Global Restructuring Review

The Art of the Pre-Pack

Editors
Yushan Ng and Jacqueline Ingram

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Publisher's Note

'Pre-packs' are a hot topic in the world of restructuring and insolvency – wherever you are. But – until now – there hasn't been a thematic overview that sets out the essentials of different jurisdictions while also drawing out what they have in common. This guide changes that.

It draws on the wisdom of 18 pre-eminent practitioners to help the reader become more adept at completing a pre-pack deal, through a series of overviews, country chapters and case studies. *The Art of the Pre-Pack* is GRR's second such guide, joining *The Art of the Ad Hoc* in our library. We hope you enjoy the volume, which will be revised and expanded regularly. If you have feedback, or would like to participate, don't hesitate to get in touch. Please write to us at insight@globalrestructuringreview.com

The publisher would like to thank the editors of this guide for their energy and vision, without which the book wouldn't have been possible.

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PRE-PACKS IN THE GLOBAL CONTEXT

Introduction

Yushan Ng and Jacqueline Ingram[1]

The term 'pre-pack' is something of a hot topic in the world of restructuring and insolvency. It can be used to describe a number of different arrangements and processes across a variety of jurisdictions. Some of these arrangements are broadly similar, others quite different in nature. This guide seeks to give an insight into two of the more established forms of pre-packs: under Chapter 11 bankruptcy in the United States and as part of an administration in the United Kingdom. It also seeks to show that the core elements of a pre-pack can be found in a variety of jurisdictions, even though no generally accepted pre-pack option might exist.

This guide explores, through our collection of jurisdictional contributions, the varying forms of pre-packs between different countries. The general theme of a pre-pack is that, despite its form varying between jurisdictions, there are common underlying characteristics attributable.

What is a 'pre-pack'?

In essence, the term 'pre-pack' refers to a twofold process in which, first, a restructuring is negotiated and agreed with requisite stakeholders, and second, the agreement is implemented through a formal insolvency process.

The first characteristic we would highlight, which is visible in almost all jurisdictions represented in this guide, is that a pre-pack involves a private (and discrete) negotiation of a restructuring proposal and an agreement on terms prior to implementation through a formal insolvency. The negotiation and agreement may not involve all stakeholders; indeed, expediency often dictates that only those directly implicated or whose consent is needed to implement the restructuring have a role to play in formulating and agreeing its terms. However, the pre-pack offers a chance for private market participants to agree a deal outside of the fanfare and potentially negative connotations surrounding a typical formal insolvency process.

1 Yushan Ng and Jacqueline Ingram are partners at Milbank LLP.

The second characteristic, very much linked to the first, is the focus on limiting the amount of time the debtor entity spends in a formal insolvency process. The reason for the private negotiations ahead of implementation is to address most of the work of the restructuring first, such that the deal is effectively done prior to a filing and can be implemented without undue delay once a filing is made. The logic behind this characteristic, which is perhaps a statement of the obvious, is that, in many jurisdictions, bankruptcy and insolvency carry such a stigma that any announcement of a filing can exacerbate financial difficulties and make corporate rescue a less attainable goal. Similarly, pre-packs retain value in a company by maintaining confidence.

An additional perceived advantage of the brevity of any insolvency process is reduced cost. While pre-packs may take many months to negotiate, there are generally only a limited number of parties involved in the negotiations than there would otherwise be in a formal insolvency process. For example, in the United States, the trustee will often elect not to appoint a committee of unsecured creditors, which has the benefit of reducing a company's administrative costs.

The third characteristic, implementation through a formal insolvency process, is common to most jurisdictions, although the form the pre-pack restructuring will take depends on the tools available under the relevant legal framework. In the United States, the restructuring often proceeds by way of a plan of reorganisation where the reorganised debtor emerges from bankruptcy with a restructured balance sheet. In jurisdictions that lack procedures to impose compromises on dissenting minority stakeholders, pre-pack restructurings are implemented through sale transactions conducted by insolvency officers. In almost all circumstances the 'pre-pack' methodology itself is not specifically legislated for; it tends to be formulated through market practice utilising and interpreting existing restructuring frameworks. Indeed, in some cases, as the chapters of this guide demonstrate, existing processes that were not necessarily designed for use in 'pre-packaged' form are moulded and shaped to allow for the core objectives of a pre-pack to be achieved.

Pre-packs as a tool for corporate rescue

Given the characteristics we describe above, it is perhaps no wonder that the aim of pre-packs is corporate rescue. Despite varying in form and substance, in essence, pre-packs are all about facilitating the continuity of the core business as a going concern. This reflects the broader shift in the restructuring mindset in many jurisdictions towards creating a 'rescue culture'. We can see this, for example, in the legislative developments in the United Kingdom. The Enterprise Act 2002, which amended the administration procedure and enabled increased use of pre-pack administrations, included in its explanatory notes a statement that 'rescuing the company as a going concern' is intended to mean that 'the company and as much of its business as possible' is rescued.[2]

We explore in this guide key examples of the pre-pack being used a tool for corporate rescue. In the United States, the cases studies of Seegrid Corporation and FullBeauty Brands Inc demonstrate how pre-agreeing a deal relating to complex businesses ensured there was a clear plan of reorganisation that created certainty and stability, along with a clear path to exit

2 Enterprise Act 2002, explanatory notes: Part 10 (insolvency), Paragraph 647647.

bankruptcy proceedings and rescue these businesses. In the United Kingdom, for Johnston Press, a pre-packaged sale out of administration took the unusual and highly complex form of an asset sale across multiple entities in the face of numerous external pressures and scrutiny, which allowed the business of a historic company to be saved.

The example provided by these key case studies provides a valuable insight into the use of pre-packs in the United Kingdom and the United States. However, the art of the pre-pack is not limited to these countries. While the United States and the United Kingdom have, arguably, the most established pre-pack processes, other jurisdictions have also developed their own processes and procedures that share many of these characteristics. This guide showcases a collection of contributions from lead practitioners around the world who detail the means by which a pre-pack can be effected in their jurisdiction. What we learn from these contributions is that, in a number of jurisdictions, the pre-pack continues to develop as an innovative corporate rescue tool.

Balancing rescue and fairness

The other theme that emerges from the chapters in this guide, as well as legislative developments in a number of jurisdictions, is a note of caution around the potential for pre-packs to be used in an abusive manner. There is increasing emphasis in a number of jurisdictions on ensuring that the focus on corporate rescue does not come at the expense of well-established principles of impartiality, transparency and fair dealing.

The process of negotiating and agreeing a restructuring proposal in advance often necessitates the participation of the prospective office holder. This clearly lends the transaction a degree of certainty in that stakeholders can get comfort that the negotiated deal will be implemented upon a filing. A further advantage of this early participation is that the office holder, who is often bound by statutory obligations and professional guidelines, can exert influence on negotiations to ensure these will be respected in the ultimate transaction. However, this prior involvement could raise concerns around a lack of impartiality of the prospective office holder. Indeed, this is a key concern highlighted in the Australian chapter of this volume.

The private nature of the negotiation surrounding a pre-pack makes transparency a clear issue. In the United Kingdom, for example, while certain creditors (often those with secured debt) may have the opportunity to engage in negotiations prior to implementation of a pre-pack sale, out-of-the-money creditors often have little or no prior knowledge of a pre-pack being considered, and therefore only limited opportunity to protect their interests. The focus on privacy and limiting the negative impact of any process on the business often means that marketing processes can be limited and transfers of assets are often to connected parties. Accountability is also a key concern. Oversight through the relevant court is limited, with the court typically being asked to simply bless an already agreed upon deal.

Conclusions

As demonstrated by this volume, pre-packs exist in some form in a number of jurisdictions, and they are a popular implementation tool. There remains a challenge to balance the objective of corporate rescue and of preserving as much of the business, and as many jobs, as possible, with the need for fairness and transparency to the broader stakeholder group. It remains to be seen whether the pre-pack can continue to evolve as an art form around the world to adequately address these concerns.

Part I

Pre-Packs in the United Kingdom

1

United Kingdom: Core Elements of a Pre-Pack Administration

Jacqueline Ingram and Damilola Odetola[1]

One of the core differences between pre-pack transactions in the United Kingdom and the United States is not so much the manner in which deals are implemented, but what those deals seek to enact. In the United States, a pre-pack is in essence a prenegotiated plan of reorganisation that is implemented with the benefit of the pre-approval of the requisite creditor groups and generally sees the emergence from bankruptcy of the reorganised debtor. In the United Kingdom, pre-packs are used to describe sale transactions, where the business and assets of the debtor are transferred to a purchaser and creditors are either rolled into the new structure, to the extent that the sale is a share sale and they have structurally senior claims, or left behind. Pre-packs are often combined with pre-agreed arrangements with secured creditors of the business being sold to fund the purchase price through the novation of 'credit-bidding' of their debt claims to the purchaser, thereby creating a powerful debt-restructuring tool.

The UK government recently announced plans to reform the United Kingdom's insolvency and restructuring framework. The proposals, set out in Section 5 of 'Insolvency and Corporate Governance, Government Response' published on 26 August 2018, could, if implemented, have wide-reaching consequences for how restructurings are implemented in the future. In particular, the move to introduce a new restructuring plan that is similar to a Scheme of Arrangement[2] but that contains a cross-class cramdown, could feasibly see US-style pre-packs become more common. How those proposals would be implemented into law remains to be seen, and so this chapter will focus on our current restructuring tool – the pre-packaged administration.

1 Jacqueline Ingram is a partner and Damilola Odetola is an associate at Milbank LLP.
2 Part 26 of the Companies Act 2006.

Pre-pack administration

A pre-pack administration is an arrangement pursuant to which a plan relating to the business of a distressed company is negotiated and agreed by the requisite stakeholders prior to the appointment of an administrator, and implemented upon the commencement of the administration. The nature of the agreed plan will more often than not result in a going concern sale of all or part of the company's business and assets. The UK Insolvency Practitioners Association describes the pre-pack as 'an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator and the administrator effects the sale immediately on, or shortly after, appointment'.[3]

A pre-pack administration combines features of an informal restructuring and a formal administration procedure, allowing for private negotiations to be made in relation to how the financial distress of the company is to be resolved on an informal basis, before subsequently effecting the deal under a formal administration procedure.

Restructuring in England was historically dominated by preventive informal workouts popularly known as the London Approach. The London Approach, which is one of the most prominent examples of a multi-creditor informal restructuring system globally, describes a system where banks in the city of London privately achieved out-of-court restructurings for distressed companies. A private workout offers a number of advantages in the restructuring process. It is flexible and easily adapted to the business of the distressed company. As it does not typically involve courts and regulatory authorities, it can be done in as little time and as privately as possible, thereby preserving the goodwill of the company while seeking efficient ways to keep it alive. The private nature of the negotiations also serves the purpose of limiting negative publicity that would further destabilise the business and potentially lead to a greater loss of value for stakeholders. Overall, private restructurings offer stakeholders a tool for early intervention and opportunity for significant value preservation.

The restructuring scene in England has, over the years, transitioned from informal consensus-based restructurings led by significant bank lenders with extensive control to more formal restructuring mechanisms. One of those formal procedures is the administration procedure, which allows an insolvency practitioner to be appointed to take over the management of a distressed company and rescue the company as a going concern, as long as this produces the best outcome for the creditors as a whole.

The Insolvency Act grants the administrator broad powers of sale but does not explicitly provide for a pre-pack administration.[4] The pre-pack administration is therefore a market tool developed by market actors to achieve a speedy and efficient resolution of financial distress. Changes introduced to the administration procedure by the Enterprise Act of 2002 have made it possible for an administrator to be appointed out of court and this has in turn increased the use of both the administration procedure and pre-pack administrations significantly.[5] In contrast to a pre-packaged plan under the US Chapter 11 procedure, in a pre-pack administration there is no need for the proposed plan to be presented to the different classes

3 Statement of Insolvency Practice 16.

4 Schedule 1, Paragraph 2 and Schedule B1 of the Insolvency Act.

5 Sandra Frisby, 'A Preliminary Analysis of Pre-Packaged Administrations' Report to the Association of Business Recovery Professionals (2007).

of creditors or for creditors to vote on the plan. The deal can be agreed without the knowledge or approval of creditors and the administrator can effect the sale immediately after he or she is appointed without the approval of creditors. These features allow the company to act discretely and quickly. In a broader sense, they allow market actors to continue to reap some of the benefits of a privately negotiated restructuring, making pre-pack administrations an effective restructuring tool in the United Kingdom.

Elements of a pre-pack administration

A pre-pack administration begins with the directors of a distressed company resolving to engage the services of an insolvency practitioner to assess the company's financial state and advise on the best course of action. The options available to a company that has or may become unable to pay its debts can range from a trading administration to a company voluntary agreement, a scheme of arrangement or liquidation. Pre-pack administrations are commonly used as a strategy for selling a business as a going concern. The sale of the business and its assets is made to a purchaser entity, which may be newly incorporated for that purpose or in operation as an existing business. At the preparatory stage, the insolvency practitioner is engaged in a business advisory role but there is an understanding that he or she will be appointed as the administrator when the company goes into administration, even if for a relatively short time. This indirectly imposes a duty on the insolvency practitioner to be mindful of his or her duties under the Insolvency Act, a duty that is owed to all the creditors of the distressed company and not the proposed purchaser. The statutory objectives of an administration procedure are, therefore, a relevant consideration even at the preparatory stage.

There are different considerations that inform the choice of a sale of the business over other available options. From the insolvency practitioner's perspective, the most important consideration is whether rescuing the company as a going concern is reasonably practicable and likely to produce the best outcome for creditors. The insolvency practitioner may satisfy himself or herself that a sale is justified where, for example, it would be impossible or inefficient for the company to trade in administration because of limited funds. It could also be that the value of the business would be significantly eroded in an extended trading administration.

The pre-packaged sale is consistent with the broad powers of sale granted to the administrator under the Insolvency Act.[6] In a traditional administration, the Insolvency Act envisages that the administrator will put together a proposal as soon as is reasonably practicable and not longer than eight weeks after appointment, and present this proposal to the creditors to vote upon.[7] The administrator, however, has the power to bypass the requirement for creditors' approval of the proposal if he or she determines that each creditor will be paid in full or that no distributions will be made to unsecured creditors.[8] Also, in achieving the purpose of the administration, the administrator can sell the assets of the company without the approval of creditors.[9]

6 Schedule 1, Paragraph 2 and Schedule B1 of the Insolvency Act.

7 Schedule B1, Paragraph 49(5).

8 Schedule B1, Paragraph 52, Insolvency Act.

9 Where the sale relates to assets over which there is a fixed charge, the permission of the court is required to discharge the fixed charge. Where subject to a floating charge, the administrator can sell without the permission

This is similar to what occurs in pre-pack administrations, except that the arrangements for the sale are made before the administrator assumes his or her position. Acknowledging that there may be the need to move swiftly to preserve value, English courts have thrown their weight behind the administrator's ability to sell assets of the company without leave of court or creditor approval.[10] The decision to conclude a sale of the business in advance of or without the creditors' meeting is left to the judgment of the administrator. However, this does not protect the administrator from a subsequent challenge for breach of duty.[11]

Once a decision is made to complete a pre-packaged sale, the next step is to discretely find a suitable buyer and negotiate the terms of the sale. In some cases, the company's directors or secured creditors may have already approached potential buyers and loosely agreed terms with them, before engaging the insolvency practitioner. There is a slight risk that trade suppliers, employees and other partners of the distressed company may be reluctant or unwilling to continue to deal with a different company after the sale. To prevent this outcome and ensure that the transition is as seamless as possible, stakeholders that are crucial to the functioning of the business may be involved in the sale process. Particularly, the buy-in of secured creditors can be important, given that they would typically have security rights over all or substantially all of the company's assets, the sale may, therefore, require their consent.

An important part of the process of finding a purchaser and agreeing terms from the perspective of the insolvency practitioner, is a valuation of the company by an independent valuer for a fair determination of a fair consideration that reflects the value of the company. This is underscored by the duty of the insolvency practitioner to represent the interests of all creditors and ensure that the sale achieves the best result for them. As discussed below, there are regulatory requirements that now impose disclosure requirements, which include the valuation and marketing strategy adopted for the sale.

The concept of a deferred consideration is commonly used in pre-packaged sales in the United Kingdom.[12] Parties agree for payment of the consideration by the purchaser to be spread out over a period of time. Deferred consideration can be useful where there are insufficient funds to immediately cover the purchase price and in the absence of the deferred payment arrangement, the company will end up in a wasteful liquidation or a prolonged formal insolvency process. The deferred consideration arrangement can be structured in different ways including the payment of a proportion of the consideration as down payment combined with the grant of security by the purchaser. Such security may include fixed charges over the assets of the purchaser, retention of title arrangements and personal guarantees from management of the purchaser.

The potential purchasers will either be third parties, secured creditors or more commonly, connected parties who are shareholders, directors or other majority investors of the company. Section 249 of the Insolvency Act defines connected parties to include a director, shadow

of the creditor and the court. In both cases, the secured creditor retains priority over the proceeds of the sale. Schedule B1, Paragraphs 70 and 71, Insolvency Act.

10 *Re T&D Industries* [2001] 1 BCLC 471; *DKLL Solicitors v HMRC* [2007] EWHC 2067 (Ch).

11 *Re Transbus International* [2004] EWHC 932 (Ch); [2004] 2 BCLC 550.

12 Statistics from empirical research finds that out of 500 pre-packs completed in 2010, over half of all sales included an element of deferred consideration. Graham Review into Pre-Pack Administration (2014) https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration.

director and associates of the company.[13] The purchase of a business by a connected party raises some fairness concerns and the need for an independent valuation becomes more crucial where the proposed buyers have a connection with the company. Some of the issues raised by the involvement of connected persons in pre-packaged sales are discussed later in this chapter.

After the terms of the sale are agreed and relevant documentation is prepared, the insolvency practitioner is officially appointed as administrator and the sale is concluded immediately or soon after the appointment. The formal appointment of the administrator can be made out of court by any one of the company, the directors or a qualifying floating charge holder, if there is one.[14]

Once the administrator assumes office, the immediate task is to effect the sale on the agreed terms. The administrator distributes the consideration received from the sale of the company to the creditors in the order of priority prescribed for administration procedures by the Insolvency Act. In reality, unsecured creditors are likely to be out of the money and only secured and preferential creditors tend to receive a return from the administration. The sale of the company is completed quickly and the business resumes normal solvent trading thereafter. In the pre-packaged sale of clothing retail store House of Fraser to Sports Direct in 2018, the sale was effected within a few hours of the company going into administration.[15]

Following a pre-pack sale, the selling entity will often be left as a shell, housing only liabilities that were not transferred. The administrator determines what happens with the company. The options include a dissolution of the entity where there are no funds or property to distribute to creditors[16] and, less commonly, a creditors' voluntary liquidation of the company, a company voluntary arrangement or scheme of arrangement. To complete the administration process, the administrator will make the necessary filings at Companies House and with the Insolvency Service.[17]

Challenging a pre-pack administration

In a pre-packaged sale, stakeholders such as trade suppliers, creditors[18] and shareholders[19] may disagree with many aspects of a pre-pack sale ranging from the choice of insolvency practitioner to the proposed purchaser and, particularly, the consideration received for the sale. Such parties, if given an opportunity and the means, may attempt to challenge the process and seek to produce a different result. The main difficulty with challenging a pre-packaged sale is the fact that creditors often have limited or no visibility on the process, until it has become a done deal. Furthermore, the courts have sanctioned the practice of selling a company's assets

13 Associate is broadly defined in Section 435 of the Act to include partners, employees, persons who have control of the company, among others.

14 Schedule B1, Paragraphs 14 and 22.

15 https://www.ey.com/uk/en/services/transactions/restructuring/ey-house-of-fraser-administration.

16 Schedule B1, Paragraph 78.

17 The Insolvency Service is a government agency in the UK Department for Business, Energy and Industrial Strategy. The agency administers issues relating to insolvency and financial distress and performs a range of functions which include providing information to the public and prosecuting breaches of legislation. https://www.gov.uk/government/organisations/insolvency-service/about.

18 *Ve Vegas Investors LLC & others v. Henry Shinners, Finbarr O'Connell and others* [2018] EWHC 186 (Ch).

19 *Re Meem SL Limited (In Administration)* [2017] EWHC 2688 (Ch).

in advance without the approval of creditors, and will typically not overturn commercial arrangements unless a case of fraud or undervalue is clearly made out. Within the administration process, it is often difficult to challenge the conduct of the administration and one of the reasons for this is because the administrator is given significant discretion to exercise his or her business judgement.[20] These factors combined with the potential costs of bringing a challenge, serve as a strong disincentive to aggrieved creditors.

However, creditors who receive information about the proposed sale can successfully challenge aspects of the transaction if there are reasonable grounds to do so. In *Ve Vegas Investors LLC & others v. Henry Shinners, Finbarr O'Connell and others*[21] the applicants were creditors of VE Interactive who brought a claim against the administrators to challenge the pre-packaged sale of the company to the directors for £1.75 million. The creditors asked for the administrator to be replaced. Without determining whether the proposed sale was legitimate or not, the court found that there was a serious issue for investigation by an independent party into whether the proposed sale was in the best interest of the company and whether the administrator had breached his or her duty in agreeing to the terms of the sale.

Regulation of pre-pack administrations

As the use of the pre-pack administration has grown in the United Kingdom, the process has been recognised for its ability to rescue distressed companies. Value is preserved because of the speed with which pre-packs are concluded. The ability to sell the business as a going concern to a new buyer with minimal or no interruption to the running of the company can avoid much of the value erosion that has been known to attend formal insolvency processes. Jobs can be saved[22] and relationships with key suppliers maintained. The pre-pack also potentially reduces the cost of the administration.[23]

Unsurprisingly, a lot of criticism has also been levelled at pre-pack administrations and the manner in which they are conducted. At the core of the criticisms of pre-pack administrations is the lack of transparency, lack of inclusivity and resulting prejudice to certain creditor groups, especially unsecured creditors. As previously noted, the deal is often completed without the knowledge and approval of unsecured creditors. The concern around lack of visibility and transparency is heightened when the purchaser is connected to the insolvent business, for example, the management or previous owners. Consequently, pre-packs have been accused of enabling an abuse of the system by creating an avenue for management or investors to freely transfer the assets of a distressed company, dump the debts and leave behind merely a shell of tax liabilities, pension deficits, supplier and other debts.

20 Schedule B1, Paragraph 74 provides for a challenge of the administrator's conduct of the administrator but is not well used.

21 [2018] EWHC 186 (Ch).

22 A study of SIP16 Reports relating to pre-packs completed in 2010 showed that majority of pre-packs preserve 100 per cent of employment.

23 Note, however, that while some of the costs may be reduced as a result of the speed with which pre-packs tend to be completed, under the insolvency rules, insolvency practitioners can claim pre-appointment fees as an expense of the administration. IR 1986 r2.67A.

Statement of Insolvency Practice 16

These fairness concerns and criticisms have inspired some light-touch regulatory changes in the United Kingdom. In January 2009, the Joint Insolvency Committee issued the Statement of Insolvency Practice 16 (SIP 16) to provide some guidance to practitioners on best practices for pre-packaged sales.[24] SIP 16 recommends that an insolvency practitioner acting in a pre-pack administration should be able to demonstrate that the duties of an administrator under the Insolvency Act have been met. As discussed above, there is an expectation that the insolvency practitioner will consider whether a pre-pack sale produces the best outcome for creditors and the other alternatives are likely to result in a liquidation of the company. SIP 16 emphasises the need for insolvency practitioners to act as independently as possible in making the decision to effect a pre-packaged sale and in negotiating and arranging the sale. An insolvency practitioner is expected to keep a detailed record of the reasoning behind the pre-packaged sale and all the alternatives that were considered before deciding to settle for the pre-pack option. In a detailed document called the SIP 16 Statement, the insolvency practitioner is expected to provide the creditors with information about the justification for the pre-pack, marketing strategy and other specific information about the deal, within seven days of the sale transaction. SIP 16 also recommends an independent valuation and robust marketing of the business to ensure that the best possible value is obtained for the creditors as a whole. The SIP report is filed upon completion of the sale with the Insolvency Service.

The SIP 16 Statement aims to address the lack of transparency around the pre-pack process but it is not intended to provide creditors with any decision-making powers for what is essentially a *fait accompli*. Beyond providing information to creditors and other stakeholders, SIP 16 also seeks to elicit some accountability on the part of the insolvency practitioner. Failure to comply with SIP 16 does not invalidate a sale or automatically result in a finding of misconduct by the insolvency practitioner. Insolvency practitioners are, however, regulated by recognised bodies who routinely monitor compliance with required standards and can take disciplinary action where appropriate.

Sale to connected persons – the pre-pack pool

Sales to connected persons dominate a significant percentage of pre-packaged sales in the United Kingdom.[25] Finance for funding a trading administration can be difficult to source and where the only available buyers are persons with a connection to the company, this may be the only chance at saving the business. Further, a sale to connected persons, particularly directors who are familiar with the business and have the required expertise to run it, can be beneficial to the continued survival of the company. However, for all the benefits it may offer, a sale to connected persons adds an extra layer of criticism to a process that is already viewed as obscure and lacking accountability. The process becomes more vulnerable to challenges as to whether a fair price has been paid and whether disenfranchised creditors have not been unfairly prejudiced by the deal.

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24 The statement has been revised twice since it was first introduced. The recent version became effective from 1 November 2015 https://www.r3.org.uk/what-we-do/publications/professional/statements-of-insolvency-practice/e-and-w/sip-16-list.

25 In the empirical research commissioned by the Graham Review in 2014, it was found that in a sample of 500 pre-packs, almost two-thirds of purchasers were connected to the distressed company.

To address the unease around purchase by connected persons, the concept of the pre-pack pool was introduced in the United Kingdom in 2015. The pre-pack pool consists of a group of experts who are to be consulted for an opinion where the proposed purchaser in a pre-packaged sale is a connected person. The function of the pre-pack pool here is to make an independent assessment, for a fee, as to whether the deal is reasonable or not. The opinion is included in the SIP 16 report and available to creditors and recognised professional regulators, as part of the post-transaction disclosure requirements. The role of the pre-pack pool is to provide additional reassurance to creditors, and reference to the pre-pack pool is entirely voluntary. From its inception in 2015 to the end of 2018, the pre-pack pool reviewed 24 applications in relation to proposed connected party sales. Out of 24, the pre-pack pool concluded that 18 cases presented a reasonable case for a pre-packaged sale.[26] This statistic contrasts widely with the data on the number of pre-packaged sales that occurred in the same period. In 2018 alone, there were 450 pre-packs, 241 of which were connected party sales.[27]

Although the pre-pack pool potentially introduces some oversight and accountability into the pre-pack process, the data suggests that the pool is significantly underused. This has prompted further deliberations on the shortcomings of the mechanism and measures to improve its use and efficiency. A common view is that the pre-pack pool suffers a design challenge – the fact that it is voluntary. It has, therefore, been debated whether statutory intervention is needed to ensure that all stakeholders recognise the pre-pack pool as an essential part of the pre-pack process.

26 Pre-Pack Pool Annual Report 2018, https://www.prepackpool.co.uk/uploads/files/files/Pre%20pack%20pool%20%202018%20Annual%20report%20v3%20NC%20edits.pdf.

27 Statistics from Insolvency Service, https://www.prepackpool.co.uk/uploads/files/files/Pre%20pack%20pool%20%202018%20Annual%20report%20v3%20NC%20edits.pdf.

2

Stop Press: The Case of Johnston Press plc

Giles Boothman and Ru-Woei Foong[1]

Introduction

On the morning of Saturday 17 November 2018, the Scottish Court of Session, the High Court of Justice of England and Wales and the High Court of Justice of Northern Ireland granted out-of-court-hours administration orders in respect of Johnston Press plc and 41 of its subsidiaries, drawing to a close the Edinburgh-based publishing group's comprehensive strategic review of its business, and facilitating a complex pre-packaged administration sale of the group's assets to a newly incorporated set of companies backed by the group's bondholders.

The transaction, which invoked the group's contingency plan after all solvent restructuring options had been exhausted, is a rare example of an operating level pre-pack of a publicly listed group. In contrast to the many examples of holding company level pre-packs, an operating level pre-pack, which involves the transfer of a business as a going concern, asset by asset, contract by contract, requires months of detailed commercial planning to minimise the high risk of business disruption. The Johnston Press pre-pack was particularly challenging owing to the additional overlay of public disclosure obligations arising out of the group's listed equity and debt securities (which were held by a mix of institutional and retail investors, and activist shareholders) significant pensions liabilities, a unionised workforce, and, in light of the nature of its business, constant scrutiny in the national press.

Background

History

Johnston Press began as a family printing business based in Falkirk, Scotland. The family purchased its first newspaper, *The Falkirk Herald*, in 1846, and over the next 170 years continued to grow by acquisition, slowly expanding its portfolio to include nearly 200 newspaper

1 Giles Boothman and Ru-Woei Foong are partners at Ashurst LLP.

titles across Scotland, England, Northern Ireland and the Republic of Ireland, including *The Scotsman*, the *i* newspaper, *The Yorkshire Post* and *The News Letter* (Northern Ireland).

The business, which by the mid 1980s was a multimedia organisation providing news and information services to local, regional and national communities through its portfolio of publications, was floated on the London Stock Exchange as Johnston Press in 1988. During the financial year ending 31 December 2017 (based on the group's last reported annual accounts prior to its filing for administration), the group sold 160.1 million 'paid for' newspapers, distributed 23.7 million free newspapers and its average total monthly print audience was 13.3 million people. It was, and remains, one of the United Kingdom's largest regional newspaper publishers – a very important field in the current climate of the challenges facing journalism from global social media sites and the rising tide of fake news.

Group structure

The key companies within the group, which are shown on the structure chart set out below,[2] comprised:

- Johnston Press plc (PLC), the ultimate parent company and issuer of the group's listed equity;
- Johnston Publishing Limited (Publishing), the primary operating member of the group, which owned most of its physical assets. Publishing also provided contract printing services to third-party customers, and administrative and other operational services to the rest of the group;
- Johnston Publications Limited (Publications), the owner of the *i* newspaper, which was acquired by the group in 2016; and
- Johnston Press Bond plc (Bondco), a special purpose finance vehicle with no trading activities and issuer of the group's listed debt securities.

The majority of the group's intellectual property (aside from that relating to the *i* newspaper, which was owned by Publications) was held by various other subsidiaries of PLC (the Agency Companies) and licenced to Publishing for day-to-day operation.

Capital structure

In order to fund the growth of its business over the years, Johnston Press had entered into various financing arrangements.

In June 2014, the group completed a £360 million capital refinancing plan to deleverage its balance sheet, and to repay and redeem its then-existing revolving credit facilities, overdraft facilities and private placement notes.

In connection with the capital refinancing plan, in addition to raising £140 million of new equity from shareholders pursuant to a placing and rights issue, the group issued £225 million 8.625 per cent senior secured notes due June 2019 (the Bonds) pursuant to a New York law-governed indenture (the Indenture), the proceeds of which were used to repay the revolving credit facilities, overdraft facilities and private placement notes referred

2 Source: Administrators' Disclosure Report pursuant to Statement of Insolvency Practice (SIP) 16 in respect of Johnston Press Plc and certain group companies (in administration), dated 22 November 2018.

to above. In 2015, £5 million of the Bonds were repurchased and subsequently cancelled by Bondco, leaving £220 million of principal outstanding Bonds.

The Bonds were listed on the Global Exchange Market of the Irish Stock Exchange and unconditionally guaranteed on a senior secured basis by all material members of the group (the Guarantors). The Bonds also benefited from first-ranking security interests over all, or substantially all, of the assets of Bondco and the Guarantors.

In connection with the capital refinancing plan, the group also entered into a £25 million super senior revolving credit facility (RCF). This was subsequently cancelled in January 2017 following the sale by the group of its East Midlands and East Anglia newspaper titles for £17 million. Accordingly, at the time of the restructuring, the holders of the Bonds (the Bondholders) were the group's only material external financial creditors. To establish the relative rights of the lenders of the RCF and the Bondholders with respect to each other and the group, PLC and certain subsidiaries had entered into an English law-governed intercreditor agreement (the Intercreditor Agreement). Despite the cancellation of the RCF, the Intercreditor Agreement remained in place as between the group and the Bondholders, and as between the Bondholders and their note trustee and security agent, providing helpful mechanisms for effecting the debt-for-equity swap that formed the basis of the consideration for the pre-pack.

Pension scheme

The group had certain occupational pension schemes, including a defined benefit pension plan, the Johnston Press Pension Plan (the Pension Plan). As at 31 December 2017, the Pension Plan had a funding deficit of approximately £47.2 million on a Financial Reporting Standard 17 basis. However, as at 31 March 2018, the deficit on a 'buy-out basis' was approximately £420 million.

In April 2014, in connection with the capital refinancing plan, the trustees of the Pension Plan (the Pension Trustees) and the group entered into a framework agreement that determined a recovery plan for the Pension Plan deficit that required the group to make specific enhanced contributions over a 10-year period. All material members of the group (other than Publications, which at that time had not then been incorporated) entered into a cross-guarantee in respect of the Pension Plan deficit and to support the group's obligations under the framework agreement. The cross-guarantee was not secured. Accordingly, at the time of the restructuring, the Bondholders were the group's only secured creditors.

Strategic review

Industry in structural decline

The group's principal revenue streams comprised newspaper sales, print and digital advertising as well as contract printing. Changing consumer behaviour, including the rise of social media, had put considerable pressure on publishers, and newspaper circulation in print had been in decline for a number of years as part of a global trend in which news and information consumption shifted from traditional printed to digital product. Despite the group's successful implementation of a broad range of measures to mitigate the effects of this structural decline, including its acquisition of the *i* newspaper, which had, primarily through its digital platform, provided a boost to the group's financial performance, it soon became clear that the group faced an unsustainable long-term debt and Pension Plan deficit burden.

In light of the challenging trading environment and deterioration of the group's financial performance, there was uncertainty (and market speculation) as to whether the group would be able to repay or refinance the Bonds as would be required upon their maturity in June 2019. In March 2017, PLC announced that it had commenced a strategic review of its business to assess the financing options in respect of the Bonds available to the group.

No default

As is typical with high-yield bonds, the Indenture did not contain any financial maintenance covenants. Therefore, as the group remained cash generative at an operational level and did not have any immediate liquidity issues, despite the overarching industry and financial pressures on the business, there was no existing or anticipated default in respect of the Bonds. In other words, there was no documentary 'trigger' that placed the Bondholders in the driving seat in respect of a restructuring process.

On the one hand, this gave the board flexibility in terms of approach and timing to explore all strategic options for placing the group's business on a more stable footing for the future. However, on the other hand, it put considerable pressure on the directors to balance the interests of shareholders (some of whom were extremely vocal, both towards management and in the national press); and on finding the best strategy to address its financial concerns as well as the interests of the group's Bondholders, being the group's only secured creditors, and other key stakeholders, including the Pension Trustees and some 2,000 members of Johnston Press staff.

In the current 'covenant-lite' corporate lending environment, directors of both public and private companies are likely to find this tension between competing interests increasingly challenging, particularly when deciding when to signal to the market that a restructuring of their business may be necessary, or when to commence restructuring discussions with the relevant stakeholders. In the case of Johnston Press, the management team (acknowledging the long-term challenges for the business operating in an industry in structural decline) took a commercially pragmatic view that assessing the financing options in respect of the Bonds available to the group well ahead of the maturity of the Bonds would allow sufficient time to fully consider all possibilities that would be in the best interests of the group's stakeholders.

Strategic options

The group, together with its financial and legal advisers, explored multiple options, including a fully consensual debt-for-equity swap, equity led or third-party refinancing of the Bonds, a regulated apportionment arrangement in relation to the Pension Plan, as well as a formal sales process for the group, as a whole or in part.

Fully consensual debt-for-equity swap

This option would have involved the Pension Trustees agreeing to amend certain actuarial and technical assumptions in their assessment of the Pension Plan deficit and to reduce the required level of the group's annual contributions towards that deficit; the Bondholders exchanging some or all of the Bonds for a majority equity stake in PLC, thereby reducing or removing the requirement for the group to repay or refinance the Bonds in June 2019; and shareholders being invited to inject new capital into the group to avoid dilution of their existing equity investment.

The group held initial discussions regarding this potential solution with the Pension Trustees, who provided constructive feedback and cooperation with regard to progressing the proposals for certain amendments to the assumptions relating to the assessment of the Pension Plan deficit.

The group then held initial discussions with the financial and legal advisers to an ad hoc group of Bondholders (the Ad Hoc Committee) comprising several of the largest Bondholders, as well as the Pensions Regulator and the Pension Protection Fund (PPF). Following these discussions, the Pensions Regulator and the PPF expressed some reservations regarding the potential actuarial and technical amendments and whether they would assist with appropriately managing the Pension Plan deficit in the long term. Further, the advisers to the Ad Hoc Committee informed the group that the fully consensual solution would not be acceptable to the Ad Hoc Committee (and likely not acceptable to other Bondholders) on the basis that it would not deliver appropriate value to the Bondholders as it would put the Bondholders in the equity, behind other creditors, including the Pension Plan, which was a substantially weaker position than the Bondholders had currently within the group's capital structure as the group's only secured creditors.

Equity-led refinancing

Throughout the strategic review, the group sought to engage with some of PLC's largest shareholders to determine whether they would be prepared to invest further equity (or provide alternative funding) to support a refinancing or restructuring of the Bonds. However, despite various meetings between management and individual shareholders, no proposals were received.

Similarly, although the eight largest shareholders of PLC were each invited to participate in the formal sales process when this was launched in October 2018, no shareholders submitted offers for the group, either as a whole or in part.

Third-party refinancing of bonds

During the summer of 2018, the group's financial advisers engaged with potential third-party lenders across the high-yield bond, credit fund and bank financing markets to gauge appetite to provide or arrange financing for Johnston Press on a variety of bases. However, in light of the pressures facing the publishing industry as a whole, as well as the group's deteriorating financial performance, the feedback received was that the debt capacity of the business was substantially lower than the level of outstanding Bonds. Each of the parties approached declined to progress the opportunity further and it was concluded that a debt refinancing at a level acceptable to Bondholders would not be a viable option.

Regulated apportionment arrangement in relation to the pension plan

A regulated apportionment arrangement (RAA) is a statutory mechanism pursuant to which the obligations of a sponsoring employer of a pension scheme are transferred to the PPF through a series of interrelated steps. RAAs have only been available since 2008 and are intended (and have proved) to be extremely uncommon. In order for an RAA to be achieved, certain statutory conditions must be satisfied, including the approval of the arrangement by the Pensions Regulator and there being no objection to the arrangement being made by the

PPF. In practice, this means that both need to be closely involved in negotiations relating to the terms of the RAA, and the mitigation package proposed in connection with the RAA (often comprising a cash payment to be made by the employer upon transfer of the pension scheme to the PPF or the grant of equity in the continuing business, in both cases to the PPF) needs to meet the Pension Regulator's and the PPF's respective policies and guidance criteria.

In July 2018, Johnston Press approached the Pension Trustees, the Pensions Regulator and the PPF to discuss a potential RAA in relation to the Pension Plan, putting forward a mitigation package comprising a substantial cash payment and the issuance of equity in the restructured group to the PPF, with a view to securing an arrangement that would have effectively enabled the group to detach itself from its liabilities in respect of the Pension Plan. This would have addressed the Ad Hoc Committee's key concern regarding the fully consensual solution described above, which, in turn, would have unlocked that option and potentially allowed the group to avoid a formal insolvency process.

Over several months, discussions between Johnston Press, the pension parties and the advisers to the Ad Hoc Committee took place. However, ultimately, it became apparent that no agreement on the economic terms of an RAA, specifically the mitigation package, was likely to be reached between the pension parties and the Ad Hoc Committee (which represented the views of the Bondholders), making the possibility of achieving an RAA remote.

Formal sales process

Having explored the other options described above, in October 2018, PLC commenced a formal sales process in accordance with the City Code on Takeover and Mergers, inviting a mix of strategic parties,[3] financial investors and, as mentioned above, the company's eight largest shareholders to submit offers for the group as a whole or for certain of the group's operations in part, it having been determined that offers in the formal sales process should be sought on a variety of bases to ensure that all options were fully explored. The formal sales process was publicly and widely reported both in print and online media by local, regional, national, trade, specialist and investment press, as well as newswires.

Indicative offers were solicited from both potential strategic parties and financial investors for the whole of the group as well as for certain parts only. The highest indicative offer received valued the group between £140 million and £150 million on a debt-free, cash-free, pension-free, going-concern basis subject to adjustments – not enough to generate aggregate net sale proceeds sufficient to fully discharge the £220 million in principal outstanding bonds.

Contingency planning

In parallel to the strategic review (as is customary for businesses facing financial difficulty), the group, together with its financial and legal advisers, also undertook certain contingency planning to consider the possibilities and outcomes in the event that no viable solvent refinancing or restructuring solution in respect of the Bonds could be found.

3 Both before and during the strategic review, the group held a number of informal discussions with other media groups to explore whether a merger of the group with such other groups, or a sale of the group to such other groups, might be achieved. Ultimately, none of these parties were prepared to progress any such transaction, although a number of them did participate in the formal sales process.

In connection with this, the advisers to the Ad Hoc Committee had indicated that the Ad Hoc Committee would support, as a fallback option, a transaction whereby the Bondholders would acquire the group's business and assets (but not, in particular, any of its liabilities in respect of the Pension Plan) through a pre-packaged administration sale. It was considered that, if insolvency was unavoidable, such a pre-pack would significantly reduce disruption to the business, thereby safeguarding value and maximising returns for the group's creditors as a whole. It would also preserve the employment of some 2,000 members of Johnston Press staff.

Preparing for the pre-pack required detailed commercial planning, including a significant amount of coordination across the relevant group companies in Scotland, England and Northern Ireland, particularly as the pre-pack would need to be effected simultaneously on a company-by-company, asset-by-asset and contract-by-contract basis owing to the cross-guarantee granted by all material members of the group (other than Publications) to the Pension Trustees in support of the Pension Plan deficit and the group's obligations under the framework agreement relating to it. Structuring the pre-pack on an operating-level basis was crucial to avoid the group's liabilities in respect of the Pension Plan transferring to the Bondholders together with the group's business and assets.

Over several months, management carefully considered the impact of placing each of the relevant companies into administration and the proposed pre-pack on the group's material contracts and relationships with, among others, print, distribution and advertising customers; key stock and other core operational suppliers; landlords and other trade counterparties, such as the group's bankers; ancillary (e.g., BACS and credit card) facility providers; and prospective partners with whom the group was engaged in ongoing negotiation of new commercial arrangements. It was also necessary to determine the most efficient and effective way to transition the group's intellectual property ownership and day-to-day operation of its newspaper titles, tax grouping and other administrative and operational arrangements to a newly incorporated set of companies backed by the group's Bondholders. In addition, owing to the nature of the group's business, a comprehensive internal communications and external public relations strategy had to be developed to manage the flight risk of staff, a significant proportion of which comprised freelance journalists and a number of which were members of the Pension Plan (or other of the group's occupational pension plans),[4] the group's relationships with trade unions and other industry representative bodies, political scrutiny as well as the anticipated high level of press coverage likely to be received by the group, and the consequential impact of this on its business operations, should there be no option but to file the group for insolvency.

This planning placed considerable pressure on internal business resource as it was required to be conducted alongside and without affecting the running of business as usual, including the execution by management of various cost-saving and other strategic initiatives designed to counter the headwinds of an industry in structural decline. Given the group's public disclosure obligations and its staff composition, it was also necessary to keep the number of individuals involved in the planning to an absolute minimum.

4 These other occupational pension plans were not affected by the pre-pack, but press coverage regarding the administrations and in particular the transfer of the Pension Plan into the PPF often referred generically to 'Johnston Press's pension liabilities', causing some confusion among members of Johnston Press staff.

This planning was further complicated by activist shareholder Christen Ager-Hanssen, who during the course of late 2017 and 2018 accumulated a 25 per cent stake in Johnston Press through his investment vehicle Custos, and who attempted to requisition an extraordinary general meeting of shareholders to remove most of the existing board and replace it with his own proposed candidates. Although Christen Ager-Hanssen was ultimately unsuccessful in his efforts to convene the meeting, his attempt to do so nevertheless caused disruption for the business, particularly as it was reported widely in the press and heavily debated on social media and trade union and other industry representative body websites.

Administration

End of strategic review

Having exhausted all options available to the group over the course of its 18-month strategic review, and owing to the outcome of the formal sales process in particular (including feedback from the advisers to the Ad Hoc Committee that the Ad Hoc Committee did not consider any of the offers received pursuant to the formal sales process to be sufficiently attractive compared to the fall-back option of a pre-pack, as described above), the directors, taking into account legal advice received, their fiduciary duties and wrongful trading considerations, finally concluded in the evening on Friday 16 November 2018 that there was no longer a reasonable prospect of the group avoiding insolvent liquidation or administration. They resolved to apply to the courts in Scotland, England and Northern Ireland for administration orders in respect of PLC and 41 of its subsidiaries.

Simultaneous applications to court

Having resolved to place the group into administration, and bearing in mind the group's public disclosure obligations, which required the immediate announcement of the directors' decision together with the fact that the valuation of the group implied by the offers received pursuant to the formal sales process had indicated that there was no value in the listed equity of PLC,[5] the directors considered that the administration filings needed to be made urgently to protect the business. In particular, there were concerns that, if the proposed pre-pack was not announced before the markets opened the following Monday, the high level of press coverage likely to be received by the group would have an immediate adverse impact on the group's trading relationships and staff, jeopardising the successful transition and continuation of the Johnston Press business going forward. In addition, there were hundreds of newspaper titles, both owned by the group and third parties but supported by the contract printing services of the group, due to be printed and distributed over the weekend, and it was in the interest of local, regional and national media as well as the general public to ensure that these could be printed and distributed as normal.

The directors filed simultaneous applications to the courts in Scotland, England and Northern Ireland overnight between Friday 16 and Saturday 17 November 2018, and judges in each jurisdiction were requested to conduct hearings out-of-court-hours and as early as possible the following morning to consider whether it would be appropriate to place the

5 A statement was accordingly released by PLC shortly after 9pm on Friday 16 November 2018 (followed by a RNS announcement at 7am on Monday 19 November 2018 when trading hours reopened).

relevant companies into administration. To illustrate the urgency of the situation, for the relevant companies incorporated in England and Wales, which included Publishing as the primary operating member of the group, Publications as the owner of the profitable *i* newspaper and Bondco as the issuer of the Bonds, the hearing was convened in a conference room at the offices of the group's legal advisers, with the judge dialling in to conduct the hearing via speaker phone.

By 2.30pm on Saturday 17 November 2018, the Scottish Court of Session, the High Court of Justice of England and Wales and the High Court of Justice of Northern Ireland had granted administration orders in respect of Johnston Press plc and 41 of its subsidiaries, and shortly thereafter at 2.45pm the group announced the completion of the pre-pack of its business and assets to a newly incorporated set of companies backed by the group's Bondholders (the JPIMedia group).

Basis of insolvency

The applications were made on the basis that each relevant company was or was likely to become unable to pay its debts, as the value of its assets was less than the amount of its liabilities, taking into account its contingent and prospective liabilities. In light of the pressures facing the publishing industry as a whole, and given the persistent decline in revenues, the group did not expect to generate sufficient cash from its operations to be able to repay the Bonds in full upon their maturity in June 2019. Further, owing to the outcome of the strategic review, there did not appear to be any viable options for the solvent refinancing or restructuring of the Bonds.

As part of its contingency planning, the group had also commissioned independent desktop valuations of the enterprise value of the group (on a debt-free, cash-free, pension-free, going-concern basis) and its key assets (being, primarily, its intellectual property) to provide a frame of reference for the board when evaluating offers received pursuant to the formal sales process. The outcome of this work produced an enterprise value of the group within a range of £151 to £181 million, with the valuers concluding that £165 million, at the lower to middle end of that range, represented an appropriate valuation. Notably, this figure was lower than the total amount of principal outstanding Bonds. It was also greater than the highest indicative offer received pursuant to the formal sales process, but lower than the total consideration received by the administrators pursuant to the pre-pack, as described below.

In addition, as at close of business on Friday 16 November 2018, the bonds were trading at a deep discount to par, at approximately 56.1p/£, implying a market value of £123.4 million, indicating a value of the group less than the total amount of principal outstanding bonds.

Pre-pack

Structure and key terms

The pre-pack involved the simultaneous administration sale by each relevant company of its business as a going concern, and substantially all of its assets, to the JPIMedia group. As noted above, the transaction did not involve the transfer of any of Johnston Press's liabilities in respect of the Pension Plan, nor did it involve the transfer of certain other liabilities and various non-core or onerous assets owned by the relevant companies in administration. However, it did involve the transfer of all Johnston Press employees pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006, thereby safeguarding the jobs of around 2,000 members of staff.

The consideration received by the administrators totalled £181 million and comprised:

- cash of £8 million, of which £4.7 million was received upon completion of the transaction, and of which the balance was to be paid to the administrators over the course of the following nine months depending on the level of costs and expenses incurred in the administrations of the relevant companies. To support the obligation of the JPIMedia group to pay the deferred cash consideration, the administrators took fixed charge security over a freehold property that was sold to the JPIMedia group pursuant to the pre-pack;
- a promissory note convertible to £85 million of debt instruments of the JPIMedia group (the Debt Note); and
- a promissory note convertible to 100 per cent of the equity of the JPIMedia group's ultimate parent company (the Equity Note), valued at £88 million.[6]

Immediately following receipt of the consideration, the administrators directed that the Equity Note and the Debt Note be distributed to the security agent for the Bondholders as the group's sole secured creditors, which the security agent further distributed to individual Bondholders in accordance with the non-cash distressed disposal provisions set out in the Intercreditor Agreement. The Equity Note and the Debt Note had an aggregate value of £173 million, thereby discharging an equivalent amount of principal outstanding Bonds owed by Bondco and guaranteed by the Guarantors.

The cash consideration received (or receivable over the course of the administrations) was permitted to be applied by the administrators only for the purpose of discharging certain costs and expenses of the administrations and for making prescribed part distributions to unsecured creditors, calculated in accordance with the statutory formula by reference to the floating charge recoveries in each of the relevant companies.

As a result of the pre-pack, the Johnston Press business, now operating under the name JPIMedia and led by a new board of directors, was able to continue trading with senior secured debt of a reduced amount of £85 million, maturing in December 2023, and entirely free of the Pension Plan deficit and certain other onerous liabilities. Certain Bondholders also provided a new money facility of £35 million to support the working capital requirements of the business.

Prescribed part leakage

As part of its contingency planning, the group had instructed its legal advisers to carry out a review of the security granted by the Guarantors in respect of the Bonds. This review confirmed the overall validity of the security. However, specific provisions in the Indenture and security documents meant that certain assets typically characterised as being subject to fixed charge security (such as intellectual property) were, in the special circumstances of the

6 The values attributed to the non-cash consideration received by the administrators were based on a separate valuation of the debt issued by the JPIMedia group (at par value) and the equity in the JPIMedia group (being the enterprise value of the group as indicated by the independent desktop valuation commissioned by Johnston Press, less the value of the debt issued by the JPIMedia group and the cash consideration paid by JPIMedia under the terms of the pre-pack sale and purchase agreement).

Guarantors, likely to be construed as subject to floating charge security, if they were sold for less than £5 million. Therefore, where usually the consideration received by administrators in respect of the sale of such assets (being fixed charge recoveries) would be distributed by the administrators to a company's secured creditors, such that the consideration did not need to be in cash but could rather be provided in kind, in the case of Johnston Press, it was necessary for the consideration to be provided in cash and made available to unsecured creditors via prescribed parts in the administrations of each of the Guarantor owners of such assets.

As noted above, Johnston Press had commissioned independent desktop valuations of, among others, its intellectual property, including in particular each of the newspaper titles owned by the Agency Companies. These were conducted on a relief from royalty basis and did not consider the benefits of any synergies between titles or the centralisation of administrative and operational activities within the group, and were based on the revenue generated by the relevant newspaper title over the preceding 12 months, the level of financial contribution to the group and whether the relevant newspaper title had a long or short expected life span. The sum of the valuations for all of the newspaper titles owned by each Agency Company Guarantor was then used to determine the anticipated prescribed part in the administration of that company, to be funded by the cash consideration received by the administrators under the terms of the pre-pack sale and purchase agreement, as described above. Owing to the number of Agency Companies holding intellectual property, and based on the valuations commissioned by the group, it was anticipated that there would be prescribed parts in most of the Johnston Press administrations.

Conclusion

While Johnston Press's comprehensive strategic review of its business did not ultimately yield a solvent refinancing or restructuring solution, its operating level pre-pack did enable the business to continue trading with a significantly deleveraged balance sheet, free of historic defined benefit pension liabilities and certain other onerous liabilities, and preserved the employment of some 2,000 members of staff.

From a legal practitioner's perspective, the restructuring highlighted a number of unique challenges, including:

- the pressures faced by directors in managing the tension between diverse stakeholder interests in a no-default scenario, and the consideration of those interests while exploring all possible strategic options for placing the group's business on a more stable footing for the future;
- practical steps to be taken when contingency planning for and implementing an operating level pre-pack across numerous group companies incorporated in multiple jurisdictions, particularly when undertaken against the backdrop of listed company public disclosure obligations and the nature of Johnston Press's business and staff composition;
- coordination of simultaneous administration applications to courts in multiple jurisdictions on an urgent basis and out-of-court-hours to minimise the risk of business disruption and ensure as smooth as possible a transition of the business to new owners; and
- technical legal issues, such as evidencing balance sheet insolvency and structuring for cash consideration in the context of a debt-for-equity swap otherwise effected by way of credit bid.

Following completion of the pre-pack, Johnston Press continued to receive a high level of publicity, including discussion in both the House of Commons and the Scottish Parliament, with the Secretary of State for Digital, Culture, Media and Sport as well as politicians from all parties taking a broadly sympathetic and supportive position in relation to the restructuring.[7] With regard to the Pension Plan, although Frank Field, chair of the House of Commons Select Committee on Work and Pensions, did raise enquiries with the Pensions Regulator regarding the entry of the Pension Plan into the PPF and whether this could have been avoided or required further investigation, the Pensions Regulator subsequently cleared the transaction, confirming in particular that it had found no evidence to support the use of any of its anti-avoidance powers and that an RAA (which, as noted above, might have enabled the group to avoid administration) would not have been achievable. This was achieved largely owing to the methodical process of pursuing all available options as well as carrying out detailed and comprehensive contingency planning.

The authors are not aware of any other examples of a full operating company pre-pack of the entire business executed by a listed company, although there are plenty of examples of 'holding company' or 'share pre-packs' by listed companies.

7 The Department of Digital, Culture, Media and Sport also later confirmed that although the Secretary of State had the power to intervene in certain media mergers on public interest grounds, following consideration of the transaction, the Secretary of State had decided that the public interest considerations set out in the relevant sections of the Enterprise Act 2002 were not sufficiently relevant to justify any such intervention.

Part II

Pre-Packs in the United States

3

Prepackaged Chapter 11 in the United States: An Overview

Dennis F Dunne, Dennis C O'Donnell and Nelly Almeida[1]

If a company in financial distress is a US entity, or has sufficient contact with the United States to satisfy the jurisdictional predicates of the US Bankruptcy Code, that company will have access to a prepackaged plan process that is likely the most fully developed and sophisticated in the world. Prepackaged Chapter 11 cases have been widely used in the United States since the late 1980s and have become ever more prevalent in the last 10 years.[2] The near four decades of experience that has resulted has given the US bar and bench the opportunity to refine the governing principles for prepackaged Chapter 11 cases.[3]

1 Dennis F Dunne is a partner, Dennis C O'Donnell is of counsel and Nelly Almeida is a partner at Milbank LLP.

2 Out of the more than 300 cases studied by one commentator with plans confirmed between 2003 and 2016, 22 per cent involved a prepackaged plan. Fitch Rating, 'Shrinking Length of U.S. Bankruptcies' (7 August 2018). Among all public companies listed with assets of US$500 million to US$10 billion and Chapter 11 cases filed between January 2003 and December 2017, the number of prepackaged cases, as a percentage of all public company filings, increased dramatically – from approximately 6 per cent in 2003 to 42 per cent in 2017. See Norman Kinel, 'The Ever-Shrinking Chapter 11 Case', *eSquire Global Crossing* (20 August 2018) (citing BankruptcyData.com (25 September 2019)). Much of this increase has occurred in just the last few years. See 'BankruptcyData's 2017 Corporate Bankruptcy Review: Energy & Retail Sectors Dominate; Prepackaged Chapter 11 Bankruptcies Up 75% and Looming Debt Maturities Point to Increased Chapter 11 Activity', BankruptcyData.com (10 January 2018) ('2017 also saw a notable uptick in prepackaged or prenegotiated public company Chapter 11 restructurings, with half of the ten largest and 23% of the year's total bankruptcies employing this technique, a 44% rise from 2016's 16% of total prepackaged bankruptcies.'); John Yozzo and Samuel Star, 'For Better of Worse, Prepackaged and Pre-Negotiated Filings Now Account for Most Reorganizations', *ABI Journal*, Vol. XXXVII, No. 11, November 2018 (reviewing filings of debtors with liabilities greater than US$50 million at the time of filing between 2010 and 2018 and concluding that 44 per cent of 'cases that emerged from chapter 11 in 2010–18 (191 of 434) were . . . either prepackaged or prearranged/ pre-negotiated cases', with prepackaged plans comprising not less than 24.4 per cent (106 of 434) of this total.

3 The literature on prepackaged Chapter 11 cases and practice over these four decades has been extensive. Among the more comprehensive (although somewhat out-of-date) articles are: Marcia Goldstein and Sharon Youdelman, 'Prepackaged Chapter 11 Case Considerations and Techniques', Int'l Insolv. Inst., 8th Annual International

As a result, several options exist for prepackaged Chapter 11 cases, with all seeking to minimise the time that the debtor remains or operates in Chapter 11 by completing (or all but completing) the time-consuming task of negotiating and gaining acceptances to a plan of reorganisation prior to the filing of the Chapter 11 petition, but with each permutation permitting the debtor, as set forth herein, to address issues and circumstances specific to its financial situation and creditor body.

Origins of prepackaged cases

Prepackaged Chapter 11 cases have their origins in 19th-century equity receivership practice.[4] An equity receivership proceeding involved the formation of a protective committee of bondholders (or other funded secured creditors), with all bondholders being offered the opportunity to deposit their bonds with the protective committee pursuant to the terms of a 'deposit agreement'. The protective committee would thereafter propose a plan of reorganisation and seek its expeditious confirmation.[5] Seeking to address allegations that protective committees had (to the detriment of public bondholders) often come under the control of insiders and senior creditors, in 1938, Congress made provision for two distinct forms of bankruptcy reorganisation.[6] The first, Chapter X, which was intended to supplant the reorganisations that had previously been implemented through equity receivership proceedings, banned the solicitation of plan acceptances prior to the commencement of a reorganisation case. The second, Chapter XI, which was intended to be used for arrangements involving unsecured debt and small non-public companies, retained the authorisation for a debtor to solicit acceptances prior to filing a bankruptcy case as long as the solicitation complied with applicable non-bankruptcy law.[7]

When Congress enacted the Bankruptcy Code in 1978, it consolidated the two reorganisation regimes into one overarching chapter: Chapter 11.[8] In the process, it abandoned the Chapter X prohibition against prepackaged plans and incorporated several provisions to promote prepackaged Chapter 11 cases, such as:

- allowing Chapter 11 plans to be filed with debtors' petitions;[9]
- authorising ad hoc prepetition committees to be appointed as statutory creditors' committees;[10] and

Insolvency Conference, 9–10 June 2008; Ronit J Berkovich and Christopher Hopkins, 'Prepackaged and Prenegotiated Chapter 11 Cases' (31 October 2014), in *Recent Developments in Distressed Debt, Restructurings and Workouts* (PLI 2017); and Nicholas P Saggese and Alesia Ranney-Marinelli, *A Practical Guide To Out-Of-Court Restructurings And Prepackaged Plans Of Reorganization* (2d ed. 1998). Our debt to each of the foregoing in assembling this chapter is acknowledged.

4 Until 1933, corporate reorganisations involving secured debt were generally undertaken by means of the non-statutory mechanism of the federal equity receivership. See *1 Collier on Bankruptcy* ¶ 21.04 (16th ed. 2019); Levin and Moore, 'Bankruptcy and Reorganisation: A Survey of Changes', II, 5 *U. Chi. L. Rev.* 219, 225 (1938).

5 See *1 Collier on Bankruptcy* ¶ 21.04[2][e]; Tabb, 'The History of the Bankruptcy Laws in the United States', 3 *Am. Bankr. Inst. L. Rev.* 5, 21–23 (1995).

6 See Law of 22 June 1938, ch. 575, 52 Stat. 840 (repealed 1978); see generally *1 Collier on Bankruptcy* ¶ 20.01(d).

7 *1 Collier on Bankruptcy* ¶ 20.01(d); Jackson Report, Receivership and Bankruptcy Proceedings in United States Courts, S. Doc. No. 268, 74th Cong., 2d Sess. 3 (1936).

8 *1 Collier on Bankruptcy* ¶ 20.02; *8 Collier on Bankruptcy* ¶ 1101.01.

9 11 U.S.C. § 1121(a).

10 id. § 1102(b)(1).

- allowing votes solicited prior to the commencement of a Chapter 11 case to be counted for purposes of confirmation.[11]

In addition, Rule 3018(b) of the Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules) was adopted in a form that expressly provides for voting on a plan of reorganisation prior to the commencement of the case; Section 1102(b)(1) authorises ad hoc prepetition committees to be appointed as statutory creditors' committees; and Section 1121(a) permits Chapter 11 plans to be filed at the same time as debtors' petitions.[12] In so doing, Congress opened a new path to reorganisation that has broadened steadily over the past four decades. According to some accounts, the *Crystal Oil* case was the first prepackaged bankruptcy under the Bankruptcy Code of any significant size,[13] and it has been followed by hundreds of prepackaged cases, large and small, in the ensuing years, thereby laying the foundation for the by now well-established prepackaged Chapter 11 practice in New York and Delaware.[14]

Overview of key restructuring tools

There are various ways to restructure a company's capital structure in the United States, both through prepackaged Chapter 11 plans and through more traditional means, all as discussed below.

11 id. § 1126(b).

12 See Fed. R. Bankr. P. 3018(b); 11 U.S.C. § 1121(a); id. § 1121(a).

13 *In re Crystal Oil Co.*, Case No. 86-02834 (Bankr. W.D. La. 1986).

14 See, e.g., *In re Anglo Energy, Inc.*, Case No. 88-B-10360 (BRL) (Bankr. S.D.N.Y. 22 February 1988); *In re Circle Express, Inc.*, Case No. 90-07980 (RLB) (Bankr. D. Ind. 1990); *In re La Salle Energy Corp.*, Case No. 90-05508-H3-11 (LC) (Bankr. S.D. Tex. 1990); *In re Southland Corp.*, Case No. 390-37119-11 (Bankr. N.D. Tex. 1990); *In re JPS Textile Group, Inc.*, Case No. 91-B-10546 (JAG) (Bankr. S.D.N.Y. 1991; *In re MB Holdings, Inc.*, Case No. 91-B-15617 (BRL) (Bankr. S.D.N.Y. 1992); *In re Memorex Telex N.V. & Memorex Telex Corp.*, Case No. 92-8 (Bankr. D. Del. 7 February 1992); *In re Pioneer Fin. Corp.*, Case No. 99-11404 (LBR) (Bankr. D. Nev. 22 May 2000); *In re Choice One Commc'n Inc.*, Case No. 04-16433 (RDD) (Bankr. S.D.N.Y. 2004); *In re MTS, Inc.*, Case No. 04-10394 (PJW) (Bankr. D. Del. 2004); *In re IWO Holdings, Inc.*, Case No. 05-10009 (PJW) (Bankr. D. Del. 16 March 2005); *In re Blue Bird Body Co.*, Case No. 06-50026 (GWZ) (Bankr. D. Nev. 26 January 2006); *In re InSight Health Servs. Holdings Corp.*, Case No. 07-10700 (BLS) (Bankr. D. Del. 10 July 2007); *In re JGW Holdco, LLC*, Case No. 09-11731 (CSS) (Bankr. D. Del. 1 June 2009); *In re True Temper Sports, Inc.*, Case No. 09-13446 (PJW) (Bankr. D. Del. 30 November 2009); *In re Elec. Components Int'l, Inc.*, Case No. 10-11054 (KJC) (Bankr. D. Del. 2010); *In re Southcross Holdings, LP*, Case No. 16-20111 (CSS) (Bankr. S.D. Tex. 11 April 2016); *In re Roust Corp.*, Case No. 16-23786 (RDD) (Bankr. S.D.N.Y. 10 January 2017); *In re Global A&T Electronics Ltd.*, Case No. 17-23931 (RDD) (Bankr. S.D.N.Y. 25 January 2018); *In re Rand Logistics, Inc.*, Case No. 18-10175 (BLS) (Bankr. D. Del. 28 February 2018); *In re Remington Outdoor Co., Inc.*, Case No. 18-10684 (BLS) (Bankr. D. Del. 4 May 2018); *In re Mattress Firm, Inc.*, Case No. 18-12241 (CSS) (Bankr. D. Del. 16 November 2018); *In re Gastar Exploration Inc.*, Case No. 18-36057 (MI) (Bankr. S.D. Tex. 20 December 2018); *In re David's Bridal, Inc.*, Case No. 18-12635 (LSS) (Bankr. D. Del. 4 January 2019); and *In re Arsenal Energy Holdings LLC*, Case No. 19-10226 (BLS) (Bankr. D. Del. 13 February 2019).

Pre-insolvency processes

Out-of-court restructuring

An out-of-court restructuring is a restructuring of a distressed company's balance sheet that is consummated without filing a bankruptcy petition and using the restructuring tools available under the Bankruptcy Code. Such restructurings are typically implemented through an agreement with existing debtholders (and sometimes equity holders) or through an 'exchange offer'.

In an exchange offer, the issuer of the relevant debt instruments makes an offer to exchange the existing outstanding securities for new securities. If the issuer is in financial distress, the new securities will usually have lower face amounts (i.e., holders are being asked to take a 'haircut'). Those holders that consent to the terms of the exchange offer will tender their existing securities and receive the new securities. Any holders that 'hold out' (i.e., decline to consent to the exchange offer) will continue to hold old securities and will be entitled to full payment in accordance with the original terms of their securities. In light of the incentive thereby afforded to hold out (i.e., the right to receive generally higher interest and principal payments under the existing securities), consummation of most exchange offers is conditioned on achieving a specified minimal percentage of holders that must agree to the exchange (typically at least 85 per cent). In addition, to counteract the incentive for the securityholders to hold out, the issuer may combine a 'carrot' with a 'stick' by threatening to file a Chapter 11 case if the requisite level of consenting holders is not achieved; amending the documents governing the existing securities to 'strip' protective covenants; and offering new securities with better terms (e.g., higher interest rates, shorter maturities, senior ranking or additional protective covenants).

Insolvency processes

Traditional (also known as 'free fall') Chapter 11 cases

In a traditional Chapter 11 case, the debtor files a Chapter 11 petition without having been able to negotiate the terms of its restructuring with any of its key stakeholders. Under such circumstances, achieving consensus on the elements of a Chapter 11 plan that will permit the debtor to exit Chapter 11 protection is deferred until the debtor's business has been stabilised and the debtor has availed itself of the numerous benefits of Chapter 11 to address operational issues, such as the automatic stay, rejection of burdensome contracts and leases, and other matters.

Prenegotiated (also known as 'prearranged') Chapter 11 cases

In a prenegotiated case, the putative debtor seeks to reach an agreement with as many of its creditors as possible prior to filing for bankruptcy, but does not solicit actual votes on a Chapter 11 plan prior to such filing. Instead, the debtor files its chapter plan and related disclosure statement at the same time as its petition, or as soon thereafter as possible, with a request that approval of the disclosure statement by the bankruptcy court, solicitation of votes and confirmation of the plan all proceed on an expedited timetable.[15] In a successful

15 Recent examples of prenegotiated Chapter 11 cases confirmed expeditiously and with limited complication include: (1) *In re Penn-Virginia Corp*, Case No. 16-3239 (Bankr. E.D. Va. 11 August 2016), which was filed on 12 March 2016, and confirmed on 11 August 2016; and (2) *In re Hexion Holdings, LLC*, Case No. 19-10684 (Bankr. D. Del. 25 June 2019), which was filed on 1 April 2019, and confirmed on 26 June 2019. Prior to filing

prenegotiated case, the additional time required to achieve confirmation can be as little as 60 to 90 days (i.e., including, among other factors, the time mandated by the Bankruptcy Rules for a hearing on the disclosure statement and solicitation of acceptances and rejections) after the filing for Chapter 11 protection.[16]

Prepackaged Chapter 11 cases

As already discussed in this and other chapters, a prepackaged Chapter 11 case is one where a company in financial distress reaches agreement on the terms of a Chapter 11 plan with its key creditors and solicits acceptances for that plan prior to filing for bankruptcy protection. Only with the requisite votes in favour of the plan (i.e., in the percentages as to amount and number mandated by the Bankruptcy Code) in hand does the company file a Chapter 11 petition, along with the proposed Chapter 11 plan, and asks the bankruptcy court to confirm the plan and approve the related disclosure statement and solicitation procedures on an expedited basis. A prepackaged case is not a panacea for all cases of financial distress. This technique is practical only in those situations where the debtor's financial distress primarily is caused by burdensome funded debt levels and the company does not need a comprehensive restructuring of its business operations. All the tools otherwise available under Chapter 11 for business restructuring are available to a prepackaged case debtor, but their use may result in time-consuming litigation that would frustrate the principal benefit of a prepackaged case – reduced time under court supervision.[17]

There are generally three types of prepackaged cases:

Single-track pre-pack

This is the most common type of prepackaged case. The debtor solicits the votes of its impaired creditors on a prepackaged Chapter 11 plan prepetition and does not attempt a simultaneous exchange offer. Examples of successful single-track prepackaged cases are numerous, including: *In re Elec. Components Int'l, Inc.*, Case No. 10-11054 (KJC) (Bankr. D. Del. 11 May 2010); *In re IWO Holdings, Inc.*, Case No. 05-10009 (PJW) (Bankr. D. Del. 9 February 2005); *In re Choice One Commc'n Inc.*, Case No. 04-16433 (RDD) (Bankr.

in both cases, the debtors had negotiated plan terms with ad hoc committees of noteholders and secured lenders and reflected these terms in restructuring support agreements executed by the consenting creditors.

16 Bankruptcy Rule 2002 requires 28 days' notice of the deadline for filing objections to a disclosure statement and of the hearing to consider approval thereof. Fed. R. Bankr. P. 2002(b). The length of the solicitation period deemed appropriate will vary depending on the number of holders of claims and interests and whether these claims are based on public securities. A 30-day voting period is usually sufficient, but even shorter periods have been proposed and approved. See, e.g., *9 Collier on Bankruptcy* 2002.3 (16th ed. 2019) ('The 28-day period may be shortened or expanded, as provided by [Bankruptcy] Rule 9006.']; see, e.g., *In re Epic Associates*, V, 62 B.R. 918, 922 (Bankr. E.D. Va. 1986) (the court acted *sua sponte* to shorten time on hearing on plan confirmation); *In re Holland*, 85 B.R. 735, 736-37 (Bankr. W.D. Tex. 1988).

17 As a result, prepackaged plans are not well suited for debtors in a number of situations, including those requiring the protection of the automatic stay with respect to prepetition judgments; in need of postpetition financing to continue operations; seeking to shed burdensome contracts or leases through rejection under Section 365 of the Bankruptcy Code; unable to confirm a plan without litigating, estimating or compromising significant unliquidated or contingent claims; and seeking to reorganise operating companies with numerous trade (and not just financial) creditors.

S.D.N.Y. 9 November 2004); *In re Seegrid Corp.*, Case No. 14-12391 (MFW) (Bank. D. Del. 20 January 2018); and *In re Sungard Availability Servs Capital, Inc.*, Case No. 19-22915 (RDD) (Bankr. S.D.N.Y. 2 May 2019).

Dual-track pre-pack

In this type of prepackaged case, the debtor moves on two tracks simultaneously, combining a traditional exchange offer with a solicitation of votes on a prepackaged Chapter 11 plan. If the requisite percentage of consents are received for the out-of-court exchange offer, the debtor will consummate the exchange offer and not pursue a Chapter 11 filing. However, if the targeted percentage of consents is not achieved, the debtor, assuming any other conditions for an out-of-court restructuring are met, will use the acceptances on the prepackaged plan and file a Chapter 11 case.[18] The prospect of an imminent Chapter 11 filing may incentivise the securityholders to consent to the out-of-court exchange, thus minimising the hold-out problem. Cases where dual-track has been used successfully include: *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019); *In re Pioneer Fin. Corp.*, Case No. 99-11404 (LBR) (Bankr. D. Nev. 1999); *In re MTS, Inc.*, Case No. 04-10394 PJW (Bankr. D. Del. 4 February 2004); and *In re InSight Health Servs. Holdings Corp.*, Case No. 07-10700 (BLS) (Bankr. D. Del. 29 May 2007).

Partial pre-pack

In this hybrid approach (which is the least common), the debtor solicits the votes of key creditors already on board with the proposed reorganisation prior to the commencement of the Chapter 11 case, while deferring the solicitation of other creditors until after the Chapter 11 filing. Thus, the debtor might solicit the consents of its funded debt creditors prepetition while postponing solicitation of its trade creditors until after the Chapter 11 petition has been filed. A successful example of a partial pre-pack case was *In re Sunshine Precious Metals, Inc.*, 142 B.R. 918 (Bankr. D. Idaho 1992), where the court held that it was permissible for the debtor to have solicited the votes of all bondholders other than those that resided in California prior to the Chapter 11 filing, and to have solicited bondholders that were California residents after the filing.[19]

18 A debtor using the dual-track method may either distribute, together with the exchange offer materials, ballots meeting the Bankruptcy Code requirements, or rely on the tender of securities into the exchange offer as 'votes' in favour of the Chapter 11 plan. See Fed. R. Bank. P. 3018(c).

19 The Sunshine debtor chose this course of action because a prepetition solicitation (unlike a postpetition solicitation) must comply with applicable non-bankruptcy law, and the debtor sought to avoid compliance with the California law requirements regarding solicitation of California residents. id. at 922; see also Procedural Guidelines For Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York § III(d)(ii) ('The Court may, upon request of the Debtor or other party in interest in an appropriate case, apply some or all of these guidelines to Partial Prepackaged Chapter 11 Cases – i.e., cases in which acceptances of the Debtor's plan were solicited prior to the commencement of the case from some, but not all, classes of claims or interests whose solicitation is required to confirm the Debtor's plan.')

Advantages of a prepackaged Chapter 11 case

A prepackaged Chapter 11 case has several advantages over a traditional Chapter 11 case and an out-of-court restructuring, as discussed below.

Traditional Chapter 11 case

Time and certainty of outcome

The two most significant advantages of a prepackaged Chapter 11 case *vis-à-vis* a free-fall Chapter 11 case are: the time spent under bankruptcy protection is shorter (often considerably shorter); and there is much greater certainty as to the results that may be achieved and the ultimate exit from Chapter 11. Because the terms of the Chapter 11 plan have been agreed on and the solicitation of votes in support of such plan has taken place prior to the commencement of the Chapter 11 case, the duration of the Chapter 11 case is generally abbreviated.[20] Indeed, once a prepackaged case has been filed, all that remains for the court to do is to approve (retroactively) the disclosure statement (as containing adequate information) and confirm the Chapter 11 plan. Both matters are generally addressed at a combined hearing that typically occurs within approximately 30 days after the filing date and, sometimes, much sooner.[21]

Retention of control

Because the votes necessary to confirm the plan have already been obtained, it is also less likely that management will be displaced or otherwise lose control. Thus, for example, because the debtor will have already filed the plan and even obtained the support of the requisite majority of affected creditors, the debtor will avoid any skirmishes around the exclusive right to file a plan and solicit votes thereon conferred on the debtor by Section 1121 of the Bankruptcy Code.[22] Similarly, for the same reasons, creditors would be less likely to lobby to appoint a

20 However, in light of the time required to achieve a consensus on the terms of the plan, the aggregate time required by the debtor to consummate a successful restructuring is not necessarily shorter in a prepackaged Chapter 11 case.

21 By contrast and contingent on the presence of a number of risk factors, including 'multi-level, multi-issuer debt structures', 'legacy liabilities' and 'poor timing', confirmation of traditional Chapter 11 plans can consume considerably more time. Fitch Rating, Shrinking Length of U.S. Bankruptcies (7 August 2018). Examples of lengthy Chapter 11 cases resulting from 'complex capital structures' include: Energy Future Holdings (48 months); Mirant Corporation (29 months); Calpine Corporation (24 months); and Caesars Entertainment Operating Company, Inc. (24 months). id. These sprawling Chapter 11 cases involved leveraged buyout transactions, numerous secured and unsecured lenders, complex intercompany transactions or litigious intercreditor disputes. id. Chapter 11 cases where 'legacy liabilities' – such as union and labour issues and underfunded pensions plans – have affected the length of cases include: ASARCO LLC (52 months); Interstate Bakeries Corp. (51 months); and UAL Corp. (38 months). id. Finally, a prime example of a Chapter 11 case that was the victim of 'poor timing' was that of Delphi Corporation – which required almost four years to reach closure, in large part due to its filing for Chapter 11 protection on the eve of a severe industry downturn.

22 Pursuant to Section 1121(b) of the Bankruptcy Code, 'only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter'. 11 U.S.C. § 1121(b). Furthermore, if the debtor files a plan within such period, only the debtor has the right to solicit votes on a Chapter 11 plan. 11 U.S.C. § 1121(c). The purpose of these exclusive rights is to keep the focus on achieving consensus with respect to a single plan, rather than allowing multiple parties to present their own plans for consideration, which might unproductively divert attention from the plan proposed by the debtor. But see *Vista Del Mar Assocs., Inc. v. W. Coast Land Fund* (*In re*

'chief restructuring officer', or seek more radical remedies, such as the appointment of an examiner to investigate the debtor's affairs[23] or a trustee to replace management and the board of directors.[24]

Effects on business

The abbreviated time spent under the supervision of a bankruptcy court and greater certainty as to an outcome mitigate many of the negative effects of a free-fall Chapter 11 filing on the debtor's business operations. For example, the debtor will be able to provide assurances to its suppliers and customers that a seamless exit from Chapter 11 and a deleveraged, more sustainable capital structure are within reach. In addition, trade creditors will know from the inception of the case that their claims will be left 'unimpaired' and, thus, will have no reason to disrupt deliveries or production.[25] For the same reason, competitors will have less opportunity to use the debtor's Chapter 11 filing to lure the debtor's customers away. As an added, less tangible, benefit, the absence of contentious intercreditor disputes is likely to lead to fewer negative, value-destroying news stories about the company.

Lower administrative costs

The shorter duration of a prepackaged Chapter 11 case will also enable the debtor to minimise administrative costs, as compared to a traditional Chapter 11 case.

The Bankruptcy Code and Bankruptcy Rules impose burdensome reporting requirements on traditional Chapter 11 debtors, such as, for instance, filing detailed schedules of assets and liabilities and statement of financial affairs.[26] In a prepackaged Chapter 11 case – because most of the claimants generally listed in such schedules and statements will be unimpaired by the prepackaged plan – such requirements are often waived.

Vista del Mar Assocs., Inc.), 181 B.R. 422 (B.A.P. 9th Cir. 1995) (permitting a secured creditor to file a plan and ultimately confirming such plan).

23 Section 1104(c) of the Bankruptcy Code permits the court to appoint an examiner in any case where the debtor's liquidated, unsecured debts exceed US$5 million. 11 U.S.C. § 1104(c)(2).

24 Section 1104(a) of the Bankruptcy Code authorises the court to appoint a trustee upon the request of a party in interest 'for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management'. 11 U.S.C. § 1104(a)(1). In addition, a court must order the appointment of a trustee if it 'is in the interests of creditors, any equity security holders, and other interests of the estate'. id. at § 1104(a)(2). Like the appointment of an examiner, the appointment of a trustee is considered to be an extreme remedy, and such appointments can be used by creditors as a tactic to derail a debtor's control over the plan process.

25 A creditor's claim is 'impaired' when the plan alters the legal, contractual, or equitable rights to which such creditor is entitled on account of such claim. 11 U.S.C. § 1124. Generally, unsecured claims are 'unimpaired' if they are paid in full, in cash, on the effective date of the plan (and, in solvent-debtor cases, with interest). See *In re Texas Rangers Baseball Partners*, 434 B.R. 393, 406 (Bankr. N.D. Tex. 2010) ('[I]f a creditor receives under a plan everything to which the creditor would be entitled in a judgment entered immediately following the plan's effective date, the creditor is receiving treatment that, as required by section 1124(1), honors all the creditor's "legal, equitable, and contractual rights." For the typical unsecured creditor, those rights equate to payment of the debt owed with interest as allowed by law.'). The reasons for prepackaged Chapter 11 plans to leave trade creditors unimpaired are discussed below.

26 11 U.S.C. § 521; Fed. R. Bankr. P. 1007.

The Office of the United States Trustee imposes additional reporting requirements on a Chapter 11 debtor, such as the filing of monthly operating reports.[27] In a prepackaged Chapter 11 case, due to the abbreviated time the debtor generally spends in bankruptcy, this administrative burden on a debtor is minimised.

In a traditional Chapter 11 case, Section 341 of the Bankruptcy Code[28] requires the United States Trustee to conduct a meeting of the debtor's creditors shortly after the commencement of the case (a Section 341 Meeting). However, Section 341(e) permits the US Trustee to forego the Section 341 Meeting where the debtor has filed a prepackaged plan because, in a prepackaged case, creditors have either signed on to support the plan or are deemed to accept it, thus obviating the need to conduct a Section 341 Meeting.[29]

Very significantly, and for many of the same reasons, in prepackaged Chapter 11 cases, the US Trustee will often elect not to appoint an official committee of unsecured creditors. In most Chapter 11 cases, such a committee is appointed and charged with, among other tasks, participating in the formulation of the Chapter 11 plan.[30] However, in prepackaged cases, where the Chapter 11 plan proposes to leave unsecured creditors 'unimpaired', it is generally determined to be unnecessary to appoint a creditors' committee, unless the terms of the plan appear likely to be subject to material challenge.[31] This will further reduce the debtor's administrative expenses as compared to a traditional Chapter 11 case.[32] Conversely, if a group of creditors has already engaged in discussions with the debtor, and wishes to continue that engagement during the prepackaged case, that group of creditors may be authorised to serve as the official committee, subject to certain conditions.[33]

Out-of-court restructuring

Ability to bind holdouts

Most debt instruments governed by US law require the consent of all holders (i.e., unanimous consent) to effectuate significant changes to the terms of the instruments (e.g., to change principal, interest or maturity date). Obtaining such unanimous consent is an almost impossible undertaking for a number of reasons, not the least of which is the difficulty and

27 Pursuant to 28 U.S.C. § 586(a)(3), the Office of the United States Trustee is directed to supervise the administration of all Chapter 11 cases, which each regional office does, in part, through the promulgation of Operating Guidelines, which generally require the filing of 'monthly operating reports'.

28 See 11 U.S.C. § 341 ('Within a reasonable time after the order for relief in a case under [Chapter 11], the United States trustee shall convene and preside at a meeting of creditors.').

29 See 11 U.S.C. § 341(e) ('[T]he court, on the request of a party in interest and after notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.').

30 See 11 U.S.C. § 1102(a)(1), § 1103(c)(3).

31 See, e.g., Adoption of Prepackaged Chapter 11 Amended Guidelines, Admin. Order M-454, at § VIII(C) (Bankr. S.D.N.Y. 2013).

32 A Chapter 11 debtor is required to pay not only the fees and expenses of its own professionals, but also the fees and expenses of the professionals retained by any official committee. 11 U.S.C. § 1103(a); 11 U.S.C. 330(a). If there is no creditors' committee, there will be no official committee professionals to pay. However, while the debtor may not be contractually or statutorily obliged to pay its unsecured creditors' advisers' fees outside of bankruptcy, as a practical matter, the debtor often agrees to do so to induce its creditors to engage in restructuring negotiations, which necessarily precede the filing of any prepackaged plan.

33 11 U.S.C. § 1102(b)(1); see also Fed. R. Bankr. P. 2007(b).

expense of identifying all the beneficial holders.[34] Even if all such holders could be identified, smaller holders might not, without further efforts, respond to the debtor's solicitation materials. Non-consenting holders, who do not tender their securities into the exchange offer, retain all the rights to which they are contractually entitled under the original instruments and, accordingly, without additional incentives, such holders have every reason to reject the 'haircut' proposed by the debtor and become 'holdouts', thereby jeopardising the debtor's overall effort to rationalise and streamline its capital structure.

The use of a prepackaged Chapter 11 plan eliminates the 'holdout' problem by providing a mechanism through which a majority of holders (in number and amount) can bind the minority to the terms of a confirmed plan, notwithstanding the unanimity required by the controlling debt documents. Under Section 1126 of the Bankruptcy Code, a class of claims is deemed to accept the plan if it is accepted by at least two-thirds in amount and one-half in number of the creditors in the class that voted on the plan.[35]

Indeed, a threat by the debtor to file a prepackaged Chapter 11 case if the number of acceptances received to the exchange offer falls short of the number desired to effectuate the restructuring may strip holders of some of the incentives they might otherwise have to hold out. The existence of the prepackaged Chapter 11 alternative is likely to persuade the potential holdouts to participate in the exchange offer because (1) with a class distribution enforceable under a Chapter 11 plan, there will be little chance of payment in full under any scenario; (2) this will be especially so if (as is often the case) the potential distribution under the prepackaged Chapter 11 plan is less favourable than in the out-of-court exchange offer; and (3) the potential negative effects of a Chapter 11 filing on the debtor's business would exacerbate concerns that the securities the creditors would receive in a Chapter 11 would be less valuable than the nearly identical securities they had been offered in the out-of-court exchange.

Tax advantages

A restructuring through Chapter 11 affords the debtor a number of tax advantages. First, the Internal Revenue Code provides that a reduction or cancellation of debt in Chapter 11 (i.e., the COD income), which would be taxable as gross income outside of bankruptcy, is not treated as taxable income if effectuated under a Chapter 11 plan.[36] Second, a debtor's net operating losses receive more favourable treatment in a restructuring through Chapter 11 than in an out-of-court restructuring, as long as the majority of new stockholders of the reorganised debtor are former creditors.[37]

34 As explained in greater detail infra § IV(f)(1), public debt is generally held anonymously (i.e., in 'street name'), and efforts to reach out to the underlying beneficial holders can be difficult, unlikely to meet with complete success and prohibitively expensive.

35 11 U.S.C. § 1126(c).

36 26 U.S.C. § 108.

37 26 U.S.C. § 382(l)(5).

Bankruptcy powers

To the extent that a company would like to take advantage of the full range of benefits conferred on a debtor by the Bankruptcy Code (e.g., the power to assume, assign or reject contracts and leases, sell assets free and clear of liens), those benefits are available only in Chapter 11 and not in an out-of-court restructuring.

Implementation of prepackaged Chapter 11 plans in United States

Given the long history of prepackaged Chapter 11 cases in the United States, there are well-established procedures for the successful formulation and implementation of prepackaged Chapter 11 plans. Such extensive guidance is required because, unlike in traditional Chapter 11 cases, the Bankruptcy Court has a more limited role in a prepackaged Chapter 11 case and, therefore, will not necessarily be on the scene to steer the prepackaged plan proponents towards confirmation and closure.

In a traditional Chapter 11 case, the Bankruptcy Code mandates that the bankruptcy court consider and approve the extent of required disclosure, appropriate solicitation procedures, classification of claims and interests, and other key matters before any plan vote is undertaken. In a prepackaged Chapter 11 case, by contrast, the court rules on the disclosure provided and the solicitation steps taken only after the solicitation has been completed and the case commenced.

The consequences of inadequate disclosure or improper solicitation under such circumstances are potentially draconian: votes might have to be re-solicited during the case, the plan subject to reformulation, and the prepackaged case transformed into a free-fall Chapter 11, with all of the concomitant risks and uncertainties.[38] It is impossible to entirely foreclose such adverse developments, but a debtor seeking to successfully consummate a prepackaged Chapter 11 plan would do well to avoid atypical plan formulations and conservatively apply all relevant disclosure and solicitation requirements.

38 A prepackaged Chapter 11 case usually reflects a consensual understanding between the debtor and key stakeholders arrived at prior to the filing of the Chapter 11 case. However, such an agreement among the requisite majorities of such creditors does not foreclose the possibility that dissident creditors will emerge and seek to extract additional concessions for their own benefit. See, e.g., *In re Seegrid Corp.*, Case No. 14-12391 (Bankr. D. Del. 27 October 2016) (prepackaged plan confirmed over opposition of former CEO and dissident investor group challenging feasibility and other issues); *In re Millennium Lab Holdings II LLC*, Case No. 15-12284 (Bankr. D. Del. 18 December 2015) (confirming prepackaged plan over objections to third-party liability releases and indemnifications raised by a dissident creditor group and the US trustee); *In re Southland Corp.*, 124 B.R. 211 (Bankr. N.D. Tex. 1991) (minority group of bondholders that had been outvoted during the prepetition voting successfully challenged the debtors' solicitation procedures); *In re Zenith Elecs. Corp.*, 241 B.R. 92–98 (Bankr. D. Del 1999) (official committee of equity holders and a number of shareholders objected, unsuccessfully, to adequacy of the debtors' disclosure statement and confirmation of the plan). Whether successful or not, such challenges can delay and potentially derail bargains reflected in the relevant prepackaged plan.

Prepetition disclosure requirements

The Bankruptcy Code provides that votes in favour of a plan obtained prior to the filing of the bankruptcy petition are valid and binding if:

- the solicitation of such acceptances or rejections was in compliance with any applicable non-bankruptcy law, rule or regulation governing the adequacy of disclosure in connection with such solicitation; or
- there is not any such law, rule or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in Section 1125(a) of this title.[39]

There are no non-bankruptcy statutes or rules that apply expressly to Chapter 11 plans of reorganisation. However, prepackaged plans often involve the cancellation, exchange, or issuance of 'securities', and to the extent that the relevant plan does so provide, the securities law, including the antifraud provisions set for in Section 10(b)(5) of the Securities Act,[40] would apply to the solicitation of votes for such plan.[41] Thus, insofar as the relevant prepackaged plan provides for the cancellation, exchange or issuance of securities, the relevant debtor should seek to satisfy both the Bankruptcy Code and securities law disclosure standards.

Anti-fraud provisions of securities laws

The federal securities laws impose civil liability for failure to make proper disclosure in a prospectus or other filing made publicly available in connection with the issuance of securities. Under the Securities Act, liability can be imposed on any issuer for damages that arise from any prospectus or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.[42] Similarly, the Exchange Act[43] imposes liability on issuers and their agents for any statements in documents filed with the SEC that were, at the time and in the light of the circumstances under which they were made, false or misleading with respect to any material fact.[44] In short, the federal securities

39 11 U.S.C. § 1126(b).

40 Securities Act of 1933, 15 U.S.C. § 77a et seq. (the Securities Act).

41 Under the Securities Act, 'security' is defined as:

> *[A]ny note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganisation certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.*

15 U.S.C. § 77b(a)(1).

42 See id. § 12(a)(2), 15 U.S.C. § 77l(a)(2).

43 Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (the Exchange Act).

44 See id. § 18(a), 15 U.S.C. § 78r(a).

law requirements focus on the absolute truth (not the amount or scope) of disclosure provided by the issuer.

Adequate information under the Bankruptcy Code

By contrast, the Bankruptcy Code provides a content-oriented disclosure standard, requiring only that 'adequate information' be provided to those voting on a plan; no reference is made to truthfulness per se, or whether the information is 'material' and 'false', or 'likely to mislead'.[45] The Bankruptcy Code standard is a flexible one,[46] which is tailored to the circumstances of particular cases, based on the availability of relevant information and assessed in light of the relative sophistication of the parties.[47]

In light of these more flexible criteria, courts have interpreted the Bankruptcy Code's 'adequate information' standard to require information that might not generally be deemed necessary in federal securities laws filings. A disclosure statement, for example, will generally contain the following items, many of which will not also be contained in a registration statement:

- a summary of the proposed plan of reorganisation;
- a description of all asset values and the basis on which the values were ascertained;
- a description of the claims against the debtor's estate;
- a liquidation analysis;
- an estimate of all administrative expenses of the Chapter 11 case;
- projections as to results achieved by the future operations of the reorganised debtor;
- a description and estimate of success of possible litigation on behalf of the estate; and
- a list of the parties that served on the negotiating committees in preparing the plan.[48]

45 See 11 U.S.C. § 1125(b).

46 See id.; H.R. Rep. No. 95-595, at 226–27 (1977), reprinted in 1978 U.S.C.C.A.N., 5963, 6186. In accordance with this flexible standard, Section 1125(a)(1) of the Bankruptcy Code, as amended in 2005, provides that, in determining whether a disclosure statement provides adequate information, the court must consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing such additional information.

47 See 11 U.S.C. § 1125(a). Requiring such information as would enable a 'hypothetical' investor of the relevant class to make an informed judgment about the plan. The issue of truthfulness is subsumed in the larger question of adequacy; if material false statements or omissions are shown to exist, a court can refuse to approve a disclosure statement as inadequate.

48 Additional requirements that courts have developed include: (1) the circumstances that gave rise to the filing of the bankruptcy petition; (2) the sources of the information provided in the disclosure statement; (3) a disclaimer that no statements concerning the debtor are authorised other than those set forth in the disclosure statement; (4) the condition and performance of the debtor while in Chapter 11; (5) the accounting and valuation method used to produce the financial information; (6) information regarding the future management of the debtor, including compensation to be paid to insiders, directors and officers; (7) an assessment of the collectability of accounts receivable; (8) any financial statements, valuations, or *pro forma* projections relevant to determinations of whether to accept or reject the plan; (9) a discussion of the risks taken by the creditors and interest holders; (10) the estimated amounts to be recovered in connection with avoidable transfers; (11) the tax consequences of the plan; and (12) the debtor's relationships with its affiliates. See *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (listing factors courts have considered in determining adequacy of information in disclosure statement); see also *In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001); *In re Westland Oil Dev. Corp. v. MCorp Mgmt. Sols., Inc.*, 157 B.R. 100, 102 (S.D. Tex. 1993); *In re Ferretti*, 128 B.R.

Safe harbour

Section 1125(e) of the Bankruptcy Code expressly provides for a 'safe harbor' from liability under state and federal securities laws for good faith solicitations of votes on a Chapter 11 plan. It remains unclear, however, whether the safe harbour thus created is applicable to prepetition solicitations of votes on prepackaged Chapter 11 plans. Although Section 1126(b) of the Bankruptcy Code expressly sanctions the prepetition solicitation of votes, the legislative history of Section 1125(e) suggests that the safe harbour of Section 1125(e) was intended to protect only solicitations made in reliance on a court-approved disclosure statement – which technically is not possible if the entity has yet to file a bankruptcy petition.[49] Commentators take different positions on the issue.[50]

Weighing against the availability of the safe harbour in this context is the heading of Section 1125 of the Bankruptcy Code, which expressly references postpetition disclosure and solicitation, although section headings are generally deemed to be neither conclusive nor binding.[51] Pointing in the opposite direction is the plain language of Section 1125(e) itself, which exempts from liability all solicitation undertaken in good faith and in compliance with the applicable provisions of this title.[52] Thus, it can be credibly argued that if a prepackaged

16, 18–19 (Bankr. D.N.H. 1991); *In re U.S. Brass Corp.*, 194 B.R. 420, 424–25 (Bankr. E.D. Tex. 1996); *In re Metrocraft Publ'g Servs., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (same).

49 Gary L Kaplan, 'Understanding the Chapter 11 Acceptance Process', *Law360* (14 August 2013) ('A proponent of a prepackaged plan may not have the protection of the safe harbor provision in Section 1125(e) . . . and cannot utilise the securities laws exemption under Section 1145.'); Douglas Foley and James Van Horn, 'Prepacks on the Rise in Chapter 11 Bankruptcies: Prenegotiated Plans Can Accelerate Reorganizations' ('Because the debtor solicited a disclosure statement that had not been previously approved by the Bankruptcy Court, it may not be able to take advantage of the safe harbor protections of Bankruptcy Code Section 1125(e).'); A Ranney-Marinelli and S Feld, 'Selected Securities Issues For Publicly Held Debtors', in Southeastern Bankruptcy Law Institute Seminar (March 2009) (citing H.R. Rep. No. 95-595, at 229, reprinted in 1978 U.S.C.C.A.N. 5963 at 6189 (same).

50 Compare D Palmer and J Fink, 'Prepackaged Bankruptcy and Prearranged Bankruptcy Process', in *Recent Developments in Distressed Debt, Restructurings and Workouts – Fallout from the Credit Crunch 2008*, at 7 (PLI Comm. L. & Prac. Course Handbook Series No. #19870, 2008) ('Commentators have argued that the safe harbor does apply to prepackaged bankruptcies based on the plain language of the section.'); Richard M Cieri, et al., 'Safe Harbor in Uncharted Waters: The Securities Law Exemptions under Section 1125(e) of the Bankruptcy Code', 51 *Bus. Law.* 379 (1996) (Section 1125(e) exemption should be available for solicitations connected with prepackaged plans of reorganisation), and Stephen H Case and Mitchell A Harwood, 'Current Issues in Prepackaged Chapter 11 Plans of Reorganization and Using the Federated Declaratory Judgment Act for Instant Reorganizations', 191 *Ann. Surv. Am. L.* 75 (1992) (Section 1125(e) should apply to prepackaged plans of reorganisation), with Gary L Kaplan, 'Understanding the Chapter 11 Acceptance Process', *Law360* (14 August 2013) ('A proponent of a prepackaged plan may not have the protection of the safe harbor provision in Section 1125(e).'); Steven F Gross and George E B Maguire, 'Prepackaged Chapter 11 Plans', in *Chapter 11 Business Reorganizations* 1994, at 475 (PLI Comm. L. & Prac. Course Handbook Series No. A4-4444, 1994) (stating that prepetition solicitation is subject to the securities laws), and Stephen E Sherman, 'Overview of Bankruptcy from the Indenture Trustee's Perspective', in *The Problems of Indenture Trustees and Bondholders 1994: Defaulted Bonds, High Yield Issues and Bankruptcy*, at 367 (PLI Comm. L. & Prac. Course Handbook Series No. N4-4582, 1994) ('Pre-filing solicitation will almost always require SEC review of the proxy materials while post-filing requires only approval of the bankruptcy court under section 1125.') and Karen E Wagner, 'Representing a Business Debtor', in *Understanding Business* (same).

51 11 U.S.C. § 1125.

52 11 U.S.C. § 1125(e).

plan complies with the requirements of Section 1126(b) of the Bankruptcy Code governing prepetition disclosure, liability will not arise.[53] However, in the absence of definitive guidance on the issue, the risk that the safe harbour will not be recognised will remain.

The requirement of good faith

The Bankruptcy Code provides that votes in favour of a Chapter 11 plan may be disregarded or 'designated' if they are not solicited or procured in 'good faith' or in accordance with other provisions of the Bankruptcy Code.[54] A vote, for example, will be disallowed as having been cast in 'bad faith': if the claimant is using obstructive tactics and holdup techniques to extract better treatment for its claim than the treatment afforded to the claims of other holders within the same class; if the holder of the claim casts its vote for the ulterior purpose of securing some advantage to which it would not otherwise be entitled; or when the motivation for the vote is not consistent with the creditor's protection of its own self-interest.[55]

While the Bankruptcy Code itself does not shed any further light on what constitutes 'bad faith' in the prepackaged plan solicitation context, traditional Chapter 11 case law does provide some guidance:

In *In re Allegheny International, Inc.*,[56] the vote of a third party that was interested in obtaining control of the debtor was designated because it had purchased sufficient claims in two key classes to block acceptance of the debtors' Chapter 11 plan. As a threshold matter, the Allegheny court found that the purchase of claims for the purpose of blocking acceptance is not tantamount to 'bad faith', as long as the purchaser is acting in its own economic interest. However, in the end, the Allegheny court found that the relevant purchaser had the ulterior and undisclosed motive of obtaining control of the debtor through the plan process, which, the court found, constituted sufficient cause to designate its vote.[57]

In another non-prepackaged Chapter 11 case, *Figter Ltd. v. Teachers Insurance & Annuity Ass'n of America* (*In re Figter Ltd.*),[58] the United States Court of Appeals for the Ninth Circuit addressed the good-faith requirement in greater detail. In *Figter*, a secured creditor purchased unsecured claims against a debtor for the purpose of undermining confirmation of the debtor's plan. The *Figter* debtor sought to have those votes designated (i.e., not tabulated for voting purposes) as cast in bad faith under Section 1126(e),[59] but the court found

53 11 U.S.C. § 1126(e).

54 id.

55 Noted examples of bad faith include: a non-pre-existing creditor 'purchas[ing] a claim for the purpose of blocking an action against it', competitors purchasing claims to 'destroy the debtor's business in order to further their own' or a debtor arranging to have an insider purchase claims to entrench its control of the debtor. See *Figter Ltd. v. Teachers Insurance & Annuity Ass'n of America* (*In re Figter Ltd.*) 118 F.3d 635 (9th Cir. 1997) (citing *In re Keyworth*, 47 B.R. 966, 971-72 (Bankr. D. Colo. 1985)); *In re MacLeod Co.*, 63 B.R. 654, 655 (Bankr. S.D. Ohio 1986); *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 289 (Bankr. W.D. Pa. 1990); *In re Holly Knoll P'ship*, 167 B.R. 381, 389 (Bankr. E.D. Pa. 1994); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 834–5 (Bankr. W.D. Tex. 1991). Thus, merely protecting a claim to its fullest extent cannot be evidence of bad faith; there must be some evidence beyond negative impact on other creditors.

56 118 B.R. 282 (Bankr. W.D. Pa. 1990).

57 id. at 289–90.

58 118 F.3d 635 (9th Cir.), cert. denied, 522 U.S. 996 (1997).

59 id.

that Section 1126(e) was intended to apply only to creditors 'whose selfish purpose was to obstruct a fair and reasonable reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets'.[60] The requisite 'selfish purpose' was not found in *Figter* because the mere purchase of claims to block confirmation is not bad faith per se, in the absence of specific facts showing pure malice, an effort to blackmail, the intent to destroy a competitor's business, or some similar ulterior motive.

In *In re MacLeod Co.*,[61] the court designated the vote of a creditor as lacking good faith where the creditor was employed by a competitor of the debtor; and based upon the creditor's stance in the Chapter 11 case, it appeared that the creditor cast its vote with the ulterior purpose of destroying or injuring the debtor's business so that the competitor's business would benefit.

In *DISH Network Corp. v. DBSD North America Inc.* (*In re DBSD North America Inc.*),[62] the court designated the vote of a senior creditor that was also the debtor's competitor and that acquired its claims during the Chapter 11 case because it was 'attempting to obtain some benefit to which [it was] not entitled' by buying a blocking position with the intention of using its status as a creditor to vote against any plan that did not give it a strategic interest in the reorganised company.[63]

Finally, in *Pacific Western Bank v. Fagerdala USA-Lompoc, Inc.* (*In re Fagerdala USA-Lompoc, Inc.*),[64] the Ninth Circuit overturned a bankruptcy court decision granting designation. In so doing, it noted that the concept of good faith under Section 1126(e) is fluid; and distinguished between a 'creditor's self-interest as a creditor and a motive which is ulterior to the purpose of protecting a creditor's interest'.[65] At a minimum, there must be some evidence that a creditor is seeking 'to secure some untoward advantage over other creditors for some ulterior motive'.[66] In the absence of the requisite ulterior motive, the mere failure to make purchase offers to all outstanding creditors does not support a bad faith finding – even if the outstanding creditors will be adversely affected by a decision to block the reorganisation plan.

It is important to note that a creditor or interest holder is entitled to act in its own self-interest and that doing so does not mean that the creditor is acting in bad faith. A creditor, for example, may take a blocking position with respect to the plan, or purchase claims or the vote of a deficiency claim to block confirmation of a plan without acting in bad faith. However, a creditor must always be cognisant, in both the prepackaged and traditional Chapter 11 plan context, of the risk of vote designation. That risk increases if the creditor acquires its claims (or additional claims) during the Chapter 11 case and is particularly acute if the creditor is a competitor or has a significant stake in a competitor of the debtor.[67]

60 id. at 638 (quoting *Young v. Higbee Co.*, 324 U.S. 204, 210–11 (1945)).

61 63 B.R. 654, 655-56 (Bankr. S.D. Ohio 1986).

62 634 F.3d 79 (2d Cir. 2011).

63 id. at 102 (quoting *In re Figter Ltd.,* 118 F.3d 635, 638 (9th Cir. 1997)).

64 891 F.3d 848 (9th Cir. 2018).

65 id. at 853(b) (quoting *Figter,* 118 F.3d at 639.).

66 id. at 854; see also *Principal Mut. Life Ins. Co. v. Lakeside Assocs. (In re Deluca)*, 194 B.R. 797 (Bankr. E.D. Va. 1996); *255 Park Plaza Assocs. Ltd. P'ship v. Conn. Gen. Life Ins. Co. (In re 225 Park Plaza Assocs. Ltd.)*, 100 F.3d 1214 (6th Cir. 1996).

67 Although most of the cases construing Section 1126(e) of the Bankruptcy Code have addressed plan 'rejections', there is case law that appears to mandate that plan 'acceptances' also be made in good faith. See,

Procedural requirements

Separate and apart from the foregoing disclosure and intent issues, successful implementation of a prepackaged Chapter 11 plan will turn in large measure on compliance with a number of procedural requirements.

Entitlement to vote

Bankruptcy Rule 3018(b) requires that, to accept or reject a Chapter 11 plan, securities must be voted by 'the holder of record of the security'.[68] On the other hand, Bankruptcy Rule 3017(e) states that, before a disclosure statement may be approved, the plan and disclosure statement must be transmitted 'to beneficial holders of stock, bonds, debentures, notes, and other securities'.[69] Based upon the language of Bankruptcy Rule 3017(e) and ignoring Bankruptcy Rule 3018(a)'s reference to 'holders of record', bankruptcy courts generally require that plan proponents solicit beneficial owners of securities, not the holders whose names are registered in the books and records of the company or the registry maintained by the trustees for the relevant indentures.[70]

Mandating that the beneficial holders, and the not record holders, of publicly held securities vote on a Chapter 11 plan makes the solicitation process for a prepackaged Chapter 11 plan exponentially more difficult. The record holders of such securities are generally 'nominees', such as the Depository Trust Company (also known as Cede & Co.). These nominees do little more than maintain records of the holdings and trades of their member institutions, which include brokers, investment advisers and other financial institutions. These institutions, in turn, hold securities both for their own account, and 'in street name', for the benefit of various, often far-flung third parties. Making matters worse, several layers of intermediaries may stand between the nominee and the ultimate beneficial holders, each of which may have the option of electing – which it often exercises – to not reveal its identity and holdings to the issuer. Under these circumstances, the identity of the beneficial holders can only be ascertained with the cooperation of the record holders, which is generally obtained with the assistance of firms specialising in public securities solicitations. With such cooperation and

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e.g., *In re Quigley Company, Inc.*, 437 B.R. 102, 126, 131–32 (Bankr. S.D.N.Y. 2010) (designated votes under Section 1126(e) after finding that the debtor's non-debtor parent 'wrongfully manipulated the voting process to assure confirmation of the [debtor's] plan, and thereby gain the benefit of the channeling injunction for itself'); *In re Featherworks Corp.*, 25 B.R. 634, 640-41 (Bankr. E.D.N.Y. 1982) (disallowing vote in postpetition context, where it appeared that votes were 'bought' by the debtor's parent), aff'd, 36 B.R. 460 (E.D.N.Y. 1984); *In re Wiston XXIV, L.P*, 153 B.R. 322, 326 (Bankr. D. Kan. 1993) (in exchange for lessor's vote, secured creditor promised that it would not attempt to recover prepetition transfers from, and would make additional payments to, lessor); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 832 (Bankr. W.D. Tex. 1991) (disqualifying votes cast by insider as to claims acquired for purposes of confirming plan); *In re Machne Menachem, Inc.*, 233 F. App'x 119, 120 (3d Cir. 19 April 2007) (upholding order vacating confirmation of Chapter 11 plan because an insider purchased unsecured claims to ensure that impaired unsecured class would vote in favour of the plan).

68 Fed. R. Bankr. P. 3018(b).

69 Fed. R. Bankr. P. 3017(e).

70 See e.g., *In re Southland Corp.*, 124 B.R. 211, 221–223 (Bankr. N.D. Tex. 1991) (ordering a re-solicitation of the vote to reach beneficial holders); *In re Pioneer Fin., Corp.*, 246 B.R. 626 (Bankr. D. Nev. 2000) (denying confirmation of plan where debtor solicited votes from registered holders of bonds only); *In re City of Colo., Springs Spring Creek Gen. Improvement. Dist.*, 177 B.R. 684, 691 (Bankr. D. Colo. 1995) (same); *In re Tenn-Fla Partners*, 1993 Bankr. LEXIS 789, 6 (Bankr. W.D. Tenn. 29 April 1993) (same).

assistance, the debtor can arrange for the relevant disclosure documents to be distributed down the ownership chain to the beneficial holders and for the ballots to travel back up that chain to the debtor or its solicitation agent. Thus, the requisite solicitation process is complex and, because it is fraught with opportunities for missteps, should be constructed very carefully, with detailed instructions given to each layer of intermediaries, such that the debtor is able to persuade the bankruptcy court at the time of the confirmation hearing that the appropriate parties had been properly solicited.

The 'beneficial holder identification' problem exists, to one degree or another, in any Chapter 11 case, but its impact is exacerbated in the prepackaged plan context because no bankruptcy court is on the scene to aid the debtor. In a non-prepackaged plan context, the bankruptcy court can all but eliminate the problem by ordering the financial institutions to disclose the identity of the beneficial holders.[71] Moreover, in a traditional case, the bankruptcy court will have approved in advance the debtor's solicitation process, including its proposal for furnishing information to, and tabulating votes received from, the beneficial holders of securities, pursuant the various subsections of Section 1125 of the Bankruptcy Code. In the absence of such options, the prepackaged Chapter 11 plan proponent should take special care to ensure that it takes all the necessary steps to effectively communicate with the beneficial holders of public securities.

Tabulation of votes

The acceptance of a Chapter 11 plan (traditional or prepackaged) by a class of claims requires a vote in favour of such plan by: two-thirds of the amount of claims actually voting; and a majority in number of the holders of such claims.[72] The second requirement, generally referred to as the 'numerosity' test, has no counterpart outside of Chapter 11. Where only the votes of fully disclosed individual holders are at issue, the 'numerosity' requirement raises few issues, but where the relevant securities are held in 'street name', the story is different, both in and outside of bankruptcy. After the filing of a Chapter 11 case, as discussed above, the plan proponent can request that the court direct the brokerage houses and banks to disclose the identities of their clients pursuant to Bankruptcy Rule 1007(i).[73] In the prepackaged Chapter 11 context, there is no perfect, error-free, mechanism to tabulate the number of beneficial holders voting when securities are held in 'street name', but the methodology most often adopted is for a plan proponent to require two levels of ballots – the so-called 'master ballots' and the 'baby ballots' or 'individual class ballots'.

When this procedure is adopted, the depository trust company or any other relevant depository authorises distribution of solicitation materials directly to their financial institutions' intermediary clients by executing an omnibus proxy. Both 'master' and 'baby' ballots are then distributed to the brokerage houses and banks identified by the depository. The brokerage houses and banks retain the master ballot and distribute the baby ballots and the disclosure statements to their customers. Banks typically execute the blank baby ballots

71 Bankruptcy Rule 1007(i) provides, in relevant part, that '[a]fter notice and hearing and for cause shown, the court may direct any entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them'.

72 11 U.S.C. § 1126(c).

73 Fed. R. Bankr. P. 1017(i).

before distribution and instruct their customers to return them directly to the plan proponent. Brokerage houses usually collect the baby ballots from their customers and record their votes on the master ballots. The master ballots are then submitted to the plan proponent for tabulation in accordance with the applicable procedures.

Length of solicitation period

Bankruptcy Rule 3018(b) mandates that votes on a prepackaged plan will not be counted if 'an unreasonably short time was prescribed . . . to accept or reject the plan'.[74] Neither the Bankruptcy Code nor the Bankruptcy Rules shed any light on the meaning of 'unreasonably short time' in this context. In light of the statutory silence on the subject – and the fact that most proponents will also wish to satisfy the securities laws – the most relevant guidance is to be found in the securities law timelines. By way of example, the relevant securities laws rules prescribe that (1) tender offers and exchange offers must remain open for a minimum of 20 business days from the time the tender offer or exchange is first published or sent to security holders;[75] and (2) the minimum time for completion of a proxy solicitation under the securities laws is 10 days.[76]

However, the time prescribed under the securities laws may or may not be sufficient for the purposes of Bankruptcy Rule 3018(b). Bankruptcy courts have found, and could again find, that the circumstances of a Chapter 11 solicitation require a longer period than that applicable with respect to an otherwise analogous securities law solicitation.[77] Thus, when soliciting prepetition acceptances of prepackaged plans, the proponent should allocate more time than mandated by the securities laws or any other applicable non-bankruptcy law for completion of the solicitation. The minimum time required by the securities laws may be the starting point, but this period should be adjusted upward to ensure that the beneficial holders have sufficient time to review the solicitation materials, and take into account such circumstances as whether (1) the securities are widely held, are held by foreign creditors or are held through numerous intermediaries; and (2) the solicitation is undertaken during a holiday period that might impact the beneficial holders' opportunity to meaningfully review

74 Fed. R. Bankr. P. 3018(b).

75 See 17 C.F.R. § 240.14e-1(a) (2005).

76 id. § 240.14a-6(a).

77 In *In re Southland Corp.*, for example, the bankruptcy court found the then applicable securities laws standard of 10 days to be 'unreasonably short'. 124 B.R. 211, 227 (Bankr. N.D. Tex. 1991). Essential to the court's conclusion was the recognition that, while record owners might have 10 days to engage with the debtors, the beneficial owners (to whom the record owners were to distribute the solicitation materials) would have at most only eight days from their receipt of the materials to respond. id. The Southland court ordered re-solicitation, and, invoking the Bankruptcy Rule 2002 standard that would apply to traditional postpetition solicitations, required that the debtor provide a minimum of 25 days' notice. See *In re Roust Corp.*, Case No. 16-23786 (RDD) (Bankr. S.D.N.Y. 10 January 2017, Docket No. 41) (noting that recently amended Bankruptcy Rules provide for 28 days' notice as to disclosure statement/confirmation hearing, but holding that the Bankruptcy Rules do not require that relevant 28 days' notice period commence after petition date; instead, the notice period can commence prepetition); *In re Remington Outdoor Co., Inc.*, Case No. 18-10684 (BLS) (Bankr. D. Del. 4 May 2018) (Docket No. 248) (postpetition approval of commencement of solicitation period prior to petition date).

the materials. In light of this, any solicitation period proposed for a prepackaged plan should be at least 30 calendar days.[78]

Registration requirements

Section 5 of the Securities Act prohibits the offer or sale of securities of an issuer, including a debtor or its successor under a Chapter 11 plan, unless either the securities have been registered with the SEC or an exemption from registration is available under any applicable statute or regulation.[79] In addition to any exemptions that may be available under the securities laws, Section 1145 of the Bankruptcy Code provides an exemption for the express benefit of Chapter 11 debtors.[80] Under Section 1145, the offer or sale of securities of a Chapter 11 debtor, an affiliate of such debtor participating in a joint plan with the debtor, or a successor of such debtor under a Chapter 11 plan in exchange for claims against or interests in that debtor is exempt from the registration requirements under Section 5 of the Securities Act. This exemption is available to all entities other than 'underwriters'.[81] Thus, except for underwriters, registration of most securities issued under Chapter 11 plans, in satisfaction of creditor claims, or 'principally' in satisfaction of such claims, is not an issue in a traditional Chapter 11 case.

The applicability of Section 1145 in prepackaged cases is not as clear-cut. In fact, the SEC has taken the position that the Section 1145 exemption does not apply in the context of a prepackaged case.[82] The relevant argument, which is highly technical, is based on the SEC's view as to when the offer and sale of the securities are deemed to occur in the prepackaged plan context. According to the SEC, both the offer and the sale of the securities occur prior to the commencement of the Chapter 11 case, with the offer being made when the disclo-

78 Section 1125(g), which was added to the Bankruptcy Code by amendments enacted in 2005 (the 2005 Amendments), eliminates any uncertainty as to whether a debtor that began solicitation of its prepackaged plan prior to filing its petition can continue solicitation postpetition in the absence of a court-approved disclosure statement by providing that 'acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.' 11 U.S.C. §1125(g).

79 15 U.S.C. § 77e. Various states' 'blue sky' laws contain similar restrictions.

80 11 U.S.C. § 1145(b)(1).

81 Section 1145(b)(1) of the Bankruptcy Code provides that an entity is an 'underwriter' if it:

> *(A) purchases a claim against, interest in, or claim for an administrative expense in the case concerning, the debtor, if such purchase is with a view to distribution of any security received or to be received in exchange for such a claim or interest; (B) offers to sell securities offered or sold under the plan for the holders of such securities; (C) offers to buy securities offered or sold under the plan from the holders of such securities, if such offer to buy is (i) with a view to distribution of such securities; and (ii) under an agreement made in connection with the plan, with the consummation of the plan, or with the offer or sale of securities under the plan; or (D) is an issuer, as used in [§ 2(11) of the Securities Act], with respect to such securities.*

82 John Bessonette, 'Investors' Ability to Receive Freely Transferable Securities in a Plan of Reorganization', Kramer Levin Debt Dialogue (6 June 2018); Gary L Kaplan, 'A Close Look at Securities Law Issues in Chapter 11', *Law 360* (25 September 2013); Jonathan Friedland, 'Out-of-court Workouts, Prepacks and Pre-arranged Cases – A Primer', ABI L.J. (April 2005); Abigail Arms, 'Current Issues and Rulemaking Projects, in Conducting Due Diligence 1996', at 747, 871 (PLI Corp. L. & Prac. Course Handbook Series No. B4-7131, 1996); Timothy R Pohl et. al., 'Out-of-Court Restructurings and Prepackaged Plans, in Dealing With Secured Claims & Structured Financial Products In Bankruptcy Cases', at 443–44 (PLI Comm. L. & Prac. Course Handbook Series No. A0-00HP, 2003).

sure statement is distributed and the sale occurring when the holders of the security vote for the plan (i.e., at the time those holders make the investment decision to accept the new securities).[83] Since, in the case of a prepackaged plan, both of these events occur prior to filing, the SEC has argued that Section 1145 does not apply. Another argument is that Section 1145 exempts only the offer and sale of securities of a debtor. Prior to the commencement of the Chapter 11 case, the prospective issuer of the new securities is not a debtor under Chapter 11.

The countervailing argument is that the prepackaged Chapter 11 process and the contingencies it entails make the solicitation of votes as to a Chapter 11 plan prior to the filing a Chapter 11 petition too remote and attenuated a communication to be deemed a cognisable 'offer' to sell securities. At this stage, it is still possible that:

- the issuer will fail to obtain the necessary votes to confirm the plan;
- a determination will be made by the company not to commence a Chapter 11 case for any other reason;
- the bankruptcy court will decline to approve the disclosure statement;
- the plan is modified to such an extent that a re-solicitation will become necessary;[84]
- the bankruptcy court will decline to confirm the plan;
- the order confirming the plan will be reversed on appeal; and
- some condition precedent to the effectiveness of the plan is not satisfied or waived.

Given the uncertainty as to the availability of Section 1145, the proponent of an otherwise acceptable prepackaged plan should consider registering the offer and sale of the plan securities or avail itself of another exemption from registration. The downside of registration is that it could add significant expense and likely not less than six weeks to the process.[85] The upside, however, is substantial, insofar as it will both avoid a subsequent objection by the SEC and obviate the restrictions inherent in the otherwise applicable exemptions from registration made available under Section 3 of the Securities Act.

The exemption most commonly invoked in the Chapter 11 context is that set forth in Section 3(a)(9) of the Securities Act, which exempts the exchange of any security by the issuer where (1) the exchanging holders are all existing security holders of the issuer; and (2) where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange.[86] Unless, as is unlikely to be the case, an unrelated third party is issuing its securities to fund the debtor's plan, the latter (i.e., no remuneration) requirement is the critical consideration in the prepackaged Chapter 11 case.[87]

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83 Arms, supra at 747, 871; Kaplan, supra, at 2.

84 A re-solicitation will be required if the plan modification is material and the existing disclosure statement does not sufficiently describe the plan, as modified. See 11 U.S.C. § 1127(c).

85 The SEC is required to provide initial comments on filed registration materials within 10 days. Securities Act § 8(b), 15 U.S.C. § 77h(b). It usually takes another two weeks for the company to respond to the comments and for the SEC to declare the registration effective. However, the process of resolving the SEC's comments can take much longer, depending on, among other considerations, the financial state of the company and whether its debt is privately held.

86 15 U.S.C. § 77c(a)(9).

87 The prohibition on payments applies only to third-party advisers facilitating the exchange, not the security holders. To obtain the holders' expeditious acceptance of plan terms, early consent fees can be and have been

Whether the 'no remuneration' requirement has been satisfied necessarily turns on (1) who will be reaching out to the holders of the securities on the debtor's behalf; (2) the nature of the communications between the holders and the debtor's designee;[88] and (3) the nature of any compensation to be paid to that designee. While it is likely acceptable for the debtor, through its employees, to solicit the exchange,[89] the payment of a fee to any party (such as a proxy agent or financial adviser) contingent upon the success of the solicitation would give rise to an argument that a party has received an impermissible 'incentive' to obtain the holder's support and, thus, constitute an improper 'solicitation' that would invalidate any claim to a Section 3(a)(9) exemption.

Classification of claims

Parties in interest may object to a Chapter 11 plan on, among other grounds, the contention that it improperly classifies claims.[90] As it is often impracticable to affirmatively obtain consent from trade creditors during the pre-filing negotiation process, prepackaged plans almost uniformly provide that trade creditors will receive full payment under the plan (i.e., be unimpaired). To achieve this result, trade creditors must be classified separately from other unsecured creditors, such as public debtholders. However, the unsecured creditors in these other classes, who are treated differently under the plan than the trade creditors, may argue that the plan is predicated on an improper classification.

offered to consenting holders both in and outside of the prepackaged Chapter 11 plan context. Outside of Chapter 11, issuers have often sought to 'create incentives for security holders to tender early' by establishing an early tender premium (or early consent payment) for debt securities tendered earlier in the tender offer period. See David S Baxter, *Restructuring Debt Securities: A Primer for Issuer Tender Offers, Debt Exchange Offers, Repurchases and Other Liability Management Matters* (June 2019). In a traditional offer open for 20 business days, the early-bird premium, which is commonly expressed as a specific dollar amount per US$1,000 principal amount of tendered debt securities, is provided to security holders that tender in the first 10 business days. id. 'This approach is appealing to issuers because it provides earlier visibility as to the likely success of a debt tender offer (and any related consent solicitation).' id. An issuer typically structures the right to withdraw a tender concurrent with any such early tender premium deadline or early consent payment deadline. id. The same rationale has supported the use of such premiums in the pre-pack context, generally when the dual-track approach is used. See, e.g., *In re Global A&T Electronics Ltd.*, Case No. 17-23931 (prepackaged plan provided that 'a portion of the New Secured Notes would be used to fund a forbearance fee payable to the Initial Noteholders and Additional Noteholders that executed the Restructuring Support Agreement by certain milestones').

88 Communications between third parties, such as financial advisers, accountants and attorneys hired by the debtor and the holders of the debtor's securities are permissible as long as the nature of the communications are limited. For example, it would be permissible for the debtor's financial adviser to respond to questions from security holders by directing their attention to the responsive portions of the registration materials.

89 However, this becomes less certain if the employees' duties are exclusively related to the solicitation (e.g., the employee was hired for that purpose).

90 Section 1122 of the Bankruptcy Code is meant to ensure that all members of a voting class have similar interests so that the plan, if confirmed, affects all class members similarly. To achieve this objective, Section 1122 prohibits placing disparate types of claims in the same class. 11 U.S.C. § 1122(a) ('[A] plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.')

As a general matter, most courts allow separate classification of legally similar claims so long as the plan classification is 'reasonable' and 'necessary to a successful reorganisation'.[91] Although separate classification of similar claims cannot be used to manipulate class voting (i.e., for gerrymandering purposes),[92] most courts accept the typically proffered rationale as to why it is reasonable to classify trade creditors separately from funded debt holders.[93] However, because this is a fact-intensive, far from black-and-white test, prepackaged plans with separate classifications may nonetheless receive special scrutiny from, and might not be readily confirmed by, the bankruptcy court. Hence, plan proponent should proceed with circumspection when affording such classification and treatment to obtain the support of key classes.

Treatment

A holder's claim will be deemed 'impaired' if a plan alters any of the holder's legal, equitable, or contractual rights.[94] Even the 'slightest' change in a holder's rights can create impairment.[95]

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91 See, e.g., *Class Five Nev. Claimants (00-2516) v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 656 (6th Cir. 2002); *Aetna Cas. & Sur. Co. v. Clerk, U.S. Bankr. Court, New York, NY* (*In re Chateaugay Corp.*), 89 F.3d 942, 950 (2d Cir. 1996); *Hanson v. First Bank of S.D., N.A.*, 828 F.2d 1310, 1315 (8th Cir. 1987); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987); *In re Draiman*, 450 B.R. 777, 803 (Bankr. N.D. Ill. 2011); *In re Orchards Vill. Invs., LLC*, No. 09-30893, 2010 WL 143706, at *7–8 (Bankr. D. Or. 8 January 2010); *In re Sentinel Mgmt. Grp., Inc.*, 398 B.R. 281, 298 (Bankr. N.D. Ill. 2008); *In re Exide Techs.*, 303 B.R. 48, 78 (Bankr. D. Del. 2003); *WHBA Real Estate L.P. v. Lafayette Hotel P'ship* (*In re Lafayette Hotel P'ship*), 227 B.R. 445, 449 (S.D.N.Y. 1998). But see *In re Marlow Manor Downtown, LLC*, 499 B.R. 717, 725–26 (Bankr. D. Alaska 2013) (separate classification of claim arising under second-lien promissory note issued by insider separately from various other non-insider unsecured claims was improper); *In re Somerset Props. SPE, LLC*, 2012 Bankr. LEXIS 3867, at *6 (Bankr. E.D.N.C. 23 August 2012) (assertedly different unsecured claims should be classified in same class); *In re National/Northway L.P.*, 279 B.R. 17 (Bankr. D. Mass. 2002) (general unsecured claims must be classified together); *In re Stoneridge Apts.*, 125 B.R. 794, 796 (Bankr. W.D. Mo. 1991) (similar claims may not be classified separately).

92 See, e.g., *Boston Post Road Ltd. P'ship v. FDIC* (*In re Boston Post Road Ltd. P'ship*), 21 F.3d 477, 483 (2d Cir. 1994) ('[S]eparate classification of unsecured claims solely to create an impaired assenting class will not be permitted; the debtor must adduce credible proof of a legitimate reason for separate classification of similar claims'); *In re Somerset Props. SPE, LLC*, 2012 Bankr. LEXIS 3867, at *6 (Bankr. E.D.N.C. 2012) ('[I]t is well-established that separate classification may not be created with the sole intent to achieve cram-down.'); accord *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 242–45 (3d Cir. 2004); *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture* (*In re Greystone III Joint Venture*), 995 F.2d 1274 (5th Cir.), cert. denied, 506 U.S. 821 (1992); *Granada Wines, Inc. v. New England Teamsters & Trucking Ind. Pension Fund*, 748 F.2d 42 (1st Cir. 1984).

93 *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC* (*In re Charter Communications*), 419 B.R. 221 (Bankr. S.D.N.Y. 17 November 2009) (authorising separate classification of noteholder and trade claims); *In re Calpine*, Case No. 05–60200, 2007 WL 4565223 (Bankr. S.D.N.Y. 19 December 2007) (order confirming Chapter 11 plan separately classifying convertible unsecured notes claims from general unsecured claims); aff'd, 354 F. App'x 479 (2d Cir. 2009); *In re Coram Healthcare Corp.*, 315 B.R. 321, 350–51 (Bankr. D. Del. 2004) (finding noteholders represented 'a voting interest that is sufficiently distinct from the trade creditors to merit a separate voice in this reorganization case'); see generally Bruce A Markell, 'A New Perspective on Unfair Discrimination', 72 *Am. Bankr. L.J.* 227 (1998) (separate classification proper because 'it is generally recognised that [t]rade creditors have short–term maturities [and] debenture holders have long-term expectations.').

94 See 11 U.S.C. § 1124(1).

95 See, e.g., *Solow v. PPI Enters. (U.S.), Inc.* (*In re PPI Enters. (U.S.), Inc.*)., 324 F.3d 197, 202 (3d Cir. 2003); *In re K Lunde, LLC*, 513 B.R. 587, 595–96 (Bankr. D. Col. 2014); *Cutliff v. Reuter* (*In re Reuter*), 427 B.R. 727, 773 (Bankr. W.D. Mo. 2010); *In re Coram Healthcare Corp.*, 315 B.R. 321, 351 (Bankr. D. Del. 2004);

Impairment occurs, for example, when collateral is surrendered;[96] when voting rights are modified;[97] and even when an arguably insolvent guarantor is replaced by a financially stronger one.[98]

For a Chapter 11 plan to be confirmed, the Bankruptcy Code requires that at least one impaired class accept the plan (without taking into account any votes cast by insiders).[99] On occasion, in order to achieve this result, a plan proponent may resort to 'intentional impairment' or 'artificial impairment'.[100] In order to obtain the 'impaired accepting class', the plan proponent may, for example, offer the members of a particular class a 99 per cent recovery or stretch the payments of a 100 per cent recovery over several months. While acknowledging the broad flexibility a debtor has in classifying claims, some courts have declined to approve 'creative classification' of this type.[101] Other courts have approved artificial impairment when

In re Wilhelm, 101 B.R. 120 (Bankr. W.D. Mo. 1989); *In re Am. Solar King Corp.*, 90 B.R. 808 (Bankr. W.D. Tex. 1988).

96 See *In re Elijah*, 41 B.R. 348, 350 (Bankr. W.D. Mo. 1984) ('Alteration is synonymous with impairment.').

97 See *Acequia, Inc. v. Clinton* (*In re Acequia, Inc.*), 787 F.2d 1352 (9th Cir. 1986); see generally Adam J Levitin, *Business Bankruptcy: Financial Restructuring and Modern Commercial Markets*, at 727 (2d ed. 2019).

98 See *In re Barrington Oaks Gen. P'ship*, 15 B.R. 952 (Bankr. D. Utah 1981); *In re Eller Bros., Inc.*, 553 B.R. 10 (Bankr. M.D. Tenn. 1985); *In re Estate of LaRosa*, Case No. 03-4115, 2009 WL 1172843 (Bankr. N.D. W. Va. 25 March 2009).

99 See 11 U.S.C. § 1129(a)(10).

100 See *In re Autterson*, 547 B.R. 376, 396–97 (Bankr. D. Colo. 2016) ('Artificial impairment occurs when the plan proponent "causes the class to be impaired without an economic justification for doing so, for the apparent purpose of obtaining the required vote" of an impaired class.'); *In re Deming Hospitality, LLC*, Case No. 11-12-13377, 2013 WL 1397458 at *2 (Bankr. D.N.M. 5 April 2013) (same); *In re Swartville, LLC*, 2012 WL 211034, *2 (Bankr. E.D.N.C. 17 August 2012) ('artificial impairment' refers to a scenario where a debtor 'deliberately impairs a *de minimis* claim solely for the purpose of achieving a forced confirmation over the objection of a creditor'); see also *L & J Anaheim Assocs. v. Kawasaki Leasing Intl., Inc.* (*In re L & J Anaheim Assocs.*), 995 F.2d 940, 943 (9th Cir. 1993) ('[T]he plain language of section 1124 says that a creditor's claim is "impaired" unless its rights are left "unaltered" by the plan', and '[t]here is no suggestion here that only alterations of a particular kind or degree can constitute impairment'); accord *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213 (Bankr. D.N.J. 2000); *In re Duval Manor Assocs.*, 191 B.R. 622 (Bankr. E.D. Pa. 1996).

101 See, e.g., *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 242–45 (3d Cir. 2004) (remanding for further consideration of artificial impairment and good faith after finding that the use of a class consisting of slightly impaired 'stub claims' held by a subset of asbestos claimants that reached a deal with the debtor as the impaired accepting class is problematic); *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture* (*In re Greystone III Joint Venture*), 995 F.2d 1274 (5th Cir. 1991) (finding that separate classification of deficiency claims and trade claims was improper in a cramdown plan where, among other things, the plan treated the claims the same), cert. denied, 506 U.S. 821 (1992); *Granada Wines, Inc. v. New England Teamsters & Trucking Ind. Pension Fund*, 748 F.2d 42 (1st Cir. 1984) (finding that the fact that withdrawal liability does not have the same legal character as other general unsecured claims is not a sufficient basis for distinguishing a pension fund claim from other general unsecured claims where the debtor attempted to use the cramdown provision to support a 50 per cent reduction in withdrawal liability); *In re Autterson*, 547 B.R. at 397 (finding that where the debtor offered no explanation to justify creating a separate administrative convenience class with only one claim and then impairing the claim by paying US$8,000 instead of US$10,000, the debtor artificially impaired such class); *In re Swartville, LLC*, 2012 WL 3564171, at *5 (finding a debtor artificially impaired claims where the debtor's proposed treatment of the claims was to pay them in full within 60 days of the effective date notwithstanding clear testimony of the debtor's manager that the claims could be paid immediately).

it is found to be necessary to achieve an effective reorganisation.[102] With no certainty as to likely outcomes in any given case, the plan proponent should be circumspect about exposing any prepackaged plan to challenge by objecting parties on the ground of artificial impairment.

In addition, if the plan must be confirmed under Section 1129(b) (i.e., 'crammed down' on at least one rejecting class), the plan proponent must demonstrate that the plan does not 'discriminate unfairly' against the rejecting class.[103] As prepackaged plans often classify trade creditors separately and provide for their payment in full, other unsecured creditors may argue that the plan unfairly discriminates against them. While Section 1129(b)(1) of the Bankruptcy Code prohibits only unfair discrimination among similarly situated creditors, the plan proponent must be able to demonstrate why the proposed discrimination is rationally based and necessary for successful reorganisation.[104]

Feasibility

Critical to the confirmation of any Chapter 11 plan is a showing by the plan proponent that plan is 'feasible', i.e., that it is 'not likely to be followed by the liquidation, or the need for further financial reorganization' of the debtor unless that liquidation or reorganisation is part of the plan.[105]

102 See, e.g., *Aetna Cas. & Sur. Co. v. Clerk, U.S. Bankr. Court, New York, NY* (*In re Chateaugay Corp.*), 89 F.3d 942 (2d Cir. 1996); *Hanson v. First Bank of S.D.*, 828 F.2d 1310 (8th Cir. 1987); *Conn. Gen. Life Ins. Co. v. Hotel Assocs. of Tucson* (*In re Hotel Assocs. of Tucson*), 165 B.R. 470, 475 (B.A.P. 9th Cir. 1994); *L & J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc.* (*In re L & J Anaheim Assocs.*), 995 F.2d 940, 943 (9th Cir. 1993); *In re Club Assocs.*, 107 B.R. 385, 401 (Bankr. N.D. Ga. 1989), aff'd, 956 F.2d 1065 (11th Cir. 1992).

103 See 11 U.S.C. § 1129(b)(1).

104 Courts have struggled to formulate an 'objective standard' for the unfair discrimination test. *7 Collier on Bankruptcy* ¶ 1129.03(3)(a) (16th ed., 2019). In the Chapter 11 context, some courts have borrowed from the Chapter 13 unfair discrimination rule provided for in 11 U.S.C.§ 1322(b)(1) and proposed a test that examines the factors based on reasonableness of the discrimination. See *In re Sutton*, 2012 WL 433480 (Bankr. E.D. N.C. 9 February 2012) (surveying competing standards); *In re Aztec Co.*, 107 B.R. 585, 590 (Bankr. M.D. Tenn. 1989) (setting forth 'four-factor' test often used for determining whether plan unfairly discriminates against similarly situated creditors). But see *In re Mason*, 456 B.R. 245, 250 (N.D. W.Va. 2011) (criticising competing tests as to 'too strict', 'too loose' and 'too vague'); *In re 203 N. LaSalle St., L.P.*, 190 B.R. 567, 585–86 (Bankr. N.D. Ill. 1995) (rejecting factors applied in *Aztec*, and instead, considering whether the discrimination is supported by legally acceptable rationale), aff'd sub nom. *Bank of Am., Ill. v. 203 N. LaSalle St. P'ship*, 195 B.R. 692 (N.D. Ill. 1996), aff'd sub nom. *In re 203 N. LaSalle St. P'ship*, 126 F.3d 955 (7th Cir. 1997), rev.d on other grounds sub nom. *Bank of Am. Nat.l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (adopting codified test based upon rebuttable presumption that plan is unfairly discriminatory under specified circumstances) (citing *In re Dow Corning Corp.*, 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999)); see generally Stephen L Sepinuck, 'Rethinking Unfair Discrimination in Chapter 13', 74 *Am. Bankr.L.J.*, 341, 384–87 (2000).

105 11 U.S.C. § 1129(a)(11). This 'feasibility' requirement had its origins in the Bankruptcy Act of 1898, which, by virtue of a number of provisions, mandated that the court find that the plan was 'feasible'. As the United States Supreme Court observed in 1936, in *Tennessee Publishing Co. v. American Nat. Bank*: 'However honest in its efforts the debtor may be, and however sincere its motives, the district court is not bound to clog its docket with visionary or impracticable schemes for resuscitation.' *Tennessee Pub. Co. v. Am. Nat. Bank*, 299 U.S. 18 (1936). A more recent variation of the same maxim was proffered by the Ninth Circuit Court of Appeals in *In re Pizza of Hawaii*, in remarking that the purpose of Subsection 1129(a)(11) is 'to avoid confirmation of visionary schemes which promise creditors more under a proposed plan than the debtor can possibly attain after confirmation'.

Feasibility can be subject to challenge in the prepackaged plan context due to the same summary approach and expedited timeline that render prepackaged plans otherwise desirable. In order to streamline confirmation of a prepackaged Chapter 11 plan, the plan proponent will likely be inclined to allow as many contingent or unliquidated claims (e.g., potentially significant environmental claims) as possible to 'roll' or 'ride' through bankruptcy (i.e., continue unimpaired) and, therefore, be enforceable after reorganisation. If, however, too many contingent or unliquidated claims remain after reorganisation, an objecting creditor might argue that the debtor's future operations will be undermined and there will be a need for a further reorganisation. If a court agrees, the plan will fail to meet the feasibility requirement. Accordingly, a debtor must balance the need to minimise the time spent on claims litigation while maximising the amount of liabilities that are discharged under the plan.

Choice of venue and local guidelines

The Bankruptcy Courts for the Southern District of New York and District of Delaware are, by a large margin, the venues of choice for debtors seeking to file prepackaged Chapter 11 plans.

General venue considerations

In Delaware, the bankruptcy bench is very experienced in dealing with prepackaged bankruptcies. Indeed, nationwide, more than half of all prepackaged bankruptcies are filed in Delaware and, by some accounts, twice as many as have been filed in New York.[106]

However, there are also at least two drawbacks to filing in Delaware. The first is that the District of Delaware, unlike the Southern District of New York, does not have any specific local rules governing prepackaged bankruptcy cases.[107] The second is that, at least by some measures, prepackaged bankruptcies in Delaware have had, at various junctures, the highest rate of failure in the nation, with one study (evaluating prepackaged cases filed between 1991 and 1996) having concluded that more than 64 per cent of such plans failed.[108] More recent studies show that success rates in Delaware as well as elsewhere have improved in the

Pizza of Hawaii, Inc. v. Shakey's Inc. (*In re Pizza of Hawaii, Inc.*), 761 F.2d 1374 (9th Cir. 1985) (quoting *5 Collier on Bankruptcy* ¶ 1129.02[11] at 1129–34 (15th ed. 1984)).

106 See UCLA School of Law, UCLA-LoPucki Bankruptcy Database (28 September 2019) (based on a survey of more than 1,000 large, public company Chapter 11 filings involving since 1979 of all prepackaged and prenegotiated plan Chapter 11 cases, 66.9 per cent and 33.1 per cent, respectively, have been filed in Delaware and New York. A more recent survey of public company Chapter 11 filings with more than US$50 million in liabilities at the time of filing (between 2010 and 2018) showed that (1) filings in Delaware accounted for 42 per cent of all Chapter 11 filings; (2) filings in Delaware accounted for 54 per cent of all prepackaged and prenegotiated plan cases; (3) 57 per cent of all cases filed in Delaware were prepackaged and prenegotiated plan filings (104 of 182), versus 44 per cent across all venues; and (4) 34 per cent (61 of 182) of all Delaware filings involved prepackaged plans. See John Yozzo and Samuel Star, 'For Better or Worse, Prepackaged and Pre-Negotiated Filings Now Account for Most Reorganizations', *ABI Journal*, Vol. XXXVII, No. 11, November 2018, at 3.

107 Mette Kurth, 'Prepackaged and Prenegotiated Plans of Reorganisation: An Introduction', at 19 (25 June 2009).

108 id. at 18–19 (citing Lynn M Lopucki and Joseph W Doherty, 'Why Are Delaware and New York Bankruptcy Reorganizations Failing?' 55 *Vand. L. Rev.* 1933, 1975 (2002)); see also Foteini Teloni, 'Chapter 11 Duration, Preplanned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era', *Am. Bankr. Inst. L.rev.* (2015) ('[T]he [Lopucki and Doheny] data showed that firms emerging from the generally speedy Delaware Chapter 11 bankruptcies during that period were more likely to refile than companies emerging from other

ensuing years, but a material risk of failure (i.e., finding it necessary to file for Chapter 11 a second time) remains.[109]

The United States Bankruptcy Court for the Southern District of New York has bankruptcy judges with substantial experience in handling mega-cases of national importance, including many filed on a prepackaged basis.[110] In addition, as discussed below, it also has specific local rules governing procedures for prepackaged bankruptcies.[111]

Still, according to the same 2002 study, more than 33 per cent of prepackaged plans filed in New York failed, a far lower percentage than in Delaware, but still higher than the 20 per cent average rate of failure that prepackaged bankruptcies had in all states other than Delaware and New York.[112] As in Delaware, the long-term success rate of such plans in New York has improved, but a non-*de minimis* risk of failure remains.[113]

Local guidelines

In an effort to facilitate uniformity of results and to avoid unnecessary litigation, the United States Bankruptcy Court for Southern District of New York (S.D.N.Y.) (among other districts) has promulgated procedural guidelines (the SDNY Guidelines) for commencing and administering prepackaged Chapter 11 cases filed in that district, which, along with Delaware, is the venue of choice for most large Chapter 11 debtors.[114] The SDNY Guidelines are, in large measure, advisory and, more specifically, provide direction with respect to, among other topics:

- pre-filing notification to the US Trustee and the court clerk;[115]

jurisdictions' reorganisations.'); Edward I Altman, 'Revisiting the Recidivism – Chapter 22 Phenomenon in the U.S. Bankruptcy System', 8 *Brooklyn J. Corp., Fin. & Comm. Law* 253 (2014) (same).

109 John Yozzo and Samuel Star, 'Chapter 22 Filings Deserve a More Nuanced Narrative', *ABI Journal*, Vol. XXXVII, No. 11, November 2019 ((1) concluding that failure rates for Chapter 11 plans generally have remained stable in the 15 to 20 per cent range since 1984; (2) basing conclusions, in part, on data showing a total of 51 'Chapter 22' filings between 2010 and 2018, of which 11 involved prepackaged plans; and six involved prepackaged plans previously confirmed by Delaware courts); see also tracking Chapter 22 filings in period between 1984 and 2014.

110 According to one study addressing Chapter 11 cases filed between 2010 and 2018 with more than US$50 million in liabilities at the time of filing, (1) Chapter 11 filings in the Southern District of New York accounted for 17 per cent of all filings; (2) such filings accounted for 20 per cent of all prepackaged and prenegotiated plan filings; (3) 52 per cent of cases filed in this district were prepackaged and prenegotiated plan filings (38 of 73), versus 44 per cent across all venues; and (4) 30 per cent (22 of 73) of all New York filings involved prepackaged plans. See Yozzo and Star, supra n. 106, at 5.

111 See Kurth, supra n. 107, at 20.

112 id at 19.

113 Samuel Star and John Yozzo, supra n. 106 (noting that, of 11 'Chapter 22' filings between 2010 and 2018 involving prepackaged plans, only one involved a prepackaged plan previously confirmed by the Southern District of New York bankruptcy court).

114 On 2 February 1999, the Board of Judges for the Southern District of New York adopted General Order 201 (as amended on 24 February 1999 by General Order 203), which set forth original prepackaged Chapter 11 case guidelines, which guidelines were amended in 2013 by General Oder M-454. See Adoption of Prepackaged Chapter 11 Amended Guidelines, Admin. Order M-454, at § VIII(C) (Bankr. S.D.N.Y. 2013).

115 Pursuant to the SDNY Guidelines, at least three days prior to filing a prepackaged Chapter 11 case, the debtor should notify the US Trustee and the Clerk of the Court of its intention to file a prepackaged case, and provide to the US Trustee copies of the debtor's plan and disclosure statement. If possible, the debtor also should provide

- the retention of professionals;[116]
- balloting and soliciting procedures;[117]
- disclosure regarding the prepackaged plan;[118]
- first day motions and orders;[119]
- creditor committee meetings;[120] and
- notice requirements.[121]

General SDNY Guidelines

The SDNY Guidelines deal, for the most part, with practical matters, including information about filing documents and establishing a confirmation schedule, and are intended to streamline the process of commencing and administering a prepackaged Chapter 11 case.

Specific SDNY Guidelines include guidance as to:

drafts of all pleadings and corresponding proposed orders to be filed on the petition date (i.e., the 'first day' motions) at least one day prior to the filing of the case. (SDNY Guidelines § IV(a)–(c).)

116 Under the SDNY Guidelines, it is unnecessary for the debtor to retain, pursuant to Section 327 of the Bankruptcy Code, accountants, investment advisers, vote tabulators, solicitation agents or similar non-legal professionals that were retained by the debtor prepetition and are not seeking additional payments for services provided postpetition. Such non-legal professionals may continue to provide nominal services, such as testifying at the debtor's confirmation hearing; however, if such professionals will be providing substantive services to the debtor, they must be retained pursuant to Section 327 of the Bankruptcy Code. (SDNY Guidelines § VI(c)(6).)

117 Among other things, the SDNY Guidelines suggest that a reasonable time period for creditors or equity security-holders to cast their acceptances or rejections on the debtor's plan is (1) 21 days from the commencement of the mailing of the ballots, in the case of publicly traded securities and all other claims or interests; or (2) 14 days for securities that are not publicly traded or debt which is not evidenced by a publicly traded security. The guidelines also provide form ballots for both beneficial and record holders, as well as for other claims and interests, to be used in connection with a prepackaged plan solicitation. (SDNY Guidelines § VII(a)(1)–(3).)

118 For example, the SDNY Guidelines provide a form to be used to summarise the debtor's prepackaged plan of reorganisation and to provide notice of the hearing to consider the adequacy of the disclosure statement and confirmation of the plan. (SDNY Guidelines, Ex. D.)

119 The SDNY Guidelines provide a list of the typical first day motions, including, but not limited to, a motion setting the deadline for filing proofs of claims or interests; applications to employ appropriate professionals (i.e., attorneys, accountants, financial advisers); and a motion authorising the debtor to obtain postpetition financing, as well as the motions set forth infra § IV(b)(2). (SDNY Guidelines § VI(c)(1)–(20).)

120 The SDNY Guidelines state that '[t]ypically, no creditors' committee will be appointed in a Prepackaged Chapter 11 case where the unsecured creditors are unimpaired. However, where members of a pre-petition committee seek to serve as a member of an official creditor's committee, they shall demonstrate to the United States Trustee their compliance with Fed. R. Bankr. P. 2007(b).' (SDNY Guidelines § VIII(c).)

121 The SDNY Guidelines set forth specifications with respect to the contents of the notice to be given to creditors regarding the filing of the debtor's prepackaged plan and disclosure statement and the hearings to consider the adequacy of the disclosure statement and confirmation of the plan. For example, the notice of the disclosure statement and confirmation hearing must (1) set forth the date, time and place of the hearing, and the date and time by which objections to the foregoing must be filed and served; (2) include a chart summarising distributions under the plan; (3) set forth the name, address and telephone number of the person from whom copies of the plan and disclosure statement can be obtained (at the debtor's expense); and (4) state that the plan and disclosure statement can be viewed electronically and explain briefly how electronic access to these documents may be obtained. (SDNY Guidelines § X(a)–(d).)

Guideline	*Topic*
II	Definition of prepackaged Chapter 11 case
III, VI	Motions filed to commence a prepackaged Chapter 11 case
IV	Type of notice to be given and to whom upon filing prepackaged case
VII	Solicitation procedures for prepackaged plan, including information about the voting period, ballots, and notice
VIII	Organisational meetings and, in particular, the Section 341 Meeting
IX	Proofs of claim
X	Notice of hearing procedures

First day filings

In addition to the petition and the standard first day pleadings,[122] the first day filings in a prepackaged cases generally include the following:

SDNY Guideline	*First day filing*
II	Chapter 11 plan and related disclosure statement, in the form presented to and accepted by the requisite number of creditors.[123]
III.A	Motion to set joint hearing for approval of disclosure statement and confirmation. This motion is generally referred to as the pre-pack scheduling motion and is intended to not only request the scheduling of the joint hearing on the approval of the disclosure statement and the confirmation of the proposed prepackaged plan, but also to: (1) obtain approval for the debtor's solicitation of votes to accept or reject the plan; (2) confirm that the requisite acceptances of the plan have been obtained; and (3) clarify, in the event of a cramdown, that the debtor is requesting that the court approve its plan pursuant to Section 1129(b) of the Bankruptcy Code.[124]

122 Standard first-day pleadings include: (1) a motion for joint administration of the debtors' case; (2) a motion for an order authorising the debtor to maintain its existing bank accounts and cash management system; (3) a motion for an order authorising the debtor to pay prepetition wages, salaries and commissions; (4) a motion for an order authorising payment of prepetition sales and use taxes; (5) a motion for an order authorising payment of prepetition claims relating to insurance programmes; (6) a motion for an order prohibiting utilities from altering, refusing, or discontinuing services on account of prepetition claims; (7) a motion for an interim order authorising the debtor's use of cash collateral or to obtain postpetition financing; (8) a motion for an order authorising the debtor to employ appropriate professionals (e.g., attorneys, accountants, financial advisers); (9) a motion for an order authorising employment and payment without fee applications of professionals used in the ordinary course of business; and (10) a motion for an order establishing procedures for compensation and reimbursement of expenses of professionals and others. (SDNY Guidelines § VI.C1-20.)

123 See, e.g., *In re Remington Outdoor Co., Inc.*, Case No. 18-10684 (BLS) (Bankr. D. Del. 25 March 2018) [Docket No. 13); *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019) [Docket No. 23]; *In re Vertis Holdings, Inc.*, Case No. 08-1460 (CSS) (Bankr. D. Del. 15 July 2008) [Docket No. 14].

124 See, e.g., *In re Remington Outdoor Co., Inc.*, Case No. 18-10684 (BLS) (Bankr. D. Del. 25 March 2018) [Docket No. 12); *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019) [Docket No. 11]; *In re Vertis Holdings, Inc.*, Case No. 08-1460 (CSS) (Bankr. D. Del. 15 July 2008) [Docket No. 21].

SDNY Guideline	*First day filing*
VI.C.16	Motion for authority to pay general unsecured claims in the ordinary course of business. This motion discloses the types of claims the debtor proposes to pay (generally trade creditors supplying goods or services) and explains that paying them is justified because such creditors are expected to receive payment in full under the plan.[125]
VI.C.4	Motion to waive filing of schedules of assets and liabilities and statements of financial affairs pending confirmation of the plan. This motion requests an order dispensing with the requirement that the debtor file schedules and statements of financial affairs in the event the debtor is not seeking to bar and subsequently discharge all or certain categories of debt.[126]

Timeline considerations and factors

Indicative timeline for typical prepackaged case

As a general matter, a prepackaged Chapter 11 plan can be confirmed within 30 days of filing the Chapter 11 petition, in accordance with the following indicative timeline:

Date[127]	*Event*	*Description*
-365	Negotiation of plan	Debtor undertakes, sometimes over a period of many months, to negotiate terms of plan with all creditors whose claims will be altered or impaired by the plan.
-30	Solicitation commences	After negotiations have concluded and agreement has been reached on the terms of the plan and form of disclosure statement, but prior to filing any Chapter 11 petitions, the debtor commences solicitation with a voting deadline set approximately 30 days later.
0	Chapter 11 case filed	If the debtor obtains votes sufficient to confirm the proposed prepackaged plan, then, on the voting deadline or shortly thereafter, the debtor will file its Chapter 11 petition, plan, disclosure statement, and first day pleadings.
+2	First day hearing	Subject to the bankruptcy court's calendar, but generally within two days of the Chapter 11 petition filing, a first day hearing will take place. At that hearing, the court will consider the pre-pack scheduling motion and other first day pleadings and, subject to any objections thereto, enter orders (1) scheduling the joint disclosure statement and confirmation hearing, as well as the objection deadlines relating thereto; and (2) granting the relief requested in the other first day pleadings.
+30	Disclosure statement/plan objection deadline	In compliance with Bankruptcy Rule 2002, the deadline to object to the adequacy of the disclosure statement and confirmation of the plan is generally set at least 28 days after the first day hearing, and the confirmation hearing generally takes place five to seven days thereafter.
+35	Confirmation hearing	Confirmation hearing is held, any objections resolved, and the confirmation order is entered.

125 See, e.g., *In re Remington Outdoor Co., Inc.*, Case No. 18-10684 (BLS) (Bankr. D. Del. 25 March 2018) [Docket No. 6); *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019) [Docket No. 6]; *In re Vertis Holdings, Inc.*, Case No. 08-1460 (CSS) (Bankr. D. Del. 15 July 2008) [Docket No. 11].

126 See, e.g., *In re Remington Outdoor Co., Inc.*, Case No. 18-10684 (BLS) (Bankr. D. Del. 25 March 2018) [Docket No. 4); *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019) [Docket No. 4]; *In re Vertis Holdings, Inc.*, Case No. 08-1460 (CSS) (Bankr. D. Del. 15 July 2008) [Docket No. 3].

127 Dates are designated in relation to how many days they occur before (-) or after (+) the relevant Petition Date.

Date[127]	*Event*	*Description*
+35-+49	Possible stay of confirmation order	Bankruptcy Rule 3020(e) provide for a stay of the confirmation order for 14 days, but courts are often willing to order a shorter stay or waive the stay entirely.[128]
+40-+54	Effective date	After the stay expires or has been waived – and subject to the satisfaction of any documentation or other conditions precedent – the debtor may consummate the plan (with the date on which this occurs usually referred to as the 'effective date').[129]

Expedited confirmation and consummation

The foregoing indicative timeline notwithstanding, prepackaged Chapter 11 plans have been, and continue to be, confirmed and consummated on more expedited timelines, as illustrated by the following list of prepackaged Chapter 11 cases.

Case	*Court*	*Filing date*	*Confirmation*	*Duration*
In re Sungard Availability Services Capital, Inc., No. 19-22915 (RDD)	S.D.N.Y.	1 May 2019	2 May 2019	19 hours
In re Jones Energy, Inc., No. 19-32112 (DRJ)	S.D. Tex.	14 April 2019	6 May 2019	22 days
In re FullBeauty Brands Holding Corp., No. 19-22185 (RDD)	S.D.N.Y.	3 February 2019	5 February 2019	One day
In re Arsenal Energy, No. 19-10226 (BLS)	D. Del.	3 February 2019	13 February 2019	10 days
In re David's Bridal, Inc., No. 18-12635 (LSS)	D. Del	19 November 2018	4 January 2019	46 days
In re Gastar Exploration Inc., No. 18-36057 (MI)	S.D. Tex.	31 October 2018	20 December 2018	50 days
In re Mattress Firm, Inc., No. 18-12241 (CSS)	D. Del.	5 October 2018	16 November 2018	42 days
In re Remington Outdoor Co., Inc., No. 18-10684 (BLS)	D. Del.	25 March 2018	4 May 2018	40 days

128 Bankruptcy Rule 3020(e) states that '[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.' Fed. R. Bankr. P. 3020(e).

129 Bankruptcy Rule 2002(b) requires 'not less than 28 days' notice by mail' to the debtor, the trustee, all creditors, and indenture trustees of the objection deadline and hearings with respect to each of the approval of the disclosure statement and confirmation of the plan. Fed. R. Bankr. P. 2002(b). (Note, however, that under Bankruptcy Rule 2002(l), '[t]he court may order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice.') Bankruptcy Rule 3017(d) additionally provides that 'notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with [Bankruptcy] Rule 2002(b).' Fed. R. Bankr. P. 3017(d). This separate notice period is included in part because all creditors, including those that are unimpaired under a plan (and thus not eligible to vote on the plan), are entitled to notice of the time fixed for filing objections and notice of the hearing to consider confirmation of the plan. Creditors with claims that ride through the bankruptcy have a right to object to the plan on other grounds, such as feasibility under Section 1129(a)(11) of the Bankruptcy Code. 11 U.S.C. § 1129(a)(11). Similarly, even those classes that are deemed to reject and therefore do not have a vote should have an opportunity to object to the plan. Either of these two notice periods may be reduced for cause shown in the bankruptcy court's discretion pursuant to Bankruptcy Rule 9006(c). Fed. R. Bankr. P. 9006(c).

Case	*Court*	*Filing date*	*Confirmation*	*Duration*
In re Rand Logistics, No. 18-10175 (BLS)	D. Del.	29 January 2018	28 February 2018	30 days
In re Global A&T Electronics Ltd., No. 17-23931 (RDD)	S.D.N.Y.	17 December 2017	22 December 2017	Four days
In re Roust Corp., No. 16-23786 (RDD)	S.D.N.Y.	30 December 2016	6 January 2017	Six days
In re Southcross Holdings, No. 16-20111 (CSS)	S.D. Tex.	27 March 2016	11 April 2016	15 days
In re Elec. Components Int'l, Inc., No. 10-11054 (KJC)	D. Del.	30 March 2010	11 May 2010	41 days
In re True Temper Sports, Inc., No. 09-13446 (PJW)	D. Del.	8 October 2009	30 November 2009	53 days
In re JGW Holdco, LLC, No. 09-11731 (CSS)	D. Del.	19 May 2009	1 June 2009	13 days
In re Davis Petroleum Corp., No. 06-20152 (MI)	S.D. Tex.	8 March 2006	10 March 2006	Three days
In re Blue Bird Body Co., No. 06-50026 (GWZ)	D. Nev.	26 January 2006	27 January 2006	Two days
In re IWO Holdings, Inc., No. 05-10009 (PJW)	D. Del.	4 January 2005	7 February 2005	34 days
In re Choice One Commc'n Inc., No. 04-6433 (RDD)	S.D.N.Y.	5 October 2004	9 November 2004	35 days

With these cases, among others, as precedents, we appear to have entered the era of what one industry veteran has called the 'super speedy' pre-pack.[130] As a result, it is no longer atypical for prepackaged Chapter 11 plans to be confirmed and consummated within weeks or even days of filing. Indeed, eight of the 15 filings that exited from Chapter 11 protection through a plan of reorganisation in the first quarter of 2019 were prepackaged plans that, on average, took just 44 days from filing to emergence.[131]

It could be argued that 'super speedy' pre-packs are not a novel phenomenon and simply reflect the ever-increasing ability of motivated debtors and supportive creditors to consummate all the preparations and negotiations required to confirm, with the aid of willing judges, Chapter 11 plans prior to filing – continuing a trend of shorter case lengths based upon pre-packs that has been developing for a number of years.[132] However, such an assessment

130 Michael Eisenband, 'The "Super Speedy Prepack" Has Arrived . . . Is that A Big Deal?' (FTI 2019).

131 id.; see also Dennis A Meloro, et al., 'The Fast and Laborious: Chapter 11 Case Trends', *ABI Journal* (March 2013); James H M Sprayregen, et al., 'Need for Speed: Utilising Hybrid Solicitation Strategies to Shorten Ch. 11 Cases', 24 BBLR 1351 (2012); Brian K Tester, et al., 'Need for Speed: Prepackaged and Prenegotiated Bankruptcy Plans', ABI 17th Annual Northeast Bankruptcy Conference, 511, 520-521 (2010); Mike Spector, 'The Quickie Bankruptcy: More Companies Enter Court, and Exit, in a Flash', *Wall Street Journal* (5 January 2010).

132 Fitch Ratings, one of the 'big three' credit rating agencies, has confirmed this trend, concluding that the median duration from the date of filing of a Chapter 11 petition to the date of confirmation of a plan of reorganisation or liquidation has been declining significantly in recent years – with four months being the median duration for the 30 US cases studied with plans confirmed in 2017 and five months for the 34 cases studied with plans confirmed in 2016. (Fitch Rating, Shrinking Length of US Bankruptcies (7 August 2018).) By contrast, the

would not tell the full story, as the debtors implementing 'super speedy' pre-packs all appear to have been presented with case attributes that facilitated these expedited paths through the Chapter 11 process. By way of a common denominator, these cases, while large, featured relatively simple capital structures, with few creditor classes and an indisputable fulcrum security.

FullBeauty Brands, for example, was an online apparel retailer with no problematic bricks-and-mortar footprint, that had a pre-filing capital structure comprised solely of a small asset-based lending and 'first lien, last out' loans, a US$780 million first lien term loan and a US$345 million second lien term loan.[133] Similarly, the US$1.3 billion prepetition capital stack in the *Sungard* case comprised a small revolver, two first lien term loans with an aggregate outstanding balance of US$800 million and a US$425 million unsecured note issue, and required the support of just two impaired voting classes for confirmation,[134] while Jones Energy's pre-filing capital stack of US$1 billion largely consisted of a US$450 million first lien senior secured note and two unsecured notes with an aggregate outstanding balance of US$550 million.[135]

Each of these plans had the overwhelming (in some cases near-unanimous) support of affected creditors, which generally included well-organised groups of distressed investors prepared to convert their debt to equity and, in the process, assume ownership of the relevant debtors after emergence from Chapter 11 protection.[136] In addition, these distressed investors had committed DIP, exit, backstop financing to support the relevant Chapter 11 plans, thereby reducing the time, expense and uncertainty that might have ensued if financing had been sought elsewhere.[137]

Finally, in each of these cases, the claims of general unsecured creditors were treated as unimpaired, with the relevant plans providing that such creditors receive either cash recoveries in full or reinstatement.[138] For such creditors, including suppliers of merchandise and services, it was as if the relevant Chapter 11 filings had never occurred, which minimised any potential for business disruption resulting from loss of vendor support. Senior creditors (mostly distressed investors with large positions bought at significant discounts to face value), which were first in line but still impaired and willing to be equitised, essentially gifted part of their recoveries to junior creditors in exchange for pre-filing plan consent and third-party releases or other exculpation provisions. By making such value-sharing concessions upfront during pre-filing negotiations, the senior creditors were able to avoid protracted and costly

median duration for the 304 cases which Fitch studied where plans were confirmed between 2003 and early 2018 was seven months, broken down as follows by type of chapter filing: traditional Chapter 11 (11 months); prearranged (or prenegotiated) (four months); and prepackaged cases (two months).

133 *In re FullBeauty Brands Holding Corp*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019) [Docket No. 14 (Disclosure Statement, at 3)].

134 *In re Sungard Availability Servs. Capital, Inc.* Case No. 19-22915(RDD) (Bankr. S.D.N.Y. 1 May 2019) [Docket No. 16 (Disclosure Statement, at 1)].

135 *In re Jones Energy, Inc*, Case No. 19-32112 (DRJ) (Bankr. S.D. Tex. 14 April 2019) [Docket No. 19 (Disclosure Statement, at 1–2)].

136 *FullBeauty Brands* [Docket No. 14 (Disclosure Statement, at 4–5)]; *Sungard Availability* [Docket No. 16 (Disclosure Statement, at 5)]; *Jones Energy* [Docket No. 19 (Disclosure Statement, at 5–6)].

137 *FullBeauty Brands* [Docket No. 14 (Disclosure Statement, at 5)]; *Sungard Availability* [Docket No. 16 (Disclosure Statement, at 5)].

138 *FullBeauty Brands* [Docket No. 14 (Disclosure Statement, at 2)]; *Sungard Availability* [Docket No. 16 (Disclosure Statement, at 2)]; *Jones Energy* [Docket No. 19 (Disclosure Statement, at 6].

post-filing entanglements and litigation with dissatisfied junior creditors bent on obtaining a better recovery. In so doing, senior creditors materially enhanced the likelihood of an expeditious[139] and relatively conflict-free confirmation of their respective prepackaged plans.[140]

Alternative to prepackaged Chapter 11 plan: the prenegotiated plan

If the parties have failed to reach an agreement with respect to a prepackaged plan, the next best alternative is a 'prenegotiated' or 'prearranged' plan.

In a prenegotiated scenario, the company negotiates a Chapter 11 plan with certain of its creditors prior to filing for bankruptcy protection, but does not solicit votes prior to the petition date. Instead, the company typically files the plan and the corresponding disclosure statement simultaneously with the filing of its petition, or shortly thereafter, obtains approval of the disclosure statement from the bankruptcy court, and only then solicits acceptances on the proposed plan.

Advantages and disadvantages

A prenegotiated case lies somewhere on the spectrum between a prepackaged case and a traditional Chapter 11 case: it has fewer of the advantages of a prepackaged case, but also fewer of the disadvantages. For example, a prenegotiated case generally takes more time than a prepackaged case, but less time than a traditional case.[141] Similarly, because negotiations have occurred but solicitation has not, there is less certainty and more execution risk in a prenegotiated case than in a prepackaged case, but more than in a traditional case. A prenegotiated case, in contrast to a prepackaged case, gives the debtor an opportunity to impair trade claims and use some of the bankruptcy powers. As such, a prenegotiated case may be preferable to

139 Indeed, as set forth above, the *FullBeauty Brands* Chapter 11 plan was confirmed in just two days; the *Sungard Availability* plan in less than one day; and the *Jones Energy* plan in 22 days.

140 In both the *FullBeauty Brands* and *Sungard Availability* cases, as well as other prepackaged cases, the sole objections filed have come from the US Trustee, who argued that '[i]f allowed to proceed on such an accelerated track, the Debtors will have succeeded in depriving parties-in-interest, governmental agencies, and the Court of their Code- and Rule-given rights to an adequate period of time to evaluate, respond and object to the Plan.' (*In re Sunguard Availability Servs. Capital, Inc.*, Case No. 19-22915 (RDD) (Bankr. S.D.N.Y. 2 May 2019) [Docket No. 37 (U.S.T. Objection, at 2)].) More specifically, the US Trustee argued, without success, that Bankruptcy Rule 3017 requires the Court to hold a hearing on at least 28 days' notice 'after a disclosure statement is filed in accordance with Rule 3016(b) to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto.' Fed. R. Bankr. P. 3017; Bankruptcy Rule 2002 requires 'the clerk, or some other person as the court may direct', to give not less than 28 days' notice to the debtor and all creditors of the deadline for 'filing objections and the hearing to consider approval of a disclosure statement . . . and] for filing objections and the hearing to consider confirmation of a chapter 9 or chapter 11 plan'. Fed. R. Bankr. P. 2002(b)(1); and Bankruptcy Rule 3020(b)(1) provides that objections to confirmation of a plan must be filed and served 'within a time fixed by the court', and that the 'court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002'. Fed. R. Bankr. P. 3020(b)(1), (2)); see *In re Sunguard Availability Servs. Capital, Inc.*, Case No. 19-22915 (RDD) (Bankr. S.D.N.Y. 2 May 2019) [Docket No. 37 (U.S.T. Objection, at 11–12]); *In re FullBeauty Brands Holding Corp*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 4 May 2019) [Docket No. 34 (U.S.T. Objection, at 11–12)].

141 By way of illustration and as set forth above, the median duration for plans confirmed between 2003 and early 2018 was 11 months for traditional Chapter 11 cases; four months for prearranged (or prenegotiated) cases; and two months for prepackaged cases. (Fitch Rating, Shrinking Length of U.S. Bankruptcies (7 August 2018).)

a prepackaged case for a company that has operational issues for which it needs to use the Bankruptcy Code tools discussed above.

Plan support agreements

Indispensable to any prenegotiated case is the execution of a 'plan support agreement' with key stakeholders prior to the filing for bankruptcy protection.[142] These agreements are also called lock-up agreements or restructuring support agreements. The plan support agreements bind those stakeholders to support the debtor's restructuring on the terms, and subject to the conditions, contained in a term sheet that is usually attached to such agreements. The conditions typically include the receipt of a court-approved disclosure statement, the lack of a material adverse change in the debtor's business, and compliance with agreed-upon 'milestones' for various events that must take place in the bankruptcy case. For their part, the 'locked up' creditors agree not to transfer their claims unless their transferees agree to be bound by the terms of the plan support agreement.

These types of agreements are important for both debtors and creditors. They give comfort to the debtor that creditors will remain committed to the restructuring that was negotiated, while at the same time providing a guarantee to the consenting creditors that other creditors will not change their minds later. It is important to note that plan support agreements are likely not enforceable against the debtor as it is unlikely that a court would bind a debtor to a particular course of action. Thus, these agreements primarily create contractual obligations among creditors that can be enforceable against a breaching creditor (at least for damages, if not specific performance).

In general, prepetition plan support agreements have not been controversial. In fact, bankruptcy courts have held that they do not have jurisdiction over such agreements.[143] In certain jurisdictions, however, creditors that sign prepetition plan support agreements may be barred from serving on an official committee of unsecured creditors. The rationale is that members of the creditors' committee are fiduciaries whose duties in representing all unsecured creditors must remain unfettered. For example, the US Trustee for the District of Delaware has taken the position that any creditor that executes a prepetition lock-up agreement is ineligible to serve on a US Trustee-appointed creditors' committee.[144] In the Southern District of New York, however, the US Trustee does not consider the execution of a lockup agreement as necessarily fatal to membership on the creditors' committee. However, the lockup agreement must explicitly provide that if the creditor is appointed to the committee, it will remain free

142 Plan support agreements are also generally obtained in connection with prepackaged plans, but, because the votes are cast prior to the filing of the petition and the plan, such agreements have substantially less significance in that context.

143 See, e.g., *In re NII Holdings Inc.*, Case No. 02-11505 (MFW) (Bankr. D. Del. 2002) [Docket No. 1] (finding lock-up agreements executed prior to the filing of the bankruptcy to be valid because the court did not have jurisdiction over such agreements where the creditors had the opportunity to cast their votes after the bankruptcy court approved the disclosure statement); but see *In re Innkeepers U.S.A. Trust*, 442 B.R. 227 (Bankr. S.D.N.Y. 2010) (discussed below).

144 See *In re NII Holdings Inc.*, Case No. 02-11505 (MFW) (Bankr. D. Del. 25 June 2002) [Docket No. 137] (upholding decision of the US Trustee for the District of Delaware refusing to appoint bondholders that signed a lock-up agreement to statutory committee).

to exercise its fiduciary duties (i.e., it must have a 'fiduciary out') without violating the terms of the lock-up agreement.

Postpetition plan support agreements, on the other hand, have been a source of controversy, although they have become more acceptable in recent years. In the past, courts had found such agreements to be unenforceable under the rationale that their use impermissibly bypasses the requirements of Section 1125(b) of the Bankruptcy Code, which prohibits a debtor from soliciting votes on the plan until after the court has approved a disclosure statement.[145] In each of these cases, the votes of the creditors that were parties to the postpetition lock-up agreement were designated under Section 1126(e) of the Bankruptcy Code.[146] However, more recently, in the *Indianapolis Downs* case, a Delaware bankruptcy court declined to designate the votes of parties to a postpetition plan support agreement.[147] Although the court in *Indianapolis Downs* did not explicitly disagree with the two prior Delaware decisions cited above, it sought to limit them to their facts and stated that they were 'of only the most limited (if any) precedential value'.[148] Other courts appear to have adopted a similar view.[149] As a result, it has become more common in recent years for debtors to seek court approval of plan support agreements,[150] including through motions seeking the assumption of prepetition plan support agreements.[151]

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145 11 U.S.C. § 1125(b); see, e.g., *In re NII Holdings Inc.*, Case No. 02-11505 (MFW) (Bankr. D. Del. 2002) [Docket No. 367] (holding that lock-up agreements executed postpetition violated Section 1125(b) of the Bankruptcy Code); accord *In re Stations Holdings*, Case No. 02-10882 (MFW) (Bankr. D. Del. 30 September 2002) [Docket No. 177].

146 See 11 U.S.C. § 1126(e) ('On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.')

147 See *In re Indianapolis Downs, LLC*, 486 B.R. 286 (Bankr. D. Del. 2013) (refusing to designate the votes of creditors that signed a postpetition plan support agreement).

148 id. at 295.

149 See, e.g., *In re Residential Capital, LLC*, Case No. 12-12020 (MG) (Bankr. S.D.N.Y. 27 June 2013) [Docket No. 4102] (approving postpetition plan support agreement); *In re Heritage Org., L.L.C.*, 376 B.R. 783, 793–94 (Bankr. N.D. Tex. 2007) (refusing to designate the votes of parties that had signed a postpetition agreement to support a particular plan).

150 The bankruptcy court's blessing ensures that the court will not designate the votes cast by parties to the plan support agreement as the product of improper solicitation. Seeking court approval may also be seen as evidence of good faith in that it fully discloses the negotiations that have taken place and informs parties in interest (and the public) that a deal has been struck. See, e.g., *Indianapolis Downs*, 486 B.R. at 297 ('When a deal is negotiated in good faith between a debtor and sophisticated parties, and that arrangement is memorialised a written commitment and promptly disclosed, § 1126 will not automatically require designation of the votes of the participants.').

151 See, e.g., *In re Residential Capital, LLC*, Case No. 12-12020 (MG) (Bankr. S.D.N.Y. 11 June 2012) [Docket No. 318]; *In re TBS Shipping Servs. Inc.*, Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. 20 February 2012) [Docket No. 177]; *In re MES Int'l, Inc.*, Case No. 09-14109 (PJW) (Bankr. D. Del. 20 November 2009) [Docket No. 22]; but see *In re Innkeepers USA Trust*, 442 B.R. 227, 235 (Bankr. S.D.N.Y. 2010) (denying motion to assume prepetition plan support agreement, and stating that 'without the burden of the restrictions imposed by the plan support agreement, the Debtors will have a wide berth to fulfill their fiduciary duties to conduct a plan process which maximises value for all of the estates and treats the various tranches of debt with greater neutrality.').

The future of prepackaged Chapter 11 plans

The future of prepackaged plans in the United States is a matter for debate. At least one commentator has seen in 'super speedy pre-packs' both the future, and the fulfilment of the past promise, of Chapter 11; naysayers have articulated a different, less optimistic view.[152]

On the one hand – as the Office of the US Trustee and some disenfranchised creditors have argued – prepackaged plan proponents, in seeking to confirm plans on shorter and shorter timetables, have been empowered to 'race through the Chapter 11 too quickly',[153] and in the process, decline to 'provide time for parties-in-interest, governmental agencies, and the Court sufficient to evaluate – let alone respond or object to the Plan'.[154] The Bankruptcy Code, these critics argue, does authorise prepackaged bankruptcy plans 'in which much of the activity precedes the filing of the Chapter 11 petition(s), but it does not condone debtor(s) seeking to short-circuit the bankruptcy process so as to avoid post-petition scrutiny or to violate basic principles of due process'.[155] The 'speedier' and more 'compressed' plan timelines become, the more likely it is that parties in interest, governmental agencies, and the court will be 'deprived of their Code- and Rule-given rights to an adequate period of time to evaluate, respond and object to the relevant plan'.[156]

Side by side with such concerns about due process has been the question of whether greater speed necessarily yields better results. The compressed time frame, some have argued, may benefit senior creditors, minimise employee and trade union uncertainty, and lessen disruption to operations, but, conversely, there is a risk that accelerated valuations or asset sales can be rushed to closure without being fully market-tested, thereby adversely affecting the recoveries of claimholders at lower levels in the priority waterfall than the senior creditors driving the prepackaged plan process.[157] No study currently exists as to the precise relationship between the expedited duration of today's Chapter 11 proceedings and the percentage recoveries received by creditors – particularly unsecured creditors – versus historical averages, and, in the absence thereof, the debate as to this issue is likely to continue.[158]

152 Michael Eisenband, 'The "Super Speedy Prepack" Has Arrived . . . Is that A Big Deal?' (FTI 2019); see also Dennis A Meloro, et al., 'The Fast and Laborious: Chapter 11 Case Trends', *ABI Journal* (March 2013); James HM Sprayregen, et al., 'Need for Speed: Utilising Hybrid Solicitation Strategies to Shorten Ch. 11 Cases', 24 BBLR 1351 (2012); Brian K Tester, et al., 'Need for Speed: Prepackaged and Prenegotiated Bankruptcy Plans', ABI 17th Annual Northeast Bankruptcy Conference, 511, 520–521 (2010).

153 *In re FullBeauty Brands Holding Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019) [Docket No. 340] (Objection of the United States Trustee to Confirmation of the Plan and Related Relief (4 February 2019), at 2.)

154 id.

155 id.

156 id.

157 Norman Kinel, 'The Ever-Shrinking Chapter 11 Case', *eSquire Global Crossing* (20 August 2018), at 2; see also see also Foteini Teloni, 'Chapter 11 Duration, Preplanned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era', *Amer. Bankr. Inst. L. Rev.*, at 8 (2015) ('Indeed, the quick resolution of Chapter 11 cases, particularly through the implementation of prepackaged reorganisations, might imply that operational problems of the company have been ignored in favor of a swift confirmation of a reorganisation plan that focuses solely on the firm's financial restructuring. It follows that the company emerges quickly from its Chapter 11, but not truly rehabilitated, incurring, therefore, a greater risk to seek again bankruptcy protection.')

158 Kinel, supra n. 150, at 2.

Finally, still other critics have asked whether prepackaged plans are able to accomplish anything other than an expedited balance sheet restructuring.[159] Proponents of pre-packs will argue that business issues are addressed as well, mostly pertaining to the shedding of unfavourable executory contracts and unexpired leases, and that these bankruptcy remedies are available and sometimes invoked in prepackaged cases, thereby improving the business prospects of the reorganised debtor. However, sceptics still tend to view prepackaged plans as quick fixes that do not adequately address the full spectrum of a debtor's restructuring needs.[160]

Prepackaged plan supporters, by contrast, have argued that properly implemented prepackaged plans bring Chapter 11 back to its roots and afford all parties in interest greater protections than are currently available in the other Chapter 11 contexts. In a world of liquidating Chapter 11 plans and 'rocket docket' sales pursuant to Section 363 of the Bankruptcy Code, FullBeauty and Sunguard are among the growing number of debtors that have bucked the trend and used the Chapter 11 process as it was intended – to restructure and afford 'honest but unfortunate debtor[s]' the opportunity 'to start afresh[,] free from the obligations and responsibilities consequent upon business misfortunes'.[161]

FullBeauty and its peer prepackaged cases have not sought to execute traditional reorganisations, whereby debtors spend months (and potentially years) under Chapter 11 protection, moving slowly toward plan confirmation as the culmination of a long, court-supervised process. However, unlike proponents of the accelerated Section 363 sale approach to Chapter 11, they have not fully forsaken the broader mandate and benefits of the Bankruptcy Code.[162]

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159 Michael Eisenband, 'The "Super Speedy Prepack" Has Arrived . . . Is that A Big Deal?' (FTI 2019); James H M Sprayregen, et al., 'Need for Speed: Utilising Hybrid Solicitation Strategies to Shorten Ch. 11 Cases', 24 BBLR 1351 (2012); Brian K Tester, et al., 'Need for Speed: Prepackaged and Prenegotiated Bankruptcy Plans', ABI 17th Annual Northeast Bankruptcy Conference, 511, 520–521 (2010).

160 Eisenband, supra note 152, at 3; but see Dennis A Meloro, et al., 'The Fast and Laborious: Chapter 11 Case Trends', at 3, *ABI Journal* (March 2013) ('The increase in pre-planned and prepackaged cases is largely driven by relatively solvent, viable companies that are seeking to restructure without the potential unknowns of a long, drawn-out chapter 11 case [and] chose this route to avoid spiraling administrative and professional costs as well as to promptly resume business as usual.')

161 Norman Pernick and Rebecca Hollander, 'Recent Prepacks Stay True to Chapter 11's Intent – with a Speedy Twist', at 1, *TMA Journal of Corp. Renewal* (June 2019).

162 id. The main competitor to the prepackaged plan, in terms of other recently popular restructuring tools, has been the Section 363 sale of all or substantially all the debtor's assets on an accelerated timetable. id. Auctions of public companies in bankruptcy have gone, according to one commentator, from being the exception in the 1990s to nearly half of all cases by 2015, and have continued to increase in popularity in ensuing years. See UCLA School of Law, UCLA-LoPucki Bankrutpcy Database (28 September 2019). Such sales, moreover, have often been consummated in time frames that rival those found in recent prepackaged plan cases. id. RadioShack, for example, was able auction off more than 1,700 stores as going concerns just 39 days after filing for Chapter 11 relief in 2015. See Stephen B Selbst, 'RadioShack Dissected: The Decline, Fall and Possible Rebirth' (*ABF Journal,* March 2016). However, as many commentators have observed, Section 363 sales are often proposed and approved without making available to stakeholders any of the voting, anti-discrimination, and fairness protections afforded to such stakeholders when confirmation of a Chapter 11 plan is sought. See American Bankruptcy Institute, 'Final Report of ABI Commission to Study Reform of Chapter 11', at 84 ('The primary concerns of courts and commentators with this practice are premised on the absence of stakeholder protections that are otherwise incorporated into the section 1129 plan process.'); Harvey R Miller and Shai Y Waisman, 'Is Chapter 11 Bankrupt?', 47 *Boston Coll. L. Rev.* 129, 156–57 (2005) ('[T]he creditor-in-possession phenomenon has certainly contributed to the increasing prevalence of bankruptcy sales [because] [c]reditors often prefer Chapter 11 as a mechanism to facilitate asset sales rather than as a tool for reorganisation, given that immediate sales

Instead, these debtors seek to leverage options available to any Chapter 11 debtor under the Bankruptcy Code and the Bankruptcy Rules to their own fullest advantage in the prepackaged plan context, thereby reaping many of the benefits of the Bankruptcy Code, while truncating the in-court process, lowering execution risk and minimising bankruptcy costs.[163]

In the final analysis, stakeholders are right to ask whether 'super speedy' pre-packs are a sign of things to come as key Chapter 11 constituents increasingly prioritise expedience above other considerations, but such stakeholders should remain wary of concluding that prepackaged Chapter 11 cases can provide a panacea for all fiscal ills.[164] Debtors with complex capital structures, highly fragmented creditor groups or those in dire need of an operational turnaround will not be able to go this route.[165] Hence, it is not feasible for many reorganisations.[166] However, for debtors with the attributes described elsewhere herein, it may be a template that continues to win the approval of the courts, as even those judges with some misgivings about the speed of these proceedings can take comfort in the Section 1129 confirmation protections that continue to apply and, in the end, may be reluctant to stand in the way of an otherwise confirmable plan that enjoys the overwhelming support of diverse creditor groups.

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produce a greater certainty of return.'); Jessica Uziel, 'Section 363(b) Restructuring Meets the Sound Business Purpose Test with Bite: An Opportunity to Rebalance the Competing Interests of Bankruptcy Law', 159 *U. Pa. L. Rev.* 1189, 1214 (2011) ('Section 363 sales' expedited process and lesser disclosure requirements make investigation of the purchaser's behavior vital in order to protect creditors, equity security holders, and debtors from exploitation. Increased potential for abuse threatens creditors' interests as well as the debtor's ability to maximise the value of the estate.'); see also *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 60–61 (Bankr. D. Del. 2014) ('It is the Court's view that [the stalking horse bidder's] rush to purchase and to persist in such effort is inconsistent with the notions of fairness in the bankruptcy process. The [debtor's] failure has damaged too many people, companies and taxpayers to permit [the stalking horse bidder] to short-circuit the bankruptcy process.').

163 Pernick and Hollander, supra n. 154, at 2.

164 Marcia Goldstein and Sharon Youdelman, 'Prepackaged Chapter 11 Case Considerations and Techniques', Int'l Insolv. Inst., 8th Annual International Insolvency Conference, 9–10 June 2008, at 9 ('A prepackaged case is not a panacea for all situations of financial distress.'); James H M Sprayregen, et al., 'Need for Speed: Utilising Hybrid Solicitation Strategies to Shorten Ch. 11 Cases', 24 Bankr. L Rep. 1351, 1352 (2012) ('If a debtor can make the case that a shorter proceeding may result in increased recoveries for stakeholders, [a prepackaged plan effectuated through] Section 1125(g) provides an opportunity to potentially move quickly through Chapter 11.')

165 id. at 3; Eisenband, supra n. 152, at 3.

166 Teloni, supra n. 152, at 8 ('[T]he quick resolution of Chapter 11 cases, particularly through the implementation of prepackaged reorganisations, might imply that operational problems of the company have been ignored in favor of a swift confirmation of a reorganisation plan that focuses solely on the firm's financial restructuring [and] that the company emerges quickly from its Chapter 11, but not truly rehabilitated, incurring, therefore, a greater risk to seek again bankruptcy protection.')

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Fast Fashion: The Case of FullBeauty Brands

Dennis F Dunne, Dennis C O'Donnell and Nelly Almeida[1]

Introduction

FullBeauty Brands Holdings Corporation, together with its affiliates (FullBeauty or the Company), is a direct-to-consumer retailer in the plus-size apparel market incorporated in Delaware and headquartered in New York. Prior to filing for bankruptcy protection on 3 February 2019 (the petition date),[2] the Company experienced, among other things, a distressed retail apparel market and reduced profit margins, revenue and consumer engagement.[3] In addition, the Company had nearly US$25 million in interest payments coming due on 31 October 2018.[4] As a result, FullBeauty began recruiting a new executive team in 2017, and, in July 2018, engaged restructuring advisers to assist it in exploring strategic alternatives.[5]

Months of negotiations

Following months of negotiations with holders of more than US$1 billion in debt, the company reached an agreement regarding a consensual, comprehensive restructuring with key stakeholders, which was memorialised in a restructuring support agreement on 18 December 2018 (RSA). To implement the financial restructuring contemplated by the RSA, the Company filed voluntary petitions for reorganisation pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the Court) along with a prepackaged plan of reorganisation implementing the

1 Dennis F Dunne is a partner, Dennis C O'Donnell is of counsel and Nelly Almeida is a partner at Milbank LLP.
2 In describing events after the petition date, FullBeauty Brands Holdings Corporation and its affiliates that filed for Chapter 11 protection will be referred to as the debtors and, each entity, a debtor.
3 *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 2019), Disclosure Statement [Docket No. 14] (the Disclosure Statement), at 42–43.
4 id. at 43.
5 id. at 13.

terms of the restructuring contemplated by the RSA (the Plan). The Plan was confirmed by the Court less than 24 hours after filing for Chapter 11 protection, setting a new record for the fastest Chapter 11 case – a record previously held by Blue Bird Body Co., a school bus manufacturer, which confirmed its plan of reorganisation in less than two days. FullBeauty emerged from bankruptcy three days after the Plan was confirmed.

Terms of the Plan

The restructuring contemplated by the Plan provided for the conversion of approximately US$782 million in first lien credit facility claims to a combination of equity, US$175 million of a new first lien facility, and up to US$35 million of a new junior loan; the conversion of approximately US$345 million of second lien debt into a combination of equity, warrants and US$15 million of a new junior loan; and a new-money capital infusion in the form of a US$30 million exit first lien facility. General unsecured creditors, including contract and lease counterparties, were not affected (i.e., were unimpaired) by the Plan.

Access to prepackaged plan option

Although prepackaged bankruptcies are not novel and there have been a growing number of quick prepackaged cases in the last few years, there are often particular case attributes that will facilitate a company's quick sprint through Chapter 11. Absent these attributes, a successful prepackaged bankruptcy case is not guaranteed to succeed, especially not one on an expedited timeline.

Background

FullBeauty was an early innovator in the direct-to-consumer fashion market with operations dating back to 1901, when the Company launched its first catalogue. In the mid-20th century, FullBeauty began to expand its plus-size market share and industry presence.[6] In 2001, FullBeauty launched its first e-commerce website and in the two decades preceding the petition date the Company had 'established itself as a leading plus-size eCommerce retailer by sales and breadth of product selection'.[7] In 2007, the Company introduced fullbeauty.com, a website offering a selection of plus-size apparel, footwear and accessories products across its brands.[8] The Company continues to operate its online sales operations through its online platforms as well as third-party market places.[9]

Pre-restructuring equity ownership

In connection with its expansion, FullBeauty was the target of a series of third-party acquisitions, beginning in 1999, when FullBeauty was acquired by Kering SA and organised as Redcats USA.[10] Following this acquisition, in the six years preceding the petition date, the Company took on more than US$1.2 billion in debt to fund additional leveraged buyouts.

6 Disclosure Statement, at 33–4.
7 id. at 34.
8 id.
9 id. at 34.
10 id.

First, in February 2013, private equity sponsors Charlesbank Capital Partners (Charlesbank) and Webster Capital (Webster) purchased FBB through a leveraged buyout valued at approximately US$522 million, with an implied original equity investment of around US$130 million.[11] Charlesbank and Webster thereafter took three dividends with a total value of over US$362 million, which were largely debt-financed.[12]

Then, in 2015, FullBeauty went through a competitive bid process in connection with a second leveraged buyout. At the conclusion of the sale process, FullBeauty announced a deal with certain funds managed by Apax Partners (Apax) valued at approximately US$1.8 billion. Apax contributed approximately US$490 million in equity. The total cash raised was approximately US$1.55 billion owing to original issue discounts (OID) on the debt raised in conjunction with the transaction (US$820 million of first-lien debt at 93 OID; US$345 million of second-lien debt at 87 OID; US$490 million equity).[13]

Following these acquisitions, Apax and Charlesbank (the Sponsors) held approximately 74 per cent and 26 per cent, respectively, of the outstanding equity in the Company's ultimate parent.

Pre-restructuring capital structure

The Company had a simple prepetition capital structure. As of the petition date, FullBeauty had outstanding funded debt obligations in the aggregate principal amount of approximately US$1.3 billion, including:

- an asset-based loan facility (the ABL facility) in the aggregate principal amount of US$143.9 million, which included a first-in, last-out (FILO) tranche in the amount of US$75 million;
- a first lien credit facility in the amount of US$781.6 million; and
- a second lien credit facility in the amount of US$345 million.

Reasons for restructuring

In addition to its significant debt service obligations, the Company encountered a number of hurdles in the months leading up to its Chapter 11 cases.[14] In particular, FullBeauty faced a number of operational and financial difficulties on account of, among other things, merchandising and pricing issues, which difficulties contributed to a decline in EBITDA.[15] These circumstances, compounded with a generally depressed retail apparel market at a time when FullBeauty also faced competition from new entrants as well as competition from

11 'FULLBEAUTY auction enters home stretch; banks line up with 6.75x leverage', *Debtwire* (31 July 2015).

12 id.

13 Sources estimated that the sale price would be around 10x EBITDA totalling at least US$1.75 billion. At 10x EBITDA, Webster and Charlesbank were estimated to receive approximately US$965 million in the transaction, which would have resulted in a 920 per cent total return on their initial equity investment. At close, it was estimated that FullBeauty would have US$105 million in liquidity.

14 On 31 October 2018, the Company was scheduled to pay approximately US$26.2 million in interest payments, consisting of: an approximately US$2 million interest payment under the FILO; an approximately US$14.2 million interest payment under the first lien facility; and an approximately US$10 million interest payment under the second lien facility.

15 Earnings before interest, tax, depreciation and amortisation.

Amazon, Inc and department stores such as Kohl's, Walmart and JC Penny, began to overwhelm the Company's operations and resulted in tightening liquidity beginning in 2017.[16]

In response to the above circumstances, the Company recruited a new executive team, beginning with a new chief executive officer in November 2017. Nonetheless, in the first quarter ending 31 March 2018, the Company posted a 32 per cent decline in EBITDA and a 3.5 per cent decline in revenue.[17] Predictably, by summer 2018, there were reports of lender groups forming and demanding additional information from the Company, including, among other things, a collateral review and a perfection analysis.[18]

The Company ultimately determined that FullBeauty needed to explore strategic alternatives to deleverage its balance sheet and achieve a more sustainable capital structure.

Overview of restructuring process

To assist with a potential restructuring, in July and August 2018, the Company retained restructuring advisers who assisted the Company's management in assessing strategic alternatives.

Restructuring options

After it retained restructuring advisers, the Company needed to make a series of key decisions in autumn 2018, which ultimately shaped its restructuring path.

To start, the Company had to decide whether it was going to pursue a short-term solution that would leave its first lien debt in place, over a more comprehensive restructuring. The Company determined that its priorities would be to increase liquidity and deleverage its balance sheet. To achieve these goals, the Company required a comprehensive restructuring of its funded debt obligations.[19] Following the decision to pursue a comprehensive solution, the Company proceeded to negotiate forbearance agreements with respect to the ABL facility and the first lien credit facility, pursuant to which the applicable lenders agreed to forbear from enforcing remedies in connection with certain specified defaults.

The Company then had to decide whether to make the interest payments on account of the first and second lien facilities due on 31 October 2018. In connection with this decision, the Company elected to draw down US$24.5 million under its ABL facility on 30 October 2018.[20] The funds provided FullBeauty with sufficient liquidity to make the interest payments if it elected to do so; however, satisfying the interest payments in full would have reduced the Company's liquidity from approximately US$52.5 million as of 30 October 2018, to approximately US$26.3 million.[21] Accordingly, the Company had a critical choice to make: (1) make the 31 October interest payments to avoid defaulting under its loans, which would mean sacrificing 100 per cent of the proceeds of the ABL facility draw – liquidity that was needed to maintain operations, implement its new business plan

16 Disclosure Statement, at 42–3.

17 Reorg Research, 'FullBeauty Sponsor Apax Partners Working with PJT Partners to Explore Discounted Buybacks', 14 August 2018.

18 Reorg Research, 'Lender Group Holding 50% of FullBeauty's TLB Seeks Added Disclosure from Management as Earnings Decline', 15 June 2018; id.

19 id. at 13.

20 Disclosure Statement, at 43.

21 id.

and preserve optionality in furtherance of ongoing discussions with lenders; or (2) elect not to make the interest payment, which would trigger a default under its loans at a time when the Company was already experiencing financial difficulty and tightening trade terms.[22] Following discussions with its advisers, the Company chose to make the US$14.6 million FILO and first lien facility interest payments and took advantage of a 150-day standstill provision with respect to the US$10 million interest payment due under the second lien facility.

The Company's elections paved the way for continued negotiations with key stakeholders while providing much needed stability to the business. Importantly, the additional time provided by the forbearance agreements enabled the Company, an ad hoc group of lenders under the first lien facility (the first lien ad hoc group), an ad hoc group of lenders under the second lien facility (the second lien ad hoc group), and the Sponsors to finalise and memorialise the terms of a fully consensual prepackaged restructuring.

Restructuring support agreement

In November 2018 – concurrent with announcing entry into the forbearance agreements – the Company announced that it had reached 'an agreement in principle with its key stakeholders on the terms of a consensual transaction that will significantly deleverage its balance sheet and contemplates payment of the Company's trade partners in the ordinary course of business'.[23]

The terms of the restructuring were memorialised in the RSA, dated 18 December 2018. The transactions contemplated by the RSA included a balance sheet restructuring designed to eliminate approximately US$900 million of the debtors' funded-debt obligations and minimise the time and expense associated with the Chapter 11 cases. Furthermore, as part of the agreed terms, the Company secured a US$30 million new money credit facility to fund the reorganised the Company's working capital and operational needs upon emergence from Chapter 11.

Pursuant to the RSA, subject to certain conditions, the Company had the option of pursuing either an out-of-court restructuring or confirmation of the prepackaged Chapter 11 plan, each reflecting the terms set forth in the RSA. This dual-track approach is not unusual; companies do not always know whether they will have sufficient support to implement a restructuring out-of-court and, in such cases, often pursue a dual-track process. One of the advantages of a dual track approach is that a restructuring can be accomplished without the need to resort to an actual bankruptcy filing, while providing the security of a contingency plan.

The Company ultimately determined to implement the proposed restructuring through the Plan, as to which the requisite votes were obtained prior to the petition date and which it sought to confirm as quickly as possible. A summary of the treatment of claims under the Plan is set forth below:[24]

22 id.

23 'FullBeauty Brands Enters Into Forbearance Agreements With Lenders', 9 November 2018, http://www.prnewswire.com/news-releases/fullbeauty-brands-enters-into-forbearance-agreements-with-lenders-300747480.html.

24 Each description of the RSA, the Plan or the Disclosure Statement herein is qualified in its entirety by the terms of the RSA, the Plan or the Disclosure Statement, as applicable.

- holders of administrative claims, priority tax claims and other secured claims and priority claims remained unimpaired;
- holders of allowed claims under the ABL facility were to be paid in full;
- holders of allowed FILO claims were to receive their *pro rata* share of US$75 million of the new first lien term loan, plus accrued interest;
- holders of allowed claims under the first lien facility were to receive their *pro rata* share of the following:
  - US$175 million in aggregate principal amount of the new first lien term loan; and
  - 87.5 per cent of the new common stock, subject to dilution by the management incentive plan and the warrants;
- holders of allowed claims under the second lien facility, to the extent the requisite number of such holders voted in favour of the Plan in the prepetition date solicitation, were to receive the following:
  - US$15 million of the new junior loan;
  - 10 per cent of the new common stock, subject to dilution by the warrants and the management incentive plan; and
  - warrants as further described in the Plan; and
- holders of allowed general unsecured claims (other than any held by the Sponsors) were to remain unimpaired.

The Company, first lien ad hoc group and second lien ad hoc group also understood that to ensure an expedited restructuring process, it was important to effectuate a consensual restructuring. Accordingly, the parties took a number of steps to garner the support they required:

First, to increase the level of support from lenders under the first lien facility, the RSA and Plan provided for a 1 per cent yield enhancement fee payable in cash to lenders under the first lien facility that had signed the RSA by a date certain; and the parties agreed that the lenders under the first lien facility would have the option to receive new second lien paper in lieu of new common stock – referred to as the 'flip up' election.[25]

Second, to increase the level of support from lenders under the second lien facility, the Plan included a death trap. That is, if Class 6 (holders of claims on account of the second lien facility) voted to reject the Plan, no holder of an 'allowed second lien claim' would receive a distribution under the Plan and the 10 per cent of the new common stock that would otherwise go to those holders would be reallocated to the holders of 'allowed first lien claims'.

Third, the parties chose to leave all general unsecured claims unimpaired, even though such claims were clearly out-of-the-money. This not only conserved the debtors' resources by allowing for a prepackaged restructuring, but minimised disruptions to the business, provided certainty to the Company's customers and suppliers, and preserved the debtors' key relationships.

Finally, the Company followed a fair and transparent process with respect to notice and solicitation in accordance with the Bankruptcy Code and the applicable rules.

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25 Lenders under the first lien facility elected to 'flip up' and receive approximately US$12 million in aggregate principal amount of the new junior loan. See 'Debtors' Memorandum of Law in Support of an Order Approving the Debtors' Disclosure Statement for, and confirming, the Debtors' First Amended Joint Prepackaged Chapter 11 Plan of Reorganization', at 18 [Docket No 19].

As a result of these efforts, the restructuring contemplated by the RSA was supported by nearly all of the Company's stakeholders, even prior to officially commencing the solicitation process.

On 3 January 2019, the Company announced that it had entered into the RSA and that the 'restructuring transaction contemplated by the RSA [would] reduce [the Company's] outstanding indebtedness by approximately US$900 million, significantly strengthening the Company's balance sheet and enhancing financial flexibility going forward'.[26] The Company also noted that, to implement the terms of the restructuring, it expected to file voluntary petitions for reorganisation following the expiration of a prepetition solicitation period.[27]

Implementation

On 4 January 2019, the Company published the Plan and accompanying Disclosure Statement on the website of PrimeClerk, its solicitation and claims agent. On 6 January 2019, the Company formally commenced its solicitation of the Plan and disclosure statement with ballots distributed to all three voting classes of claims. The three voting classes consisted of the lenders under the FILO, first lien facility and second lien facility. The Company also published notice of a combined hearing on approval of the Disclosure Statement and confirmation of the Plan in *The Wall Street Journal* and *Financial Times*. This notice and solicitation process commenced, as permitted by Section 1125(g) of the Bankruptcy Code.

The Company received unanimous support for the Plan – every single creditor entitled to vote actually voted in favour of the Plan.[28] With such unanimous support, the Company filed for Chapter 11 protection and the cases were assigned to Judge Robert Drain, who sits in White Plains, New York. The first day hearing commenced on 4 February 2019 at 2 p.m. ET, and the Plan was confirmed that afternoon.

Challenges

Notwithstanding unanimous creditor support, the US trustee objected to the Company's request for plan confirmation approval on the first day of the cases, arguing, among other things, that the proposed timeline would enable the Company to 'race through the Chapter 11 too quickly and [not] provide any time for parties-in-interest, governmental agencies, and the Court' to evaluate, respond or object to the plan.[29] While acknowledging that the Bankruptcy Code authorises prepackaged bankruptcy plans where most of the activity takes place before a case is filed, the United States trustee argued that 'it does not authorise debtors to short-circuit the bankruptcy process so as to avoid post-petition scrutiny or to

26 'FullBeauty Brands Enters Into Comprehensive Restructuring Support Agreement with Debt and Equity Holders', 3 January 2019 http://www.prnewswire.com/news-releases/fullbeauty-brands-enters-into-comprehensive-restructuring-support-agreement-with-debt-and-equity-holders-300772300.html.

27 id.

28 *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019), Declaration of Craig E Johnson of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Joint Prepackaged Chapter 11 Plan of Reorganization of FullBeauty Brands Holdings Corp. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code [Docket No. 18].

29 *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019), Objection of the United States Trustee to Confirmation of the Plan and Related Relief, Pg. 1–2 [Docket No. 34].

violate basic principles of due process'.[30] At the hearing, the representative for the office of the United States trustee argued that the case was as close as you can get to a 'secret bankruptcy case that essentially takes place outside of the jurisdiction of the Court'.[31]

In response to the objections made by the United States trustee, the Court emphasised, first, that the Bankruptcy Code allows debtors to commence solicitation of a plan before the filing of a Chapter 11 petition, 'notwithstanding that the Court had not at that point approved the disclosure statements, so long as the disclosure statement is subsequently approved'.[32] Further, '[i]n keeping with those directions from Congress, the Board of Judges of the Bankruptcy Court for the Southern District of New York has long had in effect guidelines through general orders for prepackaged Chapter 11 plans.'[33] The Court ultimately found that the debtors complied with the applicable guidelines, including providing more than 15 days contemplated for voting by a non-public debt-holder – the Company had provided 19 days and over 28 days to object to confirmation of the Plan and approval of the Disclosure Statement. The Court also noted that the debtors engaged with the office of the United States trustee prior to filing for bankruptcy protection and even incorporated certain changes into the Plan in connection with those discussions.[34] The Court explained that 'Congress clearly had in mind the prospect of confirming plans' at the 'very initial stages' of a Chapter 11 case if a company is able to meet all of the confirmation requirements.[35]

The Court ultimately confirmed the Plan, explaining that the 'nature of [the Plan] is really tailor-made for such a process in that it leaves unimpaired all creditors, except the three that were very much involved in the plan formulation process and that have unanimously accepted the plan'.[36] Indeed, the Court explained that 'there are good reasons to have a plan confirmed very promptly that might not rise to the level of being a compelling reason, as long as, again, the notice and confirmation requirements are satisfied.'[37] In the case of *FullBeauty* the 'good reasons' highlighted by the Court and the debtors included that the debtors' supply chain was largely made up of foreign suppliers and the debtors were clearly committed to a tight management of their cash.

30 id.

31 *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 2019), Confirmation Hearing TrPg. at 22: 15–19. (4 February 2019 (the Confirmation Hearing Tr).

32 Confirmation Hearing Tr at 55: 1–6.

33 Confirmation Hearing Tr at Pg. 55: 9–12.

34 Confirmation Hearing Tr at 56: 4-7.

35 Confirmation Hearing Tr at 56: 8–10.

36 Confirmation Hearing Tr at 56: 14–18.

37 Confirmation Hearing Tr at 56: 19–25.

Final post-restructuring structure

Following confirmation, the debtors implemented the terms of the Plan, resulting in a significant deleveraging of their capital structure as reflected in the below chart:[38]

Capital structure as of 1 January 2019		*Post-emergence capital structure*	
	Principal outstanding		*Principal outstanding*
ABL loans (including letters of credit obligations)	US$69 million	Exit ABL facility (including letters of credit obligations)	US$71 million
FILO facility	US$75 million	Exit new money facility	US$30 million
First lien credit facility	US$782 million	New first lien term loan	US$252 million
Second lien credit facility	US$345 million	New junior loan	US$15 million to US$50 million
Total funded debt	US$1.271 billion	Total funded debt	US$368 million to US$403 million

In addition, all general unsecured claims were paid in full or reinstated, as if the bankruptcy had never occurred – a fundamental component of the restructuring.

Conclusion

Once it became clear that a comprehensive solution was the best option, the Company worked with the ad hoc groups to achieve a fully consensual deal as quickly as possible. The ability to effectuate a prepackaged bankruptcy enabled the Company to report to its creditors that the ultimate outcome – a quick restructuring process approved by the bankruptcy court – was more or less assured, thereby minimising any disruption to the business.

As the *FullBeauty* case study shows, however, the use of a prepackaged bankruptcy – even a one-day bankruptcy – does not equate to a restructuring period that is any shorter than what may occur in a traditional Chapter 11 case. Negotiations leading up to a prepackaged filing can take, as they did in *FullBeauty*, many months. Moreover, a prepackaged bankruptcy is not necessarily the best option for every company, if it is even an option at all. Whether a prepackaged bankruptcy is an option will depend entirely on the facts and circumstances of a particular case. Successful prepackaged bankruptcies only make sense in cases where there are relatively simple capital structures, with few creditor classes and an indisputable fulcrum security.

Moreover, even if a prepackaged bankruptcy case makes sense in a particular situation, the expedited relief granted to FullBeauty is not guaranteed. As the US trustee noted in *FullBeauty*, 'approval of confirmation FullBeauty in less than twenty-four hours after the filing of the petition . . . [is] a . . . departure from the normal practice'.[39] There were unique facts and circumstances that merited a quick restructuring: the Company was only seeking a financial restructuring, there was an undisputable fulcrum security, the entire capital structure was on board with the proposed restructuring, trade was set to ride through unimpaired, all contracts were being assumed and, importantly, there were no brick-and-mortar store locations.

38 The below chart is from the Disclosure Statement. Disclosure Statement, at 10.

39 Objection of the United States Trustee to Confirmation of the Plan and Related Relief, Pg. 12 [Docket No. 34].

That is not to say that we will not see quick restructurings in the future. Indeed, *FullBeauty* did not hold its record very long. Approximately three months following the Company's emergence from Chapter 11, Sungard Availability Services filed a prepackaged case and confirmed its plan of reorganisation within 19 hours of filing – one hour faster than FullBeauty – and emerged from bankruptcy in less than two days.

5

Seeing the Future: The Case of Seegrid Corporation

Robert J Dehney and Matthew B Harvey[1]

Introduction

Seegrid Corporation is an artificial intelligence and robotics company based in Pittsburgh, Pennsylvania that produces self-driving vehicles for materials handling. By 2014, after years of raising capital to support product development and business growth, the company was faced with a convoluted capital structure and overburdened balance sheet that hampered its ability to raise new capital. To make matters worse, the second-largest investor of Seegrid threatened to block new investment and commenced litigation against the company's directors and the company's largest investor related to their efforts to restructure the company.

Following failed efforts to break the deadlock and recapitalise the company, Seegrid's only option was to pursue a restructuring in Chapter 11. To minimise disruption to its business and mitigate execution risk, Seegrid pursued its restructuring through a pre-packaged Chapter 11 plan. Though the dissident investor forcefully opposed the plan, Seegrid obtained a key court ruling that neutered the investor's leverage, and the bankruptcy court ultimately confirmed the plan, allowing Seegrid to restructure and emerge from Chapter 11 in just three months.

1 Robert J Dehney is a partner and Matthew B Harvey is a partner-elect at Morris, Nichols, Arsht & Tunnell LLP. The authors would like to thank Jennifer M McNally and Brett S Turlington for their assistance in writing this chapter.

Background

Seegrid was founded in 2003 by Dr Hans Moravec and Dr Scott Friedman to bring automation to high-volume commercial vehicles.[2] Seegrid provides automation solutions for high-volume commercial vehicles, including pallet trucks and tow trucks.[3]

As of its Chapter 11 filing, Seegrid's corporate headquarters, located in Pittsburgh, housed Seegrid's research and development, engineering, technical support, global sales and marketing, and corporate functions.[4] Seegrid also maintained an engineering facility in Lowell, Massachusetts.[5] In mid 2014, Seegrid had 41 full-time employees, two interns and one part-time employee.[6]

From its inception in 2003 until its Chapter 11 filing in 2014, Seegrid developed the first automation system focused on seamlessly converting commercial industrial vehicles (pallet trucks and tow tractors) into low-cost robotic industrial vehicles that do not require additional infrastructure.[7] Robotic industrial vehicles improve the economics and operations of an existing industry through reduced labour costs and improved efficiency and safety.[8] Unlike previous attempts at vehicle automation, Seegrid's robotic industrial vehicles leverage the existing manufacturing, sales and field service operations of original equipment manufacturers.[9]

Seegrid's automation system integrates a proprietary and patented software technology to 'see' its environment, map it in a virtual 'grid' and guide the vehicle – thus the company's name, 'Seegrid'.[10] The technology is state-of-the-art yet simple to use, as it does not require additional infrastructure or a specialised team of engineers to instal, support or operate the robotic industrial vehicles.[11] Seegrid's software technology was designed by its team of engineers, including holders of five PhDs, and features sophisticated, state-of-the-art 'evidence grid' software technology, stereo camera technology, user interface or sliding autonomy interaction architecture, motion control technology, and enterprise and fleet information software technology.[12]

At the time of its Chapter 11 filing, Seegrid held 31 issued or allowed patents and over 40 patents in process on over 20 matters.[13] The patents and patent applications generally covered the automation of materials handling processes and the underlying robot perception technology.[14]

2 'Declaration of David Heilman in Support of Debtor's Voluntary Chapter 11 Petition & First Day Motions' ¶ 26, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 21 October 2014), ECF No. 3 (First Day Declaration).

3 id.

4 id. ¶ 38.

5 id.

6 id.

7 id. ¶ 39.

8 id.

9 id.

10 id. ¶ 40.

11 id.

12 id.

13 id.

14 id.

From its inception to 2014, Seegrid invested over US$15 million in research and development costs to develop its technology, commercialise its product and refine the core software and probabilistic volumetric sensing approaches.[15]

By 2014, Seegrid was using its automation systems to fundamentally change the materials handling industry by automating pallet trucks, tow tractors, and other industrial vehicles.[16] Through automating materials handling, Seegrid's technology addressed one of the biggest challenges historically facing the industry: managing labour and controlling the associated labour costs.[17]

Seegrid's next phase of market development was to partner with top original equipment manufacturers (OEMs).[18] By 2014, Seegrid had secured agreements with three of the top-four OEMs in the industrial truck industry.[19]

By 2014, Seegrid was generating revenue from the sale of Seegrid-branded robotic industrial vehicles to dealers and end users, the sale of 'Guided by Seegrid®' automation systems (sometimes referred to by Seegrid as 'S-Kits') used by OEMs to convert their product into robotic industrial vehicles, and the sale of parts and services.[20] Seegrid continued to pursue raising capital because the company's revenue could not support expenditures including continued funding of product development and marketing.[21]

Pre-restructuring capital structure

From its inception to its Chapter 11 filing, Seegrid raised approximately US$61.4 million in funding from investors including its founders and financial investors.[22] By 2014, Seegrid had two classes of shares authorised: common stock and preferred stock.[23] Preferred stock comprised six series: Series A Preferred Share Interests, Series A-1 Preferred Share Interests, Series B Preferred Share Interests, Series C Preferred Share Interests, Series C-1 Preferred Share Interests, and Series D Preferred Share Interests.[24] At the time of its Chapter 11 filing, Seegrid's most recent equity financing was completed in 2009 and raised US$7 million in proceeds from the sale of Series C-1 Preferred Share Interests.[25]

Seegrid also had approximately US$45 million in funded debt outstanding, borrowed primarily from its two largest investors.[26] Through much of its existence, Seegrid was able to raise funds through unsecured convertible loans from its investors.[27] By late 2012, however, investors required enhanced terms for new or additional unsecured debt.[28] By early 2013,

15 id.
16 id. ¶ 41.
17 id. ¶ 42.
18 id. ¶ 45.
19 id. ¶ 46.
20 id. ¶ 48.
21 id. ¶¶ 48–84.
22 id. ¶ 27.
23 id. ¶ 28.
24 id.
25 id.
26 id. ¶ 29.
27 id. ¶ 31.
28 id.

Seegrid was unable to raise capital on an unsecured basis and began issuing debt secured by substantially all of its assets.[29] Seegrid doubled the amount of secured debt financing by mid 2013.[30] Thereafter, through the middle of 2014, Seegrid's largest investors funded operational losses on a senior secured basis.[31]

At the time of its Chapter 11 filing, Seegrid's funded debt included over US$15 million in secured debt issued in three separate priority tranches over a series of issuances.[32] Additionally, the company had over US$39 million in outstanding unsecured debt issued in patchwork fashion over several years, much of which was convertible to equity on varying terms and conditions.[33] Finally, Seegrid had outstanding trade debt of approximately US$2.6 million.[34]

Reasons for restructuring

Seegrid's convoluted capital structure developed over time out of necessity, rather than by design.[35] Much of Seegrid's equity and funded debt were intended to serve as short-term solutions against a longer-term financing alternative or sale that never materialised.[36] As a result, Seegrid's equity and debt required consents and presented other restrictions to raising new capital or pursuing a transaction.[37] These restrictions dissuaded new outside investors, and Seegrid desperately needed to clean up its capital structure to attract new capital.[38]

Additionally, Seegrid had begun to experience deadlock among its two largest investors. Its largest investor, which held approximately 32 per cent of Seegrid's outstanding shares and had loaned Seegrid in excess of US$34 million,[39] remained supportive, advancing funds as needed.[40] However, Seegrid's second-largest investor, which held approximately 21 per cent of Seegrid's outstanding shares and had loaned Seegrid in excess of US$7 million,[41] ceased advancing funds in 2014 and began agitating against the efforts of the company and the larger investor to formulate and implement a long-term solution for the company's capital structure and financing needs.[42]

Throughout early and middle 2014, Seegrid's largest investor made a series of proposals to defer debt maturities, infuse new capital and simplify Seegrid's capital structure.[43] The investor also agreed to allow a full marketing process to seek outside investors or purchasers,

29 id. ¶ 32.
30 id. ¶ 33.
31 id. ¶ 36.
32 'Disclosure Statement for Prepackaged Plan of Reorganization of Seegrid Corp. Pursuant to Chapter 11 of the United States Bankruptcy Code' at 22–24, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 21 October 2014), ECF No. 11 (Disclosure Statement).
33 id. at 24.
34 id.
35 id. at 10.
36 id.
37 id. at 14–15.
38 id. at 11–12.
39 First Day Declaration, supra note 2, ¶ 9.
40 id. ¶¶ 65–84.
41 id. ¶ 9.
42 id. ¶¶ 65–84.
43 id. ¶¶ 72–83.

and even solicited the active involvement of the dissident investor.[44] All stockholders and debt holders would have been given the opportunity to participate in any transaction.[45] Furthermore, because these proposals were dilutive of existing investments, each proposal required unanimous consent of existing investors.[46] Investors were generally receptive to these proposals, but the dissident investor refused to consent.[47]

Triggers

By mid 2014, Seegrid was running out of cash and needed to raise additional capital to fund operations.[48] Even more urgently, Seegrid was facing a looming debt maturity on 30 September 2014, when nearly all of its US$45 million in funded indebtedness matured.[49] Seegrid did not have sufficient cash or access to capital to address these looming debt maturities.[50]

Although most of the debt holders would have been willing to extend the maturity date, the dissident investor group refused to do so.[51] Moreover, because the dissident investor's consent was required to extend the maturity date of any debt, and the dissident investor withheld its consent, Seegrid could not simply seek to satisfy the dissident investor's debt while extending other maturities.[52]

Compounding the issues facing the company, the dissident investor also commenced multiple litigations against Seegrid's directors and Seegrid's largest investor, alleging that they conspired in a 'malicious scheme to appropriate for themselves the entire value of Seegrid' at the expense of the dissident investor.[53] The complaints alleged that the directors and the supportive investor conspired to undercapitalise Seegrid so that the investor could increase its stake in the company at the dissident investor's expense.[54]

Overview of restructuring process

By 2014, Seegrid was a promising company, with a compelling story and a ground-breaking product. But its convoluted capital structure stood in the way of attracting the new and continued investment necessary to see the company's progress to fruition. Accordingly, the primary goal of the restructuring was to simplify Seegrid's capital structure and pave the way for additional rounds of investments.[55]

44 id.
45 id.
46 id. ¶ 76.
47 id. ¶ 83–84.
48 id. ¶ 7.
49 id. ¶ 11.
50 id.
51 id.
52 id.
53 'Verified Derivative Complaint' at 2, No. 10023-VCL (Del. Ch. 8 August 2014) (Complaint).
54 id. at 2–3.
55 See First Day Declaration, supra note 2, ¶ 107.

Implementation options

To create the cleaned-up capital structure necessary to attract new investment while preserving as much value for existing investors as possible, Seegrid's largest investor proposed that Seegrid create a new operating subsidiary to which it would contribute substantially all of its assets.[56] New equity and debt financing would then flow into the operating subsidiary.[57]

This operating subsidiary proposal was first presented as an out-of-court restructuring proposal in July 2014 and refined multiple times over the ensuing weeks.[58] Owing to opposition from the dissident investor, however, the proposal could not be adopted and implemented.[59]

With an out-of-court solution out of reach, Seegrid focused its attention on potential in-court solutions. Chapter 11 presented the most feasible option because of the ability to bind hold-outs in the capital structure, such as Seegrid's dissident investor, while avoiding the need to liquidate the company's business or engage in expensive and lengthy non-bankruptcy litigation over control of the company.[60] Moreover, while Seegrid's largest investor was unwilling to continue to lend without a solution in sight, it was willing to fund a Chapter 11 case that addressed the company's capital structure.[61]

Among the options in Chapter 11, pursuing a Chapter 11 pre-packaged plan was more attractive than a Section 363 sale.[62] Unlike a Section 363 sale, the plan option had the potential to allow existing investors to remain in the company's capital structure.[63] Furthermore, a pre-packaged plan would allow the company to secure the required votes to approve its restructuring in advance of 'crossing the Rubicon' into Chapter 11, thereby assuring, at a minimum, that it would have the minimum level of stakeholder support necessary to exit Chapter 11.[64] Additionally, the pre-packaged nature of the Chapter 11 filing would shorten the company's stay in Chapter 11, thereby reducing costs and execution risk, and minimising disruption to the company's employees, vendors, customers and other stakeholders.[65]

For these reasons, Seegrid elected to pursue a pre-packaged Chapter 11 plan.[66]

Key stakeholders

Seegrid's key stakeholders included its largest investor who would be providing critically necessary financing during and upon exit from its Chapter 11 case.[67] Other key stakeholders included Seegrid's remaining equity and debt holders who (apart from the dissident investor) recognised the need to address the company's capital structure and attract new investment.[68]

56 id. ¶ 16.
57 id.
58 id. ¶¶ 74–83.
59 id. ¶¶ 83–84.
60 Disclosure Statement, supra note 32, at 16.
61 id.
62 See First Day Declaration, supra note 2, ¶ 82 (indicating that the Seegrid Board considered a proposal that would have involved pursuing a Section 363 sale).
63 id. ¶ 32 n.2.
64 Disclosure Statement, supra note 32, at 5.
65 id. at 16.
66 id.
67 First Day Declaration, supra note 2, ¶¶ 17–18.
68 id. ¶ 23.

These investors would also be offered the opportunity to participate in the new capital structure.[69] Seegrid's employees, trade creditors and customers (including the OEMs) were also key stakeholders.[70] Seegrid was keenly focused on ensuring that the process did not negatively impact its relationship with these stakeholders.[71]

Finally, the dissident investor was also a key stakeholder. Although a transaction through a Chapter 11 plan would not need the dissident investor's consent, the dissident investor had already shown its willingness to disrupt the company's restructuring efforts.[72] And, by this point, the dissident investor had commenced multiple litigations, including against Seegrid's directors and largest investor, related to efforts to address the company's capital structure.[73]

Negotiations and path to consensus with key groups

Negotiations over a pre-packaged plan coalesced around the operating subsidiary structure that was previously considered as part of an out-of-court restructuring.[74] A key negotiating point was how to divide ownership of the operating subsidiary (which would be referred to as 'New Seegrid') between the company, new investment and employees.[75]

Seegrid viewed providing equity to employees as key to the success of the business because their existing equity interests had been diluted significantly through the multiple rounds of financing over the years.[76] Seegrid also needed to balance the need to attract new and continuing investment with the desire to preserve, to the greatest extent possible, the investments of existing stock and debt holders.[77] Additionally, Seegrid needed to assure debt holders and trade creditors of payment in full over time to make palatable its pre-packaged plan that preserved value for existing equity holders.[78] Therefore, Seegrid had to convince its debt holders and trade creditors to accept deferred payment in whole or in part.[79]

At the same time, Seegrid engaged in extensive negotiations with its largest investor over the terms of debtor-in-possession financing for its Chapter 11 case as well as exit financing to be used by New Seegrid.[80]

Implementation

After extensive negotiations and input from key stakeholders, Seegrid was able to formulate a pre-packaged plan.[81] Additionally, Seegrid secured access to debtor-in-possession financing and an exit financing commitment, each premised on acceptance of the plan.[82]

69 id.
70 id. ¶¶ 92–95.
71 id. ¶ 95.
72 id. ¶¶ 75–84.
73 See, e.g., Complaint, supra note 53, at 1–4.
74 Disclosure Statement, supra note 32, at 2.
75 See id. at 26–27.
76 id. at 14.
77 See id.
78 See id. at 24–25.
79 See id.
80 id. at 2.
81 id. at 1–2.
82 id.

Structure of the pre-packaged transaction

The primary component of Seegrid's plan was a restructuring transaction in which substantially all of Seegrid's assets would be contributed to the newly created subsidiary, New Seegrid, free and clear of all claims and encumbrances.[83] In addition to the assets transferred by Seegrid, New Seegrid would be further capitalised with the proceeds of the issuance of preferred stock in New Seegrid.[84]

As part of its exit financing commitment, Seegrid's largest investor agreed to effectively backstop the issuance of preferred stock in New Seegrid by agreeing to subscribe to at least US$10 million of the preferred stock.[85] Seegrid's other stockholders and convertible debt holders would also have the opportunity to purchase preferred stock in New Seegrid.[86] Additionally, Seegrid's secured debt would be converted to preferred stock of New Seegrid.[87] In the aggregate, preferred stock issued under the plan would amount to a 40 per cent stake in New Seegrid.[88]

In exchange for contributing substantially all of its assets to New Seegrid under the plan, Seegrid would receive a 45 per cent stake in New Seegrid in the form of common stock.[89] In this way, Seegrid's existing stakeholders would maintain their interests in Seegrid (and its assets) in existing ratios – albeit indirectly. This also meant that Seegrid's existing equity interests were 'unimpaired' under the Chapter 11 plan and therefore deemed to accept the plan.[90]

The final 15 per cent stake in New Seegrid was reserved for issuance to management and employees and directors of New Seegrid in accordance with an incentive and compensation plan to be adopted by New Seegrid's board.[91]

The plan also proposed that all of Seegrid's unsecured debt obligations be deferred in whole or in part.[92] The more than US$39 million of unsecured note claims would be reinstated by Seegrid, and their maturity date would be extended to the fifth anniversary of the effective date of the plan.[93] The holders of trade debt, approximating US$2.6 million in the aggregate, would receive, at their election, either: (1) cash equal to 50 per cent of the amount of their claim and a non-interest bearing promissory note issued by New Seegrid for the remaining 50 per cent of their claim; or (2) cash equal to 75 per cent of the amount of their claim at the plan effective date.[94]

83 First Day Declaration, supra note 2, ¶ 16.
84 id.
85 id. ¶ 17.
86 id. ¶ 108.
87 id.
88 id. ¶ 90.
89 id.
90 'Debtor's Memorandum of Law in Support of Its Request for an Order (I) Approving the (A) Disclosure Statement Pursuant to Sections 1125 & 1126(B) of the Bankruptcy Code, (B) Solicitation of Votes & Voting Procedures & (C) Forms of Ballots & (II) Confirming the Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code' at 34, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 17 December 2014), ECF No. 235 (Plan Memorandum).
91 First Day Declaration, supra note 2, ¶¶ 89–90.
92 See Disclosure Statement, supra note 32, at 24–25.
93 id. at 24.
94 id. at 25.

Seegrid received the requisite level of acceptance of its proposed plan from each impaired class prior to commencing its Chapter 11 case.[95] These acceptances, coupled with the deemed acceptance of Seegrid's equity holders, meant that Seegrid's plan had been accepted by all classes of claims and equity interests.[96]

Challenges

Although Seegrid's plan achieved the requisite acceptance to avoid having to cramdown a class of claims or equity interests, the Chapter 11 case still faced great challenges. From the first day of the case, the dissident investor opposed Seegrid's Chapter 11 process, including objecting to its financing, opposing the Chapter 11 process timetable, and telegraphing its intent to litigate any and all issues the case.[97]

The dissident investor hired multiple law firms and financial professionals to mount an aggressive litigation campaign and oppose the pre-packaged plan.[98] Central to the dissident investor's opposition was the allegation that the pre-packaged plan undervalued Seegrid and its assets, and thus allowed the company's largest investor to capture an outsized portion of New Seegrid at too low a price.[99]

To prove its case, the dissident investor retained multiple valuation experts, including an expert on business valuation and an expert on intellectual property valuation, and planned to turn confirmation of Seegrid's pre-packaged plan into multi-week trial on valuation.[100] The cost and delay of this potential litigation threatened to imperil the pre-packaged plan, and, at a minimum, would give the dissident investor outsized leverage.

Through a key pretrial ruling on an issue of first impression, Seegrid and its professionals were able to neuter the dissident investor's efforts and greatly streamline the case. Seegrid successfully moved to exclude as irrelevant all evidence of Seegrid's value.[101] Seegrid argued that, because the pre-packaged plan had been accepted (or deemed accepted) by all classes of claims and interests, the bankruptcy court need not engage in valuing the company as would be required to satisfy the 'fair and equitable' requirement for a plan that not all classes of claims or interests had accepted.[102] Seegrid also argued that the legal requirement that a plan be 'proposed . . . not by any means forbidden by law'[103] did not require the bankruptcy court to evaluate the plan under the state-law doctrine of 'entire fairness',[104] that requires

95 Plan Memorandum, supra note 90, at 47 (citing 'Declaration of Kathleen M Logan Certifying Voting on, & Tabulation of, Ballots Accepting & Rejecting Prepackaged Plan of Reorganization for Seegrid Corp.', *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 21 October 2014), ECF No. 12 (Voting Report)).

96 Plan Memorandum, supra note 90, at 17 (citing Voting Report).

97 Transcript of 'First Day' Hearing Before the Honorable Brendan L Shannon Chief United States Bankruptcy Judge at 19–20, 51–52, 62, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 5 November 2014), ECF No. 72 (First Day Transcript).

98 Plan Memorandum, supra note 90, at 1.

99 Complaint, supra note 53, at 2–3.

100 First Day Transcript, supra note 97, at 64 (raising the possibility of a 'full on valuation trial').

101 Order Excluding Evidence . . . Related to Enterprise Valuation, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. Dec. 18, 2014), ECF No. 242 (Exclusion Order).

102 Debtor's Motion in Limine to Exclude Evidence . . . Related to Enterprise Valuation, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 26 November 2014), ECF No. 87.

103 id. ¶ 27 (alteration in original) (quoting 11 U.S.C. § 1129(a)(3) (2018)).

104 id. ¶ 32 (quoting *In re Zenith Elecs. Corp.*, 241 B.R. 92, 108 (Bankr. D. Del. 1999)).

demonstrating, among other things, that the transaction resulted in a 'fair price' for the company's assets.[105]

In its pretrial ruling, the bankruptcy court agreed with Seegrid and excluded evidence of Seegrid's enterprise value at the hearing on plan confirmation.[106] This ruling drastically reduced the amount and cost of discovery and shortened what would have been a multi-week confirmation trial into just a couple of days.[107] It also significantly reduced, if not eliminated completely, the hold-out leverage of the dissident investor.[108]

The bankruptcy court subsequently confirmed Seegrid's pre-packaged plan, finding that the plan was proposed in good faith and not by any means forbidden by law.[109] The plan went effective shortly thereafter.

Furthermore, as direct result of the findings of fact and legal conclusions the bankruptcy court made in connection with confirming Seegrid's pre-packaged plan, Seegrid was able to obtain the summary dismissal of the dissident investor's litigation against Seegrid's directors and its largest investor.[110] Relying on the bankruptcy court's findings of good faith in connection with the restructuring transactions in the pre-packaged plan, the state trial court determined that the directors and the largest investor could not be accused of breaching any duties or acting in bad faith, and therefore dismissed the dissident investor's complaint.[111]

Final post-restructuring structure

As a result of the pre-packaged plan, Seegrid was able to create New Seegrid to hold its assets with a fresh capital structure.[112] Whereas Seegrid's capital structure comprised common stock, six series of preferred stock, multiple issuances of unsecured convertible notes, and multiple layers of secured debt, New Seegrid emerged with only two types of equity interests – common stock and a single series of preferred stock – and zero funded indebtedness, allowing New Seegrid to attract new and additional investment in a way that Seegrid could not, owing to its convoluted capital structure.[113]

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105 id.

106 Exclusion Order, supra note 101, at 2.

107 Curtis S Miller and William Alleman Jr, 'Delaware Bankruptcy Court Reins in Hold-Out Leverage', 34 *Am. Bankr. Inst. J.* 12, 50 (2015) (providing additional information on this issue and the bankruptcy court's ruling).

108 id.

109 'Findings of Fact, Conclusions of Law & Order (I) Approving the Debtor's (A) Disclosure Statement Pursuant to Sections 1125 & 1126(B) of the Bankruptcy Code, (B) Solicitation of Votes & Voting Procedures & (C) Forms of Ballots & (II) Confirming the Prepackaged Plan of Reorganization of Seegrid Corp. Under Chapter 11 of the Bankruptcy Code', *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 20 January 2015), ECF No. 337.

110 Transcript of Oral Argument on Nominal Defendant's Motion to Substitute Plaintiff & Rulings of the Court at 79, No. 10023-VCL (Del. Ch. 14 July 2015).

111 id. at 75–79.

112 See 'Reorganized Debtor's Motion for Entry of a Final Decree Closing the Chapter 11 Case' ¶ 8, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 21 October 2016), ECF No. 445.

113 Disclosure Statement, supra note 32, at 18–19.

Conclusion

Seegrid's restructuring was a resounding success. The pre-packaged implementation of its restructuring allowed the company to secure the necessary support before commencing Chapter 11, thereby providing a clear path to exiting Chapter 11 and minimising execution risk.

Moreover, by securing the accepting vote of all classes of its claims and interests, Seegrid was able to obtain a first-of-its-kind ruling from the bankruptcy court excluding valuation evidence, thereby drastically reducing the cost and delay associated with litigating confirmation of the plan and reducing the hold-out leverage of the dissident investor.

In the end, Seegrid was able to free its business from the existing convoluted capital structure through the 'drop down' transaction to New Seegrid, allowing the business to attract new investment. And, as an added benefit, Seegrid was able to leverage the bankruptcy court's ruling on the plan to obtain dismissal of the dissident investor's litigation against Seegrid's directors in another court.

Part III

Pre-Packs in the Global Context

6

Australia

Dominic Emmett and Hannah Cooper[1]

True pre-pack transactions are rare in Australia. Although the benefits of insolvency practitioners acting early to preserve value are widely recognised, a relatively conservative interpretation of the law has operated to increase the perceived risk profile of pre-pack transactions and has, therefore, hindered their use. In particular, creditor-friendly insolvency regimes, duties on insolvency practitioners exercising their power of sale, and perceived and actual independence requirements are seen to be at odds with the traditional pre-pack model, which is in essence a business sale (with no formal creditor involvement or court approval) effected immediately upon the appointment of an insolvency practitioner. This paper suggests that a less conservative interpretation of the current law would allow for an increased use of the pre-pack, particularly in circumstances where the transaction has the support of stakeholders that are 'in the money'. Although recent legislative reform should, in theory, allow directors of debtor companies to explore more creative solutions to corporate rescue, further and significant reform is needed to encourage the adoption of pre-pack transactions on a wider scale.

Overview of key restructuring tools

Pre-insolvency processes

The primary pre-insolvency restructuring tool available in Australia is the scheme of arrangement.[2] Like that in the United Kingdom, a scheme is a restructuring proposal put forward with input from management, the company and its financial creditors and is effected by compromising the rights of any, or all, stakeholders. The process is overseen by the courts and requires approval by all classes of financial creditors.

A scheme must be approved by at least 50 per cent in number and 75 per cent in value of creditors in each class of creditors and by the court at two separate stages. Creditor classes are

1 Dominic Emmett is a partner and Hannah Cooper is an associate at Gilbert + Tobin.

2 A scheme of arrangement can also be used where the debtor company is insolvent.

determined by pooling creditors whose rights are not so dissimilar as to make it impossible for them to consult one another with a view to a 'common interest', although recent case law suggests that the boundaries of what may constitute a class may be stretched.[3]

The outcome of a scheme depends on the terms of the compromise reached with creditors; however, most commonly, the company is returned to its normal state as a going concern with the relevant compromises having taken effect.

Schemes sit at the opposite end of the restructuring spectrum to pre-pack transactions in terms of timing and cost. Schemes are complex, time consuming (given they are subject to the court timetable, which cannot be expedited) and subject to the overall approval of the court (even if the scheme is approved by creditors, the court may still take the view that the scheme is not fair). Accordingly, schemes are generally used to implement large corporate restructures and in situations where time is not necessarily of the essence.

Insolvency processes

The Corporations Act 2001 (Cth) (the Corporations Act) is the primary piece of legislation governing the administration, reorganisation and insolvency of companies incorporated in Australia. While there is no formal process around implementing a pre-pack transaction, the receivership and administration regimes described below are capable of being used to effect a pre-pack transaction.

Receivership

Unlike many other jurisdictions, receivership is alive and well in Australia. The central role of a receiver is to take control of the assets of a company and realise those assets for the benefit of the secured creditor. A receiver may be appointed by application to the court or, more commonly, pursuant to a security document in favour of the secured creditor in circumstances where the debtor company has defaulted and the security has become enforceable.

Once appointed, the receiver will usually be the agent of the debtor company (not the appointor) and will have wide-ranging powers, including the ability to operate the debtor's business, realise assets and borrow against the secured assets. Those powers are set out in the underlying security document and are supplemented by the receiver's statutory powers set out in Section 420 of the Corporations Act.

On appointment, a receiver will immediately take possession of the assets subject to the security and then may elect to run the business if he or she is appointed to oversee the whole or substantially the whole of the assets of the debtor company.

Depending on the circumstances, a receiver may effect a sale process. In doing so, the receiver is required to fulfil his or her duty under Section 420A of the Corporations Act to take all reasonable care to sell the property for not less than market value (where the relevant property has a market value) or otherwise obtain the best price that is reasonably attainable, having regard to the circumstances existing when the property is sold. Traditionally, satisfying this duty has presented one of the biggest perceived barriers to the adoption of pre-pack transactions by receivers as a restructuring tool.

3 The courts may agree to put creditors in classes even where such creditors appear to have objectively distinct interests: *First Pacific Advisors LLC v. Boart Longyear Ltd* [2017] NSWCA 116.

Once a receiver has realised the secured assets and distributed any net proceeds to the secured creditor (returning any surplus to the company or later-ranking creditors), he or she will retire in the ordinary course.

Administration

Administration, unlike receivership, is entirely a creature of statute. Its key object, as set out in Section 435A of the Corporations Act, is to maximise the chances of the company, or as much as possible of its business, to remain in existence, or if this option is not possible, achieve a better return for the company's creditors and members than would result from an immediate winding up of the company.

An administrator (often referred to as a voluntary administrator) may be appointed to a debtor company:

- by resolution of the board of directors who consider the company is or is likely to become insolvent;[4]
- by a liquidator (or provisional liquidator) if he or she considers that the company is, or is likely to become, insolvent;[5] or
- by a secured creditor entitled to enforce security over the whole or substantially the whole of the company's property in circumstances where the security interest is enforceable.[6]

Administration is not a debtor-friendly process. Rather, the administrator and creditors control the final outcome of the administration to the exclusion of the existing board of directors.

A significant feature of administration is the implementation of a statutory moratorium upon appointment, which restricts the exercise of rights by third parties under leases and security interests[7] and in respect of litigation claims. The moratorium provides the administrator the opportunity to investigate the affairs of the company and either implement change or realise value while having protection against potential claims.

Administrators are required to call two meetings of creditors during the course of the administration. The first meeting must be convened within eight business days of the administrator's appointment and its purpose is to confirm the identity of the administrator, approve their initial remuneration and establish a creditors' committee (if the creditors resolve to do so). The second meeting is usually convened 20 business days after the date of appointment of the administrator (or as extended by application to the court). At the second meeting, the administrator reports to creditors on the affairs of the company and presents their view on the best option to maximise return to creditors. Importantly, an administrator is able to sell the business and assets of a company without the approval of creditors at the second meeting of creditors.

4 Corporations Act 2001 (Cth), s 436A.

5 ibid. s 436B.

6 ibid. s 436C.

7 However, there is an exception to the moratorium on the exercise of rights under security interests in the case of a secured creditor that has security over the whole or substantially the whole of the assets of the company and such rights are exercised within the 'decision period' (being 13 business days after the appointment of the administrator).

There are three possible outcomes that can be put to the creditors at the second meeting: entry into a deed of company arrangement (DOCA) with creditors (see below), wind up the company or terminate the administration by returning the business to the control of its directors.

DOCA

A DOCA is in essence an agreement between the company and its creditors as to how the company's business and its assets are to be reconstructed or wound down. DOCAs are flexible arrangements that can contain any combination of terms but typically include a moratorium on debt repayments for a specified period, a compromise of creditors' claims, a rescheduling of the company's debts by creditors agreeing to accept payments in instalments or by other means (such as via a debt-for-equity swap) or forgiveness of outstanding debt.

For a debtor company to enter into a DOCA, a bare majority of creditors by both value and number voting at the second creditors' meeting must vote in favour of the company executing a DOCA. Once executed, the DOCA binds the debtor company, its shareholders, directors and unsecured creditors. Secured creditors can, but do not need to, vote at the second creditors' meeting, and usually only those who voted in favour of the DOCA at the second creditors' meeting are bound by its terms.[8]

Upon execution of a DOCA, the voluntary administration that preceded it terminates. The outcome of a DOCA is generally dictated by the terms of the DOCA itself. Usually, once a DOCA has achieved its stated aims, it will terminate. If a DOCA does not achieve its objectives, or is challenged by creditors, it may be terminated by the court or in accordance with its terms.

Implementation of a restructuring on a pre-packaged basis

The receivership, administration and (to some extent) the DOCA regimes outlined above are the principal means by which insolvency practitioners may implement a pre-pack transaction in Australia. However, as will be explained further below, these regimes have presented a number of perceived legal and practical difficulties, which have led to a general unwillingness of insolvency practitioners to adopt the pre-pack as a restructuring tool. This is in contrast to other jurisdictions, such as the United Kingdom, where we understand pre-pack transactions are a central feature of the restructuring landscape.

8 There are two recent cases challenging the validity of the widely held view that secured creditors are not 'bound' by a DOCA unless they vote in favour of it. In *Australian Gypsum Industries Pty Ltd v. Dalesun Holdings Pty Ltd* [2015] WASCA 95 and *Re Bluenergy Group Limited* [2015] NSWSC 977, it was held that a DOCA can (if so expressed) have the effect of extinguishing the debt of a secured creditor that did not vote in favour of the DOCA pursuant to Section 444D(1) of the Corporations Act. However, this extinguishment is subject to the preservation of the secured creditor's ability (by virtue of Section 444D(2)) to realise or deal with its security in respect of its proprietary interest in the secured property and to the extent that its debt was provable, and secured assets were available at the date that debt would otherwise be released under the DOCA, without requiring that the debt be preserved into the future or for other purposes.

Receivership

Receivers have the power under Section 420(2)(b) of the Corporations Act to implement a pre-pack transaction immediately upon or shortly after their appointment to the debtor company. The Section provides that, in addition to any other powers granted by the security document or a court order, a receiver has the power to dispose of property of the company in the manner it sees fit.

Perhaps the single largest impediment to receivers exercising their power of sale to implement a pre-pack transaction is the fear of contravening the duty under Section 420A of the Corporations Act to take all reasonable care to (1) sell the property for not less than market value (where the relevant property has a market value) or (2) otherwise obtain the best price that is reasonably attainable, having regard to the circumstances existing when the property is sold. 'Market value' has been held to mean 'the estimated amount for which an asset should be exchanged on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion'.[9]

The prevailing view is that Section 420A requires receivers to exercise their power of sale in good faith.[10] This presents a much higher bar than in other jurisdictions, such as the United Kingdom, where receivers are only required to show they were not negligent in exercising their power of sale.[11]

The question of whether the receivers have breached their duty under Section 420A by exercising their power of sale to implement a pre-pack has focused primarily on the process undertaken by the receiver to sell the relevant property. Judicial consideration has typically focused on whether the receivers were properly informed (i.e., did they seek independent advice regarding the proposed sale and did they follow it?) and what steps were taken to market the property. The court in *Florgale Uniforms Pty Ltd v. Orders* (2004) 51 ACSR 699 summarised the courts' approach in determining whether a receiver has breached Section 420A as follows:

> *the process of evaluating and balancing the competing costs and benefits and the associated risks of various methods of sale will not, in every case, require a formal comparative analysis or documented calculations. All will depend on the circumstances of the individual case, including the scale of the receivership, the value and nature of the property involved, the receiver's expertise in relation to the type of property, relevant expert advice, the advice or input of proprietors and staff, the trading history and marketing of the company, including during the receivership, and other relevant variables in a realistic commercial context.*[12]

The very nature of a pre-pack transaction – being the quick sale of a company or its assets upon or soon after the appointment of the insolvency practitioner (and where the desired outcome is known prior to their appointment) – has, in the minds of insolvency practitioners, raised two key difficulties with respect to the ability of receivers to satisfy the duty under Section 420A.

9 *Fortson Pty Ltd v. Commonwealth Bank of Australia* (2008) 100 SASR 162 [29].
10 *Pendlebury v. Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676.
11 *Cuckmere Brick Co Ltd v. Mutual Finance Co Ltd* [1971] Ch 949.
12 *Florgale Uniforms Pty Ltd v. Orders* (2004) 51 ACSR 699 [443].

The first relates to the amount of time required to implement the pre-pack. Any pre-appointment work performed by the receiver (as investigating accountant or consultant, for example) should be considered in the receiver's assessment of compliance with Section 420A. However, where a receiver has had no pre-appointment involvement and the pre-pack sale is effected upon or shortly after their appointment, it might be difficult for the receiver to demonstrate that they have complied with the duty – given they would not have had the time to complete a thorough review. Having said that, a receiver might be able to rely on work done by others pre-appointment, such as running an earlier sale process.

The second difficulty concerns the requirement under Section 420A to achieve market value. This conflicts with the principal aim of a pre-pack transaction to preserve value by minimising the impact of the sale on the business. A sale to a particular purchaser may in fact produce a better outcome for the business and its stakeholders than any marketing campaign aimed at achieving the requirements of Section 420A. Additionally, in circumstances where value breaks in the debt and the secured creditor supports the proposed pre-pack transaction, whether the receiver has satisfied the duty in Section 420A is arguably irrelevant given the 'out of the money' creditors (including subordinated creditors and equity holders) would be unlikely to suffer any loss as a result of the transaction.

Case law in Australia has been interpreted to suggest that to fulfil this duty, a sale process should be conducted. However, it is suggested that a receiver reaching an informed view as to market value would be sufficient. We consider there to be scope for receivers that have had pre-appointment involvement in the debtor company (or who can rely on others' work in that regard) to implement a pre-pack transaction in circumstances where the decision not to pursue the transaction would result in value dilution in the business, value breaks in the debt and the receiver's view on market value has the support of the 'in the money' stakeholders. In these cases, it would be difficult to argue that the receivers had not discharged their duty under Section 420A.

Administration

Administrators have the power under Section 437A(1) of the Corporations Act to effect a pre-pack transaction provided it meets the objectives of Part 5.3A – i.e., that the sale allows the company to continue or results in a better return for creditors and members than a liquidation. This approach was confirmed in *Carter v. Global Food Equipment Pty Ltd* (2007) 25 ACLC 1173, where White J held at [13] that:

> *Administrators are entitled to sell all or part of a company's assets and business before a second meeting of creditors with a view to maximising the returns to creditors (s 437A(1)). The matter for decision at the second meeting of creditors under s 439A is not whether the assets or business of the company should be sold and if so, at what price. It is not the creditors' direct function to approve or disapprove of a proposed sale. The creditors must decide whether the company should remain in administration, whether it should be wound up, or whether any deed of company arrangement which is proposed should be entered into.*

There is at least one example of administrators implementing a pre-pack transaction before the second meeting of creditors (which usually occurs 20 business days after appointment of the administrator). In *Re Eisa Ltd; Application of Love* (2000) 35 ACSR 394, the court held that the sale by the administrator of all the shares in the company to one of the company's secured creditors without convening a general meeting of members was a legitimate use of the administrator's power of sale under Section 437A(1) of the Corporations Act and met the objects of Part 5.3A.

There appears to be a prevailing fear among insolvency practitioners in Australia that implementing a pre-pack transaction quickly (and without properly exploring other options) may fail to meet the requirements of Part 5.3A, thereby exposing the transaction (and the administrators' conduct) to challenge. However, in our view, in circumstances where a pre-pack transaction has the support of 'in the money' stakeholders, such a transaction would not be exposed.

Independence requirements for insolvency practitioners

Another significant perceived impediment to the implementation of pre-pack transactions in Australia is the strict independence requirements for insolvency practitioners. Until the *Ten Group* decision (see 'Case study: Ten Group'), the general law position has been that administrators are not permitted to have any substantial prior involvement with a company to which they are appointed as this can be seen to detract from their ability to act fairly and impartially during the course of the administration.[13] In addition, the Australian Restructuring Insolvency & Turnaround Association's (ARITA) Code of Professional Practice for Insolvency Practitioners provides that an insolvency practitioner must not accept an appointment, or continue to act under an existing appointment, if the practitioner is not in fact independent or is not seen or perceived to be independent.

The recent *Ten Group* decision has arguably broadened the scope for insolvency practitioners to accept an appointment in circumstances where they have performed pre-appointment work provided they put certain safeguards in place to avoid the existence or appearance of conflict should a subsequent appointment occur. These safeguards include (1) ensuring that the potential administrator has made it clear to the board of directors that he or she may become the actual administrator if the other measures to fix the company are unsuccessful, (2) having in place a clearly defined retainer and (3) maintaining a sufficient record of the nature of tasks performed.[14] In that case, the court held that pre-appointment work does not necessarily lead to a reasonable apprehension of bias and that insolvency practitioners are permitted to consider the benefits to the company and its creditors of their pre-appointment involvement.

Notwithstanding the statements in *Ten Group*, the Australian position on practitioner independence remains in stark contrast to that in the United Kingdom, where we understand it is the view of the courts, professionals and stakeholders that perceived conflicts are capable of being managed and the replacement of an insolvency practitioner is an option of last resort.[15]

13 *Commonwealth v. Irving* (1996) 144 ALR 172.

14 *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* (2017) 252 FCR 519 at 528.

15 M N Wellard and P Walton, 'A Comparative Analysis of Anglo-Australian Pre-Packs: can the means be made to justify the ends?' (2012) 21(3) *International Insolvency Review* 143.

Case study: Ten Group

Although there are no examples of traditional pre-pack transactions in Australia, the 2017 decision in *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 914 has arguably paved the way for the use of planned insolvency (or pre-positioned) processes in the Australian restructuring market.

The distinction between a pre-pack and a planned insolvency process is important. A traditional pre-pack typically involves the conclusion of a consensual restructure (usually the sale of all or part of the distressed company's business or assets), which is then completed immediately or shortly after the appointment of a voluntary administrator. In contrast, a planned insolvency process is where the parties use a formal insolvency regime to implement a broader restructuring in circumstances where a fully consensual restructuring may not be achievable. The distressed company engages insolvency practitioners or appropriately qualified advisers to develop a contingent restructuring plan should a later appointment prove necessary. The formal insolvency process is then used to cramdown dissenting creditors with a view to implementing the contingent restructure.[16]

The Ten Group of Companies (Ten Group) operated a free-to-air Australian TV network. In the lead up to its insolvency and entry into voluntary administration on 14 June 2017, the Ten Group had experienced significant financial difficulty. For the half-year ending February 2017, it reported accumulated losses of AU$1.5 billion, owed AU$73.7 million to its financiers and AU$215 million to its other creditors.[17] The case involved the engagement of insolvency practitioners, partners from KordaMentha, by the Ten Group's legal advisers, as potential administrators, the subsequent appointment of those partners as voluntary administrators of the Ten Group and the ultimate takeover by CBS of the Ten Group by way of a DOCA.

Rather than a formal pre-pack arrangement, partners of KordaMentha were involved pre-appointment to prepare a contingency administration plan that they would carry out should the informal restructuring negotiations not succeed. The case explored the 'boundaries of pre-administration' work in considering whether the administrators could continue to act as administrators in circumstances where they had performed pre-appointment work in connection with the Ten Group. The judgment considered at great length the treatment and status of pre-pack transactions in Australia and concluded that the boundary of pre-administration work that is acceptable in Australia does not extend to advising or assisting with pre-pack transactions.

In his judgment, Justice O'Callaghan cited the views of various authors on the impediments to adopting pre-packs in Australia.[18] These included various ethical issues that may arise where the proposed administrator, driven by its desire to secure the appointment, uses a pre-pack that is heavily influenced by certain stakeholders, rather than pursuing a transaction that benefits creditors as a whole.

16 Rowarth, Jade 'A change in the Australian restructuring landscape' 2017.

17 *Ten Network Holdings* (n14) 526.

18 Veronica Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge University Press, 2009) 460; Wellard and Walton (n15) 162–163.

Although Justice O'Callaghan did not go so far as to endorse the proposition that involvement in a pre-pack proposal would 'ipso facto disqualify an Australian insolvency practitioner from taking an appointment as a voluntary administrator',[19] his Honour agreed that it would be difficult to imagine a situation where an insolvency practitioner would be permitted to take an appointment in the circumstances described above.[20] Relevantly, the position would be different if the insolvency practitioners took on a role as receivers (as opposed to administrators), where the importance of independence is not as acute.

The *Ten Group* judgment demonstrates that the courts are not yet prepared to relax the administrators' duty of independence and impartiality. However, as will be discussed below, the recent safe harbour and *ipso facto* legislative reforms may overcome some of the barriers to implementing traditional pre-pack transactions in Australia.

Recent reforms

In 2015, the Australian Government Productivity Commission conducted an independent review into barriers to business entries and exits in Australia, including an assessment of how Australia's corporate restructuring regimes could be improved. The ensuing Productivity Commission Inquiry Report (the Report) found that Australia's insolvency framework focuses too strongly on penalising and stigmatising corporate failure and recommended a number of reforms to improve the efficacy and success of restructuring and insolvency regimes.[21]

In particular, the Report recommended that, where no related parties are involved, the Corporations Act could provide for 'pre-positioned sales' (as distinct from pre-pack sales (see 'Case study: Ten Group')), whereby administrators could overturn sales only if they can prove that the sale was not for reasonable market value or if it would unduly impinge on the performance of the administrators' duties.[22] The Report notes that a number of stakeholders, including ARITA, had submitted that legislating for pre-pack transactions in the traditional sense would not be suitable, given the actual and perceived independence concerns to which they give rise (see 'Independence requirements for insolvency practitioners').

Following the recommendations made in the Report, in 2017, the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (the TLA Act) brought into operation the following key changes to Australia's insolvency laws.

Safe harbour

The first change introduced by the TLA Act was a new safe harbour from civil liability for insolvent trading under Section 588G of the Corporations Act for directors if they appoint a restructuring adviser to develop a restructuring plan for the company. Under Section 588GA of the Corporations Act, a director will not be liable for debts incurred by a company while it is insolvent if at a particular time after the director starts to suspect the company may become or be insolvent, the director starts developing one or more courses of action that are

19 Wellard and Walton (n15) 162–163.

20 *Ten Network Holdings* (n14) 526.

21 Australian Government, Productivity Commission Inquiry Report: Business Set-up, Transfer and Closure, Report No. 75 (2015) 23–24.

22 ibid. 392.

reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator to the company. The relevant director bears the evidential burden if he or she seeks to rely on this defence.

Given the essence of a pre-pack transaction is that its terms are negotiated to near completion prior to the appointment of an insolvency practitioner and that the company may be operating in an insolvency context while the sale is being negotiated, certain boards may see the introduction of safe harbour as the protection to allow a pre-pack to be formulated during insolvency. However, many commentators do not see safe harbour as providing sufficient protection for directors with no appetite for risk, i.e., who do not want to entertain the prospect of having to justify why their plan is 'reasonably likely' to lead to a better outcome than an administration or liquidation.

The recent high-profile *Arrium* administration is an example of circumstances where a plan developed by directors (offering lenders around 50 cents in the dollar) proved to provide a worse outcome than that eventually received by lenders in the subsequent administration, i.e., in excess of 70 cents in the dollar.

Ipso facto stay

The second change introduced by the TLA Act was the implementation of an automatic stay on the enforcement of certain *ipso facto* rights, which came into effect from 1 July 2018. The stay precludes a party from enforcing certain rights (including terminating a contract) simply because the company has entered into certain formal insolvency processes. Relevantly, the automatic stay will not apply in certain circumstances, including where (1) a receiver or controller is not appointed over the whole or substantially the whole of the company's assets or (2) the company has entered into a DOCA.

Conclusion

The recent *Ten Group* decision and safe harbour and *ipso facto* reforms demonstrate an increased openness of the courts, legislature and insolvency practitioners in Australia to the use of pre-pack transactions to facilitate the more creative and effective restructuring of financially distressed or insolvent companies. While we view these developments as a positive step forward, further reform needs to be achieved if we are to see pre-packs adopted on the scale seen in other jurisdictions.

On that basis, potential suggested areas of reform to facilitate the use of pre-pack transactions in Australia could include:

- shortening the legislative time frames (see 'Insolvency processes: Administration') for conducting an administration so as to accommodate a rapid sale or restructure through a DOCA;[23]
- allowing pre-pack transactions to proceed in circumstances where the administrators or receivers are able to satisfy themselves as to where value breaks in the debt and that there is no evidence of real loss of value to the business should the proposed transaction be implemented; and

23 E Poulos and A McCunn, 'Pre-pack Transactions in Australia' (2011) 19 *Insolvency Law Journal* 255.

- addressing the independence requirements for insolvency practitioners so as to permit pre-appointment work and subsequent appointments. One possible way to manage this could be to implement an independent review panel for pre-pack transactions such as that proposed in the UK Graham Review, whereby a second practitioner appointed by an independent body (such as ARITA) reviews the proposal and, if approved, either the first or second practitioner carries the plan forward.[24]

24 Alicia Salvo, The UK's Graham Review into pre-packs – is Australia missing out? 15(9) *Insolvency Law Bulletin* 140, 143.

7

Cayman Islands

Christopher Harlowe and Christopher Levers[1]

The Cayman Islands has established itself as the jurisdiction of choice for financially sophisticated businesses such as hedge funds, private equity funds, special purpose vehicles and trusts that use offshore vehicles.

Given the prominence of the Cayman Islands, it is unsurprising that it has been at the centre of a number of high-value, complex restructurings over the last few years.[2] Indeed, the Cayman Islands' courts, and specifically its dedicated Financial Services Division, are well experienced and equipped to deal with such matters. The Cayman Islands' jurisprudence is largely based upon English common law, except where specific statutory provisions have been passed or case law developed to deal with issues specific to the jurisdiction or business. Similarly, its judicial system is largely modelled upon its English parent; a number of the Grand Court and Court of Appeal judges in the Cayman Islands are former English high court or court of appeal judges, or experienced former Cayman commercial litigation attorneys, and its final court of appeal is the Judicial Committee of the Privy Council in London.

However, despite its similarities, there is one notable difference between the Cayman Islands and comparable jurisdictions: the Cayman Islands has no formal rehabilitation process akin to the US Chapter 11 or English law administration procedures. Until a dedicated restructuring process is introduced (see Conclusion) the Cayman courts have adapted existing tools to engineer restructurings that are pre-pack in effect.

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2 These include the recent cases of *Ocean Rig UDW Inc*, *LDK Solar Co Ltd* and *Suntech Power Holdings Co Ltd*.

Provisional liquidations: the tool of choice

Given the lack of a dedicated restructuring regime, the Cayman Islands does not have specific legislation or procedures geared towards implementing a pre-pack restructuring.[3] However, the Cayman courts have adapted provisional liquidations to facilitate restructurings that allow for a pre-packaged sale of assets and businesses where appropriate.

Restructuring provisional liquidations

While a restructuring (including the sale of a business or its assets) can be implemented outside of a formal insolvency process, in practice, this would be relatively uncommon where the company is experiencing financial difficulties, as the spectre of creditor enforcement actions may hinder the company's ability to effectively manage the sales process. As such, and to obtain some protection from the claims of unsecured creditors, a company will usually invoke a formal insolvency process to obtain the protection of the statutory moratorium.

Given that the Cayman Islands does not have a similar insolvency process to Chapter 11 in the United States or an administration in the United Kingdom, the courts have creatively used the appointment of provisional liquidators, which will automatically trigger a moratorium against unsecured creditor claims or enforcement, to achieve those ends. The appointment of provisional liquidators can be made on an expedited basis where immediate protection against such creditor claims is required.

Provisional liquidation procedure

Section 104 of the Companies Law (2018 Revision) (the Law) governs the appointment of provisional liquidators. While a provisional liquidator is normally appointed to prevent the dissipation or misuse of company assets in the period between the issue of a winding-up petition and its eventual hearing, the Cayman Islands has, in absence of an administration-type process, expressly legislated that a provisional liquidator may be appointed to facilitate attempts to rescue the company.

Section 104(3) of the Law provides that the company can make an *ex parte* application to appoint a provisional liquidator on the grounds that it is or is likely to become unable to pay its debts within the meaning of Section 93,[4] and the company intends to present a compromise or arrangement to its creditors.[5]

Somewhat paradoxically, a company seeking to use this provision must first present a winding-up petition against itself and demonstrate its insolvency (on a cash flow basis) as a precondition of seeking the court's permission to implement a restructuring plan to remedy that insolvency.[6] In determining whether to allow such an application, in a recent decision, the Grand Court held that a company's directors cannot unilaterally effect a restructuring

3 A pre-packaged sale is an arrangement by which a company agrees to sell its business or assets, or any part thereof, in principle with a buyer prior to the appointment of an insolvency practitioner. The insolvency practitioner will then complete the sale shortly after being appointed.

4 i.e., that the company is experiencing cash flow insolvency.

5 For the purposes of Section 104(3), both Chapter 11 restructuring or a foreign scheme of arrangement have been held to be examples of compromises and arrangements.

6 At present, Section 104(3) only permits the company to apply for the appointment of provisional liquidators for the purpose of a restructuring and not creditors, contributories or the Cayman Islands Monetary Authority.

using a provisional liquidation without such shareholder approval unless constitutionally empowered to do so.

In *Re China Shanshui Cement Group Limited*,[7] the company's directors caused the company to present a winding-up petition against itself with the view to subsequently applying for the appointment of provisional liquidators to effect a restructuring. However, they did so without first obtaining shareholder approval to do so, and the company's articles of association did not expressly give the company's directors power or authority to issue such a petition. In accordance with the English decision in *Re Emmadart Ltd*,[8] the Grand Court held that a company could not present a winding-up petition without either shareholder sanction or an express provision in the articles of association authorising the directors to do so on the company's behalf, even where the intention of the petition was to save the company rather than to wind it up.[9] The winding-up petition was accordingly struck out for lack of standing.

This decision would, at first blush, appear to limit the use by creditors of schemes of arrangement as, following *Re China Shanshui*, a scheme could only be pursued with the protection of a provisional liquidation, and the moratorium that comes with it, if a company first presented a winding-up petition with the support of its shareholders. The shareholders may not support the restructuring and may, as in the *China Shanshui* case, oppose it.

However, the recent decision of the Grand Court in *CHC Group Ltd*[10] has demonstrated the flexibility of the provisional liquidation in furtherance of a restructuring by confirming that a company may apply for the appointment of a provisional liquidator in the context of a creditor's, as opposed to a company's, winding-up petition.

In the *CHC Group* case, the company could not have presented its own petition for the purposes of a restructuring by way of scheme of arrangement as this was not expressly permitted by its articles of association and it did not have a shareholders' resolution permitting the directors to do so. However, it arranged for a petition to wind the company up to be issued by an intra-group creditor, on the back of which the company then applied for the appointment of a provisional liquidator for the purpose of implementing a restructuring by, *inter alia*, a scheme of arrangement. This was done without obtaining shareholder approval.

The court held that, where a creditor has already filed a winding-up petition in respect of a company, not only may the directors of the company apply by themselves for the appointment of joint provisional liquidators, but they may also do so without a shareholders' resolution or express provision in the company's articles of association.

7 [2015] (2) CILR 255.

8 [1979] 2 WLR 868, first applied in the Cayman Islands in *Re Global Opportunity Fund Ltd* [1997] CILR Note 7a.

9 In doing so, the Grand Court considered that the earlier decision of *Re China Milk Products Ltd* [2011] (2) CILR 61, which held that directors of an insolvent company could present a winding-up petition on behalf of and in the name of the company without reference to the shareholders and irrespective of the terms of the articles, was wrongly decided.

10 Unreported, 24 January 2017.

The provisional liquidation

The successful appointment of provisional liquidators triggers a moratorium to protect against unsecured creditor claims against the company.[11] This will give the company, through the provisional liquidators, the necessary breathing room to effect the restructuring and to complete the sale of the assets.

In this connection, the powers given to the provisional liquidator upon appointment are important. An official liquidator appointed upon the making of a winding-up order is automatically given a full suite of powers set out in the Law. By contrast, a provisional liquidator will instead only have those powers expressly granted by the terms of the appointment order. The powers granted to the provisional liquidators are theoretically individually tailored to each appointment, although they are in practice largely standardised.

The scope of the provisional liquidators' powers will therefore depend upon the reasons for their appointment. In this context, if the provisional liquidator is being appointed for the purpose of completing a pre-packaged sale of the company's assets, the terms of the appointment order should be specifically tailored to meet those needs and expressly allow the provisional liquidator to pursue the possibility of a sale, even if final Court sanction to complete it is still required.

The appointment of provisional liquidators for these purposes does not automatically dismiss or terminate the winding-up petition pursuant to which the provisional liquidators were appointed: the petition is merely stayed for the duration of the provisional liquidation. This gives the Court ongoing oversight over the provisional liquidation, which it normally exercises by listing regular interim hearings at which the provisional liquidators are required to report to the Court on progress.

Recognition of the provisional liquidation in foreign jurisdictions

As the assets that are the subject of sale may be held in jurisdictions outside of the Cayman Islands, the recognition of provisional liquidators appointed by the Cayman Islands' courts is important to ensure that they have the authority to bind the company and creditors or other stakeholders in the foreign jurisdiction in question. There is little concern in this regard as the validity of the Cayman Islands' provisional liquidation regime has routinely been recognised in other jurisdictions. Provisional liquidators appointed under Section 104(3) of the Law have been recognised pursuant to Chapter 15 of the US Bankruptcy Code (including, for example, in the cases of *LDK Solar Co Ltd*, *Suntech Power Holdings Co Ltd* and, more recently, *Ocean Rig UDW Inc*).

Further, although the Grand Court has not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency or the Judicial Insolvency Network Guidelines for Cooperation in Cross-Border Insolvency Matters, it will apply common law cross-border insolvency principles to recognise overseas attempts to effect a restructuring. For example, the Grand Court has, in several instances, appointed provisional liquidators to companies in the Cayman Islands (at the behest of either the company itself or creditors) that are the subject of Chapter 11 proceedings in the United States.

11 The moratorium does not prohibit secured creditors from enforcing their security.

Completion of the provisional liquidation

Once the restructuring is completed, the provisional liquidator can apply to have his appointment discontinued and the petitioner (whether company or creditor) can then apply to have the winding-up petition withdrawn so that the company can continue to trade.

However, it may be that the company no longer wishes to trade and the restructuring instead involves the liquidation of that company following the distribution of its assets to its creditors or members, through cash or equity in a 'newco'.

On that basis, the most common mechanism to conduct an orderly liquidation of the company is a scheme of arrangement. This can be effected within the ambit of the provisional liquidation and may be part of the overall pre-pack arrangements.

Schemes of arrangement

A scheme is a court-sanctioned arrangement made between a company[12] and its creditors or members (or any class of them). The essence of a scheme is that it represents a true compromise between the company and its stakeholders (whether creditors or members) or any class of them.[13] There must be some element of 'give and take' and the company proposing the scheme must be able to demonstrate that its creditors or members receive some benefit (even if of nominal value only) in exchange for the surrender of their existing rights in or against the company.

However, despite needing to demonstrate that there is a benefit to creditors or members by virtue of the scheme, this is not assessed by reference to an individual creditor or member. Instead, the court will group creditors or members by class[14] and will need to be satisfied that the class as a whole will benefit. Whether such benefit is sufficient is a commercial matter for the creditors or members, and is not a matter for the court to determine. Accordingly, so long as each class of creditors or members are in support of the scheme, all creditors or members will be bound by it, irrespective of whether they voted for it.

Statutory regime

The jurisdiction of the Cayman court to consider and approve a scheme is found in Sections 86 and 87 of the Law[15] with the procedure for entering into a scheme of arrangement being set out in Section 86 of the Law and Grand Court Rules (GCR) Order 102, Rule 20.[16]

12 The Grand Court may approve a scheme of arrangement in respect of any company that is liable to be wound up in the Cayman Islands.

13 Importantly, a scheme can be entered into with all or some of the members or creditors of a company.

14 The Court requires that creditors be grouped based upon their rights against the company which must be 'not so dissimilar as to make it impossible for them to consult together with a view to their common interest'. These rights are not their private interests but those that they have against the company that may be affected by the scheme.

15 Generally, these provisions are materially the same as those set out in the UK Companies Act.

16 There is also a practice direction dealing with schemes of arrangement, Practice Direction 2 of 2010 – Schemes of Arrangement and Compromise under Section 86 of the Companies Law, which has been recently relied upon in *In Re Uni-Asia Holdings Ltd* (Unreported, 16 May 2017).

Section 86 of the Law provides for court sanction of schemes of arrangement or a reconstruction agreed between a company and its members or a company and its creditors. Further, Section 87 expressly provides that the scheme may involve the transfer of assets belonging to the subject company to a third party:

> *Where an application is made to the Court under section 86 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are specified in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purpose of or in connection with a scheme for the reconstruction of any company or companies . . . and that under the scheme the whole or any part of the undertaking or the property of [the transferor company] is to be transferred to [the transferee company] the Court may . . . make provision for . . . the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company.*

The application for sanction can be made by the company, a creditor or, if the company is in liquidation, by the company's liquidator.

Procedure

To initiate a scheme, the company, or the liquidator if the company is in liquidation, will issue:

- a petition seeking the sanction of the proposed scheme; and
- a summons seeking a direction from the court convening a meeting of the class of creditors or members.

The summons is supported by an affidavit setting out the information necessary to allow the court to assess whether it should allow the proposed meetings to be convened. As such, the affidavit should describe the purpose and effect of the proposed scheme, the manner in which the various classes of creditors or members have been composed and any other relevant information. To ensure the court has a full understanding of the scheme, the affidavit should also exhibit the proposed scheme together with any supplementary documents to which it refers, the voting instructions and an explanatory memorandum describing the merits of the proposed scheme.[17]

It is for the company promoting the scheme to determine how classes are to be constituted.

If the court hearing the scheme application is satisfied on the evidence that (1) the class is properly constituted and (2) the explanatory memorandum contains sufficient information to enable the stakeholders to make an informed decision as to the merits of the proposed scheme, it will make an order convening the meeting of creditors or members and give directions regarding the procedure and timetable for doing so.

At the convened meetings, the class of creditors or members will be asked to approve the scheme based on the information provided to them. The voting process itself is straightforward, usually done by way of poll, but the way in which the votes are taken is not necessarily so as, in the context of a members' meeting, a simple head count of those present and voting

17 All documents with which a creditor or member should be provided so that it can make a fully informed vote in meeting.

at the meeting is not always appropriate. For example, a single investor may be acting in several different capacities, such as a proxy, nominee or custodian for multiple underlying investors at the meeting.

Given that the aim of the meeting is to reflect the wishes of those persons with the real economic interest in the company, the Grand Court has held that it will be permitted to 'look through the register' for voting purposes and that a single custodian or nominee will be entitled to vote separately on behalf of each underlying investor,[18] and, to the extent necessary, the court may require the scheme documents to be modified to protect an individual underlying investor's right to be counted.

For the scheme to be approved by the various classes of creditors or members of the company, a majority of 75 per cent in value of the stakeholders voting, whether in person or by proxy, must be obtained. The chairman of the meeting will report the outcome of the meeting to the court and, if the required levels of approval have been obtained, issue a second summons seeking sanction of the scheme.

The Law does not set out the test to be applied by the court when considering whether the proposed scheme will be sanctioned. However, the court must be satisfied that the necessary procedures have been complied with and the interests of all classes of relevant parties, including creditors and shareholders, have been considered. The court will usually consider that the members are the best judges of their own commercial interests and creditors or members who voted at the convened class meetings are entitled to attend and be heard at the sanction hearing.

If the scheme is sanctioned by the court at the sanction hearing, the scheme only becomes effective and binding on creditors or members and against the company itself (or if the company is in liquidation, on the liquidator and contributories of the company) once the order approving the scheme has been filed with the Registrar of Companies in the Cayman Islands.

Using provisional liquidations to implement pre-packaged restructurings

Given the absence of any bespoke legislation dealing with pre-packaged restructurings, there are no specific guidelines such as SIP 16 that a company and its advisers must follow when making the decision to undertake a pre-pack restructuring. However, as a matter of practice, it is always advisable for a company to undertake a similarly rigorous analysis of its position and options before seeking to restructure on a pre-packaged basis so it can defend both the marketing process and price obtained against any subsequent attack or criticism.

This might involve, for example, the appointment of financial advisers to advise on the sale, to market the assets or negotiate with potential third-party buyers (if a newco is not being used to purchase the assets). Perhaps most importantly, it will be critical to engage in advance with the insolvency practitioners who will ultimately seek appointment as provisional liquidators to ensure that they agree with the strategy being deployed and the terms of the restructuring.

Directors of the company should also satisfy themselves that they have discharged their general and fiduciary duties in relation to the sale to avoid any subsequent attack or criticism against them personally in relation to their involvement in the sale process.

18 See *Re Uni-Asia Holdings Limited*, which affirmed the practice set out in *Re Little Sheep Group Limited* [2012] (1) CILR 34.

Once the decision to restructure has been made, and terms of the restructuring (including any pre-packaged proposed sales) have been agreed between all relevant stakeholders (such as secured creditors and proposed provisional liquidators), a winding-up petition would be filed with the Grand Court, whether by the company (with any necessary shareholder sanction) or a friendly creditor as discussed above. An application for the appointment of the insolvency practitioners (who have confirmed that, if appointed, would support the restructuring plan and any pre-packaged sale) as provisional liquidators ought to be filed at the same time.

As part of the affidavit required to be filed in support of that application, the court should be made aware that:

- the company intends to pursue a restructuring;
- the terms of a restructuring, including the pre-packaged sale, have already been agreed with all relevant stakeholders such as secured creditors, unsecured creditors (if they would expect a return upon a sale of the assets) and the proposed purchaser of the assets;
- the company, as part of the agreement of such terms, has considered all of the available options and considers that the terms agreed represent the best deal available to the company in the circumstances and will be for the benefit of creditors;
- the company requires the appointment of a provisional liquidator to obtain the benefit of the moratorium on the enforcement of claims to enable the restructuring to be completed; and
- upon appointment, the provisional liquidators will enter into and complete the various transactions (e.g., the sale of assets or business) required by the terms of the agreed restructuring.

If the court is satisfied that the company has acted appropriately, obtained the necessary advice and undertaken the required steps to ensure that the proposed restructuring is in the best interests of the company's creditors or other stakeholders, it will generally exercise its discretion to appoint the provisional liquidators proposed and, in the terms of its order, expressly provide the appointees with the power to do all acts and take all steps necessary to complete the proposed restructuring including expressly the power to enter into and complete the pre-packaged sale.

Once the restructuring is completed, the petition can either be withdrawn or the company liquidated (with or without the use of a scheme of arrangement to compromise any residual creditor or member claims).

Relevant authorities or examples

To date, there have been no reported cases in the Cayman Islands in which the use of a pre-pack has been expressly approved by the Cayman courts, although a pre-packaged sale of the whole of the company's assets in the context of a restructuring effected through a provisional liquidation (which also involved a scheme of arrangement as part of the restructuring) was approved by McMillan J in the unreported case of *ATU Cayman Holdco Limited* in October 2017.

This case concerned the restructuring of the German tire and motor accessory chain, the Auto-Teile-Unger (ATU) group. The ATU group was headquartered in Germany and had a significant presence in a number of European companies, with approximately 650 branches and several thousand employees. During the mid 2010s, the ATU group began to experience significant financial difficulties and, as a result, had undergone a number of restructurings that involved, *inter alia*, the 'flip up' of one of the group's UK companies higher in the group hierarchy and then a pre-packaged administration, pursuant to which all of the company's assets were sold to a lender-led vehicle.

Notwithstanding this restructuring, the group again experienced financial difficulty and required further restructuring. This restructuring would involve a solvent sale of the direct or indirect owner of the group's operating companies, Christophorus, to a third-party buyer, the French Mobivia Groupe, clear of all liabilities and encumbrances.

In summary, the proposed restructuring would involve ATU Cayman Holdco Limited (Holdco), the indirect parent of Christophorus, facilitating the sale of Christophorus to Mobivia, while retaining the significant liabilities it held on behalf of the group pursuant to various security documents throughout the group structure.

It was determined that this restructuring would best be done on a pre-pack basis. As a result, the group began a robust mergers and acquisitions process, which resulted in Mobivia being selected as a strategic buyer with terms of the sale being agreed.

However, to ensure a solvent sale to Mobivia, the claims of a number of senior lenders against the ATU group, and Holdco in particular, had to be compromised. Agreements were entered into with the relevant creditors and it was agreed that Holdco would also seek sanction for a scheme of arrangement with those creditors whereby the net sale proceeds of the sale to Mobivia would be used to compromise their claims.

In the circumstances, which involved potential claims from creditors who may have been out of the money, as the break in value was among the senior lenders, it was considered appropriate that the sale and the scheme of arrangement be conducted with the protection of the statutory moratorium on claims using a Cayman Islands provisional liquidation of Holdco.

Insolvency practitioners were engaged and assisted in advising on the restructuring, who prepared a comparison between the return to creditors on a liquidation basis and the return in the proposed restructuring, so that they could confirm to the court that the implementation of the restructuring and the scheme of arrangement were in the best interests of Holdco, the ATU group as a whole and their creditors. Holdco then filed a petition against itself and sought the appointment of provisional liquidators for the purpose of implementing the pre-packaged sale of the group's business and the subsequent scheme of arrangement.

Although apparently unprecedented, the court had no difficulty in the factual circumstances of that case with the provisional liquidators' use of a pre-packaged sale of the company's assets and business with the potential return to creditors and the saving of the group's business being a weighty factor. The court, therefore, made an order appointing the provisional liquidators with the power to take all steps necessary to complete the pre-packaged sale.

Shortly after receipt of the appointment order, in a manner similar to a pre-pack administration, the provisional liquidators took steps to complete the restructuring, including the sale to Mobivia, as agreed prior to their appointment. The provisional liquidators subsequently applied for, and received, sanction for the scheme of arrangements with Holdco's creditors.

As Holdco was returned to solvency as a result of the successful scheme, the winding-up petition was withdrawn and Holdco went into voluntary liquidation thereafter.

Conclusion

Although the Cayman Islands currently has no formal rehabilitation process akin to Chapter 11 in the United States or English law administration procedures, it has filled this gap by making statutory changes to the Law to enable provisional liquidations to be used creatively and flexibly to implement restructurings. As demonstrated by the *ATU* restructuring referred to above, this flexibility can, in factually appropriate circumstances, be extended to permit a pre-packaged sale of some or all of the company's assets or business.

The Cayman Islands has recognised the desirability of a bespoke restructuring regime that would allow the company, a shareholder or a creditor to commence restructuring proceedings, without having to prove the company's insolvency, which would trigger an automatic moratorium preventing the enforcement of claims against the company and the appointment of a restructuring officer to oversee the implementation of the restructuring. The necessary legislation has been drafted but not yet approved or implemented. It is currently unknown if and when the legislation will be passed.

8

France

Saam Golshani and Alexis Hojabr[1]

Historically, the French restructuring system has always been perceived as a debtor-friendly system. More recently, changes to the French legislation have favoured creditors' interests and the courts have favoured a number of lender-led restructurings, enabling lenders to take control of the debtor from its existing shareholders.

The recent implementation of the possibility for the committees of creditors to submit an alternative plan competing with the plan prepared by the debtor, and the obligation to take into account the inter-creditor agreements concluded throughout the preparation of the plan, clearly demonstrates this reinforcement of creditors' rights.

This evolution is not intended to make it more difficult for the debtor to find a solution. It simply allows for a better consideration of the rights of creditors by recognising the agreements that may have been concluded between them and the shareholders. Recent legislative changes have also introduced the possibility to squeeze out shareholders who are not willing to support the company in the context of its rehabilitation proceeding.

In line with these improvements, France has introduced new restructuring tools inspired by the Chapter 11 bankruptcy proceeding in the United States, at the crossroads of amicable restructuring proceedings and insolvency proceedings.

The creation of the fast-track financial safeguard proceeding has proven to be a very useful tool for the debtor to force a solution that federates most of the creditors during a conciliation proceeding with limited impact on the operations of the debtor. Order No. 2014-326, dated 12 March 2014, has also introduced the pre-pack sales system under amicable proceedings, which offers a new framework for the partial or total sale of a company's assets in an insolvency proceeding but with one or several buyers of the business identified beforehand.

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In addition, the Business Growth and Transformation Act (PACTE), dated 22 May 2019, has empowered the executive to implement the EU Directive 2019/1023 on restructuring and insolvency. This forthcoming reform should lead to a profound transformation of insolvency by further improving the treatment of creditors. The major innovations that should be introduced by this reform concern the procedure for adopting safeguard plans, with the creation of creditor classes and the introduction of a cross-class cramdown system.

The reform should also make it possible for the court to adopt a safeguard plan even when certain classes of creditors have opposed it. These new rules for adopting the plan are aimed at aligning the political power of creditors with their economic situation, by limiting the harmful power of creditors who are out of the money. The forthcoming reform should, therefore, work towards a rebalancing of the interests involved, without betraying the objective of safeguarding the company.

The French legislation has created bridges between court-assisted amicable proceedings and insolvency proceedings, with the idea that restructuring solutions could be negotiated during the amicable phase and implemented in the context of a subsequent insolvency proceeding. After providing a brief overview of the restructuring tools provided for in French law, this chapter will focus on the available prepackaging tools concerning both the implementation of traditional restructuring plans – through debt restructuring – and the sale of business.

Brief overview of key restructuring tools

Under French law, there are two categories of proceedings: court-assisted amicable proceedings and insolvency proceedings. The first category includes *mandat ad hoc* and conciliation proceedings. The second category includes safeguard, fast-track financial safeguard, fast-track safeguard, and reorganisation and liquidation proceedings.

Insolvency proceedings must be commenced if the debtor is insolvent according to the French insolvency test, defined as the debtor's inability to pay its debts as they fall due with its immediately available assets, taking into account available credit lines and moratoria. If the debtor is not facing cash flow insolvency, it has the option to request court-assisted amicable proceedings or a safeguard proceeding.

However, the distressed debtor is required to file a petition for reorganisation of liquidation proceedings within 45 days from the date of insolvency, unless it has requested the court to appoint a conciliator. Reorganisation and liquidation proceedings can also be initiated by the court if it is brought to its attention that a company registered in its jurisdiction has become insolvent; at the request of the public prosecutor; or at the request of any creditor.

Court-assisted amicable proceedings

Consensual restructuring

The *mandat ad hoc* and conciliation are preventive and confidential proceedings for resolving difficulties carried out under the aegis of a court-appointed officer under the supervision of the president of the court.

The duties of the *mandataire ad hoc* or the conciliator are determined by the order of the president of the court. Such *mandataire ad hoc* or conciliator are usually appointed to facilitate negotiations with creditors, but he or she cannot force the creditors into accepting any proposal: the restructuring agreement between the company and its creditors will consequently be negotiated on a purely consensual and voluntary basis.

Conciliation and *mandat ad hoc* do not trigger an automatic stay of payment. Pursuant to Article 1343-5 of the French Civil Code, French courts may, in any civil or commercial proceedings involving the debtor, whether initiated by the debtor or the creditor, taking into account the debtor's financial position and the creditor's financial needs, defer or otherwise reschedule the payment dates or payment obligations over a maximum period of two years.

In principle, banks and credit funds tend to advocate a supportive approach to their debtors to the extent that a debtor provides a proper independent business review to its creditors and that its shareholders are ready to support, if need be, their subsidiaries. Otherwise, banks and credit funds may be tempted to sell their claims to distressed debt investors that may take a more aggressive approach towards the debtor and its shareholders. It is, however, important to note that there are a limited number of cases where banks or credit funds have triggered a default and, therefore, an insolvency of their debtors.

These amicable proceedings do not provide for a cramdown system and the agreement of every creditors is required. As explained below, if a dissenting creditor refuses to enter an agreement with the debtor in the context of an amicable proceeding, a safeguard or reorganisation proceeding could be opened whereby the cramdown system is applied.

Conciliation proceedings can last for a period of four months, which can exceptionally be extended by another month. However, *mandat ad hoc* are not limited in time. In practice, debtors often combine the use of *mandat ad hoc* and conciliation proceedings. A *mandat ad hoc* is usually commenced first, as it is not subject to any time constraint.

If the debtor is able to reach an agreement with its creditors, applying to the court to convert the *mandat ad hoc* into conciliation proceedings permits the arrangement to be either acknowledged by the president of the court or approved by the court.

Where investors would be willing to provide new money, goods or services to ensure the continuation of the business, it will be necessary to convert the *mandat ad hoc* into a conciliation proceeding. As new money providers, these investors will benefit from the 'new money' priority allowing them to be reimbursed before all other creditors except for certain employee-related liabilities and post-filing procedural fees – provided that these new money financings are approved by the court.

Pre-pack solutions: possible first step to fast-track safeguard or fast-track financial safeguard or for sale of business

There are several interactions between amicable proceedings and the insolvency process. Court-assisted amicable proceedings are never mandatory under French law and remain the option of the debtor, who will, when possible, likely opt for these procedures as they present numerous advantages (e.g., preventing financial difficulties at an early stage, confidentiality and considerable flexibility with creditors).

Certain insolvency proceedings cannot be implemented without an in-court proceeding beforehand. Fast-track safeguard proceedings and fast-track financial safeguard proceedings are only available to a debtor that: is subject to an ongoing conciliation proceeding; has elaborated a draft plan to ensure its viability; and has not been insolvent for more than 45 days. Pre-pack sales enable a debtor to prepare a restructuring plan during an out-of-court proceeding while negotiating with its main creditors, with the plan being implemented at a later stage during an in-court proceeding.

Insolvency proceedings

The safeguard proceeding

The safeguard proceeding is a public proceeding commenced at the request of a debtor experiencing financial difficulties that it cannot overcome on its own, provided it is not insolvent. The purpose of this proceeding is to enable the debtor to continue its business, maintain employment and repay its debts. In that respect, the debtor will prepare, with the assistance of the judicial administrator, a draft safeguard plan to be negotiated with its creditors. During this proceeding, the debtor benefits from the suspension of payments and automatic stay, which prevents creditors from suing the debtor for payment and enforcing the securities.

The draft safeguard plan must be submitted to the creditors during a consultation and prior to the plan being approved by the court. The rules governing consultation vary according to the size of the business. For companies employing more than 150 employees or with an annual turnover in excess of €20 million, or with the consent of the court at the judicial administrator or debtor's request, the judicial administrator sets up two creditors' committees, on the basis of the debts that arose before the initial judgment. The first committee includes the credit institutions and the other committee includes suppliers having a claim that represents more than 3 per cent of the total amount of the claims of all the debtor's suppliers and other suppliers invited to participate in such committee by the judicial administrator. If any, the bondholders are gathered in a single general assembly and consulted on the safeguard plan.

Following approval by the creditors' committees (and the bondholders' general meeting where relevant) and determination of a rescheduling or partial cancellation against cash payment of the claim of creditors that are not members of the committees (or bondholders), as discussed hereafter, the plan has to be approved by the court. In considering such approval, the court has to verify that the interests of all creditors are sufficiently protected. Once approved by the court, the safeguard plan will be binding on all the members of the committees and all bondholders (including those who did not vote or voted against the adoption of the plan).

The reorganisation proceeding

The reorganisation proceeding is commenced upon the request of an insolvent debtor, a creditor or the public prosecutor. Under this proceeding, the administrator appointed by the court will assist the debtor to make all or some of the management decisions or may be empowered by the court to take over the management of the company.

The administrator will propose the reorganisation of the company by assisting the debtor to elaborate a reorganisation plan, it being specified that rules governing the adoption of the safeguard plan are applicable. If the elaboration of a reorganisation is not possible, the administrator will organise the sale of the business through an open bid process. Either the reorganisation plan or the sale plan will be sanctioned by the court.

The liquidation proceeding

The liquidation proceeding may be initiated by an insolvent debtor, a creditor or the public prosecutor if the company's recovery is manifestly unfeasible. A liquidator is appointed vested with the power to represent the debtor and perform the liquidation operations, with mainly consist in the liquidation of the assets.

In that respect, there are two possible outcomes of such liquidation scenario: a sale plan as in the reorganisation proceeding or sale of individual assets.

Can a restructuring be implemented on a pre-packaged basis?

As indicated above, the French legislation has recently created bridges between court-assisted amicable proceedings and insolvency proceedings, with the idea that restructuring solutions could be negotiated during the amicable phase and implemented in the context of a subsequent insolvency proceeding. These evolutions concern both the implementation of traditional restructuring plans – through debt restructuring – and the sale of business.

While *mandat ad hoc* and conciliation proceedings have the advantage of confidentiality, their positive outcome requires that debtor's creditors called up to participate in the negotiations agree to make the efforts that are necessary to ensure the continuation of business. Neither the court-appointed officer nor the debtor have the power to impose those efforts to dissenting creditors in the context of amicable proceedings.

To overcome the opposition of dissenting creditors preventing the adoption of a restructuring agreement negotiated in the context of the amicable proceedings, the practitioners were using safeguard and reorganisation proceedings to benefit from the cramdown system and force the adoption of the restructuring plan.

Thus, the French legislation has enshrined the practice of pre-packaged plan by introducing the fast-track financial safeguard and the fast-track safeguard. These new proceedings have been specially designed to force the adoption of a restructuring plan that could not be implemented in amicable proceedings owing to dissenting creditors.

In addition to this, the Order dated 12 March 2014 has introduced a major innovation in French law, with the possibility to prepare the sale of business in the context of an amicable proceeding, which will be implemented in the context of a subsequent insolvency proceeding.

Pre-packaged plan

The premises of the French pre-packaged plan: Autodis case

Even before the introduction of specially designed pre-pack proceedings, the practitioners found a way to use existing proceedings – with the combination of the conciliation and safeguard proceedings – to carry out a pre-packaged plan. The restructuring of the Autodistribution group, which took place in 2009, was its first illustration.

In this case, the LBO documentation provided that significant restructuring steps were subject to the unanimous consent of Autodis's lenders, which made it difficult for Autodis to implement a restructuring agreement in the context of the amicable proceeding. As a unanimous vote was impossible to reach, given the plurality of creditors, the only solution was to try to obtain the agreement of the two-thirds majority of the members of creditors' committees in the context of a safeguard proceeding.

In this context, a safeguard proceeding has been opened while the terms and conditions of the financial restructuring had been decided by the debtor and its main creditors before the commencement order, pursuant to a memorandum of understanding concluded under the aegis of a *mandataire ad hoc*. In contrast to the defensive safeguards – which traditionally aim for the automatic stay – the main attraction of the safeguard in this case was the possibility to use the cramdown system provided for in safeguard to impose the adoption of the plan to the dissenting creditors.

Insofar as the restructuring plan had been prepared before the opening of the proceeding, the implementation of the plan took no longer than six weeks, with a vote in committee organised less than a month after the commencement order and a judgment approving the plan 15 days later. The swiftness of the process mitigated the value-destroying effect traditionally induced by a safeguard proceeding.

Despite the lack of dedicated proceedings at the time, the wide range of tools offered by French law had permitted to implement a pre-packaged plan and brought to light its numerous advantages.

Introduction of specially designed pre-pack proceedings: fast-track safeguard proceedings

Following this case, the French legislation has enshrined the practice by introducing two new proceedings: the fast-track financial safeguard proceeding (Law dated 22 October 2010) and the fast-track safeguard proceeding (Order dated 26 September 2014).

Conditions

These proceedings have been designed for large companies. To be eligible for such proceedings, the debtor must publish accounts certified by a statutory auditor or established by a certified public accountant and have more than 20 employees, a turnover greater than €3 million excluding value added tax, or a total balance sheet exceeding €1.5 million. Companies that publish consolidated accounts in accordance with Article L. 233-16 of the Commercial Code are also eligible.

As described above, these proceedings are only available to a debtor that is: subject to an ongoing conciliation proceeding; has elaborated a draft plan ensuring the continuation of its business likely to receive sufficiently broad support from the creditors to make its adoption in the time limit probable; or faces difficulties that it cannot overcome and has not been insolvent for more than 45 days.

Negotiations in the context of a conciliation proceeding

Before the opening of the fast-track safeguard proceeding, the debtor must conduct negotiations with its creditors in the context of a conciliation proceeding. It is only if the restructuring agreement negotiated with its creditors cannot be implemented owing to dissenting creditors that the opening of a fast-track safeguard proceeding will be contemplated.

The simple threat to file for a fast-track safeguard proceeding is sometimes sufficient to obtain all creditors agreements on the plan. These accelerated safeguard techniques are indeed rarely used because their existence and the threat for the debtor to implement them are often sufficient to overcome blocking situations, creditors knowing that they will not be able to avoid company support measures imposed on them by the law of the majority both in fast-track safeguard and in fast-track financial safeguard.

Opening of a subsequent safeguard proceeding

The fast-track financial safeguard proceedings will benefit from most of the advantages attached to this proceeding, such as suspension of payments and automatic stay. However, the effects of the fast-track financial safeguard proceeding will be limited to the sole members of the credit institution committee and, if any, the bondholders committee.

Insofar as the safeguard plan has been prepared beforehand, the duration of the proceedings has been significantly reduced. It is limited to two months for the fast-track financial safeguard and three months for the fast-track proceeding.

In this limited amount of time, the draft safeguard plan must be submitted to the creditors' committees and sanctioned by the court. As described above, the safeguard plan must be approved by each committee by a two-thirds majority. It is only once the majority is obtained in each committee that the court can approve the plan. Accordingly, the dissenting part of the creditors in each committee is 'crammed down'.

It should be noted that the court has to verify that creditors are sufficiently protected with a kind of 'best interest test'. In particular, the court will pay particular attention to the differentiated treatment of creditors that may have been provided for, and to the way in which any inter-creditor agreements have been taken into account.

Advantages of the pre-packaged plan

First of all, the pre-pack scheme strengthens the efficiency of amicable proceedings by making it possible to force the adoption of the restructuring plan prenegotiated with the majority of creditors in the context of a subsequent safeguard proceeding.

Although the search for a consensual restructuring solution is often preferred by the debtor and its stakeholders, it cannot always be implemented in the context of a *mandat ad hoc* or a conciliation. In most LBO cases, the implementation of a restructuring agreement requires the unanimous agreement of the main creditors, which can be difficult to obtain. The diversity of lenders and the opposing interests that may exist between them make it difficult to reach an amicable agreement.

The use of the safeguard proceeding – whereby the cramdown system is applied – allows the debtor and the main creditors supporting the restructuring plan to force its adoption, provided that two-thirds (as calculated by the value of the debt that is owed and disregarding any security or subordination) of the voting members of each committee and the bondholders' meeting, as the case may be, vote in favour of the restructuring plan. It should, however, be noted that the court has to ensure that the interests of all creditors are sufficiently protected when sanctioning the plan voted by the committees.

As explained above, these techniques are rarely used because the mere possibility of implementing them is a deterrent and, therefore, contributes to the success of court assisted amicable proceedings. The mere assumption that a fast-track safeguard proceeding could be implemented is sometimes enough to rally the few dissenting creditors to the agreement, as they do not wish to assume publicly the failure of the amicable proceeding.

In addition, insofar as the restructuring plan is negotiated in the context of an amicable and confidential proceeding, the duration of the subsequent safeguard proceeding will be limited to the time required to vote and adopt the plan. Given the limited duration of the safeguard proceedings, the value-destroying effect and the loss of confidence of the debtor's customers and suppliers will be significantly reduced.

Illustrative cases

As indicated above, the very existence of pre-pack proceedings has made court-assisted amicable proceeding more effective. This explains why the use of these pre-pack proceedings may seem low.

French geophysical services company CGG's restructuring may be the most significant illustration of such pre-packaged plan. In this case, CGG had secured – in the context of a *mandat ad hoc* – a lock-up agreement with its main creditors providing for that they would support the contemplated restructuring plan. This restructuring plan was then implemented in the context of a subsequent safeguard proceeding after the vote of the creditors' committees.

Pre-pack sale

Overview of the traditional sale plan

As a general principle, the sale of business is initiated by the judicial administrator in the context of a reorganisation proceeding, if the adoption of a reorganisation plan is unlikely. It can also be implemented in the context of a liquidation proceeding with maintenance of the activities and, to the extent it is not a complete sale of business, in the context of a safeguard proceeding.

A sale plan provides for the transfer of assets, contracts and employment contracts of the debtor to a third-party purchaser. As the sale plan is an asset plan, the debts of the debtor are, therefore, not transferred to the purchaser of the distressed business. The sale plan process is construed as an open bidding process where there is no exclusivity to the benefit of one bidder.

At the end of the process, the court has to accept the offer that allows the most prolonged maintenance of employments attached to the assets assigned and the payment of the creditors, under the best conditions and that presents the best guarantees for its implementation.

While the sale plan has the merit to save employments, the interest of creditors tends to be sacrificed as the sale proceeds are most frequently far below the amount of debts of the debtor.

The new pre-pack sale legal framework

Preparation of the sale of business in the context of an amicable proceeding

Article L. 611-7 of the Commercial Code provides that, at the debtor's request, the conciliator may be entrusted with a mission to organise the partial or the total sale of the business, which could be implemented, where appropriate, in the context of a subsequent safeguard, reorganisation or liquidation proceedings. Although not expressly provided for, this mission could also be entrusted to the *mandataire ad hoc*.

The law suggests that the mission to organise the sale of the business should be assigned to the conciliator in the course of the conciliation proceeding if an agreement could not be reached with the creditors. It provides that this mission can be assigned to the conciliator at the request of the debtor after having received opinion of the participating creditors, which suggests that the proceeding is already pending and that negotiations with creditors have already been initiated.

Since the implementation of the pre-pack mission may lead to a total or partial sale of the company, the employer must comply with the legal obligations to provide information and consult employees' representative institutions.

As part of his or her mission, the conciliator will initiate a bidding process for the acquisition of the business in the context of the conciliation proceeding. In contrast to the bidding process provided for in the context of the reorganisation proceeding, this bidding process will not have to be public. It is, however, essential that the conciliator actions, in particular with the companies acting in the relevant business, ensure sufficient publicity.

The balance between the confidentiality that governs the amicable proceeding and the need to ensure sufficient publicity to maximise the chances of finding a purchaser is sometimes difficult to find. In most cases, the conciliator will use the same practices as those used for the sale of *in bonis* businesses. The potential buyers are approached by an investment bank, non-disclosure agreements are signed and a data room is set up.

The opening of a subsequent insolvency proceeding is not mandatory if the contemplated sale can be implemented within the framework of a share deal or an asset deal in which the creditors could be fully paid up. However, in practice, a reorganisation or a liquidation proceeding will systematically be opened to benefit from the advantageous framework of the sale in the context of these proceedings.

Implementation in the context of a subsequent insolvency proceeding

After the preparation of the sale in the context of the conciliation proceeding, the debtor will usually request the opening of a reorganisation or a liquidation proceeding, as a total sale of business cannot be implemented in the context of a safeguard proceeding. Although the opening of these proceedings is only justified by the implementation of the prenegotiated sale, the debtor will have to be insolvent in accordance with the conditions for their opening.

Even though it is not provided for in the law itself, the conciliator or *mandataire ad hoc* who conducted the bidding process beforehand is in most cases appointed as judicial administrator in the subsequent insolvency proceeding. This ensures a natural continuity between the preparation phase of the sale and its effective implementation.

At the opening of the proceeding, the court shall ensure that the actions conducted by the conciliator have ensured sufficient publicity for the preparation of the sale, in particular on the basis of the conciliator's report and having regard of the public prosecutor opinion. If the actions conducted by the conciliator and the bids received in that respect prior the opening of the insolvency proceeding are considered to be satisfactory by the court, it may decide not to open a public bidding process and a set a date for the examination of the takeover bids.

As the pre-pack sale is implemented in the context of a reorganisation or a liquidation proceeding, the bids submitted to the administrator shall contain certain specific and mandatory provisions, such as:

- business and proposals, a specific description of the assets, rights and contracts to be assigned to the purchaser;
- the sale price of the business and terms and conditions of payment;
- the date of completion of the sale;
- the number of employment contracts to be transferred; and
- the guarantees provided for completion of the purchase.

As any sale in the context of an insolvency proceeding, and to the extent that dismissals on economic grounds may have to be conducted following the sale, the employees' representative shall be informed and consulted on the bids submitted and on such potential dismissals.

At the end of the process, the court will have to accept the offer that allows the most prolonged maintenance of employments attached to the assets assigned and the payment of the creditors, under the best conditions and that presents the best guarantees for its implementation.

Advantages of the pre-pack framework

The main interests in using the pre-pack sale framework lie in – as in the pre-packaged safeguard plan – the confidentiality attached to the court assisted amicable proceeding during the preparation phase and the reduction of the duration of the subsequent insolvency proceeding.

As explained below, the opening of an insolvency proceeding has a negative impact on the value of the business and sometimes entails the loss of confidence of the debtor's customers and suppliers. The adverse effects of such proceedings do not allow for the best valuation of the debtor's assets and, in the worst case, can weaken the interest of potential purchasers.

The pre-pack scheme is of special interest in case of the sale of industrial businesses since the opening of insolvency proceedings generally leads to a significant increase in working capital requirements for such activities. The limited duration of the sale process allows the debtor to mitigate this risk and avoid a significant increase of its financing requirements.

The preparation of the sale in a confidential framework gives time to negotiate with potential buyers and thus contributes for the optimisation of the content of their respective offer. The interests of creditors will be improved, as the negative impact of the insolvency proceeding on the value of the company's assets will be significantly reduced and the sale proceeds could, therefore, be optimised.

Illustrative cases

Since the introduction of the pre-pack sale in French law, some significant sales have been successfully implemented within this framework such as *FRAM*, *NextiraOne*, *Tati* or *William Saurin*. In each of these cases, an investment bank had been mandated to ensure a serious and complete search for potential buyers.

Whenever the sale of a distressed company of a certain size is contemplated, the search for potential buyers will systematically be initiated before the opening of an insolvency proceeding. Sometimes, it is the nature of the interests expressed by potential buyers that will lead the company to use the pre-pack sale framework, for example, when these potential buyers are not willing to take over the company's debt or do not want to conduct the social restructuring.

Also, they have been cases – such as *Doux* or *Toys 'R' Us France* – where potential buyers have been identified and offers have been submitted in the conciliation proceeding, but a public bidding process have nevertheless been initiated in the context of the subsequent insolvency proceeding.

If a large majority of significant debtors uses the court-assisted amicable proceedings to search for potential buyers of their businesses in a confidential framework, the 'complete' pre-pack framework cannot always be implemented. When the bids submitted are not satisfactory or require further work, or when it appears necessary to open the process to new purchasers, it seems best to revert to traditional sale process.

Conclusion

Over the past 10 years, France has introduced a new range of restructuring tools at the crossroad of amicable proceedings and insolvency proceedings contributing to the development of pre-packaged solutions. The court-assisted amicable proceedings are now emerging as a privileged place to negotiate restructuring solutions, which will be implemented in subsequent insolvency proceedings.

Amicable proceedings offer a confidential and flexible framework allowing the conciliator or the *mandataire ad hoc*, the debtor, its shareholders and creditors to work on restructuring solutions without destabilising the business. The subsequent insolvency proceedings then allows to implement the contemplated solutions, which include both classic restructuring plan or sale plan.

9

Ireland

David Baxter and Brian O'Malley[1]

Introduction

Pre-packs in Ireland probably are not as common as they should be. In theory, a pre-pack is broadly available in each of our insolvency procedures: liquidation, examinership and receivership.

The pre-pack approach has emerged as an innovative corporate rescue tool that incorporates the benefits of both informal and formal insolvency proceedings. The expression 'pre-pack' in an Irish context typically refers to the sale of a distressed business where the sale arrangements are negotiated, agreed and documented before the onset of a formal insolvency procedure and are effected on or shortly after the appointment of the insolvency practitioner.

A key facet of the pre-pack mechanism is that, in deciding whether to effect the sale, the insolvency practitioner does not have to involve the court nor consult with junior creditors who are often left with little or no value following the sale.

Pre-pack transactions have been a feature of the insolvency landscape of other jurisdictions such as England and Wales for some years, but until the past decade had been relatively uncommon in Irish insolvency practice.[2]

While liquidation or examinership are processes that can broadly be used to implement a pre-pack sale in Ireland, normally pre-packs are implemented through receivership.

1 David Baxter is a partner and Brian O'Malley is a senior associate at A&L Goodbody.
2 Ciaran O'Mara, 'Pre Pack Insolvency Transaction and the Transfer of Undertakings Regulations: Is this the End?', *Irish Employment Law Journal* 2017.

Overview of key restructuring tools

Pre-insolvency processes

'Pre-insolvency' is not a term of art and when used in this jurisdiction refers to events that occur before a company becomes insolvent.

In contrast, pre-insolvency as a concept tends to be more widely used and attracts a plethora of varying definitions across the European Union. This has occurred against the backdrop of what some would describe as 'an almost feverish sense among most of the European states to outdo the others in amending their [insolvency] laws'.[3]

In general terms, pre-insolvency is the financial situation in which a debtor is often able to meet its current obligations as they fall due, but where it is expected that this will no longer be the case at a point in the future and insolvency is inevitable. Those involved in a pre-insolvency process typically want to intervene to avoid asset value diminution or creating personal liability exposure for directors. In an Irish context, the closest we have found to a pre-insolvency process includes elements of refinancing, or contractual-debt resizing or restructuring.

The purpose of pre-insolvency procedures is typically to provide creditors with a better return outside the framework of formal insolvency proceedings. As in the United Kingdom, a scheme of arrangement is available in Ireland as an effective formal restructuring tool that is not an insolvency process. A successful scheme of arrangement should obviate the need for an insolvency process. A scheme of arrangement can be pre-agreed among a sufficient number of creditors (typically through a lock-up agreement) to ensure the statutory creditor approval threshold is met, but ultimately it is the decision of the court whether to sanction the scheme.

In the context of pre-insolvency proceedings, on 26 June 2019, the European Union adopted the Preventative Restructuring Framework Directive (the Directive).[4] The Directive looks to introduce some minimum standards for preventive insolvency proceedings across the European Union to enable debtors in financial distress to address their debt problems at an early stage and avoid formal insolvency proceedings. The Directive, which appears to be influenced to a degree by Chapter 11 of the US Bankruptcy Code, allows Member States flexibility as to the most appropriate means to implement the key principles, such as the availability of early warning tools for insolvency. Member States are required to adopt and publish compliant domestic laws by 17 July 2021.

While Ireland has a strong corporate rescue culture (in the form of examinerships, schemes of arrangement and pre-pack receiverships) in light of the divergences between the current Irish processes and the Directive, an additional procedure may be required in order to implement the proposals under the Directive.[5] The Law Society of Ireland has already indicated, prior to its introduction, that it supports the key objectives of the Directive.[6]

3 Christopher G Paulus, 'A Vision of European Insolvency Law' (2008) 17 *Norton Journal of Bankruptcy Law and Practice* 607, p. 6.

4 Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (2016/0359).

5 ibid.

6 Law Society of Ireland, 'Submission on European Commission Proposal for a Directive on Insolvency Debt, Restructuring and Second Chance', February 2017, p. 3.

Irish restructuring and insolvency processes

The four key Irish restructuring and insolvency processes are: liquidation, receivership, examinership and schemes of arrangement.

Liquidation

Liquidation is a terminal process that ultimately results in the final dissolution of a company, and is governed by Part 11 of the Companies Act 2014. Liquidation can take the form of either a court ordered liquidation or a (solvent or insolvent) voluntary liquidation.

The function of the liquidator is to take control of all the assets of the company and to realise them to satisfy, in whole or in part, the debts due to the company's creditors. Any surplus will be remitted to the company's shareholders. The liquidator has broad power to take all measures as deemed necessary for winding up the affairs of the company and distributing its assets.

A court-ordered liquidation occurs where the court is petitioned to have a company compulsorily wound up. A provisional liquidator may be appointed by the court in the interim period between the petition issuing and the subsequent making of the winding-up order. The effect of a winding-up order is to appoint the official liquidator and to place the company into liquidation.

Companies may also be wound up voluntarily, through a creditors' voluntary (insolvent) liquidation and a members' voluntary (solvent) liquidation respectively. The effect of the company entering into a creditors' or members' voluntary liquidation is similar to the court granting a winding-up order.

A creditors' voluntary liquidation may occur where a company is insolvent. The company's directors resolve in a meeting to wind up the company and to appoint a liquidator. A shareholders' meeting and a creditors' meeting are then called. The shareholders must agree to pass a resolution resolving to wind up the company and to appoint a liquidator. At the creditors' meeting, the directors must inform the creditors of the winding up resolution passed by the shareholders. The company must nominate a liquidator, who may be approved by the creditors. Alternatively, the creditors may nominate their own liquidator.

A members' voluntary liquidation is a solvent liquidation, and essentially entails the preparation and signing of a declaration of solvency by a majority of directors, and the passing of resolutions resolving to wind up the company and appoint a liquidator.

In addition to the Companies Act liquidation regime, the Irish legislature has seen fit, in particular circumstances, to develop bespoke resolution regimes on an ad hoc basis. Examples of this include the Insurance (No. 2) Act 1983, developed to address the insolvency of insurance undertakings and more recently, the creation of the 'special liquidation' regime for Irish Bank Resolution Corporation Limited (the successor to Anglo Irish Bank Corporation Limited and Irish Nationwide Building Society) in February 2013.

Receivership

Strictly speaking, receivership is not an insolvency process but rather an enforcement mechanism for a secured creditor. The process is primarily governed by the security documentation and Part 8 of the Companies Act 2014 (where the security provider is a corporate entity).

Receivership is a distinct enforcement remedy available to secured creditors only and does not involve the commencement of insolvency proceedings. The effect of the appointment of a receiver is to suspend the company's powers in respect of the secured assets over which the receiver has been appointed.

Section 437 of the Companies Act grants extensive statutory powers to receivers, in addition to those conferred by the relevant security document. Once the receiver has realised the secured assets over which he or she has been appointed, and remitted the proceeds to the secured lender, the receiver will be discharged pursuant to the relevant security document.

Under Section 439 of the Companies Act 2014, a receiver of a company's property shall, in selling that property, exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale. This is an important point, as the qualifications contained in this section enable a receiver to act expeditiously in selling company property. However, in circumstances where there is unlikely to be a marketing process by a receiver in the context of a pre-pack, this statutory duty underscores the importance of obtaining an independent valuation that will stand up to scrutiny.

As noted under 'Liquidation', the Irish legislature has shown innovation over the years. In this regard, Ireland took extraordinary measures to control contagion within the domestic banking industry in 2008, in the wake of the global financial crisis. One of the measures taken included the establishment of the National Asset Management Agency (NAMA). NAMA is essentially a government-backed bank, developed to take receipt of, and manage, non-performing eligible assets belonging to Ireland's participating financial institutions. In order to work out the assets within its custody, once valued at around €77 billion, NAMA has extensive, legislative powers, including the ability to appoint statutory receivers with powers conferred on them by the NAMA Act 2009.

Examinership

The Irish examinership regime was introduced in 1990 as a response to the imminent collapse of the beef exporting Goodman Group of companies. This followed the United Nations' imposition of sanctions on Iraq, an economy that was important to the Irish beef industry at the time. From these beginnings, examinership has developed into Ireland's premier vehicle for corporate rescue and is the European Union's closest equivalent to Chapter 11.

Examinership is a process whereby a company in financial difficulties is placed under the protection of the court. Examinership is governed by Part 10 of the Companies Act 2014.

The aim of examinership is to provide for a structured arrangement with all creditors so as to preserve jobs and to allow companies with a potentially sound business model (but which has become burdened with an unsustainable level of debt) to continue to trade rather than be liquidated. The court will only appoint an examiner to a company where the judge determines the company has a reasonable prospect of survival as a going concern.

While a company is in examinership, there is a moratorium on action being taken by creditors against the company, for the duration of the examinership. This essentially prevents any creditor from attempting to wind up or appoint a receiver to the company in question. If the court approves the appointment of the examiner, the company will be under court protection for 70 days from the date of the presentation of the petition, which may be extended by the court by up to 30 additional days.

A petition to the court for the appointment of an examiner may be presented by the company, its directors, a creditor, a prospective creditor, or by the members holding not less than a tenth of the paid-up capital.

The function of the examiner is to conduct an examination of the company's affairs, with a view to determining if the company is capable of surviving, and to formulate proposals for a restructuring of the company that would facilitate such survival. The examiner then reports to the court.

The examiner's proposals are put to the various classes of creditors and shareholders for approval. Where approved, the proposals may then be considered by the court. If the court confirms the proposals, they are binding on all the company's creditors and shareholders. The protection afforded to the company by the examinership process will cease on the approved compromise coming into effect. Where the court refuses to confirm the examiner's proposals, it may make an order for the company to be placed into liquidation, if it considers it just and equitable to do so.

In 2012, the Irish telecommunications company, eircom, was successfully restructured through the examinership process. This was the largest successful restructuring through examinership to date, both in terms of debt quantum and company size.[7] In all, €1.4 billion out of the total debt of €4 billion was written off the balance sheets of the eircom operating companies.

The eircom examinership, which resulted in the senior lenders becoming the new owners of the business, shows the speed with which a significant restructuring can be implemented where there is significant pre-process negotiation between the company and its lenders.

For the right candidate, pre-planning should limit the degree of damage to the business that might otherwise be incurred. In those cases, scheme proposals can be formulated by the company and its key creditors before the examinership commences. Thus, the examiner can come to the role with at least one potential restructuring proposal available offering some level of creditor support, a smoother path to implementation and a reduced risk of significant challenge at the confirmation hearing.

However, since the examiner is an independent court-appointed officer, he or she is obliged to consider all reasonable offers of prospective investment and restructuring proposals for the company. A proposal that has buy-in from a number of the company's creditor groups almost inevitably becomes the 'stalking horse': the deal to beat.

In September 2019, Weatherford International plc issued a petition in Ireland that was accompanied by a fully formed proposal for a scheme of arrangement. The Irish High Court confirmed the examiner's appointment on 7 October 2019. If the scheme that was presented at the petition hearing is adopted by the examiner and sanctioned by the court, it will be the closest example we have seen in this jurisdiction to a pre-pack examinership.

Schemes of arrangement

A scheme of arrangement is a very flexible company law procedure whereby claims against a company can be compromised or arrangements can be made by the company with its members or creditors.

As long as a scheme is approved at a meeting of the creditors or, in separate meetings of different classes of creditors, by at least 75 per cent in value and a majority in number of those

7 David Baxter and Tanya Sheridan, 'Irish examinership: post-eircom – A look at Ireland's fastest and largest restructuring through examinership and the implications for the process', *Insolvency and Restructuring International* (Vol 6 No. 2) 2012.

registered to vote on the scheme, and the court sanctions it, the scheme will be binding on all creditors, including those within each class voting against the scheme.

A key feature of a scheme is that it is not an insolvency process, which may make its use more appealing to directors and sponsors wishing to avoid any perceived insolvency-related stigma. Another key feature is that the Irish High Court has the discretion to stay all proceedings and restrain further proceedings against a company.

Schemes of arrangement have been less frequently used in Ireland than the United Kingdom because examinership tends to be a more effective restructuring tool for debtors insofar as it is a one-stop shop for change of ownership together with a mechanism to compromise creditor claims. In the United Kingdom, one would need to use administration plus a scheme of arrangement to implement the same steps.

Recently, in the case of *Re Ballantyne Re plc*,[8] a scheme of arrangement to restructure US$1.6 billion of New York law-governed notes issued by Ballantyne Re plc, an Irish incorporated reinsurance vehicle, was approved by the Irish High Court.

The decision, which consolidates the law and creates helpful legal precedent in this jurisdiction on creditor schemes of arrangement, further establishes Ireland as a strong jurisdiction for complex financial restructurings.

In *Ballantyne*, the court relied on a number of key decisions of the courts of England and Wales relating to creditor schemes as authority to approve certain aspects of the Ballantyne scheme. In doing so, the Irish court has demonstrated a willingness to incorporate into this jurisdiction, the significant body of scheme jurisprudence from England and Wales, and indeed other commonwealth jurisdictions. The decision in *Ballantyne* smooths the way for further debt restructurings of this type in Ireland. In all, the High Court (Commercial) oversaw a process in Ireland that lasted just over five weeks.

Implementing restructurings on a pre-packaged basis

Which processes can be implemented in this way?

While the examinership process can involve a large degree of pre-process preparation, ultimately, one cannot entirely 'pre-pack' a transaction in an examinership. This is for two reasons. First, the scheme to put to creditors is ultimately one that the examiner must adopt, and he or she is an independent court-appointed officer who must consider all scheme-related issues on appointment. Second, the examiner's scheme requires creditor approval (albeit at a relatively low threshold) and court sanction.

Liquidation can be used as a pre-pack tool, depending on the debtor candidate, the capital structure and the creditor profile.

Accordingly, while liquidation (and, to a certain extent, examinership) can be used to implement a pre-pack in Ireland, overwhelmingly, pre-pack sales are implemented through receiverships. For this reason, this chapter focuses on receivership pre-packs in an Irish context, the main factors to consider in a pre-pack deal, and the perception of pre-packs in Ireland.

8 *Re: Ballantyne RE plc and Companies Act 2014* [2019] IEHC 407.

Pre-pack receivership in an Irish context

Receiverships are a means of enforcing security whereby a secured creditor appoints a receiver over secured assets. A receiver is appointed as agent of the debtor or mortgagor rather than the holder of the secured debt.

There is no statutory or industry guidance or regulation available in Ireland as to the steps that a receiver should be engaged in to satisfy himself or herself with regard to the best price in circumstances where the assets are being sold through a pre-pack model (although, there is guidance in the United Kingdom, in the form of statement of insolvency practice (SIP) 16, which may be of assistance).

Factors to consider in a pre-pack deal

While unlike other jurisdictions, there is limited guidance in Ireland regarding best practice on pre-pack deal implementation, the following are some of the main factors one may have to consider in a pre-pack deal, depending on deal structure and factual matrix.

Due diligence

Accelerated due diligence should be conducted in advance. Although this process may be truncated when the sale is to a connected party, generally, it should include reviewing the validity of the security, the position of key creditors in an enforcement scenario and the impact of enforcement on contractual terms generally.

There is a risk that difficulties might arise for the new acquiring company in relation to liabilities that might not have been adequately addressed. Such liabilities, for example, regarding assets, guarantees or particular types of creditors, might only become apparent at a future date. It is important that the receiver who takes charge of the company's assets, liabilities and business, addresses in detail, potential risks in this context. The importance of effective due diligence is, therefore, paramount.

Risk of litigation and junior creditor attack

Unlike in the United Kingdom, where pre-packs are more regulated (e.g., SIP 16), junior creditors have little leverage when it comes to challenging a pre-pack. This is often because the difference between the market value of the secured asset and the level of the secured debt makes a challenge on valuation (and, by extension, process) pointless. That said, junior creditors or preferential creditors (the tax authority, redundant staff claims, etc.) may establish a basis for challenges if, for instance, the receiver sale was to a connected party and the receiver did not give all creditors the statutory 14 days notification prior to sale.

While there have been a number of financially significant pre-pack receivership sales in recent times, a receiver may nonetheless request an indemnity from the secured lender to deal with any litigation or other risks that may arise as a result of the pre-pack sale.

Employee rights

A key part of preparing for a pre-pack transaction involves assessing employee liabilities. This will involve considering the application of the Transfer of Undertakings (TUPE) Regulations,[9] and the pension and other rights of employees. In both a general and pre-pack receivership context, TUPE Regulations typically apply. Where the TUPE Regulations apply, employment rights and obligations of those staff connected with the business or assets being sold will transfer to the new owner. This includes all pre-existing liabilities, including breaches of the TUPE Regulations by the transferor. The TUPE Regulations trigger information and consultation obligations for both the transferor and the transferee, potentially requiring the new owner to take on the terms of a collective agreement negotiated with a trade union, while restructurings that involve dismissals by either the transferor or the transferee are prohibited except in limited circumstances.

Contracts

Typically, except where there are specific contractual provisions to the contrary, the appointment of a receiver should not have a significant impact on contracts to which the company is a party. However, there are exceptions, and the company's material and business-critical contracts must, therefore, be reviewed to determine the operation of their termination provisions, and how ongoing obligations are to be managed. It is possible that valuable contracts may need to be novated or, indeed, that the transaction may have to be structured such that particularly onerous contracts can be left behind in the shell company.

Examinership risk

A trading company over which a receiver is appointed has three days to present a petition to the High Court seeking the appointment of an examiner. If this application succeeds, the receiver must stand aside, at least until the examinership concludes.[10] This is a genuine risk to a pre-pack receivership when a sponsor or a board of directors is not aware of or supportive of the proposed pre-pack.

Valuation

The receiver is afforded considerable discretion in determining the timing of a sale of assets. He or she is not, for example, obliged to postpone a sale in the hope that the market improves. Nevertheless, the receiver has a statutory duty to get the best price reasonably obtainable at the time of sale. Worth noting in this regard that if the value of the secured assets breaks in the senior debt, it will be very difficult for junior creditors to challenge a transaction irrespective of sale price.

Since the business will typically not be exposed to market testing before the sale, it is difficult for a receiver to be sure that the price to be paid is the true market value. To enable a receiver to satisfy his or her duties in this regard, he or she should obtain at least one independent, professional valuation of the business or assets. The receiver will often seek a letter from the valuer confirming that the buyer's offer represents the best price reasonably

9 European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

10 Section 512(4) Companies Act 2014.

obtainable at that time. This will also be important if any party tries to challenge the sale by the receiver.

Consent

Consideration will have to be given to whether any regulatory notifications need to be made and the time frame that may elapse between notifications being made and approvals or consents being provided. For example, an acquirer of substance, operating within the target's sector, may be required to make a notification to the Irish Competition Authority (now, the Competition and Consumer Protection Commission). Where this is the case, obtaining competition clearance will typically be made a condition precedent to completing the transaction. Equally, a pre-pack transaction that involves the acquisition of a food processing business may need to consider whether a notification must be made to the Food Safety Authority of Ireland.

Sale to a connected party

Irish company law[11] prevents a receiver from selling an asset of the company to an officer of the company unless the receiver has given at least 14 days' notice of his or her intention to do so to all known creditors of the company. For the purpose of the relevant provision, 'officer' includes a director or shadow director as well as a 'connected person'. The definition of a person connected with a director of a company is extensive and extends to natural persons and legal persons. A body corporate will be deemed to be connected with a director of a company if it is controlled by that director.

How are pre-packs perceived?

In the United Kingdom, it was the growing public discontent, in respect of the perceived unfairness of pre-pack administrations, that led to the 2014 Graham Review. Following that review, voluntary industry measures were introduced that sought, in particular, to regulate pre-pack sales involving connected parties. Under the Small Business, Enterprise and Employment Act 2015, the UK government has the power (not yet invoked) to make regulations to impose conditions on property sales to connected parties in administration; however, this legislative power expires in May 2020.[12]

By contrast, in an Irish context, there has been limited public commentary about the impact of pre-packs on unsecured creditors and the lack of transparency around the process. There has been no statutory or industry guidance issued on the subject and, in fact, there has also been little judicial guidance.

One notable Irish decision in relation to pre-packs is that of Ms Justice Finlay Geoghegan in *Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd and others* (2013).[13] In that case, in the context of Thomas Crosbie Holdings' pre-pack deal (see below), Webprint claimed that a point of law of public importance should be determined by the court, i.e., that the receivership

11 Section 439(3) Companies Act 2014.

12 Lorraine Conway, 'Pre-pack Administrations', Briefing Paper No. CBP5035, House of Commons Library (13 December 2017).

13 *Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd and others* [2013] IEHC 359.

process, being used in a pre-packaged manner, gave rise to an abuse of process and deprived creditors impacted by the restructuring of the their procedural rights and protections.

On this point, Judge Finlay Geoghegan, when considering Webprint's submissions, made the following general observation in relation to the Irish pre-pack process:

> *In my judgment, Webprint has not identified a point of law in this case of such gravity and importance as to transcend the interests of the parties actually before the Court which could be considered in the interests of the common good to require clarification.*
>
> *Whilst pre-pack receiverships may be relatively novel, the term is not a definition of any one type of transaction. It covers many different potential factual situations.*
>
> *In any so called pre-pack receivership the obligations on the participants will depend upon the facts and nature of the transactions. The determination of what were or were not the obligations of the Receiver herein will fall to be determined by applying well-established principles or provisions in the Companies Act (about the construction of which no uncertainty was identified) to the particular facts of this case.*
>
> *There may well be points of importance which, if determined in this case, might affect subsequent transactions.*
>
> *However, that is the position in many cases which come before the courts and in my judgment, falls short of the necessary characteristics to constitute a question of law of public importance.*

Case studies

Our selected case studies represent examples of some of the high-profile pre-pack restructurings to have taken place in the Irish market. These examples highlight the intricacies and complexities of pre-pack receiverships and demonstrate the adaptability of the process to high-value, large-scale transactions involving key commercial stakeholders.

Superquinn

Superquinn was an Irish supermarket chain founded in 1960 by Fergal Quinn that operated over 20 high-end supermarkets across the country and was one of the most recognisable brands in Irish households.

Quinn sold the supermarket chain to a consortium of Irish property developers in January 2005 for €450 million. A combination of falling sales and declining market share subsequently proved fatal to Superquinn. By 2011, Superquinn had amassed debts of more than €400 million, of which €275 million was property related.

On 18 July 2011, Kieran Wallace and Eamonn Richardson of KPMG were appointed joint receivers to Superquinn and its parent company Tokad Company. The Superquinn grocery chain was sold to the Musgrave Group, an Irish public company active in grocery and food wholesale distribution, for approximately €230 million, by the joint receivers, in what has probably been to date the largest (publicly disclosed) pre-pack transaction in the Irish market.[14]

14 'Superquinn stores to be renamed SuperValu', *The Irish Times*, 12 February 2014.

The transaction, which involved the acquisition by Musgraves, through wholly owned subsidiaries, of 24 Superquinn stores and certain associated properties, had the following key elements:[15]

- the transfer of the Superquinn supermarket retail business to a newly formed company, Remrock Limited (including all of the nearly 2,800 employees);
- Remrock did not acquire any of the liabilities of Superquinn;
- the acquisition by Screenridge Limited, a wholly owned subsidiary of Musgrave, of sole control of Remrock Limited;
- the acquisition by Ideaford Limited, a wholly owned subsidiary of Musgrave, of sole control of certain properties, from which Superquinn traded;
- Screenridge Limited was subsequently renamed 'Superquinn;' and
- all former Superquinn stores were subsequently rebranded under SuperValu (another Supermarket chain owned by Musgrave) in February 2014.[16]

A notable aspect of this transaction was the involvement of the Competition Authority of Ireland owing to the proposed merger of two large domestic supermarket businesses (Superquinn and SuperValu). The Competition Authority had questions about certain arrangements that had been put in place between the parties under which Musgrave was to provide consultancy services to the joint receivers. The Authority's initial view was that these arrangements might amount to prior implementation of the merger, in breach of Section 19(1) of the Competition Act 2002.[17] However, it ultimately became clear, to the satisfaction of the Authority, that the objective of those arrangements was to maintain the value of the target business pending a determination by the Authority.

Thomas Crosbie Holdings

Thomas Crosbie Holdings (TCH) owned several Irish newspapers, including *The Irish Examiner* and *The Sunday Business Post*, as well as a number of regional print titles and broadcast investments. The Crosbie family itself had a long-standing association with the newspaper business in Ireland stretching back to 1842.

TCH became increasingly acquisitive in the early 2000s, buying many regional titles and some national titles, including *The Sunday Business Post*. As a result of the economic crash, declining readership numbers and the onset of alternative media, TCH was suffering financially. By 2011, it found itself with bank debt of €27 million[18] and constrained under the terms of an onerous printing contract between Thomas Crosbie Printers Limited (TCP), a TCH group company, and Webprint Concepts Limited (Webprint).

15 Competition Authority, Determination of Merger Notification M/11/022, *Musgrave/Superquinn*, 28 September 2011.

16 'Superquinn stores to be renamed SuperValu', *The Irish Times*, 12 February 2014.

17 Competition Authority, Determination of Merger Notification M/11/022, *Musgrave/Superquinn*, 28 September 2011.

18 Stephen Rogers, 'Landmark day for historic newspapers', *The Irish Examiner*, 7 December 2017.

The secured lender, Allied Irish Banks plc (AIB) appointed Kieran Wallace of KPMG as receiver, on the morning of 6 March 2013.[19] Within hours of the appointment of the receiver, most of the assets of TCH were bought from the receiver by a newly formed company, Landmark Media Investments (Landmark), a company owned by Tom Crosbie and his father, Ted Crosbie (who had both been shareholders in TCH). The transaction, which also involved the transfer of all 554 people employed in TCH operations to Landmark, took the following form:[20]

- AIB made demands for repayment on several companies within the TCH Group. It made no demand on TCP, although AIB held a guarantee and debenture from TCP.
- AIB appointed a receiver to the companies within the TCH Group upon which it had demanded. The receiver was not appointed to TCP.
- AIB, as mortgagee, sold to a newly incorporated subsidiary of TCH, Sappho Ltd (Sappho), assets of some companies within the group and shares in other subsidiary companies. The assets and shares were sold for amounts specified in accordance with a valuation that had been carried out, aggregating approximately €18.5 million.
- TCP sold to Sappho its 85 per cent interest in 97 South Mall, Cork for €1.02 million.
- AIB provided facilities to Sappho to purchase the assets and shares from AIB and the 85 per cent interest in the property at South Mall from TCP.
- TCH (acting through the receiver) sold the entire issued share capital of Sappho to Landmark for a consideration of €1. AIB provided finance to Landmark to refinance the earlier facilities granted to Sappho and to provide additional funding for working capital.
- The directors of TCP resolved to cease trading with immediate effect and recommended to its shareholders that it should petition for the winding up of the company. A written resolution of TCP's shareholders was passed to petition the High Court to wind up TCP.
- As part of the restructuring of *The Sunday Business Post*, its publisher Post Publications Limited, applied to the High Court for the appointment of an examiner, which had not guaranteed any of the liabilities of TCH and was not subject to a charge by AIB.
- TCP then applied to the High Court for the appointment of a liquidator. The liquidation of TCP resulted in the loss of 12 jobs.[21]

Central to the TCH pre-pack plan was the ability of the company to exit an onerous printing contract with Webprint (see above). *The Irish Times* then contracted with Landmark to provide printing services, commencing on the night of 6 March 2013, the same day as the appointment of the receiver.

19 Eoin Burke Kennedy, 'Receiver appointed to Thomas Crosbie Holdings media group', *The Irish Times*, 6 March 2013.

20 *Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd and others* [2013] IEHC 359, Judgment of Ms Justice Finlay Geoghegan, Paragraph 21.

21 'Statement from Thomas Crosbie Holdings on restructuring', *Irish Independent*, 6 March 2013.

Conclusion

In Ireland, examinership is viewed as more business-friendly to receivership in terms of preserving a trading undertaking. However, receivership (and in particular pre-packs) can be hugely effective in preserving enterprise too. If implemented speedily through a pre-pack, receivership can prove to be a very effective way to maintain the viability of a business in terms of employment, customer base and relationships with key suppliers.

Despite some criticism levelled at the pre-pack concept, there will be circumstances where the reasons for using a pre-pack are commercially compelling. Also, so long as the insolvency practitioner can stand over the price for the sale of assets, then unsecured creditor opposition (without legislative intervention) is unlikely to come to much. In circumstances where the business in question is suffering from falling asset values and has a level of distress, creditors challenging a pre-pack process, that preserves enterprise, will likely face an uphill battle.

Conclusion

Jacqueline Ingram[1]

As we have seen in this guide, pre-packs are a flexible tool that, while employed globally in myriad ways, share the essential characteristics of being privately negotiated deals that are implemented through an expedient formal insolvency. They are, however, not a 'one-size fits all' restructuring solution.

Their inherent flexibility makes the pre-pack popular as a means to preserve a struggling business as a going concern. The case studies in this guide show that parties to highly complex restructurings have used pre-packs as a work-out solution, pre-agreeing a reorganisation deal and implementing it in an expeditious manner. The unifying theme throughout being to limit further damage to an already struggling business by focusing on discretion and efficiency.

However, pre-packs are not without their critics. Concerns continue to be raised in various jurisdictions on transparency, inclusivity, prejudice to creditors who may have been left in the dark and the involvement of related parties. Thus far, these criticisms have been addressed in different ways – whether relying on court-based debate, voluntary regulators or supervisory bodies.

As practitioners and legislators worldwide work to develop robust restructuring regimes, it will be interesting to see how different jurisdictions seek to resolve the tension between the benefits and perceived weaknesses of pre-packs.

1 Jacqueline Ingram is a partner at Milbank LLP.

Appendix 1

About the Authors

Nelly Almeida
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Nelly Almeida is a partner in the New York office of Milbank and a member of the firm's financial restructuring group. Ms Almeida has represented companies, noteholders, lenders, official committees, sponsors, and other interested parties in complex Chapter 11 cases and out-of-court restructurings, including in the pre-packaged case of *FullBeauty Holdings*. Further, Ms Almeida has represented monoline insurers with exposure to municipal debt, including in the Chapter 9 cases of *Stockton* and *San Bernardino, California* and the restructuring of certain entities in Puerto Rico. Ms Almeida received a BA degree from Amherst College and a JD degree, *cum laude*, from the University of Michigan.

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David Baxter is a partner and head of A&L Goodbody's restructuring and insolvency group. David has acted for companies, creditors and insolvency practitioners in the majority of significant restructurings and corporate collapses in Ireland in recent years, including: acting for the special liquidators of IBRC (in special liquidation); acting for Ambac UK as the architects of the scheme of arrangement of Ballantyne Re plc; acting for senior lenders in Weatherford International plc's recent examinership; acting for the first-lien lender group as regards eircom's examinership; acting company side for the restructuring of the Quinn Group; and acting for the bondholder group in relation to the liquidation of Eurofood IFSC Limited, a subsidiary of Parmalat.

Giles Boothman

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Giles is a partner and the global head of Ashurst LLP's restructuring and special situations group and is based in London. Over the last 20 years, he has accumulated extensive experience in acting for distressed companies, secured lenders, alternative investment funds and other major stakeholders in distressed businesses in almost every industrial sector and has a strong track record of working both on large, complex domestic transactions as well as institutional situations, a number of which have involved cross-border challenges. Giles has particular expertise in acting on debt control situations both for alternative investment funds and corporates. He has also acted on multiple loan portfolio acquisitions for distressed funds.

Hannah Cooper

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Hannah Cooper is a lawyer in Gilbert + Tobin's restructuring and insolvency group. Her experience includes advising financial institutions, special situations groups and distressed debt funds, insolvency practitioners, creditors and debtors on restructuring, insolvency, workouts and distressed debt transactions. She also has considerable experience in mergers and acquisitions and general corporate matters.

Ms Cooper worked for leading restructuring teams at Cadwalader, Wickersham & Taft and at Milbank, Tweed, Hadley & McCloy in London during 2017 and 2018, and was involved in high-profile transactions, including the Seadrill Chapter 11 restructuring and the workout of BMI Healthcare. Since returning to Australia, Ms Cooper has worked on a number of prominent restructuring and insolvency matters, including Nyrstar and Blue Sky Alternative Investments.

Ms Cooper is a member of the Australian Restructuring Insolvency and Turnaround Association and the Turnaround Management Association.

Robert J Dehney

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For more than 20 years, Rob has focused on corporate restructuring, reorganisation and counselling. Rob's substantial experience extends to representations of debtors and creditors in all facets of pre- and post-Chapter 11 filings that include out-of-court reorganisation and restructuring, acquisitions and complex lending arrangements. He also provides corporate governance, fiduciary duty and strategic advice to boards of directors, special committees and executives.

Rob regularly works with inside and outside counsel, turnaround professionals, crisis management firms, investment and non-investment bank professionals, and debtors-in-possession (DIP) and exit financing lenders.

Rob's representative engagements span diverse industry segments that include health companies, retail, airline, housing, steel manufacturing, insurance, mortgage brokerage and consumer finance. He has worked on behalf of distressed companies, boards of directors, special committees and individual members, and other parties such as official equity committees and ad hoc committees in insolvency-related matters.

A frequent speaker before business and professional audiences, Rob has spoken at conferences coordinated by the *ABI Journal*, the *Norton Annual Survey of Bankruptcy Law*, *Global Restructuring Practice* and *The Journal of Private Equity*. Rob is ranked Band 1 among Delaware bankruptcy and restructuring attorneys by *Chambers USA*, listed in *The Best Lawyers in America* and selected for inclusion in *Delaware Super Lawyers*.

Dennis F Dunne

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A distinguished restructuring practitioner, author and speaker, Dennis F Dunne is a partner in the New York office of Milbank and a member of the firm's global executive committee. He is a practice group leader of the firm's financial restructuring group. Mr Dunne has extensive experience in representing debtors and creditors in reorganisation cases and out-of-court workouts, acquirors of financially distressed companies, providers of financing, and board of directors of public and private companies.

His engagements have ranged across a wide array of industries, including automotive, airline, apparel, cable and broadcasting, chemical, construction, gaming, healthcare, housing, infrastructure, manufacturing, pharmaceutical, energy, retail, shipping, telecommunications, and textiles. Mr Dunne is a Fellow of the American College of Bankruptcy, a Fellow of the International Insolvency Institute, and a Conferee to the National Bankruptcy Conference, a non-partisan organisation of approximately 60 leading bankruptcy lawyers, law professors and judges selected to advise Congress on bankruptcy law and policy.

He is a co-author of *Collier on Bankruptcy*, the pre-eminent treatise in bankruptcy law and frequent speaker at conferences sponsored by, among others, the American Bankruptcy Institute and the National Conference of Bankruptcy Judges. Mr Dunne received his law degree from New York University School of Law with honours, where he was also the Galgay Fellow in Bankruptcy, and his undergraduate degree from Williams College, with honours.

Dominic Emmett

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Dominic Emmett heads the restructuring and insolvency group at Gilbert + Tobin and has nearly 30 years of significant local and international experience.

Mr Emmett specialises in non-contentious restructuring and insolvency work for banks and financial institutions, as well as special situations groups and distressed debt funds. His expertise includes preparing and negotiating standstill and forbearance arrangements; debt restructuring and schemes of arrangement; structured administration and receivership sales; and advice to directors, receivers, administrators and liquidators. Recently, he has led the Gilbert + Tobin team working at the heart of Australia's major restructurings: *BIS Industries*, *Slater and Gordon*, *Ten Network*, *Toys R Us*, *Norske Skog*, *Emeco*, *Boart Longyea*r, *Arrium*, *Blue Sky Alternative Investments* and *Paladin*.

Mr Emmett has been consistently ranked as one of Australia's elite restructuring and insolvency lawyers in all major legal directories for restructuring and insolvency. *Chambers Asia-Pacific 2019* recognises him as a star individual for restructuring and insolvency. *Who's Who Legal 2018* recognises Mr Emmett as the leading restructuring and insolvency lawyer in the world (excluding the United States and Europe). The Finance Monthly Fintech Awards recognised him as Banking and Finance – Lawyer of the Year – Australia in 2018, and The Legal 500 *Asia Pacific 2018* ranks him as a leading lawyer for restructuring and insolvency, among many others.

Ru-Woei Foong

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Ru-Woei is a partner in the restructuring and special situations group in London, specialising in complex UK and cross-border restructuring and insolvency matters. She regularly acts for a wide range of stakeholders in distressed situations, including financial institutions, bondholders, corporates, directors and insolvency practitioners, and over the past decade has developed a particular focus on providing strategic advice to alternative investment funds in connection with distressed investing and bespoke lending opportunities.

Saam Golshani

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Saam Golshani is a partner in the EMEA private equity team of White & Case LLP's global mergers and acquisitions practice. He has more than 20 years' experience representing clients in all manner of M&A, private equity and restructuring transactions, in all industries, notably in the tech sector. Ranked as a leading lawyer in his field by top legal directories *Legal 500*, *Chambers* and *Who's Who Legal,* among others, Saam's reputation is based on a record of accomplishment, advising creditors, debtors, investors and potential buyers on complex matters, corporate reorganisations and insolvency proceedings.

Fluent in French, English and Farsi, Saam is at ease navigating both domestic and cross-border mergers and acquisitions, as well as private equity and venture capital matters, on behalf of multinational clients, including investment funds, investment banks, entrepreneurs, industrials, listed and non-listed companies, and distressed companies.

Saam is a frequent speaker, author and commentator on private equity and restructuring issues. He is a member of the Iranian/French lawyers' association.

Saam joined White & Case LLP in December 2018 from an international law firm in Paris, where he was a partner in charge of the French M&A private equity group and co-head of the European restructuring group.

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Christopher is a partner in the litigation and insolvency department at Mourant in the Cayman Islands. He joined the firm in 2014, having previously been the head of corporate recovery and insolvency at a top-30 London law firm. He specialises in contentious insolvency and restructuring, acting for insolvency practitioners and office holders, directors, shareholders and other stakeholders in distressed situations. Christopher is recognised in both *Legal 500* and *Chambers*.

Matthew B Harvey

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Matt focuses on Chapter 11 business bankruptcy, bankruptcy litigation, reorganisation, and restructuring. He represents international, national and regional clients, including debtors, official and ad hoc committees, asset purchasers, debtor-in-possession (DIP) lenders, secured and unsecured creditors, petitioning creditors in involuntary bankruptcy filings and other parties in interest.

His experience includes in- and out-of-court restructuring transactions for publicly traded and private companies, and he has represented clients in bankruptcy litigation and appeals, as well as commercial litigation. Matt also has substantial experience representing debtors, foreign representatives, and others in cross-border cases.

Matt devotes a portion of his time to *pro bono* matters, such as serving as an attorney guardian *ad litem* in the Family Court for the State of Delaware. He is also a volunteer attorney for the Federal Civil Panel of the US District Court for the District of Delaware.

In 2017, Matt participated in the renowned National Conference of Bankruptcy Judges (NCBJ) Next Generation Program. Matt also was also one of eight attorneys selected for the Bankruptcy Trial Practice Seminar of the Delaware Chapter of the Federal Bar Association in 2017.

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Alexis Hojabr is a partner in the EMEA private equity team of White & Case LLP's global mergers and acquisitions practice. Alexis's practice focuses on M&A, private equity and restructuring.

Alexis is frequently called upon to counsel private equity funds and other financial investors across a broad array of business sectors including infrastructure, energy, transport and telecommunications, where clients look to his experience in advising on domestic and international cross-border transactions.

Alexis brings knowledge and insight to clients, and has particular skills in advising on multi-creditor and financial restructurings involving alternative investors, hedge funds and distressed companies.

He supports clients so that they can successfully complete mergers and acquisitions, divestitures, joint ventures and equity investments, often involving multiple jurisdictions. He has earned particular ability to pre-empt complexity, build trust with the different parties involved in a transaction, to quickly bring efficient and commercial solutions to the table and to take strategic decisions and craft innovations that will add value and best serve clients.

Alexis joined White & Case LLP in December 2018 from an international law firm in Paris, where he was a partner in the M&A private equity group.

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Jacqueline Ingram is a partner in the London office of Milbank LLP in the firm's European financial restructuring practice.

Jacquie's practice focuses on debt restructuring and special situations financing. Jacquie uses her restructuring background to analyse lending structures with an eye to downside protection, developing structures that focus on preserving the ability of creditors to act quickly and access the core value within the borrower group. She advises a diverse range of clients including distressed investors, creditor and noteholder committees, banks and corporates on a range of transaction structures across various industries and geographies with extensive experience of acting on complex cross-border restructurings, involving a wide range of insolvency and reorganisation processes, in the United Kingdom, the United States and Europe.

Jacquie graduated from Nottingham University with a first-class BA and studied for the graduate diploma in law and legal practice course at Nottingham Law School. She is admitted to the roll of solicitors of England and Wales. Jacquie is recognised as a 'Rising Star' by the *IFLR1000*.

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Yushan co-heads the firm's European financial restructuring practice and has particular experience in advising creditor committees in complex cross-border capital structures, as well as investors with strategic positions seeking to effect loan-to-own transactions. His practice encompasses advising lenders and borrowers on a range of corporate and acquisition finance transactions. He combines his financing skill set with practical restructuring experience to develop and implement novel rescue and priming loan structures. Yushan graduated from the University of Oxford and is admitted to the roll of solicitors of England and Wales.

Yushan is ranked as a leading individual for restructuring and insolvency by Chambers & Partners UK and described by clients as 'one of the most technical lawyers in London', noting that 'this, combined with his strategic thinking, means that he is one of very few lawyers in the London restructuring market who can operate at the top level'. Yushan also serves as vice president of the Insolvency Lawyers Association.

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Dennis C O'Donnell is of counsel in Milbank's LLP's financial restructuring group and is based in the firm's New York office. Mr O'Donnell has extensive experience in corporate reorganisation and bankruptcy-related litigation matters, and has represented debtors, lenders, official and unofficial committees, significant creditors, equity holders, examiners and acquirors in Chapter 11 cases, loan restructurings and out-of-court workouts. Mr O'Donnell has also appeared in federal courts throughout the United States, including before the United States Supreme Court, the Second Circuit Court of Appeals, the Third Circuit Court of Appeals, the Fourth Circuit Court of Appeals, and numerous district and bankruptcy courts. Mr O'Donnell's experience includes representing firm clients on a wide range of bankruptcy-related matters, including but not limited to as debtors in possession, ad hoc and official committees of unsecured and secured creditors, DIP lenders and asset purchasers in Chapter 11 cases. Prior to joining Milbank in 2001, Mr O'Donnell spent 10 years as a litigator at Simpson Thacher & Bartlett LLP and Schulte Roth & Zabel LLP. Mr O'Donnell received his *juris doctor* from Benjamin R Cardozo School of Law in 1991, where he was articles editor for the *Cardozo Law Review*. He received a BA, in classics and philosophy, from Haverford College in 1979.

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Brian O'Malley is a senior associate in A&L Goodbody's restructuring and insolvency group and also specialises in commercial litigation. Brian has acted for companies, creditors and insolvency practitioners in some of the most significant and complex Irish restructurings and corporate collapses. He has a wide range of experience in liquidations, receiverships and examinerships as well as advising on formal and informal restructuring and reorganisations. Brian also advises a range of credit institutions and loan portfolio purchasers on their work out strategies.

Representative samples of Brian's assignments have included advising corporate groups on redomestication, both onshore and offshore; the special liquidators to IBRC on a wide range of issues; Ladbroke (Ireland) Limited on its successful restructuring via examinership; Bain Capital on trading receiverships and debt sales; Citibank and GE on Irish law aspects of their Federal Reserve resolution plans.

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‘Pre-packs’ are a hot topic in the world of restructuring and insolvency – wherever you are. But – until now – there hasn’t been a thematic overview that sets out the essentials of different jurisdictions while also drawing out what they have in common. This guide changes that.

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