictions.

Hence, somewhat crudely, the dynamic that emerges is that often stakeholders are in effect given a choice – accept a particular basis of valuation (and it may be a liquidation valuation, which ignores going concern surplus arising from a successful restructuring) or see the enterprise go into an administration or liquidation proceeding. Ideally, a consistent and harmonised framework should be created for fast judicial resolution of valuation disputes in restructurings, short of administration proceedings. This will enable practice and precedent to develop in restructuring valuations, providing stakeholders relative certainty of outcome, whilst avoiding the value loss that arises through administration and/or liquidation.

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[1] See "The Valuation of Distressed Companies — A Conceptual Framework" by Michael Crystal QC and Rizwaan Jameel Mokal, in particular the discussion at p14 et seq.

(C) Cramdown

Having established a valuation of the enterprise to be restructured, it generally then emerges that some lower ranking stakeholders – shareholders and perhaps subordinated creditors - no longer have an “economic interest” in the enterprise. In other words there is insufficient value arising to satisfy the claims of more senior stakeholders in full. Traditionally, however, the agreement of these “out-of-the-money” junior creditors and/or shareholders would nevertheless be required before an “out-of-court” restructuring could be implemented. In recent times, parties have realised that making a restructuring dependent upon consents from stakeholders with no economic interest in an enterprise, properly valued, is not conducive to an efficient restructuring. However, practice has differed in the resolution of this issue. See Appendix A – “Court approved cram down on creditors?”, and “Court approved cram down on shareholders?”.

Our view is that the question of whether shareholder or junior creditor consents should be conditions to restructurings (which, if not met, would lead to formal insolvency proceedings) will become increasingly important as more complex capital structures predominate. The present position is that practice varies. This ad hoc approach leads to greater uncertainty concerning stakeholders' rights and, ultimately, make restructurings outside administration more difficult. This issue is too important to be left subject to the vagaries of each individual case. As a policy matter, we do not consider that creditors or shareholders with (on a proper valuation basis) no economic interest in the enterprise should be in a position where their “veto” forces full insolvency proceedings or delays otherwise viable restructurings . In other words, a judicially supervised process is required to allow a restructuring to proceed without the necessity of extracting consent from a class of creditors or shareholders with no economic interest.

With respect to cramdown procedures, English Courts apply a “fairness test” prior to sanctioning an English Scheme of Arrangement. This can be contrasted with the position in Spain where creditors suffering a “disproportionate sacrifice” (which term is not defined under Spanish law nor has any guidance been developed by Spanish courts) may only challenge a scheme *after* it has been sanctioned the court. To create a robust and readily available cramdown regime that effectively binds out-of-the-money stakeholders and minority dissidents, there should be more consistency and improvement in minimum requirements and protections for those affected stakeholders dissidents to ensure that this tool is being used fairly.

(D) Creditors' ability to propose a restructuring plan

A key positive development in insolvency law in recent years has been the receptiveness of lender-led restructuring proposals.[2] In fact, a number of jurisdictions now grant the ability for creditors to propose their own restructuring plan (or a counter-proposal to a debtor's plan), notably France and Spain. See Appendix A – “Creditors able to propose restructuring plan?”.

[2] See for example the restructuring of French fashion retailer *Vivarte*; a lender-led restructuring proposal which resulted in a fully consensual work-out involving France's largest ever debt-for-equity swap, and which avoided the need to put the company into Accelerated Financial Safeguard proceedings.

Where a debtor is not obliged to put a creditor's restructuring proposal to a vote, creditors are often left with little other choice than to approve the debtor's plan or force the company into liquidation.

In court-supervised pre-insolvency proceedings, creditors and, potentially, interested third parties in general (as opposed to debtors only) should, therefore, be granted the right to submit a restructuring plan to a debtor, which should be put to creditor vote. This would allow credit-bids and, more generally, create an incentive on the debtor to 'stay honest' and present more achievable restructuring proposals.

Summary

Of course, the four points set out above are inter-related, and amount to a call for a court supervised restructuring process, which would stay enforcement action for the duration of the process, whilst enabling fast resolution of valuation and allocation disputes and with a process to avoid hold up from financial stakeholders without an economic interest.

IV. Additional Features

We would also like to emphasise three further points.

(A) Funding

In an ideal world, steps should also be taken to address the issue of ongoing funding for distressed companies. In the US, the Bankruptcy Code provides a super priority status for post petition Debtor-in-Possession, or "DIP", lending. As a result, a specialised market has evolved in the US for this sort of rescue funding. In contrast, in Europe, no such market exists because there are few legislative provisions to prioritise rescue finance (although we note that a number of European jurisdictions have recently implemented reforms providing for the priority status of post-petition financing e.g. France, Italy and Spain). See Appendix A – "Priority status of post-petition financing/DIP financing" for more information regarding DIP financing in Europe.

Consequently, a distressed company has to rely on existing creditors to meet the interim funding requirements whilst a restructuring plan is devised. Whether this is possible and, if so, how it is organised, depends on the support of existing lenders and the nature of the facilities already in place. The procedure can be complicated by the increasing number of financial institutions involved in the process, and their range of different investment and exit strategies. Whilst a majority of senior lenders may initially find a way to provide interim finance to the debtor, priority status cannot be assured and these lenders are then further exposed to the vagaries and uncertainties of the restructuring process (as outlined above), in particular the potential blocking risk by stakeholders with no economic interest.

For court-supervised restructurings, we are therefore of the view that there should be no regulatory restrictions on the provision of interim financing to debtors and there should be automatic priority status for new financing. In particular, the market should be open to alternative sources of finance, such as hedge funds, and any usury thresholds should be removed. This would greatly increase the sources of financing and encourage the development of a US-style DIP financing market. Court supervision would ensure that the terms of the

interim financing (including any priority status over existing financing) are warranted in the context of a particular situation.

(B) Pensions and Employees

An efficient restructuring process, maximising the prospect that an enterprise will survive, is of great importance to employees. British Energy was a good example where the company's pensioners and employees had significant interests – there were over 5,000 employees whose interests needed to be safeguarded. Pensions were also of significant importance in the Polestar restructuring, with both the pensions regulator and the fund trustee being involved in negotiations.

We believe that a more streamlined and certain restructuring process is entirely consistent with a policy to promote the interests of non-financial stakeholders such as employees.

(C) Trade Creditors

We also stress that our views are principally designed to streamline restructuring of the claims of financial stakeholders – by which we mean "structural" investor debt and shareholder claims, as opposed to "trade" creditors, whose claims arise out of the day-to-day operation of the business.

Invariably restructurings outside of a formal court-led process do not compromise the claims of trade creditors and leave operating companies intact, although often freed from guarantee liabilities in respect of the holding company debt having been adjusted. We are not advocating a court process to impair or cram down the claims of trade creditors. There are numerous examples of financial creditors receiving different statutory treatment to "ordinary" creditors (for example, the preferential status of certain employee and pension claims,[3] and the setting aside of the "prescribed part" under English insolvency laws, intended to benefit trade creditors[4]).

(D) Holding/Operating Companies

There should be a uniform manner of dealing with affiliate group insolvencies to retain efficiencies. This is becoming more critical as corporate structures encompass numerous jurisdictions and otherwise become more complex. In this regard, we note the EU Insolvency Regulation reforms which, among other things, provide a framework for group insolvency proceedings.

V. Court and Administrative Officials

It is important that there is an adequate judicial and professional framework in place to successfully administer any European insolvency reform. For example there should be consistency among the courts in the application of insolvency laws, rules and regulations. In some countries the outcome of an insolvency proceeding may be completely different depending on where in that country the case is heard, or depending on which judge hears the case.

[3] In Schedule 6 to the Insolvency Act 1986

[4] See section 176A of the Insolvency Act 1986

It is also important that judicial, administrative and regulatory officials charged with interpreting and administering insolvency rules and regulations are sufficiently knowledgeable about, and experienced in, insolvency to be able to apply such rules and regulations in a consistent and reasoned manner. It would be helpful if the Commission were to encourage the development of a network of dedicated, knowledgeable and independent court and administrative officials across Europe to interpret and administer its insolvency rules and regulations.

VI. Practical Issues

- **Public/private Issues**. European insolvency procedures sometimes have awkward or unintended securities law implications. Information regarding proceedings under European insolvency regimes (even in-court proceedings) is, generally, not publicly available, and any relevant information is usually distributed on a confidential basis and made available only to creditors. In this situation, trading on a public basis in the relevant securities can become difficult or problematic. For example, under UK market abuse rules, trading on information not available to the public and shareholders, even if available to all creditors including your trading counterparty, might make one vulnerable to accusations of market abuse. Any European insolvency reform should address this issue and make it clear when and how securities of an insolvent company may be publicly traded during insolvency proceedings.

- **Capital Market harmonisation**. The European Union is working very hard to harmonise capital market rules and practices across Europe, as evidenced by initiatives such as the European banking union and the proposed capital markets union. In addition, the European Commission is seeking to establish a "single rulebook" through legislation on markets in financial instruments (MiFiD II), market abuse (MAR/MAD), alternative investment fund managers (AIFMD) and central securities depositories (CSDR), among others.[5] Each of these initiatives and regulations support and encourage deeper and stronger markets and are intended to increase harmonisation across Europe. While we generally support these initiatives and regulations we believe, for the reasons stated above, that they will not be optimally effective without a similar and corresponding focus on reform and harmonisation of European insolvency rules. Any consistency or certainty provided to market participants by these initiatives and regulations will likely be undermined if market participants ultimately remain subject to the uncertainties and inconsistencies inherent in 28 different European insolvency and restructuring regimes.

- **Disclosure**. Many European countries are currently reforming and revising their insolvency laws, as illustrated by the information contained in Appendix A. In addition, many debtors are able to take advantage of COMI shifts and other mechanisms to tailor where and how their insolvency or restructuring proceedings are conducted. As mentioned above, the location and participants in an insolvency or restructuring proceeding can sometimes have a significant effect on the outcome of such proceedings. This situation increases investor

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[5] See the European Commission's Green Paper on "Building a Capital Markets Union", page 5, footnote 1.

uncertainty regarding the treatment of debt in an insolvency or restructuring and, in a worst case scenario, might result in such treatment being very different from the insolvency considerations described in the relevant offering document. Reform and harmonisation of European insolvency regimes would help to reduce this uncertainty.

VII. Conclusion

A predictable, consistent and radically superior restructuring process is singularly lacking across Europe. There is no doubt in our minds that the limited alterations to European insolvency laws described in this letter would help to increase the efficiency of, and confidence in, European capital markets.

We would very much like to have the opportunity to discuss with you further the issues we have raised and we look forward to hearing from you. Please contact Gary Simmons at +44 207 743 9508 in the first instance to arrange a convenient time to meet with you.

Appendix A
Key Differences in EU Insolvency and Restructuring Law

24 March 2015

1. This jurisdictional chart (the "**Chart**") has been prepared by Weil Gotshal & Manges, together with input from Loyens & Loeff as to matters of Luxembourg law, Garrigues as to matters of Spanish law, Houthoff Buruma as to matters of Dutch law and Paul Hastings as to matters of Italian law (together, the "**Law Firms**") and the Association for Finance Markets in Europe ("**AFME**") in response to the European Commission's "Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency".

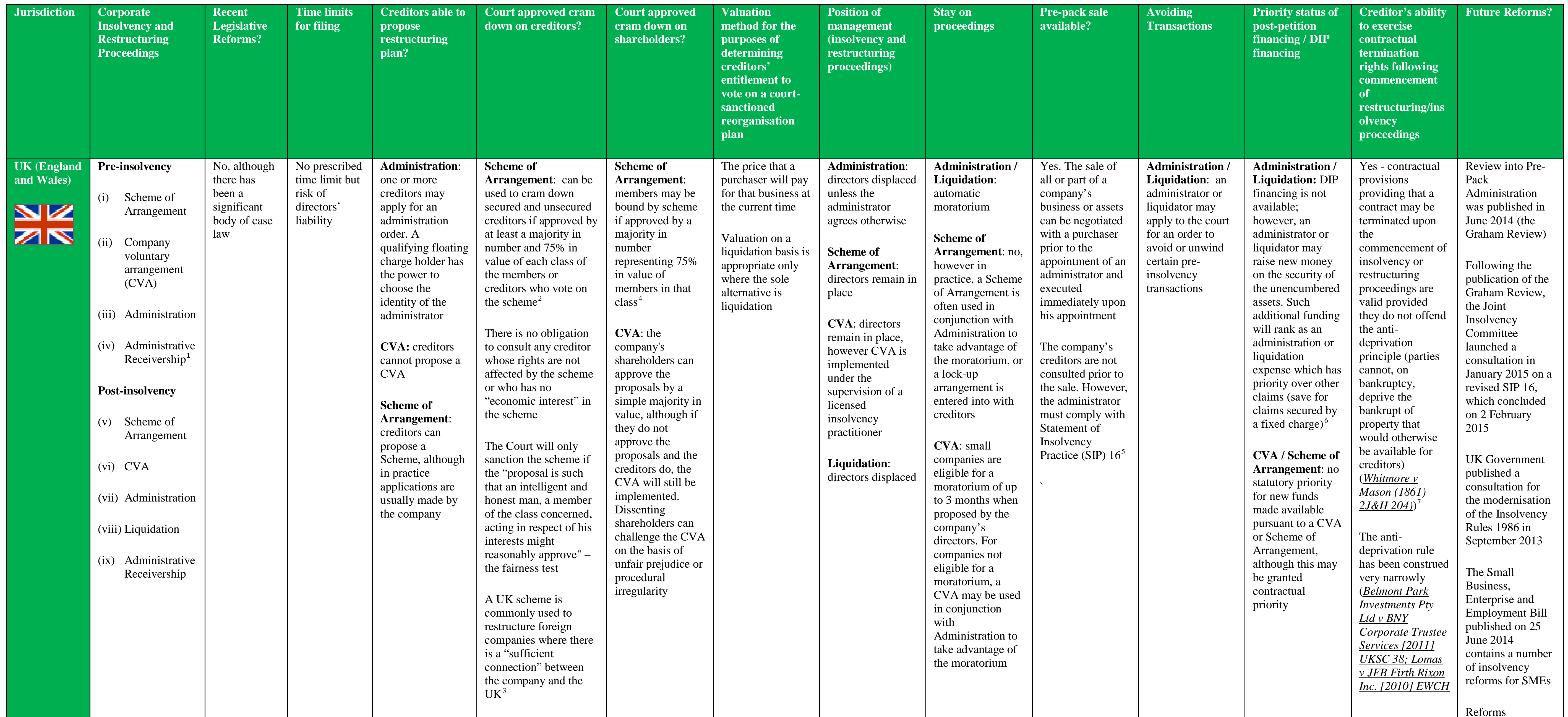
2. This Chart summarises certain key aspects of insolvency and restructuring law in force in England and Wales, France, Germany, Italy, Spain, the Netherlands and Luxembourg (the "**Jurisdictions**") as at 24 March 2015.

3. This Chart is provided to the European Commission for general information purposes only in respect of, and is not intended to cover every aspect of, insolvency or restructuring law in the Jurisdictions. The information in this Chart does not constitute the legal or other professional advice of AFME or the Law Firms.

4. The views expressed in this document reflect those of the authors in respect of each Jurisdiction to which they have contributed and are not necessarily the views of the Law Firms (or of their clients) or AFME (or its members).

5. If you would like to discuss further, contact details for AFME and the Law Firms are set out on the final page.

Key Differences in EU Insolvency and Restructuring Law



Jurisdiction	Corporate Insolvency and Restructuring Proceedings	Recent Legislative Reforms?	Time limits for filing	Creditors able to propose restructuring plan?	Court approved cram down on creditors?	Court approved cram down on shareholders?	Valuation method for the purposes of determining creditors' entitlement to vote on a court-sanctioned reorganisation plan	Position of management (insolvency and restructuring proceedings)	Stay on proceedings	Pre-pack sale available?	Avoiding Transactions	Priority status of post-petition financing / DIP financing	Creditor's ability to exercise contractual termination rights following commencement of restructuring/insolvency proceedings	Future Reforms?
UK (England and Wales)	**Pre-insolvency** (i) Scheme of Arrangement (ii) Company voluntary arrangement (CVA) (iii) Administration (iv) Administrative Receivership[1] **Post-insolvency** (v) Scheme of Arrangement (vi) CVA (vii) Administration (viii) Liquidation (ix) Administrative Receivership	No, although there has been a significant body of case law	No prescribed time limit but risk of directors' liability	**Administration**: one or more creditors may apply for an administration order. A qualifying floating charge holder has the power to choose the identity of the administrator **CVA:** creditors cannot propose a CVA **Scheme of Arrangement**: creditors can propose a Scheme, although in practice applications are usually made by the company	**Scheme of Arrangement**: can be used to cram down secured and unsecured creditors if approved by at least a majority in number and 75% in value of each class of the members or creditors who vote on the scheme[2] There is no obligation to consult any creditor whose rights are not affected by the scheme or who has no "economic interest" in the scheme The Court will only sanction the scheme if the "proposal is such that an intelligent and honest man, a member of the class concerned, acting in respect of his interests might reasonably approve" – the fairness test A UK scheme is commonly used to restructure foreign companies where there is a "sufficient connection" between the company and the UK[3]	**Scheme of Arrangement**: members may be bound by scheme if approved by a majority in number representing 75% in value of members in that class[4] **CVA**: the company's shareholders can approve the proposals by a simple majority in value, although if they do not approve the proposals and the creditors do, the CVA will still be implemented. Dissenting shareholders can challenge the CVA on the basis of unfair prejudice or procedural irregularity	The price that a purchaser will pay for that business at the current time Valuation on a liquidation basis is appropriate only where the sole alternative is liquidation	**Administration**: directors displaced unless the administrator agrees otherwise **Scheme of Arrangement**: directors remain in place **CVA**: directors remain in place, however CVA is implemented under the supervision of a licensed insolvency practitioner **Liquidation**: directors displaced	**Administration / Liquidation**: automatic moratorium **Scheme of Arrangement**: no, however in practice, a Scheme of Arrangement is often used in conjunction with Administration to take advantage of the moratorium, or a lock-up arrangement is entered into with creditors **CVA**: small companies are eligible for a moratorium of up to 3 months when proposed by the company's directors. For companies not eligible for a moratorium, a CVA may be used in conjunction with Administration to take advantage of the moratorium	Yes. The sale of all or part of a company's business or assets can be negotiated with a purchaser prior to the appointment of an administrator and executed immediately upon his appointment The company's creditors are not consulted prior to the sale. However, the administrator must comply with Statement of Insolvency Practice (SIP) 16[5] `	**Administration / Liquidation**: an administrator or liquidator may apply to the court for an order to avoid or unwind certain pre-insolvency transactions	**Administration / Liquidation:** DIP financing is not available; however, an administrator or liquidator may raise new money on the security of the unencumbered assets. Such additional funding will rank as an administration or liquidation expense which has priority over other claims (save for claims secured by a fixed charge)[6] **CVA / Scheme of Arrangement**: no statutory priority for new funds made available pursuant to a CVA or Scheme of Arrangement, although this may be granted contractual priority	Yes - contractual provisions providing that a contract may be terminated upon the commencement of insolvency or restructuring proceedings are valid provided they do not offend the anti-deprivation principle (parties cannot, on bankruptcy, deprive the bankrupt of property that would otherwise be available for creditors) (*Whitmore v Mason (1861) 2J&H 204)*)[7] The anti-deprivation rule has been construed very narrowly (*Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services [2011] UKSC 38; Lomas v JFB Firth Rixon Inc. [2010] EWCH*	Review into Pre-Pack Administration was published in June 2014 (the Graham Review) Following the publication of the Graham Review, the Joint Insolvency Committee launched a consultation in January 2015 on a revised SIP 16, which concluded on 2 February 2015 UK Government published a consultation for the modernisation of the Insolvency Rules 1986 in September 2013 The Small Business, Enterprise and Employment Bill published on 25 June 2014 contains a number of insolvency reforms for SMEs Reforms

[1] Administrative Receivership may be available to a holder of a floating charge over all or substantially all of the company's assets. Pursuant to the Enterprise Act 2002, this out-of court enforcement mechanism is no longer available for charges created after 15 September 2003 (unless a specific exception applies e.g. capital markets exception) and is rarely used in practice.

[2] Unlike U.S. Chapter 11 proceedings and the German Insolvency Plan, a UK scheme cannot be used to cram down an entire dissenting class. "Roll over schemes" which combine a scheme (to bypass consent thresholds to roll-over senior debt to a Newco) and a pre-pack sale, where assets are transferred to a Newco and junior debt is left behind in the Oldco, have therefore become common in the UK (e.g. *IMO Carwash*)

[3] Recent examples include *Apcoa*, the German car parking operator (2014); *Zlomrex International Finance S.A*, the French financing vehicle for the Cognor group, suppliers and distributers of steel products in Poland (2014); and *Magyar*, the Dutch holding company of the Invitel group of companies, one of the leading telecommunication services providers in Hungary (2014)

[4] In practice, a "rollover scheme and pre-pack" (see footnote 2 above) is often used to take control of a distressed company without shareholder consent.

[5] SIP 16, as effective on 1 November 2013, is available on the UK's Insolvency Practitioners Association website (http://www.insolvency-practitioners.org.uk/regulation-and-guidance/england-wales). Following the publication of the Graham Review, the Joint Insolvency Committee launched a consultation in January 2015 on a revised SIP 16, which closed on 2 February 2015.

[6] In practice, UK companies often grant a floating charge over all their assets. As such, generally, there are no unencumbered assets over which to grant new security. The UK Government considered amending legislation when consulting on the Enterprise Act 2002 and concluded that "*the matter was one of too great complexity which required a wider consultation, particularly if it were intended that the UK courts would have a role in approving the grant of super-priority funding on a case by case basis*". See INSOL article "Repair or Recycle? Some thoughts on DIP Financing and Pre-Packs" (https://www.insol.org/_files/Fellowship%202013/Literature/Session%206/Repair%20or%20Recycle.pdf) and "Financing Corporate Rescues, Where Does the UK Stand?", by Akpareva Aruoriwo (http://sas-space.sas.ac.uk/5609/1/2080-3020-1-SM.pdf).

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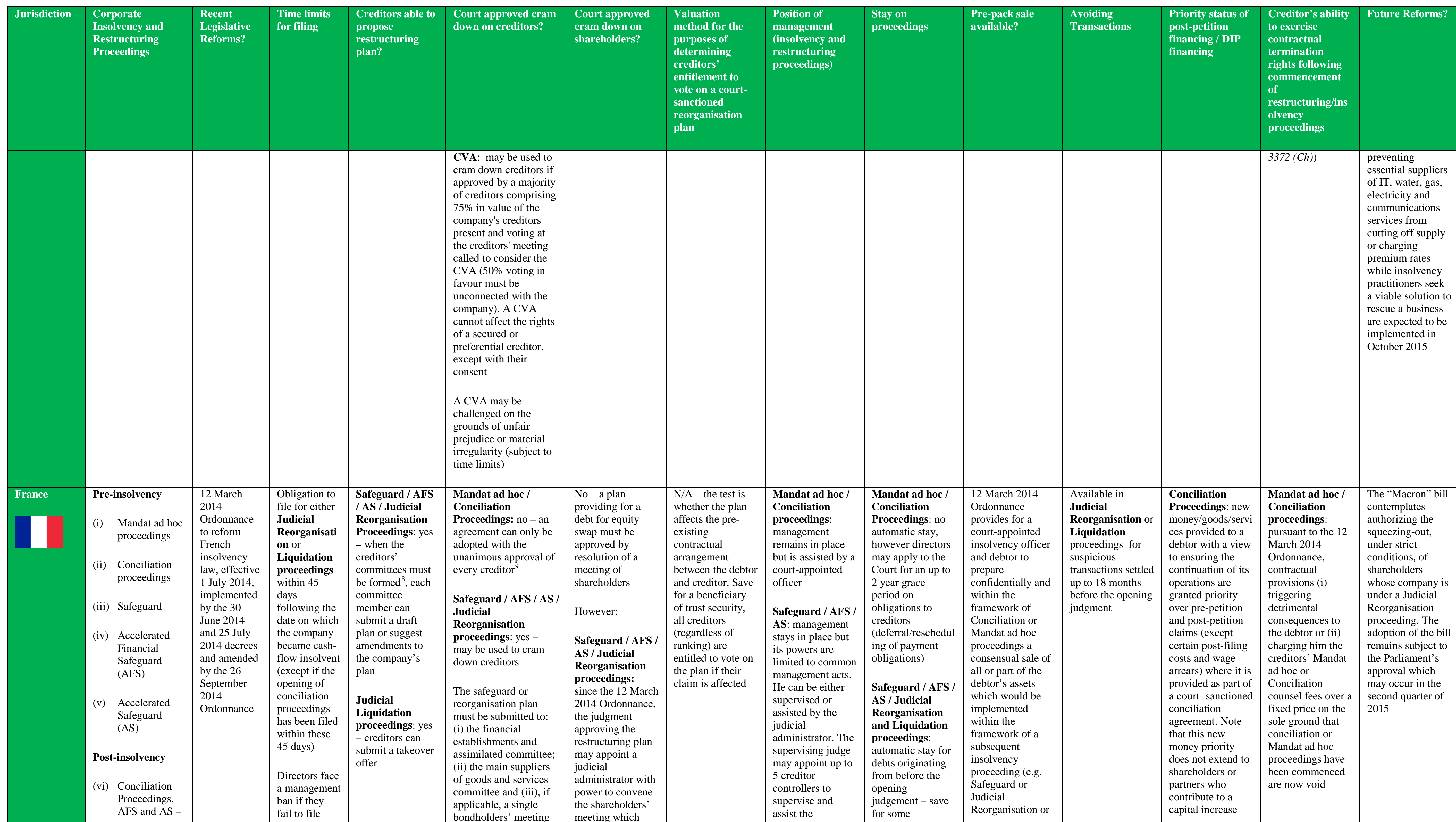

Jurisdiction	Corporate Insolvency and Restructuring Proceedings	Recent Legislative Reforms?	Time limits for filing	Creditors able to propose restructuring plan?	Court approved cram down on creditors?	Court approved cram down on shareholders?	Valuation method for the purposes of determining creditors' entitlement to vote on a court-sanctioned reorganisation plan	Position of management (insolvency and restructuring proceedings)	Stay on proceedings	Pre-pack sale available?	Avoiding Transactions	Priority status of post-petition financing / DIP financing	Creditor's ability to exercise contractual termination rights following commencement of restructuring/insolvency proceedings	Future Reforms?
					CVA: may be used to cram down creditors if approved by a majority of creditors comprising 75% in value of the company's creditors present and voting at the creditors' meeting called to consider the CVA (50% voting in favour must be unconnected with the company). A CVA cannot affect the rights of a secured or preferential creditor, except with their consent A CVA may be challenged on the grounds of unfair prejudice or material irregularity (subject to time limits)								*3372 (Ch)*)	preventing essential suppliers of IT, water, gas, electricity and communications services from cutting off supply or charging premium rates while insolvency practitioners seek a viable solution to rescue a business are expected to be implemented in October 2015
France	**Pre-insolvency** (i) Mandat ad hoc proceedings (ii) Conciliation proceedings (iii) Safeguard (iv) Accelerated Financial Safeguard (AFS) (v) Accelerated Safeguard (AS) **Post-insolvency** (vi) Conciliation Proceedings, AFS and AS –	12 March 2014 Ordonnance to reform French insolvency law, effective 1 July 2014, implemented by the 30 June 2014 and 25 July 2014 decrees and amended by the 26 September 2014 Ordonnance	Obligation to file for either **Judicial Reorganisation** or **Liquidation proceedings** within 45 days following the date on which the company became cash-flow insolvent (except if the opening of conciliation proceedings has been filed within these 45 days) Directors face a management ban if they fail to file	**Safeguard / AFS / AS / Judicial Reorganisation Proceedings**: yes – when the creditors' committees must be formed[8], each committee member can submit a draft plan or suggest amendments to the company's plan **Judicial Liquidation proceedings**: yes – creditors can submit a takeover offer	**Mandat ad hoc / Conciliation Proceedings:** no – an agreement can only be adopted with the unanimous approval of every creditor[9] **Safeguard / AFS / AS / Judicial Reorganisation proceedings**: yes – may be used to cram down creditors The safeguard or reorganisation plan must be submitted to: (i) the financial establishments and assimilated committee; (ii) the main suppliers of goods and services committee and (iii), if applicable, a single bondholders' meeting	No – a plan providing for a debt for equity swap must be approved by resolution of a meeting of shareholders However: **Safeguard / AFS / AS / Judicial Reorganisation proceedings:** since the 12 March 2014 Ordonnance, the judgment approving the restructuring plan may appoint a judicial administrator with power to convene the shareholders' meeting which	N/A – the test is whether the plan affects the pre-existing contractual arrangement between the debtor and creditor. Save for a beneficiary of trust security, all creditors (regardless of ranking) are entitled to vote on the plan if their claim is affected	**Mandat ad hoc / Conciliation proceedings**: management remains in place but is assisted by a court-appointed officer **Safeguard / AFS / AS**: management stays in place but its powers are limited to common management acts. He can be either supervised or assisted by the judicial administrator. The supervising judge may appoint up to 5 creditor controllers to supervise and assist the	**Mandat ad hoc / Conciliation Proceedings**: no automatic stay, however directors may apply to the Court for an up to 2 year grace period on obligations to creditors (deferral/rescheduling of payment obligations) **Safeguard / AFS / AS / Judicial Reorganisation and Liquidation proceedings**: automatic stay for debts originating from before the opening judgement – save for some	12 March 2014 Ordonnance provides for a court-appointed insolvency officer and debtor to prepare confidentially and within the framework of Conciliation or Mandat ad hoc proceedings a consensual sale of all or part of the debtor's assets which would be implemented within the framework of a subsequent insolvency proceeding (e.g. Safeguard or Judicial Reorganisation or	Available in **Judicial Reorganisation** or **Liquidation** proceedings for suspicious transactions settled up to 18 months before the opening judgment	**Conciliation Proceedings**: new money/goods/services provided to a debtor with a view to ensuring the continuation of its operations are granted priority over pre-petition and post-petition claims (except certain post-filing costs and wage arrears) where it is provided as part of a court- sanctioned conciliation agreement. Note that this new money priority does not extend to shareholders or partners who contribute to a capital increase	**Mandat ad hoc / Conciliation proceedings**: pursuant to the 12 March 2014 Ordonnance, contractual provisions (i) triggering detrimental consequences to the debtor or (ii) charging him the creditors' Mandat ad hoc or Conciliation counsel fees over a fixed price on the sole ground that conciliation or Mandat ad hoc proceedings have been commenced are now void	The "Macron" bill contemplates authorizing the squeezing-out, under strict conditions, of shareholders whose company is under a Judicial Reorganisation proceeding. The adoption of the bill remains subject to the Parliament's approval which may occur in the second quarter of 2015

[7] The suspension of *ipso facto* clauses in administration was considered during the Standing Committee Stage of the Enterprise Act 2002 and was rejected for interfering with freedom of contract.

[8] Creditors' committees, namely, the financial institutions creditors' committee and the trade creditors' committee, must be formed if the debtor has more than a 20 M€turnaround or 150 employees. As the case may be, a general meeting of bondholders is held to vote on the draft plan as approved by the committees.

[9] In the restructuring of the French fashion retailer, *Vivarte,* the Vivarte Group failed to receive the support of 66.6% of creditors for a covenant standstill due to the opposition of certain funds, seeking higher fees to approve the request. The company was, nevertheless, able to implement a fully consensual work out plan involving France's largest ever debt-for-equity swap through Mandat ad Hoc and, ultimately, conciliation proceedings to implement the work-out plan.

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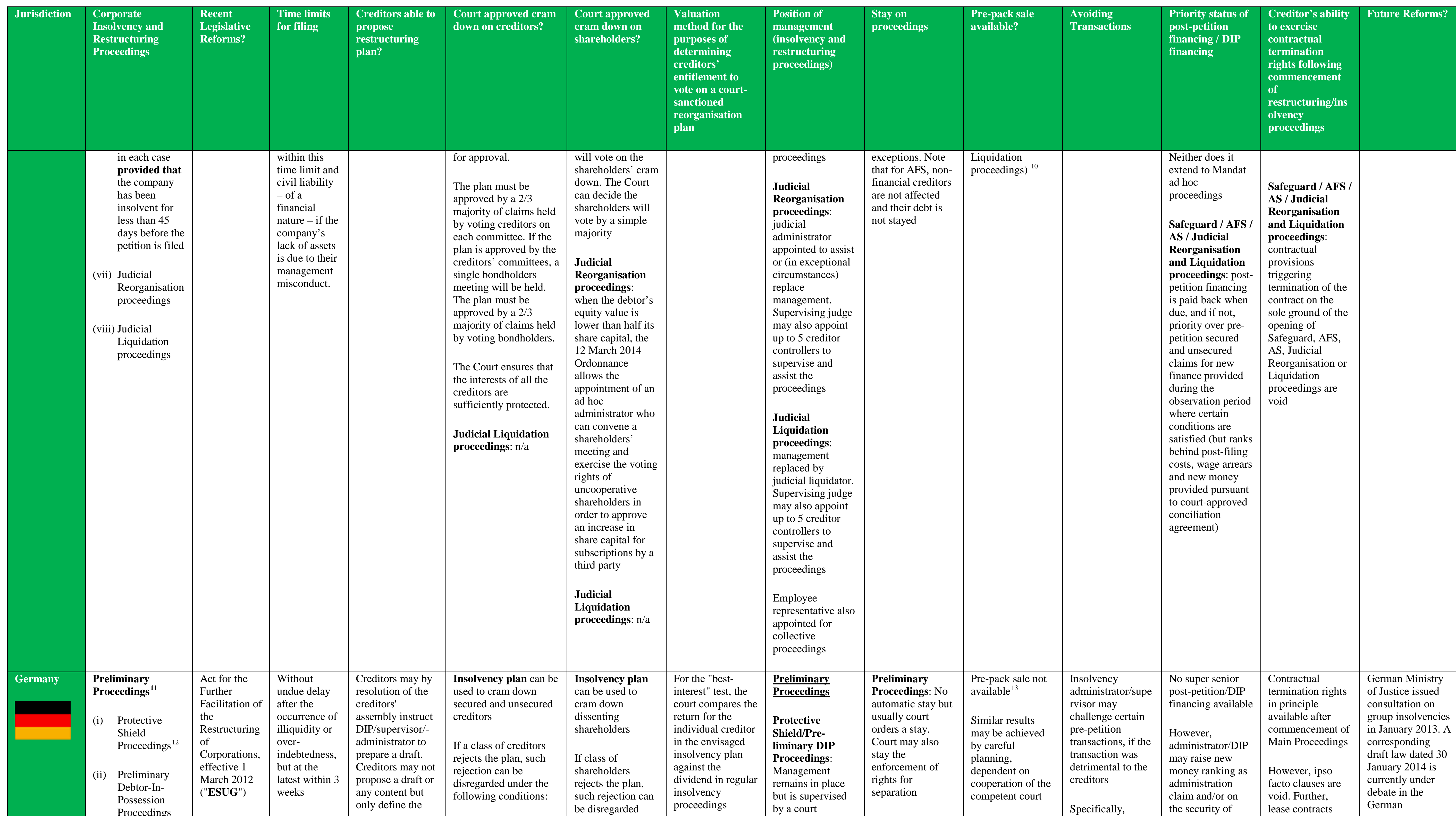


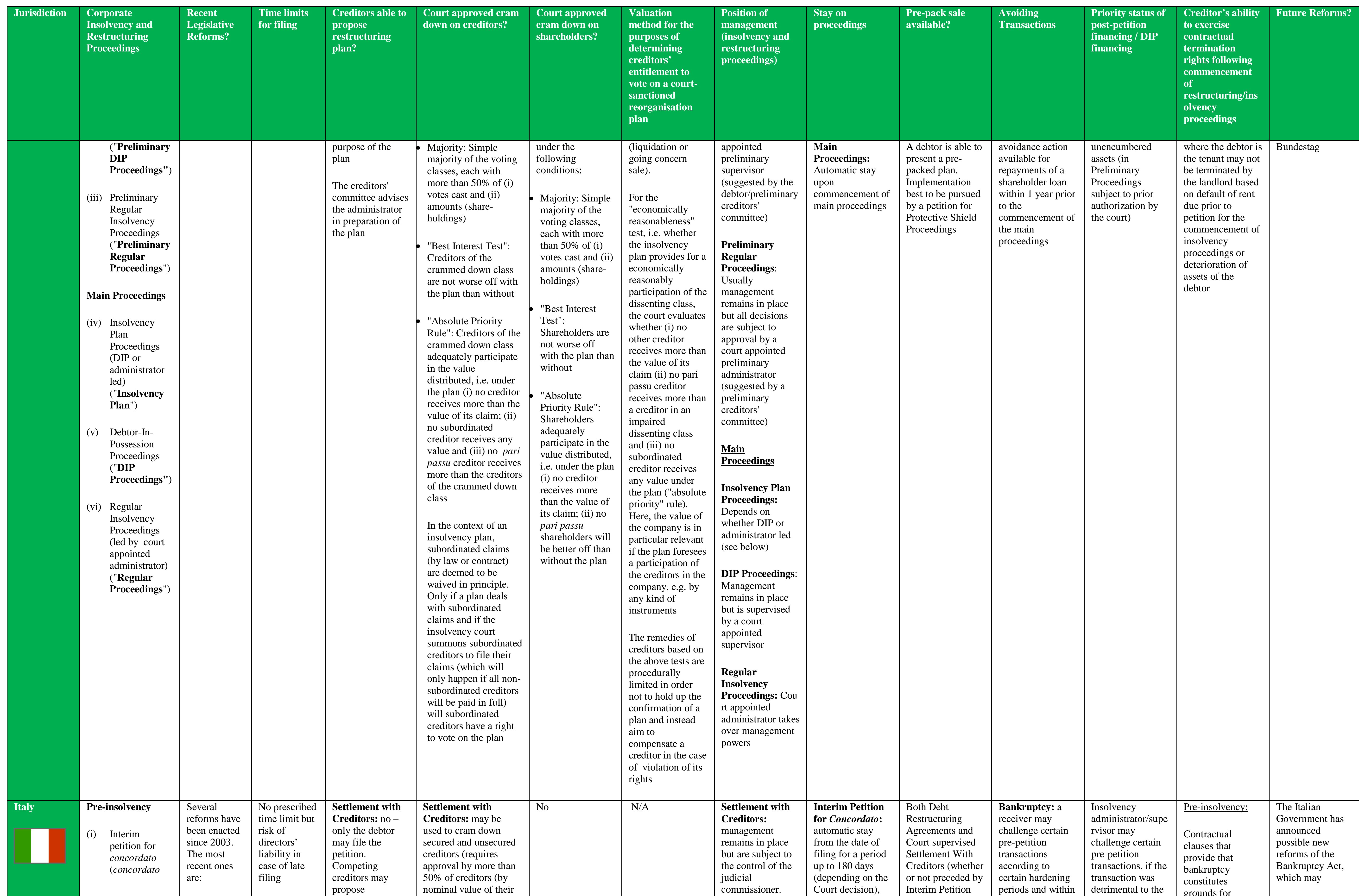
Jurisdiction	Corporate Insolvency and Restructuring Proceedings	Recent Legislative Reforms?	Time limits for filing	Creditors able to propose restructuring plan?	Court approved cram down on creditors?	Court approved cram down on shareholders?	Valuation method for the purposes of determining creditors' entitlement to vote on a court-sanctioned reorganisation plan	Position of management (insolvency and restructuring proceedings)	Stay on proceedings	Pre-pack sale available?	Avoiding Transactions	Priority status of post-petition financing / DIP financing	Creditor's ability to exercise contractual termination rights following commencement of restructuring/insolvency proceedings	Future Reforms?
	in each case **provided that** the company has been insolvent for less than 45 days before the petition is filed (vii) Judicial Reorganisation proceedings (viii) Judicial Liquidation proceedings		within this time limit and civil liability – of a financial nature – if the company's lack of assets is due to their management misconduct.		for approval. The plan must be approved by a 2/3 majority of claims held by voting creditors on each committee. If the plan is approved by the creditors' committees, a single bondholders meeting will be held. The plan must be approved by a 2/3 majority of claims held by voting bondholders. The Court ensures that the interests of all the creditors are sufficiently protected. **Judicial Liquidation proceedings**: n/a	will vote on the shareholders' cram down. The Court can decide the shareholders will vote by a simple majority **Judicial Reorganisation proceedings**: when the debtor's equity value is lower than half its share capital, the 12 March 2014 Ordonnance allows the appointment of an ad hoc administrator who can convene a shareholders' meeting and exercise the voting rights of uncooperative shareholders in order to approve an increase in share capital for subscriptions by a third party **Judicial Liquidation proceedings**: n/a		proceedings **Judicial Reorganisation proceedings**: judicial administrator appointed to assist or (in exceptional circumstances) replace management. Supervising judge may also appoint up to 5 creditor controllers to supervise and assist the proceedings **Judicial Liquidation proceedings**: management replaced by judicial liquidator. Supervising judge may also appoint up to 5 creditor controllers to supervise and assist the proceedings Employee representative also appointed for collective proceedings	exceptions. Note that for AFS, non-financial creditors are not affected and their debt is not stayed	Liquidation proceedings) [10]		Neither does it extend to Mandat ad hoc proceedings **Safeguard / AFS / AS / Judicial Reorganisation and Liquidation proceedings**: post-petition financing is paid back when due, and if not, priority over pre-petition secured and unsecured claims for new finance provided during the observation period where certain conditions are satisfied (but ranks behind post-filing costs, wage arrears and new money provided pursuant to court-approved conciliation agreement)	**Safeguard / AFS / AS / Judicial Reorganisation and Liquidation proceedings**: contractual provisions triggering termination of the contract on the sole ground of the opening of Safeguard, AFS, AS, Judicial Reorganisation or Liquidation proceedings are void	
Germany	**Preliminary Proceedings**[11] (i) Protective Shield Proceedings[12] (ii) Preliminary Debtor-In-Possession Proceedings	Act for the Further Facilitation of the Restructuring of Corporations, effective 1 March 2012 ("**ESUG**")	Without undue delay after the occurrence of illiquidity or over-indebtedness, but at the latest within 3 weeks	Creditors may by resolution of the creditors' assembly instruct DIP/supervisor/-administrator to prepare a draft. Creditors may not propose a draft or any content but only define the	**Insolvency plan** can be used to cram down secured and unsecured creditors If a class of creditors rejects the plan, such rejection can be disregarded under the following conditions:	**Insolvency plan** can be used to cram down dissenting shareholders If class of shareholders rejects the plan, such rejection can be disregarded	For the "best-interest" test, the court compares the return for the individual creditor in the envisaged insolvency plan against the dividend in regular insolvency proceedings	**<u>Preliminary Proceedings</u>** **Protective Shield/Pre-liminary DIP Proceedings**: Management remains in place but is supervised by a court	**Preliminary Proceedings**: No automatic stay but usually court orders a stay. Court may also stay the enforcement of rights for separation	Pre-pack sale not available[13] Similar results may be achieved by careful planning, dependent on cooperation of the competent court	Insolvency administrator/supervisor may challenge certain pre-petition transactions, if the transaction was detrimental to the creditors Specifically,	No super senior post-petition/DIP financing available However, administrator/DIP may raise new money ranking as administration claim and/or on the security of	Contractual termination rights in principle available after commencement of Main Proceedings However, ipso facto clauses are void. Further, lease contracts	German Ministry of Justice issued consultation on group insolvencies in January 2013. A corresponding draft law dated 30 January 2014 is currently under debate in the German

[10] Similar to a UK-style pre-pack, the fact that the company is in financial difficulty is kept confidential, until implemented through a subsequent insolvency proceeding. This can help preserve value in the company.

[11] German law does not provide for a pre-insolvency proceeding. Due to the absence of a pre-insolvency proceeding and the short deadlines obliging the directors to file, it can be difficult for German companies to arrange a rescue deal or sale, without the risk of insolvency becoming public knowledge. This can, arguably, have a negative impact on value of the company.

[12] The Protective Shield Proceeding is a new type of proceeding where the debtor, if not yet illiquid, is granted 3 months to develop a restructuring plan as a debtor-in-possession under the supervision of a court appointed supervisor who may be suggested by the debtor.

[13] As a result of the lack of a German style pre-pack sale, there are examples of German companies taking advantage of a UK pre-pack. See for example *<u>Re Christophorus 3 Limited [2014]</u>*, whereby ATU, the German automotive group, implemented a restructuring via a UK administration and pre-pack sale. Despite the group having almost no connection with the UK, it incorporated an English company to purchase the assets of the Group in order to obtain a UK administration order and sell its assets to a new group structure.



Jurisdiction	Corporate Insolvency and Restructuring Proceedings	Recent Legislative Reforms?	Time limits for filing	Creditors able to propose restructuring plan?	Court approved cram down on creditors?	Court approved cram down on shareholders?	Valuation method for the purposes of determining creditors' entitlement to vote on a court-sanctioned reorganisation plan	Position of management (insolvency and restructuring proceedings)	Stay on proceedings	Pre-pack sale available?	Avoiding Transactions	Priority status of post-petition financing / DIP financing	Creditor's ability to exercise contractual termination rights following commencement of restructuring/insolvency proceedings	Future Reforms?
	("**Preliminary DIP Proceedings**") (iii) Preliminary Regular Insolvency Proceedings ("**Preliminary Regular Proceedings**") **Main Proceedings** (iv) Insolvency Plan Proceedings (DIP or administrator led) ("**Insolvency Plan**") (v) Debtor-In-Possession Proceedings ("**DIP Proceedings**") (vi) Regular Insolvency Proceedings (led by court appointed administrator) ("**Regular Proceedings**")			purpose of the plan The creditors' committee advises the administrator in preparation of the plan	• Majority: Simple majority of the voting classes, each with more than 50% of (i) votes cast and (ii) amounts (share-holdings) • "Best Interest Test": Creditors of the crammed down class are not worse off with the plan than without • "Absolute Priority Rule": Creditors of the crammed down class adequately participate in the value distributed, i.e. under the plan (i) no creditor receives more than the value of its claim; (ii) no subordinated creditor receives any value and (iii) no *pari passu* creditor receives more than the creditors of the crammed down class In the context of an insolvency plan, subordinated claims (by law or contract) are deemed to be waived in principle. Only if a plan deals with subordinated claims and if the insolvency court summons subordinated creditors to file their claims (which will only happen if all non-subordinated creditors will be paid in full) will subordinated creditors have a right to vote on the plan	under the following conditions: • Majority: Simple majority of the voting classes, each with more than 50% of (i) votes cast and (ii) amounts (share-holdings) • "Best Interest Test": Shareholders are not worse off with the plan than without • "Absolute Priority Rule": Shareholders adequately participate in the value distributed, i.e. under the plan (i) no creditor receives more than the value of its claim; (ii) no *pari passu* shareholders will be better off than without the plan	(liquidation or going concern sale). For the "economically reasonableness" test, i.e. whether the insolvency plan provides for a economically reasonably participation of the dissenting class, the court evaluates whether (i) no other creditor receives more than the value of its claim (ii) no pari passu creditor receives more than a creditor in an impaired dissenting class and (iii) no subordinated creditor receives any value under the plan ("absolute priority" rule). Here, the value of the company is in particular relevant if the plan foresees a participation of the creditors in the company, e.g. by any kind of instruments The remedies of creditors based on the above tests are procedurally limited in order not to hold up the confirmation of a plan and instead aim to compensate a creditor in the case of violation of its rights	appointed preliminary supervisor (suggested by the debtor/preliminary creditors' committee) **Preliminary Regular Proceedings**: Usually management remains in place but all decisions are subject to approval by a court appointed preliminary administrator (suggested by a preliminary creditors' committee) __**Main Proceedings**__ **Insolvency Plan Proceedings:** Depends on whether DIP or administrator led (see below) **DIP Proceedings**: Management remains in place but is supervised by a court appointed supervisor **Regular Insolvency Proceedings:** Court appointed administrator takes over management powers	**Main Proceedings:** Automatic stay upon commencement of main proceedings	A debtor is able to present a pre-packed plan. Implementation best to be pursued by a petition for Protective Shield Proceedings	avoidance action available for repayments of a shareholder loan within 1 year prior to the commencement of the main proceedings	unencumbered assets (in Preliminary Proceedings subject to prior authorization by the court)	where the debtor is the tenant may not be terminated by the landlord based on default of rent due prior to petition for the commencement of insolvency proceedings or deterioration of assets of the debtor	Bundestag
Italy	**Pre-insolvency** (i) Interim petition for *concordato* (*concordato*	Several reforms have been enacted since 2003. The most recent ones are:	No prescribed time limit but risk of directors' liability in case of late filing	**Settlement with Creditors:** no – only the debtor may file the petition. Competing creditors may propose	**Settlement with Creditors:** may be used to cram down secured and unsecured creditors (requires approval by more than 50% of creditors (by nominal value of their	No	N/A	**Settlement with Creditors:** management remains in place but are subject to the control of the judicial commissioner.	**Interim Petition for *Concordato*:** automatic stay from the date of filing for a period up to 180 days (depending on the Court decision),	Both Debt Restructuring Agreements and Court supervised Settlement With Creditors (whether or not preceded by Interim Petition	**Bankruptcy:** a receiver may challenge certain pre-petition transactions according to certain hardening periods and within	Insolvency administrator/supervisor may challenge certain pre-petition transactions, if the transaction was detrimental to the	__Pre-insolvency:__ Contractual clauses that provide that bankruptcy constitutes grounds for	The Italian Government has announced possible new reforms of the Bankruptcy Act, which may

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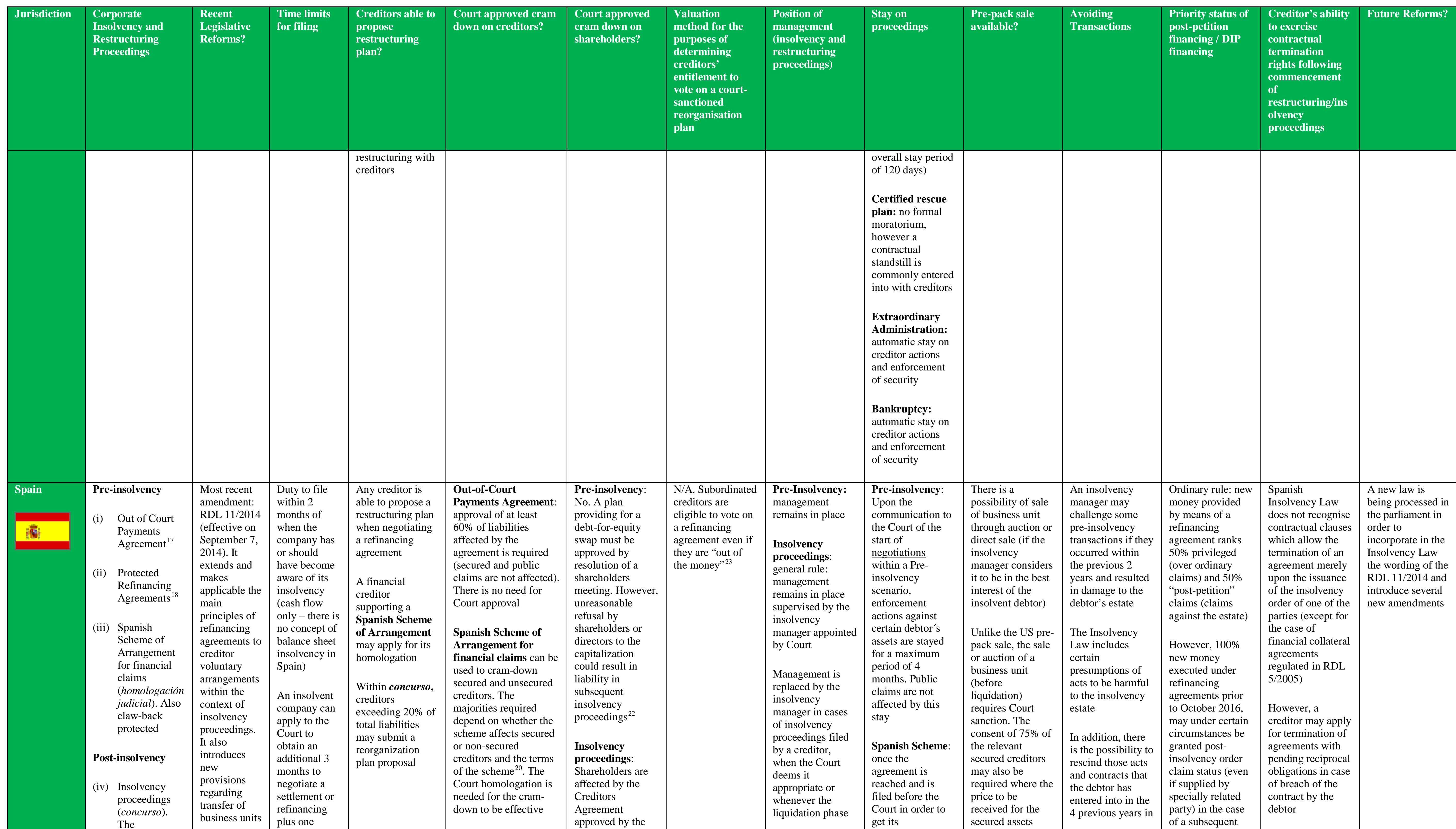
	con riserva) (ii) Court supervised settlement with creditors (*concordato preventivo*) (iii) Debt Restructuring Agreement (*accordi di ristrutturazione dei debiti*) (iv) Out-of Court Certified Rescue Plans (*piani di risanamento attestati*) **Post-insolvency** (v) Extraordinary administration (*Prodibis Proceedings*)[14] (vi) Extraordinary administration for large insolvent companies[15] (Marzano Proceedings) (vii) Bankruptcy proceedings (fallimento)[16] (viii) Post-Bankruptcy Creditors' Composition	Law Decree No.83 of 22 June 2012 Law Decree No. 69 of 21 June 2013. Law Decree No. 145 of 23 December 2013. Law Decree No. 144 of 24 June 2014.		competing plans to show the Court that they would recover a greater amount under available alternatives **Debt Restructuring Agreement**: no, only the debtor may propose a debt restructuring agreement **Certified rescue plan:** plan is prepared by the debtor **Extraordinary Administration:** extraordinary administration proceedings can be commenced by a creditor (as opposed to extraordinary administration of large enterprises, which cannot) **Post-Bankruptcy Creditors' Composition**: once insolvency has been declared and the relevant procedure has commenced, creditors or third parties may file a proposal for a composition with the Court, with the aim of concluding the insolvency proceeding with a consensual	claims) and majority of creditor classes) Only creditors who are affected by the settlement plan are entitled to vote A court appointed expert assesses the viability (but not fairness) of the settlement plan to creditors or creditor classes **Debt Restructuring Agreement:** no cram down on dissenting creditors **Certified Rescue Plan:** no – this is an out of court procedure **Extraordinary Administration:** no, unless through settlement with creditors			Extraordinary transactions require Court approval **Debt Restructuring Agreement:** management remains in place **Certified rescue plan:** management remains in place since this is an out-of-court restructuring procedure **Extraordinary Administration:** The powers of the board of directors are suspended and attributed to one or three extraordinary commissioner(s) appointed by the Ministry of Economic Development or the Court **Bankruptcy:** control of company transferred to the receiver. Creditor committee consent required for extraordinary transactions	when the debtor must file either a Debt Restructuring Agreement or a Settlement with Creditors. Any judicial mortgage on the debtor's properties granted in the 90 days prior to filing is ineffective **Settlement with Creditors:** automatic stay from date of filing and for the entire duration of the proceedings (up to a maximum of 8 months). Any judicial mortgage on the debtor's properties granted in the 90 days prior to filing is ineffective **Debt Restructuring Agreement:** automatic 60 day stay on creditor actions from date restructuring agreement is published in the Companies' Register. The stay may also be anticipated upon court approval for a period of 60 days before the entering into the agreement, in addition to the 60-day stay period following the publication of same (for an	for *Concordato*) are instruments suitable for pre-pack and pre-agreed restructuring plans	certain time limits. Payments made and guarantees granted by the debtor as part of a **Settlement with Creditors,** a **Debt Restructuring Agreement** or a **Certified Rescue Plan** are not subject to claw-back In pre-insolvency proceedings the Court may enter orders protecting certain transactions from **claw-back** risks **Extraordinary Administration for Large Companies:** the commissioner's powers are the same as those of a receiver during bankruptcy proceedings **Extraordinary Administration Proceedings:** the commissioner can only claw-back transactions approved as part of a Ministry-approved liquidation programme, but not if there is a restructuring plan in place	creditors. Specifically, avoidance action available for repayments of a shareholder loan within 1 year prior to the commencement of the main proceedings	termination are ineffective only in case of **Settlement with Creditors** which provides for the continuation of the business as an ongoing concern No restrictions to enforce similar clauses in **Debt Restructuring Agreement** and **Court Certified Rescue Plan** <u>Post-insolvency</u> Contractual clauses that provide that bankruptcy constitutes grounds for termination are ineffective	include: (a) public tenders in case of sale of business units / ongoing concerns in the course of Settlement with Creditors proceedings or Interim Petition for *Concordato*; (b) possibility for lenders to provide new financings beyond usury thresholds; (c) disapplication of criminal sanctions for usury in case of financings to debtors in the course of Settlement with Creditors or Interim Petition for *Concordato*; (d) possibilities for creditors and interested third parties to submit a restructuring plan to the debtor and open pre-insolvency proceedings.

[14] Extraordinary administration is available under Italian insolvency law for large companies that employ at least 200 employees during the previous year (including those admitted to the redundancy fund). The overall debts of the company must be at least 2/3 of the assets on the balance sheet and of profits deriving from sales and provision of services during the previous financial year. When a company subject to the extraordinary administration procedure is part of a corporate group, the procedure extends to the other insolvent companies within the group.

[15] Extraordinary administration of large enterprises is only available under Italian insolvency law to insolvent companies with at least 500 employees in the last year and an overall debt of €300m. If the company subject to the procedure is part of a group of companies, the extraordinary commissioner may ask the minister for economic development to admit other insolvent companies in the group to the procedure by submitting the application for insolvency to the relevant court.

[16] The procedures that arise out of bankruptcy are insolvency, arrangements with creditors and liquidation (for entities of public interest which are not allowed to go bankrupt).



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				restructuring with creditors					overall stay period of 120 days) **Certified rescue plan:** no formal moratorium, however a contractual standstill is commonly entered into with creditors **Extraordinary Administration:** automatic stay on creditor actions and enforcement of security **Bankruptcy:** automatic stay on creditor actions and enforcement of security					
Spain	**Pre-insolvency** (i) Out of Court Payments Agreement[17] (ii) Protected Refinancing Agreements[18] (iii) Spanish Scheme of Arrangement for financial claims (*homologación judicial*). Also claw-back protected **Post-insolvency** (iv) Insolvency proceedings (*concurso*). The	Most recent amendment: RDL 11/2014 (effective on September 7, 2014). It extends and makes applicable the main principles of refinancing agreements to creditor voluntary arrangements within the context of insolvency proceedings. It also introduces new provisions regarding transfer of business units	Duty to file within 2 months of when the company has or should have become aware of its insolvency (cash flow only – there is no concept of balance sheet insolvency in Spain) An insolvent company can apply to the Court to obtain an additional 3 months to negotiate a settlement or refinancing plus one	Any creditor is able to propose a restructuring plan when negotiating a refinancing agreement A financial creditor supporting a **Spanish Scheme of Arrangement** may apply for its homologation Within ***concurso***, creditors exceeding 20% of total liabilities may submit a reorganization plan proposal	**Out-of-Court Payments Agreement**: approval of at least 60% of liabilities affected by the agreement is required (secured and public claims are not affected). There is no need for Court approval **Spanish Scheme of Arrangement for financial claims** can be used to cram-down secured and unsecured creditors. The majorities required depend on whether the scheme affects secured or non-secured creditors and the terms of the scheme[20]. The Court homologation is needed for the cram-down to be effective	**Pre-insolvency**: No. A plan providing for a debt-for-equity swap must be approved by resolution of a shareholders meeting. However, unreasonable refusal by shareholders or directors to the capitalization could result in liability in subsequent insolvency proceedings[22] **Insolvency proceedings**: Shareholders are affected by the Creditors Agreement approved by the	N/A. Subordinated creditors are eligible to vote on a refinancing agreement even if they are "out of the money"[23]	**Pre-Insolvency:** management remains in place **Insolvency proceedings**: general rule: management remains in place supervised by the insolvency manager appointed by Court Management is replaced by the insolvency manager in cases of insolvency proceedings filed by a creditor, when the Court deems it appropriate or whenever the liquidation phase	**Pre-insolvency**: Upon the communication to the Court of the start of negotiations within a Pre-insolvency scenario, enforcement actions against certain debtor´s assets are stayed for a maximum period of 4 months. Public claims are not affected by this stay **Spanish Scheme**: once the agreement is reached and is filed before the Court in order to get its	There is a possibility of sale of business unit through auction or direct sale (if the insolvency manager considers it to be in the best interest of the insolvent debtor) Unlike the US pre-pack sale, the sale or auction of a business unit (before liquidation) requires Court sanction. The consent of 75% of the relevant secured creditors may also be required where the price to be received for the secured assets	An insolvency manager may challenge some pre-insolvency transactions if they occurred within the previous 2 years and resulted in damage to the debtor's estate The Insolvency Law includes certain presumptions of acts to be harmful to the insolvency estate In addition, there is the possibility to rescind those acts and contracts that the debtor has entered into in the 4 previous years in	Ordinary rule: new money provided by means of a refinancing agreement ranks 50% privileged (over ordinary claims) and 50% "post-petition" claims (claims against the estate) However, 100% new money executed under refinancing agreements prior to October 2016, may under certain circumstances be granted post-insolvency order claim status (even if supplied by specially related party) in the case of a subsequent	Spanish Insolvency Law does not recognise contractual clauses which allow the termination of an agreement merely upon the issuance of the insolvency order of one of the parties (except for the case of financial collateral agreements regulated in RDL 5/2005) However, a creditor may apply for termination of agreements with pending reciprocal obligations in case of breach of the contract by the debtor	A new law is being processed in the parliament in order to incorporate in the Insolvency Law the wording of the RDL 11/2014 and introduce several new amendments

[17] An out-of-court payments agreement under Spanish insolvency law can be reached by (i) an entrepreneur (an individual) in a position of current or imminent technical insolvency with liabilities below €5 million; and (ii) a legal entity in a position of technical insolvency with fewer than 50 creditors or assets or liabilities below €5 million, provided that the costs of the agreement can be met and the expected assets and revenues will be sufficient to allow a viable agreement. An insolvency mediator is appointed and the payment plan must achieve the consent of at least 60% of liabilities affected by the agreement. If agreement cannot be reached or the terms are breached, a consecutive insolvency proceeding will be declared in order to directly liquidate the assets. Therefore, an out-of-court Payments Agreement is very rarely used.

[18] There are two types of refinancing agreement under Spanish law which are protected from claw-back risk: (i) a collective refinancing agreement, being an agreement entered into at least by 60% of liabilities and made in response to a viability plan; and (ii) an individual financing agreement "safe harbour" which is not supported by a majority of creditors but which may, if certain criteria are met (the refinancing agreement clearly improves the debtor's financial position), be protected from claw-back risk.

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	proceedings will either have the aim of reorganisation (by way of a creditors' arrangement supported by a viability plan) or liquidation (in which case sale of business as a going concern is also available)	within *concurso*[19]. Law 17/2014 (effective on October 2, 2014). It incorporates in the Insolvency Law contents of the latest RDLs with some minor amendments	additional month to file for insolvency In relation to imminent insolvency, there is no duty to file, but debtor may decide to do so		Creditors may, following approval of the Spanish Scheme of Arrangement by the Court, challenge it on the basis of "disproportionate sacrifice"[21] **Creditors Agreement in insolvency proceedings: t**he Absolute Priority Rule does not apply. a) acceptance of at least 50% of the ordinary liabilities is required for non-burdensome measures (like write-offs up to 50% or deferrals up to 5 years); b) acceptance of a superior proportion of the liabilities than those voting against the proposal will be sufficient for the less aggressive proposals of full payment within 3 years or immediate payment with a write-off of less than 20%; c) acceptance of at least 65% of the ordinary liabilities is required for the more onerous measures (higher haircuts, conversion into equity etc.) Cram down on privileged creditors and	Court, save that shareholder consent is required for any debt-for-equity swap The debtor has a veto right on a proposed plan (even if accepted by creditors). The debtor may prefer liquidation and, if he so decides, no proposal should be approved by the Court		is opened	homologation, single enforcement proceedings are stayed by the Court until the homologation is awarded **Insolvency proceedings:** upon the issuance of the insolvency order, the general rule is that enforcement actions against the debtor are stayed With regards to secured creditors, only enforcement actions over certain debtor's assets (and other than financial collateral) are temporally stayed	included in the production unit is lower than the value of the security	fraud of creditors A **Refinancing Agreement** which meets the legal requirements is immune to claw-back [24]	insolvency proceeding that occurs within the following 2 year period After expiry of the 2 year period the ordinary rule will apply again		

[20] In very simplified terms, the regime for the homologation/cram down on ordinary unsecured creditors requires: (a) the approval by creditors holding 60% of financial liabilities for non-burdensome measures (v.gr. deferrals for up to 5 years); (b) the approval by creditors holding 75% of financial liabilities for more onerous measures e.g. write-offs etc.. The regime for the homologation/cram down on secured creditors is the following: (a) for claims up to the value of the security, the approval by creditors holding 65% or 80% of secured liabilities (calculated according to the proportion between the creditors with in rem guarantees adhering to the agreement and the total debt with in rem guarantees) is required, and (b) for the secured debt amount not covered by the security value, the same majorities as for unsecured creditors is required.

[22] To avoid debtors objecting unreasonably to reaching agreements setting out debt for equity terms, a new presumption of serious wilful misconduct or fault by the debtor or the debtor's legal representatives, directors or liquidators, in generating or aggravating the debtor's technical insolvency, has been added where they object to a refinancing agreement and an insolvency order is later issued on the debtor (and, most importantly, this presumption can apply even to the shareholders or members if it was their negative vote at the company's shareholders' meeting that prevented the exchange of debt for equity).

[23] Note, however, that for formal Spanish Court proceedings, subordinated creditors do not formally have voting rights.

[19] A key element of the RDL 11/14 was the introduction of a new section 3 in article 90 of Law 22/2003 (the Spanish Insolvency Law) which provides that special privilege to secured claims shall only apply to that part of a secured claim not exceeding the value of its security. Valuation criteria for valuing security were set out, a key element of which is the determination of "fair value" of the secured asset.

[21] "disproportionate sacrifice" is not defined under Spanish law and there is no set of guidelines developed by the Courts. The Spanish Court has, to date, only admitted challenges on this basis in a very limited number of cases. Furthermore, any potential challenge to a resolution validating a refinancing agreement is heard by the same court that issued the resolution (not by a higher court).

[24] See footnote 20. The Spanish Scheme of Arrangement may also resist claw back upon its homologation by the Court.

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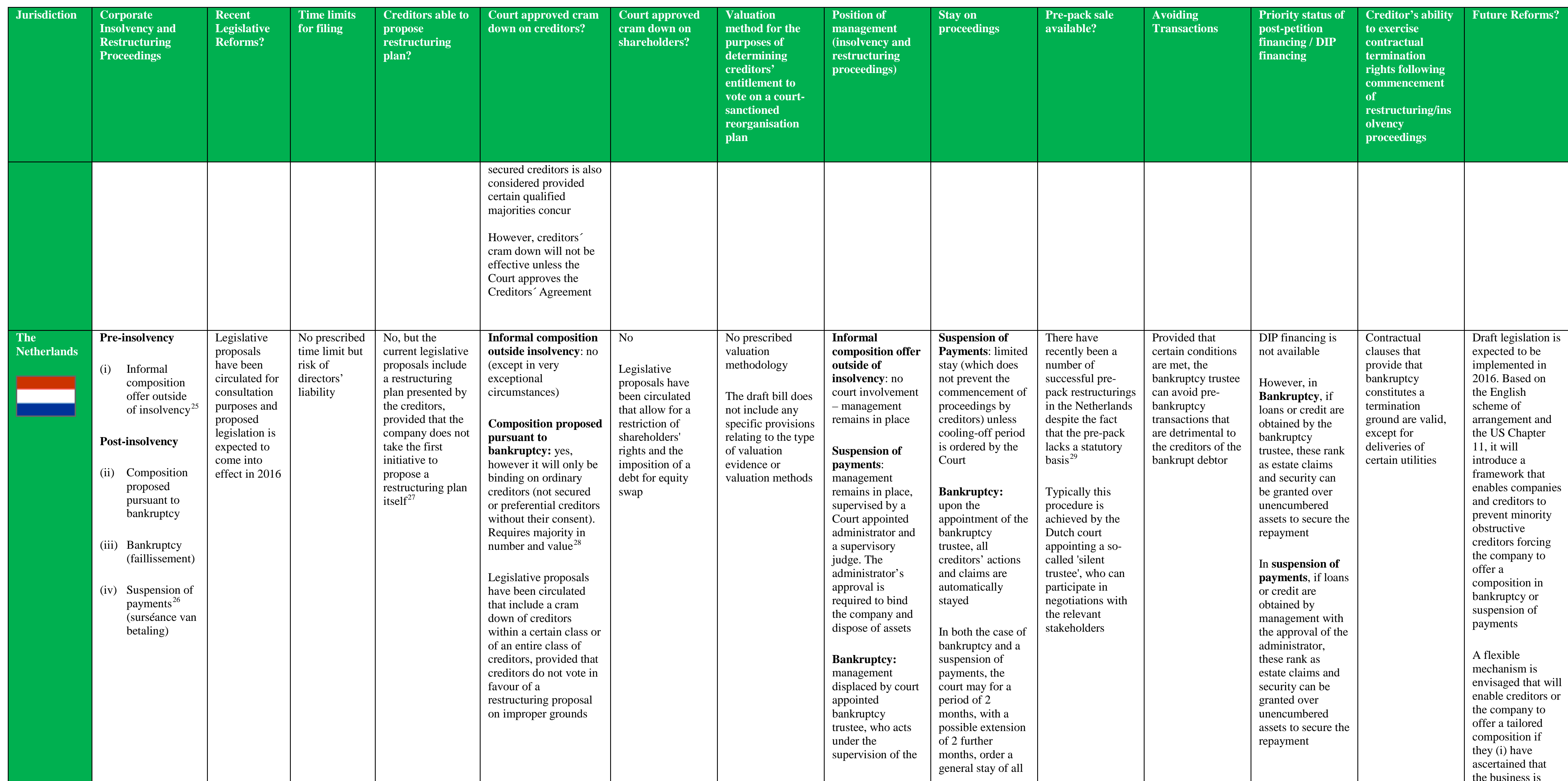


Jurisdiction	Corporate Insolvency and Restructuring Proceedings	Recent Legislative Reforms?	Time limits for filing	Creditors able to propose restructuring plan?	Court approved cram down on creditors?	Court approved cram down on shareholders?	Valuation method for the purposes of determining creditors' entitlement to vote on a court-sanctioned reorganization plan	Position of management (insolvency and restructuring proceedings)	Stay on proceedings	Pre-pack sale available?	Avoiding Transactions	Priority status of post-petition financing / DIP financing	Creditor's ability to exercise contractual termination rights following commencement of restructuring/insolvency proceedings	Future Reforms?
					secured creditors is also considered provided certain qualified majorities concur However, creditors´ cram down will not be effective unless the Court approves the Creditors´ Agreement									
The Netherlands	**Pre-insolvency** (i) Informal composition offer outside of insolvency[25] **Post-insolvency** (ii) Composition proposed pursuant to bankruptcy (iii) Bankruptcy (faillissement) (iv) Suspension of payments[26] (surséance van betaling)	Legislative proposals have been circulated for consultation purposes and proposed legislation is expected to come into effect in 2016	No prescribed time limit but risk of directors' liability	No, but the current legislative proposals include a restructuring plan presented by the creditors, provided that the company does not take the first initiative to propose a restructuring plan itself[27]	**Informal composition outside insolvency**: no (except in very exceptional circumstances) **Composition proposed pursuant to bankruptcy:** yes, however it will only be binding on ordinary creditors (not secured or preferential creditors without their consent). Requires majority in number and value[28] Legislative proposals have been circulated that include a cram down of creditors within a certain class or of an entire class of creditors, provided that creditors do not vote in favour of a restructuring proposal on improper grounds	No Legislative proposals have been circulated that allow for a restriction of shareholders' rights and the imposition of a debt for equity swap	No prescribed valuation methodology The draft bill does not include any specific provisions relating to the type of valuation evidence or valuation methods	**Informal composition offer outside of insolvency**: no court involvement – management remains in place **Suspension of payments**: management remains in place, supervised by a Court appointed administrator and a supervisory judge. The administrator's approval is required to bind the company and dispose of assets **Bankruptcy:** management displaced by court appointed bankruptcy trustee, who acts under the supervision of the	**Suspension of Payments**: limited stay (which does not prevent the commencement of proceedings by creditors) unless cooling-off period is ordered by the Court **Bankruptcy:** upon the appointment of the bankruptcy trustee, all creditors' actions and claims are automatically stayed In both the case of bankruptcy and a suspension of payments, the court may for a period of 2 months, with a possible extension of 2 further months, order a general stay of all	There have recently been a number of successful pre-pack restructurings in the Netherlands despite the fact that the pre-pack lacks a statutory basis[29] Typically this procedure is achieved by the Dutch court appointing a so-called 'silent trustee', who can participate in negotiations with the relevant stakeholders	Provided that certain conditions are met, the bankruptcy trustee can avoid pre-bankruptcy transactions that are detrimental to the creditors of the bankrupt debtor	DIP financing is not available However, in **Bankruptcy**, if loans or credit are obtained by the bankruptcy trustee, these rank as estate claims and security can be granted over unencumbered assets to secure the repayment In **suspension of payments**, if loans or credit are obtained by management with the approval of the administrator, these rank as estate claims and security can be granted over unencumbered assets to secure the repayment	Contractual clauses that provide that bankruptcy constitutes a termination ground are valid, except for deliveries of certain utilities	Draft legislation is expected to be implemented in 2016. Based on the English scheme of arrangement and the US Chapter 11, it will introduce a framework that enables companies and creditors to prevent minority obstructive creditors forcing the company to offer a composition in bankruptcy or suspension of payments A flexible mechanism is envisaged that will enable creditors or the company to offer a tailored composition if they (i) have ascertained that the business is

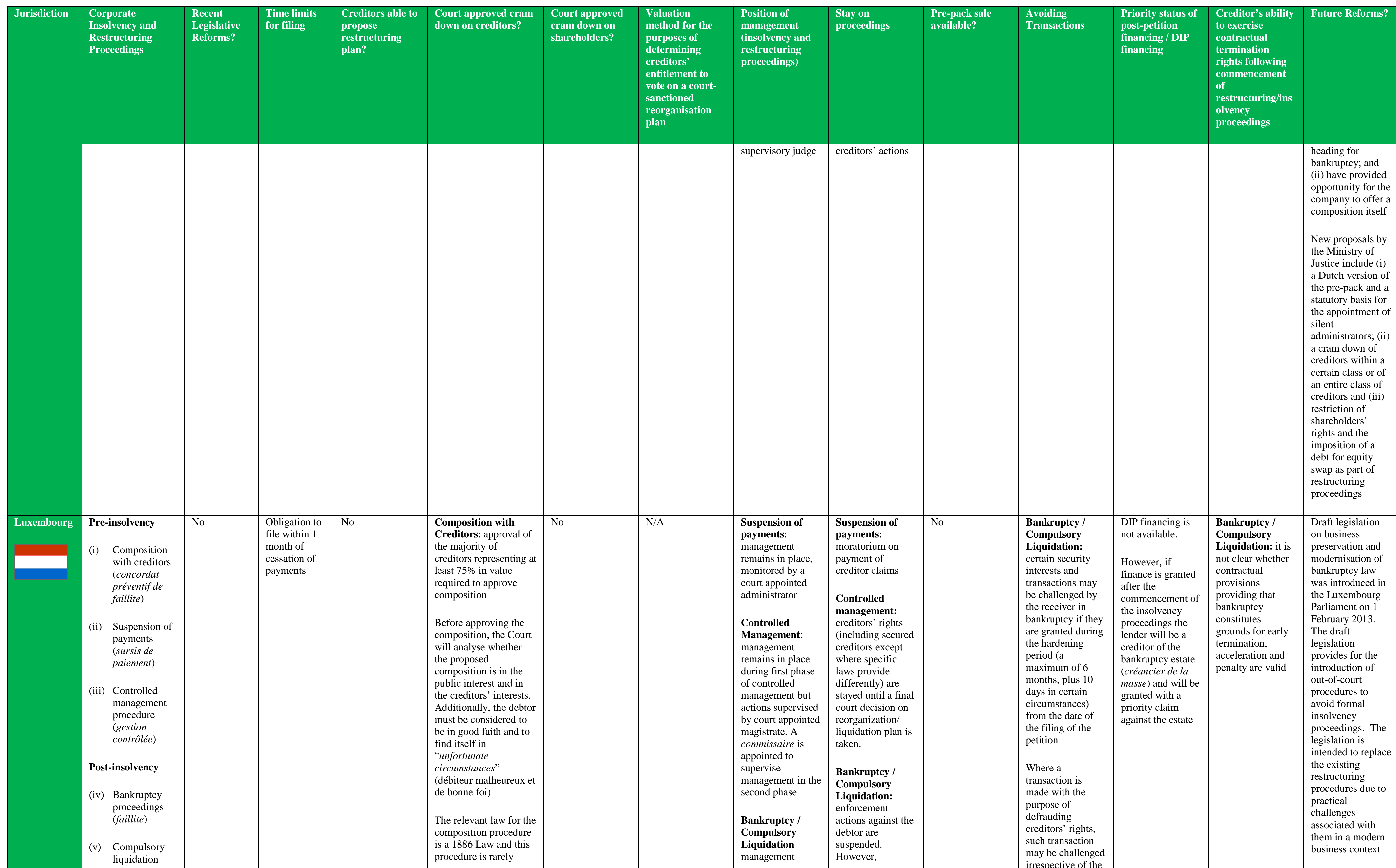
[25] An informal composition outside insolvency is an agreement between the company and its creditors, that provides for partial payment in full satisfaction of the creditors' claims. The company is free to negotiate terms with its creditors, however it is only allowed to put forward one proposal plan. Once agreed and approved by the court, the company avoids liquidation and its debts are discharged. Only parties to the agreement are bound by its terms.

[26] Under a suspension of payments, a debtor is given temporary relief against its unsecured creditors and any creditors who have subsequently been granted a security interest. The period may last up to 1 1/2 years and may be extended, during which time the business is managed jointly by the company and the adopted administrator.

[27] A notable example of an English scheme of arrangement being used to restructure a Dutch company is the restructuring of *Magyar Telecom B.V. (2014)*, where an English scheme of arrangement was used to compromise New York governed notes issued by a Dutch incorporated company. Magyar embarked on a number of measures (such as opening of a UK office, notices to creditors, negotiation meetings with creditors in London, appointment of UK based directors) to ensure that COMI shifted from the Netherlands to the UK. The other relevant jurisdictions (the Netherlands, Hungary and the United States) did not provide any attractive alternatives to the English scheme for the implementation of the transaction. The trend of using of an English scheme of arrangement to restructure NY high yield bonds issued by European corporates has continued e.g. *Zlomrex International Finance S.A*. (2014).

[28] If the required majority do not vote in favour of the plan, the supervisory judge may, upon request, approve the plan if at least 75% of the present ordinary creditors vote in favour, provided the rejection of the proposal is due to one or more creditors who could not reasonably vote on the plan.

[29] E.g. in July 2014, the Dutch childcare service provider *Estro* went bankrupt and a Dutch 'pre-pack' bankruptcy process was utilised. Currently, all Dutch courts except for two, are accustomed to approving the appointment of "silent administrators" to effect a Dutch pre-pack sale.

Jurisdiction	Corporate Insolvency and Restructuring Proceedings	Recent Legislative Reforms?	Time limits for filing	Creditors able to propose restructuring plan?	Court approved cram down on creditors?	Court approved cram down on shareholders?	Valuation method for the purposes of determining creditors' entitlement to vote on a court-sanctioned reorganisation plan	Position of management (insolvency and restructuring proceedings)	Stay on proceedings	Pre-pack sale available?	Avoiding Transactions	Priority status of post-petition financing / DIP financing	Creditor's ability to exercise contractual termination rights following commencement of restructuring/insolvency proceedings	Future Reforms?
								supervisory judge	creditors' actions					heading for bankruptcy; and (ii) have provided opportunity for the company to offer a composition itself New proposals by the Ministry of Justice include (i) a Dutch version of the pre-pack and a statutory basis for the appointment of silent administrators; (ii) a cram down of creditors within a certain class or of an entire class of creditors and (iii) restriction of shareholders' rights and the imposition of a debt for equity swap as part of restructuring proceedings
Luxembourg 	**Pre-insolvency** (i) Composition with creditors (*concordat préventif de faillite*) (ii) Suspension of payments (*sursis de paiement*) (iii) Controlled management procedure (*gestion contrôlée*) **Post-insolvency** (iv) Bankruptcy proceedings (*faillite*) (v) Compulsory liquidation	No	Obligation to file within 1 month of cessation of payments	No	**Composition with Creditors**: approval of the majority of creditors representing at least 75% in value required to approve composition Before approving the composition, the Court will analyse whether the proposed composition is in the public interest and in the creditors' interests. Additionally, the debtor must be considered to be in good faith and to find itself in "*unfortunate circumstances*" (débiteur malheureux et de bonne foi) The relevant law for the composition procedure is a 1886 Law and this procedure is rarely	No	N/A	**Suspension of payments**: management remains in place, monitored by a court appointed administrator **Controlled Management**: management remains in place during first phase of controlled management but actions supervised by court appointed magistrate. A *commissaire* is appointed to supervise management in the second phase **Bankruptcy / Compulsory Liquidation** management	**Suspension of payments**: moratorium on payment of creditor claims **Controlled management:** creditors' rights (including secured creditors except where specific laws provide differently) are stayed until a final court decision on reorganization/ liquidation plan is taken. **Bankruptcy / Compulsory Liquidation:** enforcement actions against the debtor are suspended. However,	No	**Bankruptcy / Compulsory Liquidation:** certain security interests and transactions may be challenged by the receiver in bankruptcy if they are granted during the hardening period (a maximum of 6 months, plus 10 days in certain circumstances) from the date of the filing of the petition Where a transaction is made with the purpose of defrauding creditors' rights, such transaction may be challenged irrespective of the	DIP financing is not available. However, if finance is granted after the commencement of the insolvency proceedings the lender will be a creditor of the bankruptcy estate (*créancier de la masse*) and will be granted with a priority claim against the estate	**Bankruptcy / Compulsory Liquidation:** it is not clear whether contractual provisions providing that bankruptcy constitutes grounds for early termination, acceleration and penalty are valid	Draft legislation on business preservation and modernisation of bankruptcy law was introduced in the Luxembourg Parliament on 1 February 2013. The draft legislation provides for the introduction of out-of-court procedures to avoid formal insolvency proceedings. The legislation is intended to replace the existing restructuring procedures due to practical challenges associated with them in a modern business context

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	(*liquidation judiciaire*)				used. **Controlled Management:** reorganisation plan must be approved by majority in number and value of creditors			displaced by court appointed receiver (*curateur*) **Composition with creditors (*concordat préventif de faillite*)** Management remains in place. Supervisory judge supervises the composition process. If the composition is specifically to realise the company's assets, liquidators are appointed by the court and are supervised by the supervisory judge.	financial collateral arrangements[30] remain enforceable **Composition with creditors (*concordat préventif de faillite*)** If the composition is approved, it applies to all creditors (except the tax authorities, claims guaranteed by security or mortgage and claims due in respect of maintenance (*aliments*)). The composition only applies to contracts signed/debts contracted before the composition was obtained		date the transaction took place			

[30] Financial Collateral Arrangements include: transfers of ownership for security purposes, repurchase agreements relating to financial instruments (including securities, shares, etc.) and claims (including receivables and bank account balances).

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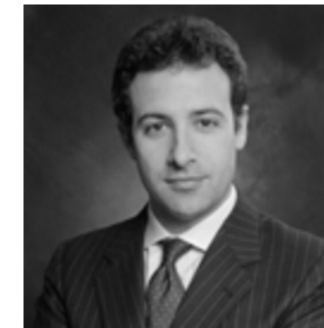

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